

Congress of the United States
House of Representatives

COMMITTEE ON OVERSIGHT AND REFORM

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April 5, 2021

President Joseph R. Biden, Jr.
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear Mr. President:

We write to urge you to nominate qualified board members to the Merit Systems Protection Board (MSPB), which is currently without any board members. Without a quorum, the MSPB is unable to act on claims of whistleblower retaliation and is at risk of essentially having to cease its operations.

The MSPB is an independent agency that protects merit system principles and guards federal employees against prohibited personnel practices.¹ The MSPB is designed to be led by a board of three members appointed by the President with the advice and consent of the Senate. By law, it is a bipartisan body, with no more than two members from the same political party.²

Since January 7, 2017, the Board has lacked a quorum to perform its responsibilities. Since March 1, 2019, the Board has been without a single board member. Because of these vacancies, the MSPB is unable to issue decisions on petitions for review from federal employees who allege that their agencies have unlawfully acted against them. These vacancies have led to a backlog of more than 3,000 petitions from federal employees requesting review of their allegations.³ The MSPB's lack of a quorum has concerned this Subcommittee and the Committee on Oversight and Reform for some time.⁴

¹ Merit Systems Protection Board, *About MSPB* (accessed Mar. 25, 2021) (online at www.mspb.gov/About/about.htm); Merit Systems Protection Board, *Prohibited Personnel Practices* (accessed Mar. 25, 2021) (online at www.mspb.gov/ppp/ppp.htm).

² 5 U.S.C. §. 1201.

³ *Historic Absences at MSPB Hit 4-Year Mark, Creating Potentially Costly Backlog*, Federal News Network (Jan. 13, 2021) (online at <https://federalnewsnetwork.com/workforce-rights/governance/2021/01/historic-absences-at-mspb-hit-4-year-mark-creating-potentially-costly-backlog/>).

⁴ Subcommittee on Government Operations, *Hearing on Revitalizing the Federal Workforce* (Feb. 23, 2021) (online at <https://oversight.house.gov/legislation/hearings/revitalizing-the-federal-workforce/>); H.R. 7864, 116th Cong. (2020); H.R. 1235, 116th Cong. (2019); Committee on Oversight and Reform, *Press Release: Connolly and Cummings Introduce the "Interim Stay Authority to Protect Whistleblowers Act,"* (May 7, 2019) (online at <https://oversight.house.gov/news/press-releases/connolly-and-cummings-introduce-the-interim-stay->

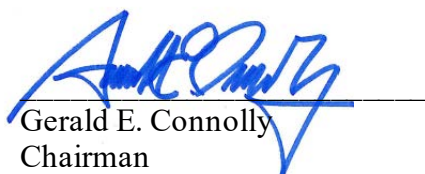
While the Board has been unable to adjudicate petitions for review, the MSPB's roughly 60 administrative judges (AJs) have been able to continue their work issuing initial decisions on federal employee appeals to the MSPB. The continued work of these AJs has provided at least some measure of relief to employees who may be victims of adverse agency actions.

But now, even the work of the AJs is in jeopardy. Three cases pending in the federal court system—*Coppola v. Department of Veterans Affairs*, *McIntosh v. Department of Defense*, and *Henderson v. Department of Health and Human Services*—threaten to force the cessation of AJ operations entirely.⁵ According to MSPB officials, *Coppola* could be decided within the next five months.

This threat exists because in the wake of the Supreme Court's decision in *Lucia v. Securities and Exchange Commission*, the courts deciding these three cases may rule that AJs at the MSPB are not appropriately vested with the authorities needed to perform their duties.⁶ In the event of such rulings, the MSPB would need to take action to vest the AJs with the required authority, which requires the Board to assemble a quorum—something it cannot now do.

In short, if the MSPB lacks a quorum when the courts render their decisions in the cases listed above, the MSPB is at risk of having to essentially cease its operations. To prevent this outcome, as Chairman and Ranking Member of the Subcommittee with jurisdiction over the MSPB, we respectfully request that you prioritize the nominations of new Board members. Once your nominations are made, we trust that the Senate will work quickly to confirm the qualified candidates to the MSPB and restore the Board to full operations.

Sincerely,



Gerald E. Connolly
Chairman
Subcommittee on Government
Operations



Jody B. Hice
Ranking Member
Subcommittee on Government
Operations

authority-to-protect); Subcommittee on Government Operations, *Hearing on the Effects of Vacancies at the Merit Systems Protection Board*, 116th Cong. (Feb. 28, 2019) (online at <https://oversight.house.gov/legislation/hearings/effects-of-vacancies-at-the-merit-systems-protection-board>).

⁵ *McIntosh v. Dep't of Def.*, No. 19-2454 (Fed. Cir. filed Feb. 18, 2020); *Henderson v. Dep't of Health & Human Servs.*, appeal docketed, No. 21-1647 (Fed. Cir. Feb. 12, 2021); *Coppola v. Dep't of Veterans Affairs*, No. 20-70361, 2021 U.S. App. LEXIS 5491 (9th Cir. Feb. 24, 2021).

⁶ *Lucia v. SEC*, 138 S. Ct. 2044 (2018).