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TESTIMONY

Statement of

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Hearing on

"Effects of Vacancies at the Merit Systems Protection Board"

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Chairman Connolly, Ranking Member Meadows, and Members of the Subcommittee:

My name is Valerie Brannon. I am a Legislative Attorney in the American Law Division of the Congressional Research Service (CRS). Thank you for inviting me to testify on behalf of CRS regarding the statutory and constitutional authority for the Merit Systems Protection Board (MSPB) to continue functioning if the agency has no sitting members on its three-member board (Board).[1]

The MSPB is principally tasked with "review[ing] certain serious personnel actions against federal employees."[2] The President appoints Board members with the advice and consent of the Senate.[3] The term for a Board member seat is seven years,[4] but because terms are tied to the calendar year, running from the date of the expiration of the prior term rather than the date of the new member's appointment,[5] the actual duration of a member's service may be slightly shorter. However, sitting members may potentially remain on the Board for up to a year beyond the seven-year term while awaiting the appointment of a successor.[6]

The Board currently has one member, Vice Chairman Mark Robbins.[7] Vice Chairman Robbins's seven-year term expired on March 1, 2018,[8] but he remains seated with the Board pending the appointment of a successor or the expiration of the one-year carryover term, whichever occurs first.[9] If his one-year carryover period expires before another Board member is confirmed and appointed, all three seats on the Board would be vacant. While three nominations are currently pending in the Senate,[10] if no nominee is approved before March 1, 2019, all seats on the Board would become vacant.

As discussed below in more detail, three central questions may arise regarding how a vacant Board may affect continuing Board and MSPB functions:

1. Is there a statute that provides authority for an acting MSPB official to temporarily perform the duties of a Board member while all three Board seats remain vacant?
2. Can prior Board delegations of authority to MSPB officials be exercised while the Board is vacant?
3. At what point do delegations of authority grant MSPB employees sufficient authority that they become "officers of the United States"[11] under the Appointments Clause of the Constitution that must be appointed through constitutionally prescribed procedures?

Each of these questions is discussed in turn below.

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[1] 5 U.S.C. § 1201. This statement uses "MSPB" to refer to the agency, and "Board" to refer to the three Board members.

[2] Perry v. MSPB, 137 S. Ct. 1975, 1979 (2017) (citing 5 U.S.C. §§ 1204, 7512, 770).

[3] 5 U.S.C. § 1201.

[4] *Id.* § 1202(a). However, if a Board member does not complete his or her term, the President may appoint someone to fill the duration of the predecessor's term. *Id.* § 1202(b).

[5] *See Merit Systems Protection Board—Term of Office—Statutory Construction—5 U.S.C. § 1202*, 3 Op. O.L.C. 351, 355–56 (1979).

[6] 5 U.S.C. § 1202(b), (c) (providing that both a member who served a full seven-year term and a member selected to fill the duration of a term not completed by his or her predecessor may carry over for up to a year while a successor is appointed).

[7] *Board Members*, U.S. Merit Sys. Prot. Bd., https://go.usa.gov/xERgx (last visited Feb. 8, 2019)

[8] 158 CONG. REC. S2889 (daily ed. Apr. 26, 2012) (confirming Robbins "for the term of seven years expiring March 1, 2018").

[9] 5 U.S.C. § 1202(c).

[10] Because the terms are interpreted as tied to the calendar, rather than to the date of appointment, none of these nominations would allow the appointees to serve for a full seven years. Julia Clark is nominated for a term that expires on March 1, 2021. 165 CONG. REC. S284 (daily ed. January 16, 2019). Dennis Kirk is nominated to be both member and Chairman for a term that expires on March 1, 2023. *Id.* Andrew Maunz is nominated for a term that expires on March 1, 2025. *Id.*

[11] U.S. CONST. art. II, § 2, cl. 2.

May Acting Officers Temporarily Perform Duties of Board Members When Board Seats Are Vacant?

The first question this statement addresses is whether any statute[12] authorizes a government official to serve as an acting Board member. If a government official is lawfully serving as an acting officer for a vacant office, that person may perform any of the duties of that office.[13] The Federal Vacancies Reform Act of 1998 (Vacancies Act) generally provides "the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office of an Executive agency . . . for which appointment is required to be made by the President, by and with the advice and consent of the Senate."[14] However, the Vacancies Act does not appear to cover the MSPB. The Vacancies Act does not apply to "any board, commission, or similar entity that—(A) is composed of multiple members; and (B) governs an independent establishment or Government corporation."[15] Members of the Board appear to fall within this provision: the Board "is composed of 3 members,"[16] and it seems to govern an independent establishment. Title 5 of the U.S. Code defines the phrase "Independent establishment" in the negative as "an establishment in the executive branch . . . which is *not* an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment."[17] Thus, "independent establishment" is essentially a catch-all term, including any executive branch entities that do not fall within any of the other Title 5 categories.[18] Although there is no statute expressly characterizing the MSPB as an independent establishment,[19] it appears to fall within this statutory definition because it is a freestanding executive agency that is not part of any other executive branch establishment.[20] Therefore, although no court seems to have considered the matter, it does not appear that the Vacancies Act authorizes MSPB officials to temporarily perform Board members' duties.[21]

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[12] The Constitution's Recess Appointments Clause also provides limited authority for the President to make temporary appointments. U.S. CONST. art. II, § 2, cl. 3 ("The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."). This provision applies not only to "vacancies that initially occur before a recess," but also to vacancies that "continue to exist during the recess." NLRB v. Noel Canning, 134 S. Ct. 2550, 2567 (2014). In *Noel Canning*, the Court also said that "a recess lasting less than 10 days is presumptively too short" to "trigger the Recess Appointments Clause." *Id.*

[13] *See* Keyser v. Hitz, 133 U.S. 138, 145–46 (1890) ("There is an officer designated a Deputy Comptroller of the Currency, who may exercise the powers and discharge the duties attached to the office of Comptroller, during a vacancy in that office, or during the absence or inability of the Comptroller. . . . [A]t the date of [the challenged act], [the Deputy] was authorized to exercise the powers and discharge the duties of the Comptroller, and was therefore, at the time, Acting Comptroller."); Ryan v. United States, 136 U.S. 68, 81 (1890) ("[I]n the absence of the Secretary the authority with which he was invested could be exercised by the officer who, under the law, became for the time Acting Secretary of War.").

[14] 5 U.S.C. § 3347(a).

[15] *Id.* § 3349c(1).

[16] *Id.* § 1201.

[17] *Id.* § 104(1) (emphasis added).

[18] *See id.*

[19] *Cf. id.* § 1101 ("The Office of Personnel Management is an independent establishment in the executive branch.").

[20] *See Applicability of the Federal Vacancies Reform Act to Vacancies at the International Monetary Fund and the World Bank*, 24 Op. O.L.C. 58, 65 (2000) ("The term 'establishment' embodies the idea of a free-standing entity with its own structure and unity."); *id.* at 66 ("[W]e concluded that the Commission on Fine Arts is an independent establishment because it is a congressionally created, free-standing entity entirely financed by the federal government."). The statute establishing the MSPB, 5 U.S.C. § 1201, does not place the agency within any executive or military department, as those terms are defined in 5 U.S.C. §§ 101 and 102, or within any other independent establishment, and does not create the MSPB as a corporation, as that term is defined in 5 U.S.C. § 103. *See* 5 U.S.C. § 104(1).

[21] *See* 5 U.S.C. § 3349c(1).

Instead, 5 U.S.C. § 1202 governs Board vacancies. This statute does not appear to contemplate acting or temporary service in the event that a Board member's term ends,[22] apart from a provision that allows a member to serve in a holdover term for up to a year beyond the expiration of that member's seven-year term.[23] Therefore, there does not appear to be any statutory authority for any government official to serve as an acting Board member in the event a Board seat becomes vacant.

May MSPB Officials Continue to Exercise Delegated Authority If the Board Is Vacant?

Absent express statutory authority for an official to serve as an acting officer, some duties of a vacant office still might lawfully be delegated to another government official, who could then perform those duties while serving in his or her own position.[24] Courts often presume that delegation is permissible "absent affirmative evidence of a contrary congressional intent."[25] But statutes may prohibit the delegation of a particular function[26] or otherwise limit the class of officials to whom a duty is delegable.[27]

In the case of the MSPB, there are several statutory provisions addressing delegation. For example, 5 U.S.C. § 1204(g) provides that "[t]he Board may delegate the performance of any of its administrative functions under this title to any [MSPB] employee . . . ." This statute broadly allows the delegation of "administrative" authority to "any" employee.[28] By contrast, under 5 U.S.C. § 7701(b)(1), cases appealed to the Board may be heard by "an administrative law judge . . . or other employee of the Board designated by the Board to hear such cases," but for "any case involving a removal from the service, the case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge."[29] Neither of these provisions contains any express limitations on the delegation of duties, but this second statute seems to limit implicitly the *class* of government officials to whom duties may be delegated.[30] In particular, the specific delegation of authority to hear cases involving removals under § 7701(b)(1) can only be made to administrative law judges or employees "experienced in hearing appeals."[31]

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[22] The statute does, however, provide that when a Board seat becomes vacant prior to a member's completion of a seven-year term, a person may be appointed by the President to fulfill the remainder of that term. *Id.* § 1202(b).

[23] *Id.* § 1202(c).

[24] *See, e.g.*, Stand Up for Cal.! v. Dep't of the Interior, 298 F. Supp. 3d 136, 150 (D.D.C. 2018); Schaghticoke Tribal Nation v. Kempthorne, 587 F. Supp. 2d 389, 421 (D. Conn. 2008); Action for Boston Cmty. Dev. v. Shalala, 983 F. Supp. 222, 229 (D. Mass. 1997).

[25] U.S. Telecom Ass'n v. FCC, 359 F.3d 554, 565 (D.C. Cir. 2004). *See also, e.g.*, Ethicon Endo-Surgery, Inc. v. Covidien LP, 812 F.3d 1023, 1031 (Fed. Cir. 2016); Kobach v. U.S. Election Assistance Comm'n, 772 F.3d 1183, 1190 (10th Cir. 2014); Loma Linda Univ. v. Schweiker, 705 F.2d 1123, 1128 (9th Cir. 1983).

[26] *See, e.g.*, 12 U.S.C. § 1790d(i)(4)(A) ("Except as provided in subparagraph (B), the [National Credit Union Administration] Board may not delegate the authority of the Board under this subsection."); 25 U.S.C. § 2706(a) ("The [National Indian Gaming] Commission shall have the power, not subject to delegation . . . .").

[27] *See, e.g.*, United States v. Giordano, 416 U.S. 505, 507–08 (1974) (holding "Congress did not intend the power to authorize wiretap applications to be exercised by any individuals other than the Attorney General or an Assistant Attorney General specially designated by him"); Halverson v. Slater, 129 F.3d 180, 185 (D.C. Cir. 1997) (concluding statute that authorized Transportation Secretary to "delegate the duties and powers conferred by this subtitle to any officer, employee, or member of the Coast Guard," 46 U.S.C. § 2104(a), prohibited the "delegation of . . . functions to a non-Coast Guard official").

[28] *See* 5 U.S.C. § 1204(g).

[29] In comparison, 5 U.S.C. § 1204(b) grants certain adjudicative authority to any Board member, any administrative law judge, or "any employee of the Board designated by the Board."

[30] *See supra* note 27.

[31] *See* 5 U.S.C § 7701(b)(1).

Under its authority, the Board has delegated many adjudicative and administrative authorities to various MSPB personnel.[32] Assuming these delegations were permissible at the time they were made, their continuing validity in the event that the Board becomes entirely vacant would seem to turn on whether these vacancies would effectively terminate or otherwise modify those existing delegations. Under ordinary administrative law principles, "[t]he acts of administrative officials continue in effect after the end of their tenures until revoked or altered by their successors in office."[33] Consequently, courts have held that proper delegations may survive a resignation of the official who issued them, absent any limitations in the delegation itself.[34] For example, a delegation may authorize an employee to perform delegated functions only for a limited time or only under certain conditions.[35]

There are several cases that have discussed whether total vacancies in multi-member boards affected existing delegations. In *New Process Steel, L.P. v. National Labor Relations Board*, the Supreme Court considered whether it was permissible for two members of the National Labor Relations Board (NLRB) to exercise the power of the board as a whole.[36] The four sitting members of the five-member board had delegated the board's power to a three-member sub-group, as authorized by statute.[37] However, two board members then left, leaving the sub-group with only two sitting members.[38] The Supreme Court held that when the sub-group lost its third member, it lost its ability to act on behalf of the NLRB because the relevant statute only authorized delegations to sub-groups of three members.[39] But the Court rejected the broader argument that the loss of a quorum "necessarily" suspends an entity's power "so that it [could] be exercised by *no* delegee."[40] The Court said that its decision did "not cast doubt on the prior delegations of authority to nongroup members, such as the regional directors or the general counsel."[41]

The U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) reached a contrary conclusion in dicta in *Railroad Yardmasters of America v. Harris*.[42] In that case, two sitting members of the National Mediation Board delegated the board's authority to a single member.[43] One member subsequently resigned, leaving only one sitting member.[44] The D.C. Circuit upheld the exercise of the board's authority by the remaining member, citing the broad language in the board's organic statute that authorized delegation of its authority.[45] The court emphasized that the delegation "was institutional rather

[32] MSPB, *Organization Functions & Delegations of Authority*, at 15 (Apr. 2011), https://go.usa.gov/xPh2w.

[33] United States v. Wyder, 674 F.2d 224, 227 (4th Cir. 1982).

[34] *See, e.g.*, United States v. Anderson, 39 F.3d 331, 341 (D.C. Cir. 1994); Donovan v. Spadea, 757 F.2d 74, 77 (3d Cir. 1985); United States v. Kerr, 711 F.2d 149, 150–51 (10th Cir. 1983); United States v. Messersmith, 692 F.2d 1315, 1317 (11th Cir. 1982); Champaign Cty. v. U.S. Law Enf't Assistance Admin., 611 F.2d 1200, 1207 (7th Cir. 1979). *But cf.* R.R. Yardmasters of Am. v. Harris, 721 F.2d 1332, 1344 & n.31 (D.C. Cir. 1983) (upholding delegation but stating in dicta that if "all three [National Mediation] Board members resigned," "the Board would cease to exist[,] . . . . the powers of the Board that were delegated also would cease to exist, and the remaining employee would have no powers to exercise"). *Harris* is discussed in more detail below.

[35] *See, e.g.*, Designating Certain Officials to Perform the Functions and Duties of the Attorney General, A.G. Order No. 3777-2016; Order of Succession to the Secretary of Labor in Periods of Vacancy, Continuity of Executive Direction, Repositioning and Devolution of Departmental Governance, and Emergency Planning Under Circumstances of Extreme Disruption, 82 Fed. Reg. 6653 (Jan. 19, 2017) (Secretary's Order 1-2017).

[36] New Process Steel, L.P. v. NLRB, 560 U.S. 674, 676 (2010).

[37] *Id.* at 676–77.

[38] *Id*. at 677.

[39] *Id.* at 688.

[40] *Id.* at 684 n.4 (emphasis added).

[41] *Id.*

[42] R.R. Yardmasters of Am. v. Harris, 721 F.2d 1332, 1344 n.31 (D.C. Cir. 1983).

[43] *Id.* at 1333.

[44] *Id.*

[45] *Id.* at 1339, 1341–42. The statute permitted the board "to assign, or refer, any portion of its work, business, or functions arising

than personal," made by "the Board as a body, acting through a quorum," and said that "[i]nstitutional delegations of power are not affected by changes in personnel, but rather continue in effect as long as the institution remains in existence and the delegation is not revoked or altered."[46] But in dicta, the court distinguished the case before it from a hypothetical scenario in which all three members resigned from the board.[47] The D.C. Circuit said that if all the board members resigned, "the Board would cease to exist. Accordingly, the powers of the Board that were delegated also would cease to exist, and the remaining employee would have no powers to exercise."[48]

By contrast, in *Kobach v. U.S. Election Assistance Commission*, the U.S. Court of Appeals for the Tenth Circuit (Tenth Circuit) held that the exercise of delegated power by an agency official was valid even though the agency's governing multimember body was entirely vacant.[49] The Election Assistance Commission (EAC) had delegated certain authority to the agency's Executive Director, and the Executive Director exercised this authority, "purporting to act on the agency's behalf,"[50] at a time when the Commission was entirely vacant.[51] The Tenth Circuit upheld the delegation, concluding that because it "only passe[d] limited authority to a subordinate outside the delegating group, it grant[ed] the Executive Director powers that survive[d] the later loss of a quorum of commissioners."[52] The panel emphasized that the delegation "did not transfer the Commissioners' full power," and "therefore did not raise the specter" of a "'tail that would not only wag the dog, but would continue to wag after the dog died.'"[53] The court also noted that "it would be impractical to simply shutter the EAC while it lacks a quorum."[54]

Thus, while the D.C. Circuit said in one decision that a board would "cease to exist" when it lacked any members, so that agency officials could not then exercise any previously delegated authority,[55] the Supreme Court has expressly declined to adopt this position.[56] And in *Kobach*, which is the only one of these decisions in which the governing body was actually vacant, the Tenth Circuit upheld the agency official's ability to exercise delegated authority.[57] However, in *Kobach*, the court emphasized that the commission had not delegated its "full power" to non-member officials, suggesting that it might have more significant concerns if an agency official attempted to exercise the *full power* of a board or commission while that board or commission was entirely vacant.[58] If a vacant MSPB Board were

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under this or any other Act of Congress, or referred to it by Congress or either branch thereof, to an individual member of the Board or to an employee or employees of the Board." 45 U.S.C. § 154.

[46] *Harris*, 721 F.2d at 1343.

[47] *Id.* at 1344 n.31.

[48] *Id.*

[49] 772 F.3d 1183, 1193 (10th Cir. 2014).

[50] *Id.* at 1192.

[51] *See* Ryan J. Levan, *Do We Have a Quorum? Anticipating Agency Vacancies and the Prospect for Judicial Remedy*, 48 COLUM. J.L. & SOC. PROBS. 181, 209 (2015); *see also Former Commissioners*, U.S. ELECTION ASSISTANCE COMM'N, https://go.usa.gov/xER2Q (last visited Feb. 8, 2019).

[52] *Kobach*, 772 F.3d at 1193.

[53] *Id.* at 1194 (quoting New Process Steel, L.P. v. NLRB, 560 U.S. 674, 688 (2010)).

[54] *Id.*

[55] R.R. Yardmasters of Am. v. Harris, 721 F.2d 1332, 1344 n.31 (D.C. Cir. 1983).

[56] *New Process Steel, L.P.*, 560 U.S. at 684 n.4.

[57] *Kobach*, 772 F.3d at 1193.

[58] *Id.* at 1194. *Cf.* Cudahy Packing Co. v. Holland, 315 U.S. 357, 361 (1942) (holding officer could not delegate subpoena power, where 29 U.S.C. § 209 and 15 U.S.C. § 49 provided that the specified officer "shall have power" of subpoena). In *Cudahy Packing Co.*, the Supreme Court considered whether the delegation of the subpoena power was authorized by a statute providing that "[t]he principal office of the [officer] shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place." *Id.* at 360 (quoting 29 U.S.C. § 204). The Court said that "[a] construction of the Act which would thus permit the Administrator to delegate all his duties, including those involving administrative judgment and

evaluated under the same standard as employed in *Kobach*, a reviewing court might examine the scope of the current delegations made by the Board to MSPB officials. The relative dearth of case law exploring delegations under vacant boards means that the precise point along that spectrum, if any, at which such a delegation may become impermissible remains unclear.

What Delegated Authority Qualifies an MSPB Official as an "Officer of the United States" Under the Appointments Clause?

Apart from the statutory and common law principles governing delegations of authority, the Constitution may provide additional limits. The Appointments Clause generally requires "Officers of the United States" whose positions are "established by Law" to be appointed through nomination by the President, with the advice and consent of the Senate.[59] For "inferior Officers," though, as distinct from principal officers, Congress may vest their appointment "in the President alone, in the Courts of Law, or in the Heads of Departments."[60] Any MSPB official exercising sufficient authority to qualify as a constitutional officer rather than a non-officer employee, whether by congressional or agency delegation of authority, must be appointed through these constitutional processes.[61]

Legal Background: The "Significant Authority" Test

The Constitution does not elaborate on how to determine whether any given government official is an "officer" subject to the Appointments Clause, and the Supreme Court's guidance on distinguishing officers from employees is relatively limited. To determine whether an official is an officer, the Court has generally looked to the nature of the official's duties. As a preliminary matter, an officer exercises duties that are "continuing and permanent, not occasional or temporary."[62] If an official meets these criteria, then the primary test, as stated in *Buckley v. Valeo*, is that "any appointee exercising *significant authority* pursuant to the laws of the United States is an 'Officer of the United States.'"[63] The Court has not developed a test beyond this "significant authority" standard, and therefore inquiries into whether any given official is an officer or an employee are often fact-specific, proceeding by analogy to previously decided Supreme Court cases.[64]

In *Buckley* itself, the Commissioners of the Federal Election Commission (FEC) were not appointed through the Appointments Clause's advice-and-consent procedures.[65] Instead, Congress had given itself an outsized role in the appointments process.[66] Given that the Commissioners were not appointed in compliance with the Appointments Clause, the Court examined which of their statutory powers the

discretion which the Act has in terms given only to him, can hardly be accepted unless plainly required by its words." *Id.* at 361.

[59] U.S. CONST. art. II, § 2, cl. 2.

[60] *Id. See also* Buckley v. Valeo, 424 U.S. 1, 124–28 (1976) (per curiam) (outlining requirements of the Appointments Clause); Edmond v. United States, 520 U.S. 651, 662–63 (1997) (discussing distinction between principal and inferior officers).

[61] *See, e.g.*, Freytag v. Comm'r, 501 U.S. 868, 881 (1991).

[62] United States v. Germaine, 99 U.S. 508, 511–12 (1878) (holding that a civil surgeon was not an officer). *See also* Auffmordt v. Hedden, 137 U.S. 310, 327 (1890) (holding that a merchant appraiser was not an officer because the position was "without tenure, duration, continuing emolument, or continuous duties, and he acts only occasionally and temporarily").

[63] 424 U.S. at 126 (emphasis added).

[64] *See, e.g.*, Lucia v. SEC, 138 S. Ct. 2044, 2053–54 (2018); *see also id.* at 2052 (noting that the standard is "framed in general terms, tempting advocates to add whatever glosses best suit their arguments").

[65] *Buckley*, 424 U.S. at 127.

[66] Four Commissioners were appointed by Congress alone, while two Commissioners were nominated by the President, but subject to confirmation by the Senate *and* the House of Representatives. *Id.* at 126.

Commissioners could exercise.[67] The Court said that the FEC could exercise powers that were "essentially of an investigative and informative nature, falling in the same general category as those powers which Congress might delegate to one of its own committees."[68] But the FEC's enforcement powers, including its "discretionary power to seek judicial relief," were executive rather than legislative in nature, and could be exercised "only by persons who are 'Officers of the United States.'"[69] Turning last to the FEC's "broad administrative powers: rulemaking, advisory opinions, and determinations of eligibility for funds and even for federal elective office itself," the Court said that these functions "represent[ed] the performance of a significant governmental duty exercised pursuant to a public law."[70] The Court held that these, too, could only be exercised by constitutional officers.[71]

More recently, the Court held in *Freytag v. Commissioner* in 1991 that special trial judges (STJs) of the United States Tax Court were officers of the United States.[72] Based on "the significance of the duties and discretion that special trial judges possess," the Court concluded that they met *Buckley*'s significant authority standard.[73] The Court first held that because the "duties, salary, and means of appointment for that office [were] specified by statute," the office was "established by Law" within the meaning of the Appointments Clause.[74] The Court then noted that the STJs "perform[ed] more than ministerial tasks": "They take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders."[75] Finally, the Court said that even if these duties "were not as significant as" the Court believed, its "conclusion would be unchanged" because the STJs could, in certain proceedings, render final decisions.[76]

The Court applied *Freytag* to Administrative Law Judges (ALJs) at the Securities and Exchange Commission (SEC) last term, in *Lucia v. SEC*.[77] The Court concluded that the ALJs were "near-carbon copies" of the *Freytag* STJs.[78] Specifically, like the *Freytag* STJs, SEC ALJs were career appointees "to a position created by statute, down to its 'duties, salary, and means of appointment.'"[79] The Court also said that the ALJs "exercise[d] the same 'significant discretion' when carrying out the same 'important functions' as STJs."[80] The Court emphasized four functions: (1) taking testimony;[81] (2) conducting trials;[82] (3) deciding whether to admit evidence;[83] and (4) "enforc[ing] compliance with discovery orders."[84] With respect to the fourth function, the Court acknowledged that the ALJs' particular methods

[67] *Id.* at 137.

[68] *Id.*

[69] *Id.* at 139, 140 (quoting U.S. CONST. art. II, § 2, cl. 2).

[70] *Id.* at 140.

[71] *Id.* at 141.

[72] 501 U.S. 868, 882 (1991).

[73] *Id.* at 881.

[74] *Id.*; U.S. CONST. art. II, § 2, cl. 2.

[75] *Freytag*, 501 U.S. at 881–82.

[76] *Id.* at 882.

[77] 138 S. Ct. 2044, 2051 (2018).

[78] *Id.* at 2052.

[79] *Id.* at 2053 (quoting *Freytag*, 501 U.S. at 881).

[80] *Id.* (quoting *Freytag*, 501 U.S. at 882).

[81] *Id.* (noting SEC ALJs received evidence, examined witnesses, and took depositions).

[82] *Id.* (noting SEC ALJs could "administer oaths, rule on motions, and generally 'regulat[e] the course of' a hearing" (quoting 17 C.F.R. § 201.111) (alteration in original)).

[83] *Id.*

[84] *Id.* (quoting *Freytag*, 501 U.S. at 882) (internal quotation mark omitted).

for enforcing compliance were less "muscular" than the STJs' powers.[85] While STJs could punish contempt through fines or imprisonment, the SEC ALJs could only exclude wrongdoers from proceedings.[86] But in the Court's view, these "distinctions ma[d]e no difference for officer status."[87]

In addition to these particular functions, the Supreme Court also observed that SEC ALJs issue decisions that have "potentially more independent effect" than the decisions of the *Freytag* STJs.[88] While the ALJ opinions are subject to review by the SEC, "the SEC can decide against reviewing an ALJ decision at all. And when the SEC declines review . . . , the ALJ's decision itself 'becomes final' and is 'deemed the action of the Commission.'"[89] Prior to the issuance of the Court's decision in *Lucia*, lower courts had split on whether the authority to issue final decisions was a necessary characteristic for officer status, equating "officer" status with the ability to take actions that "bind third parties, or the government itself, for the public benefit."[90] Justice Sotomayor dissented from the Court's opinion in *Lucia*, saying that because the SEC ALJs could not "make final, binding decisions on behalf of the government," they were not, in her view, officers.[91] The majority opinion countered by noting that the "primary analysis" in *Freytag* rejected the "theory that final decisionmaking authority is a *sine qua non* [an essential element] of officer status."[92] Accordingly, following *Lucia*, while the ability to issue final decisions is no longer a *necessary* factor for officer status, it is possible that under certain circumstances, it might still be a *sufficient* one.[93]

Which MSPB Officials Are "Officers of the United States"?

If any MSPB officials exercise "significant authority" in the form of "continuing and permanent"[94] duties, they must be appointed in accordance with the procedures outlined in the Appointments Clause.[95] While it may be easy to characterize those at the top of the agency—the members of the Board—as constitutional officers,[96] and those at the bottom of the organizational chart as non-officer employees,[97] it may be more

[85] *Id.* at 2054.

[86] *Id.*

[87] *Id.*

[88] *Id.* at 2053.

[89] *Id.* at 2054 (quoting 17 C.F.R. § 201.360(d)(2); 15 U.S.C. § 78d-1(c)).

[90] Raymond J. Lucia Cos. v. SEC, 832 F.3d 277, 286 (D.C. Cir. 2016), *rev'd*, Lucia v. SEC, 138 S. Ct. 2044 (2018). *See also, e.g.*, Helman v. Dep't of Veterans Affairs, 856 F.3d 920, 929 (Fed. Cir. 2017); Bandimere v. SEC, 844 F.3d 1168, 1183–84 (10th Cir. 2016), *aff'd*, Lucia v. SEC, 138 S. Ct. 2044 (2018). *See generally* CRS Legal Sidebar LSB10061, *UPDATED: Supreme Court Agrees to Hear Constitutional Challenge to SEC Administrative Law Judges*, by Victoria L. Killion.

[91] 138 S. Ct. at 2065–66 (Sotomayor, J., dissenting).

[92] *Id.* at 2052 n.4 (majority opinion).

[93] *Cf.* Edmond v. United States, 520 U.S. 651, 665 (1997) (holding that Court of Criminal Appeals judges are inferior rather than principal officers because they "have no power to render a final decision on behalf of the United States unless permitted to do so by other executive officers").

[94] United States v. Germaine, 99 U.S. 508, 512 (1878).

[95] *See* Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam) ("[A]ny appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of that Article." (quoting U.S. CONST. art. II, § 2, cl. 2)).

[96] The Board members are not "directed and supervised" by anyone other than the President, and, as a result, they are likely principal officers within the meaning of the Appointments Clause. *See* Edmond v. United States, 520 U.S. 651, 663 (1997).

[97] In 2018, the agency was authorized to employ 235 full-time employees. MSPB, STRATEGIC PLAN FOR FY 2018–2022, at 3–4 (Feb. 12, 2018). It seems likely that many of these employees do not possess sufficient authority to give them officer status. *See, e.g.*, Bandimere v. SEC, 844 F.3d 1168, 1170 (10th Cir. 2016) (noting that "most" executive branch officials are "employees"), *aff'd*, Lucia v. SEC, 138 S. Ct. 2044 (2018). *But see, e.g.*, NLRB v. SW Gen, 137 S. Ct. 929, 946 (2017) (Thomas, J., concurring) ("'Extensive evidence suggests' that, at the time of the framing, this phrase ["officers"] was understood to encompass 'all federal officials with responsibility for an ongoing statutory duty.'" (quoting Jennifer L. Mascott, *Who Are "Officers of the United*

difficult to determine whether relatively senior MSPB officials possess sufficient authority to qualify as officers of the United States. Appointments Clause analyses can be highly fact-specific, proceeding by analogy to previously decided cases and turning on the nature of the precise functions exercised by a particular official.[98] The remainder of this statement considers how the above case law may apply to the Board's delegations of its adjudicative and administrative functions and then examines the possible effect of Board vacancies on this analysis.

Delegation of Judicial Functions

As discussed, the Board is authorized by statute to delegate certain adjudicatory authority to ALJs and AJs.[99] In *Lucia*, the Court said that the SEC ALJs were officers subject to the Appointments Clause because they were "near-carbon copies"[100] of the STJs evaluated in *Lucia*, as they: (1) "h[e]ld a continuing office,"[101] (2) exercised the same four "important functions" highlighted in *Freytag*,[102] and (3) issued decisions with sufficiently "independent effect."[103] If MSPB officials exercising delegated adjudicatory authority also possess these same characteristics, then it is very likely they will also be constitutional officers. If, however, these MSPB officials do not possess comparable authority to the SEC ALJs—if, for example, they have only three of the four powers emphasized by the Court in *Lucia*—it will be an open question whether they exercise "significant authority" sufficient to qualify as a constitutional officer.[104]

The MSPB ALJs and AJs possess very similar authority to the SEC ALJs that the Supreme Court said were "officers" subject to the Appointments Clause in *Lucia*.[105] They hold "continuing office[s] established by law,"[106] exercise most of the same functions as the SEC ALJs,[107] and issue decisions with similar effect to those of the SEC ALJs.[108] The only possible distinction is in the fourth function exercised

States"?, 70 STAN. L. REV. 443, 464 (2018))).

[98] *See, e.g.*, Lucia v. SEC, 138 S. Ct. 2044, 2052–53 (2018).

[99] *See* 5 U.S.C. §§ 1204(b), 7701(b). This statute refers to "administrative law judge[s]" or certain "other employee[s]," but in practice, the MSPB refers to agency officials possessing adjudicatory duties as "administrative judges." *See How a Hearing Is Conducted*, MSPB, https://go.usa.gov/xE268 (last visited Feb. 8, 2019).

[100] Lucia v. SEC, 138 S. Ct. 2044, 2052 (2018).

[101] *Id.* at 2053.

[102] *Id.* (quoting Freytag v. Comm'r, 501 U.S. 868, 882 (1991)) (internal quotation marks omitted).

[103] *Id.* at 2053–54.

[104] See, e.g., CRS Legal Sidebar LSB10153, *Supreme Court Holds That SEC Administrative Law Judges Are "Officers" Subject to the Appointments Clause*, by Victoria L. Killion (noting this open question).

[105] *See Lucia*, 138 S. Ct. at 2055.

[106] *Id.* at 2053. The MSPB's ALJs—at least until recently—were appointed through the same process as the SEC's ALJs, and accordingly, would likely be viewed similarly. Both SEC and MSPB ALJs are appointed under 5 U.S.C. § 3105. *See Lucia*, 138 S. Ct. at 2053; 5 U.S.C. §§ 1204(b), 7701(b). The duties of the MSPB ALJs are described in MSPB-specific statutes. *See* 5 U.S.C. §§ 1204(b), 7701(b). The AJs are not hired under the same statutory authority as ALJs, see, e.g., *How a Hearing Is Conducted*, MSPB, https://go.usa.gov/xE268 (last visited Feb. 8, 2019), but they are provided for and granted statutory authority under MSPB-specific statutes, 5 U.S.C. §§ 1204(b), 7701(b). Thus, it appears that MSPB ALJs and AJs are in positions that have "tenure, duration, continuing emolument, or continuous duties." Auffmordt v. Hedden, 137 U.S. 310, 327 (1890).

[107] Looking to the first three factors noted by the Court in *Lucia*, 138 S. Ct. at 2053, and *Freytag v. Commissioner*, 501 U.S. 868, 881 (1991), MSPB ALJs and AJs may: (1) take testimony, *see* 5 U.S.C. § 1204(b); (2) conduct trials, *see, e.g.*, 5 U.S.C. § 1204(b); 5 C.F.R. §§ 1201.41, 1201.55, 1201.73, 1201.82; and (3) rule on the admissibility of evidence, *see* 5 U.S.C. § 1204(b); 5 C.F.R. §§ 1201.41, 1201.61.

[108] *See Lucia*, 138 S. Ct. at 2052–53. Like SEC ALJs, MSPB judges have the authority to issue decisions containing factual findings and legal conclusions and granting parties relief. 5 U.S.C. § 7701(b); 5 C.F.R. §§ 1201.41(b), 1201.111. Also like the SEC ALJs, although MSPB judges issue only interim decisions that are appealable to the Board, those initial decisions are to become the Board's final decision if they are not appealed or if the Board denies a petition for review. 5 U.S.C. § 7701(e); 5

by the *Lucia* ALJs: MSPB judges may not have the authority to exclude individuals from adjudicatory proceedings as a punishment for failing to comply with a discovery order.[109] While the MSPB judges do have some independent authority to "enforce compliance with discovery orders,"[110] that authority may not be identical to the authority the SEC ALJs possess and may provide a basis to distinguish the MSPB judges from the SEC ALJs. It is unclear, however, whether this factual distinction would make a difference for the legal outcome.

If a court were to conclude that the MSPB officials who have been delegated adjudicative authority are constitutional officers, then those officers must be appointed in compliance with the Appointments Clause.[111] If they are inferior officers rather than principal officers, which seems likely given that the MSPB ALJs and AJs are directed and supervised by the Board,[112] then Congress can constitutionally vest their appointment in the President or in the Board, as the head of the agency.[113]

Delegation of Administrative Functions

As mentioned above, the Board may, by statute, "delegate the performance of any of its administrative functions under [Title 5 of the U.S. Code] to any employee of the Board."[114] As with the MSPB's ALJs and AJs, courts reviewing whether MSPB officials engaging in administrative functions are constitutional officers will consider whether those officials: (1) "hold a continuing office,"[115] and (2) exercise "significant authority."[116] To determine whether an official exercises significant authority, courts look to the nature of the official's duties, including the extent to which the duties entail "significant discretion,"[117] as well as the effect of these actions.[118]

In *Buckley*, the Court said that the "broad administrative powers" possessed by the FEC, including the Commission's "rulemaking" powers, were functions that only officers appointed in compliance with the Appointments Clause could exercise.[119] Thus, under *Buckley*, the Board therefore likely could not delegate its rulemaking authority.[120] In addition, the Board would not be able to delegate to non-officer

C.F.R. § 1201.113.

[109] While MSPB judges, like the SEC ALJs, *may* exclude representatives for "contumacious conduct," 5 C.F.R. §§ 1201.31, 1201.43, this authority to sanction "contumacious conduct" is described *separately* from the authority to sanction the failure to comply with an order, making it unclear whether "contumacious conduct" should be interpreted as including the failure to comply with discovery order. *Cf., e.g.*, Lindh v. Murphy, 521 U.S. 320, 330 (1997) (drawing "negative implications" from "disparate [statutory] provisions").

[110] *Lucia*, 138 S. Ct. at 2053 (quoting *Freytag*, 501 U.S. at 882). Under 5 C.F.R. § 1201.43, MSPB judges may draw inferences in favor of the requesting party, permit the requesting party to introduce other evidence, prohibit the party failing to comply from introducing other related evidence, or exclude pleadings or other submissions of the party failing to comply with an order. *Id.* Further, while at least some MSPB judges have the authority to issue subpoenas, 5 U.S.C. § 1204(b)(2); 5 C.F.R. § 1201.81, if a person subject to such a subpoena does not comply, the Board must ask a federal district court to enforce the subpoena, 5 U.S.C. § 1204(c); 5 C.F.R. § 1201.85.

[111] *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam).

[112] *See* Edmond v. United States, 520 U.S. 651, 663 (1997).

[113] *See* U.S. CONST. art. II, § 2, cl. 2. *Cf., e.g.*, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 512 (2010) (holding that the full SEC is the head of an agency for purposes of the Appointments Clause).

[114] 5 U.S.C. § 1204(g).

[115] Lucia v. SEC, 138 S. Ct. 2044, 2053 (2018); *see also* U.S. CONST. art. II, § 2, cl. 2 (referring to offices "established by law").

[116] *Lucia*, 138 S. Ct. at 2052.

[117] *See id.* at 2053 (quoting Freytag v. Comm'r, 501 U.S. 868, 882 (1991)). *See also, e.g.*, *Freytag*, 501 U.S. at 881 (noting that STJs "perform more than ministerial tasks").

[118] *See Lucia*, 138 S. Ct. at 2052–53; *Freytag*, 501 U.S. at 881–82.

[119] Buckley v. Valeo, 424 U.S. 1, 140–41 (1976) (per curiam).

[120] The Board has "the authority to prescribe such regulations as may be necessary for the performance of its functions." 5 U.S.C.

employees any administrative functions that represented an equivalent level of authority to the FEC functions that the Supreme Court characterized as "significant."[121] For example, the Board's power to "order any Federal agency or employee to comply with any order or decision issued by the Board . . . and enforce compliance with any such order"[122] might be seen as "significant authority."[123]

Some administrative functions, however, seem less significant than the ability to promulgate regulations or enforce compliance with orders, and therefore may be delegable to non-officers in conformance with the Appointments Clause. For example, to the extent that the Board performs functions "of an investigative and informative nature," under *Buckley*, those might not constitute "significant authority" and may be delegable to employees.[124] As discussed, the Board has already delegated a number of administrative duties, including functions like approving organization and staffing plans for the agency,[125] approving employee details[126] or leave requests,[127] approving the settlement of claims by or against the MSPB,[128] and negotiating and entering into contracts.[129] It is difficult to say definitively whether these tasks would be seen as "significant" under *Buckley*,[130] given that many of them have no analogue in Supreme Court cases interpreting the Appointments Clause, but it is possible that at least some of these duties may represent non-significant authority that can be performed by non-officers.

Apart from drawing factual analogies to the authorities described by the Court as significant in *Buckley*, there may be another metric to determine whether such duties are significant. As discussed above, the Court held in *Lucia* that "final decisionmaking authority" is not necessary to be considered a constitutional officer.[131] Nonetheless, if an administrative official did possess authority to independently bind third parties or the government, that would likely be a factor suggesting that the official is a constitutional officer.[132] However, officials exercising administrative duties such as approving

§ 1204(h). The MSPB has, in the past, exercised this authority to prescribe rules of practice and procedure. *E.g.*, Practices and Procedures, 80 Fed. Reg. 66787 (Oct. 30, 2015) (to be codified at 5 C.F.R. pt. 1201). The Board also has the authority to review certain rules or regulations issued by the Director of the Office of Personnel Management. 5 U.S.C. § 1204(f). Because this authority includes the power to declare rules invalid or invalidly implemented, this authority may also qualify as rulemaking. *Cf., e.g.*, 5 U.S.C. § 551(5) (defining rulemaking to include the amendment or repeal of a rule).

[121] *See Buckley*, 424 U.S. at 140–41.

[122] 5 U.S.C. § 1204(a)(2).

[123] *Cf. Buckley*, 424 U.S. at 139–40 (holding that FEC's enforcement powers could be exercised only by constitutional officers).

[124] *See id.* at 137, 126. Such duties might include, for example, the Board's reporting duties, if they are construed as having only an investigative and informative nature. *See, e.g.*, 5 U.S.C. § 1204(k) (requiring the Board to submit an annual budget); *id.* § 1204(*l*) (requiring the Board to submit legislative recommendations).

[125] MSPB, *Organization Functions & Delegations of Authority*, 25 (Apr. 2011), https://go.usa.gov/xPh2w.

[126] *Id.* at 25–26.

[127] *Id.* at 26–27.

[128] *Id.* at 29.

[129] *Id.* at 30–31.

[130] *Buckley*, 424 U.S. at 126.

[131] Lucia v. SEC, 138 S. Ct. 2044, 2052 n.4 (2018).

[132] *See, e.g.*, Helman v. Dep't of Veterans Affairs, 856 F.3d 920, 929 (Fed. Cir. 2017) ("[T]he authority to render a final decision, affirming or overturning the Secretary of the [Department of Veterans Affairs]'s removal decision, is a significant duty that can only be performed by officers of the United States."); *see also* Bandimere v. SEC, 844 F.3d 1168, 1183–84 (10th Cir. 2016), *aff'd*, Lucia v. SEC, 138 S. Ct. 2044 (2018) ("Final decision-making power is relevant in determining whether a public servant exercises significant authority. But that does not mean *every* inferior officer must possess final decision-making power."). Under certain circumstances, the ability to independently issue decisions with final effect might signify that a government official is a principal, rather than inferior officer. *See* Edmond v. United States, 520 U.S. 651, 665 (1997).

organization and staffing plans for the agency[133] are less likely than officials adjudicating cases to be viewed as having the "ability to make final, binding decisions on behalf of the Government."[134]

Board Vacancies and the Appointments Clause

The requirements of the Appointments Clause—that government officials exercising "significant authority" must be appointed pursuant to the constitutionally prescribed procedures[135]—apply regardless of whether or not the Board is vacant. However, as a practical matter, Board-level vacancies may cause more significant, discretionary, and independent authority to be delegated down to other officials,[136] raising more substantial questions about whether the delegee is exercising significant authority in violation of the Appointments Clause. Vacancies may also occasion temporary or contingent delegations of authority, raising open questions not fully answered by existing Supreme Court precedent regarding when an official may temporarily exercise significant authority on behalf of a constitutional officer without violating the Appointments Clause.[137] It is unclear whether the Board has in fact made any additional delegations in connection with the Board vacancies,[138] although there is evidence of a number of other delegations made when the Board was fully staffed.[139]

Nonetheless, it appears unlikely under governing Supreme Court precedent that the current Board vacancies alter any analysis of whether a delegee is operating in violation of the Appointments Clause. Even if the principal officers—the Board members—were absent, that likely would not, in and of itself, alter the nature of the authority that any subordinate officials within the MSPB possess.[140] Any analysis of whether such officials need to be appointed in line with the requirements of the Appointments Clause would hinge on the nature of those officials' authority and not whether the Board is fully operating.[141] However, Board vacancies may foreclose one avenue of compliance with the procedural requirements of the Appointments Clause. As discussed, Congress may vest the appointment of inferior officers in agency

[133] MSPB, *Organization Functions & Delegations of Authority*, 25 (Apr. 2011), https://go.usa.gov/xPh2w.

[134] *Lucia*, 138 S. Ct. at 2065 (Sotomayor, J., dissenting).

[135] Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam).

[136] Once the Board is entirely vacant, there would be no Board members to delegate any functions; however, Board members could delegate duties prior to leaving office. If only one Board member attempted to delegate the functions of the entire Board, there might be a question as to whether such a delegation was permissible under common law principles and under the relevant statutes. *Cf., e.g.*, New Process Steel, L.P. v. NLRB, 560 U.S. 674, 692 (2010) ("The full Board must have three or more members in order to conduct any business, including delegating its authority to a three-member group, as required under the Board quorum provision.").

[137] *Compare* United States v. Eaton, 169 U.S. 331, 343 (1898) (holding that it was not unconstitutional for a vice-consul to "temporarily perform[] the functions of the consular office" during the illness of the consul-general," saying that where "the subordinate officer" performs "the duty of the superior for a limited time and under special and temporary conditions, he is not thereby transformed into the superior and permanent official"), *and* Designation of Acting Director of the Office of Management and Budget, 27 Op. O.L.C. 121, 123–25 (2003) (concluding acting officer exercising duties of principal officer was inferior officer because of the temporary nature of his duties, and that under the Vacancies Act, he was appointed consistently with the Appointments Clause), *with* NLRB v. SW Gen., Inc., 137 S. Ct. 929, 946 (2017) (Thomas, J., concurring) (concluding acting officer exercising duties of principal officer was a principal officer notwithstanding the temporary nature of the duties, and that the officer could not exercise these duties absent appointment through the advice-and-consent process). However, none of these opinions considered whether an *employee*, rather than an inferior officer, could temporarily exercise the duties of a constitutional office without being converted into an officer subject to the Appointments Clause.

[138] There was no evidence of such delegations after searching the MSPB website for "delegation" and "delegating," or after searching Federal Register notices issued by the MSPB for "delegation" (which returned variants of the term).

[139] *See* MSPB, *Organization Functions & Delegations of Authority* (Apr. 2011), https://go.usa.gov/xPh2w.

[140] *Cf.* United States v. Hartwell, 73 U.S. 385, 393 (1868).

[141] *Cf.* Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam); United States v. Eaton, 169 U.S. 331, 343 (1898).

heads—in this case, the Board.[142] Assuming that such a statute exists and does authorize the Board to appoint a certain inferior officer, the lack of Board members may prevent the agency from appointing inferior officers.[143]

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[142] U.S. CONST. art. II, § 2, cl. 2.

[143] *Cf., e.g.*, Lucia v. SEC, 138 S. Ct. 2044, 2051 (2018) ("The Appointments Clause prescribes the exclusive means of appointing 'Officers.' Only the President, a court of law, or a head of department can do so."); Freytag v. Comm'r, 501 U.S. 868, 884 (1991) ("The Appointments Clause names the possible repositories for the appointment power.").