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NOMINATIONS OF COLLEEN D. KIKO, MARY M. ROSE, HON. JULIET J. McKENNA, AND JOHN R. FISHER

HEARING

BEFORE THE

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

ON THE

NOMINATIONS OF COLLEEN D. KIKO TO BE GENERAL COUNSEL, FEDERAL LABOR RELATIONS AUTHORITY; MARY M. ROSE TO BE MEMBER, MERIT SYSTEMS PROTECTION BOARD; HON. JULIET J. McKENNA TO BE ASSOCIATE JUDGE, DISTRICT OF COLUMBIA SUPERIOR COURT; AND JOHN R. FISHER TO BE ASSOCIATE JUDGE, DISTRICT OF COLUMBIA COURT OF APPEALS

SEPTEMBER 13, 2005

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NOMINATIONS OF COLLEEN D. KIKO, MARY M. ROSE, JULIET J. McKENNA, AND JOHN R. FISHER

TUESDAY, SEPTEMBER 13, 2005

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

The Committee met, pursuant to notice, at 10:05 a.m., in room 342, Dirksen Senate Office Building, Hon. George Voinovich presiding.

Present: Senators Voinovich, Akaka, Carper, and Lautenberg.

OPENING STATEMENT OF SENATOR VOINOVICH

Senator VOINOVICH. Good morning. Today, the Committee on Homeland Security and Governmental Affairs meets to consider four nominations: Colleen Kiko to be General Counsel of the Federal Labor Relations Authority (FLRA); Mary Rose to be a member of the Merit Systems Protection Board (MSPB); Judge Juliet JoAnn McKenna to be an Associate Judge for the Superior Court of the District of Columbia; and John Fisher to be an Associate Judge of the District of Columbia Court of Appeals.

I commend all of these nominees for answering the President's call to serve our Nation, and I trust that you will fulfill your responsibilities with honor, courage, and character befitting the office to which you have been nominated.

We will begin by considering the nominations of Ms. Kiko and Ms. Rose. You have been nominated during a period of extraordinary change in the Federal workforce. Over the past few years, Congress has enacted numerous pieces of legislation that altogether constitute the most significant reforms of the Federal civil service since the enactment of the Civil Service Reform Act of 1978.

Senator Akaka, who I am pleased has joined us here today, has been a steadfast partner in working to raise awareness of the importance of strategic human capital management and finding the solutions to the government's personnel challenges. As Federal departments and agencies continue to understand and take steps to implement these reforms, whether the groundbreaking efforts of developing a new personnel system at the Department of Homeland Security or the more targeted reforms of implementing direct hire, the FLRA and the MSPB will continue to play vital roles in ensuring the success and integrity of the Federal civil service.

I welcome this morning to the Committee Congressman James Sensenbrenner, Chairman of the House Committee on the Judiciary. We are very honored to have you here with us, Congressman Sensenbrenner, and I understand that you are going to introduce Ms. Kiko to us this morning, if you would proceed.

Senator LAUTENBERG. Mr. Chairman, are we going to have opening statements?

Senator VOINOVICH. Well, I think we ought to let the Congressman introduce Ms. Kiko.

Senator LAUTENBERG. It raises the question for me. All of us have our individual rights and opportunities, and there is work that goes into laying out what we think are the parameters for the discussion. However, I will back down for Congressman Sensenbrenner, but I would hope that after his statement and respect for his time that we can hear from each of us, please.

STATEMENT OF HON. F. JAMES SENSENBRENNER, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WISCONSIN

Mr. SENSENBRENNER. Thank you, Mr. Chairman. I appreciate the opportunity to come before this Committee and endorse the qualifications of my good friend, Colleen Duffy Kiko, for the position of General Counsel for the Federal Labor Relations Authority. She is eminently qualified for this position and let me tell you why.

I have known Colleen for 24 years, since 1981. She graduated from George Mason University School of Law in 1986 and was hired right out of law school by the Department of Justice in the Honors Program, Office of Legal Policy, and later the Civil Rights Division. While there, she spent her time investigating and prosecuting housing and credit discrimination complaints and was detailed to the Eastern District of Virginia to serve as a Special Assistant to the U.S. Attorney prosecuting criminal cases.

At that time, I was the ranking minority member on the Civil and Constitutional Rights Subcommittee of the House Judiciary Committee, and a vacancy occurred on my subcommittee for associate counsel. I knew that there were three upcoming Federal judicial impeachments coming before the committee for which I would need someone on my staff with prosecutorial skills. Colleen fit the bill with her background.

I hired Colleen, who served as my counsel for the several impeachments, and primarily the successful impeachment of Judge Walter Nixon, for which I served as one of the House managers during the Senate trial. During that time, she also served as the principal negotiator for the Judiciary Republicans on the Americans with Disabilities Act, which as we know just celebrated its 15th anniversary.

Colleen left my employ in 1989 due to her ever-expanding family commitments, or at least that is what she used as an excuse to get away from me.

In 1996, she hung out her shingle and opened up her own law practice, focusing primarily on criminal defense and domestic relations. Colleen has excellent legal skills, exercises independent judgment, and is steadfast in purpose. She is good with people and is

a good negotiator. She has shown excellent capabilities of juggling both a serious legal career and her important family commitments.

I would highly recommend her to serve in the position for which she has been nominated. First, she was doing the work of the FLRA for 2 years even before the agency even existed and worked at the FLRA from its inception for 5 more years. She knows the agency and its mission. FLRA whetted her appetite for a law degree, and she returns with not only a law degree, but with much legal and prosecutorial experience from which to draw to be the chief prosecutor for all unfair labor practices in the Federal labor relations area. This is a role especially suited to her background and experience.

In short, I am really happy to be able to present to you a public servant with a distinguished background who really deserves early confirmation by this Committee, and I appreciate your courtesy.

Senator VOINOVICH. Thank you, Congressman. We really appreciate your being here and appreciate your introduction of Ms. Kiko. It means a great deal to me because of the high respect that I have for you.

I know you are a very busy person as chairman of the Judiciary Committee, and I suspect you have other things to do. Thanks very much.

Mr. SENSENBRENNER. We are preparing a few more bills to send over here. [Laughter.]

Senator VOINOVICH. Thanks.

The Federal Labor Relations Authority provides leadership within the Federal Government in developing and maintaining positive labor relations. If confirmed, Ms. Kiko's responsibilities as General Counsel will include processing unfair labor practice allegations, encouraging the use of alternative dispute resolution techniques, and promoting stable and productive labor-management relations in the Federal sector.

As a former mayor and governor, I understand the importance of establishing a positive labor-management relationship based on open communication and trust. I encourage Ms. Kiko to be active in improving labor-management relations in the Federal sector during times of such dramatic reform.

Mary Rose currently serves as the Chair of the Federal Prevailing Rate Advisory Committee of the Office of Personnel Management. Prior to this position, she served as the Deputy Associate Director for Presidential Personnel and was the Director of Personnel for President Reagan. Additionally, Ms. Rose was elected as the Clerk for Anne Arundel County Circuit. Prior to her elected office, Ms. Rose was the Deputy Under Secretary for Management of the Department of Education. Furthermore, Ms. Rose's professional career included working at the Office of Personnel Management, where her responsibilities included acting as the agency liaison to the White House on personnel policy.

Her nomination is to the Merit Systems Protection Board, an independent agency that protects Federal employees from abuses by agency management, including prohibited personnel practices. It is an impartial arbiter and is essential to ensuring that agencies make employment decisions in accordance with the merit systems principles.

I can say to you, Ms. Rose, that the Ranking Member of the Subcommittee, Senator Akaka, is someone who pays a lot of attention to that particular Board.

With the changes underway at the Department of Homeland Security and the Department of Defense, the role of the MSPB continues to evolve. Ms. Rose, if confirmed, you would join the Board at a time when it faces new and complex challenges, and everyone will be watching how cases that come before the Board are disposed of. There is much uncertainty today with the new personnel systems that Congress authorized, and it is going to require the attention of the Board.

Ms. Kiko and Ms. Rose, we look forward to your testimony so that we may learn how you plan to apply your experiences to your new positions and what steps you have taken to prepare for them.

I will now yield to Senator Akaka for his opening statement and the other Members of this Committee who are interested in making opening statements. Senator Akaka.

OPENING STATEMENT OF SENATOR AKAKA

Senator AKAKA. Thank you very much, Mr. Chairman. I again want to say I enjoy working with you on this Committee. I also want to join you in welcoming our nominees and their families and friends who are here today. Of course, it was good to see Chairman Jim Sensenbrenner. We served together when I was in the House.

President Bush has nominated John Fisher to be an Associate Judge on the D.C. Court of Appeals, and it is good to see you here, John, and your family, and Juliet McKenna to be an Associate Judge on the D.C. Superior Court. Both Mr. Fisher, with his background at the U.S. Attorney's Office, and Ms. McKenna, with her background in family law, have impressive resumes. I look forward to their testimony and hearing their thoughts on the D.C. Court System.

The positions to which Ms. Kiko and Ms. Rose have been nominated are among the most important for Federal employees. If confirmed, I would expect them to be strong voices for employee rights and fair employment principles.

Ms. Kiko has been nominated to be the General Counsel of the Federal Labor Relations Authority. This nomination comes at a critical juncture for the FLRA and the Federal workforce, given the shifting nature of the Federal labor relations system. As such, the position to which she has been nominated will face new challenges and take on renewed importance.

Changes to Federal labor law at the Departments of Homeland Security and Defense will impact the workload of the FLRA and its General Counsel. I fear that employees at those agencies may be unable to have the benefit of an independent prosecutor to bring cases of unfair labor practices and will lack the assurance of having an impartial and independent adjudicator. In addition, the issues that are currently considered unfair labor practices may likely be reduced, further eroding employee rights and impacting the workload of the General Counsel.

In addition, the administration is proposing additional changes to the Federal Labor Management System through the Working for America Act. Because some of these changes are similar to those

proposed by DHS and DOD, the Federal labor-management construct is facing major changes.

Ms. Kiko, I look forward to discussing with you your thoughts on these proposals and how they will impact the job of the General Counsel.

Ms. Rose has been nominated to be a member on the Merit Systems Protection Board. The MSPB is charged with protecting the merit principles and ensuring that Federal employees are free from political and other prohibited personnel practices and management abuses.

I have serious concerns with the proposed changes to the appeals systems at DHS and DOD, which, in my opinion, undermine long-held merit principles. The MSPB plays a critical role in ensuring the right balance between civil service reform and protecting the rights of employees, and that is why I look to the members of MSPB to ensure that the rights and protections of Federal employees, whether in substance or through procedures, are not eroded.

I am particularly interested in discussing with Ms. Rose whistleblower protections for Federal workers. Reporting government mismanagement is a basic obligation of the Federal workforce. To foster confidence in these protections, Federal employees, especially those disclosing information vital to our national security, should feel secure by a strong and functioning Whistleblower Protection Act (WPA). Unfortunately, the Federal Circuit Court of Appeals, with sole jurisdiction over the WPA, has created inconsistencies with Congressional intent through Court decisions. These loopholes pose challenges for the MSPB in interpreting the law as envisioned by Congress. I am pleased that the Committee, and you in particular, Chairman Voinovich, as well as Senators Lautenberg and Carper, have been strong supporters of my legislation, the Federal Employee Protection of Disclosures Act, which would restore Congressional intent to the WPA. I hope the Senate will act on this soon.

Ms. Kiko, Ms. Rose, Mr. Fisher, and Ms. McKenna, I want to welcome you and congratulate you on your nomination.

Mr. Chairman, I also want to mention that I had a good meeting with Mary Rose and want to mention that her husband, a doctor in North Carolina, is teaching and unable to join her. Her son, who is serving with the Coast Guard, and her two daughters, who live in Los Angeles and Pennsylvania, could not be here either. I know the whole family is here today with her in spirit.

Thank you very much, Mr. Chairman.

Senator VOINOVICH. Senator Lautenberg.

OPENING STATEMENT OF SENATOR LAUTENBERG

Senator LAUTENBERG. Thanks, Mr. Chairman. We rarely have any disagreement about decisions that come from your desk. Everyone knows very well of your public service career and has great respect for you and the accomplishments of that career, so while we differed on the process, I thank you for permitting the opening statements to be read, to learn more about the people who are nominated for these important positions.

I am particularly interested in the Merit Systems Protection function. We have recently been given a vivid reminder of how im-

portant it is to scrutinize nominees for these important jobs. We have a situation at FEMA where the person named to the top position lacked the right experience, and the outcome was almost predictable, and then we learned that some of the claims on his resume or in his biography might have been exaggerated. But this underscores the need to take a closer look at nominees before they are allowed to assume positions of public trust.

Ms. Rose, one of the individuals before us today, is nominated for one of the three seats on the Merit Systems Protection Board and that Board is responsible for enforcing the Federal Government's merit-based employment practices. It was established to protect Federal employees, including whistleblowers, from political and other prohibited personnel practices and abuses by agency management. Now, I believe that this Board requires members to be capable of looking at the facts of a case in a nonpartisan manner, and I am concerned with ensuring that this agency abandon any partisanship and any partisan leanings as they review the cases that come before them.

I would like to learn more about Ms. Rose's view on the importance of whistleblowers that expose waste, fraud, and mismanagement in government bureaucracies and agencies. Many times, the only people aware of such wrongdoings are those who work inside the agency, and if we fail to protect those who would come forward and do the right thing, we do a disservice to the individual and the taxpayers in our country.

Recently, we learned that a whistleblower who exposed irregularities in a billion-dollar no-bid contract between the Department of Defense and Halliburton has been demoted from her job at the Army Corps of Engineers. Now, this was only the latest example of people who were punished after they revealed information that the Administration wanted to hide from the American people.

In my view, the current whistleblower protection system is not working. It doesn't protect those who would come forward, and I am working on legislation to strengthen those protections by making it a criminal offense for an individual to retaliate against whistleblowers. I am pleased to be on an amendment that Senator Akaka has produced to make sure that we are dealing fairly with these people.

Mr. Chairman, I thank you very much for the opportunity to make my statement and look forward to hearing from our witnesses.

Senator VOINOVICH. Senator Carper.

OPENING STATEMENT OF SENATOR CARPER

Senator CARPER. Thanks, Mr. Chairman. I will be brief. To our nominees, welcome, and to those that are on, I think, our second panel, the judicial nominees, we welcome you, too. I am not going to be able to stay for that second panel, but I wanted to be here for at least the beginning of this one.

Both Senator Lautenberg and Senator Akaka have spoken of the need for whistleblower protection. We need it. There are too many instances where people of good faith, good intent, are stepping forward and blowing the whistle, telling the truth, and they are being punished for it rather than rewarded for it. It is just unacceptable,

and it is unacceptable to me, and I am sure it is unacceptable to our Republican colleagues, as well.

We are reminded on the heels of Katrina that the folks whose names come to us for positions—we have an obligation, we have an oversight responsibility to make sure that we fully vet those nominees and better ascertain whether they are well qualified to do the jobs for which they have been nominated. With respect to FEMA, we have seen in recent weeks that sometimes that is not the case. That is the responsibility of the Executive Branch, but we bear responsibility, too.

Again, we thank you. We welcome you and your families and friends today and thank you for your willingness to serve.

Thank you, Mr. Chairman.

Senator VOINOVICH. Thank you, Senator.

Ms. Kiko and Ms. Rose, you have filed responses to a biographical and financial questionnaire and answered pre-hearing questions submitted by the Committee. You have had your financial statements reviewed by the Office of Government Ethics. Without objection, this information will be made a part of the hearing record, with the exception of the financial data, which are on file and available for public inspection in the Committee offices.

Our Committee rules require that witnesses before this Committee take an oath, and if you will stand, I will administer the oath.

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

Ms. KIKO. I do.

Ms. ROSE. I do.

Senator VOINOVICH. Ms. Kiko, I understand you have some family members here with you, and I would like to give you an opportunity to introduce them before you make your statement to the Committee.

Ms. KIKO. Thank you, Mr. Chairman. I do have my husband, Phil Kiko, and my daughter, who is representing my four children, Sarah Kiko, and my sister, Tama, is behind my daughter. Thank you.

Senator VOINOVICH. Would you like to share your statement with the Committee?

TESTIMONY OF COLLEEN D. KIKO,[1] TO BE GENERAL COUNSEL, FEDERAL LABOR RELATIONS AUTHORITY

Ms. KIKO. Thank you, Mr. Chairman. Chairman Voinovich, Senator Akaka, Senator Lautenberg, Senator Carper, Members of the Committee, I would like to thank you and your staff for all the courtesies that have been shown to me as I have prepared for this hearing. I also deeply appreciate Chairman Sensenbrenner taking time away from his boat time to introduce me today.

It is indeed a very special and honored occasion for me to be sitting here after being nominated by the President to serve as the

[1] The prepared statement of Ms. Kiko appears in the Appendix on page 27.
Biographical and professional information appears in the Appendix on page 39.
Responses to pre-hearing questions appear in the Appendix on page 49.
Responses to post-hearing questions appear in the Appendix on page 63.

General Counsel of the Federal Labor Relations Authority having started in the Federal Government in 1972 as a GS–3 clerk-typist. The Federal civil service was considered an honored profession in my family. My father, Lawrence Duffy, had almost a half-century, 49 years, of proudly serving as a civil servant, first as a railway mail carrier for the U.S. Postal Service, and then for the U.S. Customs Service as a customs inspector. He believed in the opportunities the Federal Government offered and advised me as I was determining what career path to follow to look to the Federal Government as an honorable, rewarding, and fulfilling experience.

My father always said that you spend almost half of your life at whatever job you choose—make sure you are happy in it. He provided a daily example of hard work, commitment, and impeccable character. I hope to follow in those shoes.

I would like to point out several areas of my background and employment experience that I believe affirmatively qualify me for this position. From 1976 to 1979, I worked in the Department of Labor, Labor Management Services Administration. This same entity was transferred to the newly created Federal Labor Relations Authority on January 1, 1979, where I worked until I resigned to pursue a legal career in 1983.

I worked in almost all of the professional roles of the Authority. In the regional office, I investigated unfair labor practice charges, chaired hearings on representational disputes, monitored Federal union elections, and conducted training for both management and unions. In the headquarters, I reviewed Administrative Law Judge decisions and the exceptions filed by the parties and prepared draft decisions for the Authority members. I also handled the procedural motions practice before the Authority.

I left the Authority as a supervisory labor relations specialist. My experience working at the Authority in increasingly responsible positions throughout the Authority gives me, I believe, a great understanding of the agency as a whole.

My work at the FLRA spearheaded my decision to pursue a legal career. My experience since then has also prepared me well for this position. After obtaining my law degree in 1986, my service with the Department of Justice in the Civil Rights Division and in the U.S. Attorney's Office, litigating both criminal and civil matters, has particularly prepared me for the prosecutorial role of the General Counsel position.

Further, in my role as an Associate Counsel in the Judiciary Committee, I was very involved with the historic impeachment of a U.S. District Court judge. The House managers, one of whom was Chairman Sensenbrenner, prosecuted the Articles of Impeachment before the Senate.

My years in the private practice of law in a small firm representing clients has given me perspective on advocacy and on the need to respond effectively to client needs.

Finally, in my current position as an Employees' Compensation Appeals Judge, I have had the benefit of independent decision-making, listening to both sides objectively, and rendering a fair decision. Exercising such judicial temperament prepares me well for the neutral role that the Federal Labor Relations Authority plays in the Federal sector labor relations.

I believe I have been well prepared for this position. Neither when I left North Dakota to come to Washington, D.C. in 1972, nor when I left the FLRA to pursue a legal career, did I ever expect to be sitting in this chair right now. It is amazing how full-circle this journey has become.

I see as the goal of the Office of the General Counsel as helping agencies effectively and efficiently fulfill their statutory mission through healthy labor-management relations. I hope to faithfully pursue that objective.

I greatly appreciate the opportunity to appear before this Committee today and will be happy to answer any questions.

Senator VOINOVICH. Thank you very much, Ms. Kiko.

Ms. Rose, you have an opportunity to introduce your family to the Committee.

Ms. ROSE. Thank you, Mr. Chairman. My daughter and my son-in-law and my grandchild are sitting over here, Kaitlyn, the little redhead. Thank you for giving me the opportunity to introduce them.

Senator VOINOVICH. Would you like to share your statement with the Committee?

TESTIMONY OF MARY M. ROSE,[1] TO BE MEMBER, MERIT SYSTEMS PROTECTION BOARD

Ms. ROSE. Good morning, Chairman Voinovich, Ranking Member Akaka, and Members of the Committee. I am Mary M. Rose, and I appreciate the opportunity to appear before you as you consider my nomination to be a member of the Merit Systems Protection Board. Given the seriousness of the issues that surround you today, I am especially appreciative of the time you have taken to ensure the MSPB operates at full strength.

I am honored by the President's confidence in me, as demonstrated by his decision to nominate me to a position of such importance. If confirmed, I will dedicate myself to discharging the responsibilities of this office in accordance with the laws, rules, and regulations applicable to the Board to the best of my ability.

In this time of change, the mission of the Merit Systems Protection Board is more important than ever. I will work to fully preserve the merit systems principles and to protect Federal employees from prohibited personnel practices, the core of the MSPB's mission. The assurance of fair adjudication of employment disputes and the timely issuance of decisions will enhance the confidence of Federal employees and managers in the civil service system as well as their effectiveness in fulfilling the missions of their respective agencies.

The Board's role in regulatory, studies, and oversight functions, in addition to its adjudicatory responsibilities, will be part of the cutting edge of transformation in human resources management. If confirmed, I welcome the opportunity to work in cooperation with MSPB's Chairman McPhie in fulfilling the responsibilities and missions of the Board during this period of transition and beyond. I

[1] The prepared statement of Ms. Rose appears in the Appendix on page 31.
Biographical and professional information appears in the Appendix on page 66.
Responses to pre-hearing questions appear in the Appendix on page 72.
Responses to post-hearing questions appear in the Appendix on page 93.

hope to use my past experiences in the Federal civil service as well as the expertise I have developed to assist the Board in fulfilling its missions.

I began my tenure in Federal service during the early 1980's when the reforms mandated by the Civil Service Reform Act of 1978 were first being implemented. I saw firsthand how difficult change can be, but witnessed the improvements in government-wide personnel management as a result of that change. During this time, a major shift in management practices required managers and employees to communicate on an annual basis regarding goals of their employing agency and the standards and the expected levels of performance. Should I be confirmed, it will be a great honor to be part of this historical time in the continued evolution of Federal human resources management.

I wish to thank you for consideration for my nomination, and again, I express my appreciation for your time. I would be happy to answer any questions you may have.

Senator VOINOVICH. Thank you, Ms. Rose.

There are standard questions that this Committee asks all of the nominees. I will begin with those questions, and I would appreciate your answering them yes or no.

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

Ms. KIKO. No.

Ms. ROSE. No, sir.

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

Ms. KIKO. No, I do not.

Ms. ROSE. No, sir.

Senator VOINOVICH. 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?

Ms. KIKO. Of course, yes.

Ms. ROSE. Yes, sir.

Senator VOINOVICH. I mentioned that you are both coming to your responsibilities at a time that is very critical, as far as I am concerned. We have, as I mentioned, made significant changes to the Civil Service Code at the Department of Homeland Security, Department of Defense, and also government-wide. I value Federal employees. For too many years they have been neglected, but as we have seen with Hurricane Katrina, people do make a difference.

I would like each one of you to comment about your awareness of the situation that you are going to find yourself in. Ms. Kiko.

Ms. KIKO. I will go first, Mr. Chairman. The Department of Homeland Security and the Department of Defense regulations that are currently under consideration are examples where the legislative process made changes allowing the agency to appropriately craft labor relations and employee relations policies that would best effectively take into account its mission. I certainly find that to be an appropriate situation. These agencies certainly are going

through a difficult time right now trying to find out how to properly craft those particular regulations.

Right now, as it is pending litigation in the D.C. Court, certainly the merits of the regulations are not something that I would want to comment on particularly. I do see the government is going through a process of attempting to craft the personnel policies in a time now that is a little different from years past, where homeland security is a particularly important area right now. It is a challenge and the government is going through a process right now which I think is working. The process is doing what it is supposed to be doing.

That is my comment, essentially. I believe that your question was directed mostly to the Homeland Security regulations. If I have missed the point, I would be happy to redirect the answer.

Senator VOINOVICH. I think that one of the concerns that our unions particularly have is this: What kind of people are we going to have in responsible positions and how sensitive are they going to be to the rights of Federal employees.

Ms. Rose.

Ms. ROSE. Thank you, Mr. Chairman. With the new regulations and reforms coming our way, there are going to be major changes, and we will have to be ever vigilant as a member of the MSPB. When adjudicating cases and writing studies the MSPB must find an independent and open way to describe agency performance with respect to personnel practices. Additionally, preventing prohibited personnel practices against employees is vital. As a board we must watch the agency trends to ensure these laws are enacted and the intent of Congress is followed. The new laws may be more complicated and more cumbersome, but I believe we should look at this enthusiastically as a time of change. I look forward to helping in any way I can in the service of my country to protect Federal civil servants and to be more vigilant than ever on their behalf. As well, I hope to help managers through their difficult times.

Senator VOINOVICH. You come to the table with individuals who obviously feel that they have been discriminated against because they have come forward. Do you believe that the parties come to the table and it is an even situation, or do you believe the emphasis should be on trying to make sure that the individual who claims to have been aggrieved perhaps gets more emphasis than the agency that fired or demoted him?

Ms. ROSE. I think every case needs to be judged on its merits. I can't answer, without a case in front of me, if one side is being favored. This is a difficult question. With the changes and reforms, one will have to use extra scrutiny reviewing employee and managers claims because—this is all going to be new to both sides. Everything will have to be looked at very carefully and weighed very openly and impartially. That is how I would look at each case.

Senator VOINOVICH. We have spent a great deal of time on this issue. I would recommend that you cearly communicate that the individuals that come before you are going to receive fair consideration. I know we had testimony here about the backlog of cases before the Office of Special Copunsel, and it has been argued that maybe each case wasn't getting the attention that it ought to receive.

I think there is a feeling among Federal employees that perhaps individuals aren't getting the kind of treatment that they should get, and it becomes an issue of perception. This will affect whether or not people are going to be willing to stand up and report wrongdoing. If they just see co-workers blow the whistle and then get shut out, the word will go around that, hey, you had better keep your mouth shut, or leave, or whatever the case may be.

Federal employees really have to have a feeling that they are being treated fairly and that they are listened to and that this isn't just some perfunctory process where they come before the Board and then end up out on the street. You need to take that into consideration.

Ms. ROSE. I believe my management and HR experience will be a benefit because I have experienced situations where employees need help, and I know that communications between manager and employee is very important. I have seen this through many years of my professional life. I think I will be more open to reviewing these cases and seeing them from a different perspective and a dynamic than an attorney would. While I know I am not an attorney, I believe I add a valuable dynamic that will be beneficial to the Board as well as the employees who come before the Board.

Senator VOINOVICH. Thank you. Senator Akaka.

Senator AKAKA. Thank you very much, Mr. Chairman.

I thank you, Ms. Kiko and Ms. Rose, for your testimony. I appreciate your comments as both the FLRA and MSPB are very important agencies for protecting employee rights.

Ms. Kiko, DHS and DOD claim that their agencies need flexibility in the area of labor-management relations based on their national security needs. In response to Chairman Voinovich's question, you said that employee rights and collective bargaining rights at DHS and DOD are being balanced against the missions of the agency. Could you elaborate on this and tell me if this applies to all agencies and all missions or only those pertaining to national security?

Ms. KIKO. Thank you, Senator Akaka. Labor-management relations, healthy labor-management relations, is important in every government agency. When the statute was created in 1979, it was stated in one of the findings that one of the law's purposes was to help agencies more efficiently and effectively accomplish their statutory mission. Each government agency has been created with a particular mission. The best way that mission can be accomplished is through employees working well with management to accomplish the mission. The best way to do that is with good labor-management relations.

Does it always work? No. Do I have some magic wand that can make it all work? No. But I certainly believe you start there; you want to develop and work on healthy labor-management relations in each agency. The mission is simply where everybody wants to go at the end of the day. What does the agency want to accomplish? It doesn't matter necessarily which mission. Good labor-management relations is good in every agency.

Senator AKAKA. Ms. Kiko, the FLRA has been without a General Counsel for almost a year, and I understand there are over 100 unfair labor practice charges awaiting issuance of a complaint. If you

are confirmed, do you intend to immediately issue complaints on these backlogged charges?

Ms. KIKO. Well, I would probably want to review the complaints first, but certainly, I expect there may be some things sitting on the desk waiting for my action upon my arrival. I do not certainly expect to jump in and start acting immediately. I do intend to communicate with the regional directors, with the staff of the agency, to find out where we are, where we need to go. At that time, I would evaluate each of the complaints waiting to be filed as an unfair labor practice complaint, and determine whether the qualifications are met or the requirements that have been established to date on what would make an unfair labor practice charge into an unfair labor practice complaint. At that point, I would make a determination. But certainly, I don't think I am going to walk in with my pen open and ready to sign.

Senator AKAKA. Ms. Kiko, the General Counsel is responsible for the seven regional offices at FLRA. There has been no hiring in the regional offices in over a year. Under General Counsel policy, a full staffing level of attorneys and labor relations specialists would be 11 agents. The Atlanta Region currently only has four agents and the Dallas Region only has five agents. Do you intend to begin hiring new employees in the regional offices to address these staffing shortages?

Ms. KIKO. I certainly believe one of my first orders of business will be to evaluate the staffing needs of the agency and the staff that is existing to accomplish the mission. There are many factors that affect the staffing in the Federal Labor Relations Authority. Workload is one. Geographical location is another. All of those factors, I would like to study and do staffing reviews and management reviews to determine what the personnel levels should be.

There are other situations facing our agency as to whether the Homeland Security regulations and the Department of Defense regulations will have an effect on the caseload of the agency. That would be certainly something that I would want to investigate prior to making any decisions, but certainly that is an area that would be getting a lot of my attention.

Senator AKAKA. Ms. Rose, a number of Federal Circuit Court interpretations of the Whistleblower Protection Act are inconsistent with Congressional intent. A primary example is the meaning of the term, "any disclosure." In 1994 and again this year, this Committee reaffirmed language from the 1988 Senate Committee report and explicitly stated that the Office of Special Counsel, the Board, and the courts should not erect barriers to disclosure of government wrongdoing, including limiting protection for disclosures made for certain purposes, limiting protection for disclosures made to certain employees, or limiting protection to the employee who is the first to raise the issue. Nonetheless, the Federal Court erected nearly every barrier listed in the Committee report.

As a member of the MSPB deciding whistleblower cases, how would you reconcile this contradiction between Federal Circuit Court case law and clear Congressional intent?

Ms. ROSE. As a member of the Merit Systems Protection Board, I will be obligated to apply the laws that are in place at this time. When Congress enacts legislation that strengthens the Whistle-

blower Act, I assure you if this issue comes before me, I will adjudicate cases, and I will apply the applicable laws as fairly and as openly and as credibly as I can.

Senator AKAKA. Mr. Chairman, my time has expired. Thank you very much.

Senator VOINOVICH. Thank you. Senator Lautenberg.

Senator LAUTENBERG. Thank you, Mr. Chairman, and I thank the witnesses for their testimony.

One thing I think that is quite apparent in the Senate is that we rely on sources of information that are not necessarily those that are routine, those that are brought to a committee hearing. So when we have an opportunity to learn from someone who is inside the system, I think we have an obligation to listen.

I ran a pretty good-sized company before I came to this Senate, and I encouraged employee suggestions or even criticism. I didn't want a list of whiners standing at my door in the morning because I would make sure that if someone had a complaint, that they had to have some record of the incident that was verifiable. But I think it particularly important in government, when we have the system of protection in place that we have, that violations not be ignored.

Ms. Rose, you worked under Republican administrations, including this White House, where you helped prepare nominees for political appointments. One of the primary systems of the Merit Systems Protection Board is to ensure that politics is not a factor in civil service personnel action. Now, what will you do to ensure that those individuals who put their consciences above orders that they think are inappropriately functioning, to come up with their criticism or complaint and to guarantee that there is no recrimination for speaking out?

Ms. ROSE. Senator, should I be confirmed, as a member of the Merit Systems Protection Board, I will not allow partisan politics to interfere with any of my decisions. I will not allow partisan politics to exist.

Yes, I worked in the White House, but I also have worked in other jobs. I have worn hats in many fields. My background is varied. I have been a nurse. I did not allow the background of the patients I treated to interfere with my decisions regarding their care. As a manager, employee backgrounds were never part of a decision. I made strong and sound decisions.

I know your concern about looking at candidates very carefully because I, too, have had that responsibility as a Deputy Assistant at the White House. I had to interview people. I had to look them in the eye and see if they were actually telling the truth, if their backgrounds were correct and verifiable. So it is an awesome responsibility to put the right person in the right job.

Senator LAUTENBERG. Ms. Rose, I am sure that you employ your best instincts, but don't we have to look to something beyond one's instincts or one's feeling about the individual to get to the substance of the issue? Are there not systems applications that can be used to say, OK, here is what we do if someone comes up with a complaint? Where do we go? Do we then call in the supervisor? Do we call in fellow employees, rather than rely on some good feeling or bad feeling about an individual? I think that gets us into a prob-

lem that we ought not to be trying to employ in making important decisions like this.

We have, for instance—are you familiar with the Bunny Greenhouse situation? Bunny Greenhouse was an employee of the Corps of Engineers, and she was the top civilian contracting official with the Army Corps since 1997. She was demoted, and it appears to be retaliation for her June 27—just this past year—testimony before a Senate Committee, albeit it was a Democratic Committee because we couldn't get her on the agenda of the standard Committee structure. She talked about inappropriate actions taken by the Army Corps in granting a no-bid contract to Halliburton.

Now, how do you take an action like this and listen to someone carefully who feels that the government is acting improperly in this action and how do you say to that person, well, understand if you tell us, you may be putting your head on the chopping block. What would you do to ensure that these complaints are valid, that they are heard? Would you take the responsibility solely on yourself for making this decision about whether or not this person has fabricated this idea or whether or not punishment is in order?

Ms. ROSE. I think it is the role of the member to seek the truth in whatever way is possible and make decisions based on what you believe is the truth and the facts that are laid out in the case.

Senator LAUTENBERG. Ms. Rose, in 2001, you had a responsibility for recruiting, interviewing, and preparing candidates for appointment at executive levels in the Administration. In 2001, a man named Mike Brown was nominated to be Deputy Director of FEMA. Do you recall working on his nomination?

Ms. ROSE. No, sir.

Senator LAUTENBERG. Well——

Ms. ROSE. I did not have FEMA in my portfolio.

Senator LAUTENBERG. But weren't you responsible for vetting people who were being appointed to high-ranking positions in the government?

Ms. ROSE. Yes, sir. I did domestic agencies, but not FEMA.

Senator LAUTENBERG. So did you not look at Mr. Brown's background? You know what happened there. He had a fabricated biography, as exposed by *Time* magazine and other sources. But that should have been an important look at a candidate for such an important job, and you don't recall having——

Ms. ROSE. No, sir. I had nothing to do with his appointment.

Senator LAUTENBERG. With the vetting? You weren't responsible for the vetting?

Ms. ROSE. No, sir.

Senator LAUTENBERG. Thank you. Thanks, Mr. Chairman. I am done, Mr. Chairman. Thank you.

Senator VOINOVICH. Thank you. Senator Akaka indicated that he would like a second round of questioning, and I will start it off.

Ms. Kiko, how would you approach your responsibility to work with the unions and Federal managers to foster effective labor relations in the Federal Government? I will never forget when I was mayor of Cleveland I had my directors come to me, and they were complaining that it just was impossible to fire a bad employee. I talked to the woman that headed up our Civil Service Board, and she said, "Mayor, the bottom line is they don't know what they are

doing." In other words, there are certain procedures that you follow, and they are not following them. At that time, we began a very aggressive effort to educate them about how the system worked, and it is amazing how the situation improved.

Have you thought about how you might communicate to the various agencies on human capital management? If you conclude that there are agencies that don't know what they are doing or the people in human resources don't have the training they should have, do you feel it is your responsibility to call someone and maybe encourage training sessions?

Ms. KIKO. Thank you for that question. I think it is a very important one in the labor-management area. I think you hit it on the head because of your background. Education is very important in attempting to help parties get along. I think you can certainly understand that managers deal with their employees. Some employees are good workers and some have challenges. There are problems of communication between parties. Sometimes management feels it absolutely can't stand working with the union, and sometimes the union feels it cannot possibly stand to work with management. Then there are other agencies kind of on middle ground.

Hopefully, in the role as the General Counsel of the Federal Labor Relations Authority, you have an opportunity to do two things. Certainly, we have the opportunity to prosecute cases against management or against the union if there are violations of the law. But prior to that, and I think it is probably the most important role, is attempting to get parties to work together, and the most important way to do that is to help them understand their parameters: What are the management rights? What are the union rights? What are the employee rights? And help the agencies understand that.

Certainly, if there are areas where it appears that unfair labor practice charges are coming from the same area over and over and over again, that should suggest a problem. It would be my role to attempt to educate them as to the role of the Federal Labor Relations statute as to the roles of the parties, whether it means picking up the phone and calling someone or whether I set up training classes and offer such opportunities to various agencies that may need assistance.

Senator VOINOVICH. You probably haven't had a chance, but do you intend, if confirmed, to examine the performance of various agencies to get a feel for——

Ms. KIKO. Absolutely. I mean, this is what we are trying to do, is to promote healthy labor relations. If there are unhealthy labor relations going on, is there an opportunity to educate in the ways of the Authority decisions to help them understand? If they understand their parameters, they may be fighting over less. If we can help them understand their particular rights, this is what you need to work within.

I think the Authority in recent years has done an incredibly wonderful job of attempting to do just that, to set out in their decisions, more predictability, more understandable decisions on how do I take this and then follow a roadmap. Oftentimes, legal opinions can be good for this particular case, but not particularly good for the next one because no one really understands what it is all about.

But I think the decisions are starting to become much clearer and helping to educate the parties in what direction people need to go. The FLRA is now telling you: This is what we are finding to be right; this is what we are finding to be wrong. Now go out and play with those rules. And that helps healthy labor-management relations. Certainly, that is one area that I feel that is very important in educating the parties in what their roles are.

Senator VOINOVICH. Do you know Colleen Kelley?

Ms. KIKO. I do not know Colleen Kelley. I certainly know who she is, but I have not met her yet.

Senator VOINOVICH. Do you know John Gage?

Ms. KIKO. Not yet. I do intend to meet with them.

Senator VOINOVICH. That is good. It would be wise for you to spend some time with them and let them share their feelings. I think it is important you all get to know each other so that they understand that you take your job very seriously and that you understand that there has been some misunderstanding between this administration and the unions. I am glad to hear that you are going to do that.

Ms. KIKO. Thank you.

Senator VOINOVICH. Senator Akaka.

Senator AKAKA. Thank you very much, Mr. Chairman.

Ms. Rose, at a November 2004 forum hosted by GAO and the National Commission on Public Service, participants questioned whether the merit systems principles should be updated in light of the new personnel flexibilities granted to Federal agencies as well as an increased focus on missions, goals, and results as envisioned by the Government Performance and Results Act. Do you believe that any changes should be made to the Federal merit systems principles, and if so, what changes and why?

Ms. ROSE. That is a very interesting theory. I think it is very important that we constantly improve, and give introspective thought and consideration to all the laws because when laws are enacted, government changes. These laws should be changed based on policy changes that take place in government.

I know of the Congress's intent to look at these merit principles, and I welcome that. As I said, we can always look to improve ourselves in any way possible. In doing so, when the Congress enacts those changes, I will apply those laws to my cases as I see them should I be confirmed.

Did you want a specific—any specific changes? At this time, I am not ready to answer that. As I see cases and identify the need for these changes I will say so in my reports and studies.

Senator AKAKA. Thank you for that. Ms. Kiko, you were a labor relations specialist at the FLRA for 7 years. What problems, if any, did you see with the system at the time you worked there, and in your opinion, do these same problems persist today?

Ms. KIKO. Well, it has been 23 years ago, so I have to go back into the mind a little bit further than I am used to. When I worked in the Federal Labor Relations Authority, it was a brand new agency. I think everyone was excited about the process. It is exciting to have your role taken out of an agency and put into an independent agency, and it gave a much heightened awareness to what we were

doing at the time in the Department of Labor. It was a very exciting time. I recall a birthday cake for it on its first year in 1980.

So at the time, it seemed a process that was working very well. We were attempting to train people. We were attempting to help understand the new law, where it was going, how it was going to be interpreted, that sort of thing. It was a new and exciting time.

Were there problems with the system? I suspect there might have been. Certainly, whenever you are dealing with people trying to get along, you are always going to run into some problems.

As for how the agency works now, that is one of the things that I would like to look at in depth, is how is the agency working, and I don't intend to go in there with a preordained slate of what I remember from 23 years ago. I want to go in there with an open slate, and I want to go in and say, what is wrong with this agency and how does it work well? What is good? What is bad? Let us talk about it, and in my role of the Office of the General Counsel, should I be confirmed, what can I do to make it better?

So I really am looking forward to listening and finding out where those issues are from the unions, from management, from my own staff in the agency, should I be confirmed, and from there determine where the problems are and find ways to correct them if it is possible within my authority.

Senator AKAKA. Thank you.

Ms. Rose, DHS and DOD have been granted flexibility to waive Chapter 77 of Title 5 relating to Federal employee appeals. As you know, the Federal Aviation Administration was granted similar authority in 1996. However, after finding that the internal process was unfair and biased, Congress reinstated MSPB appeal rights for FAA employees in the year 2000. What do you believe are some best practices that should be included in any appeals system?

Ms. ROSE. Best practices would be making it as easy as possible for employees to appeal. By whatever means. For example, printing brochures or assisting them by making sure their phone calls are answered when they have questions. These simple administrative procedures can make it easier for an employee to appeal. Administratively, there are a lot of things I will do to help make the appeal process easier for the employee. It should be approachable and understandable. If they can't understand the language, it doesn't do them much good, and not all of them can afford attorneys or have the access to the help some other employees may have. Plain language is important. Communication and openess to employees who wish to make appeals are imperative.

As far as the DHS and DOD regulations, I will just have to wait and see how they play out. I will carefully look at how difficult or easy it is for these employees to make appeals. The appeals process to the agencies and the Board must also be closely watched for difficulties or barriers that might interfere.

Senator AKAKA. What about the independence of the appeals boards?

Ms. ROSE. Independence is primary. I mean, there can be no interference or no obstruction to that independence. We talk about the issue of timeliness and the quality of the decisions of those appeals. I said in my question and answers that timeliness is important because people are suffering and you need to address their

case as soon as possible and give them relief as soon as possible. At the same time, I do not believe that the independence or the integrity of the decision process should be endangered.

Senator AKAKA. I thank you both for your responses. Thank you, Mr. Chairman.

Senator VOINOVICH. I have one other question. Ms. Kiko, who do you go to for your budget?

Ms. KIKO. The Chairman of the Authority manages the budget for the Authority.

Senator VOINOVICH. OK. One of the things that I have observed around here is that we often ask people to do a job and then we don't give them the resources to do it. I would hope that you would do an initial evaluation of the capacity of the Board to do its job and make sure that is communicated to OMB.

I think that as we go back and examine preparation for Hurricane Katrina we are going to learn that some agencies should have had more resources. They have been asking for more resources but were ignored by the Administration and Congress. So I would urge you to do that. I know it is not easy, but you have to have the resources to get the job done.

You may also need to hire more people. You are going to have people recommended to you, I am sure. I hope that you have the wherewithal to be able to reject bad candidates. One of the things that I did when I was governor and as mayor, I asked somebody to do a job and I said, you are the one that hires and fires and you are responsible. If you get someone that is recommended and you don't think they have got it, you need to have the courage to say, they are not qualified or I don't want them. Those two things are tough, but standing up for your budget and making sure that you get the people that you need to get the job done are important.

Thank you both for being here today. We are going to leave the record open in the event that some of my colleagues have questions for the record. It will be open for 48 hours. Thank you.

Ms. KIKO. Thank you very much, Mr. Chairman.

Ms. ROSE. Thank you, Mr. Chairman.

Senator VOINOVICH. You are more than welcome.

Now, I ask Judge Juliet McKenna and John Fisher to come forward.

Eleanor, I don't know how long you have been in the wings, but if we kept you there a long time, I apologize.

Ms. NORTON. It is all right. I was watching the hearing.

Senator VOINOVICH. I welcome Eleanor Holmes Norton of the District of Columbia, who is here to introduce Mr. Fisher and Judge McKenna. I would like to thank Delegate Norton for her conscientiousness. She does a good job of making sure that she familiarizes herself with the individuals being nominated and makes it her business to come and appear before the Committee.

Thank you for being here.

STATEMENT OF HON. ELEANOR HOLMES NORTON, A DELAGATE IN CONGRESS FROM THE DISTRICT OF COLUMBIA

Ms. NORTON. Thank you very much, Mr. Chairman, and may I thank you once again for your very exceptional work for the residents of the District of Columbia on the authorizing Committee

here, and may I thank you for arranging this hearing for two exceptionally well-prepared and well-qualified nominees.

I think if you look at their qualifications, and I will only briefly summarize them, it would appear that they have spent their entire professional lives preparing for the nominations they have received.

John Fisher, as Associate Judge for the D.C. Court of Appeals, our highest appellate court in the District of Columbia, who now serves as the Chief of the Appellate Division for the United States for the District of Columbia, began his career as a law clerk for a Federal judge in the Southern District of Ohio. He was an Assistant Attorney General in Ohio for the United States for 3 years and then an Assistant Attorney General in the District of Columbia for 16 years until he became the Chief of our Appellate Division.

He has received many awards for his professionalism, including the Attorney General's John Marshall Award for outstanding legal achievement in handling appeals. He has been elected to the American Academy of Appellate Lawyers. He is a Vietnam veteran, a graduate, magna cum laude, of Harvard College and cum laude, Harvard Law School.

For our Superior Court, Juliet McKenna, who now serves in the Family Court as a magistrate. This is a court that this Committee was instrumental in forming as a part of our Superior Court, one of the great reforms, the first reform of that court in its history.

Ms. McKenna has spent her life in legal services for children and for families. She began in a Washington law firm, but quickly moved into what has been her life's work. She became Director of Lawyers for Children of America, which is a nonprofit organization that seeks to provide quality legal representation for children in the welfare system. She became an Assistant Corporation Counsel in the Abused and Neglected Children's Section, and then she has gone to the Family Court as a magistrate and now wishes to be a full judge in the Superior Court and has committed herself to serving in the Family Court Section of that court, where we are especially looking for judges who have background and special dedication.

So it is with great pleasure that I ask you to confirm these two exceptionally well-qualified nominees, in my opinion.

Senator VOINOVICH. Thank you very much for being with us this morning. While you are welcome to stay for the remainder of the hearing, I understand you have other commitments. Thank you very much.

I have reviewed the biographical questionnaires and believe you are both well qualified for the positions to which you have been nominated.

Senator Akaka, would you like to make an opening statement?

Senator AKAKA. Mr. Chairman, I just want to add my welcome to the nominees, and I look forward to their statements this morning.

Senator VOINOVICH. It is the custom in the Committee, as you know, to swear in the witnesses. If you will stand, I will administer the oath.

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

Mr. FISHER. I do.

Judge MCKENNA. I do.

Senator VOINOVICH. Judge McKenna, I understand that you have some family members here today, as well as supportive colleagues. I would welcome you to introduce them to us.

Judge MCKENNA. Thank you very much, Senator. I am joined today by my parents, Sherri and Jon McKenna, as well as my husband and my 6-year-old daughter, Miracle, who is sitting immediately behind me.

I am also honored today that Judge Emmet Sullivan of the U.S. District Court for the District of Columbia is here today, as well as Judge Eric Washington, Chief Judge of the Court of Appeals, and my Chief, Chief Judge Rufus King of the Superior Court.

I also wanted to take this opportunity to recognize several colleagues of mine from the Family Court who, as you can imagine, have served as sources of inspiration and support for me, including Magistrate Judge Pamela Gray, Magistrate Judge Karen Howze, and Magistrate Judge Carol Dalton, along with her courtroom clerk. I am also fortunate in that my courtroom clerk, Cynthia Milner, is here, as well as my former clerk, Rhonda Young. Thank you.

Senator VOINOVICH. Thank you. It is a pleasure to have members of your family and colleagues represented here today.

Please proceed with your statement.

TESTIMONY OF HON. JULIET J. McKENNA,[1] TO BE ASSOCIATE JUDGE, DISTRICT OF COLUMBIA SUPERIOR COURT

Judge MCKENNA. Thank you. Senator, I am honored to testify today before the Committee, and I would like to thank Congresswoman Norton for her kind introduction this morning. I also would just like to take this opportunity to thank the members of the nominations commission for recommending me and the President of the United States for nominating me.

I would, of course, like to express my appreciation to this Committee for convening today's hearing and to your dedicated and hard-working Committee staff, as well as the staff of the White House Counsel's Office, who assisted me throughout this process.

I have been privileged to serve as a magistrate judge within the Family Court for the past 3 years, and I have taken this responsibility very seriously. I am committed to treating all people who come before the court with fairness, patience, and respect, and if confirmed, I would be honored to continue to serve the citizens of the District of Columbia as an Associate Judge.

I look forward to answering any questions that you or Senator Akaka may have for me this morning.

Senator VOINOVICH. Thank you very much.

Mr. Fisher, would you please take the opportunity to introduce your family and friends who are here today.

Mr. FISHER. I would, indeed. Thank you, Mr. Chairman. I would first like to introduce my wife, Margaret. Margaret and I have been married for 39 years, and I know very well that without her constant support and sacrifice, I wouldn't be here today. Our son,

[1] The prepared statement of Judge McKenna appears in the Appendix on page 33. Biographical and professional information appears in the Appendix on page 98.

Clark, who lives and works near San Francisco, and our daughter, Mandana, who is a junior at East Carolina University.

I would like to note for the record, Mr. Chairman, that Margaret, Mandy, and I were all born in the great State of Ohio—— [Laughter.]

Senator VOINOVICH. I was familiar with the fact that you had worked with a distinguished law firm in the State of Ohio, but I wasn't aware that you were both born in the State.

Mr. FISHER. Clark was not born in Ohio, but that is not his fault. [Laughter.]

He did live with us in Columbus for several years, and he is a graduate of Denison University in Granville, Ohio.

Mr. Chairman, many friends are here. I won't take time to introduce them. I very much want to thank each and every one of them for being here today.

There are a few other individuals I would like to take time to introduce, if I may. I would like to introduce Ken Wainstein, who is the U.S. Attorney for the District of Columbia. Mr. Wainstein is a very experienced prosecutor. He is a very effective leader of our office, and his nomination to be the presidentially appointed U.S. Attorney is now pending before the full Senate for possible confirmation.

I would also like to introduce my friend and special advisor, Sam Kleinman. I hope Sam is here today. Sam, thank you very much.

I am also very honored that several judges are here today, Chief Judge Eric Washington, who is the new Chief Judge of the District of Columbia Court of Appeals. I very much look forward to serving under his leadership.

I would also like to recognize Judge Annice Wagner, who was Chief Judge of the Court of Appeals until about a month ago. Judge Wagner has been a judge, a trial judge on the Superior Court. She has been an associate judge of the Court of Appeals. And she has been Chief Judge of the Court of Appeals, and through all those assignments, she has been a remarkable leader and a true servant of justice. I have been nominated to take her seat, Mr. Chairman, but I have no illusions that I can ever take her place.

I also believe that Judge Emmet Sullivan is here. I think I saw him earlier. He is a U.S. District Judge for the District of Columbia. He formerly served on the District of Columbia Court of Appeals, and before that, he served on the Superior Court of the District of Columbia. I believe the reason he is here today is because he is the current Chair of the D.C. Judicial Nomination Commission.

Senator VOINOVICH. Would you stand up so we can see you? Thank you for being here. One thing that makes our job a little easier is the nominations committee vets everyone that we receive. I think Senator Akaka will agree with me that we really get outstanding nominees who come before us.

Mr. Fisher.

Mr. FISHER. And Judge McKenna had also introduced Chief Judge Rufus King of the Superior Court of the District of Columbia. Thank you for the opportunity to introduce these people.

Senator VOINOVICH. We would welcome your statement.

TESTIMONY OF JOHN R. FISHER,[1] TO BE ASSOCIATE JUDGE, DISTRICT OF COLUMBIA COURT OF APPEALS

Mr. FISHER. Mr. Chairman and Senator Akaka, it is a great honor for me to be here today, and I am very grateful for the opportunity. I know how very busy this Committee is at this particular time, and I really do appreciate that both of you have taken time to consider our nominations.

I want to express my sincere thanks to the staff of your Committee. They have been very courteous and they have been very helpful. This may be a familiar process to you folks, but it is a once-in-a-lifetime experience for me. I very much appreciate your courtesy and guidance and especially the courtesy of Ms. Jennifer Hemingway.

As you know, Mr. Chairman, I have devoted most of my professional life to public service, and it has been one of the greatest opportunities of my career to be able to litigate so frequently before the District of Columbia Court of Appeals. I really do wish that more people understood how very talented and how very dedicated the judges of that court are. Our community is very well served by its Court of Appeals, and so it is a special honor for me to be nominated to join that court.

Senator Akaka, Senator Voinovich, you both know about my background and my experience. I just want to assure you that if the Senate chooses to confirm me, I will work as hard as I can to justify your confidence in me, and I do welcome your questions.

Senator VOINOVICH. Thank you. There are three questions that we ask all nominees. First, is there anything that 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? If you will respond yes or no.

Judge MCKENNA. No, Mr. Chairman.

Mr. FISHER. No, Mr. Chairman.

Senator VOINOVICH. Do you know of any reason, 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?

Judge MCKENNA. No, sir.

Mr. FISHER. No, Mr. Chairman.

Senator VOINOVICH. Do you know of any reason, personal or otherwise, that would in any way prevent you from serving the full term for the office to which you have been nominated?

Judge MCKENNA. No, sir.

Mr. FISHER. I have an explanation, Mr. Chairman. I intend to serve as long as they will let me. I have been nominated to a 15-year term. I celebrated my 59th birthday late last month, and I would be required to retire at the age of 74, so I would fall a couple months short of the full 15-year term.

Senator VOINOVICH. Thank you. Senator Akaka, would you like to start the questions?

Senator AKAKA. Yes. Thank you very much, Mr. Chairman. As you pointed out, we have individuals who are well qualified for the

[1] The prepared statement of Mr. Fisher appears in the Appendix on page 34.
Biographical and professional information appears in the Appendix on page 121.

positions to which they have been nominated. I want to congratulate you both and also add my welcome to your families and friends who are here today to join you at this hearing.

I would like to ask each of you what you believe are the biggest challenges facing the D.C. Court of Appeals and the D.C. Superior Court and what role each of you believe you could play in addressing these challenges. Mr. Fisher, let us start with you.

Mr. FISHER. Thank you, Senator. Let me begin by saying that both courts, the Superior Court and the District of Columbia Court of Appeals, are very good courts. This community is very lucky to have such well run courts and talented judges serving there.

A constant problem for both courts is the volume of litigation with which they have to contend. Because of my experience practicing so frequently before the courts, I hope to be able to hit the ground running. I think as a baby judge, I will not be able to make any significant changes in the beginning, but I do think being fair-minded and hard-working is the best contribution I can make to trying to address fairly and as expeditiously as possible the cases that come before us.

Senator AKAKA. Thank you. Ms. McKenna.

Judge MCKENNA. Thank you, Senator Akaka. I would just like to first echo some of the comments of Congresswoman Norton and just recognize the hard work of this Committee with respect to the Family Court, which has relieved so much of the stress and the burden under which the Family Court used to operate. Now, I am very much pleased to have served on that court as a magistrate judge. I believe that the children and the families of the District of Columbia are much better served, in large part due to the additional resources that this Committee dedicated to the court.

However, I think one of the challenges that the court as a whole continues to face, and the District of Columbia as a community, is the pervasive problem of substance abuse addiction, and I think we see the impacts of that in every division of the court, whether that be family, criminal, or civil in the landlord-tenant arena. Certainly, substance addiction is something that plagues many members of the D.C. community and can unfortunately lead to increased violence, increased poverty, and mental health issues, which too often then bring people before the court.

I would hope that if I am confirmed and have the honor of sitting as an associate judge, I would be able to continue much of the work that has already begun through the community courts in the Criminal Division and the Family Treatment Court that is a part of the Family Court to try to collaborate with service providers in the community to be sure that those needs of those litigants are met in order to hopefully reduce recidivism and reunite children with their families as quickly as possible.

Senator AKAKA. Thank you. I am interested in knowing, and this question is to both of you again, what challenges you will face in transitioning from your current positions to your respective positions on the D.C. Court, and how you will address these challenges? Let me switch and ask Ms. McKenna first.

Judge MCKENNA. Thank you, Senator. As you know from my background, I am currently serving as a magistrate judge on the court and have been honored to be in that position for the last 3½

years. I would welcome the opportunity to preside over a greater variety of cases if I am confirmed as an associate judge, but I have no illusions. I know that my workload will only increase if I am fortunate enough to be confirmed as an associate judge. But I feel that the last 3½ years have prepared me well for that challenge, and I certainly look forward to hopefully assuming greater responsibility and being able to perform greater service on behalf of the court and the people of the District of Columbia.

Senator AKAKA. Mr. Fisher.

Mr. FISHER. Senator, as you know, for most of my career, I have been a prosecutor, an advocate, and although I am very familiar with appellate litigation, I hope to soon assume a new role, and it would not be a role as an advocate but a role as a fair and impartial judge.

I believe I can make that transition. I certainly am determined to be fair and impartial if I am allowed to sit upon the bench. I think I have earned a reputation as being a fair-minded person, and so I look forward to making that transition in my role from being an advocate to being a judge.

I think there is also a substantial management component to being a good and efficient judge. One of the things I will have to learn how to do is how to staff and manage a chambers. As Chief of the Appellate Division for the last 16 years, I have essentially been the manager of a small law firm. We have about 35 lawyers and about 10 support people in our Appellate Division, and I am hopeful that experience will help me be able to manage a chambers efficiently. I have always tried very hard to be a very collegial person, a very friendly person. The court to which I have been nominated is known for its collegiality, and I really do look forward to the opportunity to work with the judges there.

Senator AKAKA. I thank you both very much for your excellent responses.

Mr. Chairman, I just want to tell you that I would join you in expediting their confirmation. Thank you.

Senator VOINOVICH. Thank you.

Judge McKenna, if you are confirmed for this judgeship, you will preside over civil, criminal, and family cases. I have looked at your background and noticed your strong background in family law, which will be a vital asset to the family courts. What I didn't see was a strong background in criminal law. How are you going to deal with some of these areas that maybe you are not as familiar with as you would like to be? Are you going to go to school? Do you see this as a problem?

Judge MCKENNA. I appreciate the question. I feel very fortunate in that the Superior Court has, over the course of the time that I have been there, a long history of providing extensive training opportunities for judicial officers as they embark upon new assignments.

As you know in your role of the Chairman, the Superior Court is a very diverse bench with people with very diverse backgrounds, including family, civil, and criminal backgrounds, who are called upon at one time or another to serve in divisions with which they may have had little previous familiarity.

I feel that I am fortunate in having an extensive litigation background prior to coming to the court during the time that I served as a civil prosecutor for the Office of Corporation Counsel, and since being on the bench, while the substance of the cases I have handled have focused on family, I certainly have had the opportunity to preside over numerous evidentiary hearings and believe that I have learned skills in that capacity that will translate to any division of the court.

But while I won't have the luxury of going back to school, I certainly would avail myself of any and all training opportunities that could be made available in the civil or the criminal arena if the needs of the court would best be served by having me serve in one of those divisions.

Senator VOINOVICH. The Chief Judge will decide what kind of cases you will be assigned to? You could end up handling a lot of the same cases?

Judge MCKENNA. That is correct. Those decisions are made by the Chief Judge of the court, who I believe weighs the preferences that are expressed by the judges, assesses the backgrounds of the various judges, and then makes a determination about how the needs of the court would best be served, and I do feel that I am certainly prepared and able to serve in any division of the court as is needed by the Chief.

Senator VOINOVICH. I have no further questions, Senator Akaka. If there are any other additional questions, they will be submitted to you within 48 hours, and if you don't hear from anybody, it is fine. [Laughter.]

I would like to give a special note to your respective families for the sacrifice that they have made so that you can serve in the positions that you have held. So often, our families don't get the credit they deserve for their sacrifices. I am sure they are going to continue to make sacrifices so you can continue the job that you have to do. I know in my case, I have burned the midnight oil many times. My grandchildren complain about me taking home the weekly reports and reviewing them. So, I want to say thank you to your families for the sacrifice they have made over the years and for the one they will continue to make.

I know you are both anxious to be confirmed. The next step in the process will be consideration of your nomination at a Committee business meeting, and reporting your nomination to the Senate for final action.

Thank you for being here today. The hearing is adjourned.

[Whereupon, at 11:45 a.m., the Committee was adjourned.]

A P P E N D I X

STATEMENT
OF
COLLEEN DUFFY KIKO
NOMINEE TO BE GENERAL COUNSEL
OF THE
FEDERAL LABOR RELATIONS AUTHORITY
BEFORE
THE COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

I would like to thank the Committee on Homeland Security and Governmental Affairs and its staff for all the courtesies they have shown me as I have prepared for this hearing. I also deeply appreciate Congressman F. James Sensenbrenner, Jr., Chairman of the House Judiciary Committee, for taking the time to introduce me today.

It is indeed a very special and honored occasion for me to be sitting here after being nominated by the President to serve as General Counsel of the Federal Labor Relations Authority after having started out in the Federal Government in 1972 as a GS-3 clerk typist.

Federal civil service was considered an honored profession in my family. My father, Lawrence Duffy, had almost ½ century - 49 years - of proudly serving as a civil servant – first as a railway mail carrier for the U. S. Postal

Service and later a U.S. Customs Inspector. He believed in the opportunities the federal government offered and advised me, as I was determining what career path to follow, to look to the Federal government as an honorable, rewarding and fulfilling experience. Dad always said that you spend almost half of your life at whatever job you choose - make sure you are happy in it. He provided a daily example of hard work, commitment and impeccable character.

I would like to point out several areas of my background and employment experience that affirmatively qualify me for this position. From 1976 to 1979 I worked in the Department of Labor, Labor Management Services Administration. This same entity was transferred to the newly created Federal Labor Relations Authority on January 1, 1979, where I worked until I resigned to pursue a legal career in 1983. I worked in almost all of the professional roles of the Authority. In the regional office, I investigated unfair labor practice charges, chaired hearings on representational disputes, monitored federal union elections, and conducted training for both management and unions. In the headquarters, I reviewed Administrative Law Judge decisions and the exceptions filed by the parties and prepared draft decisions for the Authority Members. I also handled the procedural

motions practice before the Authority. I left the FLRA as a Supervisory Labor Relations Specialist. My experience working at the FLRA in increasingly responsible positions throughout the Authority gives me a great understanding of the agency as a whole.

My work at the FLRA spearheaded my decision to pursue a legal career. My experience since then has also prepared me well for this position. After obtaining my law degree in 1986, my service with the Department of Justice in the Civil Rights Division and in the U.S. Attorney's Office litigating both civil and criminal matters has particularly prepared me for the prosecutorial role of the General Counsel position. Further, in my role as an Associate Counsel in the Judiciary Committee, I was very involved with the historic impeachment of a U.S. District Court judge. The House Managers, one of whom was Chairman Sensenbrenner, prosecuted the articles of impeachment before the Senate.

My years in the private practice of law in a small firm, representing clients, has given me perspective on advocacy and the need to respond effectively to client needs. Finally, as an Employees' Compensation Appeals Judge, I have had the benefit of independent decision making, listening to both sides

objectively and rendering a fair decision. Exercising such judicial temperament prepares me well for the role the FLRA plays in federal sector labor relations.

I believe I have been well prepared for this position. Neither when I left North Dakota to come to Washington, D.C. in 1972, nor when I left the FLRA to pursue a legal career, did I ever expect to be in this chair right now. It is amazing how full-circle this journey has become.

I see as the goal of the Office of the General Counsel as helping agencies effectively and efficiently fulfill their statutory mission through healthy labor management relations. I would faithfully pursue that objective. I appreciate the opportunity to appear before the Committee.

U. S. Senate Committee on Homeland Security and Governmental Affairs
Confirmation Hearing on the Nomination of Mary M. Rose to be a Member of the Merit Systems Protection Board
Opening Statement

September 13, 2005

Good morning Chairman Voinovich, Ranking Member Akaka and Members of the Committee. I am Mary M. Rose, and I appreciate the opportunity to appear before you as you consider my nomination to be a Member of the Merit Systems Protection Board. Given the serious issues that currently surround you I am especially appreciative of the time you have taken to ensure the MSPB operates at full strength. I am honored by the President's confidence in me as demonstrated by his decision to nominate me to a position of such importance. If confirmed, I will dedicate myself to discharging the responsibilities of this office in accordance with the laws, rules and regulations applicable to the Board to the best of my ability.

In this time of change, the mission of the Merit Systems Protection Board is more important than ever. I will work to fully preserve the Merit Systems Principles and to protect Federal employees from prohibited personnel practices, the core of MSPB's mission. The assurance of fair adjudication of employment disputes and the timely issuance of decisions will enhance the confidence of Federal employees and managers in the civil service system, as well as their effectiveness in fulfilling the missions of their respective agencies.

The Board's role in regulatory, studies, and oversight functions, in addition to its adjudicatory responsibilities, will be part of the cutting edge of transformation in Federal human resources management. If confirmed, I welcome the opportunity to work in cooperation with MSPB Chairman McPhie in fulfilling the responsibilities and missions of the Board during this period of transition and beyond.

I hope to use my past experiences in the Federal civil service, as well as the expertise I have developed, to assist the Board in fulfilling its missions. I began my tenure in Federal service during the early 1980's when the reforms mandated by the Civil Service Reform Act of 1978 were first being implemented. I saw first-hand how difficult change can be, but witnessed the improvements in government-wide personnel management as a result of that change. During this time, a major shift in management practices required managers and employees to communicate on an annual basis regarding goals of their employing agency, the standards, and the expected levels of performance.

Should I be confirmed, it will be a great honor to be part of this historical time in the continued evolution of federal human resources management. I wish to thank you for your consideration of my nomination, and again, I express my appreciation for your time. I would be happy to answer any questions you might have.

Prepared Statement of Juliet J. McKenna, Nominee to the D.C. Superior Court
Committee on Governmental Affairs
September 13, 2005 10:00 AM

I am honored to appear before the Committee on Governmental Affairs for consideration of my qualifications to serve as an Associate Judge of the Superior Court of the District of Columbia. My parents, Jon and Sherrie McKenna, as well as my husband and six year old daughter, Miracle, join me today. I would also like to recognize several colleagues from the Family Court, who have served as sources of inspiration and support. I would like to take this opportunity to thank the members of the District of Columbia Nomination Commission for recommending me, and the President of the United States for nominating me. I would also like to express my appreciation to this Committee for convening today's hearing and to the dedicated and hard working Committee staff, as well as the staff of the White House Counsel's Office, who assisted me throughout this process.

I have been privileged to serve as a Magistrate Judge on the Superior Court for the past three years and have taken this responsibility very seriously. I am committed to treating all people who come before the Court with fairness, patience and respect and, if confirmed, would be honored to continue to serve the citizens of the District of Columbia as an Associate Judge.

PREPARED STATEMENT OF JOHN R. FISHER

THANK YOU, MR. CHAIRMAN.

IT IS A GREAT HONOR FOR ME TO BE HERE THIS MORNING, AND I AM GRATEFUL FOR THE OPPORTUNITY. I KNOW HOW BUSY THE COMMITTEE IS AT THIS TIME, AND I THANK YOU AND SENATOR AKAKA FOR TAKING TIME TO CONSIDER MY NOMINATION.

I AM HUMBLED AND VERY GRATEFUL THAT PRESIDENT BUSH HAS NOMINATED ME TO BE AN ASSOCIATE JUDGE OF THE DISTRICT OF COLUMBIA COURT OF APPEALS.

I WANT TO RECOGNIZE AND THANK NEOMI RAO, ASSOCIATE COUNSEL TO THE PRESIDENT, WHO IS HERE THIS MORNING.

I ALSO WANT TO EXPRESS MY SINCERE THANKS TO THE STAFF OF THIS COMMITTEE, AND ESPECIALLY MS. JENNIFER HEMINGWAY, FOR THEIR COURTESY AND GUIDANCE. THIS MAY BE A FAMILIAR PROCESS TO YOU FOLKS, BUT IT IS A ONCE-IN-A-LIFETIME EXPERIENCE FOR ME, AND IT HAS BEEN VERY COMFORTING TO HAVE THEIR GUIDANCE.

AS YOU KNOW, MR. CHAIRMAN, I HAVE DEVOTED MOST OF MY PROFESSIONAL LIFE TO PUBLIC SERVICE. ONE OF THE GREAT PRIVILEGES OF MY CAREER HAS BEEN THE OPPORTUNITY TO LITIGATE SO OFTEN IN THE DISTRICT OF COLUMBIA COURT OF APPEALS.

I WISH MORE PEOPLE UNDERSTOOD HOW TALENTED AND DEDICATED THE JUDGES OF THAT COURT ARE. THIS COMMUNITY IS VERY WELL SERVED BY ITS COURT OF APPEALS, AND IT IS A SPECIAL HONOR FOR ME TO BE NOMINATED TO JOIN THAT COURT.

MR. CHAIRMAN, YOU KNOW ABOUT MY BACKGROUND AND EXPERIENCE.

I ASSURE THIS COMMITTEE THAT, IF YOU CHOOSE TO CONFIRM MY NOMINATION, I WILL WORK VERY HARD TO JUSTIFY YOUR CONFIDENCE IN ME.

I WELCOME YOUR QUESTIONS.

U.S. SENATOR PAUL STRAUSS
DISTRICT OF COLUMBIA (SHADOW)

OFFICE OF THE
United States Senator
FOR THE DISTRICT OF COLUMBIA

1 JUDICIARY SQUARE
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Statement of

Paul Strauss, United States Senator

District of Columbia

Before the Senate Committee on

Homeland Security and Governmental Affairs Committee

On the Nominations of:

Mr. John R. Fisher, as Associate Judge of the District of Columbia Court of Appeals, and the Honorable Juliet JoAnn McKenna, as Judge of the Superior Court of the District of Columbia

Tuesday, September 13, 2005

Dirksen Senate Office Building

Room 342

Chairman Voinovich 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, and I am also a practicing attorney in the District. 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 enthusiastic and wholehearted support of President George W. Bush's nominations to the District of Columbia Court of Appeals and the Superior Court of the District of Columbia, Mr. John R. Fisher and the Honorable Juliet JoAnn McKenna, respectively. I have taken the time to familiarize myself with both nominees, and have spent some time with each of them on an individual basis. As a result of these efforts, I am confident that both nominees are extremely well-qualified candidates and will undoubtedly make excellent additions to the District courts.

I will begin with Mr. John R. Fisher, an accomplished attorney who has spent many years serving the public, particularly in the District of Columbia. When you meet John Fisher, you are immediately struck by his calm and reasonable demeanor. He appears to represent the very ideal of judicial temperament. Had I not known for a fact that this was his first nomination to the Bench, I would have presumed him to be a long standing member of the Judiciary. After earning his A.B. degree from Harvard University in 1968, Mr. Fisher dutifully served his country in South Vietnam and was honorably discharged in 1970. Following his tour of duty, Mr. Fisher continued his education at Harvard and earned his J.D., cum laude, in 1974. Upon his second graduation from Harvard, Mr. Fisher clerked for the Honorable Joseph P. Kinneary, the United States District Judge for the Southern District of Ohio until 1976. Following his clerkship, he served for seven years as an Assistant United States Attorney for the District of Columbia, three years as an Assistant United States Attorney for the Southern District of Ohio, and since 1989, Mr. Fisher has served honorably as both Assistant United States Attorney for the District of Columbia and Chief of the Appellate Division of the office of the United States Attorney for the District of Columbia. Throughout his career, Mr. Fisher has received numerous awards and commendations for both his legal achievements and personal character, including the Army Commendation Medal, the John Marshall Award for Outstanding Legal Achievement for Handling of Appeals, and several Special Achievement Awards from the United States Attorney. In addition to his work for the U.S. Attorneys Office, Mr. Fisher has served on the Legal Ethics Committee for the D.C. Bar and currently serves as Chair on the Advisory Committee on Procedures of the United States Court of Appeals. His familiarity with and understanding of appellate law, coupled with his respect for ethics and justice, makes him an ideal candidate for this post. Mr. Fisher's extensive professional experience in the District and exceptional education have inarguably prepared him for the immense responsibilities of an Associate Judge of the District of Columbia Court of Appeals, and I have full faith that he will serve as a competent and honorable jurist. After such a significant career in service to the Department of Justice, he

deserves this honor, but more importantly, the litigants of the District of Columbia deserve the benefit of his experience.

I would now like to offer my full support for the nomination of the Honorable Juliet JoAnn McKenna, another long-time District resident who has admirably and consistently demonstrated her commitment to the welfare of children, both as a practicing attorney and District of Columbia Family Court Magistrate Judge here in the District of Columbia. She is a graduate of Georgetown University and Yale Law School. Judge McKenna has been an active member of her community for many years, particularly in the matters of family law. Her record of serving the public interest is extensive. From 1996 to 1998, Judge McKenna served in the District of Columbia's Office of Corporation Counsel as an Assistant Corporation Counsel in Abuse and Neglect, and the District's Office of Corporation Counsel. She spent the following three years as the Legal Services Program Director for Lawyers for Children America, a non-profit organization dedicated to assisting neglected and abused children. While serving in this capacity, Judge McKenna was awarded the Arthur Liman Public Interest Fellowship, an honor bestowed upon Yale graduates who demonstrate a commitment to serving the public interest. In 2001, Judge McKenna became the Executive Director of the entire organization, and in that same year, she received the D.C. Bar Association Unsung Hero of the Law Award for her work on behalf of abused and neglected children. The legal experience she accrued from 1996 to 2002 provided her with a commanding comprehension of family law, particularly child welfare, and in April of 2002 she was appointed as one of the first of five D.C. Superior Court Family Court Magistrates. Clearly, Judge McKenna's commitment to the public good and the welfare of children is well established. Her legal experience alone serves as sufficient qualification for Judge of the Superior Court of the District of Columbia, her demonstrated dedication to the welfare of children, and her community significantly augments her standing. Despite her superb intellectual credentials, what I find most compelling about this nominee are her personal credentials, and not merely her Judicial qualifications. On a personal level, I have had the privilege of knowing this outstanding Jurist for the past 9 years. Our daughters attend the same D.C. public elementary school together, and we are both proud residents of the Glover Park community. She is a dedicated and outstanding parent. The fact is she became a parent as a participant in the very Family Court system, she now presides over. This personal experience will endow her with a unique understanding and special ability to appreciate the human factor as she weighs her judicial options. While we expect our Judges to have some experience on both sides of the bench, it is a special opportunity to have one who has known the unique pressures of being an actual litigant in the family court system. Judge McKenna's experience as an adoptive parent, who opened her heart and home to a child in need, will bring a unique and special perspective that will enrich her Judicial experience, and benefit all who appear before her. There is no question that Judge McKenna possesses the requisite criteria to serve the District in this capacity, and certainly the citizens of D.C. deserve to have such an accomplished and dignified judge presiding in the

Superior Court of the District of Columbia. I urge the committee to promptly move on these nominations. Although, these individuals are deserving of all the requisite prestige which accompanies a Presidential nomination and the advise and consent of this esteemed Senate, I look forward to the day when all of us in the District of Columbia will enjoy the even greater dignity of full citizenship. Until that day, since neither I, nor any other District resident can cast a vote in the Senate, I am limited to asking you to cast your votes to confirm Judge's Fisher and McKenna on my behalf. Thank you for the opportunity to present this statement for the record.

BIOGRAPHICAL AND FINANCIAL INFORMATION REQUESTED OF NOMINEES

A. BIOGRAPHICAL INFORMATION

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

   Colleen Duffy Kiko, Colleen Duffy Raap, Colleen Margaret Duffy

2. **Position to which nominated:** General Counsel, Federal Labor Relations Authority

3. **Date of nomination:** June 23, 2005

4. **Address:** (List current place of residence and office addresses.)

   200 Constitution Avenue, N.W., Washington, D.C. 20210 (office)

5. **Date and place of birth:** October 15, 1950, Fargo, North Dakota

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

   Married: Philip George Kiko

7. **Names and ages of children:**

   Jamie Lynn Raap – Age 27
   Sarah Elizabeth Kiko – Age 22

8. **Education:** List secondary and higher education institutions, dates attended, degree received and date degree granted.

   North Dakota State University, 1968-1972, B.S. May 1972
   George Mason University School of Law, 1983-1986, J.D. May 1986

9. **Employment record:** List all jobs held since college, including the title or description of job, name of employer, location of work, and dates of employment. (Please use separate attachment, if necessary.)

   (See Attachment A)

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.

    St. Charles School, Arlington, Virginia, Member of the Board of Regents
    Ronald M. Cohen & Associates, P.C., Arlington, Virginia, Associate Attorney,

Law Offices of Colleen Duffy Kiko, P.C., McLean, Virginia, President
Arlington Knights of Columbus Swim Team, Computer Chair, Board of Directors

12. **Memberships:** List all memberships and offices currently or formerly held in professional, business, fraternal, scholarly, civic, public, charitable and other organizations.

Arlington Diocese Cursillo, Team Member
St. Charles Borromeo Catholic Church, Arlington, Virginia
Virginia State Bar
District of Columbia Bar
Fairfax County Bar Association
Arlington County Bar Association
Kappa Delta Sorority
Phi Delta Phi
American Red Cross, Arlington Chapter, Treasurer
Society of Federal Labor Relations Professionals

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.

None.

(b) List all memberships and offices held in and services rendered to all political parties or election committees during the last 10 years.

Wisconsin Leadership PAC, Board Member
Virginia Republican Party
Arlington County Republican Party
Reagan/Bush Alumni Association
Bush/Quayle Alumni Association
The Federalist Society
Delegate, 8th District Republican Convention, 1994, 1996
Delegate, Virginia Republican Convention, 1994
Security Detail, National Republican Convention, 1996

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

7/30/2000	Bush for President	$100
3/5/2000	Arlington County Republican Committee	$80
1/1/2001	Republican Party of Wisconsin	$750
2/13/2002	National Right to Life	$100
2/13/2002	Republican Party of Virginia	$100
10/25/2002	Eric Hall for Congress	$100
10/11/2004	The Arlington GOP	$200

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

Outstanding Performance Award and Special Achievement Award – 1976
Special Achievement Award – 1978
Quality Step Increase – 1979
Exceptional Performance Rating - 1981

15. **Published writings:** List the titles, publishers, and dates of books, articles, reports, or other published materials which you have written.

None

16. **Speeches:** Provide the Committee with four 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.

None

17. **Selection:**

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

I do not specifically know why I was chosen for this nomination by the President but I can certainly assume that it was based on my education, my experience and my qualifications that make me particularly qualified for this position.

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

I believe there are several areas of my background and employment experience that affirmatively qualify me for this particular appointment.

First, I have past experience working in the Federal Labor Relations Authority. From August 1976 to January of 1979 I worked in the Department of Labor, Labor Management Services Administration, investigating unfair labor complaints, handling hearings on representation disputes, overseeing federal union elections, and conducting training of both management and unions on the Federal labor relations program This function was transferred to the newly created Federal Labor Relations Authority on January 1, 1979, where I worked until I resigned the Federal government to attend law school in 1983.

Second, my law degree, obtained in 1986, provides me the appropriate educational requirements for the General Counsel position

Third, my private law practice as well as my time at the U.S. Attorney's Office has prepared me for the prosecutorial role the General Counsel has in the federal labor relations arena.

Fourth, my current position as an Employee's Compensation Appeals Judge in the Department of Labor has provided me, for the past two and a half years, with an opportunity to assist with the management of a staff of approximately 50 attorneys, paralegals and legal clerks. This provides me experience from which to draw in the management of the staff of the Office of the General Counsel.

B. FUTURE EMPLOYMENT RELATIONSHIPS

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

   Yes.

2. 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.

3. 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?

   No.

4. Has anybody made a commitment to employ your services in any capacity after you leave government service?

   No.

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

   Yes.

C. POTENTIAL CONFLICTS OF INTEREST

1. 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.

   There are none.

2. 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 and execution of law or public policy other than while in a federal government capacity.

   None.

3. 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

1. 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, professional association, disciplinary committee, or other professional group? If so, provide details.

   No.

2. To your knowledge, 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.

3. 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.

4. Please advise the Committee of any additional information, favorable or unfavorable, which you feel should be considered in connection with your nomination.

   I graduated from law school in 1986 with two young children and one on the way. I stayed in the work force as an attorney until 1989 when my family responsibilities of raising three children and later a fourth took priority. I stayed home with my four children until opening my law firm in 1996 when my youngest son started Kindergarten. While I was home with the children, I began serving as the finance officer for their school, St. Charles Catholic School. Although this was considered a full-time job, I mainly worked on nights and weekends. I also worked in a similar capacity on a part-time basis for our church, St. Charles Borromeo Catholic Church. I returned to the legal profession, in both my law firm and in the firm of Ronald M. Cohen & Associates, in a part-time capacity. In 2002, I returned to full-time employment when I was appointed to my current position in the Department of Labor. Many labor relations issues are affected by the struggle of balancing family and work. My career as a mother and attorney has made me particularly sensitive to the needs of working parents and families and the stresses of trying to keep both family and work a priority.

AFFIDAVIT

Colleen Duffy Kiko 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.

Subscribed and sworn before me this 5th day of July, 2005

Nancy A. Sundstrom
Notary Public

NANCY A. SUNDSTROM
NOTARY PUBLIC DISTRICT OF COLUMBIA
My Commission Expires March 14, 2010

COLLEEN DUFFY KIKO

EDUCATION

George Mason University School of Law – Juris Doctor May 1986
Member, Virginia Bar
Associate Member, District of Columbia Bar
North Dakota State University – Bachelor of Science, May 1972

EMPLOYMENT

Employees' Compensation Appeals Board Feb. 2002 to Present
Department of Labor
Washington, D.C.

- Serve as Member of the Board;
- Appointed by Secretary of Labor Elaine Chao;
- Responsible for rendering, in a 3-Member Panel, the final decision in appeals of federal workers' compensation cases after staff of 24 attorneys submit draft decisions for review;
- Assist the Chairman in administrative management of the 50 employee legal and clerical staff of the Board;
- Preside over oral arguments presented by the appellant or appellant's representative and the Office of the Solicitor representing the Office of Workers' Compensation Programs;
- Serve as ECAB representative on major IT initiative including all 5 adjudicatory bodies in the Department of Labor to provide more citizen-centric resources and to consolidate and integrate the many stovepipe systems in legal entities in Department.

Ronald M. Cohen & Associates, P.C. Nov. 1999 to Feb. 2002
Arlington, Virginia

- Served as Associate in this general practice law firm;
- Responsible mainly for the firm's criminal defense and domestic relations matters;
- Handled other general legal matters as necessary, such as civil litigation, personal injury matters, wills and estate planning, probate, real estate settlements;
- Practice included all the courts in the jurisdictions of Arlington County, Alexandria City, Fairfax County, Prince William County, Loudoun County and the United States District Court, Eastern District of Virginia;
- Served as court-appointed counsel to the United States District Court.
- Served as Outside Counsel to the Division of Child Support Enforcement, Office of the Attorney General, Commonwealth of Virginia.

Law Offices of Colleen Duffy Kiko, P.C. Sept. 1996 – Nov. 1999
McLean, Virginia

- Started General Law Practice;
- Handled matters in criminal law, family law, estate planning, personal injury, creditor's rights, employment, and a variety of other matters;
- Appeared before the State of Virginia Juvenile and Domestic Relations Courts, General District Courts and Circuit Courts in Arlington, Alexandria, Fairfax, Loudoun and Prince William Counties, the United States District Court in the Eastern District of Virginia and the Superior Court in the District of Columbia;
- Served as court-appointed counsel in Arlington County, Fairfax County and the United States District Court in the Eastern District of Virginia.

Legal Counsel/Finance Officer August 1991- Present
St. Charles School/St. Charles Church
Arlington, Virginia

- Serve as legal advisor to St. Charles School;
- Handle all financial matters for St. Charles School, including payroll, accounts payables and receivables;
- Prepare budget for each school year, obtain audit, prepare yearly proposal for Combined Federal Campaign;
- Report to the governing Board of Regents and the Parish Finance Committee on a regular basis;
- From March 1995 through September 1996, served temporarily in the same position for St. Charles Church.

Associate Counsel March 1989-Nov. 1989
Committee on the Judiciary
Subcommittee on Civil and Constitutional Rights
U.S. House of Representatives

- Provided legal, legislative and policy advice to Members of Congress on matters before the Committee, including constitutional amendments, law enforcement, civil rights, and government oversight;
- Assisted and advised the Floor Manager, House leadership and Committee Members during debate on the House floor and during House and Senate Conferences;
- Acted as Committee Member liaison to various special interest organizations and to the press;
- Developed, organized and coordinated hearings, cross-examined witnesses during hearings and drafted language for the reports on legislation passed by the Committee;
- Worked closely with the House Managers prosecuting impeachment charges against several Federal judges.

Special Assistant United States Attorney Sept. 1988 – Mar. 1989
United State Attorney's Office
Alexandria, Virginia

- Served on detail to this office for six months while still employed by the Department of Justice (below);
- Served as prosecutor for all types of misdemeanors in the U.S. Magistrate Court;
- Prosecuted felony cases in the United States District Court;
- Prepared and presented appeals to the United States District Court and the 4th Circuit;
- Responded to and argued various motions and engaged in extensive plea negotiations.

Attorney/Advisor Dec. 1986 - Mar.1989
Department of Justice
Civil Rights Division

- Enforced the public accommodations provisions of the Civil Rights Act of 1964, the Fair Housing provisions of the Civil Rights Act of 1968, and the Equal Credit Opportunity Act;
- Investigated allegations of discrimination nation-wide, researched substantive law, prepared legal memorandum, drafted complaints and motions for filing in Federal court;
- Engaged in extensive discovery, including taking and defending depositions nation-wide, and negotiated settlements;
- Attended Attorney General's Advocacy Institute.

Law Clerk Nov. 1985 – Feb. 1986
Fairfax County Attorney's Office
Fairfax, Virginia

- Held this position during Law School;
- Assisted in the defense of Title VII Employment Discrimination suits;
- Involved primarily in research and drafting legal memoranda.

Labor Relations Specialist Feb. 1976 – Aug. 1983
Federal Labor Relations Authority
Washington, D.C.

- Involved in all aspects as a neutral case worker in the Federal labor relations program at both headquarters and the regional level.
- At the regional level, investigated representation, unfair labor practices, grievability and arbitrability matters, monitored and supervised union elections in federal agencies, presided over formal hearings, including the massive reorganization of several agencies into the Department of Energy, and conducted training seminars on the Federal sector labor relations program;
- At the headquarters level, reviewed briefs of the parties, drafted and presented justification to the Federal Labor Relations Authority for the final administrative

decisions on matters relating to negotiability determinations, unfair labor practice appeals, and representation disputes.

- Served in a supervisory capacity in the in the Office of Operations and Technical Assistance at the headquarters level. Responsible for ensuring compliance with rules of the Authority, ruled on interlocutory motions before the Authority, including those raised during the PATCO decertification proceedings. Researched, wrote and prepared for publication a "Guide to the Federal Service Labor Management Relations Statute."

Labor/Employee Relations Specialist Oct. 1973 – Feb. 1976
U.S. Customs Service
Washington, D.C.

- Analyzed and evaluated the labor and employee relations programs throughout Customs;
- Provided staff advice to 10 regional offices;
- Prepared and interpreted substantive and procedural guidelines for national use.

Clerk-Typist Mar. 1973 - Oct.1973
Office of the Secretary
Division of Personnel
U.S. Department of Treasury

- Performed general clerical duties and assisted with screening applicants for employment in the 12 operating personnel offices in the Department;
- Helped with the clerical aspect of the summer intern program;
- Prepared background material for security clearances;
- Assisted with processing appointments for consultants.

French Teacher Sep. 1972 – Feb. 1973
Souris Valley School
Wawanesa, Manitoba

- Taught French to Grades 7,8,9 and 10.
- Taught Social Studies to Grade 6
- Coach of the Junior Volleyball Team and Cheerleaders

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

June 28, 2005

The Honorable Susan M. Collins
Chair
Committee on Homeland Security and
Governmental Affairs
United States Senate
Washington, DC 20510-6250

Dear Madam Chair:

In accordance with the Ethics in Government Act of 1978, I enclose a copy of the financial disclosure report filed by Colleen D. Kiko, who has been nominated by President Bush for the position of General Counsel, Federal Labor Relations Authority.

We have reviewed the report and have also obtained advice from the Federal Labor Relations Authority concerning any possible conflict in light of its functions and the nominee's proposed duties.

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

Sincerely,

Marilyn L. Glynn
Acting Director

Enclosure

U.S. Senate Committee on Homeland Security and Governmental Affairs
Pre-hearing Questionnaire for Colleen Duffy Kiko
to be General Counsel
Federal Labor Relations Authority

I. Nomination Process and Conflicts of Interest

1) Why do you believe the President nominated you to serve as General Counsel for the Federal Labor Relations Authority (FLRA)?

I do not specifically know why I was chosen for this nomination by the President but I would assume that it was based on my education, my experience and my qualifications that are appropriate to this position.

2) Were any conditions, expressed or implied, attached to your nomination? If so, please explain.

No.

3) What specific background and experience affirmatively qualify you to be General Counsel for the FLRA?

I believe that my experience working at the FLRA early in my career is a tremendous advantage to my role as General Counsel in terms of understanding the agency as a whole. My years in the private practice of law in a small firm, representing clients, has given me perspective on advocating on behalf of my clients and the need to respond effectively to their needs. Lastly, as an Employees' Compensation Appeals Judge, I have had the benefit of independent decision making, listening to both sides objectively and rendering a fair decision. Exercising such judicial temperament, I believe, prepares me well for the job of General Counsel.

4) Have you made any commitments with respect to the policies and principles you will attempt to implement as General Counsel? If so, what are they and to whom have the commitments been made?

No.

II. Role and Responsibilities of the General Counsel for the FLRA

5) What is your view of the role of the Office of the General Counsel?

The principal role of the General Counsel, as spelled out in 5 U.S.C. § 7104(f), is to investigate and, where warranted, prosecute charges of unfair labor practices. In so doing, the General Counsel is to ensure that the rights and obligations of employees, unions, and agencies are fairly enforced.

6) In your view, what are the major challenges facing the Office of the General Counsel? How will you as General Counsel address these challenges and what will be your top priorities?

The major challenge facing the Office of the General Counsel is to efficiently utilize its resources to apply and enforce Chapter 71 in a balanced and neutral manner. As General Counsel, I will fulfill my statutory duties to ensure that this challenge is met.

7) Do you think that any organizational changes should be made in the General Counsel's Office? Do you think any changes should be made in the manner in which cases are handled? If so, what are they?

It would be premature at this point for me to comment on whether there should be organizational or case-handling changes until I have had the opportunity to assess the operations of the Office of General Counsel first hand. If confirmed, I would examine all phases of operations and, where appropriate, pursue organizational or case-handling changes.

8) Do you believe that any changes should be made in any substantive guidance, policies, or procedures of the General Counsel's Office, or do you believe that any new guidance, policies, or procedures should be issued? If so, please describe them.

Again, it would be premature to suggest changes at this time. I intend to examine all guidance published on the agency's website, as well as the case-handling manuals published by the Office of the General Counsel, to ensure that it is current and consistent with present statutes, court decisions, etc.

9) How do you plan to communicate to the Office of the General Counsel staff on matters of relevance to them?

I will communicate with staff throughout the Office of General Counsel in person and/or through electronic means, such as telephone, e-mail and, if available, teleconferencing.

10) Describe your philosophy regarding enforcement of the labor provisions contained in Chapter 71 of title 5, United States Code.

My philosophy will be to enforce the provisions of the Chapter 71 as Congress has provided, respecting the rights of employees, agencies, and unions.

11) FLRA's fiscal year 2004 Performance and Accountability Report outlines a number of performance goals, including ensuring that no more than 15 percent of Unfair Labor Practice (ULP) cases pending are more than 90 days old without the issuance of a complaint, or without the dismissal, withdrawal, or settlement of the charge. What is your assessment of how well FLRA is meeting each of these goals? How would you ensure that cases are investigated and resolved in a timely manner?

I was not involved in establishing these goals and for that reason do not believe it would be appropriate, at this point, to render an opinion on how well the Office of the General Counsel is performing with respect to its goals. I will make timely processing and resolution of cases a top priority.

12) The Office of General Counsel provides training for union and management representatives on their rights and responsibilities and how to avoid litigation. What is your opinion of the current program, and, if confirmed, what changes, if any, would you make?

I support training initiatives; however, I have no first-hand experience with the current training policies in use within the Office of General Counsel. If confirmed, I will assess the current training policies and practices and determine whether changes need to be made.

13) The General Counsel of the FLRA has prosecutorial discretion in determining whether to prosecute charges of unfair labor practices and operates, to a large extent, without supervision. The decision not to pursue a charge of an unfair labor practice may leave the possible injured party without legal recourse. Given this great responsibility, what factors would you consider in deciding whether to pursue charges of unfair labor practices?

The Office of General Counsel has published criteria in its ULP Casehandling Manual, Part 4, Chapter F (available on the FLRA website), for the exercise of prosecutorial discretion. These criteria include, but are not limited to, the seriousness of the violation, whether the violation is an isolated one, whether the violation has been cured, or whether circumstances are such as to preclude an effective remedy. As an outsider, I view these criteria as a reasonable basis for the exercise of prosecutorial discretion. However, as with all policies of the Office of the General Counsel, upon assumption of the position, I will evaluate this policy to ensure that it continues to be appropriate and effective.

14) In the biographical information that you provided to this Committee, you stated that your private law practice and your time at the U.S. Attorney's Office prepared you for the prosecutorial role that the General Counsel has in the federal labor relations arena. Please elaborate on this. Among other things, did any of your legal work involve issues relating to the Federal Sector Labor-Management Relations statute, the National Labor Relations Act, or other aspects of employment law? Did you represent unions or employees; did

you represent employers; did you represent plaintiffs? Please describe the nature and extent of your experience as a prosecutor.

My work as a private attorney, as well as my time at the U.S. Attorney's Office, afforded me opportunities to hone my ability to evaluate evidence, prepare witnesses, and prepare and present arguments before a tribunal. In the prosecution of unfair labor practices, the same legal skills are required. My work in those capacities did not involve the Federal Sector Labor Management Relations statute nor the National Labor Relations Act. In my private practice of law, I represented several clients who had been terminated from employment. My experience as a Special Assistant U. S. Attorney involved the prosecution of misdemeanors and traffic violations occurring on Federal property as well as a felony prosecution for drug possession.

15) In the biographical information that you provided to this Committee, you also stated that your current position as an Employee's Compensation Appeals Judge has provided you with an opportunity to assist with the management of a staff of approximately 50 attorneys, paralegals, and legal clerks. Please elaborate on this. Among other things, how many employees are under your supervision? What is your role in the management of employees who are not under your supervision?

As an Employees' Compensation Appeals Judge, I do not personally supervise any employees. I am, however, involved in an advisory capacity to the Chief Judge of the Board as he manages the staff of approximately 50 employees.

III. Policy Questions

Labor-Management Relations

16) Are there any statutory or regulatory standards, policies, or procedures related to the FLRA and its responsibilities which you feel should be modified? Please explain.

At this point, I am not prepared to identify specific standards, procedures, or policies in need of revision; however, all such matters are appropriate for continuing review and, where appropriate, modification.

17) What is your assessment of the current state of labor-management relations in the federal government?

I view the current state of Federal sector labor-management relations in connection with the Department of Homeland Security (DHS) and the Department of Defense (DoD) as one of transition, as a result of legislation regarding those agencies. The effect of this transition on the state of labor-management relations government-wide, remains to be seen. To the extent that the transition in DHS and DOD is encouraging communication between parties, I believe that is positive.

18) In certain labor-management relationships, there is a perception that some may abuse their rights by filing frivolous ULP complaints. Do you share this perception? If so, do you have a sense of the extent to which this may be occurring and how such situations and complaints should be dealt with?

I have no current basis upon which to render a judgment on this matter. I will, however, ensure that all ULP charges are taken seriously and investigated to the extent necessary to ascertain their merits. Where investigations reveal charges to be clearly without merit, such charges should be promptly dismissed.

19) The Federal Sector Labor-Management Relations statute states a Congressional finding that statutory protection of the right of employees to organize and bargain collectively contributes to the effective conduct of public business. (5 U.S.C. § 7101(a)).

a. To what extent, and under what circumstances, do you believe that collective bargaining at federal agencies contributes to the effective conduct of public business?

Congress has found that collective bargaining over certain matters affecting employees contributes to the effective conduct of public business and facilitates the amicable resolution of workplace disputes. I believe that is an appropriate guide to follow in carrying out statutory responsibilities.

b. To what extent, and under what circumstances, do you believe that the right of federal employees to bargain collectively is, or could be, detrimental to the ability of agencies to fulfill their missions?

In my view, the collective bargaining rights of federal employees should not interfere with an agency's ability to fulfill its statutory mission. Chapter 71 recognizes this principle, noting in § 7101(b) that the provisions of the chapter "should be interpreted in a manner consistent with the requirement of an effective and efficient Government." I believe that it is important that an appropriate balance exist between the benefits of collective bargaining and the need for serving the taxpayer through an effective and efficient government.

20) After the General Counsel issues a complaint alleging that an agency or labor organization engaged in an unfair labor practice, the FLRA may seek injunctive relief, under 5 U.S.C. § 7123(d).

a. Under what circumstances do you believe it is appropriate to seek such injunctive relief?

Under the current policy of the Office of General Counsel, *see* Case Handling Manual Part 2, Chapter E (available on the FLRA website), injunctive relief is appropriate only in extraordinary circumstances, where the *status quo* must be maintained. I view this to be a reasonable basis for the exercise of injunctive relief. For example, the Office of the

General Counsel has previously successfully petitioned for injunctive relief in cases involving an illegal strike by a labor organization, *United States v. PATCO*, 524 F.Supp. 160 (D.D.C. 1981); and in a case involving the unilateral termination of on-base housing where other suitable housing was not available, *Petrucci v. United States Southern Command, Department of Defense, Republic of Panama*, No. 94-3786 (E.D. La. Nov. 29, 1994).

b. Do you agree with the factors currently set forth in the Office of General Counsel Case Handling Manual (e.g., Part 2, Chapter E, Injunctions)? Do you believe changes should be made to these stated factors?

These factors, including the seriousness of the violation, the likelihood of success on the merits, and the absence of a meaningful post-litigation remedy appear to be reasonable. As noted earlier, however, I will evaluate this and other policies, in order to assess their continued efficacy.

c. Do you believe it is appropriate for the FLRA to seek injunctive relief under the same criteria as, or different criteria from, those under which the NLRB has traditionally sought injunctive relief in the context of the private sector under 29 U.S.C. § 160(j)?

The general requirements noted in the NLRB's Casehandling Manual, Part 1, § 10310.2, that injunctive relief is appropriate only where there is a sufficient showing that a ULP has occurred and that the effects of the ULP cannot be remedied without interim relief, appear similar to the federal standard but without further research into how the standard has been applied over the past decades, it is difficult to determine whether it would be an appropriate standard for the federal sector. Chapter 71 recognizes the difference between the private sector and government operations. Title 5, section 7123(d) specifically provides that a court shall not grant temporary relief if it would interfere with the ability of the agency to carry out its essential functions. I believe that to be an appropriate standard for the federal sector.

21) The Office of Management and Budget recently released a draft bill entitled the "Working for America Act," which, if enacted, would make several changes to the Federal Service Labor-Management Relations statute, including the following:

a. Section 401(1)(A) of the draft bill would change the definition of a "grievance," by amending 5 U.S.C. § 7103(a)(9)(C)(ii) to read: "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation *issued for the purpose of* affecting conditions of employment, *including determinations regarding an employee's pay, except the exercise of managerial discretion of judgment in such determinations*." (New language shown in italics.)

b. Section 401(2)(A) of the draft bill would change the current process for resolving bargaining disputes by requiring the Chairman of the FLRA to ". . . establish a single, integrated process to resolve all matters associated with a bargaining dispute." Among other things, the Chairman would be granted the power "to

direct the General Counsel, the Federal Services Impasses Panel, or both, to submit a matter before them to the Authority for appropriate action or to take whatever action is appropriate pursuant to the procedures the Chairman establishes under this paragraph."

c. Section 401(2)(A) of the draft bill would allow the Chairman of the FLRA, "in his or her sole discretion," to call a meeting of the Authority without regard to 5 U.S.C. § 552b (the Government in the Sunshine Act).

d. Section 401(2)(B) of the draft bill would allow the Chairman of the FLRA to appoint an Executive Director, regional directors, administrative law judges, and other individuals as he or she may find necessary, and to delegate authority to them. Current law authorizes the Authority collectively to appoint those officers and to delegate authority to them.

e. Section 401(2)(E) of the draft bill would prohibit the FLRA from imposing *status quo ante* remedies, "where such remedies would adversely impact the agency's or activity's mission or budget, or the public interest."

f. Sections 401(1)(B) and 401(3) of the draft bill would change management rights with respect to emergencies. In addition to having the right to take whatever actions may be necessary to carry out the agency mission during emergencies, the bill would authorize management to take whatever actions may be necessary "to prepare for, practice for, or prevent any emergency." Moreover, the term "emergency" is defined to mean "an actual or potential situation requiring immediate action to carry out critical or essential agency functions, including, but not limited to, any situation involving or potentially involving - (A) an adverse effect on agency resources; (B) an increase in agency workload due to unforeseeable events; (C) changed mission requirements imposed on the agency by external authorities; or (D) any budgetary exigency caused in whole or in part by authorities external to the agency."

g. Section 401(5) of the draft bill would alter the duty to bargain by adding the following limitation: "The obligation of any agency or any labor organization to bargain or consult extends to any otherwise negotiable subject only if the effect of the change on the bargaining unit, or that portion of the bargaining unit affected by the change, is foreseeable, substantial, and significant in terms of impact and duration."

For each of the bill provisions identified above - (1) What would be the effect, if any, on the operations, authority, and independence of the Office of General Counsel? (2) What do you believe would be the effect on agencies and their ability to fulfill their missions, on employees and their ability to assert their interests, on the FLRA and its operations, and on the nature of labor relations within the government? (3) Generally, what is your opinion of the proposed provision, and do you believe it is necessary and desirable? (4)

With respect to the bill provision identified in paragraph h. of this question, how would you interpret the meaning of the terms "foreseeable," "substantial," and "significant"?

At this stage, it is difficult to speculate what the overall effect of the listed provisions will be on agencies, employees, the FLRA and the nature of labor relations within the Government. The potential impact will likely become clearer as the bill is considered and the views of the various stakeholders are expressed. Nonetheless, I will attempt to respond to the questions to the best of my ability.

a.) Section 401(1)(A)

(1) The provision as presented in this context does not appear to have an impact on the operations, authority, and independence of the Office of General Counsel.

(2) To the extent that this provision may or may not change substantive aspects of Federal labor law, my role as General Counsel would be to apply and enforce the substantive provisions of Chapter 71 as established or revised by the Congress.

(3) This provision, restricting grievances to violations of law rule, or regulation issued for the purpose of affecting conditions of employment, appears to be a codification of a case decided by the United States Court of Appeals for the District of Columbia Circuit. *United States Dep't of the Treasury, United States Customs Serv. v. FLRA*, 43 F.3d 682 (D.C. Cir. 1994). I have no basis for determining whether this provision is necessary or desirable. As General Counsel, it would be my duty to uphold and enforce the law enacted by Congress in a balanced and neutral manner and to ensure the Office of General Counsel, as an organization, carries out its duties consistent with the provisions of Chapter 71.

b.) Section 401(2)(A)

(1) The provision as presented in this context may impact the operations of the Office of General Counsel in terms of providing opportunities for evaluating and perhaps streamlining the processing of cases agency-wide. The Office of General Counsel is but one component of the FLRA, which also includes the Office of Administrative Law Judges, the Authority, and the Federal Service Impasses Panel. Although ULP cases do arise in the Office of General Counsel, a particular case does not necessarily end there. The same case may route through one or more of the other FLRA components during the life of the case. This provision, as presented, appears to be geared to improving customer service government-wide by seeking to address efficiencies in case-processing. I do not view this provision as significantly impacting the responsibility that I, as General Counsel, would have to apply and enforce the substantive provisions of Chapter 71.

(2) To the extent that this provision may or may not change substantive aspects of Federal labor law, my role as General Counsel would be to apply and enforce the substantive provisions of Chapter 71 as established or revised by Congress.

(3) As General Counsel, it would be my duty to uphold and enforce the law enacted by Congress in a balanced and neutral manner and to ensure the Office of General Counsel, as an organization, carries out its duties consistent with the provisions of Chapter 71.

c./d.) Section 401(2)(A)
Section 401(2)(B)
The provisions as presented in this context, regarding meetings of the Authority and the Chairman's appointing authority, do not directly affect the responsibility of the Office of the General Counsel to apply and enforce the substantive provisions of Chapter 71.

e.) Section 401(2)(E)
This provision, as I understand it, would prohibit the FLRA from imposing *status quo ante* remedies if such remedies would adversely impact the public interest or an agency's mission or budget. I do not at this time have any basis upon which to state whether this provision is necessary or desirable.

f.) Section 401(1)(B) and 401(3)
As I understand these provisions, in the context presented, Section 401(1)(B) defines the term emergency and § 401(3) extends management's right as necessary "to prepare for, practice for or prevent" any emergency.
(1) & (2) The impact of these two provisions is unclear at this point. Currently "emergency" is undefined in Chapter 71.
(3) I am not in a position at this time to state whether this provision is necessary or desirable. As General Counsel, it would be my duty to uphold and enforce the law enacted by Congress in a balanced and neutral manner and to ensure the Office of General Counsel, as an organization, carries out its duties consistent with the provisions of Chapter 71.

g.) Section 401(5)
(1) & (2) As I understand this provision, in the context presented, the effect of §401(5), which limits the bargaining obligation to matters that are "foreseeable, substantial, and significant," is unclear. Under current law, the obligation to bargain exists whenever a change has "more than a *de minimis* effect on conditions of employment." *Soc. Sec. Admin., Office of Hearings and Appeals, Charleston, S.C.*, 59 F.L.R.A. 646 (2004).
(3) I am not in a position to state whether this provision is necessary or desirable. As General Counsel, it would be my duty to uphold and enforce the law enacted by Congress in a balanced and neutral manner and to ensure the Office of General Counsel, as an organization, carries out its duties consistent with the provisions of Chapter 71.
4) As General Counsel, I would attempt to interpret the terms "foreseeable," "substantial," and "significant" in a manner consistent with Congressional intent and illuminating decisions rendered by the Authority and the Courts. In the absence of Congressional debate and consideration of this proposed legislation, as well as decisions of the Authority interpreting this provision, it would be premature for me to speculate on how these terms should or would be interpreted and applied.

Alternative Dispute Resolution

22) There has been increased use of alternative dispute resolution (ADR) to deal with disputes in the federal workplace, including those arising under the Federal Service Labor-Management Relations Statute. Some have pointed to the success of ADR in bringing about interest-based resolutions while reducing the adversarial nature of the process and improving relations between labor and management. Others have said that although ADR is a useful tool, an emphasis on the use of ADR could create undue pressures on the parties to reach settlements. What are your views on the use of ADR to resolve federal workplace disputes? Is there a role for the Office of the General Counsel in this regard and, if so, what should that role be?

I believe that Alternative Dispute Resolution (ADR) services can be a useful tool or technique for dispute resolution as the parties are able to craft their own resolution of a dispute rather than having one imposed upon them. Since Congress created the Federal Mediation and Conciliation Service (FMCS) nearly 60 years ago, I believe it has been the perspective of Congress that techniques such as mediation and other methods short of litigation are useful for promoting productive labor-management relations. In the early 1990's, Congress passed the *Alternative Dispute Resolution Act* which requires Federal agencies to incorporate ADR when appropriate. I believe that ADR techniques can be used successfully in resolving federal workplace disputes. In terms of the role for the Office of the General Counsel, I believe that ADR is a tool to facilitate dispute resolution, along with other tools and techniques and in relation to the services provided by other agencies (such as FMCS). Reviewing and monitoring the effective use of ADR would be included in my oversight role as General Counsel, to ensure timely resolution of cases for our customers, both labor and management.

23) While ADR techniques can be helpful, in some situations, to resolving conflicts, what, in your view, can be done to help prevent disputes from arising in the first place and promote collaborative labor-management working relationships? Is there a role for the Office of the General Counsel in this regard and, if so, what should that role be?

The ultimate responsibility for a productive and collaborative labor-management relationship rests with the parties. It is my understanding that the FLRA provides training to the parties to ensure they understand their rights and obligations and that Office of General Counsel staff do participate in providing training, as do attorneys from other FLRA components. As the General Counsel, I would support training initiatives.

Personnel Systems at the Departments of Homeland Security and Defense

24) The Departments of Homeland Security (DHS) and Defense (DOD) are in the midst of developing and implementing changes to their personnel systems. What are your views about the changes as they affect labor-management relations? What are the implications for the Office of General Counsel in terms of workload and its leadership role in federal labor-management relations?

It remains to be seen precisely how the DHS and DOD regulations may affect labor relations in those agencies until the regulations are in effect and the parties are operating under the new system. As General Counsel, I would expect to monitor workload once the DHS and DoD regulations are in effect and to offer my input alongside other FLRA program components in connection with meeting the agency's statutory mission and strategic plan goals.

25) Both the final DHS and the proposed DOD personnel regulations create labor relations panels appointed by the respective Secretary. The regulations provide that FLRA may review the decisions of these internal boards, but must defer to the internal labor relations panels' findings of fact and law unless the requesting party shows the panel's decision was: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) based on error in applying the board's procedures; or (3) unsupported by substantial evidence.

a) Do you view these changes as an impediment to FLRA's authority to independently review these labor relations disputes? Please explain.

As the FLRA General Counsel, I would have no direct role in the FLRA's review of the decisions of the DHS or DOD labor boards. It is my understanding that review of the DHS or DOD labor board decisions would be under the jurisdiction of the three-Member Authority. In accordance with Chapter 71, I would defer to the Authority's decision(s) concerning whether these or other regulations create impediments to the FLRA's statutory responsibilities.

b) What role would you anticipate playing with respect to the new systems for labor management at DHS and DOD?

As I understand the final DHS regulations (70 Fed. Reg. 5,272) and the proposed DOD regulations (70 Fed. Reg. 7,552), there are some powers and duties ascribed to the FLRA Authority (the three members, 5 U.S.C. § 7104(a)). The regulations, as I understand them, are silent with respect to the General Counsel.

c) Do you support the DHS and DOD labor relations regulatory provisions, and do you believe that model should be extended government-wide, despite the diminished role for FLRA?

I have great respect for the legislative process and the separation of powers. The Congress has determined that DHS and DOD may establish their own agency-specific labor relations systems. Once these systems have been implemented, I will, consistent with my Chapter 71 responsibilities, execute the provisions of the DHS and DOD regulations, as appropriate. Should Congress choose to extend the DHS and DOD authority to other Federal agencies, I will, consistent with my Chapter 71 responsibilities, execute the provisions of those regulatory schemes.

26) Under the final DHS and the proposed DOD personnel regulations, the new internal labor-relations boards would be assigned many of the responsibilities of the FLRA, including the handling of unfair labor practice charges related to bargaining. However, these regulations do not appear to provide for the establishment of a neutral and independent investigative and prosecuting authority such as the FLRA General Counsel. Would you recommend creating such an entity at DHS and DOD? Please explain.

Congress has made the determination to permit the Secretaries of DHS and DOD, in conjunction with the Director of OPM, to establish their own labor-relations systems. It will be up to the particular entities to determine the procedures for handling their program.

27) The final DHS and the proposed DOD personnel regulations provide that, when management issues directives, matters addressed in those directives are no longer allowed to be the subject of collective bargaining. At DHS such directives must be department-wide, and at DOD such directives may extend to the entire department or to any component of the department. The DHS and DOD regulations also expand the scope of "management rights" that managers can exercise without being required to bargain.

a. What do you believe would be the effect of these regulations on the nature and extent of employees' right to bargain collectively and to participate through labor organizations in decisions that affect them?

The actual effect of these provisions can only be ascertained with certainty after the respective systems have gone on-line and the parties have operated under the systems for a period of time. The administration of labor-management relations is, at the end of the day, a function of the relationship among the parties.

b. If one party to a negotiation can take any subject off the table at will, to what extent do you believe collective bargaining can achieve its intended purpose of encouraging and facilitating the amicable and productive resolution of workplace issues?

As I understand Chapter 71, which has been in effect now for more than 25 years, the Statute has long limited the scope of bargaining and has excluded some agencies from the provisions altogether. For example, an agency may choose to bargain or not on various matters set out in 5 U.S.C. § 7106 (b). Therefore, as I read the authorities granted with respect to the scope of collective bargaining in the DHS and DOD systems, they are changes of degree rather than something totally new and previously unknown to Federal sector collective bargaining. The actual effect that these regulatory provisions will have on collective bargaining rights remains to be seen.

c. Do you believe that the DHS and DOD regulations on collective bargaining are desirable? Are there any changes to those regulations that you believe would be preferable?

Congress has instructed DHS and DOD to develop a labor relations program appropriate for each agency's respective and specific mission. As such, these agencies are in the best position to make the necessary determinations concerning regulations on collective bargaining and the implementation of such regulations. As the FLRA General Counsel, my role would be to execute whatever, if any, provisions that are consistent with law, and my duties under Chapter 71.

28) In January 2003, the Administrator of the Transportation Security Administration (TSA) issued an order prohibiting federal baggage and passenger screeners from engaging in collective bargaining. The Administrator issued a statement explaining that "mandatory collective bargaining is not compatible with the flexibility required to wage the war against terrorism." The Administrator's statement further explained: "Fighting terrorism demands a flexible workforce that can rapidly respond to threats," and: "That can mean changes in work assignments and other conditions of employment that are not compatible with the duty to bargain with labor unions." This January 2003 order remains in effect. Do you believe that the need for a flexible workforce that can rapidly respond to threats can be compatible with the duty to bargain with labor unions? Please explain.

As FLRA General Counsel, I would be responsible for enforcing the law under Chapter 71. The Authority has recognized that Congress conferred upon the head of TSA the authority to determine whether collective bargaining is appropriate for the agency's employees. *United States Dep't of Homeland Sec., Border and Transportation Sec. Directorate, Transportation Sec. Admin.*, 59 F.L.R.A. 423 (2003). It remains the role of Congress to determine whether, and to what extent, federal employees should have the right to organize for collective bargaining.

Collaboration with other agencies

29) Describe your vision of what the relationship should be between FLRA and other agencies with government-wide civil service responsibilities, including the Office of Personnel Management, the Equal Employment Opportunity Commission, the Merit Systems Protection Board, and the Office of Special Counsel. In your view, do the current relationships between the FLRA and these agencies reflect your vision? If not, what would you seek to do to change the current relationships?

As the FLRA General Counsel, I would endeavor to establish or to maintain effective, professional relationships with these agencies, recognizing, however, that these agencies may appear as parties in cases before the Authority.

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?

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?

Yes.

V. Assistance

32) Are these answers your own? Have you consulted with the FLRA or any interested parties? If so, please indicate which entities.

Each answer is my own; however, I have consulted with FLRA staff to obtain helpful information of a background nature.

AFFIDAVIT

I, Colleen Duffy Kiko, 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.

Colleen Duffy Kiko

Subscribed and sworn before me this 19th day of August, 2005.

Margo Terrell
Notary Public

SWORN TO BEFORE ME AND SUBSCRIBED IN MY PRESENCE
THIS 19th DAY OF August 2005, IN THE
DISTRICT OF COLUMBIA
Margo Terrell
MARGO TERRELL
Notary Public, District of Columbia
My Commission Expires Oct. 30, 2006

Post-Hearing Questions for the Record
Submitted to Colleen D. Kiko
From Senator Daniel K. Akaka

September 13, 2005

1. Both the Department of Defense (DOD) and the Department of Homeland Security (DHS) have been granted flexibility with their human resources management systems, including the authority to make changes to their labor-management system. Such authority could have major implications on how labor-management relations are handled and what issues may come before your office.

   A. What should the role of the General Counsel be with regard to the new personnel systems at DOD and DHS?

The principal role of the General Counsel of the Authority, as spelled out in 5 U.S.C. § 7104(f), is to investigate and, where warranted, prosecute charges of unfair labor practices. As I understand the final DHS regulations (70 Fed. Reg. 5,272) and the proposed DoD regulations (70 Fed. Reg 7,552), they are silent with respect to the General Counsel. Therefore, the role of the General Counsel would be to apply and enforce the substantive provisions of Chapter 71, as established or revised by the Congress.

   B. Do you believe the final DHS regulations and the proposed DOD regulations will foster positive labor-management relations and communication between labor and management?

I believe that communication between and among parties is an important part of a positive labor-management relations program. The ultimate responsibility for a productive and collaborative labor-management relationship, however, rests directly with the parties. It remains to be seen precisely how the DHS and DoD regulations may affect labor relations in those agencies until the regulations are in effect and the parties are operating under the new system.

2. Earlier this year, the FLRA Chairman commissioned a study that concluded that 81 percent of all FLRA employees were too highly graded. This conclusion applied to all of the employees in the Regional Offices, who would be under your authority if you were confirmed as General Counsel. Do you believe that attorneys and labor relations specialists who work for the FLRA are over-graded, and if so, do you believe that those positions that operate under the authority of the General Counsel should be downgraded?

I was not involved in and have no experience with this study and for that reason would not be able to render an opinion on the study or the conclusions of the study. I do know that classification of Federal positions is governed by Title 5 of the U.S. Code. The

law requires the U.S. Office of Personnel Management (OPM) to define Federal occupations, establish official position titles, and describe the grades of various levels of work. To arrive at a classification for most General Schedule (GS) positions, OPM applies various standards that must be used by agencies to determine the title, series, and grade of positions. Agencies are required to classify positions consistent with OPM's guidance and criteria. Such factors include the complexity of the work being performed, the scope and effect of the work, the personal contacts involved, the purpose of those contacts, the knowledge, skills, and abilities required by the position, and the supervisory controls over the position. These factors are to be applied consistently for a particular classification level.

3. The Administration's proposal, the Working for America Act, contains language applicable for the rest of the federal government's labor law that is similar to that being considered for use by DHS and DOD. For example, the final DHS regulations, the proposed DOD regulations, and the new Administration proposal permit impact and implementation bargaining only when the impact is foreseeable, substantial, and significant in terms of impact and duration.

   A. How will the interpretation of such language by the internal labor boards to be established at DHS and DOD influence your interpretation of this language if applied government-wide?

As General Counsel, I would attempt to interpret the terms "foreseeable," "substantial," and "significant" in a manner consistent with Congressional intent and illuminating decisions rendered by the Authority and the Courts. In the absence of Congressional debate and consideration of this proposed legislation, as well as decisions of the Authority interpreting this provision, it would be premature for me to speculate on how these terms should or would be interpreted and applied.

   B. Will the perceived lack of independence of the internal board members at DHS and DOD by employee representatives have any impact on the weight to give to their interpretation of similar language?

The General Counsel has been given the satutory duty to uphold and enforce the law enacted by Congress in a balanced and neutral manner and to ensure the Office of General Counsel, as an organization, carries out its duties consistent with the provisions of Chapter 71. Thus, the Office of the General Counsel should be guided by the legislative history, the Authority decisions and any applicable court decisions.

4. DHS and DOD claim that their agencies need flexibility in the area of labor-management relations based on their national security missions. At the hearing you said that employee rights and collective bargaining rights have to be balanced against the mission of the agency and said that this applies to every agency. Do you believe the collective bargaining rights of employees at DHS and DOD are out of balance with agency missions? Do you believe the collective bargaining rights of employees of other agencies

are out of balance with agency missions? Do you believe the current labor-management construct inhibits agencies from carrying out their missions?

I have no current basis upon which to render a judgment regarding the status of collective bargaining rights within DHS and DoD and whether such rights are out of balance with each of these respective agency's missions, nor do I have first-hand knowledge of the current status within other agencies. Section 7101(b) of Chapter 71 recognizes that the provisions of Chapter 71 "should be interpreted in a manner consistent with the requirement of an effective and efficient Government." I accept this provision as enacted by Congress. The General Counsel would be responsible for enforcing the law under Chapter 71 and, with respect to regulations of DHS, DoD, or other agencies, for executing whatever provisions are consistent with law and my duties under Chapter 71.

BIOGRAPHICAL AND FINANCIAL INFORMATION REQUEST

A. BIOGRAPHICAL INFORMATION

1. **NAME:**
MARY M. ROSE
MARY MCNALLY ROSE

2. **POSITION TO WHICH NOMINATED:**
MEMBER, MERIT SYSTEMS PROTECTION BOARD

3. **DATE OF NOMINATION:**
JUNE 23, 2005

4. **ADDRESS:**

OFFICE:
1900 E STREET NW
WASHINGTON, DC 20415

5. **DATE AND PLACE OF BIRTH:**
4/10/46, BALTIMORE, MARYLAND

6. **MARITAL STATUS:**
PHILIP D. ROSE MD

7. **NAMES AND AGES OF CHILDREN:**
SARINA (ROSE) OVERTON AGE: 34
AIMEE (ROSE) DEPOORTERE AGE: 32
MICHAEL R. ROSE AGE: 30
MAUREEN E. ROSE AGE: 28

8. **EDUCATION:**
BON SECOURS HOSPITAL SCHOOL OF NURSING RN DEGREE 6/1967
LICENSED 8/1967.
2/2002-5/2002-Anne Arundel Community College Nurse refresher course. Successfully completed

9. **EMPLOYMENT:** List all jobs held since college, including the title or description of job, name of employer, location of work and dates of employment.

12/2001-Present Chair, Federal Prevailing Rate Advisory Committee.
US Office of Personnel Management. 1900 E Street NW 20415 Kay Coles James (Director)
Chair a committee, consisting of National Labor Officials and Management officials to study the prevailing rate system and other matters pertinent to the establishment of prevailing rates of pay for federal employees.

02/2001-12/2001 Deputy Associate Director, Presidential Personnel (The White House) recruited, interviewed and prepared candidates for possible appointments at executive levels in the Administration. 1800 G Street, Washington DC 20415. Edmund Moy (Associate Director)

11/2000-2/2001 Visiting fellow, The Heritage Foundation. 214 Massachusetts Avenue 20002
Contacted policy advisors for information and resumes of possible interest to the future Administration. Edwin Fuelner. President Heritage Foundation.

EMPLOYMENT CONTINUED:
9/1998-9/1999 Annapolis Katz Law Firm, Consultant. Interviewed workers for workman's compensation benefits. Evaluated medical needs and advised Attorneys representing the workers. Joel Katz, employer. West Street Annapolis Md.

10/2002-10/2002 Annapolis Assisted Care Facility, Part time night nursing supervisor. 84 Old Bottom Rd. Carl Chadwick (Administrator)

8/1995-8/1998 Primary care provider for elderly family members

9/1990-9/1994 Anne Arundel County Circuit Court, Elected Clerk. Elected on a platform of management reform by sixty percent of the vote. Reorganized and downsized the office, brought an office in deficit of $250,000 with 99 employees, to a budget surplus by years end. In a four year term returned 1.3 MM to the treasury with a reduced staff of 87 employees. 3 Church Circle Annapolis Maryland, 21401

8/1986-7/1988 U.S. Department of Education, Deputy Undersecretary for Management. Served as a Presidential Appointee with Senate Confirmation in the Ronald Reagan Administration. Supervised a staff of six hundred and fifty employees and a budget of approximately of $75 MM. Negotiated contracts with government unions and directed the development and implementation of major administration initiatives including privatization credit reform, productivity improvement and advanced information technology.

8/1985-8/1986 The White House, Director of Personnel West Wing Office. Developed and implemented a performance based personnel system for the White House. Established numerous policies effecting position classification, pay and performance, leave, incentive awards and hiring practices. Drafted position papers outlining proposed personnel policies for the approval of the White House Chief of Staff.

2/1980-6/1985 U.S. Office of Personnel Management. Responsibilities included issuing all federal personnel regulations government-wide, regarding career and non-career SES (Senior Executive Service). Supervising a staff of sixty employees and managing a budget of approximately $2.5 MM. Served as agency White House liaison on personnel policy matters.

1970-1980 Married and had four children.

1968-1969 Washington Hospital Center, Emergency Room Nurse. Supervisor: Carolyn Reed RN. 110 Irving Street, Washington D.C.

1967-1968 Montgomery General Hospital, Emergency Room Nurse. Sandy Spring Road, Montgomery County Maryland. Cannot remember the name of the Nursing supervisor.

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.

July 24, 2002 was appointed by the President of the United States to serve as the Vice Chair of the Federal Salary Council.

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 or other business enterprise, educational or other institution.

NONE

12. MEMBERSHIPS: List all memberships and offices currently or formerly held in professional, business, fraternal, scholarly, civic, public, charitable and other organizations.

Member of St Pius X Church, Greensboro, NC.
Member of the Lady Hibernians, Greensboro NC.
Member Greensboro Symphony Organization
Member of the Fleet Reserve Club, Annapolis Md.

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.

Member of the Republican Party. 1994 Ran for State Senate in Anne Arundel County Maryland. 1990 Ran for and won Clerk of the Circuit Court Anne Arundel. President of the Republican Women of AA County Md. 1978/ 1079. Ronald Reagan Chair for AA County, 1979-1980.

(b) List all memberships and offices held in and services rendered to all political parties or election committees during the last 10 years.

I continue to be a member of the Republican Party but hold no position with them, or for the past 10 years.

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

Republican Presidential Campaign, $2000.00 Primary President Bush Reelect Campaign
Post Primary Presidential Campaign, $2000.00 President Bush Reelect Campaign
Friends of Robert Duckworth, Congressional Campaign, $2000.00, year 2004. AA Co. Md.
Republican Presidential Campaign 2000, Presidential candidate George Bush, $250.00.

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

NONE

15. **PUBLISHED WRITINGS**: List the title, publishers, and dates of books, articles, reports, or other published materials, which you have written.

NONE

16. **SPEECHES:** NONE

17. **SELECTION:**
(a) I believe I was selected because of my past experience in personnel management and administration, as well as labor relations, and conflict resolution.
(b) My years of experience managing both large organizations as well as small staff, provide a unique exposure to the needs of management as well as staff, in different environments. As Chair of the Federal Prevailing Rate Advisory Committee, I have broadened my skills in labor-management negotiations.

B. FUTURE EMPLOYMENT RELATIONSHIPS

1. Will you sever all connections with present employers, business firms, business associations or business organizations if confirmed by the Senate? **Yes.**
2. Do you have any plans, commitments or agreements to pursue outside employment, with or without compensation, during my service with the government? If so explain. **No**.
3. Do you have plans, commitments or agreements after completing government service to resume employment, affiliation or practice with your previous employer, business firm, association or organization? **No.**
4. Has anybody made a commitment to employ your services in any capacity after you leave government service? **No.**
5. If confirmed, do you expect to serve out your full term or until the next Presidential election, whichever is applicable? **Yes**.

C. POTENTIAL CONFLICT OF INTEREST

1. 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**
2. 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 and execution of law or public policy other than while in a federal government capacity. **None**
3. Do you agree to have written opinions provided to the Committee by the designated agency ethics officer of the agency to which your 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

1. Have you ever been disciplined or cited for breach of ethics for unprofessional conduct by, or been the subject of a complaint to any court, administrative agency, professional association, disciplinary committee or other professional group? **No**
2. To your knowledge have you 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. **No.**
3. Have you or any business of which you were an officer or director or owner ever been involved as a party in interest in any administrative agency proceeding or civil litigation? If so provide details. **Yes. As the newly elected Clerk of the Circuit Court, Anne Arundel County Md. I asked the top three political appointees of the former elected Clerk to retire/resign. They filed suit and the case was dismissed.**
4. Please advise the Committee of any additional information, favorable or unfavorable, which you feel should be considered in connection with your nomination. **None**

AFFIDAVIT

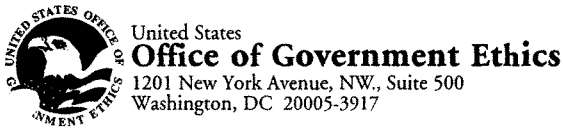
Mary M. Rose being duly sworn, hereby states that he/she has read and signed the foregoing Statement on Biographical and Financial Information and that the information provided therein is, to the best of his/her knowledge, current, accurate, and complete.

Mary M. Rose

Subscribed and sworn before me this 29 day of June, 20 05

June S. McMurray
Notary Public

NOTARY PUBLIC
OFFICIAL SEAL
JUNE S. McMURRAY
GUILFORD COUNTY NC
My Commission Expires May 8, 2010



June 29, 2005

The Honorable Susan M. Collins
Chair
Committee on Homeland Security
and Governmental Affairs
United States Senate
Washington, DC 20510-6250

Dear Madam Chair:

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

We have reviewed the report and have also obtained advice from the Merit Systems Protection Board concerning any possible conflict in light of its functions and the nominee's proposed duties.

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

Sincerely,

Marilyn L. Glynn
Acting Director

Enclosure

U.S. Senate Committee on Homeland Security and Governmental Affairs
Pre-hearing Questionnaire for the
Nomination of Mary M. Rose 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)?

I believe the President nominated me because of my knowledge and experience in the areas of human resources, management and administration. In addition, during my tenure at the White House, senior White House staff members were able to observe the quality of my work and were impressed with my work ethic. I believe my performance in my current position as Chair of the Federal Prevailing Rate Advisory Committee, and Vice Chair of the Federal Salary Council was taken into consideration.

2. Were any conditions, expressed or implied, attached to your nomination? If so, please explain.

No.

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

As the Chair of the Federal Prevailing Rate Advisory Committee and Vice Chair of the Federal Salary Council, I have mediated and interacted with both management and labor on many issues in dispute, specifically those involving Federal salary and locality pay. We have successfully resolved most of these matters by consensus. I also believe my management and administrative experience will be an asset in addressing case management. As Clerk of the Circuit Court of Anne Arundel County, I gained vast experience in this area as well as legal issues and am familiar with the adjudicatory function. I developed close working relationships with the judges and local attorneys.

4. Have you made any commitments with respect to the policies and principles you will attempt to implement as a Member of MSPB? If so, what are they and to whom have the commitments been made?

No.

5. If confirmed, 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 am not aware of any conflicts of interest that would cause me to recuse or disqualify myself from involvement in any issue that might arise.

II. Role and Responsibilities of a Member of the MSPB

6. What is your view of the role of an MSPB Board member?

As an impartial adjudicator, a member of the MSPB must participate in protecting the rights of federal employees and ensure the effective performance of the federal service. An MSPB Board member must also ensure that federal agencies' employment decisions are made in accordance with merit principles. A member of the MSPB must also assist the Chairman with his internal administrative responsibilities.

7. In your view, what are the major challenges facing MSPB? What do you plan to do, specifically, to address these challenges?

Due to the many changes, timely and impartial adjudication of cases is going to be a primary challenge. Case management will need to be studied on a continual basis and lines of communication must be kept open at all staff levels to prevent backlogs. Department and agency performance trends will need extra scrutiny. The Chair leads the efforts for major improvements and I look forward to working with him in improving performance.

8. How do you plan to communicate to MSPB staff on efforts to address issues of relevance to them?

It is my experience that meeting with staff on a regular basis opens avenues for progress and eliminates any barriers that may exist. I will submit my ideas to the Chairman in a timely manner as the need arises.

9. What in your background has prepared you to work with two other members of a decision-making body, each of whom has an equal vote in the adjudication of cases? Are you comfortable working in a collegial setting where substantive disagreements sometimes arise?

I believe my work with Labor and Management in my present position has instilled in me the necessity of listening to all sides of an issue. This approach allows me to understand

competing positions and points of views and become aware of the important contributions each side can make in resolving issues before I reach my own conclusions. I am comfortable in such a setting. I recognize the need for collegiality to address workload and process issues while maintaining independence in reaching adjudicatory decisions.

10. What in your background has prepared you to serve as an adjudicator, including –

    a. evaluating and applying MSPB case precedents, court holdings, and other legal authorities;

    b. critically evaluating legal arguments presented by attorneys for the parties, and questioning the attorneys about their arguments; and

    c. writing opinions that make appropriate use of MSPB case precedents, court holdings, and other legal authorities?

a. In every professional position I have held, I have been tasked with making sound and thoughtful decisions. Applying case precedents, court holdings and other legal authorities will just be another component to my decision making process.

b. Regulatory constraints and existing precedents have guided much of my work at the Federal Prevailing Rate Advisory Committee. As a result I am quite familiar in a precidentially bound environment.

c. I would note that being a non-attorney is not precedent setting as the former Chair of the MSPB was not an attorney, and successfully served her full term.

11. In a published news report, it has been alleged that, upon taking office as newly elected Clerk of the Circuit Court in Anne Arundel County, Maryland, you told three senior career employees that they had one hour in which to decide whether to resign or retire. (*Baltimore Sun*, Arundel edition, local news section page 2, December 5, 1990.)

    a. Were those allegations true? Please explain the circumstances.

    b. The news article also stated: "Three senior courthouse employees filed civil rights complaints with the federal government yesterday as part of their fight against new county Clerk of Circuit court Mary M. Rose's attempts to oust them from their jobs." Please respond to this allegation in the article and explain the circumstances. Were you named in, or otherwise the subject of, any of the

complaints? What were the allegations in the complaints and how were they disposed of.

a. From the time I was elected to serve as Clerk of the Circuit Court (November 1990) until I was sworn into office (January 1991), I conducted a thorough transition review. That review disclosed the Clerk's Office had incurred a $250,000 deficit and had eight to ten week backlog of cases. I won the election with 60 percent of the vote, a reflection of the dissatisfaction with the former Clerk. My review also disclosed that the former Clerk, his deputy and two top political aides were clearly responsible for the ineffective management of the office. I discovered that a proposed budget had not been prepared. I was aware of the critical need for change. I had to make serious decisions before a new amendment reducing my management authorities became law and personnel changes would be impossible. I gave these employees the option to retire and to inform me of their plans because I did not want to jeopardize their retirement annuities. As political appointees of the former Clerk they were at-will employees subject to removal. I provided them a more favorable outcome.

b. The three political appointees filed suit. Their case was dismissed on the basis that they were political appointees of the former administration. Their allegations of age discrimination were found baseless and the case was dismissed. There were no other complaints by any other employees. I subsequently appointed two assistant deputies who were currently working within the Clerk's Office and hired a new deputy from outside the Office.

III. Policy Questions

General

12. As a long-time management professional, please describe what you see as the role and benefits of the merit system in federal personnel law. What is the Board's responsibility to achieve those results?

Managing both large and small organizations, I have had to resolve disputes of every magnitude. Employees as well as managers want fair decisions. They want someone who sees both sides and decisively resolves their dilemma in a fair and impartial manner. The MSPB should be the voice of reason, where no one is ignored and all parties are treated with respect.

13. In your view, how important is it that the independence of MSPB be maintained? What is the Board's responsibility to be independent of political pressure?

It is critical that the MSPB is independent as intended by the Civil Service Reform Act of 1978, which established it. Members have a responsibility to not only avoid political pressure but any appearance of political pressure.

14. In adjudicating cases, MSPB is frequently required to interpret statutes and regulations. What is your general opinion about how the MSPB should conduct such interpretation?

This is a very broad question. I believe the interpretation of statutes and regulations should be guided by precedent, but when adjudicating cases, individual circumstances must be given consideration. I believe that MSBP decisions should leave both sides with the sense that their arguments have been heard and understood.

15. Some cases require lengthy and complex decisions. What steps will you take 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?

I believe laws are written for the people and not just for attorneys. Decisions should be written for all to understand. The fact that I am not an attorney may be helpful to the average employee trying to understand the complex laws that govern their work environment.

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

It is important that MSPB's administrative procedures be streamlined so members are provided the maximum amount of time to review each case. If confirmed, I will work with my colleagues to streamline procedures without rushing members into making decisions. I believe careful consideration need not be sacrificed in favor of timeliness. Better use of technology can be utilized in addressing the Board's case management processes. Reversal rates could be one appropriate indicator of the quality of MSPB's decisions.

17. MSPB's fiscal year 2005 performance plan states that MSPB obtains feedback from customer surveys regarding the adjudicatory process. In your view, how should this feedback inform your view of MSPB policies and procedures?

As in any productive organization, management at MSPB should be concerned with organizational performance, especially the quality of its performance. Customer surveys are excellent tools to help identify strengths and weaknesses.

18. You were cited as a contributor to the chapter on "The Office of Personnel Management," in the 1989 Heritage Foundation publication entitled *Mandate for Leadership III: Policy Strategies for the 1990s*. The citation states that you and other task force members commented and contributed generously to the chapter, but "do not necessarily endorse all" of the views and recommendations in it. Please state and explain your views with respect to the following statements and recommendations in the chapter:

    a. To help address the perceived problem of the dispersed nature of employee management, the chapter recommends that the MSPB, the Federal Labor Relations Authority, and the EEOC's authority with respect to federal sector cases should be combined into a single federal employee appeals panel. (Page 373.) Do you agree or disagree with this recommendation, and why?

    b. The chapter further recommends that "the special counsel (OSC) should be abolished and that all whistleblower protection cases and Hatch Act prosecutorial authority should be transferred to agencies' Inspectors General." (Pages 373-374.) Do you agree or disagree with this recommendation, and why? If you agree, please explain whether and how your views would affect your performance of your responsibilities as a member of the MSPB.

    c. In describing the institutional constraints on OPM, the chapter states: "The ability of the Director of OPM to control the personnel process within the executive branch is limited by a number of factors. One is the federal employee unions, such as the American Federation of Government Employees, the National Treasury Employees Union, and the National Federation of Federal Employees. These unions work to raise federal pay, expand the number of employees, and curtail managerial authority over federal workers." (Page 363.) Do you agree or disagree with this statement, and why? Generally, what is your opinion of the effect of federal employee unions on the effective conduct of public business?

    d. The chapter states: "In periods in which the presidency and Congress are controlled by different political parties, Congress seeks to undermine presidential power by limiting the ability of the President and his political subordinates to control the tenured bureaucratic workforce." (Page 364.) Do you agree or disagree with this statement, and why? Please explain how your views on this subject would affect your review of cases where a career employee alleges that a political appointee, in an apparent effort to further the Administration's agenda, has performed a personnel practice made unlawful by Congress?

a. I did not contribute anything in writing to the *Mandate for Leadership III: Policy Strategies for the 1990s*. I am not sufficiently familiar with the Federal Labor Relations Authority, and the EEOC processes and procedures to properly comment on the merits of this commendation.

b. I see no reason to change the status quo of the Office of the Special Counsel.

c. In my years as Federal Prevailing Rate Advisory Committee Chair, I have grown to value the impact of federal unions input and opinions. I feel it is inappropriate to comment on the relationship of the Office of Personnel Management with federal labor unions.

d. I do not have sufficient information on which to base an opinion on the quoted material. All cases involving prohibited personnel practices must be judged on the merits regardless of who is in control of the Executive Branch of government. Whistleblowers must be protected from reprisal when they report waste, fraud and abuse.

19. Under what circumstances, if any, do you believe it is desirable that civil service law or practice may enable or encourage career federal employees to express opinions contrary to those of agency leadership?

I cannot comment on when or how civil service laws should encourage civil servants to express opinions. I do know that agency heads must comply with laws in existence. Good leadership starts at the top, and it is the responsibility of good management to enthusiastically solicit honesty and candor among the civil servants without reprisal.

20. Under 5 U.S.C. § 1204(f), the Board, on its own motion or upon the application of the Special Counsel or any individual, may review regulations of OPM and may declare them invalid if (as written or as applied) they require the commission of a prohibited personnel practice. Based on your experience, what kinds of OPM regulations should MSPB consider in this context?

The law is clear. MSPB has the authority to review all OPM regulations to assure compliance with federal statutes.

Case Processing

21. In fiscal year 2004, MSPB's average case processing time for headquarters decisions was 282 days. The current MSPB Chairman has pledged that the Board will greatly reduce

the time it takes to render a decision. If confirmed, would you be committed to this effort? If so, how would you maintain fairness and quality in decision-making while simultaneously trying to meet compressed decisional timeframes?

Yes, if confirmed, I intend to work with the other members of the Board to reduce the time it takes for the Board to render a decision. However, I also believe that fairness and quality must not be compromised in the interest of efficiency.

22. Do you believe that it would be beneficial for MSPB to identify systemic and recurring issues in the cases that the Board reviews that, if acted upon by Congress, agencies, and employees, would improve the federal government's civil service system and personnel practices, and reduce the need for litigation? If so, how should MSPB go about identifying and reporting such issues?

I am certainly open to considering this option but have not yet established my views.

23. The appeals process administered by MSPB has been characterized by some as not always being user-friendly. What is your opinion about the balance MSPB should strive for between making its processes "user-friendly" to appellants and yet appropriate to deal fairly and consistently with the complex issues presented to it? How can that balance be achieved?

The MSPB is an adjudicative body that must follow certain legal principles which at times may be complicated. Due process and fairness should not be compromised by efforts to make the process more "user-friendly."

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

This is a cost and resource issue which will need study. The Board must remain independent while remaining user friendly.

25. MSPB's fiscal year 2005 performance plan contains goals for quality (e.g., maintaining or lowering the percentage of cases remanded or reversed) and for maintaining or reducing average case processing time. Do you believe it is desirable that the performance

management system for administrative judges and attorneys be aligned to MSPB's performance goals? What are the advantages and disadvantages? Please explain.

I support all efforts to reduce average case processing time. I also believe the integrity of the MSPB process must be assured -- both explicit and implicit pressure for specific outcomes and unfair scheduling must be avoided.

26. One factor that helps reduce average case processing time is that more than half of the initial appeals that are received by MSPB and not dismissed are settled. What role, if any, do you believe MSPB should exercise to help ensure that parties do not feel compelled to enter into settlements that might be unfair, unwise, or without due process?

If confirmed, I would have strong reservations about MSPB injecting itself into the settlement process. The MSPB should not place itself into the personal decision making process.

Federal Redress System

27. According to the fiscal year 2005 performance plan, MSPB has initiatives underway to foster mediation and other forms of alternative dispute resolution (ADR).

    a. Do you believe that MSPB should play a role in promoting the use of ADR and training federal staff in ADR techniques? If so, how should that role be exercised?

    b. How should MSPB's role be coordinated with, or differentiated from, the role of other federal entities with similar responsibilities or interests to help ensure efficiency and consistency in federal workplace ADR policy and practice?

a. I am not opposed to mediation, but promoting the use of ADR and initiating training for federal staff raises resource issues that need to be addressed by the Administration and Congress.

b. It is not immediately clear to me that there are sufficient similarities to make coordination feasible. The question raises very interesting issues that I would look forward to studying. At this time I have insufficient information to offer any qualified opinion.

28. The redress system for federal employees as a whole (involving the Equal Employment Opportunity Commission (EEOC), the Federal Labor Relations Authority (FLRA), the Office of Special Counsel (OSC) as well as MSPB) has been described by some as lengthy, time consuming, costly, sometimes misused, and offering the opportunity to "forum shop" in some situations. These are among the factors that the Department of Homeland Security (DHS) and the Department of Defense (DOD) have taken into account in developing 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. 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. If these concerns have some validity, can you offer recommendations that could help improve the process? Please explain.

The current framework of the redress system is generally in balance. The extent it warrants adjustment to meet the needs of the Department of Homeland Security and the Department of Defense will have to be determined by Congress.

29. A frequently cited example of system complexity is the so-called "mixed case" involving an allegation of unlawful discrimination in an appeal of an adverse personnel action to MSPB. In such cases, an appellant can ask EEOC to review an MSPB decision, and if MSPB does not concur with EEOC's decision, the case would go before a Special Panel. A still dissatisfied appellant could seek a *de novo* review in U.S. district court. What do you understand to be the rationale of the underlying framework for handling mixed cases as established by the Civil Service Reform Act of 1978? In your view, does that rationale remain valid today? Please explain.

The process for mixed cases is set forth in the Civil Service Reform Act of 1978. The Act sets forth a process that blends the civil service rights and procedures for employees appealing adverse personnel actions that involve allegations of discrimination. At this time I do not know the current volume or the impact of mixed cases. Since Congress has not acted on this aspect of the Act, the rational remains unchanged.

30. The Special Counsel or any individual alleging a prohibited personnel practice to the Board may request a stay of personnel action until the appeal is resolved. Given that the appellate process may take considerable time, this temporary relief can be indispensable

in appropriate circumstances for professional survival while the claim is being adjudicated. In your opinion, under what circumstances should a stay be granted at the request of the Special Counsel? Under what circumstances should a stay be granted solely at the request of an individual federal employee?

It is inappropriate for me to provide an answer describing what circumstances should exist before the Board grants a stay when requested by either the Special Counsel or a federal employee.

Personnel Reform within the Executive Branch

31. According to MSPB's Fiscal Year 2004 Performance and Accountability Report, the most significant external trend affecting MSPB - and the federal civil service generally - is the continuing increase in the number of agencies that have received statutory authority to establish their own unique human resource management systems. The most notable of these are the personnel systems for DHS and DOD, particularly as they relate to employee appeals. In your view, what are the implications of unique personnel systems on MSPB operations?

The implications of establishing unique personnel systems rather than a single connected body of law guarding employees' rights could be the MSPB will be faced with conflicting statutes governing ever smaller components of government. This result would make the handling of appeals at the MSPB more complicated.

32. DHS and DOD are in the midst of implementing wide-ranging reforms to their personnel systems. In your opinion, what should MSPB's role be if a plan emerges to reform the civil service laws covering other departments and agencies?

If the DHS and DOD plan emerges to implement reforms to their personnel systems and if these reforms affect the federal redress framework that includes MSPB's jurisdiction, MSPB should be consulted and afforded the opportunity for input.

33. One of the cornerstones of the Civil Service Reform Act of 1978, which created MSPB, is a set of merit systems principles. Among other things, these principles provide that hiring in the civil service should be based on merit and fitness, and that personnel actions should be free from partisan political influence, arbitrary action, and prohibited motivations such as discrimination, retaliation for whistleblowing, or cronyism. Some

critics of the changes being implemented for DHS and DOD believe that, in their drive for greater efficiency and managerial flexibility and discretion, the new rules will undermine these merit system principles. Do you believe there is any tension between establishing greater efficiency and managerial flexibility and discretion in the civil service and maintaining strict adherence to merit system principles? In your view, what should be done to assure that, in modernizing the civil service system, the values underlying the merit systems principles are fully maintained? Do you believe that the rules published for DHS and DOD accomplish this?

I was not involved with the creation or development of the new DHS and DOD regulations and am not prepared to evaluate what will happen when they are implemented. I am confident that the laws passed by Congress have had the greatest of care and thought by outstanding minds whose primary concern is that the rights of federal civil servants are protected from partisan political influence, arbitrary action, and prohibited motivations such as discrimination, retaliation for whistleblowing, or cronyism. I feel strongly that employees' rights to report waste, fraud and abuse without fear of reprisal must be protected.

34. Some survey data, including MSPB surveys, show that some managers avoid taking appropriate personnel actions against employees because of what they perceive to be a burdensome appeals process. What is your opinion on this matter, and what, if anything, do you believe MSPB can and should do to reduce the burden on managers who take appropriate personnel actions? How will the changes to the appeals procedures for DHS and DOD employees reduce this perceived burden? How will the changes affect employees' due process rights and their ability to obtain relief from prohibited personnel practices or other unlawful or unreasonable personnel actions?

The information gleaned from surveys indicating some managers do not take appropriate personnel actions against employees because of a perceived burdensome appeals process illustrates that management training is critical. However, such training is the responsibility of the Administration and the Office of Personnel Management. I see no role for the MSPB. I am not sufficiently familiar with the regulations proposed by DHS and DOD to answer the questions regarding changes to the appeals process.

35. The final DHS and the proposed NSPS personnel regulations include streamlined appeals procedures for adverse actions.

    a. How will you ensure that MSPB meets these deadlines without unnecessarily delaying appeals from other federal agencies?

b. In your view, what is the potential benefit as well as the potential downside of the streamlined procedures?

c. To what extent, if any, do you believe such modifications should be adopted as uniform MSPB procedures?

I am not prepared to comment on the effect of the proposed regulations and streamlined procedures will have on the MSPB's caseload. I do know there are substantial parts of the regulatory scheme that are not final.

36. In testimony before Congress, the MSPB Chairman raised the possibility that a dual track appeals process may be put in place, one for the accelerated processing of appeals from DHS and DOD employees and another track for other federal appellants. What are your views about the implications for fairness and equity of possibly creating a dual track system?

I have not had the opportunity to be briefed on details of the staffing numbers and case management issues at the MSPB. In my brief meeting with the Chairman, however, he did advise me of this issue. The Chairman told me he is working very hard to not only give DOD and DHS employees expedited service but all federal appellants. I look forward to helping with this challenge.

37. The final DHS and the proposed NSPS personnel regulations incorporate a single standard for the appeal of adverse actions taken on the basis of both conduct and performance. What do you believe are the advantages and disadvantages of that change? Do you believe the single standard should be applied to the rest of the federal civil service?

I am not prepared to comment on the proposed regulations or their potential effects, to do so may compromise future decisions should I be confirmed. I do know that there are substantial parts of the regulatory scheme that are not final.

38. Both the final DHS and the proposed NSPS regulations, as well as other proposals for civil service reform, limit the ability of the MSPB to mitigate penalties imposed by an

agency. What is your view of this policy? How will it affect the right to an independent appeal of an adverse action?

I am not prepared to comment on the proposed regulations or their potential effects, to do so may compromise future decisions should I be confirmed. I do know that there are substantial parts of the regulatory scheme that are not final.

39. According to public comments and congressional testimony, it appears that a number of employees are concerned that the appeals systems established under the DHS and proposed DOD regulations will not be fair. In your opinion, what could be done to make the appeals systems at those departments fair and perceived as fair?

I am not prepared to comment on the proposed regulations or their potential effects, to do so may compromise future decisions should I be confirmed. I do know that there are substantial parts of the regulatory scheme that are not final.

40. The proposed NSPS regulations allow DOD to modify or reverse an initial ruling of an MSPB Administrative Law Judge. Do you believe this proposal meets the intent of the NSPS authorizing statute? What do you believe are the advantages and disadvantages of this proposal?

I am not prepared to comment on the proposed regulations or their potential effects, to do so may compromise future decisions should I be confirmed. I do know that there are substantial parts of the regulatory scheme that are not final.

41. The NSPS authorizing statute provides that MSPB may order corrective action based on specific criteria, including: (1) whether or not the decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law having been followed; or (3) unsupported by substantial evidence. The proposed NSPS regulations appear to eliminate MSPB's discretion to adequately address due process for employees and guard against unreasonable penalties imposed by DOD.

    a. What is your opinion of the implementation of the NSPS authorizing statute as provided for in the proposed regulations?

b. Do you believe the "wholly without justification" standard in the proposed NSPS regulations should be modified to conform to the standard required by the statute? Please explain.

I am not prepared to comment on the proposed regulations or their potential effects, to do so may compromise future decisions should I be confirmed. I do know that there are substantial parts of the regulatory scheme that are not final.

42. The proposed NSPS regulations provide greater opportunity for OPM to intervene in cases brought by DOD employees before the MSPB. Do you believe that authority is needed, and, if so, why? Do you believe such greater opportunity for OPM intervention would be appropriate for employees of all agencies?

I am not prepared to comment on the proposed regulations or their potential effects, to do so may compromise future decisions should I be confirmed. I do know that there are substantial parts of the regulatory scheme that are not final.

43. In mid-July the Administration released a draft bill entitled the Working for America Act, which would make certain changes in the operations of the MSPB:

a. Current law empowers the Board to delegate to any employee the authority to perform any administrative function. Section 404(1) of the bill would remove such power from the Board and would vest it in the Chairman. Furthermore, section 404(4) of the bill would empower the Chairman to delegate to officers and employees appointed by the Chairman authority to perform such duties and make such expenditures as necessary. What are the advantages and disadvantages of sections 404(1) and (4) of the bill and what is your opinion of the proposed provisions?

b. Sections 404(2) - (3) would authorize the Chairman to call a meeting of the Board without regard to the open-meetings provisions of the Government in the Sunshine Act. What do you believe is the purpose of the open-meetings provisions? What are the advantages and disadvantages of sections 404(2)-(3) of the bill and what is your opinion of the proposed provisions?

I understand that substantial work is still being performed by OPM in conjunction with the Administration and Congress on the proposed Working for America Act. I am not prepared to comment on events that may occur in the future.

44. Both the DHS and the proposed DOD personnel systems have heightened the burden of proof the employee must meet in order for the MSPB to mitigate penalties against an employee. The Working for America Act proposes that any penalty imposed in an adverse action case not be overturned by the Merit Systems Protection Board (MSPB) unless it is "totally unwarranted in light of all relevant factors." Furthermore, the MSPB is to "give primary consideration to the impact of the sustained misconduct or poor performance on the mission of the agency or activity as determined by the agency."

    a. Please explain what you think is the meaning of "totally unwarranted in light of all relevant factors?" In what ways is this different from the current MSPB authority?

    b. What is your definition of the phrase "give primary consideration to the impact of the sustained misconduct or poor performance on the mission of the agency or activity as determined by the agency?" In what ways is this different from the current MSPB authority?

    c. The NSPS proposed regulations state that MSPB may mitigate the penalty for a DOD employee only if it is "wholly without justification." How do you think this standard differs from "totally unwarranted in light of all relevant factors?" What impact will these two new and different standards have on the ability of the MSPB to quickly adjudicate cases?

a. - c. These questions contain hypothetical circumstances. It is not appropriate for me to respond in light of the fact that MSPB will likely be developing case law defining this standard in specific cases.

Relationship between MSPB and the Office of Personnel Management (OPM)

45. MSPB and OPM both have responsibility for oversight of the merit system and both agencies have issued reports on the merit system that identify similar issues.

    a. What is your understanding of the differences Congress intended in how each agency should go about performing these roles?

    b. What is your understanding of the difference in how each agency currently goes about performing these roles?

c. Should any changes be considered in the respective responsibilities of MSPB and OPM for merit system oversight?

a. The MSPB and OPM have different responsibilities for oversight of the merit system. Generally OPM sets the human resources policy for the Executive branch of government and MSPB adjudicates disputes that arise under that policy.

b. OPM and the MSPB are charged with complying with laws, as created by Congress.

c. No, the MSPB and OPM should do that which the law requires, nothing more and nothing less.

46. Both MSPB (Merit Principles Survey) and OPM (Federal Human Capital Survey) periodically conduct surveys of the federal workforce. Do you believe there is benefit to continuing current practice whereby each agency conducts separate surveys? What would be the benefit of MSPB and OPM conducting a unified survey?

This is a very interesting question certainly worth considering and studying, but I have insufficient information on which to offer an opinion at this time.

Human Capital Management

47. MSPB's fiscal year 2005 performance plan calls for the development of agency wide recruitment strategies to ensure a diverse, highly qualified workforce. Do you have a perspective of MSPB's performance in meeting this performance goal? What challenges, if any, do you believe that MSPB faces in ensuring a diverse, highly qualified workforce? To the extent there may be challenges, how do you believe that MSPB should deal with them?

Ensuring a diverse, highly qualified workforce is a management responsibility. However, I have no information regarding this responsibility or any relevant challenges that accompany ensuring such a workforce.

Whistleblower Protection

48. A major statutory responsibility for the Board is adjudication of alleged violations of the Whistleblower Protection Act (WPA). What do you understand to be the purpose of the WPA? What do you believe are the benefits or other consequences of whistleblower

disclosures by federal employees? What are responsible and constructive ways for federal employees to make whistleblower disclosures? How prevalent do you believe is retaliation against whistleblowers, and what are its consequences?

I believe the WPA was enacted to protect integrity of the system. I have no knowledge as to how prevalent retaliation against whistleblowers is, but such practices are certainly illegal. I strongly believe that federal employees must be protected from reprisals when reporting fraud, waste and abuse.

49. In 2000, the United States Court of Appeals for the Federal Circuit held that the MSPB lacked jurisdiction over an employee's claim that his security clearance was revoked in retaliation for whistleblowing. Hesse v. Department of State, 217 F.3d 1397 (Fed. Cir. 2000). The Court held that, even if the employee's security clearance was suspended or revoked in retaliation for making protected disclosures, the employee cannot obtain a remedy from the MSPB, because civil service law does not authorize the Board to either review a security clearance determination or require the grant or reinstatement of a clearance. To respond to the holding in Hesse, S. 494, which was reported favorably by the Committee is pending before the Senate, contains a provision that would make it a prohibited personnel practice for a manager to suspend, revoke, or take other action with respect to an employee's security clearance in retaliation for the employee blowing the whistle.

    a. What, if any, significant impact on MSPB would you anticipate from the creation of this additional prohibited personnel practice if S. 494 were enacted?

    b. In addition to establishing a new prohibited personnel practice, the legislation would also state that MSPB or a reviewing court could, under an expedited review process, issue declaratory and other appropriate relief, but may not direct the President to restore a security clearance. Absent restoration of the security clearance, what are some examples of relief that you think might be appropriate in these cases?

a and b. If this proposed legislation is enacted, I do not know the impact it will have on the MSPB. Nor am I familiar with either the details of the United States Court of Appeals for the Federal Circuit decision in *Hesse v. Department of State* or the legislation under consideration. The question is hypothetical and is one that I am unable to answer.

50. The WPA generally protects a federal employee whistleblower who discloses information that the individual reasonably believes is evidence of government impropriety. However,

recent case decisions seem to say that, in the case of alleged "gross mismanagement," the WPA protects a disclosure only if there is no reasonable disagreement about the agency policy in question. See *White v. Dept. Air Force*, 391 F.3d 1377 (Fed. Cir. 2004); *White v. Dept. Air Force*, 95 M.S.P.R. 1 (MSPB September 11, 2003). Some observers argue that the rule withholding whistleblower protection where there is reasonable disagreement about whether there was gross mismanagement is much less protective than, and is inconsistent with, the general rule protecting whistleblowers who have a "reasonable belief" that the disclosed information evidences government impropriety. They argue that a "reasonable belief" generally means that the issue is amenable to disagreement among reasonable people. What do you believe a whistleblower must demonstrate under current case law to receive protection for a protected disclosure evidencing "gross mismanagement," and do you agree or disagree with such observers arguments? Please explain.

It is not appropriate for me to comment on this issue because it might compromise my decisions in the future should I be confirmed.

51. Under current law, appeals of most MSPB decisions are appealed to the United States Court of Appeals for the Federal Circuit. Subject to a five-year sunset, S. 494, as reported by the Committee, would allow petitions for review of these MSPB decisions to be filed with the Federal Circuit or any other federal circuit court of competent jurisdiction. The rationale for this provision, including a list of several existing statutes that allow federal employee cases (including certain MSPB decisions) to be appealed to Courts of Appeals across the country, is stated in the Committee on Homeland Security and Governmental Affairs report on S. 494, S. Rep. No. 109-72 (May 25, 2005), pages 8-10. What do you believe would be the impact of this provision on federal personnel law?

A change in the current appeal process would concern Congressional policymakers. Differences in legal interpretations by the various circuit courts could cause conflicts and uneven results.

The Hatch Act

52. The 1989 Heritage Foundation publication to which you were a contributor, which was referred to in an earlier question, discussed legislative proposals to reform the Hatch Act that were then under consideration: "Congressional proposals to remove Hatch Act restrictions on the partisan activity of civil servants would destroy the foundation of the nonpolitical civil service, converting federal employees into a superspecial interest group intervening in elections on behalf of candidates favoring higher pay and expanded

government." (Page 377.) Do you agree or disagree with this statement, and why? Congress passed the Hatch Act Reform Amendments of 1993, Public Law 103-94, to enable most federal civil servants to participate more fully in the political process. Do you believe the prediction made in the quoted statement has been borne out over the past 12 years?

I have insufficient information relating to the probable political activity of civil servants under the amended Hatch Act to offer an opinion. However, if confirmed, I will apply the law in its current form.

53. In the spring of 2004, the Office of Special Counsel issued an advisory stating that a union, although it had not endorsed a Presidential candidate, was "unable to conduct a truly nonpartisan voter registration drive." See "Federal Hatch Act Advisory, Voter Registration Drives in the Workplace (2)" (May 25, 2004) http://www.osc.gov/documents/hatchact/federal/fha-32.htm. What steps should a union that has not endorsed a candidate or its members take to assure that its voter registration efforts in the workplace are nonpartisan and therefore permissible?

Because this case deals with facts that could possibly lead to litigation, it is not appropriate for me to comment on union activities and the Hatch Act at this time.

IV. Relations with Congress

54. 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?

Yes.

55. 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?

Yes.

V. Assistance

56. Are these answers your own? Have you consulted with the MSPB or any interested parties? If so, please indicate which entities.

While these answers are my own, I consulted with the MSPB and OPM for clarification of administrative procedure only.

AFFIDAVIT

I, Mary M. Rose, 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.

Mary M. Rose

Subscribed and sworn before me this 16th day of August, 2005.

Bobbie Jean Williams
Notary Public

BOBBIE JEAN WILLIAMS
NOTARY PUBLIC OF DISTRICT OF COLUMBIA
My Commission Expires October 31, 2006

Post-Hearing Questions for the Record
Submitted to Mary M. Rose
From Senator Daniel K. Akaka

September 13, 2005

1. *One of the primary reasons agencies give for seeking a waiver from chapter 77 of Title 5 is the length of time it takes to remove or discipline poor performers or those employees who engage in misconduct. In your opinion, what factors contribute to the length of time it takes to discipline or remove these employees? Do you believe that the average time it takes for a matter to be resolved by the MSPB is reasonable?*

Some of the factors that contribute to the length of time it takes to discipline or remove employees who perform poorly or engage in misconduct include: 1) a manager's lack of understanding of agency and government-wide personnel policy and procedures; 2) a real or perceived lack of support by agency officials for managers who take such actions; and 3) cumbersome agency administrative procedures dealing with appeals.

A number of other factors might affect the amount of time it takes to complete the adjudication of a case before the Board. Those factors might include: 1) the number and complexity of issues in a particular case; 2) the size of the Board's pending caseload at any point in time; and 3) the staffing level.

Congress established in the Civil Service Reform Act that it expected the MSPB to be an efficient decision maker and the Board has an obligation to try to meet reasonable timetables in every case. If in a particular case or line of cases, it can be shown that the Board's jurisprudence is contributing to an unreasonable delay in the ability of agencies to finalize their adverse or performance-based actions, I would, if confirmed, work to clarify and streamline Board case law.

As to whether the average time it takes the Board now to resolve cases is reasonable, I hesitate to render a generalized opinion absent knowledge of the cases that currently comprise the Board's docket. I believe strongly, however, that members of the Board have a continuing obligation to process appeals expeditiously, so as to help ensure that the Board is not an impediment to the fair and efficient implementation of the merit system disputes resolution process.

2. *In light of the changing rules and regulations affecting federal employees, it is important that employees are aware of their rights and protections. While individual agencies and the Office of Special Counsel have statutory responsibility in this area, do you believe the MSPB should have a role in educating federal employees about their rights and protections against retaliation and discrimination in the workplace?*

   I believe that the Board properly does play a role in educating federal employees about their rights and protections. Although the Board is primarily an adjudicatory body, and is prohibited from rendering advisory opinions, members are free to attend seminars, workshops, and conferences in which merit system laws and processes are explained and examined. If confirmed, I would endeavor to contribute to the important training opportunities offered.

   In addition, the Board also has a statutory charge to engage in special studies relating to the civil service and other merit systems, and to report as to whether the public interest in a civil service free of prohibited personnel practices is being adequately protected. The Board carries out this role through its published decisions, its published studies and a number of publications in hard copy and on the Board's website. I believe that this special studies function is a proper basis on which to help educate employees of their rights, thereby giving the Board an additional way in which to supplement the educational efforts undertaken by the Office of Special Counsel.

3. *The first goal in MSPB's Fiscal Year 2004-2009 Strategic Plan is to provide fair, timely, and efficient adjudication of cases. Performance indicators of whether the MSPB is meeting this goal include the percentage of petitions for review reversed and/or remanded by the Board and percentage of cases unchanged on review by the Federal Circuit Court of Appeals. As you know, under the DOD proposed regulations, the Department will be able to review MSPB administrative judge decisions and, in some circumstances, overturn or modify them. As such, if the DOD regulations are implemented, the performance indicators for meeting MSPB's strategic goals may be modified to reflect the percentage of MSPB administrative judge cases overturned by the Department. As you have repeatedly stated the importance of having no interference with the independence of the decisions of MSPB Board Members and administrative law judges, what impact do you believe such proposals will have on the independence of administrative judge decisions on DOD cases?*

   I would hope and expect that the independence of the Board's administrative judges would not be impaired regardless of whatever changes might occur in the way in which cases are processed. The Board and its administrative judges are under an obligation to apply the law fairly in all cases, consistent with statutory and procedural rules. Sometimes, those rules are designed to raise or diminish the ability of one or another party to prevail. The original framers of the Civil Service Reform Act, for example, relaxed the evidentiary standards for agencies to prevail in performance-based actions, as

opposed to actions based on misconduct. The Board and its administrative judges need to adjust to procedural changes to ensure that independence is not compromised.

4. *The Office of Personnel Management has long stated the position, thus far endorsed by this Administration, that employment discrimination based on sexual orientation is a prohibited personnel practice under 5 U.S.C. 2302(b)(10), and that agencies and managers should commit themselves to promoting a work environment that is free from discrimination based upon sexual orientation. (See "Addressing Sexual Orientation Discrimination In Federal Civilian Employment: A Guide to Employee's Rights," www.opm.gov/er/address2/guide01asp.) If confirmed, would you support these existing interpretations and policies?*

   I prefer not to commit to a position on the prohibited personnel practice issue, because the Board has not yet ruled on this matter, and it may come before me for adjudication, if I am confirmed.

5. *Although legal training is not required to be a Member of the MSPB under 5 U.S.C. 1201, I believe that effective service on the Board does require the ability to work effectively with legal materials and concepts. For example, an MSPB Member must be able to analyze statutes, regulations, and judicial and MSPB decisions and reconcile them when there are inconsistencies; to understand and apply rules of procedure and evidence; to understand legal principles and concepts. What training and experience in your background have provided you with the skills and ability to carry out the duties of a Member of the MSPB?*

   I believe that my many years of experience in federal personnel management, accumulated over the past quarter century at the Office of Personnel Management and the Department of Education, equip me to understand the important balance the Civil Service Reform Act strikes between management prerogatives and federal employee due process. Executive experience at OPM has given me valuable insight into systemic issues that impact federal personnel law, in the full range of staffing, examining, pay, benefit, and disciplinary matters. Futhermore, my service at the Department of Education provided me the opportunity to understand how systemic decisions impact specific agency policies and their implementation. In addition I plan to follow the tradition of other Board members who have availed themselves of Counsel with expertise in personnel case law. I also expect to draw on the legal expertise of staff on the Board's Office of Appeals Counsel.

6. *Currently, individuals who claim that they are subject to prohibited personnel practices defined under 5 U.S.C. 2302(b)(8) may file an individual right of action and bring their cases directly to the MSPB. Do you believe all prohibited personnel practices should have an individual right of action?*

   While I sympathize with victims of all prohibited personnel practices (PPPs), I can understand why Congress limited the right to file individual rights of action to

whistleblowers. Whistleblowers are Federal employees who disclose waste, fraud and abuse, and it can be argued that they serve the public interest in efficient government. It would therefore be in the taxpayer's interest for whistleblowers to be encouraged and protected. When Congress passed the Whistleblower Protection Act of 1989 and gave whistleblowers the right to file individual right of actions, it could also have given this right to victims of other prohibited personnel practices but chose not to do so. I am not aware that the current avenues of redress for the other PPPs are insufficient.

7. *As you know, the MSPB adjudicates employee appeals of personnel actions and allegations of whistleblower reprisal and other prohibited personnel actions. However, situations may arise where an employee of the MSPB is subject to an adverse personnel action or a prohibited personnel action. What redress and review processes do you believe should be in place when MSPB employees are subject to such actions?*

I believe that MSPB employees are entitled to the same kinds of due process protections afforded other federal employees. Where there is a need to furnish an appeals process to Board employees, I would not hesitate to support an independent venue for the vindication of such rights, including the appointment of an administrative law judge by the Board for the purpose of rendering an independent decision on matters in dispute.

Post-Hearing Questions for the Record
Submitted to Mary M. Rose
From Senator George V. Voinovich

September 13, 2005

8. *Your experience as a federal civil servant would benefit you in hearing cases that have negatively impacted federal employees. However, it does not appear that you have an extensive background with MSPB case law. How do you intend to prepare yourself for the responsibilities of this position?*

   I have managed organizations and dealt with disputes of employees, managers and supervisors and am therefore familiar with many aspects of dispute resolution. I believe that this part of my background has prepared me with the experience needed in this particular position. I intend to review the most recent studies published by the board as a guide to the systemic issues that impact the federal personnel system and meet with my legal staff for reference material and their legal advice in order to decide, if confirmed, cases in a manner consistent with the applicable laws, rules and regulations.

9. *What steps have you taken since being nominated to prepare yourself to serve as a member of the Merit Systems Protection Board?*

   I have thoroughly reviewed the material MSPB provided to me regarding the internal functions of the Board, its purpose and the board member responsibilities. I also studied MSPB regulations and MSPB significant issues report, as well as the Whistleblower Appeals questions and answers. I had the opportunity to review the appeals form and petition for review form.

   With regard to policy discussions, I have reviewed the Federal Employee Protection of Disclosures [Whistleblower] Act and transcripts of hearings related to the Act. I reviewed the new DHS and DOD legislation and proposed regulations. I have also read the Working For America legislative proposal.

10. *The statute does not require members of the Merit Systems Protection Board to have a legal background. However, members of the Board are required to evaluate case law use, interpret statute, and make legal decisions. The Board employs many career civil servants with legal training which are great assets to members of the Board. Since you do not have a legal background, how do you intend to approach the intricate legal aspects of your position?*

    Should I be confirmed, I will call upon the resources at the MSPB to assist me as I approach the intricacies of the legal world. I understand the current policy at the MSPB is to provide a new member, a Chief Counsel and a staff attorney. I fully intend to use their legal expertise as I seek to make decisions in a fair and impartial manner.

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

I. BIOGRAPHICAL AND PROFESSIONAL INFORMATION

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

Juliet JoAnn McKenna. I have formerly used the name Julie.

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.**

Superior Court of the District of Columbia
500 Indiana Avenue NW, Suite 4450
Washington, DC 20001
202/879-0422

4. **Date and place of birth.**

I was born in Valparaiso, Indiana on October 19, 1970.

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).**

My husband, Douglas Townsend Kendall, is an attorney and the Executive Director of Community Rights Counsel, 1301 Connecticut Avenue NW, Suite 502, Washington, DC 20036.

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

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.**

I attended Yale Law School in New Haven, Connecticut from August 1992 until my graduation in May 1995; I received a Juris Doctor. I attended Georgetown University in

Washington, DC from August 1988 until my graduation in May 1992. I received a Bachelor of Arts degree, with a major in English and minor in Psychology. I attended Amity Regional Senior High School from September 1985 until my graduation in June 1988; I received a high school diploma.

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.

Following my second year of law school, I worked as a summer associate at the law firm of Crowell & Moring, 1001 Pennsylvania Avenue NW, Washington, DC 20004, from May 1994 until August 1994. I was selected to participate in the firm's public interest fellowship program and was detailed to the Legal Aid Society of the District of Columbia for six weeks.

Following my first year of law school, I worked as a summer associate at the law firm of Dunnells & Duvall (since merged with Holland & Knight), then located at 2100 Pennsylvania Avenue NW, Washington, DC 20006, from May 1993 until August 1993.

During the summer following my graduation from college, I worked as a waitress at the American Café from approximately May to August 1992. The restaurant was formerly located in at the corner of M Street and Wisconsin Avenue NW, Washington, DC, however it is no longer in business at that location.

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.

In March 2001, the Bar Association of the District of Columbia presented me with an Unsung Hero of the Law Award for my work on behalf of abused and neglected children in the District.

In March 1999, I was awarded the Arthur Liman Public Interest Fellowship to support my position with Lawyers for Children America for one year. The Fellowship is awarded to Yale Law School graduates who demonstrate a commitment to serving the public interest through the law.

I have been a member of Phi Beta Kappa since graduating from college in 1992.

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.

I served as the Executive Director of Lawyers for Children America, a non-profit organization, from March 2001 until my appointment as a D.C. Superior Court magistrate judge in April 2002. I held this position as an employee of the organization.

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.

Member, Superior Court of the District of Columbia Family Court Implementation Committee and Neglect Subcommittee, Present

Steering Committee Member, Family Law Section of the D.C. Bar, 2001-2004 Term (elected position), Practice Manual Coordinator, 2001-2002, Internet Coordinator, present

Member, Women's Bar Association, Present

Voting Member, National Association of Women Judges, 2003

Member, Superior Court of the District of Columbia Family Court Panels Committee, 2002-2003

Member, Superior Court of the District of Columbia Permanency Resolution Advisory Committee, 2001

Member, Superior Court of the District of Columbia Family Division Advisory Rules and Practice Standards Committee, 2000

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.

My family holds membership in the following organizations: Friends of the National Zoo, Glover Park Neighborhood Association, Sierra Club, Stoddert Elementary School Parent Teacher Association. None of these organizations has discriminated on the basis of race, sex or religion.

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.

I was admitted to practice law in the State of California in 1995; I have been an inactive member since 1997. I was admitted to practice law in the District of Columbia in 1996 and have been an active member of the bar since my admission.

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

"Child Welfare in the District of Columbia in the 21st Century," Sponsored by Family and Child Services of Washington, DC Inc., Spring 1999, (working paper for distribution to attendees at a child welfare symposium).

"Where Ignorance Is Not Bliss, A Proposal for Mandatory HIV Testing of Pregnant Women," Stanford Law and Policy Review, Summer 1996.

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.

I have delivered numerous presentations on the topic of child welfare law, best practices for child welfare practitioners, and abuse and neglect case proceedings in the District of Columbia to attorneys, social workers, mediators, and judges. None of these presentations has been reduced to writing.

16. Legal career (In responding to the following, please include and highlight any experience related to family law).

1. 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;

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

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

I have never served as a law clerk to a judge.

I have never practiced alone.

Aug-Sept 1995	Legal Services for Children, Inc.	1254 Market St., 3rd floor San Francisco, CA 94102
Oct 1995- Oct 1996	Crowell & Moring	1001 Pennsylvania Ave. NW Washington, DC 20004
Oct 1996- Sept 1998	Office of Corporation Counsel Abuse and Neglect Section	441 4th Street NW 6N50 Washington, DC 20001
Sept 1998-Apr 2002	Lawyers for Children America	2445 M Street NW Washington, DC 20037 (9/98-12/01) 2000 K Street Suite 200 Washington, DC 20006 (12/01-4/02)
Apr 2002- present	D.C. Superior Court, Family Court	500 Indiana Ave. NW Suite 4450 Washington, DC 20001

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

Upon graduation from law school, I accepted a position as an associate with the law firm of Crowell & Moring. Before beginning my work there, I spent eight weeks during August and September 1995 as an unpaid legal intern at Legal Services for Children in San Francisco, California. I drafted guardianship and emancipation petitions on behalf of young people and assisted in the implementation of a legal services program in a shelter for battered teen-age mothers.

I served as an associate at Crowell & Moring for one year, from October 1995 to October 1996. My work focused primarily in the areas of white collar crime and general litigation. As a first year associate, I researched and wrote memoranda, reviewed documents, and participated in client and witness interviews. I was actively involved in a number of pro bono projects while at Crowell and worked with other attorneys on several domestic relations and neglect matters, including two contested termination of parental rights proceedings.

For the next six years I dedicated myself to the area of child welfare law. I served as an Assistant Corporation Counsel (ACC) in the Abuse and Neglect Section of the District of Columbia's Office of Corporation Counsel from October 1996 until September 1998. Over this time period I developed a comprehensive understanding of abuse and neglect case proceedings, from the initial determination to file a petition, through trial, disposition and permanency

hearings. I carried a caseload of upwards of 75 cases at a time, in addition to attending the review matters of several D.C. Superior Court judges when needed. As an ACC, I gained extensive trial skills and practical experience in abuse and neglect law, including preparing and responding to discovery requests, writing stipulations and findings of fact, and researching and drafting motions.

In September 1998, I joined Lawyers for Children America (LFCA), a non-profit organization with offices in Washington, DC, Florida and Connecticut that is dedicated to leveraging the pro bono skills and resources of the legal community to assist abused and neglected children. As the Legal Services Program Director, I had primary responsibility for the recruitment, training and provision of ongoing support to pro bono attorneys serving as guardians ad litem in D.C. Superior Court. This position also provided me with the opportunity to serve as a guardian ad litem in several matters.

In March 2001, I became the Executive Director for the organization as a whole. In addition to continued responsibilities for the Washington, DC program and my work on individual cases, I also developed the organization's budget, explored opportunities for funding and prepared grant proposals, provided reports to the Board of Directors, gave presentations on child welfare practice, and managed of staff of six attorneys located in the three different program sites.

In April 2002, I was appointed as one of the first five D.C. Superior Court Family Court Magistrate Judges pursuant to the District of Columbia Family Court Act of 2001. I participated in an intensive three-week training that encompassed the many subject areas under the jurisdiction of the Family Court and have continued to participate in regular training opportunities. Since my appointment, I have presided primarily over child abuse and neglect matters. I also have handled an increasing number of related adoption, custody, juvenile, domestic violence and mental retardation commitment proceedings, as well as mental health probable cause hearings.

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

Since 1996, I have specialized in the area of family law, with a particular focus on child welfare law. The family situations I have encountered that bring children to the attention of the child protection system are incredibly varied, ranging from instances of child abandonment, severe neglect, sexual abuse or the suspicious death of a sibling. Likewise, the multitude of issues that abused and neglected children face makes it difficult to describe a typical case that I was assigned while at Corporation Counsel, or a typical client I represented as a guardian ad litem. I have handled matters involving children from the time of birth to the age of twenty-one. Many of the children have special education needs, or mental or physical health issues that must be addressed. All of the children have needed placement in a safe and permanent home environment.

4. 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.

(2) What percentage of these appearances was in:

(1) Federal courts (including Federal courts in D.C.);
(2) State courts of record (excluding D.C. courts);
(3) D.C. courts (Superior Court and D.C. Court of Appeals only);
(4) other courts and administrative bodies.

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

(1) 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.

(2) What percentage of these trials was to

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

I have served as a magistrate judge in the D.C. Superior Court, Family Court since April 2002. Prior to my appointment, I appeared in D.C. Superior Court regularly. From 1996 to 1998, while with the Office of Corporation Counsel, I appeared in court essentially every weekday and some Saturdays. My appearances became less frequent during the period that I worked with Lawyers for Children America beginning in September 1998; however I continued to appear in court approximately once a week or accompanied a volunteer attorney to provide supervision and support.

My court appearances have been in D.C. Superior Court and the D.C. Court of Appeals exclusively.

All of my litigation experience has been civil litigation.

Prior to my appointment as a magistrate judge, I tried approximately fifty cases to judgment. I served as associate counsel (guardian ad litem) in two of these cases, and as sole counsel in the remainder.

All of these cases were tried before the court.

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.

The five child abuse and neglect cases described below were all litigated in D.C. Superior Court. I handled the first four matters while serving as an Assistant Corporation Counsel on behalf of the District of Columbia and was appointed in the fifth matter while at Lawyers for Children America. Because of the confidential nature of neglect proceedings, I have identified the parties by initials only.

While at the Office of Corporation Counsel, of the over 200 pretrial cases I was assigned, approximately 50 cases proceeded to trial. These litigated matters tended to involve more complicated allegations of neglect or abuse than those cases that were resolved by stipulation. I tried several cases in which very young children suffered broken bones or head injuries for which a rationale explanation was not provided, requiring that sufficient evidence be introduced to support a reasonable inference that the children had been abused. In other cases, missing, frightened or hostile witnesses posed a challenge to obtaining the testimony essential to proving the allegations. I gained extensive experience not only in conducting direct and cross-examinations, but also in making and overcoming evidentiary objections, qualifying and questioning expert witnesses, and in developing a concise and cohesive presentation of the evidence to the court.

In re R.E., P.E., M.F., A.F. and K.F.

The case of In re R.E., P.E., M.F., A.F. and K.F., Neglect Nos. 496-500-96, was of particular significance to me because the District's proof at trial relied almost exclusively on the testimony of the child victim, R.E..

This case involved an allegation that the stepfather of R.E. and P.E. used excessive force in disciplining his stepchildren, and that his actions placed his children, M.F., A.F. and K.F., in danger of being abused. Aside from the stepfather, no other adults were present in the home

when the incident occurred. Neither R.E. nor P.E. showed any signs of physical injury, and the only tangible evidence of the abuse was a picture of the hole created when the stepfather smashed R.E. into the wall. Accompanied by the guardian ad litem, I met with R.E., fourteen years old, to discuss the incident with her, as well as her willingness and ability to testify at trial. I was struck by R.E.'s determination to testify and her need to take action to help ensure that her step-father never hurt her, her younger siblings, or her mother, again.

With the exception of brief testimony from the Youth Division Detective to establish a foundation for the introduction of the photograph of the smashed wall into evidence, R.E. was the only witness presented at trial. Based on R.E.'s testimony, the court found that the stepfather began beating P.E. after the child ate something he was told he couldn't have. When R.E. intervened to protect her brother, the stepfather pushed her with sufficient force to smash a hole in the wall. R.E.'s testimony as to the stepfather's angry demeanor and intoxication undermined any argument offered by opposing counsel that the stepfather was seeking to appropriately discipline the children. R.E. also testified that her younger siblings were in the apartment when this incident occurred, providing sufficient evidence to support a finding that they were in danger of being abused. Based upon the strength of her testimony, the court entered findings that the children were neglected.

The trial was held on April 10, 1997 before Judge Robert S. Tignor. All of the children were reunited with their mother, who obtained a civil protection order against the stepfather. The family relocated to Virginia and the case was closed the following year.

The other attorneys on the case were:

Anthony Davenport, Guardian ad litem
601 Pennsylvania Avenue NW, Suite 900
Washington, DC 20004
202/434-8201

Stephen Watsky, Attorney for mother
1275 K Street NW, Suite 825
Washington, DC 20005
202/898-1333

Thomas O'Toole, Attorney for father of P.E.
P.O. Box 42054
Washington, DC 20015
202/244-0273

Lawrence Spillan, Attorney for stepfather
1115 Massachusetts Avenue NW
Washington, DC 20005

202/638-5822

John Trevithick, Attorney for father of R.E.
5916 Rudyard Drive
Bethesda, MD 20814
301/493-8645

In re D.H. and Da.H.

As illustrated by the case above, one of the many challenges encountered in litigating child protection cases is that oftentimes the only witnesses to the abuse and neglect are the parent who committed the act and the child who endured it. Even greater challenges are posed when the child who suffered the injury is unable to speak due to age or disability. During my first eight months as an Assistant Corporation Counsel, I was assigned such a case in which a four-month-old baby girl was brought to the hospital with second and third degree burns covering 20% of her body.

While both the mother and father testified at trial that the child had been in their exclusive care prior to sustaining the severe burns, neither would provide any explanation as to how the injury could have occurred. A detective from the Youth Division of the Metropolitan Police Department also testified that he interviewed the parents shortly after the child was brought to the hospital and no explanation for the burns was provided. I called on the doctor who examined the infant at Children's National Medical Center to testify as an expert witness. In his opinion, the child had likely been scalded by immersion in very hot liquid. His testimony established a time frame during which the injuries could have occurred and also dispelled any claim that the parents could not have noticed the child's injuries given the severe pain the child likely experienced.

I successfully argued that, based upon the strength of the doctor's testimony, the parents' own admission that no one else had cared for the child, and the child's young age and inability to self inflict the injuries, the court could draw an inference that the child had been abused, as authorized by the District's child welfare statute. The court also found that the child's sibling was in imminent danger of abuse, given the testimony that the two children were together throughout the time period when the injury occurred.

Judge Ronna Lee Beck presided over this case, In the Matter of D.H. and Da. H., N 1443-96, N 1456-96, on April 16 and 17, 1997. The adoption of the children was finalized in July of 2000. The other attorneys on the case were:

Stephen Burns, Attorney for the mother
8313 Silverthorn Road
Fairfax Station, VA 22039
703/495-8000

Semi Feuer, Attorney for the father
P.O. Box 10189
Silver Spring, MD 20914
301/622-7788

Al Gonzalez, Guardian ad litem
601 Pennsylvania Avenue NW, Suite 900
Washington, DC 20004
202/434-8255

James Marsh, Attorney for mother's husband
159 Valley Stream Road
Larchmont, NY 10538
(previous Executive Director, Children's Law Center)

In re W.D. and S.D.

In another case I litigated before Judge Beck, In re W.D. and S.D., N 1424-96, N 1425-96, the court found that the mother of five year old twins neglected her children by exposing them to her drug use, spending the nights with them at a crack house, and failing to enroll them in school. This case posed a particular challenge in that my primary witness was herself a recovering addict who had come to know the mother and her children through enrollment in the same methadone treatment program. Ms. G.'s history of drug use and soured friendship with the mother made her vulnerable to attack on cross- examination. However, based upon Ms. G.'s statements, I was able to locate additional independent witnesses, including a social worker and school teacher, to substantiate her testimony. This corroboration, combined with thorough preparation of Ms. G., led the court not only to credit her testimony in its entirety, but to note in its findings Ms. G's "strength and courage in facing [her] own addiction to drugs, and . . . [her] willingness to help someone else struggling with drug addiction."

The trial in this matter was held on April 16 and April 24, 1997. The children were subsequently adopted in July 2001. The other attorneys involved in this case were:

Debbie Kirk, Guardian ad litem
Ms. Kirk is no longer in practice in this area and was subsequently replaced another attorney. Her successor was:
Anne Schneiders
2828 Wisconsin Avenue NW, Suite 314
Washington, DC 20007
202/363-7916

Karen Howze, Attorney for the mother
Ms. Howze is now serving as a Family Court magistrate judge and may be contacted at:
D.C. Superior Court
500 Indiana Avenue NW, Suite 4450
Washington, DC 20001
202/879-1061
(Ms. Howze was subsequently replaced by attorney Michelle Henry, 301/596-3752)

In re K.C., K.J., and P.J.

A fourth case that I litigated on behalf of the District of Columbia involved three children alleged to be neglected due to persistent absences from school and their mother's mental health difficulties. This case was of particular significance in that the children adamantly did not want to be removed from their mother and staunchly defended the level of care that she had provided to them. This was one of the first cases I handled in which I was directly confronted with the power of the love, guilt and loyalty some abused children experience, causing them to want to remain with their parent regardless of how dreadful the situation is. The evidence gathered through the social worker's investigation and my review of the mental health and attendance records in the case led me to the position that the children could not safely be returned to their mother's care at that time. The mother had been diagnosed as paranoid and psychotic, and her deluded view of the world was beginning to negatively impact upon the children.

In order to prove the nexus between the children's excessive absences and the mother's actions or lack thereof, I had to call two of the children as witnesses to establish why they had not attended school. I was mindful of not wanting to cause further emotional harm to the children by asking hostile questions or aggressively attacking their mother. The children's own matter of fact account of what had transpired in their home provided ample evidence of the neglect they had experienced. The twelve year old boy's response that he hated school because he didn't like being so much older and bigger than the other children in the fourth grade, and the fifteen year old sister's inability to read the attendance form I put in front of her, a fact that I was unaware of prior to her testimony, spoke volumes about the negative impact the lack of education had on these children and would have on their future.

The trial was held on June 25 and 26, 1998 before Judge Zoë Bush. The court's finding of neglect was affirmed by the Court of Appeals in a memorandum opinion issued on March 27, 2000. (In re K.C., K.J., and P.J, N 217-219-98, 98-FS-1773, 1781, 1913). In upholding the trial court's decision, the appellate court noted that "there was significant evidence of the children's non-attendance," as well as evidence of "the detrimental effect this lack of schooling was having on the children's social and educational development."

The cases of K.C. and K.J. are now closed; K.C. was placed in the legal custody of her father, and K.J. rejected any further involvement from Child and Family Services Agency upon

turning eighteen. P.J. became involved in the juvenile system and is currently in a residential treatment facility.

The other attorneys on the case were:

Rosalind Johnson, Attorney for the father of K.C.
11109 Wood Elves Way
Columbia, MD 21044
301/596-4005

Barbara Lindskold, Guardian ad litem
419 7th Street NW, Suite 401
Washington, DC 20004
202/347-1849

Beth Walker, Attorney for mother
800 7th Street NW, Suite 201
Washington, DC 20001
202/452-5532

In re D.B.

Through my position with Lawyers for Children America, I supervised the trial work of many pro bono attorneys serving as guardians ad litem in D.C. Superior Court. I also had the opportunity to work directly on some very unique and challenging cases. In August 2000, I was appointed by D.C. Superior Court Judge Kaye Christian as the special counsel on behalf of a neglected child in the case of D.B., N 978-99, to prosecute the orders to show cause why Child and Family Services Agency and then Receiver Ernestine Jones should not be held in contempt for failing to obey the court's orders. The orders to show cause were issued following CFSA's failure to provide needed services to the child, and for twice failing to appear at the disposition hearing and to submit the required report. Ms. Jones was further ordered to show cause why she should not be held in contempt for failing to comply with the order requiring her presence before the court. Due to the confidential nature of the neglect proceedings, a separate case was initiated in the D.C. Superior Court's Special Proceedings Section, In the Matter of Ernestine Jones, SP 2093-00.

I filed an extensive brief in opposition to the government's motions to vacate the orders to show cause and prevailed at oral argument before the court. I subsequently engaged in lengthy negotiations with Ms. Jones' counsel, retained from the law firm of Zuckerman, Spaeder. In addition to accepting conditions imposed on CFSA to immediately address the needs of the subject child, Ms. Jones ultimately acknowledged her obligation to comply with the court's orders and agreed to personally pay a fine to cover the cost of attorneys' fees resulting from her noncompliance. Following this satisfactory resolution of the issues giving rise to the orders to

show cause, Judge Christian granted my motion to withdraw as special counsel on September 28, 2000.

The attorneys who appeared in the case were:

Myesha Braden, Assistant Corporation Counsel
Office of the Corporation Counsel, Abuse and Neglect Section
441 4th Street NW, 6th Floor
Washington, DC 20001
(Ms. Braden is no longer with the office, however Paul Kratchman, an attorney with the Office of General Counsel, Child and Family Services Agency, was also involved in the case on behalf of the government. Mr. Kratchman may be reached at 202/442-6146.)

David Cohen, Guardian ad litem
4316 Hamilton Street
Hyattsville, MD 20781
301/887-0700

Sharon Singh, Attorney for the caretaker
733 15th Street NW, Suite 700
Washington, DC 20005
202/628-3886

Amrutha Rode, Attorney for the mother
P.O. Box 8495
Falls Church, VA 22041
703/671-0712

Elizabeth G. Taylor, Attorney for Ernestine Jones
Zuckerman, Spaeder, Goldstein, Taylor & Kolker LLP
1201 Connecticut Avenue NW
Washington, DC 20036
202/778-1876

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).

Consistent with the mandates of the Adoption and Safe Family Act, as a Family Court magistrate judge presiding over neglect cases, my primary charge is to ensure the safety and well being of the children under the court's jurisdiction. Securing legal permanence for each child

through reunification, guardianship or adoption is an equally crucial objective. In that regard, I have achieved resolution in over 30% of the 380 cases I have handled since my appointment in April 2002, including cases in which the youth has emancipated from the neglect system at age 21. This relatively high rate of case closure has been accomplished in part through frequent court hearings, identification of barriers to permanency and enforcement of strict deadlines for overcoming them, court ordered provision of needed services to children and families, and ongoing assessment of the child's needs and best interests. The two cases described below, one resulting in family reunification and the second in adoption, illustrate the significance of my work to date as a judicial officer.

In re C.G. and Ch.G.

The very first hearing I presided over as a Family Court magistrate judge in April 2002 was in the matter of C.G. and Ch.G.. While perhaps not legally complex, this case illustrates the myriad difficult decisions I have been called upon to make over the past two years as a Family Court judicial officer, as well as the challenges and rewards involved in this work. The mother of the children, D.G., stipulated that she left C.G. and Ch.G., then three and four years old, alone in the home while she went out in search of drugs. She acknowledged that she was a drug addict and enrolled herself in an inpatient substance abuse treatment program. The program was designed for women and children and, in order for her to remain in the program beyond 30 days, C.G. and Ch.G. had to be returned to her care.

At an emergency hearing convened to address her request for reunification, I considered the depth of the mother's commitment to drug treatment, the likelihood of her success, the children's bond to their parents and to one another, and the timeframe under which family reunification, if it is to occur, must occur under the law. After receiving multiple assurances that the program would provide the level of supervision and support that D.G. required to parent her children and address the children's educational and developmental needs, I placed the children back with their mother and instructed the parties to return in two weeks. C.F., the father of C.G. and the only father Ch.G. has known, was also required to participate in drug treatment and job training prior to any unsupervised visits with the children.

Both parents returned before the court approximately every 90 days so that I could assess their progress and ensure the safety and well-being of the children. The family experienced tremendous challenges and some significant setbacks, including D.G.'s transfer to a second drug treatment program, C.'s diagnosis with significant learning disabilities, an allegation that Ch. was sexually abused during the month she spent in foster care, paternity test results indicating that C.F. was not Ch.'s biological father, and difficulty securing stable housing. However, regular court oversight required that all of the case participants -- the social worker, attorneys, drug treatment counselors, therapists, educational advocate, and the parents-- work together closely to overcome these obstacles in order to achieve successful reunification.

In re J.P.

The case of J.P. was assigned to me in October 2002 pursuant to the "one family/one judge" model adopted by the D.C. Superior Court, Family Court. I had prior case responsibility for J.P.'s older brother R.P., now almost 21 years old and preparing to emancipate from the neglect system. The child welfare agency alleged that J.P.'s mother abandoned him at the hospital days after his birth and failed to make any arrangements for his care. Based upon the mother's prior history of child neglect and substance abuse, J.P. was placed in a preadoptive home. The case proceeded to trial in January 2003 and after hearing evidence and argument from all parties, I entered detailed written findings that J.P. was a neglected child due to his mother's abandonment and drug use.

At the disposition hearing, at which an initial permanency goal is established for the child, counsel for the parents argued that their clients should be given additional time to appear and make efforts to reunify with J.P.. They argued in the alternative that J.P. be removed from his preadoptive home and placed with biological family members. Relying upon provisions in both the federal Adoption and Safe Families Act and the D.C. child welfare law that the court may exempt the agency from making reasonable efforts to reunify a parent with a child when there has been a judicial finding of abandonment, I rejected counsels' arguments and granted the request of the guardian ad litem that the goal be changed to adoption. I ordered the agency to continue to explore any viable relative placements and authorized visitation with approved family members. However, I found that it would be contrary to J.P.'s best interests to remove him from the only home he had ever known and place him with a cousin whose ability to care for him was in serious doubt.

J.P.'s foster parents promptly filed for adoption. While both birth parents received notice, the mother through personal service and the father via publication in the newspaper, neither parent appeared at the subsequent evidentiary hearing. Based upon the evidence received concerning the failure of either parent to maintain a relationship with their son, and the testimony that J.P. is thriving in the care of his foster family, I entered a final decree of adoption on April 20, 2004 and closed the underlying neglect case. J.P.'s adoptive parents have continued to arrange visits not only with J.P.'s cousin, but also with his big brother, R.P.. J.P. will be two years old in August and, unlike R.P., will not grow up in foster care.

One of the most significant non-litigation activities I have pursued since my appointment as a magistrate judge has been the development of the Benchmark Permanency Hearing Program. This Family Court initiative began in September 2003 with the support and approval of Family Court Presiding Judge Lee F. Satterfield, and I have served as the lead judicial officer for the project since that time. The program is designed to ensure that the court more fully addresses the needs of the teenagers and young adults who will transition from the child welfare system into adulthood at age twenty-one. The obstacles these young people face are often overwhelming. While some youth are enrolled in college or are engaged in vocational training, many are

struggling to complete high school, pass the GED, raise children of their own, address mental health issues or overcome substance addiction.

The primary focus of the Benchmark program, modeled upon a similar project implemented in Chicago's Cook County Juvenile Court, is to actively engage youth in planning for their future and to ensure that the necessary supports are in place to assist them in successfully transitioning from the neglect system to adulthood. In contrast to traditional court hearings, Benchmark hearings are conducted informally around a conference table and the discussion is centered on the development of education, career and personal goals for the youth. The young person must be present in order for the hearing to proceed. Based upon the individual needs of the youth, I invite representatives from other District agencies, such as Rehabilitation Services Administration, Mental Retardation and Developmental Disabilities Administration, or the Department of Mental Health, to attend in order to assist the youth in developing a meaningful plan for his or her transition from the neglect system.

The response from the attorneys, social workers, foster parents, and most importantly the youth themselves, has been overwhelmingly positive. The attached article and Benchmark policy manual, which I developed in consultation with representatives from District social service agencies, child welfare attorneys and youth in the foster care system, describe the program in greater detail. (Attachment A).

Prior to my appointment as a magistrate judge, I served on the Family Division's Advisory Committee during 2000. Over the course of several months, the Committee developed proposed practice standards for attorneys appearing in abuse and neglect cases intended to improve the quality of legal representation for all parties. The Chief Judge subsequently issued an administrative order enacting the practice standards for all attorneys appearing in child welfare related cases.

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 currently hold judicial office as a D.C. Superior Court Family Court magistrate judge. I was appointed to this position effective April 12, 2002 to serve a four year term. Family Court magistrate judges may preside over proceedings within the jurisdiction of the Family Court and the Domestic Violence Unit, which include neglect, juvenile, adoption, divorce, custody, paternity and support, mental health, and intrafamily civil protection proceedings, excluding jury trials and trials of felony cases.

I have attached four copies of all opinions addressing contested factual or legal issues that I have written during my service. (Attachment B). I have not issued any published opinions. Due to the confidential nature of child neglect proceedings, I have redacted the names of the

parties involved in each case. Please note that following every hearing, I issue a detailed form order, proposed by the Assistant Corporation Counsel, setting forth findings required by the child welfare law, as well as reducing to writing verbal orders issued in the course of the hearing. I have not attached these orders due to the sheer number and preprinted nature of the forms.

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

Pursuant to the D.C. Superior Court rules and applicable appellate case law, a party challenging the decision of a magistrate judge (formerly hearing commissioner) must first seek review by an associate judge of the Superior Court before appealing the decision to the D.C. Court of Appeals. I have had one decision reviewed by an associate judge upon request of the Office of Corporation Counsel, In the Matter of R.L., N 807-00. In reviewing my order that the child welfare agency fund the placement of a foster child at a therapeutic school, the judge ruled that the school system should first be afforded an opportunity to consider the appropriateness of a change in school placement pursuant to the administrative process set forth by the Individuals with Disabilities Education Act (IDEA) prior to the court ordering the child welfare agency to fund such a service on behalf of the child. The judge remanded the case back to me for further proceedings, noting new developments in the case since the entry of my order.

I have not had a court decision reviewed, reversed or otherwise criticized by the D.C. Court of Appeals.

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).

In June 2001, I was elected by members of the Family Law Section of the District of Columbia Bar to serve a three year term as a member of the Family Law Section Steering Committee. I have not otherwise been a candidate for elective, judicial, or any other public office.

21. Political activities and affiliations.

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

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

3. 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.

I have never held elected or appointed public office, or sought such as a candidate or applicant, other than what is referenced in response to question 20, above.

I am a registered Democrat and have not otherwise held office in or rendered services to any political party or election committee during the last ten years.

I have not made any political contributions during the last five years.

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.

My husband and I were parties to an adoption proceeding and corresponding neglect matter involving our foster, now adopted, daughter in D.C. Superior Court. The biological parents consented to our petition to adopt and a final decree of adoption was entered in July 2002. The neglect matter was closed a short time thereafter.

I have been named as a defendant in a civil action arising from my duties as a judicial officer. Pursuant to an administrative order issued by Chief Judge Rufus King, I was appointed to the Family Court Panels Committee in April 2002, comprised of D.C. Superior Court judges and magistrates. The Committee was tasked with recommending to the Chief Judge four panels of qualified attorneys for court appointment in family court matters. After careful and extensive review of hundreds of applications, as well as evaluations submitted by other judicial officers, the Committee issued its report and recommendations to the Chief Judge in March 2003. Chief Judge King adopted the recommendations of the Family Court Panels Committee and, pursuant to administrative order, established the panels system. While many attorneys qualified for inclusion on the panels, other attorneys who lacked the requisite experience and legal skills were deemed ineligible for further court appointments, subject to reapplication to the panels.

On May 21, 2003, attorneys Pamela Roth, David Sitomer and David Ontell, on behalf of a class of court appointed attorneys, filed a complaint in U.S. District Court and a motion for a temporary restraining order, challenging the legality of the panel system and seeking to enjoin its

implementation (Civil Action No. 03-CV-1109). The complaint names as defendants all 12 judges and magistrate judges, including myself, who served on the Family Court Panels Committee in our capacity as judicial officers and members of the committee, as well as Chief Judge King, Family Court Presiding Judge Lee Satterfield, Deputy Presiding Judge Anita Josey-Herring, the Director of the Public Defender Service, and the Director of the Office of Child Abuse and Neglect.

On June 2, 2003, Judge Ricardo M. Urbina denied plaintiffs' request for a temporary restraining order. In response to defendants' motion to dismiss, Judge Urbina issued an order directing plaintiffs to file an amended complaint. A second motion to dismiss, filed on behalf of all the defendants by the law firm of Jenner & Block, serving as pro bono counsel in this case, is currently pending before Judge Urbina.

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?

I am currently serving as a D.C. Superior Court Family Court magistrate judge and, if confirmed, will continue to serve on the Family Court as an associate judge. My current position on the court does not pose any conflicts if I should be confirmed. I have severed all other employment and business connections.

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.

None.

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.**

My spouse and I have arranged and will continue to arrange our financial affairs in a way that minimizes the potential for conflicts of interest. If a potential conflict of interest arises, I will carefully consult all applicable standards of judicial ethics, including the Code of Judicial Conduct of the District of Columbia Courts, and take all necessary and appropriate action to resolve such conflict.

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

   Yes.

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.**

   I have been a member of the District of Columbia bar since 1996.

4. **If the answer to Question 3 is "no" –**

   Not applicable.

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

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

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

   4. **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

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.**

Please see attached. (Attachment D).

AFFIDAVIT

Juliet J. McKenna 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.

SUBSCRIBED and SWORN TO before me this 29 day of June 2004.

Notary Public

APPOLLO CAMERON
NOTARY PUBLIC DISTRICT OF COLUMBIA
My Commission Expires June 15, 2005

ORIGINAL

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).

   John Robert Fisher

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

   U.S.

3. Current office address and telephone number.

   Office of the United States Attorney
   Room 8104
   555 4th Street, N.W.
   Washington, D.C. 20530

   (202) 514-7088

4. Date and place of birth.

   August 22, 1946 – Mount Vernon, Ohio 43050

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 married Margaret M. (Jones) Fisher on August 7, 1966.

   Margaret is an Instructional Assistant employed by the
   Fairfax County Public Schools. She works at
   William Halley Elementary School
   8850 Cross Chase Circle
   Fairfax Station, VA 22039

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

   Clark A. Fisher (26)

Clark works as a Marketing Representative/Broker for
Applied Underwriters
5 Thomas Mellon Circle
3rd Floor
San Francisco, CA 94134

Mandana N. Fisher (20)

Mandy will be a junior at East Carolina University. This summer she is working as a Rehabilitation Technician at
Sibley Memorial Hospital
5255 Loughboro Road, N.W.
Washington, D.C. 20016.

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.

Harvard Law School, Cambridge, MA 02138
Attended September 1971 to May 1974.
J.D. degree received June 1974

Harvard College, Cambridge, MA 02138
Attended September 1964 to May 1968
A.B. degree received June 1968

Fredericktown High School
Fredericktown, Ohio 43019
Attended 1960 to 1964
Diploma received May 1964

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.

June 1972 to Sept. 1973 – for two summers and part-time during school, I was a research assistant to Prof. Morton Horwitz, Harvard Law School, Cambridge, MA 02138 – research relating to American legal history

June 1973 – for three weeks I was a summer associate at the law firm of Barnes, Hickam, Pantzer & Boyd, 1313 Merchants Bank Bldg, Indianapolis, IN 46204.

Nov. 1970 to Aug. 1971 – I worked as a clerk for United Parcel Service, 3910 Groves Rd., Columbus, Ohio.

Jan. 1969 to Sept. 1970 – I served on active duty in the U.S. Army in grades E-1 through E-5. After training in the United States I served for one year in South Vietnam. In Vietnam I was a company clerk in a Combat Engineer Battalion. When I entered the Army my serial number was At some point during my service the Army started using Social Security numbers. My SSAN is I received an honorable discharge.

Sept. 1968 to Jan. 1969 – While waiting to enter the Army I worked on the farms of my parents and parents-in-law in Knox County and Licking County, Ohio, and did occasional odd jobs.

June 1967 to Sept. 1968 – For two summers and part-time during college I worked as a file clerk for the Richard C. Knight Insurance Agency, 6 St. James Avenue, Boston, MA.

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.

Harvard College scholarship

Army Commendation Medal

My A.B. degree from Harvard College was awarded magna cum laude

My J.D. degree from Harvard Law School was awarded cum laude

I have received several Special Achievement Awards from the United States Attorney.

In 1991 I received the Harold Sullivan Award from the Assistant United States Attorneys Association. This is an annual award presented to the Assistant United States Attorney for the District of Columbia who best exemplifies the selfless devotion, personal courage, professional fairness and trial excellence of the late Harold J. Sullivan.

In 2001 I received a Director's Award for Executive Achievement from the Director of the Executive Office for U.S. Attorneys.

In July 2002 I received from the Attorney General the John Marshall Award for Outstanding Legal Achievement for Handling of Appeals.

In 1998 I was elected to the American Academy of Appellate Lawyers.

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.

From January 2000 through December 2004 I served as Treasurer of Washington Farm United Methodist Church, 3921 Old Mill Road, Alexandria, VA 22309.

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.

I am a fellow of the American Academy of Appellate Lawyers, having been elected on August 1, 1998.

Since 1998 I have served on the Advisory Committee on Procedures of the United States Court of Appeals for the District of Columbia Circuit. I have been the Chair since 2002.

From 1997 to 2003, I served on the Legal Ethics Committee of the D.C. Bar.

I am a Master of The Edward Coke Appellate Inn of Court, an Inn I helped organize in 2000.

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.

From January 2000 through December 2004 I served as Treasurer of Washington

Farm United Methodist Church, 3921 Old Mill Road, Alexandria, VA 22309. We regularly attended this church from approximately 1990 until January of 2005 and occasionally attend it now.

I am a long-time member of the Assistant United States Attorneys Association, a social organization composed of present and former Assistant United States Attorneys for the District of Columbia.

None of these organizations formerly discriminated or currently discriminates on the basis of race, sex, or religion.

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.

Ohio – November 1974

District of Columbia – May 1976

United States District Court for the Southern District of Ohio – May 10, 1976

United States District Court for the District of Columbia – December 6, 1976

United States Court of Appeals for the District of Columbia Circuit – February 21, 1978

Supreme Court of the United States – 1980

United States District Court for the Northern District of Ohio – September 15, 1986

United States Court of Appeals for the Sixth Circuit - November 7, 1988

I have not been admitted to practice before any administrative bodies which require special admission to practice.

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

None

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.

None

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;

Yes. From June 1974 through June 1976 I served as law clerk to the Honorable Joseph P. Kinneary, United States District Judge for the Southern District of Ohio, with chambers in Columbus, Ohio.

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

No.

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

From June of 1976 until August of 1983 I was an Assistant United States Attorney for the District of Columbia. The current address of that office is 555 Fourth Street, N.W., Washington, D.C. 20530.

From August of 1983 until June of 1986 I was an Assistant United States Attorney for the Southern District of Ohio. The current address of that office is 303 Marconi Boulevard, Suite 200, Columbus, Ohio 43215.

From June of 1986 until April of 1989 I was Of Counsel to the law firm of Vorys, Sater, Seymour & Pease, 52 East Gay Street, P.O. Box 1008, Columbus, Ohio 43216-1008.

From April of 1989 until the present I have served as an Assistant United States Attorney for the District of Columbia. Since June of 1989, I have also

served as Chief of the Appellate Division of the office, which is located at 555 4th Street, 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.

As law clerk to Judge Kinneary from 1974 through 1976, I assisted the court in managing a docket of civil and criminal cases, in preparing for trials and evidentiary hearings, in drafting jury instructions, and in drafting orders and opinions.

From 1976 through 1980, I served in various rotational assignments in the Office of the United States Attorney for the District of Columbia, trying criminal cases in the Superior Court of the District of Columbia, briefing and arguing criminal appeals, investigating and indicting federal crimes, and investigating and indicting violations of the D.C. Code. In 1980 I became a Deputy Chief of the Appellate Division, and I served in that capacity until leaving the office in August 1983.

From August of 1983 until June of 1986, I served as an Assistant United States Attorney for the Southern District of Ohio, investigating, indicting, and trying criminal cases in the United States District Court for the Southern District of Ohio. I also briefed and argued a few appeals in the United States Court of Appeals for the Sixth Circuit.

At the Vorys, Sater law firm I specialized in complex civil litigation in state and federal courts.

For the past sixteen years I have been an Assistant United States Attorney for the District of Columbia and Chief of that Office's Appellate Division. I am responsible for managing a division of approximately 35 lawyers and 10 support persons. In a typical year we file between 500 and 600 briefs in criminal appeals in the District of Columbia Court of Appeals and the United States Court of Appeals for the District of Columbia Circuit. We also present between 150 and 200 oral arguments each year.

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

As an Assistant United States Attorney I have specialized in criminal law. As Chief of the Appellate Division for the past 16 years, I have specialized in the

litigation of criminal appeals. I represent the United States of America.

At Vorys, Sater, Seymour and Pease, I represented a creditors' committee in bankruptcy litigation, large and small corporations, public agencies, and individual clients. My practice involved bankruptcy claims, fraudulent transfers, ERISA matters, wrongful death actions, construction contract disputes, savings and loan fraud, litigation over insurance coverage, automobile warranty claims, and a variety of other 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.

From 1976 through 1986, when I served as an Assistant United States Attorney for the District of Columbia and then for the Southern District of Ohio, I appeared in court frequently, sometimes on a daily basis. I tried 34 jury trials and about 15 non-jury trials. In addition, I presented evidence at numerous evidentiary hearings.

From June 1986 through April 1989, when I worked for Vorys, Sater, I appeared in court only occasionally. I was co-counsel in one civil jury trial, and I argued one criminal appeal.

For the past sixteen years I have served as Chief of the Appellate Division of the United States Attorney's Office for the District of Columbia. The principal duties of this position are to manage and supervise, and to provide advice and counsel. During this period I appeared in court occasionally. I used to be able to argue five or six cases a year. Management duties have increased, so for the last four or five years I have been lucky if I can argue a couple of cases a year.

As an appellate litigator I have argued in the neighborhood of 60 to 80 cases, perhaps more. I have had 16 en banc arguments before the District of Columbia Court of Appeals and the D.C. Circuit. I have argued dozens of cases before panels of each court. I also argued three cases in the Sixth Circuit and one case in an intermediate appellate court of the State of Ohio.

(2) What percentage of these appearances was in:

(a) Federal courts (including Federal courts in D.C.);

Over the last 30 years, I estimate that 30 to 35% of my court appearances have been in federal courts.

(b) State courts of record (excluding D.C. courts);

1 to 2 %.

(c) D.C. courts (Superior Court and D.C. Court of Appeals only);

63 to 68%.

(d) other courts and administrative bodies.

N/A

(3) What percentage of your litigation has been:
(a) civil; **5%**

(b) criminal. **95%**

(4) 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.

Approximately 50. I was sole counsel on most of these and co-counsel on two or three.

(5) What percentage of these trials was to

(a) a jury; **70 %**

(b) the court (include cases decided on motion but tabulate them separately). **30 %**

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.

United States v. Cohen, 733 F.2d 128 (D.C. Cir. 1984) (en banc)

I represented the United States and briefed the case for the en banc court. I also argued the case on October 27, 1982, before Chief Judge Spottswood Robinson, Circuit Judges Wright, Tamm, Wilkey, Wald, Mikva, Edwards, (Ruth) Ginsburg, and Bork and Senior Circuit Judge MacKinnon.

Mr. Cohen was represented by A. Franklin Burgess, Jr., who was then the Chief of the Appellate Division at the Public Defender Service. He is now a Judge of the Superior Court with chambers at 500 Indiana Avenue, N.W., Washington, D.C. 20001. His telephone number is (202) 879-1164.

In 1980 Mr. Cohen was arrested near the Chinese embassy with three home-made bombs and a loaded rifle. He was found not guilty by reason of insanity of federal charges and was automatically committed to St. Elizabeths Hospital pursuant to a D.C. Code provision (enacted by Congress) that applied to defendants in both federal court and the Superior Court. At that time there was no federal legislation that provided for the commitment of defendants found not guilty by reason of insanity in federal courts throughout the country. (These insanity acquittees were released from federal custody, and any commitment for mental health treatment would be governed by state law.) Mr. Cohen protested that he had been denied equal protection of the laws because he was being treated differently than an insanity acquittee in a federal court located elsewhere. A panel of the D.C. Circuit agreed with him, but the full Court granted our petition for rehearing en banc and later ruled that applying the D.C. Code provisions to Mr. Cohen did not deny him equal protection.

This case presented complex issues centering on the nature of the equal protection guarantee and the scope of Congress's power to legislate for the District of Columbia.

United States v. Pollard, 959 F.2d 1011 (D.C. Cir. 1992)

I represented the United States. Another lawyer and I briefed the case, and I argued it on September 10, 1991, before Circuit Judges Ruth Bader Ginsburg, Silberman, and Williams.

Mr. Pollard was represented by Theodore B. Olson, who now practices at Gibson, Dunn & Crutcher, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036-5306. His telephone number is (202) 955-8668.

In 1986 Jonathan Pollard, an Intelligence Research Specialist with the United States Navy, pleaded guilty to conspiracy to deliver national defense information to a foreign government (Israel). He received a sentence of life imprisonment. Three years later, he attacked his guilty plea by accusing both the prosecution and the trial judge of behaving improperly. The district judge rejected his motion, and (by a divided vote) the Court of Appeals held that the government had not breached its plea agreement and that the trial judge was not required to recuse himself.

Darius Smith v. United States, 709 A.2d 78 (D.C. 1998)(en banc)

I briefed and argued the case before the en banc court. The case was argued on October 15, 1997, before Chief Judge Wagner and Associate Judges Terry, Steadman, Schwelb, Farrell, King, Ruiz, and Reid.

Mr. Smith was represented by Samia Fam (who argued) and James Klein of the Public Defender Service. Their address is 633 Indiana Avenue, N.W., Washington, D.C. 20004. Ms. Fam's telephone number is (202) 824-2392, and Mr. Klein's number is (202) 824-2389.

Nothing is more central to the adjudication of criminal cases than the concept of reasonable doubt. Several Superior Court judges had been modifying the standard instruction on reasonable doubt, and the defendant complained that the instruction in his case had been inadequate. The Court granted rehearing en banc to decide whether to adopt or approve a new instruction on reasonable doubt to replace Redbook instruction 2.09. Both sides recommended changes in the pattern instruction, but we disagreed about whether the instruction in this case had been constitutionally defective. The Court adopted a new pattern instruction, but upheld the conviction.

In re Sealed Case No. 97-3112 (Sentencing Guidelines' "Substantial Assistance"), 181 F.3d 128 (D.C. Cir. 1999)(en banc)

I was the primary author of the brief for the United States and argued the case on January 27, 1999, before Chief Judge Edwards and Circuit Judges Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel, and Garland.

The defendant was represented by A.J. Kramer, the Federal Public Defender. His address is 625 Indiana Avenue, N.W., Suite 550, Washington, D.C. 20004. His telephone number is (202) 208-7528, ext. 114.

Section 5K1.1 of the United States Sentencing Guidelines provides that "upon motion of the government" the court may sentence a criminal defendant below the guideline range to reward a defendant who "has provided substantial assistance in the investigation or prosecution of another person who has committed an offense". A panel of the court initially held that a district court could depart based on a defendant's "substantial assistance" even though the government had not filed a motion. The en banc court reversed, holding that in the absence of a government motion, a district court lacks authority under the Guidelines to depart from the applicable sentencing range on the basis of a defendant's substantial assistance.

The decision of the en banc court was important because it honored the plain language of the Guidelines and restored the government's control over a valuable tool for encouraging defendants to cooperate in prosecuting others.

Roy and Settles v. United States, 871 A.2d 498 (D.C. 2005)

I argued this case on May 12, 2004, before Associate Judges Glickman and Washington and Senior Judge Nebeker. It was decided on April 7, 2005.

Appellant Roy was represented by Kathleen Hartnett and David DeBruin of Jenner & Block, 601 13th Street, N.W., Suite 1200 South, Washington, D.C. 20005. Their telephone number is (202) 639-6000.

Appellant Settles was represented by Kenneth Rosenau of Rosenau & Rosenau, 1424 16th Street, N.W., Suite 502, Washington, D.C. 20036-2238. His telephone number is (202) 628-2323.

Patricia Heffernan and I collaborated on this brief. At about 6:30 one morning, Mr. Roy and Mr. Settles got into a gun battle in a residential neighborhood. They exchanged about sixteen shots, and one of those bullets killed a 76-year-old woman who was out for her morning walk. Because the bullet passed through her and was

never recovered, we could not establish through ballistic evidence which defendant fired the fatal shot. The jury convicted both of them of second-degree murder on the theory that by engaging in the gun battle in a residential neighborhood, each had acted with the "depraved heart" form of malice and had proximately caused the death.

Seeking to preserve these convictions, we asked the Court of Appeals to accept an "urban warfare" or "gun battle" theory of murder liability that has been adopted in Maryland and a few other jurisdictions. Given the number of innocent bystanders being killed by gunfire in this city, the issue is, regrettably, of increasing importance. The Court did accept our arguments, and upheld the convictions.

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).

Apart from in-court litigation and my supervisory duties, I have spent an enormous amount of time advising trial attorneys, advising the United States Attorney on matters of law and policy, providing advice on issues of professional conduct, and helping to train attorneys and law enforcement officers. My goals always have been to set high standards for performance, to provide the best possible representation for the United States of America, to give sound advice, and to emphasize the need for high standards of ethical conduct.

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.

No.

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).

In 1981, and again in 1987, I applied to be a United States Magistrate Judge for the

Southern District of Ohio. On each occasion I was recommended by the selection committee as one of the five finalists, but I was not appointed by the court.

In 2004, I applied for a position of Associate Judge of the District of Columbia Court of Appeals. The President nominated Judge Noel Kramer to fill that vacancy.

I have never been a candidate for elective public office.

21. Political activities and affiliations.

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

    As indicated in the answers to Question 16, for most of my legal career I have held the appointed office of Assistant United States Attorney. I have not held any other public offices. Except for the judicial offices indicated in my answer to Question 20, I have not sought any other offices.

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

    None

    c. 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.

I am a member of the plaintiff class in the "overtime suit" against the Department of Justice known as John Doe v. United States. The complaint was filed in the United States Court of Federal Claims, and a decision recently was issued by the United States Court of Appeals for the Federal Circuit. I have not played any role whatsoever in the litigation.

While I was at the Vorys, Sater law firm, an insurance company paid a default judgment that had been entered in the State of Texas against an Ohio manufacturing corporation which we represented on certain matters. The corporation claimed that it had notified its insurance carrier of the filing of the product liability suit in Texas, but through some mix-up the insurance company never provided a defense. Although the Vorys firm had not been retained to represent the corporation on that matter, after settling the judgment the insurance company sued the law firm, claiming to be subrogated to a claim of the client for malpractice. By that time I had left the firm and I was named as an individual defendant in the civil complaint, along with the law firm. The complaint was not properly served on me, so I never became a formal party to the litigation. The law firm agreed to be responsible for any claims against me, and an amended complaint was filed dropping me as a defendant. I thus was never required to answer the complaint. I am told that the lawsuit later was settled. The suit was filed in the Court of Common Pleas of Ashland County, Ohio, and was captioned Luther Dale Fluitt, et al. vs. Augers Unlimited, Inc., et al., Case No. 33627.

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.

I still have a 401(k) plan from Vorys, Sater, Seymour & Pease, the law firm where I worked from 1986 to 1989. Neither I nor my former employer has made any contributions since I left in 1989, nor have I received any disbursements from the plan. I do not participate in management of the plan, but all of my assets are invested in a Charles Schwab U.S. Treasury Money Market Fund.

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

None.

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.

I do not foresee any financial conflicts, but if they arise, I would plan to recuse myself from participation in the case. I will not participate in deciding any criminal case that was pending in the United States Attorney's Office during the time I served as an Assistant United States Attorney.

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

Yes. The President has nominated me to serve a fifteen year term. I will be 59 years old on August 22 of this year and, by statute, will have to retire at age 74. Whether I will be able to serve a full fifteen year term depends on when I start serving it.

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. May 1976.

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.

_____

_____

_____

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. **Attached.**

AFFIDAVIT

John R. Fisher, 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.

John R. Fisher

SUBSCRIBED and SWORN TO before me this 17th day of June 2006.

Jay D. Farris

Notary Public

JAY D. FARRIS
Notary Public of District of Columbia
My Commission Expires July 31, 2008