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NOMINATIONS OF MARK A. ROBBINS AND ROY W. MCLEESE III

HEARING

BEFORE THE

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS UNITED STATES SENATE

ONE HUNDRED TWELFTH CONGRESS

SECOND SESSION

NOMINATIONS OF MARK A. ROBBINS TO BE A MEMBER, MERIT SYSTEMS PROTECTION BOARD, AND ROY W. MCLEESE III TO BE AN ASSOCIATE JUDGE, DISTRICT OF COLUMBIA COURT OF APPEALS

MARCH 6, 2012

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NOMINATIONS OF MARK A. ROBBINS AND ROY W. MCLEESE III

TUESDAY, MARCH 6, 2012

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

The Committee met, pursuant to notice, at 2:53 p.m., in room SD–342, Dirksen Senate Office Building, Hon. Daniel K. Akaka presiding.

Present: Senator Akaka.

OPENING STATEMENT OF SENATOR AKAKA

Senator AKAKA. Let me apologize. As you know, we had two votes and the vote is still going on. I am the first name. So I was able to vote and run. [Laughter.]

Good afternoon and welcome, everyone. This hearing will come to order.

Today, the Committee on Homeland Security and Governmental Affairs meets to consider the nomination of Mark Robbins to be a Member of the Merit Systems Protection Board (MSPB). On the second panel of today's hearing, we will consider the nomination of Roy McLeese III to be an Associate Judge of the D.C. Court of Appeals. I would like to extend a warm welcome to both of these nominees, and I look forward to their testimony today.

Mr. Robbins has spent most of his professional career in Federal service and has significant experience with Federal personnel issues. From 2001 through 2006, he served as General Counsel of the Office of Personnel Management (OPM) where, among other duties, he was responsible for determining whether OPM should intervene in or seek reconsideration of board decisions.

Mr. Robbins currently serves as General Counsel at the U.S. Election Assistance Commission, an independent, bipartisan commission established under the Help America Vote Act of 2002 to improve voting systems and voter access across the country.

Mr. Robbins received his undergraduate and law degrees from George Washington University.

I would like to thank Mr. Robbins for his public service and his focus on Federal workforce issues.

I had a nice visit with Mr. Robbins, and I understand, Mr. Robbins, that your parents, Neal and Janet Robbins, are here and have traveled all the way from Arizona to be with us today. I want to give you the opportunity to acknowledge them and any other

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friends and family present at this time. Will you please do that, Mr. Robbins?

Mr. ROBBINS. Thank you, Mr. Chairman.

I would like to recognize my parents, Neal and Janet Robbins. They have been supportively behind me my entire life. So it is fitting that they are literally, and figuratively, behind me this afternoon. [Laughter.]

Senator AKAKA. Thank you very much. Aloha again and welcome to you, your family, and your friends. I am happy to see so many here today.

The Civil Service Reform Act of 1978 created the Merit Systems Protection Board to protect merit system principles and prevent unfair practices in the workplace. In addition to appeals of alleged prohibited practices and adverse actions, the Board hears cases under the Whistleblower Protection Act, the Hatch Act, the Veterans' Employment Opportunity Act, and the Uniformed Services Employment and Reemployment Rights Act (USERRA).

I believe that the position to which Mr. Robbins has been nominated is among the most important in the Federal Civil Service, and I look forward to hearing his views on the many important issues affecting the Federal workforce.

At a time when Federal employees are under-appreciated and often disparaged, it is important to take this opportunity to recognize the critical work they do, securing our nation, keeping our food safe, caring for wounded warriors, and many other critical tasks. These dedicated individuals are among this country's greatest assets. To provide the best possible service to the American people, Federal employees must be able to serve in a workplace without fear of discrimination or undue influence.

Mr. Robbins, if you are confirmed, I expect you to be a strong advocate of the merit system and Federal employees' rights. You have significant experience in this area, and I am hopeful that you can make a difference.

One of the most important functions of the Board is to protect the Federal whistleblowers from illegal retaliation. As a sponsor of the Whistleblower Protection Enhancement Act, I believe it is vital that Federal employees be able to report waste, fraud, and abuse without fear. Whistleblowers are essential to accountable, fiscally responsible government.

Last year, according to the Department of Justice, private sector whistleblowers reporting fraud against the government were responsible for nearly $3 billion recovered by the government in civil cases, but Federal employees who blow the whistle simply do not receive the protections they need at this time. I am hopeful that Congress will finally pass my bill so Federal employees and taxpayers will have these protections.

Other responsibilities of the Board include reviewing OPM regulations and conducting studies on the merit systems. I understand that the Board is currently conducting studies on important issues such as implementing effective telework programs in the Federal Government, the importance of protecting against stereotyping of and discrimination against women in the Federal workforce, and an explanation of each prohibited personnel practice under the law with real-world examples.

Again, I look forward to Mr. Robbins' testimony here today.

Mr. Robbins has filed responses to a biographical and financial questionnaire and answered pre-hearing questions submitted by the Committee. Without objection, this information will be made part of the hearing record, with the exception of the financial information, which is on file and available for public inspection at the Committee office.

Our Committee rules require that witnesses at nomination hearings give their testimony under oath. Therefore, I ask you to please stand, Mr. Robbins, and raise your right hand.

Do you swear that the testimony you are about to give this Committee will be the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. ROBBINS. I do.

Senator AKAKA. Thank you very much.

Let it be noted for the record that the witness answered in the affirmative.

Mr. Robbins, please proceed with your statement.

TESTIMONY OF MARK A. ROBBINS [1] TO BE A MEMBER, MERIT SYSTEMS PROTECTION BOARD

Mr. ROBBINS. Chairman Akaka and Members of the Committee, I appreciate this opportunity to present my qualifications and respond to your questions regarding my nomination to be a Member of the U.S. Merit Systems Protection Board. I do have a few brief opening remarks and a longer statement for the record, with your permission.

I want to thank the President of the United States for the privilege and honor of this nomination; I want to thank Senator Mitch McConnell for his recommendation to the President; and I want to thank Senator Susan Collins for her early and very gracious support. If confirmed, I will carry out my responsibilities with the highest degree of professionalism and integrity.

As an historian by both education and avocation, I am particularly pleased to be nominated to a position once occupied by a young Theodore Roosevelt, who served as then-U.S. Civil Service Commissioner from 1889 to 1895 under Presidents Benjamin Harrison and Grover Cleveland.

As he wrote to a friend upon assuming his duties in 1889, "I have pretty hard work and work of a sometimes rather irritating kind; but I am delighted to be engaged in it. I intend to hew the line and let the chips fall where they will."

And Mr. Chairman, I think we can agree that the chips fell well for Theodore Roosevelt.

The future President brought to this position a passion for and dedication to a spoils-free, merit-based Federal Civil Service. However, he brought little in the way of practical experience with the Federal workforce.

Like the colleagues I hope to join, Chairman Susan Grundman and Vice Chairman Anne Wagner, and the member I would succeed, Mary Rose, I bring to the MSPB a career of experience with the issues I will face, if confirmed.

[1] The prepared statement of Mr. Robbins appears in the Appendix on page 17.

Mr. Chairman, as your kind introductory remarks highlighted, with my career, I have been involved with Federal Civil Service issues most of my adult life, going back almost to the passage of the Civil Service Reform Act in 1978. I began covering Civil Service issues as a young staffer for the House of Representatives and did two stints with the White House Office of Presidential Personnel. And I was very privileged and honored to serve 5 years as General Counsel at the U.S. Office of Personnel Management.

The next few years are going to be an exciting time to serve at the MSPB. The last Congress passed updates to the Uniformed Services Employment and Reemployment Rights Act.

Mr. Chairman, I know the importance, we have discussed together the importance, you place in enhancing Federal whistleblower protections. I note that both this Committee and the House Oversight and Government Reform Committee have passed versions of the Whistleblower Protection Enhancement Act. I am also aware that the Office of Special Counsel has proposed legislative initiatives to update the Hatch Act.

My previous experiences with these and other relevant issues have either been as an attorney advisor or in public policy and Administration positions. I fully understand that, if confirmed, I will be taking a new and unique role as an impartial, objective adjudicator. I believe I am qualified for that responsibility, and I am excited at the possibility.

During this confirmation process, I have been asked several times whether I bring to public service generally, and this appointment specifically, a governing philosophy. And I do.

No one states it better than then-President Theodore Roosevelt in 1909 when he wrote, "The national government should be a model employer. It should demand the highest quality of service from each of its employees, and it should care for all of them properly in return."

The MSPB is a modern, necessary component of that philosophy, and I am honored to be considered for appointment to it.

Before concluding, I would like to thank those who have assisted me in this process—my parents, the rest of my family, friends, and colleagues who have given me advice and moral support. And I am very appreciative of the shepherding process work that the staffs at the White House, in the Senate, and at the MSPB have done on my behalf.

Mr. Chairman, I want to thank you again for this opportunity, and I look forward to responding to any questions the Committee may have.

Senator AKAKA. Thank you very much for your statement.

I will begin with the standard questions that this Committee asks of all nominees.

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

Mr. ROBBINS. No, sir.

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

Mr. ROBBINS. No, sir.

Senator AKAKA. Finally, do you agree, without reservation, to respond to any reasonable summons to appear and testify before any duly constituted committee of Congress if you are confirmed?

Mr. ROBBINS. Yes, sir.

Senator AKAKA. Thank you very much for your responses.

Mr. Robbins, please discuss how your experience in Federal service, and in particular as General Counsel at the OPM, will assist you as a member of the Board if you are confirmed?

Mr. ROBBINS. Thank you, Mr. Chairman. As I alluded to in my opening remarks, I do have a lifelong career of experience with Federal Civil Service issues. I think that is important because it will allow me to assume my responsibilities without a learning curve. I am going to be dealing with them now from a slightly different angle than I have in the past, but the issues remain the same.

I have been out of Federal Civil Service issues and policy for about 4 or 5 years, but it will not take me long to get back up to speed on the issues that face the Federal Civil Service as an institution and the MSPB as an agency.

As you mentioned in your opening remarks, one of the responsibilities I had as General Counsel at OPM was to coordinate the agency's Title V, Chapter 77 statutory rights to intervene in and seek reconsideration of MSPB decisions. I had a wonderful staff that helped me with that, and it was one of the more enjoyable exercises of responsibility I had at OPM. It is a little like playing a mini solicitor general, deciding where OPM is going to intervene and seek reconsideration.

We do so, or OPM does so, if two criteria are met. The first is that the issues being considered have to involve rules, laws, or regulations over which OPM has jurisdiction, and the potential decision of the MSPB has to have a significant impact on those rules, laws, and regulations.

So I am familiar with how the MSPB operates. I am familiar in terms of the legal issues that might come before the body itself. And also on a wider, sort of broader level I suppose, I understand the policy considerations that go into what constitutes the rules and regulations that I will be charged with enforcing.

Senator AKAKA. Mr. Robbins, as I noted in my opening statement, Federal employees provide a valuable service to our country and save taxpayers money when they expose waste, fraud, and abuse in the government.

What is your view of the role whistleblowers play in strengthening the merit system and improving the effectiveness of Federal Government?

Mr. ROBBINS. Whistleblower protections are, above all else, a good government tool. They bring transparency to the process. As you mentioned, they target waste, fraud, and abuse, and promote the health and safety not only of the Federal Civil Service but of the American public.

I am a strong supporter of whistleblower protections, and I do look forward to, with Senate confirmation, joining the Board and enforcing the enhancements that you are shepherding through the Senate at this point.

Senator AKAKA. Thank you.

Mr. Robbins, as you know, the Board adjudicates claims under the Uniformed Services Employment and Reemployment Rights Act and the Veterans' Employment Opportunity Act. As a senior member of the Senate Veterans Affairs Committee, I am strongly committed to promoting veterans' employment.

Please describe any experience you have with these statutes and discuss what you will do to ensure our Nation's veterans are given the opportunities to which they are entitled.

Mr. ROBBINS. Mr. Chairman, veterans' preference and USERRA are issues of personal importance to me. I had the privilege of serving my country with the State Department for 19 months in Iraq as a Senior Rule of Law Advisor in Babil Province. And I was working with men and women who were from the National Guard and the Reserves, called up to come to Iraq and fight a war on behalf of their country. I am pleased that one of my colleagues is here with me today.

I know from personal experience the anxiety that goes through these soldiers' minds when they are not sure they have a job waiting for them when they come back. I also note, with chagrin, that according to recent press reports in the *Washington Post,* one of the biggest offenders of USERRA rights as an employer is, in fact, the Federal Government.

Now I do not believe that people would necessarily, or intentionally, violate USERRA and veterans' preferences. There are those that will, but the overwhelming problem I believe is education. I think people need to know what the law says and how it applies to men and women who are leaving their jobs with the Federal Government and going to serve their country.

I have to be careful because I will be the adjudicator of these claims, so I cannot be an advocate, but I am a very strong supporter of those two pieces of legislation and their effective use within the Federal Civil Service.

Senator AKAKA. Well, thank you for that response.

Mr. Robbins, as you know, most Federal employees are not represented by counsel during the MSPB process. In your answers to the Committee's pre-hearing questions, you referenced the importance of complying with my Plain Writing Act of 2010.

How do you believe the Board can make complicated legal rules and regulations, along with its decisions, more easily understood by Federal employees who are unfamiliar with the legal process?

Mr. ROBBINS. Asking lawyers to uncomplicate issues is always an interesting topic to raise. But you know, I think a good deal of progress can be made if decisions and instructions for practitioners before the Board are done in plain English, as plain as can be when you are dealing with legal processes and issues.

I also believe that the use of standardized documents and automation through the Web is a handy tool for making the process more user-friendly and accessible.

I note, although I do not know much about it, that the MSPB has begun to move a lot of its appellate process online so that those who believe they may have a claim that they can take to the MSPB can get online, take a look through the MSPB's Web page at what

some of the issues they are going to have to address before they can file, and then some of the forms are there, too.

And if confirmed, I am looking forward to talking with staff to see how that has sped up the system, how it has made it more user-friendly for practitioners, and whether there are criteria that actually are able to measure that movement forward.

Senator AKAKA. Thank you.

As you know, Mr. Robbins, one of the Board's statutory responsibilities is to conduct studies relating to the Civil Service and report to the President and Congress. I would like to know the issues on which you believe the Board should focus future studies.

Mr. ROBBINS. The studies responsibility of the MSPB is an important one. It is obviously provided for in Title V. The process on how those studies are adopted has changed over the years, and a lot of that depends on who the chairman is and the constituency of the Board, who the members are.

I note that they have recently adopted a 5-year plan identifying studies they want to engage in. I do know that, like all other Federal agencies, budget issues and staff attrition and the inability to backfill positions is becoming a problem.

One of the things I would encourage the Board to do in considering what studies it should undertake is to focus on that area where the Board brings unique strength—those particular issues where we have specific, credible knowledge based primarily on the adjudication function—so that if, for instance, let us say the last 20 cases that came before the Board all have one common element to them, we should be able to study that, analyze it, and make recommendations to the policy arm of the Federal Civil Service management team, which would be OPM, and to Congress, how addressing that commonality that we have been able to identify will ease the process. It will lessen the burden. It will erase ambiguity in the process and bring better government.

Senator AKAKA. Thank you for that response.

We have discussed many important issues the Board faces. If confirmed, what will be your long-term priorities as a Board member?

Mr. ROBBINS. Mr. Chairman, I do not come to this job with an agenda. I would like at the end of my tenure to have people say he exemplified the service of Commissioner Theodore Roosevelt; his opinions were well written, well reasoned, easily understood, timely; he brought management and administrative experience to the table to assist the chair when she thought it was prudent; and that in the end I brought honor to my family and friends in doing so.

Senator AKAKA. Well, I thank you very much and thank you for visiting me. We had a nice personal and friendly chat about your background. And we look forward to the Committee making the decision on your nomination and trying to move it as quickly as we can so you can get to work as a Board member.

Mr. ROBBINS. Thank you, Senator. I would appreciate that.

Senator AKAKA. Thank you very much, and I really appreciate your bringing your parents and also your friends here. I am sure your parents are proud of you and what you have been doing all of these years.

The Merit Systems Protection Board makes important decisions affecting some of the most valuable assets of our country, our Federal workers.

I thank you very much for coming and wish you well.

Mr. ROBBINS. Thank you, Senator.

Senator AKAKA. Thank you very much and thank you for your testimony. There are no further questions.

Thank you, Mr. Robbins.

The hearing record will remain open until the close of business Tuesday, March 13, for Members of this Committee to submit additional statements or questions. Any questions will be submitted to you in writing.

I would like to call up our second panel, please. As we consider the nomination of Roy McLeese III to be Associate Judge of the District of Columbia Court of Appeals, I am so glad the timing is perfect for Congresswoman Norton. She is a busy woman, and I am always delighted to have her come and talk about those who will be within her realm of Washington, DC. So I would like to welcome Congresswoman Norton to the Committee and will yield for her introduction of Mr. McLeese.

Congresswoman Norton, please proceed.

TESTIMONY OF HON. ELEANOR HOLMES NORTON, A DELEGATE IN CONGRESS FROM THE DISTRICT OF COLUMBIA

Ms. NORTON. Well, thank you very much, Mr. Chairman, and I thank you for all of your help for the city and especially the help you are giving us with our courts at the present time.

I am pleased to strongly recommend Roy Wallace McLeese III for the highest court for the District of Columbia, the District of Columbia Court of Appeals.

Mr. McLeese serves now as Chief of the Appellate Division in the Office of the U.S. Attorney for the city. He supervises criminal appellate litigation not only for the District of Columbia Court of Appeals, but also for the U.S. Court of Appeals for the District of Columbia Circuit Court.

He began his career as an Assistant U.S. Attorney in this city. He has since also served in the Office of Solicitor General, including as Acting Deputy Solicitor General.

Mr. McLeese has argued cases in the court on which he seeks to serve as well as in the District of Columbia Court of Appeals and the Supreme Court of the United States.

He is a graduate of Harvard University and NYU Law School, where he was editor-in chief of the law review. He clerked for Justice Antonin Scalia when the Justice was a judge on this circuit and for the Justice when he became a Justice of the U.S. Supreme Court.

I think you will agree when you hear from him, Mr. Chairman, that he is highly qualified to serve on our own highest court here in the District of Columbia, and I thank you, sir.

Senator AKAKA. Thank you very much, Congresswoman Norton. It is always good to see you here. You are welcome anytime.

It is good of you to take time off to be here to help us with this nomination. We really do appreciate your being here today to intro-

duce Mr. McLeese, despite your busy schedule. So, thank you again.

Ms. NORTON. Thank you, Mr. Chairman.

Senator AKAKA. Mr. McLeese has a distinguished legal career, devoted to public service. He is currently the Chief of the Appellate Division of the U.S. Attorney's Office for the District of Columbia and has twice been detailed to the Office of the Solicitor General to argue complex cases before the U.S. Supreme Court. Mr. McLeese also clerked for the Federal Court of Appeals for the D.C. Circuit and U.S. Supreme Court.

This Committee consistently receives excellent candidates nominated by the President from those recommended to him by the nonpartisan Judicial Nomination Commission. Like others who have appeared before the Committee, I believe Mr. McLeese is well qualified and has much to offer the District bench. I hope we can act quickly to confirm him.

I understand, Mr. McLeese, you have loved ones here with you today, and I would like to give you an opportunity to introduce them at this time. Please proceed.

Mr. MCLEESE. Thank you, Mr. Chairman.

I would like to introduce my beloved wife, Virginia Seitz; my son, Roy Seitz-McLeese. We also have two dear family friends who traveled from Connecticut to attend the hearing—Katie Fine and Jonas Rosenbruch.

Senator AKAKA. Welcome to the Committee.

Thank you. I am sure they are proud of all you have accomplished and look forward to this new chapter in your life.

The nominee has filed responses to a biographical and financial questionnaire submitted by the Committee. Without objection, this information will be made part of the hearing record, with the exception of the financial data, which will be kept on file and made available for public inspection in the Committee office.

Our Committee rules require that all witnesses in nomination hearings give their testimony under oath. Therefore, at this time, I will ask Mr. McLeese to please stand and raise your right hand.

Do you solemnly swear the testimony you are about to give this Committee will be the truth, the whole truth, and nothing but the truth, so help you, God.

Mr. MCLEESE. I do.

Senator AKAKA. Thank you. Let the record note that the witness answered in the affirmative.

Mr. McLeese, please proceed with your statement.

TESTIMONY OF ROY W. MCLEESE III[1] TO BE AN ASSOCIATE JUDGE, DISTRICT OF COLUMBIA COURT OF APPEALS

Mr. MCLEESE. Thank you. Mr. Chairman, and Members of the Committee, I am grateful for the opportunity to appear before you as the Committee considers my nomination to be an Associate Judge of the District of Columbia Court of Appeals.

I thank the District of Columbia's Judicial Nomination Commission and the President for the honor of the nomination.

[1] The prepared statement of Mr. McLeese appears in the Appendix on page 38.

I also thank the Committee and its staff for all the work that goes into preparing for and conducting the hearing.

I also wanted to thank Congresswoman Norton for taking time out of her schedule to appear and to make a statement on my behalf.

I did have a chance a moment ago to introduce family members and dear friends who are present. I also have family members who are using technology to watch from afar. My daughter, Miranda Seitz-McLeese, is at college in Chicago and could not attend, but she is hopefully, technology willing, watching the proceedings from there. My mother, my brother, my sister, and their families are all in St. Louis, Missouri, and again, hopefully are watching from afar.

I also have a number of friends and colleagues who are here and attending the hearing, or who are watching from elsewhere, and I appreciate all of them coming, or watching, as their schedules permit.

Since I graduated from law school in 1985, I have spent my entire career in government service. I have spent that entire career working in or appearing before the courts in the District of Columbia.

For over the last 20 years, I have been a supervisor in the Appellate Division at the U.S. Attorney's Office here in Washington, DC, and in that capacity, I have practiced primarily in the D.C. Court of Appeals, arguing and briefing cases myself, and supervising others who are arguing or litigating in that court.

And over those years, I have had an opportunity to develop the highest respect for that court and for the significance of its work. It would be a great privilege to continue in public service as a member of that court.

Mr. Chairman, I thank you for considering my nomination, and I look forward to answering your questions.

Senator AKAKA. Thank you very much.

I will begin with the standard questions this Committee asks of all nominees and would like you to answer each question.

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

Mr. MCLEESE. No, Mr. Chairman.

Senator AKAKA. Thank you.

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

Mr. MCLEESE. No, Mr. Chairman.

Senator AKAKA. Do you agree, without reservation, to respond to any reasonable summons to appear and testify before any duly constituted committee of Congress, if you are confirmed?

Mr. MCLEESE. Yes, I do, Mr. Chairman.

Senator AKAKA. Thank you for your responses.

Mr. McLeese, you have impressive credentials and spent your entire legal career with the Federal Government. I commend your decision to continue public service by joining the D.C. Judicial System. Please elaborate on why you are seeking the appointment to become an associate judge at this point in your career?

Mr. MCLEESE. Mr. Chairman, as I mentioned in my opening remarks, I have had the opportunity to practice in front of that court primarily for the last 20 years, and I think that the longer you do that, the more you develop background and experience that might allow you to make a contribution to that court. And I think over the years, I have come to be very familiar with the Court's law and its procedures. And so, I think one component of it is I feel as though I now have the background and experience to hit the ground running or make a contribution to that court if I were to be confirmed.

Senator AKAKA. Mr. McLeese, the Court of Appeals handles a heavy caseload, and judges must rule on complex issues, both quickly and correctly. At the same time, litigants must feel they received a fair hearing where they were heard and respected. Please describe how your experience qualifies you to meet these challenges.

Mr. MCLEESE. The U.S. Attorney's Office Appellate Division also has a very heavy burden, a very heavy caseload. In any given year in recent times, the Appellate Division has filed somewhere in the neighborhood of 500 to 750 briefs or substantive pleadings. And the process of preparing some of those pleadings myself, a small proportion of them, and then managing and supervising the filing of the rest of them has given me a full opportunity to do appellate work, to try to maintain high quality as we do that appellate work but to do it under conditions that mean we have to work hard and we have to work efficiently in order to keep up with the heavy burdens.

I think a lot of those challenges are very similar to the challenges that the judges on the D.C. Court of Appeals face.

Senator AKAKA. Mr. McLeese, as we have discussed, associate judges review a high volume of cases and must be able to prioritize and delegate certain tasks. Please describe your management style, including the role you envision for law clerks in the chamber.

Mr. MCLEESE. One of the most enjoyable parts of being a supervisor at the U.S. Attorney's Office Appellate Division is getting the chance to work with the young attorneys who are oftentimes starting in the U.S. Attorney's Office. One of the first places some start is in the Appellate Division.

One of the jobs of the supervisors in the Appellate Division is to help those young lawyers do two things. One is to produce good briefs that we can file in court at high quality but also to learn how to become good appellate lawyers and good government lawyers.

I think the process of working with young attorneys to produce high quality appellate work—again, very busy context—is very similar to the relationship that an appellate judge would have with his or her law clerks in working with them to, again, get the benefit of their contribution but also to try to teach and develop them as young lawyers.

Senator AKAKA. Mr. McLeese, during your time with the U.S. Attorney's Office, you have, no doubt, become familiar with the Court of Appeals' rules and possibly some ways it could improve. What do you think the Court's biggest challenge is, and if confirmed, what role would you play in addressing that challenge?

Mr. MCLEESE. I think the Court's biggest challenge is something that you mentioned earlier, Mr. Chairman, which is the difficulty of continuing to provide high quality opinions and decisions in cases while governing a very heavy caseload.

The District of Columbia Court of Appeals has appeals as of right. It does not have discretionary authority to control its caseload, and it is supervising judgments from a very busy city judicial system that generates quite a lot of work. And so, I think the Court's biggest challenge is to continue to maintain the quality of its decisions but to be timely and efficient in getting those cases resolved.

If I were confirmed, I think judges can contribute to that challenge of the Court in two ways. One is individualized to the judge's own chambers, and that is working with respect to the particular cases that you are assigned and are working on to try to make sure that you and your chambers are meeting that challenge of getting those decisions out quickly but at a very high quality.

I think that it can help to have similar experiences in producing a similar kind of work, and a lot of that is just putting in the hours and the work to try to make sure that you are getting all of that done and getting it done efficiently.

I do think judges also can contribute to that in a more systemic way. There are issues of policy about things like how the Court moves into electronic case filing and case management, which can add efficiency, how the Court works with the other entities the Court interacts with.

The issues of speed and decision are not only about the time that it takes from when a case is ready for the judges to resolve until the time the judges resolve it. There are a lot of earlier steps in the process, involving the getting of transcripts and the filing of briefs by the parties, about which the Court has an administrative set of responsibilities.

If I were confirmed, I would be quite interested in attempting to contribute to the problem from a more administrative or managerial perspective as well as simply from the perspective of getting decisions out timely from an individual chambers.

Senator AKAKA. This is my final question. During your career, you have appeared before many judges and, no doubt, learned a great deal from observing them. Describe some of the qualities you hope to emulate as a judge and those you hope to avoid.

Mr. MCLEESE. The qualities I most admire in judges circle around words like fairness and civility, those two words.

I am focused right now on appellate judges. That is my experience, and that is our current context.

Generally, the litigants' first exposure to an appellate judge is at the oral argument. So in the context of oral argument, I think judges do best when they are polite, respectful of the lawyers; they are well prepared so that they can ask questions that are the questions that are helpful to resolve the case, but they are interested in listening to the litigants' answers and are, again, respectful in manner and tone, both to the litigants and to the parties and the issues that bring the parties into the litigation.

I think there are similar attributes in the opinion-writing process. That is the other time when litigants primarily, and parties

and lawyers, are exposed to judges and are formulating reactions to them.

I think, again, the same set of principles are important—opinions that are thorough and that address each of the arguments that the parties are making so that the parties correctly feel as though their case has been given fair and respectful consideration, that acknowledge the pros and cons and deal with each part of a case in a fair, even-handed way, and that are respectful in tone, both about the litigants and about counsel.

I think those things are all quite important.

And relatedly, I think those same characteristics also serve well in judges' interactions with their colleagues in terms of being civil on the bench in your opinions when you are dissenting from one of your colleagues' opinions, or vice-versa. I think a calm, respectful tone is a key characteristic that I would like to emulate if I were confirmed.

And obviously, I would hope to avoid the converse of most of those attributes.

Senator AKAKA. Thank you. Thank you very much for your testimony and your responses to my questions. There are no further questions at this time.

Members of the Committee may submit additional statements or questions, which will be given to you in writing. The hearing record will remain open until the close of business Tuesday, March 13.

I want to, again, thank Congresswoman Norton for introducing you and for taking time to be with us today.

I want to note for the record that Paul Strauss is submitting a statement of support for your nomination,[1] Mr. McLeese.

It is my hope that this Committee and the Senate will be able to act quickly on both of today's nominations.

I thank you very much for coming, and it is great to meet your family. I know they are proud of you. I like to say that you are as good as you are because of them.

Mr. MCLEESE. Certainly true.

Senator AKAKA. You have great supporters, and I am sure they will continue to support you. So, it is good to meet your family and friends.

So, thank you very much. This hearing is adjourned.

[Whereupon, at 3:43 p.m., the Committee was adjourned.]

[1] The prepared statement of Mr. Strauss appears in the Appendix on page 60.

APPENDIX

Statement of Senator Daniel K. Akaka
Nominations of Mark Robbins to be a Member of the Merit Systems Protection Board; and Roy McLeese III to be an Associate Judge of the District of Columbia Court of Appeals

March 6, 2012

Good afternoon and welcome. Today, the Committee on Homeland Security and Governmental Affairs meets to consider the nominations of Mark Robbins to be a Member of the Merit Systems Protection Board and Roy McLeese III to be an Associate Judge of the District of Columbia Court of Appeals.

Mr. Robbins has spent most of his professional career in Federal service, and has significant experience with Federal personnel issues. From 2001 through 2006, he served as General Counsel of the Office of Personnel Management, where among other duties, he was responsible for determining whether the Office of Personnel Management should intervene in or seek reconsideration of Board decisions.

Mr. Robbins currently serves as the General Counsel at the U.S. Election Assistance Commission, an independent, bipartisan commission established under the Help America Vote Act of 2002 to improve voting systems and voter access across the country. He also has served as the Executive Director of the Privacy and Civil Liberties Oversight Board in the White House under President George W. Bush and as a State Department legal advisor to a Provincial Reconstruction Team in Iraq.

Mr. Robbins received his undergraduate and law degrees from George Washington University. I would like to thank Mr. Robbins for his public service and his focus on Federal workforce issues.

The Civil Service Reform Act of 1978 created the Merit Systems Protection Board to protect merit system principles and prevent unfair practices in the workplace. In addition to appeals of alleged prohibited practices and adverse actions, the Board hears cases under the Whistleblower Protection Act, the Hatch Act, the Veterans' Employment Opportunity Act, and the Uniformed Services Employment and Reemployment Act.

I believe that the position to which Mr. Robbins has been nominated is among the most important in the Federal Civil Service, and I look forward to hearing his views on the many important issues affecting the Federal workforce.

At a time when Federal employees are under-appreciated and often disparaged, it is important to take this opportunity to recognize the critical work they do securing our nation, keeping our food safe, caring for wounded warriors, and many other critical tasks. These dedicated individuals are among this country's greatest assets. To provide the best possible service to the American people, Federal employees must be able to serve in a workplace without fear of discrimination or undue influence.

Mr. Robbins, if you are confirmed, I expect you to be a strong advocate of the merit system and Federal employees' rights.

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One of the most important functions of the Merit Systems Protection Board is to protect Federal whistleblowers from illegal retaliation. As the sponsor of the Whistleblower Protection Enhancement Act, I believe it is vital that Federal employees be able to report waste, fraud, and abuse without fear. Whistleblowers are essential to accountable, fiscally responsible government.

Last year, according to the Department of Justice, private sector whistleblowers reporting fraud against the government were responsible for nearly three billion dollars recovered by the government in civil cases. But Federal employees who blow the whistle simply do not receive the protections they need. I am hopeful that Congress will finally pass my bill, so Federal employees and taxpayers will have these protections.

Other responsibilities of the Board include reviewing Office of Personnel Management regulations and conducting studies on the merit systems. I understand that the Board is currently conducting studies on important issues such as: implementing effective telework programs in the Federal government; the importance of protecting against stereotyping of, and discrimination against, women in the Federal workforce; and an explanation of each prohibited personnel practice under the law, with real world examples.

Mr. McLeese has a distinguished legal career devoted to public service. He currently is Chief of the Appellate Division of the U.S. Attorney's Office for the District of Columbia, and has twice been detailed to the Office of the Solicitor General to argue complex cases before the U.S. Supreme Court. Mr. McLeese also clerked on the Federal Court of Appeals for the D.C. Circuit and the U.S. Supreme Court.

This Committee consistently receives excellent D.C. judicial candidates, nominated by the President from those recommended by the non-partisan Judicial Nomination Commission. I believe Mr. McLeese is well qualified and has much to offer the District Bench.

I hope that the Committee and the Senate can act quickly to confirm both of the nominees.

MSPB NOMIMATION HEARING TESTIMONY

MARK A. ROBBINS
MEMBER
U.S. MERIT SYSTEMS PROTECTION BOARD

SENATE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENT AFFAIRS
March 6, 2012

Chairman Akaka, Ranking Member Johnson and members of the Committee:

I appreciate this opportunity to present my qualifications and respond to your questions regarding my nomination to be a Member of the U.S. Merit Systems Protection Board. I want to thank the President for the honor and privilege of his nomination, Senator McConnell for his recommendation to the President, and Senator Collins for her early and very gracious support. If confirmed, I will prove my worthiness of this appointment by carrying out my responsibilities with the highest degree of professionalism and integrity.

As a historian by both education and avocation, I am particularly pleased to be nominated to a position once occupied by a young Theodore Roosevelt, who served at the then-U.S. Civil Service Commission from 1889-1895 under Presidents Benjamin Harrison and Grover Cleveland. As he wrote to a friend upon assuming his duties in 1889, "I have pretty hard work, and work of a sometimes rather irritating kind; but I am delighted to be engaged in it. * * * I intend to hew the line and let the chips fall where they will." And Mr. Chairman, I think we all agree that those chips fell pretty well for Theodore Roosevelt.

The future president brought to this position a passion for and dedication to the concept of a spoils-free, merit based Federal civil service. However, he brought little in the way of practical experience with the Federal workforce. Like the colleagues I hope to join, Chairman Susan Tsui Grundman and Vice chairman Anne Wagner, and the Member I would succeed, Mary McNally Rose, I bring to the MSPB a career of experience with the issues I will face if confirmed.

I began my career as a Legislative Assistant to my hometown California members of the House of Representatives from 1981-1984. My portfolio included civil service issues, and this was shortly after passage of the *Civil Service Reform Act of 1978*. I have worked twice for the White House Office of Presidential Personnel with my portfolio including the Federal human resources agencies, including the Office of Personnel Management (OPM), Merit Systems Protection Board (MSPB), Federal Labor Relations Authority (FLRA), Office of Government Ethics (OGE) and Office of Special Counsel (OSC). These are all successor agencies to the old U.S. Civil Service Commission (1883-1978). From 2001-2006, I was privileged to serve as General Counsel of OPM. One of my responsibilities was to coordinate OPM's exercise of its Title 5, Chapter 77 statutory rights to intervene in or seek reconsideration of MSPB decisions. Following 19 months of service with the State Department in Iraq and one year conducting officer training with the U.S. Army, I am again the General Counsel of a Federal agency, the U.S. Election Assistance Commission, and dealing with Federal human resources and personnel policy issues.

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My early experience with the *Civil Service Reform Act,* along with my later tenure at OPM, gives me good insight into the respective roles and responsibilities of the successor agencies to the old Civil Service Commission. If read too broadly, the Title 5 responsibilities of these agencies could be seen to overlap or conflict. This is neither desirable nor helpful to an efficient administration of the Federal Civil Service. But if Title 5 is read narrowly, and with due consideration given to the intent of Congress when the Act was passed, each organization has an important mission to pursue, that neither overlaps nor conflicts with those of its sister agencies. If confirmed, I will bring with me to this position a clear understanding of the MSPB's role in the grand scheme of Federal civil service management and policy development envisioned by the *Civil Service Reform Act*, and an appropriate deference to the roles and responsibilities of the other agencies.

If confirmed I will also bring significant management and administrative skills to the MSPB, which I will place at the Chairman's disposal to assist whenever and wherever she believes my services would be helpful and prudent. I have briefly reviewed the Board's FY 2011 Final Performance Plan (December 20, 2010) and the subsequent FY 2011 Performance and Accountability Report (November 15, 2011). I am pleased the Board exceeded its decision quality and alternative dispute resolution performance goals. And I fully understand the conflicting tensions that exist in meeting the goal of timely but high quality work product in the form of Board decisions. In my meetings with stakeholders and practitioners prior to this hearing, I have been consistently informed that the timeliness of Board decisions is extremely important. But no one wants the quality of those decisions to suffer as a result of focus on speed. And most understand and appreciate the effort the Board is making in this regard. If confirmed, I look forward to working with my colleagues to continue addressing this matter.

The next few years will be an exciting time to serve on the MSPB. The last Congress passed updates to the *Uniformed Services Employment and Reemployment Rights Act* (USERRA), although I note from recent press reports that enforcement issues, particularly with regard to the Federal government as an employer, remain. Senator Akaka, I know the importance you place in enhancing Federal whistleblower protections and note that both the Senate Homeland Security and Government Affairs and the House Oversight and Government Reform committees have passed with bipartisan support versions of the Whistleblower Protection Enhancement Act. I am also aware that the Office Special Counsel has proposed a legislative initiative to update the *Hatch Act*.

My previous experiences with these and other relevant issues have either been as an attorney advocate or in the public policy and administration spheres. I fully understand that if confirmed I will be taking on a new and unique role as an impartial, objective adjudicator. I believe I'm qualified for that responsibility and I am excited at the possibility.

During this confirmation process I have been asked several times whether I bring to public service generally, and this appointment specifically, a governing philosophy. I suppose I do, and no one states it better than then-President Theodore Roosevelt toward the end of his presidency in 1909 when he wrote: "[t]he National Government should be a model employer. It should demand the highest quality of service from each of its employees and it should care for all of

them properly in return." The MSPB is a modern, necessary component of that philosophy. I'm honored to be considered for appointment to it.

Before concluding, I would like to thank those who have assisted me in this process: my family, friends and colleagues who have given me their moral support; Senate and White House staff; my future colleagues at the MSPB who provided logistical support, most especially Rosalyn Coates and Katherine Smith; and the stakeholders I reached out to who generously gave me their time and thoughts. I will always be grateful for the public service mentoring of two men who have assisted me with my career over the years: the late Congressman John H. Rousselot of California, and Ambassador Robert H. Tuttle. And finally, I especially want to thank, and gratefully note the presence of, my parents Neal and Janet Robbins, who are visiting from Phoenix, Arizona. They have been supportively behind me my entire life. So it is natural that they are here with me today.

Mr. Chairman, again, thank you, and I look forward to responding to any questions the members of this Committee may have.

BIOGRAPHICAL AND FINANCIAL INFORMATION REQUESTED OF NOMINEES

A. BIOGRAPHICAL INFORMATION

1. **Name:** (Include any former names used.) Mark Allen Robbins

2. **Position to which nominated:** Member, Merit Systems Protection Board

3. **Date of nomination:** December 5, 2011

4. **Address:** (List current place of residence and office addresses.)
   - Home: REDACTED
   - Work: U.S. Election Assistance Commission, 1201 New York Ave. NW #300 Washington, DC 20005

5. **Date and place of birth:** 6/7/1959, Ann Arbor, MI

6. **Marital status:** (Include maiden name of wife or husband's name.) Single

7. **Names and ages of children:** N/A

8. **Education:** List secondary and higher education institutions, dates attended, degree received and date degree granted.
   - Glendora High School, Glendora, CA, 1974-77; Graduated in 1977
   - California Polytechnic University, Pomona, CA, 1977-79
   - Semester-at-Sea, then with University of Colorado, spring voyage 1978
   - George Washington University, Washington, DC 1979-81; BA 1981
   - George Washington University, Washington, DC 1984-88; J.D. 1988

9. **Employment record:** List all jobs held since college, and any relevant or significant jobs held prior to that time, including the title or description of job, name of employer, location of work, and dates of employment. (Please use separate attachment, if necessary.)
   - 1979-83, Congressman John H. Rousselot, Washington DC. Personal staff.
   - 1983-84, Congressman David Dreier, Washington, DC. Personal staff.
   - 1984-88, Presidential Personnel, the White House, Washington, DC.
   - 1988-93, Pepper, Hamilton, LLP, Los Angeles, CA. Attorney.
   - 1993-94, Belin, Rawlings & Badal, Los Angeles, CA. Attorney.
   - 1994-97, Hancock, Rothert & Bunshoft, Los Angeles, CA. Attorney.
   - 1997-2000, ACE USA Property & Casualty Insurance Co., Los Angeles, CA Attorney.
   - 2000, Hancock, Rothert & Bunshoft, Los Angeles, CA. Attorney
   - 2001-06, U.S. Office of Personnel Management, Washington, DC. General Counsel.

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- 2006-08, Privacy & Civil Liberties Oversight Board, The White House, Washington, DC. Executive Director
- 2008-09, Department of State, Babil, Iraq Provincial Reconstruction Team. Senior Rule of Law Advisor.
- 2009-10, IDS International, Arlington, VA. Rule of Law consultant/contractor.
- 2010-present, U.S. Election Assistance Commission, Washington, DC. General Counsel.

10. **Government experience:** List any advisory, consultative, honorary or other part-time service or positions with federal, State, or local governments, other than those listed above. None.

11. **Business relationships:** List all positions currently or formerly held as an officer, director, trustee, partner, proprietor, agent, representative, or consultant of any corporation, company, firm, partnership, or other business enterprise, educational or other institution. None.

12. **Memberships:** List all memberships, affiliations, or and offices currently or formerly held in professional, business, fraternal, scholarly, civic, public, charitable or other organizations.
    - Council Member, Georgetown Lutheran Church, Washington, DC 2010-present
    - Board Member, Kalorama Homeowners Asso., Washington, DC 2009-present
    - Federalist Society member, 1984-present
    - American Bar Association member, 1984-2001
    - International Network to Promote the Rule of Law member, 2008-present
    - California Republican Party state and Los Angeles County central committee member, 1992-1994
    - Log Cabin Republican Club member, 1990-2010

13. **Political affiliations and activities:**

    (a) List all offices with a political party which you have held or any public office for which you have been a candidate.
        - Republican nominee for the U.S. House of Representatives (CA-29), 1992
        - Member of California State and Los Angeles County Republican Central Committees, 1992-1994

    (b) List all memberships and offices held in and services rendered to any political party or election committee during the last 10 years.
        - Bush for President, 2000
        - Republican National Committee 72 hour program, 2002
        - Republican National Committee 72 hour program, 2004
        - NRCC GOTV 2005 (VA)
        - NRCC GOTV 2006
        - Log Cabin Republican Club member, 1990-2010

Since September, 2010 I have been employed by an agency that is under the heightened Hatch Act restrictions. Since then, I have refrained from all political activity except financial contributions and voting.

(c) Itemize all political contributions to any individual, campaign organization, political party, political action committee, or similar entity of $50 or more during the past 5 years.

- Mike Dovilla for Congress (OH), 2006, $500
- Schwarzenegger for Governor (CA), $1,000
- Giuliani for President, 2007, $2,300 (primary)
- McCain for President, 2008, $2,300 (primary)
- McCain for President, 2008, $2,300 (general)
- Mike Dovilla for Assembly (OH), 2010, $200
- Mitt Romney for President, 2012, $2,500 (primary)

14. **Honors and awards:** List all scholarships, fellowships, honorary degrees, honorary society memberships, military medals and any other special recognitions for outstanding service or achievements.

- American Legion Honor Award, 1977
- OPM Theodore Roosevelt Award for Distinguished Public Service, 2006
- U.S. Army Commander's Award for Civilian Service, 2009
- Department of State Meritorious Honor Award (2) for service in Iraq, 2009

15. **Published writings:** Provide the Committee with a list and two copies of any books, articles, reports, or other published materials which you have written. These items can be provided electronically via e-mail or other digital format.

- None, other than legal motions and briefs filed in active litigation as an attorney of record in either Federal or California state court. I've also written several letters to the editor (none since 1993) to various publications over the years. I don't have copies and don't recall exact subject matter.

16. **Speeches:**

(a) Provide the Committee with a list and two copies of any formal speeches you have delivered during the last 5 years which you have copies of and are on topics relevant to the position for which you have been nominated. Provide a list and copies of any testimony to Congress, or to any other legislative or administrative body. These items can be provided electronically via e-mail or other digital format.

- None. I have participated in public events and panel discussions on numerous occasions over the years. But I had no prepared remarks.

(b) Provide a list of all speeches and testimony you have delivered in the past 10 years, except for those the text of which you are providing to the Committee. Please provide a short description of the speech or testimony, its date of delivery, and the audience to whom you delivered it. None.

17. **Selection:**

(a) Do you know why you were chosen for this nomination by the President?

- I was the recommendation of the Senate Republican leadership for the open non-majority party seat.

(b) What do you believe in your background or employment experience affirmatively qualifies you for this particular appointment?

- I have been involved in Federal personnel management and merit systems issues for most of my adult professional life. I covered these issues as a Legislative Assistant to two members of the U.S. House of Representatives from 1981-84. I served in the White House Office of Presidential Personnel from 1984-88, then after 13 years in the private practice of law in Los Angeles, CA, returned to Washington, DC and served five years as General Counsel at the U.S. Office of Personnel Management (2001-06). Since then I have returned to the White House as Executive Director of the Privacy and Civil Liberties Oversight Board (2006-08), served as a Senior Rule of Law Advisor to a Provincial Reconstruction Team in Babil, Iraq (2008-09), and presently serve as General Counsel of the U.S. Election Assistance Commission.

B. EMPLOYMENT RELATIONSHIPS

18. Will you sever all connections with your present employers, business firms, business associations or business organizations if you are confirmed by the Senate? Yes.

19. Do you have any plans, commitments or agreements to pursue outside employment, with or without compensation, during your service with the government? If so, explain. No.

20. Do you have any plans, commitments or agreements after completing government service to resume employment, affiliation or practice with your previous employer, business firm, association or organization, or to start employment with any other entity? No.

21. Has anybody made a commitment to employ your services in any capacity after you leave government service? No.

22. If confirmed, do you expect to serve out your full term or until the next Presidential election, whichever is applicable? Yes.

23. Have you ever been asked by an employer to leave a job or otherwise left a job on a non-voluntary basis? If so, please explain. No.

C. POTENTIAL CONFLICTS OF INTEREST

24. Describe any business relationship, dealing or financial transaction which you have had during the last 10 years, whether for yourself, on behalf of a client, or acting as an agent,

that could in any way constitute or result in a possible conflict of interest in the position to which you have been nominated. None.

25. Describe any activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat or modification of any legislation or affecting the administration or execution of law or public policy, other than while in a federal government capacity. None.

26. Do you agree to have written opinions provided to the Committee by the designated agency ethics officer of the agency to which you are nominated and by the Office of Government Ethics concerning potential conflicts of interest or any legal impediments to your serving in this position? Yes.

D. LEGAL MATTERS

27. Have you ever been disciplined or cited for a breach of ethics or unprofessional conduct by, or been the subject of a complaint, to any court, administrative agency, professional association, disciplinary committee, or other professional group? If so, provide details. No.

28. Have you ever been investigated, arrested, charged or convicted (including pleas of guilty or nolo contendere) by any federal, State, or other law enforcement authority for violation of any federal, State, county or municipal law, other than a minor traffic offense? If so, provide details. No.

29. Have you or any business of which you are or were an officer, director or owner ever been involved as a party in interest in any administrative agency proceeding or civil litigation? If so, provide details. No.

30. For responses to question 30, please identify and provide details for any proceedings or civil litigation that involve actions taken or omitted by you, or alleged to have been taken or omitted by you, while serving in your official capacity.

    - I am advised that I am one of 29 named defendants in a civil RICO action presently pending in the Virginia Circuit Court for Fairfax County. I am being sued in my official capacity as General Counsel of OPM (2001-6). I have not been served and I am being represented by the Department of Justice. *Bloch v. Executive Office of the President, et al.*

31. Please advise the Committee of any additional information, favorable or unfavorable, which you feel should be considered in connection with your nomination. None.

E. FINANCIAL DATA - REDACTED

All information requested under this heading must be provided for yourself, your spouse, and your dependents. (This information will not be published in the record of the hearing on your

nomination, but it will be retained in the Committee's files and will be available for public inspection.)

AFFIDAVIT

MARK ALLEN ROBBINS, being duly sworn, hereby states that he has read and signed the foregoing Statement on Biographical and Financial Information and that the information provided therein is, to the best of his/her knowledge, current, accurate, and complete.

Mark A. Robbins

Subscribed and sworn before me this 19th day of December, 2011

Notary Public

United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

DEC 22 2011

The Honorable Joseph I. Lieberman
Chairman
Committee on Homeland Security
and Governmental Affairs
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

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

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

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

Sincerely,

Don W. Fox
Acting Director

Enclosures - REDACTED

U.S. Senate Committee on Governmental Affairs
Pre-hearing Questionnaire for the
Nomination of Mark A. Robbins to be
A Member of the Merit Systems Protection Board

I. Nomination Process and Conflicts of Interest

1. Why do you believe the President nominated you to serve as a member of the Merit Systems Protection Board ("MSPB" or "the Board")?
   - I was recommended by the Senate Republican leadership for the open non-majority party seat. I have been involved in Federal personnel management and merit systems issues for most of my adult professional life. I covered these issues as a Legislative Assistant to two members of the U.S. House of Representatives from 1981-84. I served in the White House Office of Presidential Personnel from 1984-88, then after 13 years in the private practice of law in Los Angeles, CA, returned to Washington, DC and served five years as General Counsel at the U.S. Office of Personnel Management (2001-06). In that capacity I was responsible for OPM's Title 5, Chapter 77 rights to intervene in or seek reconsideration of MSPB decisions. Since then I returned to the White House as Executive Director of the Privacy and Civil Liberties Oversight Board (2006-08), served as the State Department's Senior Rule of Law Advisor to a Provincial Reconstruction Team in Babil, Iraq (2008-09), and presently serve as General Counsel of the U.S. Election Assistance Commission.

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

3. What specific background and experience affirmatively qualifies you to be a member of the MSPB?
   - See response to question 1.

4. Have you made any commitments with respect to the policies and principles you will attempt to implement as a member of the MSPB? If so, what are they and to whom have the commitments been made?
   - No.

5. If confirmed as a member of the MSPB, are there any issues from which you may have to recuse or disqualify yourself because of a conflict of interest or the appearance of a conflict of interest? If so, please explain what procedures you will use to carry out such a recusal or disqualification.
   - I do not believe so. I have been away from OPM for six years, so it is doubtful there are any pending matters before the Board in which I was previously involved. As the

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Designated Agency Ethics Officer (DAEO) at two different Federal agencies (OPM and EAC), I am well able to identify and address potential conflicts of interest if they arise. In addition, my nomination paperwork has been reviewed by both MSPB counsel and the U.S. Office of Government Ethics, with no conflicts identified.

II. Role and Responsibilities of a Member of the MSPB

6. What is your view of the role of a member of the MSPB?
   - I believe the primary role of a member of the MSPB is to impartially, objectively and knowledgably apply the law, appropriate regulations and policy to specific facts presented to the Board for adjudication. This requires a member to be familiar with and conversant in applicable law, regulation and policy.

7. How does your prior experience prepare you to effectively deal with issues and challenges facing MSPB?
   - As discussed in response to questions 1 and 3, I have been involved with Federal civil service issues most of my adult professional life. Most importantly, I served five years as General Counsel of OPM and as such, was responsible for the agency's 5 U.S.C. §7701 statutory right to intervene in or seek reconsideration of MSPB decisions (1) involving the interpretation or application of any civil service law, rule or regulation under OPM's jurisdiction, and (2) resulting in a substantial impact on those laws, rules or regulations. In addition, I have acquired significant Federal management and administrative experience which I will offer to the chairman for internal assignments as she believes appropriate.

8. With respect to the management and administration of the MSPB, what are your views of the respective rights and responsibilities of the Chairman and the other members of the Board?
   - 5 U.S.C. §1203 makes clear that the chairman of the MSPB is the chief executive and administrative officer of the Board. I understand and respect that role. I believe it is the duty of the other two Board members to offer assistance and candid, private advice when they believe it is warranted. That having been said, as mentioned in response to question 7, I will offer my experience and assistance to the chairman in her management and administrative responsibilities to use as she deems appropriate.

III. Policy Questions

MSPB Case-Management and Procedures

9. In your view, what are the major internal and external challenges facing the MSPB? How do you plan to address these challenges?
   - Beyond the issues discussed in specific response to questions below, and those challenges common to all Executive Branch agencies, such as Federal budget limitations and

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workforce retention, attrition and training, I am not presently aware of specific internal and external challenges facing the Board. If confirmed, I believe it will be easy for me to quickly establish a good working relationship with my colleagues on the Board, and the MSPB staff. I have the reputation of a team player, and look forward to assisting them in identifying and addressing any and all challenges.

10. What will be your long-term priorities as a member of the MSPB?
    - To exemplify the legacy of Civil Service Commissioner Theodore Roosevelt (1889-1895) by serving the American people and the Federal civil service with the highest integrity; writing well-reasoned, timely and easily understood opinions consistent with relevant law, regulation and policy; providing sound agency management and administrative support when requested; and bringing honor to my family and friends through my service.

11. The Board has established performance goals for itself that include the issuance of high-quality decisions (which is measured in terms of cases that are not changed, reversed, or remanded on review), and the issuance of timely decisions. (*See* MSPB, Performance and Accountability Report for Fiscal Year 2011, November 15, 2011). Other performance goals related to the adjudication function include controlling average case processing cost, and achieving high rates of case settlement. What is your opinion of the performance goals established by the Board? Do you believe any adjustments may be desirable, and if so, what?
    - I support these performance goals and am pleased to note that the Board exceeded its decision quality and alternative dispute resolution performance goals. The Board itself concedes that it did not achieve its adjudication timeliness goal due to a greater emphasis on decision quality and adjudication process transparency, and the lack of resources to fill vacancies. As discussed in response to questions 13 and 14, I understand and personally support the emphasis on decision quality over other performance elements when a choice is necessary.

12. In your view, what are some options for timelier decision making? Specifically, what do you believe that you, as a member of the MSPB, could and should do to expedite Board review, while maintaining fairness and quality in decision-making?
    - Not presently serving on the Board, this is a difficult question to answer. I know that the present Board members are striving to provide timely, quality decisions. And from my pre-hearing conversations with stakeholders and practitioners, I know there is an acknowledgment of progress being made, and an understanding of and appreciation for their present efforts. But more can always be done, and if confirmed I look forward to working with my colleagues to continue addressing this issue. I trust that my experience in issues relevant to the Board's responsibilities will result in a minimum learning curve on my part, thus preventing me from slowing down the process at the beginning of my service.

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13. It has been suggested that, in order to issue speedy decisions, administrative judges may limit discovery. What steps, if any, do you believe can be taken to improve the pre-hearing discovery process for MSPB litigation?

- It has been several years since I've participated in or observed the MSPB adjudication discovery process, and I am not presently familiar with specific plans or arguments to limit it in an effort to speed the adjudication process. I note generally however that discovery is an important element of due process. Limits beyond those presently set in either the Board's regulations (5 C.F.R. §§ 1201.71-75), or the Federal Rules of Civil Procedure must be considered very carefully. As I have stated in response to other questions here, I understand the importance of and support a speedy decision process, but not at the expense of sacrificing due process protections or the quality of the final work product. Before considering proposals to limit discovery, I would prefer to initially examine whether abuse of the discovery process by parties is a significant element to slowing the adjudication process, and if so, work to correct that situation first.

14. Timeliness is one measure of performance. Quality of decisions is another measure. How can the competing goals of quality and timeliness be balanced? Do you believe that measuring the numbers of cases not changed, reversed, or remanded on review is the best measure the quality of decisions; should other measures be considered?

- This is not a question unique to the MSPB. It is an issue that confronts all entities with adjudication responsibilities, and is the subject of much discussion and debate with regard to Federal and state court systems. In the end, everyone wants both quality decisions that survive appeal, which are concise, transparent and understandable, and provided in a timely manner. One must strive for a balance between quality and timeliness. But in the end quality must be given the ultimate priority. The credibility of the adjudication system and the Board depend on it.

15. Pursuant to 5 U.S.C. §§ 1214(b)(i)(A) and 1221(c)(1), the Special Counsel or an individual civil servant alleging a prohibited personnel practice to the Board may request a stay of a personnel action until the appeal is resolved. Given that the appellate process can take a significant period of time to be completed, this temporary relief may prevent great financial and professional hardship for an affected employee. In your opinion, under what circumstances should a stay be granted at the request of the Special Counsel or an individual civil servant?

- The legal standard for a granting a stay is *reasonable grounds*. The existence or non-existence of *reasonable grounds* is necessarily fact-specific. It is difficult to enunciate an application standard that could be appropriately applied in all situations. As in private practice, I generally believe that absent demonstrated prejudice or harm to the employer, or evidence of process abuse or intentional delay with good cause not shown, stays should be liberally granted.

16. The appeals process administered by MSPB has been characterized by some as being cumbersome. What is your opinion about the balance MSPB should strive for between making its processes "user friendly" to individual parties and yet appropriate to deal

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fairly and consistently with the complex issues presented to it? How can that balance be achieved?

- One of the first steps at making the adjudication process less cumbersome is to make sure the regulations and rules guiding it are easily understandable to the parties involved. The past three Presidential administrations have emphasized the importance of using plain English in documents intended for public use, and after passage of the Plain Writing Act of 2010 (P.L. 111-274), it is now the law. If confirmed I will work with my colleagues and staff to review MSPB regulations and rules in an effort to make guidance more easily understood and applied in the adjudication process. I also believe that the development and use of standard form documents whenever possible, helps to simplify the process. If confirmed, I will be interested in learning from staff how the agency's *e-Appeals Online* process is working, and whether it is leading to a more "user friendly" process.

17. The appeals process can be daunting for appellants, particularly those not represented by an attorney. Do you believe that MSPB should assist pro se appellants in exercising their rights to due process? If so, what assistance should MSPB provide? Are there any other things that you believe MSPB can and should do to reduce the burden on appellants?

- The MSPB, like any entity with adjudication responsibilities, must take great care in distinguishing between providing appropriate assistance with the process, from assisting in the substance of a party's case. As discussed in response to question 16, making sure the process is understandable and that standard form documents are easily accessible goes far in assisting pro se appellants.

18. Some cases require lengthy and complex decisions. What do you believe can be done to help ensure that the Board's decisions are written in such a manner that they can be easily understood and implemented by both agencies and employees?

- At their core, Board decisions are legal documents. Published decisions are precedential and appealable to the Federal court system (mostly the Federal Circuit Court of Appeals). As such, they must be accurate. Some issues are indeed lengthy, complex and technical. When interpreting or applying statutory or regulatory language, adjudicators are tied to that language to a great extent. But I think if Board members and staff adhere to the plain English requirements discussed above, it will assist in producing decisions which are both easily understood and implemented.

19. One factor that helps reduce average case processing time and conserve agency resources is the settlement of cases. Indeed, the MSPB has established a performance goal for itself that at least 50% of initial appeals that are not dismissed should be settled, and the Board has well exceeded that goal. (See MSPB, Performance and Accountability Report for Fiscal Year 2011, November 15, 2011, page 9).

    a. What is your view of that goal and of how it can best be achieved and exceeded?

- While I am certainly pleased that the MSPB has exceeded the goals it set in the FY 2011 PAR, I am not yet familiar with how it did so and how this achievement can be exceeded.

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But if confirmed, I look forward to working with my colleagues to continuing this success. Generally, I believe that if settlement is in all parties' best interest, it should be pursued. However, I am wary of pushing settlement to meet what can be perceived as arbitrary numerical goals which cannot take into account fact specific complicating factors of cases not yet filed. And there are times when settlement only defers a legal issue or ambiguity which must eventually be resolved, or results in inappropriate actions on the part of one party or another going unsanctioned.

b. What role, if any, do you believe the MSPB should exercise in order to help ensure that parties do not feel undue pressure to enter into settlements that might be unfair, unwise, or without due process?

- As I mentioned in response to question 13, I am protective of the elements that constitute due process in merit system adjudications. The main concern I expressed in response to subquestion (a) above, regarding arbitrary numerical goals, is that it can lead to undue pressure on parties to settle a case. I would note that this is also the case with private practice in Federal and state courts. I am not presently familiar with how large a problem this may be at the Board. But my experience has been that practitioners and participants in the process who have felt pressure or displeasure tend to speak out. If there are systemic problems in this regard, if confirmed I look forward to working with my colleagues to address them.

20. Do you believe the MSPB should play a role in promoting the use of alternative dispute resolution (ADR) at other federal agencies and in training federal staff in ADR techniques? If so, how should that role be exercised? How should MSPB's role be coordinated with, or differentiated from, the respective roles of other federal entities with similar responsibilities or interests to help ensure efficiency and consistency in federal workplace ADR policy and practice?

- Yes. I am a supporter and practitioner of alternative dispute resolution programs, in both private practice and in the Federal workplace. In 2003, while I was General Counsel at OPM, we updated our ADR Resources Guide, available to all Federal agencies for assistance in setting up in-house ADR programs. In fact, OPM used to sponsor an annual awards program to recognize successful and innovative ADR programs. I believe this has been discontinued. So long as ADR is not used to circumvent the statutory protections of the Federal workforce, it is an economical and efficient method to resolve Federal workplace disputes. MSPB training, perhaps in conjunction with the other Federal human resources agencies (OPM, OSC and EEOC), would ensure that the protections of Title 5 and other relevant statutes are the primary focus of ADR and that all entities and individuals utilizing it are doing so in a consistent procedural and substantive manner.

21. According to some, the redress system for federal employees as a whole (involving the Equal Employment Opportunity Commission, the Federal Labor Relations Authority, the Office of Special Counsel as well as MSPB) is lengthy, time consuming, costly, and sometimes misused, and offers the opportunity to "forum shop" in some situations. These are among the arguments that the Department of Homeland Security and the Department

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of Defense have considered in developing proposed alternative employee appeals options. Others have argued that the current arrangements for redress include necessary and appropriate mechanisms to perform the essential functions of protecting the federal workplace against political favoritism, retaliation, discrimination, and managerial abuse.

a. What is your view about the current framework of the redress system for federal employees? Please explain the extent to which, if at all, you have concerns about the current process.

- There is no question in my opinion that the current system leads in some circumstances to forum shopping. And holding a senior policy position at OPM during the stand up of the Department of Homeland Security and the design of the National Security Personnel System intended for the Department of Defense, I am very familiar with the arguments made to justify the personnel redress process flexibilities those two systems envisioned. However, as a nominee for a position on the MSPB, I believe this is a policy question best considered by the Administration, through its human resources policy agency (OPM), and Congress. While each of the agencies above provides a unique service different from the rest, there are certainly efficiencies of scale when smaller agencies are combined and processes streamlined. I have experience in and knowledge of this from my previous Federal appointments. I also note that most, if not all, the functions of the agencies identified above were exercised for almost a century by a single agency: the old U.S. Civil Service Commission, which in its day set ever higher standards for a Federal workforce free of political favoritism, retaliation, discrimination and managerial abuse. With regard to the present MSPB, I always believed, and continue to believe, that with adequate resources, it is best able to provide necessary adjudication services to any number of different personnel systems authorized in law.

b. What recommendations, if any, would you offer to improve the process?

- Again, I believe deference to the policy makers is appropriate. As I mention in response to question 25, I believe that as long as each agency remains focused on its core mission and responsibilities, there is little chance of conflict or overlap. Where there is potential, such as with the studies responsibilities of both OPM and MSPB, or in the adjudication of discrimination claims covered by both MSPB and EEOC, coordination between the agencies to avoid duplication and/or conflict, would be advisable. I note that the MSPB and EEOC have a process for mixed cases involving issues over which both agencies have responsibility.

22. MSPB has the statutory responsibility to conduct objective, non-partisan studies that assess and evaluate federal merit systems policies, operations, and practices. The board has reported that it plans to focus on six broad areas of related research from 2011-2013[1]: Hiring and Assessment, Supervision and Leadership, Defending Merit, Focus on the Office of Personnel Management, Performance Management, and Building an Effective Workforce. Within these areas, what priority issues should MSPB focus on and why?

[1] U.S. Merit Systems Protection Board, *2011-2013 Research Agenda*, Washington, DC, March 2011

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- As discussed in more detail to questions 28 and 29, I believe the studies of MSPB should focus on those areas where its adjudication responsibilities give it credible, specific and particular knowledge that is unique from other Federal agencies with human resources and civil service responsibilities. This avoids conflicts and mixed messages. With MSPB's small budget and staff, I believe matters of general policy interest not tied to a specific Board function are best left to those Federal entities or non-profit good government associations best equipped to handle them.

23. The MSPB is responsible for adjudicating claims brought by whistleblowers. What is your view of the role of whistleblowers in helping to improve the functioning of government? What do you believe are the strengths and weaknesses of current whistleblower protections in the federal government?

- Whistleblower protections are a tool for good government and transparency. They are aimed at fighting waste, fraud, abuse and in promoting the health and safety of the American people. Like most Americans, I fully support them. The greatest weakness is that whistleblower protections, at both the Federal and state levels, are statutory, meaning open to application interpretations. This can lead to wide-spread misunderstanding of what actions are in fact protected, and confusion with the process one must use to successfully invoke the protections. This major weakness can best be addressed by government workforce education and training. It is also helps when the institutions charged with managing the whistleblower protections (OSC, MSPB) are able to ensure the integrity of the process to the confidence of those involved in it.

24. Given the recent history of Federal Circuit Court of Appeals and MSPB decisions, there has been growing concern about the ability to protect employees who disclose damaging information about federal operations or federal employees from retaliation. What is your view of MSPB's role in ensuring that whistleblowers are protected?

- The MSPB must apply the law as it is written and/or interpreted by senior bodies of competent jurisdiction. I am pleased to note that the House Oversight and Government Reform Committee and the Senate Homeland Security and Government Affairs Committee have both approved, with bipartisan support, their Chambers' version of a Whistleblower Protection Enhancement Act. The Senate bill (S. 743) awaits action by the full Senate. The House bill (H.R. 3289) awaits action by the House Permanent Select Committee on Intelligence and the House Committee on Homeland Security. While I have not yet had an opportunity to study in depth the provisions of these bills, I understand that both are intended to address the difference that emerged between MSPB and judicial interpretation and Congressional intent of the statute as it is presently written. If confirmed, I look forward to applying the provisions of the enacted enhancements.

25. Federal labor-management and workforce programs are administered by a number of different agencies and offices. Please describe what you believe the relative roles and relationships should be between the MSPB and (a) the Office of Personnel Management, (b) the Federal Labor Relations Authority, (c) the Equal Employment Opportunity Commission, and (d) the Office of Special Counsel.

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- My early Congressional staff experience with the *Civil Service Reform Act,* along with my later tenure at OPM has given me a good perspective into the respective roles and responsibilities of the successor organizations to the old Civil Service Commission. If read too broadly Title 5 responsibilities could be seen to overlap or conflict. This is neither desirable nor helpful to an efficient administration of the Federal Civil Service. But if read narrowly, each organization has an important mission to pursue, that neither overlaps nor conflicts with those of its sister agencies. It has long been my opinion that OPM, working within the Administration and with Congress, sets government human resources policy. The FLRA handles labor-management issues and considers charges of unfair labor practices. OSC investigates and prosecutes prohibited personnel practices and other statutory or regulatory rights. And MSPB adjudicates appeals from agency final decisions on these matters. The EEOC manages issues associated with equal opportunity and work place discrimination. I also refer back to my response to question 21.

26. MSPB administrative judges must interpret and apply complex Federal workplace laws. Do you believe that additional specialized training is needed for administrative judges on these laws? If so, how would you implement such training?
- I am not presently familiar with the level of training for administrative judges on Federal workplace laws. As an attorney with annual continuing legal education requirements, I am a believer in and supporter of ongoing professional training. Keeping in mind present Federal budget restrictions, if confirmed I will work with my colleagues to examine ways in which initial and on-going administrative judge training in Federal workforce issues can be structured and implemented.

27. The large caseload and small staff of the Board may make it difficult to always fully articulate findings of fact and conclusions of law in Board rulings. What do you believe are the Board's responsibilities with respect to presenting specific findings of fact and conclusions of law in support of its rulings?
- In a common law judicial system like that of the United States, articulated findings of fact and conclusions of law are not only necessary in establishing how the law is applied, it is also an important component in minimizing future judicial case loads. If practitioners have a reasonable, educated idea of how the law will be applied, cases requiring actual adjudication are minimized.

Merit System Oversight

28. MSPB is required to conduct "special studies" relating to the civil service and to other merit systems in the executive branch, and to report to the President and to Congress as to whether "the public interest in a civil service free of prohibited personnel practices is being adequately protected.[2]" What is your understanding of the value that MSPB can

[2] 5 U.S.C. § 1204(a)(3).

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bring to the public interest through these studies? Do you believe there are issues or areas that warrant particular attention from MSPB under this authority?

- As mentioned in response to question 22, I believe the special studies responsibility of the MSPB, as provided for in 5 U.S.C. § 1204(a)(3) is an important function of the Board. But it must be exercised in a way that focuses on those issues with which the Board has credible, specific and particular knowledge based on its adjudication responsibilities. This ensures that the Board's studies do not trespass on or conflict with the responsibilities statutorily reserved for OPM or other Federal entities with civil service responsibilities. In the course of adjudication, common trends, themes or problems can be identified. This allows the Board to assess where policy improvements can be made, or recommended to those who can make them (OPM, Congress), to address and resolve the cause of the common problems.

29. Do you believe that it is beneficial and appropriate for the MSPB to identify systemic and recurring issues in the cases that the Board reviews that, if addressed, could improve the federal government's civil service system and personnel practices and reduce the need for and costs of litigation? If so, how should MSPB go about identifying such systemic and recurring issues and how should agencies, employees, or Congress be made aware of these issues?
    - Absolutely. As discussed in question 28, identification of these systemic and recurring issues should be the focus of MSPB activities, studies and reports. Addressing these issues eventually reduces the MSPB case load, and the level of cost, energy expended and frustration on the part of Board practitioners.

IV. Relations with Congress

30. Do you agree without reservation to respond to any reasonable summons to appear and testify before any duly constituted committee of the Congress if you are confirmed as a member of the MSPB?
    - Yes.

31. Do you agree without reservation to reply to any reasonable request for information from any duly constituted committee of the Congress if you are confirmed as a member of the MSPB?
    - Yes.

V. Assistance

32. Are these answers your own? Have you consulted with the MSPB or any interested parties? If so, please indicate which entities.
    - Yes. My responses were shared with MSPB staff for purposes of confirming factual accuracy only.

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AFFIDAVIT

I, MARK A. ROBBINS, being duly sworn, hereby state that I have read and signed the foregoing Statement on Pre-hearing Questions and that the information provided therein is, to the best of my knowledge, current, accurate, and complete.

Mark A. Robbins

Subscribed and sworn before me this 22 day of February, 2012.

Notary Public

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Roy W. McLeese III
Nominee to be an Associate Judge of the District of Columbia Court of Appeals
March 6, 2012

Mr. Chairman and members of the Committee, I am grateful for the opportunity to appear before you as you consider my nomination to be an Associate Judge on the District of Columbia Court of Appeals. I thank the Judicial Nomination Commission and the President for the honor of this nomination. I also thank the Committee and its staff for its work in preparing for and holding today's hearing.

A number of my family members and friends either are here today or will be watching from afar. I particularly want to introduce my beloved wife Virginia and son Roy, who are here today, and daughter Miranda, who is watching from Chicago where she is attending college. My mother, sister, and brother, and other members of my extended family, are watching from St. Louis, Missouri. Thanks also to my friends and colleagues who are here today.

Since graduating from law school in 1985, I have spent my entire career in government service, working in or appearing before courts in the District of Columbia. For over twenty years, I have served as a supervisor in the Appellate Division of the United States Attorney's Office. In that capacity, I have practiced primarily in the District of Columbia Court of Appeals. I have the highest respect for that Court and for the significance of the Court's work. It would be a great privilege to continue in public service as a member of the Court.

Thank you again for considering my nomination, and I look forward to answering your questions.

QUESTIONNAIRE FOR NOMINEES TO THE DISTRICT OF COLUMBIA COURTS COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS, UNITED STATES SENATE

I. BIOGRAPHICAL AND PROFESSIONAL INFORMATION

1. Full name (include any former names used).

   Roy Wallace McLeese III

2. Citizenship (if you are a naturalized U.S. citizen, please provide proof of your naturalization).

   I am a citizen of the United States.

3. Current office address and telephone number.

   555 4th St., N.W.
   Washington, D.C. 20530
   (202) 252-6783

4. Date and place of birth.

   December 7, 1959; Evanston, Illinois

5. Marital status (if married, include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

   I am married to Virginia Anne Seitz. She is the Assistant Attorney General for the Office of Legal Counsel at the U.S. Department of Justice, 950 Pennsylvania Ave., N.W., Washington, D.C. 20530.

6. Names and ages of children. List occupation and employer's name if appropriate.

   Miranda Grace Seitz-McLeese (20)
   REDACTED

7. Education. List secondary school(s), college(s), law school(s), and any other institutions of higher education attended; list dates of attendance, degree received, and date each degree was received. Please list dating back from most recent to earliest.

   1982 – 1985, New York University School of Law; J.D., *cum laude*, 1985

   1981 – 1982, University of Utah; no degree received

   1977 – 1981, Harvard University; B.A., *cum laude*, 1981

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1973 – 1977, New Trier East High School (Winnetka, Illinois), 1977

8. Employment record. List all jobs held since college, other than legal experience covered in question 16, including the dates of employment, job title or description of job, and name and address of employer. Please list dating back from most recent to earliest. If you have served in the US military, please list dates of service, rank or rate, serial number, and type of discharge received.

1991
American University, Washington College of Law
4801 Massachusetts Avenue, N.W.
Washington D.C. 20016-8180
Adjunct Professor

September 1984 – May 1985
New York University School of Law
40 Washington Square
New York, New York 10012
Research Assistant

June 1984 – July 1984
Cravath, Swaine & Moore
1 IBM Plaza
New York, New York 10005
Summer Associate

September 1983 – May 1984
New York University School of Law
40 Washington Square
New York, New York 10012
Teaching Assistant

June 1983 – August 1983
Milgrim Thomajan Jacobs & Lee (firm no longer exists)
405 Lexington Ave.
New York, New York 10174
Summer Associate

July 1981 – August 1982
Tramway Properties
2640 Maywood Dr.
Salt Lake City, Utah 84109
Researcher

9. Honors and awards. List any scholarships, fellowships, honorary degrees, academic or professional honors, honorary society memberships, military awards, and any other special recognition for outstanding service or achievement.

Assistant United States Attorneys Association, Harold Sullivan Award for Outstanding Performance as an Assistant United States Attorney (2011)
Attorney General's Award for Distinguished Service (2011)
Attorney General's John Marshall Award for Handling Appeals (2005)
United States Attorney's Office Team Award (2003)
United States Attorney's Office STAR Award (2002)
Department of Justice JustWorks Award (1998)
Assistant United States Attorneys Association, John F. Evans Advocacy Award (1996)
U.S. Department of Justice Annual Special Achievement Awards (several during period from 1990 – 2005)
Numerous commendations and certificates of appreciation from law-enforcement agencies, including the United States Secret Service, the Federal Bureau of Investigation, and the District of Columbia Metropolitan Police Department (1990 – 2005)
New York University School of Law, Order of the Coif (1985)
New York University Law Review Kaufman Award for Outstanding Law Review Note (1985)
James Conant Bryant Award for Outstanding Undergraduate Papers in the Natural Sciences (1978)
National Merit Scholarship (1977)

10. Business relationships. List all positions currently or formerly held as an officer, director, trustee, partner, proprietor, agent, representative, or consultant of any corporation, company, firm, partnership, or other business enterprise, or educational or other institution.

None.

11. Bar associations. List all bar associations, legal or judicial-related committees, conferences, or organizations of which you are or have ever been a member, and provide titles and dates of any offices which you have held in such groups.

District of Columbia Bar
Pennsylvania Bar
Edward Coke Appellate Inn of Court
Master of the Inn (approx. 2005 to present)
Assistant United States Attorneys Association

12. Other memberships. List all memberships and offices currently and formerly held in professional, business, fraternal, scholarly, civic, public, charitable, or other organizations, other than those listed in response to Question 11. Please indicate whether any of these organizations formerly discriminated or currently discriminates on the basis of race, sex, or religion.

Bannockburn Pool, Bethesda, Maryland
Boy Scouts of America
Field School Home & School Association
Lowell School Home & School Association
Lafayette Elementary School Home & School Association

To my knowledge, none of these organizations formerly discriminated or currently discriminates on the basis of race, sex, or religion, except that the Boy Scouts of America is a single-sex organization.

13. Court admissions. List all courts in which you have been admitted to practice, with dates of admission and lapses in admission if any such memberships have lapsed. Please explain the reason for any lapse in membership. Please provide the same information for any administrative bodies which require special admission to practice.

Supreme Court of the United States, 1997
United States Court of Appeals for the District of Columbia Circuit, 1988
District of Columbia Bar, 1988
Pennsylvania Bar, 1987

I took inactive status in the Pennsylvania Bar and subsequently resigned after the Bar imposed a fee on inactive members. There have been no other lapses in membership.

14. Published writings. List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited.

Note, Disagreement in D.C.: The Relationship Between the Supreme Court and the D.C. Circuit and Its Implications for a National Court of Appeals, 59 N.Y.U. L. Rev. 1048 (1984).

15. Speeches. List the titles of any formal speeches you have delivered during the last five (5) years and the date and place where they were delivered. Please provide the Committee with four (4) copies of any of these speeches.

November 2, 2011: Award Acceptance Speech, Assistant United States Attorneys Association, Washington, D.C. (no written text or notes used).

July 12, 2010: Investiture of Hon. David B. Fein as U.S. Attorney for the District of Connecticut, Yale Law School, New Haven, Connecticut (no written text or notes used).

In the past five years, I have guest-taught law school classes on a number of occasions, at Yale, Northwestern, Catholic, Georgetown, George Washington, and American University (no written text or notes retained). Also, in the past five years, I have been a guest-teacher in a Law and Society class at my children's high school, the Field School (no written text or notes retained).

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In the past five years, I have given numerous training lectures or talks to audiences inside and outside of the Department of Justice. I have tried to identify all such presentations, but it is possible that I have delivered other presentations that I have been unable to identify. When giving such presentations, I do not speak from a written text, but do sometimes use notes. To the extent I have been able to locate notes that I prepared for purposes of these presentations, I have included them.

November 1, 2006: Talk on appellate judging, George Washington University Law School Washington, D.C. (no notes retained).

November 7, 2006: U.S. Attorney's Office training on the 4th, 5th and 6th Amendments, Washington, D.C. (no notes retained).

November 27, 2006: Training for D.C. Superior Court judges on recent legal developments, Washington, D.C. (no notes retained).

November 29, 2006: U.S. Attorney's Office *Brady* training, Washington, D.C. (no notes retained).

February 6, 2007: U.S. Attorney's Office *Brady* training, Washington, D.C. (no notes retained).

May 15, 2007: U.S. Attorney's Office *Brady* training, Washington, D.C. (no notes retained).

July 11, 2007: U.S. Attorney's Office *Brady* training, Washington, D.C. (no notes retained).

July 25, 2007: U.S. Attorney's Office *Brady* training, Washington, D.C. (no notes retained).

September 19, 2007: U.S. Attorney's Office *Brady* training, Washington, D.C. (no notes retained).

October 26, 2007: U.S. Attorney's Office training on recent legal developments, Washington, D.C. (no notes retained).

November 5, 2007: U.S. Attorney's Office training on *Brady* and professional responsibility, Washington, D.C. (no notes retained).

November 7, 2007: U.S. Attorney's Office training on sentencing guidelines, Washington, D.C. (no notes retained).

November 27, 2007: U.S. Attorney's Office *Brady* training, Washington, D.C. (no notes retained).

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December 6, 2007: U.S. Attorney's Office training on recent legal developments, Washington, D.C. (no notes retained).

February 28, 2008: U.S. Attorney's Office *Brady* training, Washington, D.C. (no notes retained).

March 5, 2008: U.S. Attorney's Office training on *Brady* and professional responsibility, Washington, D.C. (no notes retained).

March 5, 2008: U.S. Attorney's Office training on federal sentencing guidelines, Washington, D.C. (no notes retained).

March 14, 2008: Training for the D.C. Metropolitan Police Department on the consideration of race in law enforcement, Washington, D.C. (notes provided).

May 8, 2008: U.S. Attorney's Office training on recent legal developments, Washington, D.C. (no notes retained).

May 15, 2008: U.S. Attorney's Office *Brady* training, Washington, D.C. (no notes retained).

June 3, 2008: U.S. Attorney's Office *Brady* training, Washington, D.C. (no notes retained).

July 24, 2008: U.S. Attorney's Office *Brady* training, Washington, D.C. (no notes retained).

July 30, 2008: U.S. Attorney's Office training on presenting oral arguments, Washington, D.C. (no notes retained).

September 22, 2008: U.S. Attorney's Office *Brady* training, Washington, D.C. (no notes retained).

September 25, 2008: Joint defense/prosecution *Brady* training, Washington, D.C. (notes provided).

October 2, 2008: U.S. Attorney's Office training on recent legal developments, Washington, D.C. (notes provided).

October 9, 2008: U.S. Attorney's Office training on recent legal developments, Washington, D.C. (no notes retained).

December 3, 2008: U.S. Attorney's Office training on recent legal developments, Washington, D.C. (notes provided).

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December 4, 2008: Training for D.C. Superior Court judges on recent legal developments, Washington, D.C. (no notes retained).

March 10, 2009: Talk before judges from Colombia on the United States appellate system, Office of Overseas Prosecutorial Development, Assistance, and Training, U.S. Department of Justice, Washington, D.C. (no notes retained).

March 16, 2009: U.S. Attorney's Office training on *Brady* and professional responsibility, Washington, D.C. (no notes retained).

March 18, 2009: U.S. Attorney's Office training on federal sentencing guidelines, Washington, D.C. (no notes retained).

April 2, 2009: U.S. Attorney's Office *Brady* training, Washington, D.C. (notes provided).

April 9, 2009: U.S. Attorney's Office training on recent legal developments, Washington, D.C. (no notes retained).

April 28, 2009: U.S. Attorney's Office *Brady* training, Washington, D.C. (no notes retained).

May 7, 2009: U.S. Attorney's Office training on recent legal developments, Washington, D.C. (notes provided).

June 17, 2009: Training on editing appellate briefs, National Advocacy Center, U.S. Department of Justice, Columbia, South Carolina (notes provided).

July 21, 2009: U.S. Attorney's Office *Brady* training, Washington, D.C. (no notes retained).

September 23, 2009: U.S. Attorney's Office training on recent legal developments, Washington, D.C. (no notes retained).

October 7, 2009: Training on 5th and 6th Amendment law, Professional Responsibility Advisory Office, U.S. Department of Justice, Washington, D.C. (notes provided).

October 15, 2009: Training on appellate brief writing, National Advocacy Center, U.S. Department of Justice, Columbia, South Carolina (no notes retained).

November 10, 2009: *Brady* training, Office of the Attorney General, U.S. Department of Justice, Washington, D.C. (notes provided).

November 17, 2009: U.S. Attorney's Office training on *Brady* and professional responsibility, Washington, D.C. (no notes retained).

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November 20, 2009: U.S. Attorney's Office training on federal sentencing guidelines, Washington, D.C. (no notes retained).

December 3, 2009: U.S. Attorney's Office *Brady* training, Washington, D.C. (no notes retained).

December 7, 2009: U.S. Attorney's Office *Brady* training, Washington, D.C. (no notes retained).

December 16, 2009: U.S. Attorney's Office *Brady* training, Washington, D.C. (notes provided).

January 5, 2010: U.S. Attorney's Office *Brady* training, Washington, D.C. (notes provided).

January 13, 2010: Training on recent legal developments, District of Columbia Bar, Washington, D.C. (notes provided).

March 24, 2010: U.S. Attorney's Office training on presenting oral arguments, Washington, D.C. (no notes retained).

March 25, 2010: U.S. Attorney's Office *Brady* training, Washington, D.C. (no notes retained).

April 6, 2010: U.S. Attorney's Office *Brady* training, Washington, D.C. (no notes retained).

May 6, 2010: U.S. Attorney's Office training on recent legal developments, Washington, D.C. (no notes retained).

May 27, 2010: U.S. Attorney's Office training on recent legal developments, Washington, D.C. (no notes retained).

July 13, 2010: U.S. Attorney's Office *Brady* training, Washington, D.C. (notes provided).

July 21, 2010: U.S. Attorney's Office *Brady* training, Washington, D.C. (no notes retained).

September 16, 2010: Training on Supreme Court developments, U.S. Department of Justice Appellate Chiefs Working Group, Washington, D.C. (notes provided).

October 21, 2010: Training on Supreme Court developments, U.S. Department of Justice Appellate Chiefs, Cincinnati, Ohio. (notes provided).

February 2, 2011: U.S. Attorney's Office training on *Brady* and professional responsibility, Washington, D.C. (no notes retained).

February 18, 2011: Guest lecture on appellate practice, Northwestern University Law School, Chicago, Illinois. (no notes retained).

April 7, 2011: Training on *Brady*, Office for the Attorney General of the District of Columbia, Washington, D.C. (notes provided).

April 28, 2011: Training on recent legal developments, Federal Bureau of Investigation, Washington, D.C. (no notes retained).

May 8, 2011: Talk to law clerks on appellate practice, D.C. Court of Appeals, Washington, D.C. (no notes retained).

May 10, 2011: Training on appellate oral advocacy, National Association of Attorneys General, Washington, D.C. (no notes retained).

May 19, 2011: U.S. Attorney's Office training on recent legal developments, Washington, D.C. (no notes retained).

May 25, 2011: U.S. Attorney's Office training on *Brady*, professional development, and the federal sentencing guidelines, Washington, D.C. (notes provided).

June 22, 2011: Training for D.C. Superior Court judges on recent legal developments, Washington, D.C. (notes provided).

June 29, 2011: Training on editing appellate briefs and organization of appellate units, National Advocacy Center, U.S. Department of Justice, Columbia, South Carolina (notes provided).

August 4, 2011: U.S. Attorney's Office training on appellate brief writing, Washington, D.C. (no notes retained).

August 25, 2011: U.S. Attorney's Office training on *Brady*, professional development, and the federal sentencing guidelines, Washington, D.C. (notes provided; some of the handouts were not prepared by me).

16. Legal career.

A. Describe chronologically your law practice and experience after graduation from law school, including:

(1) Whether you served as a law clerk to a judge, and if so, the name of the judge, the court, and the dates of your clerkship;

I was a law clerk to then-Judge Antonin Scalia on the U.S. Court of Appeals for the D.C. Circuit from July 1985 through September 1986. I was a law

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clerk to Justice Scalia on the Supreme Court of the United States from September 1986 through August 1987.

(2) Whether you practiced alone, and if so, the addresses and dates;

I have never practiced law alone.

(3) The dates, names, and address of law firms, companies, or governmental agencies with which you have been employed.

December 1987 – present
U.S. Attorney's Office
555 4th St., N.W.
Washington, D.C. 20530

June 1997 – June 1999; August 2010 – December 2010 (on detail)
Office of the Solicitor General
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

B. Describe the general character of your law practice, dividing it into periods with dates if its character has changed over the years.

After law school, I spent two years as a judicial law clerk, first at the United States Court of Appeals for the District of Columbia Circuit and then at the Supreme Court of the United States. As a law clerk, I worked on both civil and criminal cases. In 1987, I joined the Office of the U.S. Attorney for the District of Columbia. For the first couple of years, I rotated through various parts of that Office, serving in the Appellate Division, the Misdemeanor Trial Section, the Grand Jury Section, the Felony Trial Section, and the Narcotics Section. During my stint as a line attorney in the Appellate Division, I briefed and argued approximately a dozen criminal appeals in the District of Columbia Court of Appeals and the United States Court of Appeals for the District of Columbia Circuit. In the other sections of the U.S. Attorney's Office, I served as a trial prosecutor investigating and trying criminal cases, primarily in the Superior Court of the District of Columbia. In that capacity, I personally handled 25 jury trials and a comparable number of non-jury trials, and conducted over 100 grand-jury investigations.

In 1990, I was promoted to the position of Deputy Chief of the Appellate Division, a position I held from then until 2005. The Appellate Division handles criminal appellate litigation in the District of Columbia Court of Appeals and the United States Court of Appeals for the District of Columbia Circuit. My responsibilities as a Deputy Chief included personally briefing and arguing appellate cases of particular importance or difficulty; advising appellate line attorneys and editing

their draft briefs; preparing line attorneys for oral argument, sitting with them at counsel table, and providing them with feedback about their performance; training Appellate Division attorneys, attorneys from other sections of the Office, and attorneys from other federal and local agencies, and law-enforcement officers from numerous federal and local agencies on numerous topics; helping to manage a Division with 30-40 attorneys and 10 support-staff employees; and providing advice to trial attorneys in the U.S. Attorney's Office and other components of the Department of Justice concerning a wide array of legal and other issues arising in their investigations and cases, including fielding numerous emergency phone calls from attorneys seeking assistance from court during trial.

For two years, from 1997 to 1999, I went on a detail to the Office of the Solicitor General. During those two years, I represented the United States in the Supreme Court, handling both criminal and civil matters. More specifically, my responsibilities included briefing and arguing cases on the merits in the Supreme Court; preparing petitions for writs of certiorari and oppositions to petitions for writs of certiorari; making recommendations to the Solicitor General as to whether the United States should appeal, seek rehearing en banc, participate as an amicus, or seek certiorari; and consulting on other legal issues and policy matters of particular importance.

In October 2005, I became Chief of the Appellate Division. Many of my responsibilities in that capacity are the same as those I had as Deputy Chief. My additional responsibilities as Chief of the Division include managing a Division of approximately 40 attorneys and 10 support-staff employees; providing legal and policy advice to the U.S. Attorney and other components of the Office; as a Professional Responsibility Officer for the U.S. Attorney's Office, advising attorneys about professional-responsibility issues under the applicable bar rules; and serving as a member of the Department of Justice's Appellate Chiefs Working Group, which works to improve standards of appellate litigation in the Department of Justice and provides advice to other components of the Department of Justice.

From August through December 2010, I was detailed to the Office of the Solicitor General in the United States Department of Justice, to serve as Acting Deputy Solicitor General. In that capacity, I supervised the criminal litigation of the United States in the Supreme Court. More specifically, my duties included arguing cases of particular importance in the Supreme Court; editing briefs on the merits, petitions for writs of certiorari, and oppositions to petitions for writ of certiorari filed in the Supreme Court; making recommendations to the Solicitor General about whether the United States should appeal, seek rehearing, or seek certiorari in cases in which courts had ruled adversely to the United States; and providing assistance and advice on issues and cases of particular significance to the Solicitor General and other components of the Justice Department.

C. Describe your typical former clients and describe the areas of practice, if any, in which you have specialized.

As a lawyer in the Department of Justice, I have represented the United States and its agencies. For most of my career, I have specialized in criminal appellate law. As a trial prosecutor, my focus was on trial litigation and investigation in criminal matters. As a judicial law clerk and as an Assistant to the Solicitor General, my practice was more general, and I handled both civil and criminal matters.

D. Describe the general nature of your litigation experience, including:

(1) Whether you have appeared in court frequently, occasionally, or not at all. If the frequency of your court appearances has varied over time, please describe in detail each such variance and give applicable dates.

In the first few years of my tenure as an Assistant United States Attorney (1987 – 1990), I appeared in court very frequently. In connection with my rotation through the Appellate Division as a line attorney, I handled approximately a dozen appellate arguments. When I was in trial rotations, I appeared in court virtually every day to handle hearings or trials. During the period I served as a Deputy Chief in the Appellate Division (1990 – 1997, 1999 – 2005), I personally briefed and argued approximately forty appeals. I also sat at counsel table as a supervisor for hundreds of other appellate arguments. While I was an Assistant to the Solicitor General (1997 – 1999), I argued four cases in the U.S. Supreme Court, and I sat at counsel table in three other cases that I had briefed. As Chief of the Appellate Division (2005 – present), I have personally briefed and argued approximately twenty matters. As Acting Deputy Solicitor General (August 2010 – December 2010), I argued two cases in the U.S. Supreme Court, and sat at counsel table for oral argument as a supervisor in one other case.

(2) What percentage of these appearances was in:

(a) Federal courts (including Federal courts in D.C.);
(b) State courts of record (excluding D.C. courts);
(c) D.C. courts (Superior Court and D.C. Court of Appeals only);
(d) other courts and administrative bodies.

Approximately 25% of these appearances have been in Federal courts (including Federal courts in the District of Columbia), and 75% have been in D.C. courts.

(3) What percentage of your litigation has been:
(a) civil;
(b) criminal.

As an Assistant U.S. Attorney, all of my litigation has been criminal. As a

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line attorney in the Solicitor General's Office, approximately 67% of my litigation was criminal and 33% was civil. As Acting Deputy Solicitor General, my litigation was entirely criminal.

(3) What is the total number of cases in courts of record you tried to verdict or judgment (rather than settled or resolved, but may include cases decided on motion if they are tabulated separately). Indicate whether you were sole counsel, lead counsel, or associate counsel in these cases.

During the period I served as a trial prosecutor, I tried approximately 50 cases to verdict in the D.C. Superior Court. With the exception of one trial in which I had a second chair, I handled all trials as sole counsel.

(4) What percentage of these trials was to

(a) a jury;
(b) the court (include cases decided on motion but tabulate them separately).

Approximately 50% of these trials were jury trials, and 50% were bench trials.

17. Describe the five (5) most significant litigated matters which you personally handled. Provide citations, if the cases were reported, or the docket number and date if unreported. Give a capsule summary of the substance of each case and a succinct statement of what you believe was of particular significance about the case. Identify the party/parties you represented and describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case, (a) the date of representation; (b) the court and the name of the judge or judges before whom the case was litigated; and (c) the name(s) and address(es) and, telephone number(s) of co-counsel and of the principal counsel for the other parties.

1) Pepper v. United States, 131 S. Ct. 1229 (2011). This case presented two issues: (1) whether a federal judge who is resentencing a defendant can vary from the federal sentencing guidelines based on the defendant's post-sentencing efforts to rehabilitate himself; and (2) whether the law-of-the-case doctrine applies at a de novo resentencing. I edited the briefs for the United States, and argued the case before the Supreme Court on December 6, 2010. On the first issue, the United States agreed with the criminal defendant, arguing that a judge at a resentencing may lawfully vary downward from the federal sentencing guidelines and impose a more lenient sentence in order to reflect a defendant's successful efforts to rehabilitate himself. Although a federal statute appeared to foreclose such variances, the United States argued that that federal statute was invalid in light of the Supreme Court's decision in United States v. Booker, 534 U.S. 220 (2005). On the second issue, the United States argued that the law-of-the-case doctrine does not apply at a de novo resentencing. The Supreme Court agreed with the United States on both issues, and remanded the case for resentencing. The case was important because the Court resolved a

conflict among the federal circuits on a recurring issue of federal sentencing law, and because the Court accepted the argument of the United States that a provision of federal law was invalid. The petitioner was represented by Alfredo Parrish, Esq., Parrish Kruidenier Dunn Boles Gribble Parrish Gentry & Fisher LLP, 2910 Grand Ave., Des Moines, Iowa, 52240, (515) 284-5737, and Leo Spies, Esq., Mellon and Spies, 312 E. College St., Suite 16, Iowa City, Iowa, 52240, (319) 337-4193. A number of amici also participated in the case.

2) Abbott v. United States, 131 S. Ct. 18 (2010). The issue in this case was whether all defendants who commit drug-trafficking offenses involving deadly weapons must receive a mandatory minimum sentence under 18 U.S.C. § 924(c), or whether instead no such sentence need be imposed on defendants who violate Section 924(c) but are subject to a mandatory minimum sentence for some other offense. That issue had divided the federal courts of appeals, and the Supreme Court granted review to resolve the conflict. The briefs of the United States were prepared before I began my detail to the Office of the Solicitor General. I argued the case before the Supreme Court, on October 4, 2010. The Supreme Court unanimously agreed with the position of the United States that Section 924(c)'s mandatory minimum sentence was applicable to all defendants who violate that provision. The case resolved a conflict among the circuits on an important question with respect to one of the most commonly prosecuted federal offenses. The names and addresses of counsel for the other parties in the case are: counsel for petitioner Abbott – Mark T. Stancil, Esq., Robbins, Russell, Englert, Orseck, Untereiner & Sauber, LLP, 1801 K Street, N.W., Suite 411, Washington, D.C., 20006, (202) 775-4520; Elizabeth K. Ainslie, Joseph J. Anclien, Esqs., Schnader, Harrison, Segal & Lewis LLP, 1600 Market Street, Suite 3600, Philadelphia, PA, 19103, (215) 751-2359; James E. Ryan, Daniel R. Ortiz, George A. Rutherglen, Esqs., University of Virginia School of Law Supreme Court Litigation Clinic, 580 Massie Road, Charlottesville, VA, 22903, (434) 924-3572; David T. Goldberg, Esq., Donahue & Goldberg, LLP, 99 Hudson Street, 8th Floor, New York, NY, 10013, (212) 334-8813; John P. Elwood, Vinson & Elkins, LLP, 1455 Pennsylvania Ave., N.W., Suite 600, Washington, D.C., 20004, (202) 631-6518; and counsel for petitioner Gould – David L. Horan, David J. Schenck, Paul F. Theiss, Esqs., Jones Day, 2727 N. Harwood Street, Dallas, TX, 75201, (214) 969-4548; Gregory A. Castanias, Esq., Jones Day, 51 Louisiana Ave., N.W., Washington, D.C., 20001, (202) 879-3639. A number of amici also participated in the case.

3) In re Crawley, 978 A.2d 608 (D.C. 2009) (Oberly, J., joined by Glickman and Kramer, JJ.). The issue in this case was whether the District of Columbia Council had lawfully assigned to the Office of the Attorney General for the District of Columbia the authority to prosecute violations of the false-claims statute, D.C. Code § 2-308.21. After the District of Columbia charged the defendant under that statute, the defendant argued that such charges could only be brought by the United States Attorney's Office. The trial court certified that issue to the District of Columbia Court of Appeals, at which point the United States became involved in the matter. I wrote the brief of the United States and represented the United States at oral argument on June 2, 2009, arguing that Congress had required under the Home Rule Act that prosecutorial authority over false-claims charges remain vested in the United States Attorney's Office. The Court of Appeals agreed, and remanded the case

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for further proceedings. The Office of the Attorney General for the District of Columbia sought rehearing or rehearing en banc, which the Court of Appeals denied. I wrote the United States's opposition to the rehearing petition. The case resolved an important question about the proper allocation of prosecutorial authority in the District of Columbia. The names and addresses of counsel for the other parties in the case are: counsel for defendant Crawley – Frederick D. Cooke, Jr., Esq., Rubin, Winston, Diercks, Harris & Cooke, LLP, 1155 Connecticut Ave., N.W., Suite 600, Washington, D.C., 20036, (202) 861-0870; and counsel for the District of Columbia – Peter J. Nickles, Attorney General, Todd S. Kim, Solicitor General, Rosalyn Calbert Groce, Deputy Solicitor General, and Sidney R. Bixler, Assistant Attorney General, Office of the Attorney General, 441 4th St., N.W., Suite 600S, Washington, D.C., 20001, (202) 724-6609.

4) Neder v. United States, 527 U.S. 1 (1999). In this case, the Supreme Court decided two different issues: whether it can be harmless error if the jury instructions omit an element of a charged offense, and whether materiality is an element of federal mail, bank, and wire fraud. With the assistance of an attorney from the Criminal Appellate Section, I wrote the response of the United States to the petition for a writ of certiorari, acquiescing in the petition, and the brief of the United States on the merits. I also argued the case before the Supreme Court, on February 23, 1999. The Supreme Court held that the omission of an element from the jury instructions case can be harmless, where proof of the omitted element was overwhelming and uncontested. The Court also held that materiality is an element of the offenses at issue. The Supreme Court therefore affirmed in part and reversed in part. Both holdings of the case are of particular importance. The question whether and in what circumstances the omission of an element can be harmless arises with great frequency, and the Supreme Court's analysis of the issue in Neder also has broad implications for many other issues of harmless error. Further, mail fraud, bank fraud, and wire fraud are frequently prosecuted offenses, and the Court's holding as to the elements of those offenses was of substantial significance. The Court's opinion in Neder has been cited over 13,000 times. The petitioner was represented by Javier Rubinstein, Esq., who is now at PricewaterhouseCooper International Ltd., 1 N. Wacker Dr., Chicago, IL, 60606, (312) 298-4096.

5) United States v. Crowder, 141 F.3d 1202 (D.C. Cir. 1998) (en banc). In this case (and one consolidated with it), the D.C. Circuit granted rehearing en banc sua sponte to address the question whether other-crimes evidence is rendered irrelevant or otherwise inadmissible by a defendant's offer to stipulate that whoever committed the offense acted with the requisite intent. I wrote the brief of the United States for the en banc Court, and argued the case before the en banc Court on September 21, 1995. The Circuit initially held that the evidence at issue should not have been admitted, and reversed appellants' convictions. 87 F.2d 1405 (1996). The United States sought Supreme Court review, and the Supreme Court granted certiorari, vacated the D.C. Circuit's decision, and remanded for further proceedings. 519 U.S. 1087 (1997). On remand, I prepared the supplemental brief for the United States and re-argued the case before the en banc Court, on January 28, 1998. The D.C. Circuit ultimately held that the defendants' conditional offers to stipulate did not render the other-crimes evidence at issue irrelevant, and that the district court had not abused its discretion in admitting that evidence. The D.C. Circuit therefore affirmed

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the defendants' convictions. The case is of particular importance not only because it resolved a recurring and unsettled question of evidence law, but also because it laid out a general framework governing the admission of other-crimes evidence. The defendants were represented by Neil Jaffee, Esq., Assistant Public Defender, 625 Indiana Ave., N.W., Suite 550, Washington, D.C., 20004, (202) 208-7500; and Robert Morin, Esq., who is now an Associate Judge on the Superior Court of the District of Columbia, Moultrie Courthouse, 500 Indiana Ave., N.W., Washington, D.C., 20001, (202) 879-1550.

18. Describe the most significant legal activities you have pursued, including significant litigation which did not proceed to trial or legal matters that did not involve litigation. Describe the nature of your participation in each instance described, but you may omit any information protected by the attorney-client privilege (unless the privilege has been waived).

The most significant legal activities I have pursued, other than litigation I personally handled, are detailed in the answer to Question 16.B, and include management of the Appellate Division of the United States Attorney's Office, supervision of appellate litigation in the United States Attorney's Office, provision of advice and assistance to trial prosecutors and other Department of Justice attorneys, and provision of training to attorneys and law-enforcement officers.

19. Have you ever held judicial office? If so, please give the details of such service, including the court(s) on which you served, whether you were elected or appointed, the dates of your service, and a description of the jurisdiction of the court. Please provide four (4) copies of all opinions you wrote during such service as a judge.

I have never held judicial office.

A. List all court decisions you have made which were reversed or otherwise criticized on appeal.

20. Have you ever been a candidate for elective, judicial, or any other public office? If so, please give the details, including the date(s) of the election, the office(s) sought, and the results of the election(s).

I have never been a candidate for elective, judicial, or other public office.

21. Political activities and affiliations.

- List all public offices, either elected or appointed, which you have held or sought as a candidate or applicant.

None.

- List all memberships and offices held in and services rendered to any political party or election committee during the last ten (10) years.

None.

- Itemize all political contributions to any individual, campaign organization, political party, political action committee, or similar entity during the last five (5) years of $50 or more.

None.

22. To your knowledge, have you ever been investigated, arrested, charged, or convicted (include pleas of guilty or nolo contendere) by federal, State, local, or other law enforcement authorities for violations of any federal, State, county, or municipal law, other than for a minor traffic offense? If so, please provide details.

No.

23. Have you or any business of which you are or were a officer, director or owner ever been a party or otherwise involved as a party in any other legal or administrative proceedings? If so, give the particulars. Do not list any proceedings in which you were merely a guardian ad litem or stakeholder. Include all proceedings in which you were a party in interest, a material witness, were named as a co-conspirator or co-respondent, and list any grand jury investigation in which you appeared as a witness.

It is my understanding that some years ago I was named, along with numerous other government officials including the President of the United States and the members of the Supreme Court, in a suit by a convicted defendant seeking monetary damages of some kind. I do not recall having seen the complaint, and was not required to take any action in the case. I was later advised by an Assistant United States Attorney in our Civil Division that a judge had dismissed the suit as frivolous without requiring an answer from the United States or the named defendants.

Although this is not entirely clear, I believe that the aforementioned suit may be the same as one of two cases located during a recent search of electronic court records. In those cases, I and others were sued by defendants who had been convicted of criminal offenses by the United States Attorney's Office for the District of Columbia. The first suit was Walter Morton v. U.S. Attorney's Office, et al., No. 1:06-cv-1089. The district court dismissed that suit with prejudice on June 14, 2006, without calling for any response by the defendants. The plaintiff appealed, and the order of dismissal was affirmed by the United States Court of Appeals for the District of Columbia Circuit on November 14, 2006, in an unpublished judgment (No. 06-5212). The second suit was Parviz Karim-Panahi v. John Warner, Senator, et al., No. 1:06-cv-987. The district court dismissed that suit as frivolous on July 19, 2006. The plaintiff appealed, and the order of dismissal was affirmed by the United States Court of Appeals for the District of Columbia on April 16, 2008, in an unpublished judgment (No. 06-5195).

I also have been called as a witness on a number of occasions by the Office of the Attorney General for the District of Columbia, in administrative proceedings involving police

officers. My testimony in those proceedings has focused on the implications of various kinds of adverse administrative determinations on the ability of police officers to serve as effective witnesses in criminal trials.

In April 2011, I was named as a defendant in a suit alleging that numerous defendants infringed the plaintiff's copyright by downloading the movie "The Hurt Locker." Voltage Pictures, LLC v. Does, 1:10-cv-873-BAH (D.D.C.). I did not download "The Hurt Locker," nor have I ever illegally downloaded any copyrighted material. The allegations at issue related to the conduct of a minor child acting without my knowledge. The case was dismissed pursuant to settlement in September 2011.

In July 2011, I was called as a witness in a bar-discipline proceeding (Bar Counsel No. 2009-D522) involving an Assistant U.S. Attorney. I was called as a witness by the Assistant U.S. Attorney, to testify about training generally provided to Assistant U.S. Attorneys, and about positions the United States had taken in litigation.

24. Have you ever been disciplined or cited for a breach of ethics for unprofessional conduct by, or been the subject of a complaint to any court, administrative agency, bar or professional association, disciplinary committee, or other professional group? If so, please provide the details.

No.

II. POTENTIAL CONFLICTS OF INTEREST

1. Will you sever all connections with your present employer(s), business firm(s), business association(s), or business organization(s) if you are confirmed?

   Yes.

2. Describe all financial arrangements, deferred compensation agreements, or other continuing dealings with your law firm, business associates, or clients.

   None.

3. Indicate any investments, obligations, liabilities, or other relationships which could involve potential conflicts of interest.

   My family's financial assets are listed in response to question III.1. I am not aware of any other investments, obligations, liabilities, or other relationships that could involve potential conflicts of interest.

4. Describe any business relationship, dealing, or financial transaction which you have had in the last ten (10) years, whether for yourself, on behalf of a client, or acting as an agent, that could in any way constitute or result in a possible conflict of interest other than while in a federal government capacity.

   None.

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

   None.

6. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service as a judge? If so, explain.

   No.

7. Explain how you will resolve any potential conflicts of interest, including any that may have been disclosed by your responses to the above items. Please provide three (3) copies of any trust or other relevant agreements.

   If a potential conflict of interest arose, I would consult as necessary with judicial-ethics officials, and as appropriate would either divest myself of any financial interest or recuse myself from the matter at issue. I would fully comply with all applicable codes of judicial conduct.

8. If confirmed, do you expect to serve out your full term?

   Yes.

III. FINANCIAL DATA - REDACTED

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

IV. DISTRICT OF COLUMBIA REQUIREMENTS

Supplemental questions concerning specific statutory qualifications for service as a judge in the courts of the District of Columbia pursuant to the District of Columbia Court Reform and Criminal Procedure Act of 1970, D.C. Code Section I I - 150 1 (b), as amended.

1. Are you a citizen of the United States?

   Yes.

2. Are you a member of the bar of the District of Columbia?

   Yes.

3. Have you been a member of the bar of the District of Columbia for at least five (5) years? Please provide the date you were admitted to practice in the District of Columbia.

   Yes. I was admitted to practice in the District of Columbia on December 9, 1988.

4. If the answer to Question 3 is "no" --

   A. Are you a professor of law in a law school in the District of Columbia?

   B. Are you a lawyer employed in the District of Columbia by the United States or the District of Columbia?

   C. Have you been eligible for membership in the bar of the District of Columbia for at least five (5) years?

   D. Upon what grounds is that eligibility based?

5. Are you a bona fide resident of the District of Columbia?

   Yes.

6. Have you maintained an actual place of abode in the greater Washington, D.C. area for at least five (5) years? Please list the addresses of your actual places of abode (including temporary residences) with dates of occupancy for the last five (5) years.

   Yes. I have lived at REDACTED Washington, D.C. since 1993.

7. Are you a member of the District of Columbia Commission on Judicial Disabilities and Tenure or the District of Columbia Judicial Nominating Commission?

   No.

8. Have you been a member of either of these Commissions within the last 12 months?

No.

9. Please provide the committee with four (4) copies of your District of Columbia Judicial Nomination commission questionnaire.

Copies are supplied.

AFFIDAVIT

Roy W. McLeese III being duly sworn, hereby states that he/she has read and signed the foregoing Statement on Biographical and Financial Information and that the information provided therein is, to the best of his/her knowledge, current, accurate, and complete.

Roy W. McLeese III

SUBSCRIBED and SWORN TO before me this 15 day of November 2011.

Marc Thompson
Notary Public
D.C.
My commission expires 5/31/13

STATEMENT OF PAUL STRAUSS
U.S. SHADOW SENATOR FOR THE DISTRICT OF COLUMBIA
On the Nomination of
Roy Wallace McLeese III
to be an Associate Judge on the District of Columbia Court of Appeals

Chairman Akaka and distinguished Members of the Senate Committee on Homeland Security and Governmental Affairs, I am Paul Strauss, United States Senator for the District of Columbia. I am also a practicing attorney in the District of Columbia. In each of these capacities, I appreciate the opportunity to provide this statement on behalf of my constituents in the District of Columbia. I wish to express my strong support of President Barack Obama's nomination of Roy W. McLeese III to the District of Columbia Court of Appeals. After taking the time to review the nominee's professional history as well as spending the time to get to know him personally, I am confident that our President has chosen a well qualified person to take on the responsibilities of this position. It is my expectation that he will make an excellent addition to our highest "State" Court, the District of Columbia Court of Appeals.

Roy Wallace McLeese III, is currently the Chief of the Appellate Division in the United States Attorney's Office for the District of Columbia. In this position he supervises criminal appellate litigation in the District of Columbia Court of Appeals and the United States Court of Appeals for the District of Columbia Circuit. Although this is a Federal position, these responsibilities are frequently local in nature, as the District of Columbia lacks the ability to control most local prosecutorial functions granted to the sovereign States.

Before he was appointed Chief of the Appellate Division, Mr. McLeese served as the Deputy Chief for fifteen years from 1990 to 2005. For a brief period in 2010, McLeese also served as Acting Deputy Solicitor General, supervising criminal litigation of the United States in the Supreme Court and arguing cases in the Supreme Court on behalf of the United States.

Mr. McLeese began this notable career when he graduated cum laude from Harvard University with a degree in Philosophy. He went on to earn his law degree from New York University School of Law, where he was Editor-in-Chief of the New York University Law Review. Following law school, Mr. McLeese served as a law clerk for then-Judge Antonin Scalia of the United States Court of Appeals for the District of Columbia Circuit, and then for Associate Justice Antonin Scalia on the Supreme Court of the United States.

Roy McLeese's accomplished career in public service has not gone unnoticed. He is the recipient of several awards, including the Attorney General's Award for Distinguished Service in 2011 and the John Marshall Award for Handling Appeals in 2005 as well as numerous other Special Achievement Awards.

In addition to this respectable professional history, I believe that Mr. McLeese possesses the necessary character and temperament appropriate for an appellate Judge. Upon meeting Mr. McLeese, one is struck by his thoughtful and contemplative nature. My personal impression of Roy McLeese is that he is a caring family man who is driven by strong sense of duty. Behind his soft-spoken demeanor is a strong will and passion for justice. I am confident that Mr. Roy McLeese is ready to confront the challenges that lay ahead of him. I urge this Committee to act promptly on this nomination.

Finally, I am forced to note that these nomination hearings are always a source of mixed emotions for me and the American citizens I was elected to represent. Without a doubt, my constituent, the soon to be Honorable Roy W. McLeese III, is an individual most deserving of all the pomp and prestige that accompanies a Presidential nomination and Confirmation of the United States Senate. However, I can not help but look forward to the day when he and his fellow citizens of the District of Columbia will enjoy the even greater dignity of full citizenship and the ability to select and confirm our own Judges for the local District of Columbia courts. Until that day, which may only come with full Statehood for the District of Columbia, neither I, nor any other District of Columbia resident, can cast a vote in the Senate, on his or anyone's behalf. I must ask therefore look to you, Senator, to cast your vote on my behalf to confirm Roy W. McLeese, III as an Associate Judge on our DC Court of Appeals.

In closing I want to thank Ms. Emma Boorboor of my staff for her assistance in facilitating my meeting with the nominee, and for assisting in the background research necessary for the preparation of this statement. Thank you again, Senator Akaka, for the opportunity to present this statement for the record.

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