

## **Questions for the Record from Senator Margaret Wood Hassan**

**During our meeting, we discussed the importance of the National Labor Relations Act. During our conversation, you mentioned the importance of the Act in helping to provide some stability for workers and employers and that the overturning of precedent inherently impacts this stability.**

**In December, prior to the end of Chair Phillip Miscimarra's term, with no public comment period, the board made a number of decisions that overturned precedent without notice to the public.**

- 1. In the past you referred to the Obama Board as "an activist" board. Do you believe that issuing five decisions in one week overturning significant precedent without any opportunity for public input qualifies the current Board as an "activist" Board?**

ANSWER: I believe the NLRB during the Obama Presidency has been described as an "activist" board because of the significant number of settled and longstanding Board precedent that it overturned. On the other hand, it could be argued that the five decisions decided in December, 2017 were not "activist" as compared to the cases during President Obama's term based on the difference in sheer volume of precedent overturned and the fact that the precedent overturned by the Miscimarra Board was largely not of as settled or longstanding Board precedent. I note that it is not uncommon for a large number of cases to issue at the conclusion of a Board member's term. In any event, I have not prejudged any of the issues addressed by these cases. If confirmed, my decisions will be based on the facts and circumstances of the particular case that comes before the Board.

- 2. Do you think that the pace of these reversals creates uncertainty for workers, unions, and employers who rely on the NLRB to follow and carry out its duties appropriately?**

ANSWER: In my experience, stability and predictability in labor law is critically important for all stakeholders of the NLRB. Frequent and retroactive changes in precedent not only works against such stability and predictability, it makes compliance with the law difficult and undermines the integrity of the Board. For these reasons, I view precedent as important in decision making, and, if confirmed, settled and longstanding Board precedent will be an important factor that I will take into account when deciding cases.

- 3. Do you believe the public should be able to provide input when the board is considering a case that overturns precedent?**

ANSWER: I generally favor more rather than less public input. It would not be appropriate for me to commit to any procedural or substantive positions with respect to cases that may come before me, if I am confirmed. I will commit to ensuring the Board follows its procedures in a manner that gives all stakeholders confidence in its decision-

making process, and will consider whether to seek input from the public and parties with an open mind and based on the facts and circumstances of the particular case.

**4. If any of your fellow Board members favor a public notice before reversing precedent, would you proceed without public notice over their objections?**

ANSWER: I would give every consideration to the views of my fellow Board members if they favored public notice before reversing precedent. Nevertheless, public notice may not be appropriate in every case. It would not be appropriate for me to commit to any procedural or substantive positions with respect to when public notice should or should not be required, but if confirmed, I commit to ensuring the Board follows its procedures in a manner that gives stakeholders confidence in its decision-making process, and will consider whether to seek input from the public and parties with an open mind and based on the facts and circumstances of the particular case.

**Another issue we discussed during our meeting was the importance of recusals. As you know, the NLRB's Inspector General has ruled that Mr. Emanuel failed to recuse himself from the Hy-Brand case, which was determined to be "do over" and therefore "merely the vehicle" to reconsider the original Browning-Ferris decision. This has called into question the overall procedures of the board, and has even resulted in the board withdrawing its December decision to overturn the joint employer Standard under Browning-Ferris.**

**5. How will you ensure that you are following the appropriate procedure for recusals?**

ANSWER: As I discussed during my confirmation hearing, I view the issue of government ethics and all recusal obligations as critically important. I consider one of the primary responsibilities of my role as a Board member, if confirmed, to avoid any conflict of interest – or even the appearance of conflict of interest – in the matters and cases I will be asked to decide. It is essential that all the NLRB's stakeholders, Congress and the public have absolute confidence in the Board's processes and impartiality. I have committed in writing to full compliance with all of the government's ethics rules and recusal requirements. To ensure that all conflicts and recusal obligations are fully met, I am submitting with my QFR responses (1) a list of clients for which I have performed service for the past two years regardless of the amount of compensation that I have received from those clients; (2) a list of cases currently pending before the NLRB in which Morgan, Lewis & Bockius represents a party; and (3) a list of cases that have been decided by the NLRB but that are currently pending in federal appeals court in which Morgan, Lewis & Bockius represents a party. I personally have no cases currently before the Board or on appeal in which I am representing a party. Additionally, in the event there is ever a question about ethical recusal obligations with respect to a particular case, I will consult with the NLRB's designated ethics officer.

**The issue of recusals has become more concerning in part due to a revolving door issue with appointment to the NLRB. Former Chairman Miscimarra went from Morgan Lewis**

**to the Board and then back to Morgan Lewis – a law firm that represents companies, not workers. You work at Morgan Lewis and now you’ve been nominated to the Board just as he left.**

- 6. How will you deal with matters where Morgan Lewis represents or has represented a party?**

ANSWER: See answer to Question #6. I believe having a complete list of all recused matters will prevent recusal concerns.

- 7. Have you talked to former Chairman Miscimarra about any Board case, doctrine, or rule? If so, will you provide the Committee a copy or summary of those discussions?**

ANSWER: I have not talked to former Chairman Miscimarra about any Board case, doctrine or rule since I have been under consideration for this nomination. Mr. Miscimarra and I consciously and deliberately have taken care to avoid any communication about these matters.