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EFFECTS OF VACANCIES AT THE MERIT SYSTEMS PROTECTION BOARD

HEARING

BEFORE THE

SUBCOMMITTEE ON GOVERNMENT OPERATIONS

OF THE

COMMITTEE ON OVERSIGHT AND REFORM

HOUSE OF REPRESENTATIVES

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EFFECTS OF VACANCIES AT THE MERIT SYSTEMS PROTECTION BOARD

Thursday, February 28, 2019

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON GOVERNMENT OPERATIONS,
COMMITTEE ON OVERSIGHT AND REFORM,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:02 a.m., in room 2154, Rayburn House Office Building, Hon. Gerald E. Connolly (chairman of the subcommittee) presiding.

Present: Representatives Connolly, Sarbanes, Lawrence, Khanna, Lynch, Raskin, Meadows, Hice, Grothman, Comer, and Steube.

Mr. CONNOLLY. The committee will come to order.

Without objection, the chair is authorized to declare a recess of the committee at any time.

Without objection, members of the full committee not on this subcommittee are authorized to participate in today's hearing.

The hearing is entitled "Effects of Vacancies at the Merit Systems Protection Board."

Now I'm going to give my opening statement, and then I will recognize the ranking member for his opening statement.

Two years into the Trump administration, the President has still not filled half of the top posts of the Federal Government.

According to the Partnership for Public Service, of the 705 key executive branch positions requiring Senate confirmation, only 431 are currently filled. More than 40 percent of Senate-confirmed positions at the Departments of the Interior, Justice, and Labor remain unfilled. President Trump has not even nominated individuals for 149 top posts in the Federal Government, and the Republican Senate has not acted on 126 nominations awaiting confirmation.

Keeping vacancies open at the top of the key Federal agencies could be exploited as an expedient way to circumvent Congress' advice and consent role. In fact, President Trump recently said he's not in a rush to name permanent members to his Cabinet, stating, and I quote, "Well, I'm in no hurry. I have 'actings' and my actings are doing really great. I sort of like 'acting.' It gives me more flexibility."

However, a failure to adequately staff the Federal Government can cause real harm.

One example of an agency where vacancies impair the mission of the agency is before us today, the Merit Systems Protection Board. It's a small agency, but a critical one that was established by Congress to protect merit principles in the civil service and to help ensure nonpartisan Federal work force compliance.

Since January 7, 2017, the agency has been hobbled by two vacancies on its three-member Board, leaving it without a quorum. This is the longest absence of a quorum in the history of the agency. And unlike other agencies, the vacant seats at the MSPB cannot simply be filled by an individual in an acting capacity.

The sole remaining member of MSPB, like the last of the Mohicans, is with us today, Mr. Robbins. He was confirmed by the Senate in 2012 for a term to expire in 2018. He continues to serve in a one-year carryover term which will expire at the end of today—today.

Once his term expires—today—the MSPB will be left without any Board members. If that agency is left without any principal officers, it's unclear which functions employees of the agency can continue and which would need to be suspended.

It is clear, however, that whistleblowers will lose, because the Office of Special Counsel will no longer be able to obtain a stay of retaliatory actions against them, which falls under the rubric of the MSPB.

There are two ways to avert a memberless Board. Either the Senate could confirm nominees, which Mr. Hice and I would certainly call on them to do, or Congress could pass a temporary extension of Mr. Robbins' term, which is what we did the other day on the floor.

Unfortunately, the Senate leadership opted not to allow the full Senate to confirm the Republican and Democratic nominees who have cleared the Senate Homeland Security and Governmental Affairs Committee until the President nominates a third individual.

But earlier this week, as I said, the House passed H.R. 1235, a bill offered by Chairman Cummings and myself, to temporarily extend Mr. Robbins' term for one more year. Unfortunately, the Senate failed to act on that bill and has not even allowed debate.

As a result, at 5 p.m. today we will enter uncharted territory. The Board will be memberless for the first time in its 40-year history.

The last two years of vacancies at the MSPB have also been unprecedented, and they've impaired the agency's mission. The absence of a quorum has prevented the Board from hearing final appeals of adverse agency actions, such as terminations, suspensions in excess of 14 days, reductions in grade or pay, reductions in force actions, denials of restoration of reemployment rights, OPM determination in retirement cases, and Hatch Act violations, among many others.

The MSPB has also been unable to hear appeals of wrongful terminations and retaliations against whistleblowers, a prime concern of this committee. That means that MSPB is unable to enforce the law that this committee, and Congress, passed to protect the brave individuals who alert us to waste, fraud, and abuse.

According to Tom Devine, the legal director of the nonprofit Government Accountability Project and one of our witnesses today, the current situation, quote, "is disastrous for whistleblowers."

The lack of a quorum has also resulted in a backlog of 1,975 cases, according to the documents provided to the subcommittee. Acting Chairman Robbins has reportedly said that eliminating that

backlog will take, at a minimum, three years to process. That is a clear example of justice delayed being justice denied.

The vacancies of principal officers at the agency are untenable. Federal employees deserve better. They deserve to have their appeals heard by the Board. Employees of the MSPB deserve to work at a fully functioning agency with leadership in place. And taxpayers deserve to have their government capable of carrying out the Nation's laws. President Trump's vacancies stand in the way of these missions.

I look forward to hearing a careful look at the issues today and drawing attention to the importance of a fully operational Merit Systems Protection Board.

With that, I call upon the ranking member for his opening statement.

Mr. HICE. I thank my friend, Chairman Connolly. And the real ranking member, Mr. Meadows, just walked in. He was running late with another commitment and asked if I would provide opening remarks, which I'm more than happy to do. And I want to thank each of the witnesses for being here as well today.

This is an issue that the chairman and I, and many up here, are deeply concerned about. In fact, we just had a productive debate on this issue on the floor this week. And we're concerned about the future of the Merit Systems Protection Board. I know, Chairman, you know that I am very committed to ensuring that we have a successful operation at MSPB.

In fact, during the 115th Congress, the Oversight Committee conducted numerous hearings and even passed the MSPB reauthorization bill, which would have made some critical reforms to MSPB. The responsibilities there primarily include: to adjudicate appeals of Federal personnel actions and to also provide protection for whistleblowers.

Congress has a duty, I believe, to ensure that MSPB functions effectively and administers their rulings fairly. To be effective and to be able to make decisions properly, MSPB needs at least two members to make a quorum. As we are all aware of today, that has not been the case now for two years. And without a quorum, the backlog has gotten quite dramatic to now nearly 2,000 cases, and that's very disturbing.

The only remaining member, again, as the chairman highlighted a moment ago, Mark Robbins, is term limited.

We want to welcome you and thank you for your service and for being here today.

But starting tomorrow, MSPB will be without a single Board member.

Currently there are two MSPB nominees awaiting consideration in the Senate. Looking ahead, I hope the President will go ahead and nominate the third Board member. And as we were talking about a few moments ago, we desperately need the Senate to quickly confirm these nominations. We need the third one as quickly as possible.

In December the President asked Mr. Robbins to serve as the general counsel at the Office of Personnel Management. Over the past 10 weeks, he has been serving in both roles at OPM and MSPB.

Mr. Robbins, you have worked tirelessly, and we deeply appreciate the work that you have given. But we know that it's time that you're now moving on. But your sense of duty to the MSPB is greatly appreciated, and we do want to express that publicly to you. Your commitment to Federal workers and the Federal workforce is greatly appreciated. Your willingness now to serve the President and our country in another capacity also is appreciated.

But in closing, I hope that we can work together to provide certainty to Federal workers and whistleblowers by making the MSPB operational once again.

Again, Chairman, I thank you. I yield back.

Mr. CONNOLLY. I thank the ranking member.

Are there any other members who wish to make an opening statement for one minute?

Hearing and seeing none, today we welcome our panelists. We have with us Mark Robbins, the acting chairman of the Merit Systems Protection Board; Thomas Devine, the legal director of the Government Accountability Project; John Palguta, former director of policy and evaluation at the agency, MSPB; Valerie Brannon, legislative attorney for the American Law Division at the congressional Research Service; and John York, policy analyst for the Heritage Foundation.

Welcome, all of you.

If you would rise. We generally swear in our witnesses. And if you'd raise your right hand.

Do you swear to affirm that the testimony you're about to give is the truth, the whole truth, and nothing but the truth, so help you God?

Let the record show that all of our witnesses answered in the affirmative.

Thank you.

Witnesses have five minutes if they want it. We are running against the clock, and we want to try to get this in, because once we take votes, coming back is problematic. Some of you know that. Although Mr. Meadows will be, I know, here no matter what.

So if you don't need the full five minutes to summarize your testimony, which we have in full, that would be great. But you do have five minutes if you want it.

Mr. Robbins.

STATEMENT OF MARK A. ROBBINS, ACTING CHAIRMAN, MERIT SYSTEMS PROTECTION BOARD

Mr. ROBBINS. Chairman Connolly, Ranking Member Meadows, and members of the committee, thank you for inviting me here to testify today. It's always an honor for me to publicly represent the men and women of the U.S. Merit Systems Protection Board. And sadly, as you've noted, this will be the last time I have that honor. My term ends at midnight tonight.

On a personal note, I'd like to thank you, Mr. Chairman and Congressman Hice, for your kind comments both today and on the floor Monday. It's greatly appreciated, and you've made my father proud. So thank you for that.

I also want to acknowledge the longstanding interest of Ranking Member Meadows. My staff fondly recalls your visit back in April 2016, I believe it was.

And I'd like to invite you, Mr. Chairman, or any other member to visit the MSPB at your convenience. We can do a pretty good dog and pony show.

I also want to acknowledge my longstanding association with fellow panelists John Palguta and Tom Devine. I greatly respect their career-long dedication to the professional, efficient, and well-managed civil service. And I'd like to add I'm proud of my seven-year tenure at the Board and its ability to continue functioning at almost full capacity since we lost our quorum two years ago.

I'm fond of quoting Theodore Roosevelt, and there's one quote in particular that's very appropriate to the Board and its operations of late, and it is: "Do what you can, with what you have, where you are." That's what we've done.

With that, I look forward to addressing any issues of interest or concern by the committee.

Mr. CONNOLLY. Mr. Robbins, you're an exemplar. Thank you so much.

Mr. Devine.

STATEMENT OF THOMAS M. DEVINE, LEGAL DIRECTOR, GOVERNMENT ACCOUNTABILITY PROJECT

Mr. DEVINE. Thank you. I serve as legal director of the Government Accountability Project, but this testimony is also for six leading members of the nonpartisan, trans-ideological Make It Safe Coalition dedicated to whistleblower protection.

No institution is more important for accountable government than the MSPB. But since January 2017, the Board has been dysfunctional. At a minimum, it's in danger of its administrative appeals function becoming dormant.

Board vacancies already have created a crisis. While Chairman Robbins has performed beyond the call of duty as a public servant under impossible circumstances, they remain impossible.

The first consequence has been delays. Without a quorum for two years, the Board has been unable to issue any final decisions, and the resulting current nearly 2,000-case backlog exacerbates already inexcusable delays before January 2017. Whistleblower Kim Farrington's nine-year nightmare is summarized in written testimony. We can't allow this to get worse.

Second, Board vacancies have created a crisis of accountability for administrative judges. AJs are the soul of the merit system because they preside over administrative due process hearings that are Federal employees' only day in court and a major duty of the Board is to provide guidance on proper interpretation of employee rights to them. The prior Board was effective at providing that support.

But since the vacuum of appellant review, the track record for whistleblower rights has dropped sharply. The Board reported that for Fiscal Year 2016 whistleblowers won about 7 percent of decisions on the merits.

To compare, since we haven't had appellant review, I researched four months of Board decisions by AJs, the last four months and

December 2017. The track record was one in 45, 2.2 percent, over three times lower than with active Board oversight.

The decisions also have become more hostile to the Whistleblower Protection Act's statutory boundaries. They've been echoing Federal Circuit Court of Appeals rulings that forced Congress to pass the All Circuits Review Act.

My written testimony provides seven examples of hostile judicial activism in those four months.

Most disturbing is the clear and convincing evidence standard to independently justify acts of partial retaliation. Despite repeated congressional and Federal Circuit strong mandates that this is an extremely high bar that should be respected, AJs ruled against whistleblowers on the clear and convincing evidence standard in 15 out of 16 cases. In the absence of normal appellate review, they have not been respecting the legislative mandate.

Like the partial government shutdown, an MSPB shutdown would have destructive consequences. Even continued AJ opinions without Board members would make a currently dysfunctional system disastrous.

First, there's questions whether members of the Board could operate under the Constitution's Appointments Clause. If they can't, that would end enforcement of the Civil Service Reform Act and the Whistleblower Protection Act, period.

At a minimum, justice will be further delayed and settlements reduced. Currently, agencies and whistleblowers settle about 10 to 25 percent of appeals. A shutdown would eliminate all agency incentive to settle cases because they'd be winning until the Board was there to stop them again.

Third, even if AJs can continue to make decisions appealable to the Circuit Courts, the quality of the appellate review will deteriorate because those courts inherently can't have the accumulated expertise that the Board has from doing this work constantly full-time.

And most significant, a Board shutdown would erase enforcement capacity for the Office of Special Counsel. Immediately it would cancel emergency legislation to seek stays from one Board member, because there wouldn't be any.

Stays are indispensable. They freeze retaliation that otherwise would be long-term faits accompli and they provide leverage to enforce corrective action settlements in disputes that agencies otherwise would drag out indefinitely. The Board would be unavailable to enforce OSC corrective action recommendations when an agency balks.

We are confident that Special Counsel Kerner will creatively seek to minimize the damage. But scrambling is no substitute for statutory authority. Depriving the OSC of Board backup for enforcement would dilute the Merit System's most effective resource to an advisory body.

Mr. Chairman, we are just talking today about crisis response. My testimony has long-term structural suggestions.

Mr. CONNOLLY. Wonderful. Thank you so much.

Mr. Palguta.

Am I pronouncing your name correctly?

STATEMENT OF JOHN M. PALGUTA, FORMER DIRECTOR OF POLICY AND EVALUATION, MERIT SYSTEMS PROTECTION BOARD

Mr. PALGUTA. You are. Thank you very much.

Chairman Connolly, Ranking Member Meadows, members of the subcommittee, thank you for the opportunity to appear before you today.

Mr. CONNOLLY. And, Mr. Palguta, you are a constituent of mine, are you not? Did you say you were a constituent of mine?

Mr. PALGUTA. I am, indeed.

Mr. CONNOLLY. In Vienna? One of the most brilliant people ever to come before this subcommittee.

Mr. PALGUTA. Thank you very much, and let the record show.

So I am John Palguta, and from 1979 to 2001 I had the privilege of working for the Merit Systems Protection Board. For the last 4–1/2 years of that tenure I was the director of the Office of Policy and Evaluation and a career member of the Federal Senior Executive Service.

First of all, I want to commend the subcommittee for calling this hearing to focus on a relatively small and somewhat obscure Federal agency but one with a disproportionately large role to play in ensuring the presence of a strong, vibrant Federal work force.

I chose to spend 22 years of my career at MSPB because I believe in the importance of its mission. Congress created the Board under the Civil Service Reform Act of 1978 as part of a carefully thought out and hotly debated set of checks and balances within the executive branch.

There was concern at the time of that 1978 act that the replacement of the bipartisan U.S. Civil Service Commission with a politically responsive Office of Personnel Management, that it posed an existential threat to a merit-based, politically neutral career Federal work force.

Congress' answer to that concern was the creation of MSPB with statutory oversight over OPM, a charter to review and report on the health of the Federal merit system, and the responsibility to hear and adjudicate appeals from Federal employees who believed they were being disciplined or removed for non-meritorious or partisan political reasons. For the last 38 of 40 years, that has worked very well.

I've been asked by the subcommittee to share my views on three issues. I'll do that very quickly.

One, what is the impact of the MSPB given that two of the three Board members have been vacant for two years. We've already heard about the devastating impact on the backlog of petition for reviews that remain undecided.

In addition, no reports from the Board's Merit System studies and OPM oversight function have been issued in the last two years. In the event there are no Board members at the end of today—or after today—it will not be possible, as Mr. Devine has already said, to stay an adverse personnel action being taken as reprisal for a whistleblower.

Then one other thing. Over the last two years the Board has been unable to amend formally its own operating procedures to address changes in the law, such as those for appeals from employees at Veterans Affairs.

There was also the question about the independence of the MSPB given that Mr. Robbins is dual-hatted. Suffice it to say, and I'm confident that Mark Robbins has fully recused himself from any decisions that would create a conflict of interest, but certainly there is an appearance of a conflict.

So going forward, I am also confident that, in their wildest dreams, the writers of the Civil Service Reform Act never contemplated that the chairman of MSPB would serve as the general counsel of the very agency for which they have oversight.

Then the last question had to do with the continuing of operations of MSPB as of midnight tonight. We have other experts who will address that. But I will just say that without any Board members, the dire situation at MSPB will simply become more dire.

So in conclusion, it's clearly possible that it is clearly in the public interest to have a fully functional MSPB. Best possible course of action is for the Senate to confirm three qualified nominees. Absent a third nominee right now, I fully agree that the two nominees who are awaiting confirmation should be forwarded to the full Senate without delay.

And if tomorrow dawns with all Board positions vacant, then every effort needs to be made to determine how best to enable this vitally important agency to continue operating at whatever level is possible under the law.

So thank you, and I will be happy to answer any questions.

Mr. CONNOLLY. Thank you, Mr. Palguta, for your perspicacious and brilliant testimony.

Ms. Brannon.

STATEMENT OF VALERIE BRANNON, LEGISLATIVE ATTORNEY, AMERICAN LAW DIVISION, CONGRESSIONAL RESEARCH SERVICE

Ms. BRANNON. Chairman Connolly, Ranking Member Meadows, and members of the subcommittee, my name is Valerie Brannon. I'm a legislative attorney with the American Law Division of the congressional Research Service. Thank you for inviting me to testify today on behalf of CRS regarding the continuing operations of the MSPB if it has no sitting Board members.

In brief, the ability of the MSPB to function with a vacant Board will likely turn on whether it has delegated authority to agency employees and whether those delegations are legally permissible.

There are at least three types of possible legal limitations on these delegations—common law, statutory, and constitutional—and I'll be speaking somewhat broadly about these legal limits.

So, first, any agency delegations of authority may be tested again common law principles of agency law. So, for example, one general rule is that any person who makes a delegation must have the authority themselves to take the action that they're delegating.

But when we talk about Federal agencies, a lot of these common law principles have been replaced by statutory and regulatory regimes. So when you evaluate Federal agency delegations, it's important to look to those statutes and regulations.

So Congress delegates regulatory authority to agencies in statute, and agencies may then further delegate that authority to subordinates. Courts will generally assume that agencies are author-

ized to make these sorts of subdelegation. But Congress can pass statutes that limit subdelegation.

So turning to the MSPB, there is a statutory provision that broadly authorizes the Board to delegate the performance of any of its administrative functions to any MSPB employee. Other statutes grant certain adjudicative powers to specific MSPB officials, which may mean that these adjudicative functions may be delegated only to the named officials. The MSPB has, in fact, made a number of delegations pursuant to these statutory authorizations.

So assuming that these delegations were valid at the time they were made, if the Board becomes completely vacant, then a court would likely conclude that these delegations continue in effect.

Outside the context of multi-member boards, courts have generally held the delegations of authority do survive the resignation of the official who made the delegations. And in the context of multi-member commissions, at least one Federal court of appeals has held that the commission's delegation of specific authority to the agency's executive director remained valid even after the commission became completely vacant want.

However, the cases do suggest that courts will probably look to the scope of any specific delegation and may be more likely to uphold more limited delegations.

The third and final legal limitation on agency delegations that I'll discuss comes from the Appointments Clause of the Constitution.

So the Appointments Clause generally divides government officers into three categories: principal officers, inferior officers, and employees. The Constitution says that officers have to be appointed through constitutionally prescribed procedures. Generally, this is the advice and consent process. But Congress may vest the appointment of inferior officers as opposed to principal officers in the President or in agency heads.

The Constitution doesn't define who is an officer as opposed to an employee, but the Supreme Court has said that an officer is any official who exercises significant authority in the form of continuing and permanent duties.

So if an MSPB official is responsible for continuing duties that represent significant authority, then that official has to be appointed in accordance with those constitutional procedures. Conversely, if an employee was not appointed in accordance with those procedures, then they may not exercise significant authority.

These Appointments Clause requirements apply to MSPB officials regardless of whether or not the Board is vacant. But as a factual matter, it's possible that Board vacancies would cause more significant duties to be delegated down, which may raise more significant Appointments Clause questions.

But ultimately the constitutionality of the authority that's exercised by any MSPB official will depend really heavily on the precise scope of their duties. So it's difficult to say in the abstract whether there are any constitutional violations.

Thank you. And I'll be happy to answer any questions at the appropriate time.

Mr. CONNOLLY. Thank you so much, Ms. Brannon.

Mr. York.

STATEMENT OF JOHN YORK, (MINORITY WITNESS), POLICY ANALYST, HERITAGE FOUNDATION

Mr. YORK. I appreciate the invitation to be here today. My name is John York, and I'm a policy analyst at the Heritage Foundation. I also have experience managing civil service employees. As a Coast Guard officer, I was the direct supervisor for 20 truly exceptional civil servants.

Before I begin, the views I express in this testimony are my own. They should not be construed as representing the official position of the Heritage Foundation.

I think I'm going to sound like a little bit of a broken record today, because I agree with almost everything that's been said. But I think in repeating what we've already heard, sort of get a sense that this isn't a liberal or conservative issue. The good functioning of the MSPB is a good government issue.

For anyone interested, as I am, in the just and effective functioning of our Federal Government, the vacancies at the MSPB should be very troubling. The vacancies have left the Board without a quorum since January 2017, as we've heard multiple times.

The Board, as a result, has been unable to issue final decisions in adverse action appeals or review OPM regulations. It can issue no official reports. It can order stays only as requested by the Office of Special Counsel. The backlog of appeals waiting for the Board's review is now nearly 2,000.

For some, this is justice denied. For most, it is punishment delayed. After all, the MSPB finds in favor of agencies a great majority of the time. If this pattern holds, many employees who will eventually be drummed out of the civil service are today receiving interim relief while they either to work or languish on administrative leave. All the while their agencies cannot advertise an opening nor begin the long process of hiring a replacement.

A smaller but still sizable number of Federal employees who cannot afford a legal battle wait for their names to be cleared, their pay to be restored, and their careers to resume.

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

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 Board member concurrently serving as the general counsel of the Office of Personnel Management.

But regardless who is to blame, one individual simultaneously fulfilling both these roles does present several potential conflicts of interest, which I note in my written testimony.

Troubling as these potential conflicts of interest are, and none of them have been realized, the entire time Mark Robbins has both at MSPB and OPM the MSPB has been without quorum. Thus Robbins has been unable to discharge those duties that would bring these conflicts of interest to a head.

Robbins' very imminent departure from the MSPB creates additional concerns, however. Not only will Mark Robbins' good work over the last several years be voided, but the complete vacancy of the Board raises constitutional questions, which you've just heard about.

Can the MSPB continue to function with an acting agency head who has received no confirmation from the Senate? While I'm not a lawyer, and I might be getting out of my skis a little bit here, you can correct me if I'm wrong, I think the answer is yes. An acting MSPB agency head fulfilling only those very limited duties outlined in the continuity of operations plan that MSPB has published arguably does not possess significant authority. In fact, if the largely administrative functions the acting head will wield constitute significant authority, there should be a significantly higher number of PAS positions in the Plum Book, I'd argue.

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

To conclude, the crisis at the MSPB should occasion a broader conversation about the status of our civil service and the adverse action process. 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 cannot or will not improve.

Not only does the American public deserve better from its government, but good civil servants deserve better from their managers.

Thank you very much.

Mr. CONNOLLY. Thank you, Mr. York. Particularly, I thank your observation. This is not a Republican or Democratic issue. This is a good government issue. And hopefully all of us can try to rally around that and figure out a solution.

The chair now recognizes for five minutes of questioning the gentleman from California, Mr. Khanna.

Mr. KHANNA. Thank you, Representative Connolly, for your leadership and bringing this attention to the American people.

I want to focus my questioning on whistleblowers. I know, Mr. Devine, you've done tremendous work on representing many whistleblowers and also helping craft many laws about whistleblowers.

Mr. Devine, how does a fully functioning Board, when all three members are appointed, protect whistleblowers?

Mr. DEVINE. Well, sir, it's the enforcement authority, monopoly enforcement authority, for nearly all the Merit System rights in the Civil Service Reform Act, whether it's temporary relief, final relief, sanctions or accountability for violations of the act. All we've got is the Merit Systems Protection Board. And we think that's unfortunate.

Federal employees are the only whistleblowers, significant portion of the labor force in our country, where whistleblowers can't go to court and enforce their rights to jury trials if they can't get timely administrative relief. That's been the case in every corporate whistleblower law since 2002.

The Board is indispensable, but it shouldn't be monopoly indispensable. We should have the kind of balance that corporate whistleblowers are entitled to.

Mr. KHANNA. How many Board members are needed to constitute a quorum?

Mr. DEVINE. I'm sorry, sir?

Mr. KHANNA. On the Merit—how many Board members are needed?

Mr. DEVINE. Oh, two.

Mr. KHANNA. Two. And we obviously haven't had that since the Trump administration.

Is it normal for a President to come in and wait a year when there's such openings and not appoint someone?

Mr. DEVINE. Sir, from every perspective, this has been unprecedented. I've been following these rights for 40 years, and nothing like this has happened before, either in the Senate or with the Presidency.

Mr. KHANNA. Is there any panelist who thinks this is normal? I mean, for example, would Nixon or Reagan or Bush just say, "Oh, I don't know what the Merit Board System is. Who cares? Let's not appoint someone."

Mr. YORK. I don't think it's normal. But I also think we shouldn't ignore the Senate's role in this. While it's true that Trump has been making appointments slower than normal, it's also true that the Senate has a longer backlog than normal. So both of things are unusual.

Mr. KHANNA. Sure. But the Senate can't appoint them. I mean, my understanding is the President didn't send a name over for over a year. Has any other President waited that long?

Mr. ROBBINS. Congressman, if I could address that question.

Mr. KHANNA. Yes.

Mr. ROBBINS. I have said in public many times that the situation the Board is presently in is the old Lemony Snicket's Series of Unfortunate Events. We lost the vice chairman about four years ago. And the President, President Obama's nominee, was not passed by the Senate. So we started this administration with the term of the then chair, Susan Grundmann, getting ready to expire.

The Board was teed up along with the other Title 5 agencies, the Office of Special Counsel, the Office of Personnel Management, the Federal Labor Relations Authority, and the Office of Government Ethics. And we had, the administration had nominees identified. A couple fell out during the process for reasons I'm not familiar with. But I am familiar with the process itself, because the Board itself has a role in clearing candidates before they're formally nominated to the Senate.

So if you look at the FLRA and the Office of Special Counsel and the Office of Government Ethics, their people moved almost as a group and were confirmed relatively quickly, but it still took six to eight to nine months into the administration.

I think any administration would have focused naturally on the bigger departments and agencies, the Cabinet level. Smaller agencies usually come second tier when the focus of nominations comes up.

So as I was sitting there at the Board at the beginning of this administration, I didn't anticipate we would have a quorum likely until the summer of 2017. That probably would have been the case had earlier-identified potential candidates not fallen out.

There are a lot of reasons we are where we are now. I agree that, at this point, the Senate could solve this problem immediately and hasn't.

Mr. KHANNA. I appreciate that.

I see my time is about to expire.

Mr. CONNOLLY. I thank the gentleman.

Just an observation. I think Mr. York is right and Mr. Robbins is right. Yes, the President could do a better job in getting these nominations to the Senate. But the Senate has decided on its own, as Mr. Hice and I were talking, God knoweth why, that it's not going to act until there's a third nominee. Well, right now we've got a crisis. They need to act. They've got several choices in front of them and have chosen to ignore all of them.

I think it was Sam Rayburn who once said, looking at politics, he said the Republicans are the opposition, but the U.S. Senate is the enemy.

At any rate, I call upon the distinguished gentleman from Georgia, Mr. Hice, for his five minutes.

Mr. HICE. Thank you, Mr. Chairman.

And while we're talking about the Senate, I would totally agree with that. Quite frankly, I'm not sure at this point if the Senate could even pass a kidney stone. Perhaps they could, but we'd need to get something out of the Senate for sure.

This is a good government issue, and sometimes I think we legislators are guilty of assuming we have all the answers, which we absolutely do not. I think there's great wisdom in trying to get information from those who have boots on the ground, so to speak.

And, Mr. Robbins, you have a lot of experience over the last several years, probably more than you care to have over the last couple of years. But from your perspective, I would be interested to know what kind of improvements or modifications do you think need to take place on our end of things that would help MSPB function more efficiently.

Mr. ROBBINS. Thank you, Congressman.

This committee in the last Congress actually held a hearing on our reauthorization. The Board has not been reauthorized since 2002. And included in that effort were a series of legislative fixes to a number of issues that I believed could bring efficiency to the process. I would refer back to them, I don't have my notes with me, on what those were.

Our process, the process for the Merit Systems Protection Board, is the most efficient of the Title 5 processes. If you take a look at organizations like the EEOC or the grievance process, if you could do a schematic chart of the various options, you've got EEOC, MSPB, collective bargaining agreements, the new individual rights of action for whistleblowers.

To date, the process of the MSPB going through our regional level where the administrative judges hear cases and issue initial decisions and then up to the full Board for the petitions for review,

the appeals of those individual decisions, were good. We process those cases.

I would—and I know this is controversial—I would like to see an effort to give our judges summary judgment authority similar to what EEOC AJs have. I would like to see a very small, nominal fee for filing with the Board, because I believe that would separate out meritless cases from real cases that deserve attention.

I use as an example the 33,000 furlough cases we had in the summer of 2013. We usually get about 6,000 or 7,000 cases a year, and in the course of two months we received 33,000 appeals because of the sequestration furloughs back then.

Those cases had to be processed. And I believe that had there been even a $25 filing fee, most of those—you know, someone would have said, "Do I"—they were angry. The employees were angry. And the easiest thing to do was file a grievance with us.

But had there been a nominal fee, I think many people would have found another avenue to express their frustration. It took us the better part of three years to process those 33,000 cases and other priorities had to take a back seat.

Mr. HICE. Well, I thank you for that. It affirms to me that we're kind of barking up the same tree on some of the things we're trying to accomplish.

Mr. York, you brought up something in the past that I found interesting with the jurisdictional overlap between some of these. Could you kind of explain how that is problematic and what needs to take place to smooth out that whole thing?

Mr. YORK. Yes. I've said multiple times, and I believe another panelist has agreed, at some time that we should have a single forum for appeals.

There are jurisdictional overlaps between the FLRA and MSPB on some occasions. EEOC and MSPB more commonly. And that does slow down the process. It's not the way ordinary adjudicative processes go, I mean.

Mr. HICE. So it slows it down because it goes through all three?

Mr. YORK. In some cases. One can appeal an EEOC decision to the MSPB or even an FLRA adjudication to the MSPB on occasion. Then, of course, the Office of Special Counsel has a role in whistleblower cases.

But having a single forum would, I think, expedite without changing the substantive defense.

Mr. HICE. What would that look like? I mean, what would be the single——

Mr. YORK. It would look very much like what we had before the Civil Service Reform Act. Before the Civil Service Reform Act there was one adjudicative body that would hear all appeals, no matter what the subject matter, from Federal employees.

Mr. HICE. Okay. And when did that change?

Mr. YORK. 1978, I think.

Mr. HICE. Okay. All right.

Thank you. Mr. Chairman, I yield.

Mr. CONNOLLY. Thank you. Thank you, Mr. Hice.

Let me just also say, I would hope that out of this hearing, and maybe there will be subsequent hearings, we will produce some legislation—it's got to be bipartisan—to reauthorize the Board, but

also to fix the immediate problem. That may be two bills. That may be one. But we've got to work together to find this problem.

I don't know that we can solve the problem of kidney stones passing in the other body, but we can do our job.

I call upon the distinguished gentleman from Maryland, Mr. Raskin, for his five minutes.

Mr. RASKIN. Thank you very much, Mr. Chairman.

Mr. Robbins, I want to thank you for your service on the Merit Systems Protection Board. It's not been easy being the only member on the Board for I think it's more than two years now.

In your testimony, you say: "Tomorrow the Board may face a condition unprecedented in its 40-year history. All three Board seats will become vacant when my term expires." Now we're waiting for the Senate to act either by confirming nominees or taking up legislation that we passed in the House to extend your term for another year.

If the Senate fails to act and your term expires Friday, what happens to MSPB? Would the agency have to shut down all of its operations?

Mr. ROBBINS. Thank you, Congressman.

I don't believe so. I have given my staff instructions that as of midnight tonight, they are to, in the words of that old English war poster, "keep calm and carry on," until an authority of competent jurisdiction tells them otherwise.

I think the analysis of my fellow panelists is correct. We have delegations in place that will allow at least the administrative judges at the regional level—which, by the way, is where 80 percent of our caseload is resolved—to continue to operate.

Like all other Federal agencies, we have a continuity of operations plan that is required by a Bush 43 era executive order, which was to anticipate literally decapitation. What if an agency loses all of its Article II officers? What happens in order to keeps the lights on?

Mr. RASKIN. Who becomes the head when you leave, when you're decapitated?

Mr. ROBBINS. So under our COOP plan, the primary, the first two people to take over the administrative functions—now, they couldn't exercise the adjudication or studies functions of the Board, but they could administer the agency—would be first the executive director and then the general counsel, both of whom are noncareer senior executives.

But an acting individual in either of those positions can't assume responsibility under COOP. And right now our executive director is in an acting capacity. So as of tomorrow, our general counsel will be the administrative and executive head of the agency.

Mr. RASKIN. All right. So you view the executive and administrative functions of the Board as safe during this period?

Mr. ROBBINS. Yes, sir.

Mr. RASKIN. Okay.

Let's see. Would the administrative judges and contract administrative law judges still be able to try cases and issue initial decisions?

Mr. ROBBINS. Yes, sir, I believe so.

Mr. RASKIN. Okay. Then they are appealable where?

Mr. ROBBINS. Well, so once either an administrative judge or an administrative law judge has rendered an initial decision, either the agencies or the employee has an opportunity to appeal either to the full Board, the three members, or they can skip us and go directly to—usually it's the United States Court of Appeals for the Federal Circuit Court.

Mr. RASKIN. Okay. So they would simply lose the possibility of going to the Board. They would have to go directly to the court of appeals?

Mr. ROBBINS. That's correct.

Mr. RASKIN. Okay.

Mr. ROBBINS. Which, by the way, has been the case for the last two years.

Mr. RASKIN. Okay.

Ms. Brannon, committee staff asked for your analysis of whether the Board could keep functioning as a vacant Board. Do you believe that the Board can keep functioning without members? Why?

Ms. BRANNON. So I believe that the agency and agency officials could likely continue to exercise any delegated functions assuming those delegations were permissible prior to the Board becoming vacant.

Mr. RASKIN. Gotcha.

Mr. Robbins, back to you. You say in your testimony that one significant function which cannot continue without the presence of a Board member is the issuance or extension of personnel action stays requested by the Office of Special Counsel. Is that correct? If so, can you explain why a general counsel or another MSPB employee cannot take over this function from you?

Mr. ROBBINS. I do believe that is correct. There are two reasons. I think, legally, the Board traditionally has not believed that certain functions can be delegated, that they need to be exercised under Title 5 by the Board; that is, three members.

Stays are a little different because Title 5 provides that any one member can grant an initial stay of 45 days, and then it takes the Board to extend those stays.

Congress, two years ago, once the Board became a quorum, was pass legislation which allowed any single member to extend the initial stays. So that problem was solved.

But even if legally stays could be delegated down, they haven't been. And I can't do that lacking a quorum. Even if there was a legal argument that you could delegate stays to the general counsel, there's no mechanism to do that without a quorum.

Mr. RASKIN. Gotcha.

Mr. CONNOLLY. Thank you, Mr. Raskin.

The gentleman from Wisconsin, Mr. Grothman.

Mr. GROTHMAN. Yes. I guess anybody—how many cases—maybe start with this. How many cases do you deal with per year? And what are the nature, if you could break them down by the nature of the cases you deal with?

Mr. ROBBINS. Congressman, we get between 6,000 and 8,000 cases a year. Again, those are appeals from agency actions that go initially to one of our regional or field offices, and the case is worked up by an administrative judge.

Eighty percent, as I said earlier, of those decisions are final, because the parties don't——

Mr. GROTHMAN. Okay. But, I mean, are they like somebody got fired? Somebody wasn't promoted? What is the nature of the——

Mr. ROBBINS. So the two big areas that we have are adverse actions, that is someone is fired, someone is put on leave, they're demoted, they lose their pay. We also adjudicate retirement and disability claims from OPM.

Mr. GROTHMAN. Okay. And if you break them down by category, how much are the adverse actions and how much, if you've got 8,000 a year, how many of each?

Mr. ROBBINS. The vast majority are adverse actions. I don't have the materials in front of me now. We're getting ready to issue our 2018 annual report which has a pie chart.

Mr. GROTHMAN. You think it's five to one, four to one?

Mr. ROBBINS. I would think probably 60 percent are adverse actions. Maybe 5, 10 percent are disability claims and retirement claims. We also hear certain veterans——

Mr. GROTHMAN. It adds up to 65 percent.

Mr. ROBBINS. Right. Then we also hear, you know, we've got veterans preference issues. We have we have Hatch Act, which is the political restrictions of Federal employees.

Mr. GROTHMAN. How many times do you overturn the decision that was made, at whatever the local level, percentage-wise, about?

Mr. ROBBINS. Less than 90 probably. Or, no, I'm sorry. We affirm usually between 90 and 94, 95 percent of the time.

Mr. GROTHMAN. Okay. Do you, in your own mind, think that, since you're almost always affirming them, that a high number of these appeals, if that's what I can call them, are frivolous or not much to them?

Mr. ROBBINS. You know, I believe that the vast majority of employees who file an appeal with us believe that they've been wronged. I don't think there's bad faith.

Mr. GROTHMAN. One other question. Do you sometimes, when a filing is made, is sometimes a settlement reached, or is it always yes or no?

Mr. ROBBINS. No, the cases do settle. They settle if the agency and the employee agree on terms of a settlement, and then the case is withdrawn.

Mr. GROTHMAN. Okay. Do you think some of the claims are made—I can think of other areas of the world where people make claims figuring that I'll give you $10,000 to go away or I'll give you $20,000 to go away, it's not worth the bother. Do you feel that is going on in your system?

Mr. ROBBINS. Oh, I'm sure it is, certainly. I couldn't put a percentage on it.

Mr. GROTHMAN. Okay.

Mr. ROBBINS. You know, again, pointing to frivolity in filing, I would just go to the poster child, which was the sequestration for those 33,000 cases, and none of them had merit.

Mr. GROTHMAN. Okay. It's tough. They always just give us five minutes. So when I'm being rude, it's just because that's all they give me.

Therefore, to come back for this fee, I sometimes think a fee would be a good thing, because it kind of separates the wheat from the chaff.

How much of a fee—you mentioned $25, but I think it would be more than that to really get the junk out of there—how much of a fee do you think would be appropriate, or maybe the fee should vary with the nature of the claim, to kind of reduce all the paperwork you guys have got to deal with?

Mr. ROBBINS. A sliding scale would probably be hard to administer. I believe the House, when it reauthorized us last year, authorized a fee of up to whatever a U.S. District Court filing fee is, which I think is $250.

Mr. YORK. It was $175. It was the half a district court filing.

That's me.

Mr. ROBBINS. Okay. Yes.

Mr. GROTHMAN. Okay. How many staff do you guys have?

Mr. ROBBINS. The Board has about 235.

Mr. GROTHMAN. Okay. Is it one of those things where the staff does the work and the—they do most the work, right?

Mr. ROBBINS. Well, I would like to disagree with that, sir.

Mr. GROTHMAN. I know you'd like to, but if you're being honest.

Mr. ROBBINS. So, you know, yes.

Mr. CONNOLLY. Unlike the U.S. Congress.

Mr. ROBBINS. What's that?

Mr. CONNOLLY. I said unlike the U.S. Congress.

Mr. ROBBINS. Exactly.

Yes, of course, the staff does the first level work out in the field in regional offices. Then we've got attorneys in headquarters which do the first review of the appeals when they come in.

Mr. GROTHMAN. Okay.

One final question, Mr. York, because the immediate problem is the Senate won't take these people up. Is there an individual group that really is fighting behind the scenes, fighting confirmation of these nominees?

Mr. YORK. Sorry. I was——

Mr. GROTHMAN. You know, the real problem here is the Senate is not——

Mr. YORK. Sure. Right.

Mr. GROTHMAN. Is there an individual group who is behind the scenes fighting confirmation of these employees?

Mr. YORK. Boy, I don't—I'm not privy to any of the backroom dealings that may or may not be occurring.

Mr. CONNOLLY. The gentleman's time has expired.

Unfortunately, because they've called votes, Mr. Lynch.

Mr. Comer, are you okay if we adjourn this hearing? I'm so sorry you didn't get a chance and Mr. Meadows didn't get a chance and I didn't get a chance. But we've just, I think, running out of time. If we try to come back, I'm afraid we'll be sparse.

Mr. Lynch, you get the final word.

Mr. LYNCH. Thank you, Mr. Chairman. I appreciate your work on this as well as our bipartisan effort by the ranking member, Mr. Meadows, and Mr. Hice as well.

I want to, first of all, thank the witnesses for your help on this. It's a tough issue. I don't see any easy solution without the cooperation of the White House.

But I did want to say that oftentimes, Ms. Brannon, this committee especially relies on CRS for its work. And very seldom do you get recognition or appreciation for the work that you do.

But in our case, this is a committee of unlimited jurisdiction, and we often face one-off situations and rely heavily on CRS to provide very concise, well-written analyses of the problems that we're dealing with. So I just want to ask you to take back to your superiors the appreciation of this committee on both sides of the aisle for the work that CRS does.

The congressional Research Service is probably below the radar screen of most of the people in the United States, and you certainly are not given the due respect and appreciation that you deserve. So thank you.

On the substantive matter before us, the professional analysts and attorneys who work at MSPB have been working hard, but their reports can't see the light of day because the MSPB lacks a quorum and cannot vote on whether to make them public.

So in preparation for this hearing the subcommittee asked the Merit Systems Protection Board for a number of major reports that are typically generated with respect to the government's compliance with civil service laws that have been held back from publication for years.

So, Chairman Robbins, your staff informed us that MSPB has a report ready to go on the incidence of sexual harassment in executive agencies, but the absence of a quorum means that MSPB cannot release it to Congress and the President. Is that correct?

Mr. ROBBINS. Yes, sir.

Mr. LYNCH. In fact, there's actually eight studies that we rely upon, and some of these are keenly important to the work that we do and that the government can benefit from.

I'll just go down a list here. Sexual harassment. Prohibited personnel practices. Employee engagement. Whistleblowing. That's especially important to this committee with the work that we're doing. Supervisory probation. And employee performance.

So some of these are disciplinary in terms of making sure that employees are held accountable. Some of them, like in the whistleblower case, is to make sure that employees have their full spectrum of rights in the work force.

Chairman Robbins, the MSPB also has a report on whistleblowing and the implementation and impact of the Whistleblower Protection Act of 2012. That would be, again, enormously significant to this committee since we passed that bill out of this committee. That is our bill. That's Mr. Cummings' bill. Is it correct that you can't share that with us?

Mr. ROBBINS. That's correct.

Mr. LYNCH. So it's just the issuance of the report. The work's been done, but you can't issue the—we can't get the benefit of the report because there's not a quorum to promulgate that.

Mr. ROBBINS. The reports can't be issued without a quorum, that's correct.

Mr. LYNCH. Okay. Here are some other important topics that I'm told from your staff you can't share with us due to the absence of a quorum:

Employee perceptions on prohibited personnel of practices, such as retaliation against whistleblowers.

Examination of burnout in high stress occupations, such as law enforcement. That's very, very important, the mental stress that some of our law enforcement are dealing with.

Discussions of best practices, of improving employee performance.

Mr. Palguta, you headed the Office of Special Studies while you worked at MSPB. Is that correct?

Mr. PALGUTA. I did.

Mr. LYNCH. Okay. Did the topics that I have gone through here, are those especially important to the operation of civil service?

Mr. PALGUTA. Absolutely. The very first study we issued was in 1981 on sexual harassment. There have been several followups. The reports on whistleblowing, prohibited personnel practices.

I think the studies function—I'm a little biased, I headed the function for a number of years—is quite important. The information has been acted upon by Congress over the years. It also, within the executive branch, has caused some positive movement over the years. Not being able to issue the reports, I think, is a real shame.

Mr. LYNCH. Thank you very much.

Mr. Chairman, my time has expired, and I know there's a vote on, so I'll yield back.

Mr. CONNOLLY. I thank the gentleman.

Yes, we do have a vote, 360 have not yet voted, but there are only, like, 3–1/2 minutes left. So we are going to have to wrap up the hearing.

I thank everybody for participating. As I said, we look forward to working on a bipartisan basis to try to fix this. And we are committed to doing that. We need counterparts in the other body, as Mr. York rightfully pointed out.

I also want to put in the record, without objection, a list of studies that have been underway on eight different topics, following up Mr. Lynch's querying, but no report issued, frankly, because of lack of a quorum. Without objection, that will be entered into the record.

Mr. CONNOLLY. I want to thank our witnesses for coming today.

Without objection, all members will have five legislative days within which to submit additional written questions for the witnesses through the chair, which will be forwarded to the witnesses for their response.

I also want to ask our witnesses to please respond as promptly as you're able.

Without objection, all members will also have five legislative days within which to submit extraneous materials to the chair for inclusion in the record.

This hearing is now adjourned.

[Whereupon, at 11:01 a.m., the subcommittee was adjourned.]

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