## EUGENE SCALIA

September 23, 2019

The Honorable Charles E. Grassley Chairman Senate Committee on Finance 135 Hart Senate Office Building Washington, D.C. 20510

Dear Senator Grassley:

Thank you for your September 17 letter regarding the Department of Labor's enforcement of whistleblower laws. I know how important whistleblower protections are to you, and welcome the opportunity to address any questions about the commitment I would have to enforce those laws if I were confirmed as Secretary of Labor.

My answers to the questions you have posed are below; for convenience, I have restated the questions as well.

1. If confirmed as Secretary of Labor, will you commit to faithfully enforce all whistleblower protection laws under DOL's jurisdiction?

Yes.

2. Do you believe whistleblowers are only protected if a disclosure to Congress is done in the course of a duly authorized congressional investigation?

No. I do not believe that whistleblower protections are so limited.

3. Absent a declaration of executive privilege, do you believe there is a Separation of Powers issue when an Assistant United States Attorney or any other government employee shares information or documents with a member of Congress? If yes, please explain your reasoning.

In a broad range of circumstances where government employees share information or documents with a member of Congress, no Separation of Powers concerns would be presented. As just one (important) example, Separation of Powers concerns would not ordinarily be implicated by a government employee providing information or documents evidencing fraud, waste, or abuse within an agency. On the other hand, I can envision circumstances where the Department of Justice (DOJ) would take the position that, even absent an express declaration of executive privilege, the position historically taken on the

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privilege by DOJ and the President would be undermined if a DOJ lawyer provided a member of Congress confidential or classified information obtained in an ongoing investigation.

What I can say firmly is this: If I am confirmed as Secretary of Labor and a case involving a question of this nature were to come before me, I would not be guided by any personal views I may have on this topic (I hold none), rather, I would consider the text and purpose of the whistleblower law at issue; the recommendation of DOL personnel responsible for that area; and the Justice Department's position on any Separation of Power concerns. I would also be mindful of the views that you and other members of Congress hold on such questions.

4. Will you work with Congress to identify weaknesses in whistleblower protection laws and identify ways to strengthen whistleblower protections?

If confirmed, it would be my honor to meet with you and other members of Congress to discuss ways in which the Department of Labor could more effectively advance whistleblower protections, and to provide support and assistance to Congress in its consideration of potential legislation to strengthen whistleblower protections.

5. Do you believe whistleblowers provide a benefit to the workforce and society as a whole?

Yes—and to American business and shareholders as well. Here's an excerpt from an article I published in 2005, regarding enforcement strategies at the Labor Department:

A second and related enforcement priority in a world of limited resources is ensuring that auxiliary means of achieving compliance are open, functioning, and respected . . . . When those who make good faith safety and health complaints are subject to retaliation, it erodes an important source of government information on potential violations of the law. The government, in turn, is forced to place greater reliance on less reliable sources, such as the random inspection schemes addressed below.\*

The article then describes two actions I took as Solicitor to protect whistleblowing: Instituting, as one of my first acts as Solicitor, new timetables and procedures for the more expeditiously handling of whistleblower retaliation cases by the Mine Safety and Health

<sup>\*</sup>Inspection and Enforcement Strategies at the U.S. Department of Labor, 7 U. PA. J. LAB. & EMP. L. 529, 531 (2005) (emphasis added).

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Administration; and filing a preliminary injunction motion—which to my knowledge was unprecedented in the Department's history—that resulted in immediate reinstatement of a worker who had been fired for reporting wage-hour violations. As Solicitor, I also played an important role in coordinating implementation of the Sarbanes-Oxley whistleblower requirements, beginning with a planning meeting in my office days after that law was enacted that included the Department's Chief Administrative Law Judge and other career and non-career personnel with responsibility for the Act's implementation. In that regard, I thought you might appreciate a copy of the attached letter by more than a dozen former senior career lawyers at the Department, describing my pursuit of the Department's mission in my time as Solicitor.

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Senator Grassley, I hope that this letter helps address your questions; I look forward to our meeting tomorrow.

Respectfully,

Eugene Scalia

Attachment

## August 30, 2019

The Honorable Lamar Alexander Chairman Senate Committee on Health, Education, Labor & Pensions U.S. Senate Washington, D.C. 20510 The Honorable Patty Murray Ranking Member Senate Committee on Health, Education, Labor & Pensions U.S. Senate Washington, D.C. 20510

Dear Chairman Alexander and Ranking Member Murray,

We formerly served in various leadership positions as career attorneys and, in one case, as the Chief Administrative Law Judge, in the United States Department of Labor, and are writing to support the nomination of Eugene Scalia for the position of Secretary of Labor. We were all long-term employees of the Department of Labor and worked closely with Gene during his tenure as Solicitor of Labor and Acting Solicitor of Labor. Some of the undersigned worked in Washington, D.C., and others served in Regional Offices.

Gene would bring to the position of Secretary of Labor an in-depth knowledge of the Department of Labor ("DOL") and all of the laws DOL is charged with administering and enforcing. These include the Fair Labor Standards Act, the Occupational Safety and Health Act, the Employee Retirement Income Security Act, the Mine Safety and Health Act, and the Black Lung Benefits Act, among many others.

As Solicitor of Labor, Gene's "clients" were the Secretary of Labor and all of the Assistant Secretaries who headed the various components of DOL. The mission of the Office of the Solicitor is to meet the legal service requirements of DOL by providing legal advice to the Secretary and other DOL officials, representing the Secretary and client agencies in both enforcement actions and defensive litigation, and providing legal assistance in the promulgation of regulations and legislative proposals.

Gene showed great respect for the mission of the Office of the Solicitor and DOL and understood the role of the Solicitor in ensuring that the laws and regulations within the agency's purview were faithfully executed. He was very supportive of enforcement litigation to vindicate the rights of workers, both at the trial and appellate levels.

Gene would bring a powerful intellect to the position of Secretary of Labor. As Solicitor of Labor, he analyzed complicated legal issues on a daily basis. He was always willing to listen

to divergent views. He quickly learned the intricacies of our laws and regulations and brought to the position thoughtful analyses and a willingness to make difficult decisions.

Gene was also very interested in pursuing initiatives to strengthen the Solicitor's Office. The most notable example is his creation of the Honors Program to attract the best and brightest law school graduates. Honors attorneys spend their first two years handling a broad range of assignments before being placed in a permanent position. The program has been in effect for eighteen years now, and has been highly successful in recruiting, training and retaining a strong pool of new attorneys.

Gene's temperament is well-suited to the position of Secretary of Labor. As Solicitor, Gene headed a legal staff of approximately 500 career attorneys and support staff, located in the Washington, D.C. area and in fourteen regional and branch offices. He consistently treated us with respect. He was fair, open and honest and listened attentively when we discussed legal issues with him. He also displayed a wry sense of humor and seemed to take delight in interacting with people. He is very much a "people person," which made working with him an enjoyable experience.

For all of these reasons, we believe that Gene would be an outstanding Secretary of Labor in this Administration, and we fully support Gene's nomination.

Respectfully,

Richard J. Fiore
Jaylynn K. Fortney
Theresa S. Gee
Craig W. Hukill
Judith E. Kramer
Frank V. McDermott
Catherine O. Murphy
Leslie Canfield Perlman
Donald S. Shire
Michael A. Stabler
William W. Taylor
John M. Vittone
Joseph M. Woodward