



STATEMENT

OF

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BEFORE THE

HOUSE SUBCOMMITTEE ON THE FEDERAL WORKFORCE, POSTAL
SERVICE AND THE DISTRICT OF COLUMBIA
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

CONCERNING

“ENSURING A MERIT-BASED EMPLOYMENT SYSTEM: AN
EXAMINATION OF THE MERIT SYSTEMS PROTECTION BOARD AND
THE OFFICE OF SPECIAL COUNSEL”

PRESENTED ON

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Mr. Chairman and Members of the Subcommittee

I am Morton Rosenberg, a Specialist in American Public Law in the American Law Division of CRS. I thank you for inviting me to comment on changes proposed by the Merit Systems Protection Board (MSPB or board) and the Office of Special Counsel (OSC) in their respective enabling acts on the occasion of your Subcommittee's reauthorization review of their current statutory authorities. With me today are Henry B. Hogue and Barbara L. Schwemle, Analysts in American National Government in CRS' Government and Finance Division, and Thomas J. Nicola, a Legislative Attorney in the American Law Division of CRS, with whom I closely collaborated in the preparation of my written testimony.

As you requested, this testimony provides background on the MSPB and OSC, and a critical analysis of the draft legislation submitted by them, to reauthorize them. The board's legislation would: (1) authorize appropriations to MSPB for FY2008-FY2012; (2) provide for a line of succession to the board's chairmanship; (3) establish new delegation and budget authority for the chairman; (4) alter the board's appellate procedures to give the Board the authority to grant summary judgment; and (5) exempt MSPB from compliance with the Government in the Sunshine Act, at the discretion of the chairman.

Concerns have been voiced about the potential impact of these proposals on the operations and continued independence of the board. This testimony begins with background information about MSPB's history, purpose, organization, independence, and current operations. Following this background, each of the substantive changes proposed in the draft legislation is discussed and analyzed. For the Subcommittee's convenience, correspondence from MSPB to CRS are appended to this testimony.

The OSC's draft legislation would (1) modify or delete a current statutory provision that makes OSC liable for attorneys fees after an unsuccessful disciplinary action under 5.U.S.C. 1215; (2) give statutory permission to relocate the agency outside the District of Columbia; (3) allow MSPB to combine the disciplinary penalties currently provided in 5 U.S.C. 1215 (a)(3); (4) allow OSC to file amicus briefs in cases that go beyond MSPB to the federal court system; (5) authorize OSC to investigate and bring disciplinary actions with respect to all federal sector claims under the Unformed Services Employment and Employment Rights Act (USERRA); (6) vest OSC with full veterans preference prosecutorial power and allow it to receive, investigate, analyze and prosecute veterans' preferences claims for corrective action purposes; and (7) establish more flexible time frames for processing whistleblower reprisal claims. The OSC proposals were presented to the Subcommittee shortly before the request for our testimony. A number of the proposals involves complex areas of law and policy, some beyond our group's area of expertise. Following a brief description of OSC's history, purpose, organization, independence, and current operations, we will address Subcommittee concerns raised by several of the proposals.

MSPB Background

History and Purpose of MSPB

The Merit Systems Protection Board (MSPB) is an independent, quasi-judicial agency in the executive branch, headquartered in Washington, DC. It has six regional offices and two

field offices.¹ Reorganization Plan No. 2 of 1978, effective January 1, 1979, created MSPB, as one of three agencies, to replace the United States Civil Service Commission.² P.L. 95-454, the Civil Service Reform Act (CSRA) of 1978, as amended, codified the Reorganization Plan in statute.³ P.L. 107-304 reauthorized MSPB through FY 2007.⁴

President Jimmy Carter transmitted his message on civil service reform, which included a draft of the CSRA, to Congress on March 2, 1978. One of the objectives of the legislative proposal was “To strengthen the protection of legitimate employee rights.”⁵ MSPB was created to assume responsibility for the appellate authority that previously had been vested in the Civil Service Commission. According to the House Committee on Post Office and Civil Service report that accompanied the legislation, “One of the inherent conflicts” that prompted the reform was “that the Commission [had] both the enforcement authority as the chief personnel office of the executive branch and also the administrative review authority in adverse action cases.”⁶

The Senate Committee on Governmental Affairs report that accompanied the legislation quoted the Federal Personnel Management Project’s⁷ finding that:

Expected to be all things to all parties — Presidential counsellor (sic), merit ‘watchdog,’ employee protector, and agency advisor — the Commission has become progressively less credible in all of its roles.⁸

The report stated that, “a vigorous protector of the merit system is needed” and noted that “a strong and independent Board” would “discourage subversions of merit principles.”⁹

¹ The six regional offices are Atlanta; Dallas; Central, based in Chicago; Northeastern, based in Philadelphia; Washington, based in Alexandria, VA; and Western, based in San Francisco. Field offices are located in Denver and New York. (U.S. National Archives and Records Administration, Office of the Federal Register, *The United States Government Manual 2006/2007* (Washington: GPO, June 1, 2006), p. 436.)

² Reorganization Plan No. 2 of 1978 created the Office of Personnel Management, the Merit Systems Protection Board, and the Federal Labor Relations Authority to replace the United States Civil Service Commission. When created, MSPB included a Special Counsel. P.L. 101-12, enacted on April 10, 1989, created the Office of Special Counsel as an independent investigative and prosecutorial agency.

³ P.L. 95-454, Title II, § 202(a), Oct. 13, 1978, 92 Stat. 1111, at 1121-1122, 1131; 5 U.S.C. §§ 1201-1206.

⁴ P.L. 107-304, § 2, Nov. 27, 2002, 116 Stat. 2364; 5 U.S.C. § 5509 note.

⁵ U.S. Congress, House Committee on Post Office and Civil Service, *Civil Service Reform Act of 1978*, report to accompany H.R. 11280, 95th Cong., 2nd sess., H. Rept. 95-1403 (Washington: GPO, 1978), p. 3.

⁶ *Ibid.*, p. 6.

⁷ The Federal Personnel Management Project, an entity separate from the United States Civil Service Commission, developed a comprehensive plan for reform of the Civil Service.

⁸ U.S. Congress, Senate Committee on Governmental Affairs, *Civil Service Reform Act of 1978*, report to accompany S. 2640, S. Rept. 95-969, 95th Cong., 2nd sess. (Washington: GPO, 1978), p. 5. (Hereafter referred to as S. Rept. 95-969.)

⁹ *Ibid.*, pp. 6-7.

MSPB describes itself as an agency “established to protect Federal merit systems against partisan political and other prohibited personnel practices.”¹⁰ The President’s FY 2007 budget request for MSPB stated that the board:

serves as guardian of the Federal Government’s merit-based system of employment, principally by hearing and deciding appeals from Federal employees of removals and other major personnel actions. The Board also hears and decides other types of civil service cases, reviews regulations of the Office of Personnel Management (OPM), and conducts studies of the merit systems. The intended results (outcomes) of MSPB’s efforts are to assure that (1) personnel actions taken involving employees are processed within the law, and (2) actions taken by OPM and other agencies support and enhance Federal merit principles.¹¹

Agency Management

MSPB is composed of three members appointed by the President, by and with the advice and consent of the Senate. Not more than two of the members may be “adherents of the same political party.” The members are to be individuals who, by demonstrated ability, background, training, or experience are especially qualified to carry out the functions of the board. No member may hold another office or position in the U. S. Government, except as otherwise provided by law or at the direction of the President.¹² The members — chairman, vice chairman, and member — adjudicate the cases brought to MSPB.

Each position on the board is a seven-year term, and a member may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office. A member appointed to fill an unexpired term serves for the remainder of the predecessor’s term. The new member serving only a portion of a term continues to serve until a successor has been appointed and qualified. Such member may not continue to serve for more than one year beyond the expiration date of the original term, unless he or she is reappointed. A member serving a full term may not be reappointed, but may continue to serve for one year beyond the original expiration date of the term until a successor has been appointed and qualified.¹³ A term continues to run even when a position is unfilled or filled by a replacement, thereby creating a continuous scheme of staggered terms for the members. For example, if the term of a position on the board runs from January 1, 2000 until January 1, 2007, and a member is appointed in June 2003, the member can serve until January 1, 2007.

The chairman is the chief executive and administrative officer of the board. During the absence or disability of the chairman, or when that office is vacant, the vice chairman performs the chairman’s functions. The remaining board member performs the functions of the chairman when both the chairman and the vice chairman are absent or disabled, or when both

¹⁰ U.S. Merit Systems Protection Board, *Performance Budget Justification for FY 2007* (Washington: Feb. 6, 2006), p. 1.

¹¹ U.S. Executive Office of the President, Office of Management and Budget, *Budget of the United States Government, Fiscal Year 2007; Appendix* (Washington: GPO, 2006), p. 1174.

¹² 5 U.S.C. § 1201.

¹³ 5 U.S.C. § 1202.

of these offices are vacant.¹⁴ The current board members are Neil Anthony Gordon McPhie, who was confirmed as chairman on November 21, 2004, and whose term expires March 1, 2009;¹⁵ Mary M. Rose, vice chairman, who was confirmed on December 17, 2005, and whose term expires March 1, 2011; and Barbara J. Sapin, who was confirmed on November 21, 2004, and whose term expired on March 1, 2007.¹⁶ The law provides that a board member may remain in office for up to one year after the end of his or her seven-year term. As of this date a nomination has not been made for this position. Each board member has his or her separate staff, generally consisting of a chief counsel, at least two additional staff attorneys and one confidential assistant.¹⁷

Powers and Functions of the Board

By law, MSPB is required to perform four functions:

- hear, adjudicate, or provide for the hearing or adjudication, of all matters within the jurisdiction of the board under Title 5; Title 38, Chapter 43; or any other law, rule, or regulation. MSPB, subject to otherwise applicable provisions of law, shall take final action on any such matter;
- order any federal agency or employee to comply with any order or decision issued by the board under the authority granted above and enforce compliance with any such order;
- conduct, from time to time, special studies relating to the civil service and to other merit systems in the executive branch, and report to the President and to Congress as to whether the public interest in a civil service free of prohibited personnel practices is being adequately protected; and
- review OPM rules and regulations.¹⁸

Powers. Any member of the board, any administrative law judge appointed by the board, and any employee of the board designated by the board may administer oaths, examine witnesses, take depositions, and receive evidence. These individuals may, with respect to any individual:

- issue subpoenas requiring the individual to attend and present testimony and to produce documentary or other evidence from any place in the United States,

¹⁴ 5 U.S.C. § 1203.

¹⁵ Mr. McPhie was sworn in as a member of the board on April 23, 2003, following his recess appointment. He was designated as vice chairman on December 10, 2003, and served as acting chairman (because the chairman's position was vacant) from then until his confirmation as chairman.

¹⁶ Ms. Sapin served as vice chairman of the board from December 2000 to December 2001 under a recess appointment.

¹⁷ U.S. Merit Systems Protection Board, Office of the General Counsel, Legislative Counsel, *Meetings of the Merit Systems Protection Board*, July 20, 2006. Provided to CRS by electronic mail. (Hereafter referred to as MSPB July 2006 Response to CRS.)

¹⁸ 5 U.S.C. § 1204(a).

any territory or possession of the United States, the Commonwealth of Puerto Rico, or the District of Columbia; and

- order depositions to be taken from the individual, and responses to written interrogatories by the individual.

Witnesses may be compelled to testify or produce evidence before the board either voluntarily or by subpoena.¹⁹ In any hearing or adjudication, any board member may request an advisory opinion from the OPM director concerning the interpretation of any rule, regulation, or other policy directive promulgated by the personnel agency. The board may issue any order which may be necessary to protect a witness or other individual from harassment during an Office of Special Counsel (OSC) investigation or while any proceeding is pending before the board. In carrying out special studies relating to the civil service and to other merit systems in the executive branch, the board can make inquiries as necessary and, unless otherwise prohibited by law, have access to personnel records or information collected by OPM. The board can require additional reports from other agencies as needed.²⁰

The board can review any rule or regulation issued by the OPM director in carrying out functions under 5 U.S.C. § 1103 at any time after its effective date. This review can occur (1) on its own motion; (2) on MSPB granting, in its sole discretion and after consideration, any petition for review filed with the board by any interested person; or (3) on the filing of a written complaint by the Special Counsel requesting review. In reviewing any provision of any rule or regulation, the board can declare such provision (1) invalid on its face, if the board determines that it would require any employee to violate the prohibitions against discrimination at 5 U.S.C. § 2302(b) if implemented by any agency; or (2) invalidly implemented by any agency if the board determines that, as implemented by the agency through any personnel action or policy, the provision has required any employee to violate those prohibitions. The OPM director and the head of any agency implementing any provision of any rule or regulation being reviewed by the board have the right to participate in the review. The board can require any agency (1) to cease compliance with any provisions of any rule or regulation which the board declares to be invalid on its face, and (2) to correct any invalid implementation by the agency of any provision of any rule or regulation which the board declares to have been invalidly implemented by the agency.²¹

The board may delegate to any employee of the board the performance of any of its administrative functions.²² It may prescribe regulations, but cannot issue advisory opinions.²³ The board chairman appoints necessary personnel. Any appointment must comply with Title 5, except that OPM or Executive Office of the President approval or supervision is not required

¹⁹ 5 U.S.C. § 1204(b)-(d).

²⁰ 5 U.S.C. § 1204(e).

²¹ 5 U.S.C. § 1204(f).

²² 5 U.S.C. § 1204(g).

²³ The regulations are published at 5 C.F.R. §§ 1201-1210. 5 U.S.C. § 1204(h).

(other than the approval required under 5 U.S.C. §3324 or Chapter 33, subchapter VIII, relating to the qualifications of employees).²⁴

The board is required to prepare and simultaneously submit to the President, and the appropriate committees of Congress, an annual budget of expenses and other items which, as revised, will be included as a separate item in the President's budget transmittal to Congress.²⁵ The board is required to submit simultaneously, to the President and each house of Congress, any legislative recommendations relating to any of its Title 5 functions.²⁶

Any member of the board, or any employee of the board who is designated by the board, may transmit to Congress information and views on functions, responsibilities, or other matters relating to the board. This transmittal, which would occur at the request of any committee or subcommittee, could be by report, testimony, or otherwise, and would be without review, clearance, or approval by any other administrative authority.²⁷ MSPB is required to submit an annual report to the President and Congress on its activities, including a description of significant actions taken by the board to carry out its functions. The report is also required to review the significant actions of OPM, including an analysis of whether these actions are in accord with merit system principles and free from prohibited personnel practices.²⁸ Records of open meetings under the Government in the Sunshine Act²⁹ are kept by the clerk of the board. Disclosure of such records is made in accordance with the procedures specified in the Sunshine Act and the Freedom of Information Act.³⁰

MSPB Organization and Board Operations

As stated earlier, MSPB has regional offices in Atlanta, Dallas, Chicago, Philadelphia, Alexandria, VA, and San Francisco, and field offices in Denver and New York. The board currently has 226 employees. To carry out its functions, MSPB has organized itself around nine offices (the number of employees assigned to each office is indicated in parentheses):

- The board offices — chairman, vice chairman, and member. (12 employees)
- The Office of the Administrative Law Judge adjudicates and issues initial or recommended decisions on petitions for corrective action and disciplinary action complaints (including Hatch Act complaints) brought by the Special Counsel, proposed agency actions against administrative law judges, MSPB employee appeals, and other cases assigned by the board. (position is currently vacant)

²⁴ 5 U.S.C. § 1204(j).

²⁵ 5 U.S.C. § 1204(k).

²⁶ 5 U.S.C. § 1204(l).

²⁷ 5 U.S.C. § 1205.

²⁸ 5 U.S.C. § 1206.

²⁹ 5 U.S.C. § 552b.

³⁰ MSPB July 2006 Response to CRS.

- The Office of Appeals Counsel prepares proposed decisions that recommend appropriate action in petition for review cases and all other cases decided by the three-member board, with the exception of requests for review of OPM regulations. The office conducts legal research and submits proposed opinions to the board for final adjudication. It also conducts the board's petition for review settlement program, processes interlocutory appeals of rulings made by administrative judges on the board's own motion, and provides research and policy memoranda to the board on legal issues. (38 employees)
- The Office of the Clerk of the Board receives and processes cases filed at board headquarters, rules on certain procedural matters, and issues the board's decisions and orders. (14 employees)
- The Office of Financial and Administrative Management administers the budget, accounting, travel, time and attendance, procurement, property management, physical security, and general services functions of the board, and manages the board's financial audit function. It develops and coordinates internal management programs and projects, including review of internal controls agency-wide. Included in this office is the Equal Employment Opportunity³¹ function that plans, implements, and evaluates the board's equal employment opportunity programs, processes complaints of alleged discrimination, and furnishes advice and assistance on affirmative action initiatives to the board's managers and supervisors. (12 employees)
- The Office of the General Counsel, as legal counsel to the board, provides advice to the board and MSPB offices on matters of law arising in day-to-day operations; represents the board in litigation; and prepares proposed decisions for the board on assigned cases. (14 employees)
- The Office of Information Resources Management develops, implements, and maintains the board's automated information systems to help the board manage its caseload efficiently and carry out its administrative and research responsibilities. (17 employees)
- The Office of Policy and Evaluation carries out the board's statutory responsibility to conduct special studies of the civil service and other merit systems and conducts special projects for the board. (13 employees)
- The Office of Regional Operations oversees the regional and field offices in carrying out their adjudicatory and administrative functions. (106 employees)³²

³¹ MSPB's regulations (5 C.F.R. § 1200.10(b)(7)) and the board's FY2006 Performance and Accountability Report (cited below) list the Office of Equal Employment Opportunity (EEO) as a separate office. During a telephone conversation on February 8, 2007, MSPB staff told CRS that the EEO Office is now part of the Office of Financial and Administrative Management.

³² The descriptions are summarized from 5 C.F.R. § 1200.10(b)(7) and U.S. Merit Systems Protection Board, *Performance and Accountability Report for Fiscal Year 2006* (Washington: Nov. 15, 2006), pp. 3-5. MSPB staff provided the employment data to CRS, by telephone, on February 8, 2007.

In July and August 2006, MSPB, at the request of CRS, provided information on the board's operations.³³ The following summarizes the agency's responses.³⁴

The board does not hold regular meetings. The adjudication of cases is not generally done in a meeting. Rather, each member of the board adjudicates cases independently. The chairman is, by statute, the chief executive and administrative officer of the board, and is responsible for making all policy decisions regarding the governance and operations of the agency. Most board meetings may be closed pursuant to exemption 10 of the Sunshine Act (discussed in detail below), which provides an exception for deliberations concerning formal agency adjudication.³⁵

Since calendar year 2000, the board has held six open meetings that were subject to the requirements of the Sunshine Act. These meetings were as follow:

- March 23, 2001 — to consider the disposition of certain motions and petitions filed in the cases of *Azdell* and *Fishman*.
- May 31, 2001 — to consider the adjudication of OPM's Request for Reconsideration in *Azdell* and *Fishman*.
- September 7, 2001 — to consider MSPB's FY 2002-2003 Performance Plan, the status of *Azdell* and *Fishman*, the target group of cases expected to be over 300 days old by September 30, the appreciation of effects in accomplishing 2001 goals, and the expedited petition for review pilot.
- October 18, 2001 — to brief board members on the Senior Management retreat and case processing issues.
- November 14, 2001 — to brief a board member on the issues in the matter of *Mohammed Yunus v. VA*, and *Phillip A. Geyer v. Department of Justice*.
- November 29, 2001 — to consider strategies for acting on long-standing cases.

The board has not conducted any meetings since November 29, 2001, because no chairman since then has determined that meetings were necessary. Generally, the chief of staff and the chief counsels to each board member would attend the board meetings. The general counsel and the clerk of the board also would attend the meetings. Additionally, other board employees would attend if they were presenting matters to be considered by the board members at the meeting.

Matters such as management issues, strategic plans, and workload, which were included as agenda items in the 2001 meetings, are now generally discussed in meetings of the senior staff,

³³ MSPB July 2006 Response to CRS and U.S. Merit Systems Protection Board, Office of the General Counsel, Legislative Counsel, *Responses to Follow-up Questions Regarding Meetings of the MSPB Board Members*, Aug. 11, 2006. (Hereafter referred to as MSPB Aug. 2006 Response to CRS.) Provided to CRS by electronic mail.

³⁴ The MSPB letters to CRS are attached to this testimony.

³⁵ 5 U.S.C. § 552b(d)(2).

which are attended by the board's office heads and the chief counsels to the board members. While board members generally do not attend meetings of the senior staff, any one of the board members may, on occasion, sit in on the meetings. The chief of staff presides at these meetings and reports on the meetings to the chairman. The usual practice is for the chief counsels to brief their respective board members.

Generally, the chairman signs off on documents regarding the administration of the agency. The other board members generally sign off on documents that relate to the adjudicatory function of the agency (e.g., regulations that govern the adjudication of cases). In other matters, such as the reports of studies conducted by the Office of Policy and Evaluation and budgets or other documents prepared by the Financial and Administrative Management Office, the other board members have the same opportunity to provide input as do all office heads. However, the members do not have decision-making authority regarding these matters.

While the chairman may consult with the other two board members on matters not covered by the Sunshine Act, he is not required to do so, and such consultation does not take place as a matter of course. This consultation is not generally conducted as part of any meeting. There are no formal regular interactions held between the top officials of MSPB (such as the Director of the Office of Policy and Evaluation or the Director of Finance and Administrative Management) and the board members as a group. The chief of staff conducts a bi-weekly meeting of senior staff which is attended by the agency's senior managers and the chief counsels of all board members, including the chairman.³⁶

As stated earlier, by law, MSPB hears, adjudicates, or provides for the hearing or adjudication, of all matters within the jurisdiction of the board under Title 5; Title 38, Chapter 43; or any other law, rule, or regulation, and subject to otherwise applicable provisions of law, shall take final action on any such matter.³⁷ Regulations governing the MSPB further provide that:

The three Board members make decisions in all cases by majority vote except in circumstances described [below] or as otherwise provided by law.

When due to a vacancy, recusal or other reasons, the Board members are unable to decide any case by majority vote, the decision, recommendation or order under review shall be deemed the final decision or order of the Board. The Chairman of the Board may direct the issuance of an order consistent with this paragraph.

When due to a vacancy, recusal, or other reasons, the Board members are unable to decide a matter in a case which does not involve a decision, recommendation or order, the Chairman may direct referral of the matter to an administrative judge or other official for final disposition.³⁸

It is unclear how these decisions are currently being made by the board. (This issue is discussed in detail below.)

³⁶ MSPB July 2006 Response to CRS and MSPB Aug. 2006 Response to CRS.

³⁷ 5 U.S.C. § 1204(a)(1).

³⁸ 5 C.F.R. § 1200.3

Analysis of Draft Legislation

In anticipation of the expiration of the authorization of MSPB at the end of September, 2007, the board offered draft legislation that would reauthorize the agency and amend its enabling act to make several changes to its organization and functioning. The draft legislation was accompanied by a justification and section-by-section analysis. The proposed provisions (1) would prescribe the order of succession to the chairmanship in the event of a vacancy in that office under circumstances that are not currently expressly provided for in law; (2) would vest in the chairman the authority to delegate any of the board's administrative functions under the act to any employee of the board, allow the chairman to delegate to officers and employees the authority to perform such duties and make such expenditures as the chairman deems necessary, and to authorize the chair alone to prepare and submit the board's annual budget; (3) would allow the board to dispose of a controversy by summary judgement solely on the pleadings without an evidentiary hearing, a power presently not available to the board under the law; and (4) would permit the chairman, at his or her discretion, to call a meeting of the board without regard to the Government in the Sunshine Act. This section of our testimony addresses issues related to whether these proposals could have a significant impact on the operations and independence of the board.

The Nature of MSPB and Consideration of Issues Raised by the Draft Legislation

As has been indicated previously, MSPB is an independent executive branch agency whose essential mission is to "discourage subversions of merit principles"³⁹ from partisan political and other statutory prohibited personnel practices, principally by hearing and deciding appeals from Federal employees of removals and other major adverse personnel actions, as well as other types of civil service cases.⁴⁰ In nature and function it is primarily an adjudicatory body. In establishing the board, Congress structured it in a manner to assure both a high degree of independence and insulation from presidential intervention, and to provide avenues for congressional oversight and public access to its decisional and operational processes. To accomplish these dual goals, the board's enabling legislation contains the following requirements:

- members serve for a fixed seven-year term⁴¹
- the terms are staggered so that most Presidents do not have the opportunity to replace the entire board at one time;⁴²
- members are ineligible for reappointment, arguably reducing any incentive to curry favor with the current President;⁴³

³⁹ S. Rept. 95-969, pp. 6-7.

⁴⁰ See preceding discussion of history and purposes.

⁴¹ 5 U.S.C. §102 (a).

⁴² U.S.C. § 1202(b).

⁴³ 5 U.S.C. § 1202(c).

- members may not be removed by the President at will — only for inefficiency, neglect of duty, or malfeasance in office;⁴⁴
- members must be qualified — they must be “individuals who by demonstrated ability, background, training, or experience are especially qualified to carry out the functions of the Board”;⁴⁵
- not more than two members can be from the same political party;⁴⁶
- the chairman is appointed by the President with Senate advice and consent;⁴⁷
- each member of the board may issue subpoenas or order depositions to be taken from an individual or order written responses to interrogatives;⁴⁸
- the board, as a body, has independent (of the Department of Justice) authority to enforce subpoenas and to appear in any civil action in connection with any board function;⁴⁹
- the board’s annual budget request is to be simultaneously presented to the President and to the appropriate congressional committees, thereby bypassing OMB review;⁵⁰
- the board is directed to submit its legislative recommendations simultaneously to the appropriate legislative committees, thereby bypassing OMB clearance;⁵¹
- any member of the board, or employee designated by the board, can respond to a committee or subcommittee request for reports, testimony or other information or views on functions and responsibilities relating to the board, without review, clearance, or approval by OMB or any other administrative authority;⁵²
- the board, as a body, may delegate the performance of its administrative functions under the act to any employee of the board;⁵³ and
- the appointment by the chairman of personnel necessary to carry out the function of the board is not subject to White House or OPM approval.⁵⁴

These and other combinations of such political insulation features are to be found in numerous single-headed and multi-member independent executive agencies. Arguably, the single most important independent feature, common to all such bodies, is the denial to the

⁴⁴ 5 U.S.C. § 1202(d).

⁴⁵ 5 U.S.C. § 1201.

⁴⁶ Ibid.

⁴⁷ 5 U.S.C. § 1203(a).

⁴⁸ 5 U.S.C. § 1204(b)(2).

⁴⁹ 5 U.S.C. § 1204(c), (I).

⁵⁰ 5 U.S.C. § 1204(k).

⁵¹ 5 U.S.C. § 1202(I).

⁵² 5 U.S.C. § 1205.

⁵³ 5 U.S.C. § 1204(g).

⁵⁴ 5 U.S.C. § 1204(j). The conference report that accompanied the Civil Service reform legislation stated that this “is to prevent ‘political clearance’ of appointments” because “[t]he conferees believe that it would be inappropriate for any unit of the White House or the Office of Personnel Management to screen such candidates.” U.S. Congress, Conference Committees, 1978, *Civil Service Reform Act of 1978*, conference report to accompany S. 2640, H. Rept. 95-1717, 95th Cong., 2nd sess. (Washington: GPO, 1978), p. 133.

President of at-will removal power of members of such bodies. While the efficacy and utility of such bodies remain a matter of debate, particularly by those who advocate the necessity of presidential supervision and control over every aspect of the administrative bureaucracy,⁵⁵ the Supreme Court has consistently upheld Congress's constitutional power to establish, structure, locate, and empower all offices and officers of the bureaucracy,⁵⁶ and in particular has upheld statutory provisions limiting the President's power to remove officers he has appointed except for cause.⁵⁷ The choice of which agencies and functions are to be so specially treated is Congress's alone to make. One prominent administrative law commentator has stated that

insulation from political pressure seems most desirable in the context of adjudicatory decisionmaking by agencies. No one wants the President, or anyone else, to control the outcome of adjudicatory disputes based on political beliefs or affiliations of the individual whose rights are at stake.⁵⁸

While the divesting of the President's at-will removal power by Congress normally must be clear and express,⁵⁹ in one case involving an independent commission exercising purely adjudicative functions whose enabling legislation was silent with respect to presidential removal of its members, the Supreme Court held that the adjudicative functions being performed were sufficiently sensitive that presidential removal only for cause was properly implied.⁶⁰

The scheme of structure and organization established by Congress for MSPB was intended to allow it to carry out its adjudicatory function freer from the influence of short-term political considerations and influences than it might otherwise be. The importance of each structural element to the independence of a governmental agency intended by Congress was recognized in a 2002 decision by the Court of Appeals for the District of Columbia Circuit. In *United States v. Wilson*,⁶¹ the court held that the requirement of staggered terms was so integral to the congressional scheme of independence designed for the United States Commission on Civil Rights (Commission) in 1983 that its omission in a subsequent 1994 reauthorization measure

⁵⁵ See, e.g., Christopher S. Yoo, Steven G. Calabresi, and Anthony Colangelo, "The Unitary Executive in the Modern Era," 90 Iowa L. Rev. 601, 603-608 (2005).

⁵⁶ *Crenshaw v. United States*, 134 U.S. 99, 105-106 (1890); *Lewis v. United States*, 244 U.S. 134 (1917); *Myers v. United States*, 272 U.S. 52, 129 (1926); *Buckley v. Valeo*, 424 U.S. 1, 134-135 (1976); *Mistretta v. United States*, 488 U.S. 361 (1989).

⁵⁷ *Morrison v. Olson*, 487 U.S. 654 (1988).

⁵⁸ Richard J. Pierce, Jr., *Administrative Law Treatise*, Vol. I, section 2.5 at 65 (4th ed., 2002).

⁵⁹ *Swan v. Clinton*, 100 F. 3d 973, 981-87 (D.C. Cir. 1996).

⁶⁰ *Weiner v. United States*, 357 U.S. 349, 354-56 (1958) ("If, as one must take for granted, the War Claims Act precluded the President from influencing the Commission in passing on a particular claim, *a fortiori* must it be inferred that Congress did not wish to have hang over the Commission the Damocles' sword of removal by the President for no reason other than that he preferred to have on that Commission men of his own choosing."). Expressing a similar concern, the Senate Committee on Governmental Affairs report that accompanied the 1978 Civil Service reform legislation stated that, "As a result of this structure, the Board should be insulated from the kind of political pressures that have led to violations of merit principles in the past . . . the Board . . . will exercise statutory responsibilities independent of any Presidential directives." S. Rept. 95-969, p. 7.

⁶¹ 290 F. 3d 347. (D.C. Cir. 2002) *cert. denied*, 537 U.S. 1023 (2002).

could not be deemed to be an implied repeal of the provision. The *Wilson* case arose under the following circumstances. Victoria Holt was appointed by President Clinton on January 13, 2000, to fill the unexpired term of her predecessor who had died. When that term expired on November 29, 2001, President Bush appointed Peter Kirsanow as her successor. However, the commission refused to seat Kirsanow on the ground that Holt was entitled to a full six-year term. This was based on the commission's interpretation of its 1994 reauthorization in which the requirement of staggered terms was absent. The commission interpreted this absence to mean that staggered terms had been eliminated. The government and Kirsanow brought suit to have Holt's term declared expired. The district court ruled in Holt's favor, holding that the amended statute on its face was plain and unambiguous and no longer required staggered terms. The appeals court reversed. Contrary to the district court, it found an ambiguity in the amended statutory provision relied on by the lower court wherein after establishing six-year terms, it also contained subsequent language that tied the expiration of terms of then sitting members to that which would have been applicable to members in place on September 30, 1994, before the amended statute took effect.⁶² As a consequence, the appeals court proceeded to examine the legislative history of the 1983 reauthorization of the commission, which established a scheme to protect the independence of the commission, at the heart of which was the requirement of fixed, staggered terms. In the absence of any clear indication that Congress's 1994 revision meant to alter that scheme, the appeals court concluded that it was meant to be continued:

Congress went to great lengths to put various structural features in place to preserve the independence, autonomy, and non-partisan nature of the Commission. Clearly staggering was one of those features. *See* Pub.L. No. 98-183 § 2(b)(2), (3), 97 Stat. 1301 (1983). The 1983 Act was enacted at a time when Congress was responding to President Reagan's decision to remove and replace first two, then a total of five, members of the Commission. *See* Congressional Research Service, *Tenure of Members of the Civil Rights Commission*, Memorandum to House Subcommittee on the Constitution, at 2-3, 5 (Dec. 14, 2001). Thus it is evident that in staggering the membership (among other features), Congress was insulating the Commission from *carte blanche* replacement at any given time. To suggest that Congress abolished this practical structural feature without any indication that it intended to — evidenced by the fact that the Clinton and Bush Administrations continued to treat the Commission as a body with staggered membership — presents a highly improbable scenario. There is no evidence in or external to the 1994 Act that Congress meant to disrupt the system it had meticulously put into motion.⁶³

As the *Wilson* opinion suggests, a successful scheme of independence at times may be undermined by the elimination, diminution, or avoidance of one or more parts of the scheme. In *Wilson*, the requirement of the element of staggered terms was deemed integral to maintenance of the independence of the commission, because in its absence one President would ultimately be able to pack a majority of the commission with members of his own political persuasion, thus rendering the for cause removal protection a less potent independence factor. This implies that the proposed changes in MSPB's organizational arrangements should be assessed, both individually and collectively, for the impact they could have on the continued level of independence of the board.

⁶² See 42 U.S.C. § 1975(c) (2000).

⁶³ 290 F. 3d at 359.

Temporary Chairmanship Succession

Background and Proposal. Section 1204 of Title 5 provides the following:

- (a) The President shall from time to time appoint, by and with the advice and consent of the Senate, one of the members of the Merit Systems Protection Board as the Chairman of the Board. The Chairman is the chief executive and administrative officer of the Board.
- (b) The President shall from time to time designate one of the members of the Board as Vice Chairman of the Board. During the absence or disability of the Chairman, or when the office of Chairman is vacant, the Vice Chairman shall perform the functions vested in the Chairman.
- (c) During the absence or disability of both the Chairman and the Vice Chairman, or when the offices of Chairman and Vice Chairman are vacant, the remaining Board member shall perform the functions vested in the Chairman.⁶⁴

Section 3 of the draft legislation would amend Section 1203 by adding four so-called “order of succession” subsections:

- (d) In the event that no member has been appointed or designated to serve as Chairman or Vice Chairman or is eligible to serve in either position by operation of subsections (b) or (c) of this section, the member who is an adherent of the same political party as the President shall perform the duties and functions of the Chairman;
- (e) If the only members currently in office are adherents of the same political party as the President and neither has been designated to serve as Chairman or Vice Chairman or is eligible to serve in either position by operation of subsection (b) or (c) of this section, the member who was first appointed to the Board shall perform the duties and functions of the Chairman;
- (f) In the event that all three Board positions are vacant, the General Counsel of the Board shall perform the chief executive and administrative officer duties of the Chairman;
- (g) The person who performs the duties and functions of the Chairman, as provided in subsections (d) through (f) of this section, shall do so only until such time as the President makes an appointment or designation as described in subsection (a) or (b); the President makes an appointment in accordance with Article II, Section 2 of the U.S. Constitution; or the member’s term (including the holdover period) expires, whichever occurs first.

Agency Justification. The board’s justification for this proposed amendment explains that these provisions are intended to address the perceived risk of a leadership vacuum on the board under conditions that are not addressed under current law. These conditions arise when either (1) the board has more than one member, but no member has been appointed as chairman or designated as vice chairman; or (2) when no board members remain. Both of these scenarios are illustrated, in the justification, with reference to recent MSPB history. In the first instance, the board had two sitting members, neither of whom was chairman or vice chairman. The members, in this case, “agreed to a shared-leadership arrangement” until the President

⁶⁴ 5 U.S.C. § 1203.

designated one as vice chairman. In this case, under the proposed resolution, the member of the President's party, or, if two were from the same party, the member who was first appointed would temporarily take over the chairman's functions. In the second instance, a confluence of events was leading toward the possibility that the board would be left with no members. In this case, the situation was resolved when the Senate confirmed, and the President appointed, two members, one of whom was also confirmed as chairman. The proposal to resolve the second scenario would vest the functions of the chairman in the general counsel, who is appointed by the chairman.

Analysis. Constitutionally, the Senate and the President share the power to fill the top leadership positions in the federal government, and the arrangements by which this appointment power is shared are often carefully delineated. As noted above, Congress established MSPB membership positions with several features that increase the independence of the incumbents, and the board, from the President.

This appointment scheme is similar to those Congress has established for many other independent agencies, particularly independent regulatory commissions. Change to the board's organizational structure, including the appointment arrangements, raises the issue of the impact it could have on the independence of the board. In this case, the potential impact of the proposed chairmanship succession provisions on board independence might be weighed against the improved agency functioning that might result from the changes. Several questions follow that might be raised in connection with this assessment:

- (1) What powers would a temporary chairman exercise?
- (2) How long would he or she be able to serve under the proposed provisions?
- (3) What impact would this have on the existing process for appointing a permanent chairman, or on the process for making appointments to the board?
- (4) What might happen if the chairmanship succession provisions are not changed? Are the present arrangements insufficient to maintain efficient agency operations?

Temporary Powers. It is unclear, from MSPB's organic act and the rules published in the *Code of Federal Regulations* regarding its organization,⁶⁵ which specific duties and functions would be transferred by the provisions above; the terms "duties" and "functions" are undefined. The distinction among the existing and proposed succession provisions with regard to the specific powers and authorities that each of them would confer, is also unclear. The existing and proposed provisions use each of the following phrases as noted:

- "the functions vested in the Chairman" (§1204(b) and (c));
- "the duties and functions of the Chairman" (proposed §1204(d), (e) and (g)); or
- "the chief executive and administrative officer duties and functions of the Chairman" (proposed §1204(f)).

⁶⁵ 5 C.F.R. Part 1200.

It could be argued that these provisions each direct essentially all of the chairman's powers to be temporarily conferred on the specified member or general counsel. This interpretation is supported by the response of the board's chairman to written questions following a Senate hearing on reauthorization. When asked to identify the functions that would be performed by the general counsel under the proposed provisions, the chairman stated that they would include

those executive and administrative matters typically performed by the head of an Executive Branch agency, to the extent that the assumption of such duties is not prohibited by statute, regulation or executive order. It is not possible to enumerate all such functions, since the specific functions to be performed by the GC would be determined by the functions that need to be performed on behalf of the agency at the time that the total absence of any Board members exists. The General Counsel would not assume any of the adjudicatory functions of the Board beyond those currently delegated by the Board.⁶⁶

According to the chairman, certain of these powers are beyond those the board itself could delegate to the general counsel or another MSPB staff member. He stated that these include

those authorities and functions that are normally within the sole purview of the chief executive or administrative officer of the Board. Examples of such authorities and functions include approving personnel actions or approving contracts and other Board expenditures.⁶⁷

MSPB's power resides predominantly in its three members collectively. As noted in other sections of this testimony, most of the statutory authorities of the agency are vested in the board. The board's rules recognize this when they specify, for example, that the "three Board members make decisions in all cases by majority vote except in [specified] circumstances."⁶⁸

Authority of the Chairman. The MSPB chairman has certain specified statutory authorities, and it appears that certain other authorities have been inferred or have been delegated to the position by the board. The authorities to be taken over by another member or the MSPB general counsel under the existing and proposed chairmanship provisions might include those specified in the board's organic act and published organizational rules. In addition, these authorities might include those internally vested in the chairman.⁶⁹

Congress delegated certain general functions to the chairman when establishing the board. It provided that the "Chairman is the chief executive and administrative officer of the Board"; that, with certain exceptions, the chairman would designate an attorney to "appear for the Board, and represent the Board, in any civil action brought in connection with any function

⁶⁶ U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, "Additional Questions for the Record for Mr. Neil McPhie, Chairman, Merit Systems Protection Board," submitted March 22, 2007 (McPhie Response).

⁶⁷ Ibid.

⁶⁸ 5 C.F.R. § 1200.3(a).

⁶⁹ It could be argued, for example, that because the chairman is statutorily denominated the "chief executive and administrative officer of the Board" (5 U.S.C. § 1203(a)), he or she has certain inherent powers. But see discussion of legal authorities, *infra* at 23-25, casting doubt on such a notion.

carried out by the Board ...”; and that the “Chairman of the Board may appoint such personnel as may be necessary to perform the functions of the Board.”

The board’s rules characterize the chairman as the “chief executive officer of the Board.”⁷⁰ The rules specify certain tasks, in addition to those established in statute, that are to be completed by the chairman. These tasks, which appear to be administrative in nature, involve moving board business forward when there are at least two members in office, but members are unable to come to a decision “due to a vacancy, recusal or other reasons”⁷¹ The applicable rules are as follow:

When due to a vacancy, recusal or other reasons, the Board members are unable to decide any case by majority vote, the decision, recommendation or order under review shall be deemed the final decision or order of the Board. The Chairman of the Board may direct the issuance of an order consistent with this paragraph.⁷²

When due to a vacancy, recusal or other reasons, the Board members are unable to decide a matter in a case which does not involve a decision, recommendation or order, the Chairman may direct referral of the matter to an administrative judge or other official for final disposition.⁷³

Inasmuch as another member or general counsel is more likely to take on the chairman’s functions in the case of at least one board vacancy, he or she might carry out the actions specified by these rules. The general counsel might not take on these functions, however, if they are regarded as part of the “adjudicatory functions of the board.”⁷⁴

Additional information on the board’s operations, provided to CRS by MSPB, might provide further insight concerning the duties and functions of the MSPB chairman, as they would be transferred under existing and proposed chairmanship succession provisions. The board’s response included the statement that the “Chairman of the Board is, by statute, the chief executive and administrative officer of the Board. As such, the Chairman is responsible for making all policy decisions regarding the governance and operations of the agency.”⁷⁵

Taken together, the provisions from MSPB’s organic act, responses by the board’s chair to congressional inquiries, the board’s published organizational rules, and statements of the board in response to CRS inquiries suggest that the chairman believes he has, and a temporary successor might have, considerable discretion in running the board and determining board

⁷⁰ 5 C.F.R. § 1200.2(b).

⁷¹ 5 C.F.R. § 1200.3.

⁷² 5 C.F.R. § 1200.3(b).

⁷³ 5 C.F.R. § 1200.3(c).

⁷⁴ As previously noted, the board’s chairman has stated that, under the proposed provisions, the “General Counsel would not assume any of the adjudicatory functions of the Board beyond those currently delegated by the Board.” U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, “Additional Questions for the Record for Mr. Neil McPhie, Chairman, Merit Systems Protection Board.”

⁷⁵ MSPB July 2006 Response to CRS, p. 1.

policies. The power of the chairman, and the power temporarily conferred under existing and proposed succession provisions, seemingly would be greater if Section 5 of the draft legislation were enacted. The additional powers that would be vested in the chairman by some of the provisions in this section would presumably accompany the position's existing powers. These powers, and the powers of the chairman generally, are discussed later in this testimony, in the section entitled "The Power of the MSPB Chairman."

Potential Duration of Temporary Service. As noted previously, MSPB's powers reside predominantly in the board. The potential maximum period of time for which the functions of the chairman could be conferred upon another member or the general counsel depends, in part, on the maximum period of time that a chairman, temporary or permanent, could keep the board running under different scenarios. This depends, in turn, on the extent to which the board has delegated power to the chairman. If the chairman is vested with broad administrative authority, all or most of this power seemingly would be conferred under the temporary succession provisions. In this case, the board could be run for a considerable period of time under temporary leadership, even with board membership vacancies. If, however, delegations by the board to the chairman are limited in nature, the functioning of the agency might be impaired by a succession period of more than a few months, particularly if there were membership vacancies on the board. This would be the case if, for example, the chairman were not empowered to unilaterally prepare and submit to Congress the board's annual budget.⁷⁶

Even under the broadest interpretation of the authorities that could be performed by a temporary caretaker of the chairmanship (see above), the functioning of the board seemingly would be impaired by a long-term absence of full membership. However, it could be argued that the greater the number of authorities and functions vested in the chairman, the more easily the board could function without other members. It would follow that such greater authorities and functions could then be transferred to others under both existing and proposed succession provisions, possibly lessening the pressure for timely appointments of board members.

Impact on the Advice and Consent Process. Although enactment of the proposed succession provisions might have an impact on the process of appointing a permanent chairman, the precise impact is difficult to predict. The process of appointing a permanent chairman requires the cooperation of the President and the Senate. The success of this appointment process is generally a function of the political and institutional environment at the time of a vacancy. More specifically, the appointment of an MSPB chairman through the advice and consent process requires that the President and the Senate each have greater incentives to reach accord than not to reach accord. It could be argued that the more easily MSPB functions without the appointment of a permanent chairman, the less likely it is that the President and the Senate will reach accord to fill the position. Furthermore, if the chairman's role can be filled for a long period of time by a particular individual, potential nominees for the position might be evaluated against this individual, rather than the consequences of a long-term vacancy. Depending on how acceptable the temporary officeholder is to the Senate, this dynamic might limit or expand the range of candidates the President could nominate.

⁷⁶ The budget submission authority is, under current law, vested in the board. As discussed later in this testimony, however, the board justification for the draft legislation contends that "[t]he term 'Board' can be read to mean the Merit Systems Protection Board as a Federal agency or the three members of the Merit Systems Protection Board." Under the former interpretation, the authority would presumably be vested in the chairman. The board seeks to have the budget authority clearly conferred upon the chairman.

Consequently, to the degree, if any, that these succession provisions make it easier for MSPB to operate for long periods of time without a permanent chairman, the permanent appointment process might take longer, and the President might select different nominees.

Similar dynamics might attend the appointment of MSPB members if the proposed changes were adopted. Under current law, if the President could appoint one or two members and designate one of them as vice chairman, he could avoid the necessity of appointing a chairman through the advice and consent process. The Senate could, of course, withhold its consent for the nominations of these one or two members until the President submitted an acceptable nomination for chairman. The prospect of an empty board with a leadership vacuum might provide a strong incentive for the President and Senate to reach accord in the appointment of a chairman and other members. If the proposed chairmanship succession provisions were enacted, the appointment dynamics might change. Because the second proposed succession provision would empower the general counsel to carry out the powers of the chairman, the board seemingly could continue to function for some time with no members, and the incentive for the President and the Senate to reach accord in the appointment process would be reduced.

In any of these scenarios, the President has an additional advantage over the Senate: under the Constitution, he may unilaterally appoint a chairman or other members of the board during a Senate recess.⁷⁷ Such appointments generally last for between one and two years. President Ronald W. Reagan used this authority for three appointments to the board,⁷⁸ and President William J. Clinton made two such appointments.⁷⁹ As of June 20, 2007, President George W. Bush had also made two recess appointments to the board.⁸⁰

Consequences of Maintaining the Status Quo. The final questions raised in this analysis are as follow: What might happen if the chairmanship succession provisions are not changed? Are the present arrangements insufficient to maintain agency operations?

As noted above, the board justified the proposed chairmanship succession provisions on the basis of a perceived risk of a leadership vacuum on the board when either no member has qualified to be chairman, under the existing provisions, or no board members remain. Yet, the board has not presented any case in which the present authorities were not sufficient to maintain the operations of the board. Presumably, this means that there has been no insurmountable difficulty in the 28 years of the board's operation.

Some might argue that the current provisions are sufficient to maintain the agency. The agency has acknowledged that, in both of the cases it has cited as evidence of a need for further succession provisions, the situations were resolved. In the first case, the two members led the agency together, and this arrangement was apparently sufficient to maintain MSPB operations

⁷⁷ For more information on recess appointments, see CRS Report RS21308, *Recess Appointments: Frequently Asked Questions*, by Henry B. Hogue.

⁷⁸ President Reagan recess appointed Herbert E. Ellingwood to be a member and to be chairman, on December 17, 1981, and Samuel W. Bogley to be a member, on November 22, 1988.

⁷⁹ President Clinton recess appointed Beth S. Slavet to be a member, on December 22, 2000, and Barbara J. Sapin to be a member, on December 28, 2000. He also designated Sapin as vice chairman.

⁸⁰ President Bush recess appointed Susanne T. Marshall to be chairman, on August 6, 2002, and Neil McPhie to be a member, on April 22, 2003. He also designated McPhie as vice chairman.

for several months. This experience seemingly provides a precedent for similar situations that might arise in the future. In the second case, the potential problem (of no members) was resolved through the actions of the President and the Senate. Some may view the prospect of three vacancies at MSPB as a catalyst to moving appointments through the advice and consent process.

In addition, the chairmanship succession provisions that would be amended by the draft legislation constitute only one of several tools that might be used to maintain leadership at the board. The law also provides that a board member, including the chairman, can remain in office for up to a year after the end of a seven-year term.⁸¹ As discussed above, the President may unilaterally fill any advice and consent post, including an MSPB member position or chairmanship, during a Senate recess.

The sufficiency of existing provisions to date notwithstanding, MSPB, in its justification, has notified Congress of perceived weaknesses in the statutory chairmanship succession arrangements. These perceived weaknesses have reportedly led to two cases in which “the agency was faced with the possibility of a vacuum in its chief executive leadership.” The fact that this possibility was avoided in these cases does not completely negate the possibility of a future recurrence in which such a leadership vacuum could not be avoided.

The significance of a possible “vacuum in [MSPB’s] chief executive leadership” is, to a considerable degree, a function of the power of the chairmanship. If the chairman has broad powers to run the board essentially on his or her own, his or her absence, and the absence of any temporary placeholder, would seemingly interrupt the functioning of the agency. If, however, most of the board’s powers are vested in the board collectively, the board’s functioning would be impaired during sustained vacancies of two or more member positions.⁸² In fact, although the chairman is statutorily established as the “chief executive and administrative officer of the Board,”⁸³ few functions are statutorily assigned to this position. Most powers and functions are vested in the board collectively.⁸⁴ If most power is seen to reside in the board collectively, the board could seemingly delegate to career employees sufficient power to continue basic agency operations (e.g., hold hearings, review and make recommendations on rules, etc.) for relatively short periods, if it has not already done so.⁸⁵ Such a delegation would arguably obviate the need for additional succession provisions.

⁸¹ A member “may continue to serve beyond the expiration of the term until a successor is appointed and has qualified, except that such member may not continue to serve for more than one year after the date on which the term of the member would otherwise expire” (5 U.S.C. § 1202(c)).

⁸² The statute anticipates that the board can function with two members, since a quorum of the three is required to make board decisions. The board’s rules establish that when only two members remain, and these two members cannot agree on an adjudicative result, “the decision, recommendation, or order under review shall be deemed the final decision or order of the Board.” If the ruling is not adjudicative, it can be referred to an administrative law judge or other officer (5 CFR § 1200.3).

⁸³ 5 U.S.C. § 1203(a).

⁸⁴ 5 U.S.C. § 1204. This analysis presumes that the current vesting of powers and functions is unchanged. Should Congress elect to concentrate more powers and functions in the office of the chairman, the analysis might be different.

⁸⁵ Subsection 1204(g) of Title 5 provides that “[t]he Board may delegate the performance of any of its administrative functions under this title to any employee of the Board.”

Possible Options for Consideration. With respect to the draft chairmanship succession provisions, the following is an analysis of some available options:

Maintain the Status Quo. Arguably, the present provisions have been sufficient to maintain MSPB for 28 years. The recent examples cited in the justification can be interpreted as evidence that current law is sufficient. Changes to these provisions could, under certain circumstances, allow the board to continue to function for long periods of time without a chairman who is duly appointed by the President with the advice and consent of the Senate. To the degree that the board anticipates operational difficulties from temporary member or chairman vacancies, it could proactively delegate a caretaker role to career employees.

Adopt one or both proposed provisions. It could be argued that, the sufficiency of the present law to date notwithstanding, the cited examples provide evidence of weaknesses in current board leadership succession provisions, and only Congress can address these weaknesses. The proposed provisions address most reasonably foreseeable situations, and they would allow continuity of leadership regardless of the President's or Senate's actions or inaction. The enactment of provisions such as these might be particularly important if Congress envisions a centralized MSPB with powers concentrated in the chairman.

Specify temporary powers. The existing and proposed succession provisions indicate only generally the functions of the chairman that are to be performed on a temporary basis. Regardless of whether Congress accepts or rejects the proposed succession provisions, it could add greater specificity to the statute concerning the power of an official acting in lieu of a chairman. Temporary powers could be narrowly tailored to include only those functions necessary to "keep the lights on" and MSPB operating, or they could include certain policymaking authorities. Congress could thereby indicate whether or not such a temporary actor would have the full authority of a permanent chairman. Arguably, the enactment of such provisions would be particularly important if the statutory designation of the chairman as "chief executive and administrative officer of the Board" is seen as giving the chairman broad, unilateral discretion over board operations.

Limit the duration of successions with greater specificity. Present and proposed succession provisions are activated by the absence of a chairman and remain in force until the chairmanship or members are appointed through the advice and consent process or by recess appointment. As suggested above, the presence of indefinite succession arrangements could reduce the pressure on the President and Senate to reach accord on permanent appointments to board positions. Congress could place time limits on succession that are tied to the nomination and confirmation process. It has included such a provision, for example, regarding the general counsel for the National Labor Relations Board. It reads as follows: "In case of vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person or persons so designated shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted."⁸⁶ A provision of this kind seemingly would temporarily respond to the need for leadership at the board without removing the pressure on the President and Senate to reach accord on the appointment of permanent leadership.

⁸⁶ 29 U.S.C. § 153(d).