TESTIMONY Effects of Vacancies at the Merit Systems Protection Board

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John W. York, PhD.
Policy Analyst, B. Kenneth Simon Center for Principles and Politics, the Heritage Foundation.

My name is John W. York and I appreciate the invitation to be here today. The views I express in this testimony are my own, and should not be construed as representing any official position of the Heritage Foundation or any other organization.

I am a Policy Analyst at the Heritage Foundation and my issue portfolio encompasses the Civil Service Reform Act and related issues. Prior to coming to the Heritage Foundation, I studied Politics at the University of Virginia, where I received my Ph.D. Title V and civil service reform are not just an academic pursuit for me. My last duty station while serving as an officer in the Coast Guard was at a joint Department of Defense command where I was the direct supervisor for around 20 outstanding civilian employees.

For anyone interested, as I am, in preserving the good functioning of the federal government, the vacancies on the MSPB should be very troubling. The MSPB fulfills several critically important roles within our civil service as all who serve on the committee surely understand.

The MSPB researches and publishes invaluable reports about the status of the career civil service and reviews regulations issued by the Office of Personnel Management. It also provides a special service to our veterans. If a veteran believes his or her military service was not properly honored in the hiring process under the terms of the Veterans Employment Opportunities Act (VEOA) or Uniformed Services Employment and Reemployment Rights Act (USERRA), he or she can seek redress from the MSPB.[1]

Most importantly, the MSPB protects federal merit systems against undue partisanship, whistleblower reprisals, and other prohibited personnel practices, by adjudicating employee appeals of adverse actions. For civil servants who believe a suspension, a pay decrease (or the denial of a pay increase), or removal from the civil service was based on partisanship, illegal prejudice, nepotism, or any other prohibited personnel practice, the MSPB provides a neutral forum above and apart from their agency's leadership. As such, the MSPB is the essential steward of the

[1] A civil servant or candidate for federal employment cannot appeal a VEOA complaint directly to the MSPB. The preference eligible individual must first file a complaint with the U.S. Department of Labor's Veterans' Employment and Training Service (VETS). If VETS determines the claim is meritless, the claimant can appeal to the MSPB.

merit system and guardian of neutral, non-partisan expertise in the civil service. Whether strict neutrality is possible on the part of civil servants – or anyone – is a vexing question. But, even if imperfectly achieved, it is a standard worth vigorously pursuing.

The Impact of the MSPB's Vacancies

The vacancies on the MSPB, which have left the Board without a quorum, mean the Board cannot fulfill its vital responsibilities to our civil servants, our veterans, or the American public, whose faith in the neutral professionalism of the civil service has already been badly shaken. Without a quorum, the board has been unable make final decisions on adverse action appeals, review OPM regulations, or issue official reports. The Board can order stays only as requested by the Office of Special Counsel.

We are now in the midst of the longest period that the MSPB has been without a quorum. The ill effects are considerable. The backlog of appeals waiting for the Board's review is now nearly 2,000. For some, this is justice denied. For most, this is punishment delayed. Though the procedural pitfalls are many and the standard of proof is often high,[2] most serious adverse actions are affirmed by the MSPB.[3] This is all the more surprising given the multiple levels of review an MSPB appeal faces. A formal MSPB appeal is first heard by an Administrative Judge (AJ) at a regional or field office. In 2016,[4] 28 percent of appeals were dismissed.[5] Of the 72 percent of

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[2] Depending on the nature of the appeal, different burdens and standards of proof are applied by the MSPB. In cases where an employee was fired for poor performance, the MSPB upholds an agency's action if there is "substantial evidence" supporting the agency's decision. In legal terms, substantial evidence means the amount of evidence that "a reasonable mind might accept as adequate to support a conclusion."[2] In the case of a removal for misconduct, the agency must meet the higher evidentiary standard of "preponderance of the evidence." This means over half the evidence must point toward the agency's conclusion that the misconduct occurred and that the action was warranted. (See: https://www.law.cornell.edu/wex/preponderance_of_the_evidence.) When a former employee alleges that discrimination or whistleblower retaliation was the cause of their removal, the burden of proof is initially with the terminated employee. If he or she can demonstrate that, in fact, either one of these was a motivating factor behind their removal, the burden of proof shifts to the agency. In the case of alleged whistleblower retaliation, an agency must show by "clear and convincing" evidence that it would have taken the challenging actions in the absence of a protected disclosure.[2] When discrimination is alleged, the agency must demonstrate by a preponderance of the evidence that it would have removed an employee in the absence of a discriminatory motive. (See: *Savage v. Department of the Army*).

[3] The MSPB's annual reports do not specify the sort of adverse personnel actions that are being appealed. The MSPB can hear appeals of not only removals, but also reductions in grade and suspensions over 14 days. While I cannot differentiate between the MSPB's disposition of these very different adverse actions, there is not a clear reason to expect the MSPB would tend uphold an agency's decision more or less depending on the severity of the adverse action.

[4] I use the 2016 MSPB data instead of the 2017 MSPB data, which we publically available at the time of writing because the MSPB has been down to just one member for most of FY 2017.

[5] This does not include the rash of furlough appeals in 2016. A furlough is a cost-saving measure many departments undertook in 2016 to stay within their operating budgets. Essentially, employees are placed in

cases not dismissed, about 66 percent were settled by the agency and appellant before an initial decision by the AJ.[6] When an AJ actually issued an initial decision, he or she upheld the agency's adverse action 84 percent of the time. MSPB AJs overturned an adverse action 11 percent of the time. Another 2 percent of the time an AJ mitigated the agency's disciplinary action. The MSPB's main adjudicative body – the three board which is now nearly vacant – only granted about 15 percent of appeals for final review. In 2016, only 4 percent of initial decisions were reversed, though 89 percent were remanded. [7]

If history holds, many employees who have won an appeal before one of the MSPB's Administrative Judges, but will eventually lose before the Board, are currently receiving "interim relief" – i.e., a salary and other benefits – while they either continue working or languish on administrative leave. All the while, their agency cannot advertise an opening and begin the long process of hiring a new employee. A smaller – but still sizeable – number of federal employees who cannot afford a legal battle at the Federal Circuit, wait for their names to be cleared, their pay to be restored, and their careers to resume.

Responsibility for MSPB's incapacity rests primarily with the Senate. President Trump has nominated two qualified attorneys who now wait for confirmation. The Senate's unwillingness to fulfill its constitutional obligation to provide advice and consent regarding the President's nominees is an endemic, government-wide issue. There are currently over 130 vacancies in the judiciary and over 300 executive branch nominees awaiting confirmation in the Senate.

Had the Senate honored its obligation to provide advice and consent, we would not be here today discussing the potential conflicts of interest that result from the only remaining member of the MSPB concurrently serving as General Counsel to the Office of Personnel Management. The current Chair's term would have expired, as scheduled, at the end of February 2018, months before assuming his new position at OPM.

Potential Conflicts of Interest on the Board

Regardless of who is to blame, one individual simultaneously serving as both an MSPB chairman and as the General Counsel of OPM creates several potential conflicts of interest. As mentioned earlier, one of MSPB's functions is to review OPM regulations. Clearly, OPM's General Counsel is bound to have an opinion about whether his own office's regulations are in keeping with merit principles. Second,

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a temporary status without duties and pay.- See 5 U.S.C. § 7511(a)(5) for the definition of the term. I do not include these appeals because furloughs are not issued for disciplinary reasons.

[6]https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1374269&version=1379643&application=ACROBAT

[7] Ibid.

the MSPB hears appeals from retired federal employees regarding the status of their retirement annuities. The fact that OPM manages the federal employee retirement annuity system makes this yet another clear conflict of interest. Lastly, the Director of OPM may petition MSPB for reconsideration of a final decision if the Director is "of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office."[8] It goes without saying that OPM is much more likely to defer to MSPB's decisions if OPM's own General Counsel had a decisive hand in crafting those decisions.

Troubling as these potential conflicts of interest are, none of them have been realized. The entire time Mark Robbins has been at both MSPB and OPM, the MSPB has been without a quorum. Thus, Robbins has been unable to discharge those duties that would bring a conflict of interest to a head. He has been unable to render final judgments affecting employee annuities (or any other matter), review OPM regulations, or take any action that OPM might lawfully petition.

As Congress considers whether to allow Mr. Robbins to stay on for an additional year or accept reappointment for an additional 7-year term, it should also consider how to address the potential conflicts of interest that could develop if Mr. Robbins continues to hold positions at both OPM and MSPB. If Mr. Robbins is allowed to stay on as a stopgap until a new appointment is made, he should vacate his position at MSPB or OPM once the Senate seats any additional Board member. When and if the MSPB again has a quorum, conflicts of interest that are now only theoretical would become all-too-real if Mr. Robbins continues to serve in both his current roles.

Continuing Operations of the MSPB after February 28, 2019

If Congress does not take action to assure that there is at least one Senate-confirmed political appointee serving at the MSPB before Mr. Robbins' tenure is over at the end of this month, the Board will be able to perform only a fraction of its functions. While Administrative Judges can continue to issue initial decisions, petitions for review of those decisions will continue to pile up. And, as today, no official reports will be published and regulatory review will not occur.

However, limited thusly, a caretaker manager, even one who has not received senate confirmation, can run the agency without violating the Appointments Clause of the Constitution. An MSPB board member, wielding the full range of his or her powers, is clearly an inferior "Officer of the United States" under the Appointments Clause given the Supreme Court's recent decision in *Lucia v. Securities and Exchange Commission*. He or she wields "significant authority" and holds a "continuing position" – the two hallmarks of an inferior officer requiring senate appointment. But, an acting MSPB agency head – serving when there is no quorum on the Board – is unable to discharge or direct the major duties of the agency. Arguably, such an

[8] See: 5 U.S. Code § 7701(e)

individual does not possess "significant authority." Similarly, a caretaker agency head who is obligated, or expected, to step down immediately upon the appointment of a Senate-confirmed Board member does not hold a "continuing" position.

While the MSPB may be able to continue functioning – albeit at a very low level – when and if Mr. Robbins departs, Congress and the President should take swift action to staff the Board's three positions for the first time since 2015. The Senate's advice and consent role does not require it to rubber-stamp every nominee the President puts forward. Neither is the Senate permitted to abrogate those duties entirely. To do so is to incapacitate the Executive Branch and, perhaps, that is the intent of some in the Senate. But the MSPB's inability to fulfill its critical functions is just one demonstration of the collateral damage this tactic can cause.

Reforming the Adverse Actions Appeals Process

The crisis at the MSPB should occasion a broader conversation about the status of our civil service and the adverse actions process. Increasingly, a system that was created to guard federal employees from partisanship and tests of ideological purity, nepotism and graft, prejudice and reprisals, actually shields them from any accountability at all. A system designed to enshrine merit as the sole consideration in personnel decisions, increasingly rewards seniority instead.

Nearly every dimension of our civil service system – designed and little changed since 1978 – is long overdue for reform. The adverse actions process is only one piece of this broken system, but it is, perhaps, the most glaring deficiency to the public at large. Tales of dissolute civil servants who spend their time at work watching adult videos, auctioning off stolen government property, planning luxurious conferences, or simply doing nothing, are widespread and well-known.[9] Private sector workers understand that if they behaved in this way, they would be immediately fired while even the most ostentatious misconduct seems to go unnoticed and unpunished in the federal workforce. Indeed, the federal workforce offers the highest job security of any sector of the economy.[10] Out of a federal non-military workforce of 2.1 million, only 11,046 persons—or 0.5 percent—were fired

[9] Scott McFarlane, Rick Yarborough, and Steve Jones. "More Cases of Federal Workers Watching Porn on the Job Uncovered." NBC News Washington. May 9, 2018. Alexander Abad-Santos. "GSA Threw an $800,000 Party and All You Got Was the Bill." *The Atlantic*. April 3, 2012; Joe Zimmermann. Former NIH Employee Sentenced to Six Months in Federal Prison for Stealing Government Property, Selling it on eBay." *Bethesda Magazine*. August 6, 2017. Eric Yoder. "Hardly Any Federal Employees are Fired for Poor Performance. That Could be a Good Thing Report Says." *Washington Post*. Oct. 18, 2017.
[10] U.S. Department of Labor, Bureau of Labor Statistics. Economic News Release. Table 5: Layoffs and discharges levels and rates by industry and region, seasonally adjusted. Dec. 2017-Dec. 2018. Online: https://www.bls.gov/news.release/jolts.t05.htm#jolts_table5.f.2

in fiscal year 2017.[11] This low rate of removal does not indicate a workforce with no chaff to cut; it indicates a breakdown in accountability. According to the most recent Federal Employee Viewpoint Survey, just 32 percent of federal employees said they believe their agencies take steps to deal with a poor performer who can't or won't improve.[12]

Not only does the American public deserve better from the bureaucracy, good civil servants deserve better also. While some federal employees likely take advantage of their insulation from accountability, the vast majority of federal workers are committed to service and take pride in their work. It is these dedicated public servants who are asked to pick up the slack for co-workers who cannot, or will not, do their share of the job, and are denied opportunities for advancement by dead weight above them. No one wants to work alongside, or under, someone who has no interest in their work or, worse, creates a disruptive or dangerous work environment. This may be why a majority of federal workers supported three Trump Administration executive orders – Executive Orders 13836, 13838, and 13839 – that made it easier to remove civil servants for misconduct or poor performance, according to a survey conducted by the Government Business Council.[13]

Part of the reason for the lack of accountability in the federal workforce is the byzantine process of appeals that insulates federal employees.[14] For the vast majority of the 2.1 million career civil servants who are not exempted from the merit system protections and procedures, appeals can wind their way through four separate agencies – the MSPB, EEOC, OSC, and FLRA – as well as the courts. Even in clear-cut cases, it can take over a year to finally remove a civil servant from the federal payroll.[15]

While the adverse actions appeals process is overdue for a statutory overhaul, no limited government conservative should support incapacitating the MSPB by forestalling appointments to the Board. First, as mentioned earlier, the MSPB upholds adverse actions the vast majority of the time. Additionally, the MSPB's

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[11] U.S. Office of Personnel Management data available via FedScope. Online: Https://www.fedscope.opm.gov.

[12] U.S. Office of Personnel Management. 2018 Federal Employee Viewpoint Survey. Governmentwide Management Report. Online: https://www.opm.gov/fevs/reports/governmentwide-reports/governmentwide-management-report/governmentwide-report/2018/2018-governmentwide-management-report.pdf

[13] Erich Wagner. "Survey: Half of Feds Support White House Attempts to Ease Firing Process." *Government Executive*. June 8, 2018.

[14] John W. York. *Strengthening the Federal Workforce through Increased Accountability*. Heritage Foundation Backgrounder No. 3325. July 26, 2018; Office of Personnel Management. *Managing Federal Employees' Performance Issues or Misconduct.* Online: https://www.mspb.gov/publicaffairs/annual.htm

[15] U.S. Government Accountability Office. Report to the Chairman, Committee on Homeland Security and Governmental Affairs, U.S. Senate. *Improved Supervision and Better Use of Probationary Periods are Needed to address Substandard Employee Performance*. GAO-15-191. February, 2015.

incapacity does not – and will not – impact all civil servants equally. Union members, after all, do not need to go to the MSPB to protest adverse actions. They can elect arbitration and be represented, in many cases, by union representatives working on "official time" at no cost to them. Meanwhile, hundreds of thousands of non-union employees, including executives, managers, law enforcement officers, and other non-bargaining unit employees, who do rely on the MSPB, would be left to challenge adverse actions in court at their own expense. This two-tiered appeals system would greatly affect the decision-making process of civil servants considering whether or not to join a federal employee union.

Incapacitating the MSPB would also create a perverse incentive to level EEO complaints against agency leadership and front-line managers in an effort to gain a hearing before the Equal Employment Opportunity Commission. Nothing can more badly tarnish the reputation of a federal manager than being accused of racial or religious bias, sexism or xenophobia. But, with the MSPB incapacitated, linking an adverse action to discrimination may be the only avenue of appeal for a non-union employee who cannot afford a court battle. While very few civil servants may make such a callous calculus, the incentive to do so is clear and powerful.

A final reason to return the MSPB to good functioning is that the sheer complexity of the Civil Service Reform Act (CSRA) makes judicial review an inadequate guard against prohibited personnel practices. With the MSPB unable to hear appeals from Administrative Judges, the court system remains an avenue of appeal for civil servants (but not agencies). But, while Article III judges may be able to handle equal employment complaints leveled against private sector employers adjudicating disputes between federal agencies and employees involves significantly more complex statute and regulations.[16] As Justice Samuel Alito put it in oral arguments during a recent CSRA case, "no ordinary lawyer could read these statutes and figure out what they are supposed to do."[17]

In effect, judges will ordinarily defer to an executive branch agency's reasonable interpretation of the CSRA. This is, in fact, what they do today. From fiscal year 2005 to 2015, MSPB averaged a 92 percent affirmation rate at the Federal Circuit for adverse action cases.[18] Given the complexity of the CSRA, the Federal Circuit would still likely defer to an agency's interpretation of statute much of the time. But, if the MSPB did not exist, the agency to which judges would defer would be the very agency accused of violating merit system principles. This could create a troubling dynamic. With a greater measure of discretion, ideologically polarized agencies could purify their own ranks of dissenters or skew their hiring processes to usher in fellow believers.

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[16] *Anthony W. Perry v. Merit Systems Protection Board*. No. 16-399. Oral Argument in the Supreme Court of the United States. Washington, D.C. Monday, April 17, 2017. Online: https://www.supremecourt.gov/oral_arguments/argument_transcripts/2016/16-399_3f14.pdf

[17] Ibid.

[18] U.S. Merit Systems Protection Board. *The Limited Powers of the U.S. Merit Systems Protection Board*. Online: https://www.mspb.gov/studies/adverse_action_report/15_limitedpowers.htm

Admitting the necessity of a functional MSPB, given the current structure of our civil service system, should not be read as an endorsement of the status quo. The Board is an indispensable pillar of a badly outdated structure built forty years ago and barely remodeled since. The entire architecture of the Civil Service Reform Act should be reimagined. As a start, Congress should greatly simplify the administrative appeals process creating a single forum for appeals of adverse agency actions.[19] This system existed prior to 1978 and the dissolution of the Civil Service Commission (CSC)—and it worked well. A modern iteration of the CSC could more expeditiously settle appeals and deliver justice for the appellant and the agency.

Creating a single forum for appeals would not change the substantive protections that employees deserve. Each adjudicatory and investigative body involved in adverse action appeals was created to address clear and pressing problems – graft, reprisals against whistleblowers, invidious prejudice, and partisan bias. Real as these concerns are, splitting responsibility for appeals between several agencies does not guarantee more effective enforcement. The only thing it assures is a less efficient process.

[19] John W. York. *Strengthening the Federal Workforce through Increased Accountability*. Heritage Foundation Backgrounder No. 3325. July 26, 2018