

Senator Chuck Grassley
Questions for the Record

Elaine D. Kaplan
Nominee, Judge for the U.S. Court of Federal Claims

- 1. Would you please comment on how you will transition from being an advocate to being a Judge?**

Response: There is a vast difference between being an advocate on behalf of a client and being a judge. An advocate seeks ways to use reasonable, good faith interpretations of existing law to advance his client's interests. A judge, of course, must determine what the law *is* and apply it to the facts of the case in an even-handed manner. It is not the function of a judge to try to advance any agenda. I believe that I am well positioned to transition from the role of an advocate to one of a judge because I understand the difference between the two roles and I have a dedication to the rule of law.

- 2. The Court of Federal Claims adjudicates cases across a broad range of subject matters.**

- a. What experience do you have in the following:**

- i. tax refund suits**
- ii. takings cases**
- iii. government contracts**
- iv. contract claims**
- v. other claims that come before the Court?**

Response: I have decades of experience litigating cases at all levels of the federal courts, in a variety of areas of the law. I have participated in litigation on the side of the United States and on the side of individuals suing the United States. Some of the issues I have litigated involve claims for pay brought by government employees that are like those that the Court of Federal Claims frequently hears. In addition, as General Counsel at OPM, I have gained familiarity with the laws governing government contracts and contract claims; my office is responsible for advising OPM employees about the legal requirements governing contracts, and for defending OPM in bid protests and related matters. We also assist the Justice Department in litigating contract claims that are heard in the Court of Federal Claims. While I do not have any experience with respect to tax refund suits or takings cases, I have been involved in other kinds of constitutional litigation. If I were confirmed, I would take steps to rapidly bring myself up to speed in these areas of the law, just as I have quickly learned other areas of the law throughout my legal career.

- b. Would you explain why you feel you are prepared to assume an adjudicative function over these many diverse areas of law?**

Response: I believe that I am prepared to assume the role of a judge in these areas of the law because I already have substantive experience in several of the areas that come within the jurisdiction of the Court of Federal Claims, and because of my extensive experience litigating other kinds of civil cases in the federal courts during my 33-plus years of legal practice. I understand the importance of educating myself in those areas of law with which I have less familiarity (such as tax refund suits and takings cases), and I am fully prepared to take immediate steps to learn those areas of the law. Beyond that, I think I have the kind of skills and temperament that make a good judge. In particular, I would approach each dispute with an open mind, judging cases solely on the basis of the facts and evidence produced in the case and the controlling law.

- 3. In various LGBT conferences or roundtable discussions you have stated that while many significant reforms would require legislative action, there can be important incremental changes through administrative action. In fact, you took such action as Special Counsel – interpreting civil service law to cover LGBT employees. That action was later reversed by your successor. My question is, as a judge will you continue that type of advocacy, looking for ways where changes can be made through judicial action?**

Response: No. As noted above, in my response to question 1, there is a vast difference between the role of an advocate and the role of a judge. It is completely inappropriate for a judge to look for ways to promote any change or agenda through judicial action. I believe in the importance of judicial restraint in that regard. The role of the judge is to be a neutral arbiter who applies the law to the facts of the case before him or her, in order to resolve that particular case in a manner that is consistent with controlling precedent, and not to promote any broader cause or agenda.

- 4. At a Speaker Series event hosted by the Department of the Treasury and again at the MSPB Staff Conference, you stated, “With my background, as you might imagine, when I got to OPM, I thought that I would find a bunch of people with horns, who lived only to strip employees of their rights, deny widows and orphans their benefits, and help management smash labor. I WAS DEAD WRONG.” I understand you were obviously exaggerating, and I give you credit for admitting you were wrong. However, this characterization raises concerns about how you may view individuals or organizations with different ideological viewpoints. What assurances can you give to the Committee that you will not pre-judge parties who might come before you?**

Response: As the question notes, my remarks about my expectations of my new colleagues at OPM were exaggerated; in fact, my phraseology was intended to be humorous and self-deprecating. As I am sure my colleagues at OPM and elsewhere will attest, I am very respectful of all viewpoints; in fact, I have always believed that the best decisions are reached only after considering every possible viewpoint. I have friends and colleagues across the ideological spectrum. In addition, it bears noting that during my term as head of the Office of Special Counsel, which spanned the administrations of

Presidents Clinton and George W. Bush, I pursued meritorious cases against agencies and agency officials without regard to political or other influences, and I did not prejudge parties or cases based on ideological viewpoints or any other factor.

5. A large category of cases for the Court of Claims involve civilian and military pay questions. As a union lawyer, you made statements that “pay is usually a political football.”

a. If confirmed, will you be able to make unbiased decisions regarding pay cases?

Response: Yes. As the question notes, I made this comment in my role as advocate for the union and its federal employee members. If I were confirmed as a judge, my role would be very different and I am confident that I would be able to make unbiased decisions regarding pay cases as well as other cases, based on controlling law.

b. Are there other subject matter areas that are within the court’s jurisdiction that you would consider to be a political football? If so, how would you approach such cases?

Response: No. Politics has no place in the adjudication of cases by a federal court.

Questions on Whistleblower Protections:

Whistleblowers play an important role in the Federal Government and in business and industry. They risk a great deal to come forward and uncover wrongdoing, waste, fraud and abuse. Oftentimes, whistleblowers face significant retaliation or retribution, both overtly and covertly, from their employers.

You served as the Special Counsel investigating prohibited personnel practices undertaken against federal government employees who made protected disclosures under various whistleblower statutes. Conversely, you are now Acting Director of the United States Office of Personnel Management and were previously employed as its General Counsel – the office in the Federal Government representing the various Departments and offices of the Federal Government against whistleblowers. You also worked for the National Treasury Employees Union, an organization that advocates on behalf of Federal Government employees—including a number of employees that have been retaliated for protected whistleblowing. Accordingly, you have served on both side of litigation both for and against whistleblowers.

1. Do you support federal whistleblower laws?

Response: Yes. I have been a long-time and vocal supporter of the importance of providing protection to federal whistleblowers. I have represented whistleblowers, both when I worked

at the National Treasury Employees Union and in private practice with Bernabei and Katz. I aggressively pursued whistleblower retaliation claims when I was the head of the Office of Special Counsel. In fact, I have written and testified before Congress in support of strengthening the federal whistleblower protection laws and in support of enhanced funding for the Office of Special Counsel. I have also spoken at conferences both domestically and internationally about the importance of whistleblower protection laws to good government. Finally, I was a member of the team within the current Administration that worked with Congressional staff and good government groups on the legislation that ultimately became the Whistleblower Protection Enhancement Act.

2. Please describe in detail any and all involvement you may have had with the Office of Personnel Management opposing federal government whistleblowers who claimed they were subject to prohibited personnel practices after making protected disclosures.

Response: I would like to clarify that it is not OPM's role to provide representation to government agencies in cases against whistleblowers. Instead, OPM has the authority to seek judicial review of decisions of the Merit Systems Protection Board ("MSPB" or "the Board"), "if the Director determines, in the discretion of the Director, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive." 5 U.S.C. § 7703(d). Thus, the Director of OPM is not charged with defending federal agencies against whistleblower claims; he or she is charged with seeking review of decisions that are inconsistent with civil service laws and that would have a negative impact on such laws.

During my time with OPM, I am not aware of any cases in which I was involved where OPM took a position in opposition to a federal government whistleblower who claimed that they were subjected to prohibited personnel practices.

3. Do you believe that any worker employed by any agency dealing in national security matters, without regard to the existence of the worker's access to confidential information or security clearance, should be precluded from:

a. Bringing whistleblower complaints before Congress? Please explain why or why not.

Response: I do not believe that workers employed in agencies dealing with national security matters, without regard to their access to confidential information or a security clearance, may be precluded from bringing whistleblower complaints before Congress. To the contrary, the law (at 5 U.S.C. §§ 2302(b)(8); 2302(b)(13); and 7211) provides all covered employees with rights to bring whistleblower complaints to Congress without fear of retaliation.

b. Appealing adverse actions taken against them? Please explain why or why not.

Response: Workers employed by agencies that deal with national security matters may appeal adverse actions taken against them so long as they are within the definition of “employee” set forth at 5 U.S.C. § 7511. The Supreme Court has held, however, that the revocation or denial of a security clearance is not an adverse action that is appealable to the Board. *Department of Navy v. Egan*, 484 U.S. 518 (1988). The Court of Appeals for the Federal Circuit is currently considering whether and to what extent the rationale of *Egan* applies to preclude Board review of agency determinations that an employee is ineligible to hold a national security sensitive position. *Berry v. Conyers*, No. 2011-3207 (Fed. Cir.) (en banc). Although this issue is unlikely to come before the Court of Federal Claims, if I were confirmed, I would apply all applicable precedent to the cases before me.

4. May an employee be exempted from having a right to appeal an adverse action if that employee’s position is designated as national security sensitive (or any other applicable status subject to exemption under CSRA or otherwise) when that designation was made before the adverse action was taken?

Response: This issue has not yet been resolved; it is before the Federal Circuit en banc in *Berry v. Conyers*. Although this issue is unlikely to come before the Court of Federal Claims, if I were confirmed, I would apply all applicable precedent to the cases before me.

5. May an employee be exempted from having a right to appeal an adverse action if that employee’s position is designated as national security sensitive (or any other applicable status subject to exemption under CSRA or otherwise) when that designation was made after the adverse action was taken?

Response: This issue has not been resolved by the Board or by the Federal Circuit. The specific issue is not before the Federal Circuit en banc in *Berry v. Conyers*, although the court’s disposition of that case may shed light on the appropriate answer. While this issue is unlikely to come before the Court of Federal Claims, if I were confirmed, I would apply all applicable precedent to the cases before me.

6. What role do national security interests play in exempting an adverse action from appeal?

Response: The Supreme Court has held that the revocation or denial of a security clearance is not an adverse action reviewable by the Board on its merits. *Department of Navy v. Egan*, 484 U.S. 518 (1988). The Court of Appeals for the Federal Circuit is currently considering whether and to what extent the rationale of *Egan* applies to agency determinations that an employee is ineligible to hold a national security sensitive position. *Berry v. Conyers*, No. 2011-3207 (Fed. Cir.) (en banc). Although this issue is unlikely to come before the Court of Federal Claims, if I were confirmed, I would apply all applicable precedent to the cases before me.

7. Are employees in non-intelligence positions exempted from a right to appeal adverse actions? Why or why not.

Response: Employees in non-intelligence positions are not exempted from the right to appeal adverse actions. The Supreme Court has held, however, that the revocation or denial of a security clearance is not an adverse action subject to review by the Board. *Department of Navy v. Egan*, 484 U.S. 518 (1988). The Court of Appeals for the Federal Circuit is currently considering whether and to what extent the rationale of *Egan* applies to agency determinations that an employee is ineligible to hold a national security sensitive position. *Berry v. Conyers*, No. 2011-3207 (Fed. Cir.) (en banc). Although this issue is unlikely to come before the Court of Federal Claims, if I were confirmed, I would apply all applicable precedent to the cases before me.

8. Do low-level employees working for the Department of Defense with no access to classified information and having no security clearance have a right to appeal the merits of an adverse action taken against their employment status?

Response: The Court of Appeals for the Federal Circuit is currently considering whether and to what extent the rationale of *Egan* applies to agency determinations that an employee (including a “low level employe[e] working for the Department of Defense”) is ineligible to hold a national security sensitive position. *Berry v. Conyers*, No. 2011-3207 (Fed. Cir.) (en banc). Although this issue is unlikely to come before the Court of Federal Claims, if I were confirmed, I would apply all applicable precedent to the cases before me.

9. What are the differences between a federal employee with no access to classified information and no security clearance who works for an agency dealing in national security matters and a federal employee with no access to classified information and no security clearance who works for an agency completely divorced from national security?

Response: There are no differences between these two categories of employees for purposes of determining their rights to appeal adverse actions. A difference may exist, however, if the employee at the agency that deals with national security matters also occupies a position that has been designated national security sensitive. In that case, the employee’s adverse action rights will depend upon how the Federal Circuit resolves the issues in *Berry v. Conyers*, No. 2011-3207 (Fed. Cir.) (en banc). Although this issue is unlikely to come before the Court of Federal Claims, if I were confirmed, I would apply all applicable precedent to the cases before me.

a. Considering any stated differences, should these two employees be subject to different rights to appeal adverse actions taken against their employment status? Why or why not?

Response: Please see the answer above; the question of the extent to which these two employees should be subject to different rights to appeal adverse actions will depend

upon how the Federal Circuit resolves the *Berry v. Conyers* case. Although the issue is unlikely to come before the Court of Federal Claims, if I were confirmed, I would apply all applicable precedent to the cases before me.