No. _____

In The

Supreme Court of the United States

JOSEPH P. CARSON,

Petitioner,

v.

U.S. MERIT SYSTEMS PROTECTION BOARD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

F. DOUGLAS HARTNETT
ELITOK & HARTNETT AT LAW
1101 – 30th Street, NW, #500
Washington, DC 20007
(202) 965-0529
dhartnett@elitokandhartnett.com

Attorney for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

Preface

Joseph Carson, PE, a long-time career employee of the U.S. Department of Energy (DOE) has been bringing forward a whistleblower disclosure against the Senate-Confirmed members of the U.S. Merit Systems Protection Board (MSPB or Board) for over 15 years. Specifically, his whistleblower disclosure is that they have failed or refused, since the creation of MSPB in 1979, to "report to the President and to the Congress as to whether the public interest in a civil service free of prohibited personnel practices (PPPs) is being adequately protected," per an independent clause of 5 U.S.C. §1204(a)(3). This whistleblower disclosure is undisputed, but still unresolved.

Questions

Whether the U.S. Merit Systems Protection Board (MSPB or Board) violated Mr. Carson's due process rights under the Fifth and Fourteen Amendments to the U.S. Constitution by adjudicating his whistleblower reprisal appeal involving allegations against its members, rather than assigning it to a judicially independent Administrative Law Judge (ALJ), consistent with the intent of its regulation at 5 C.F.R. §1201.13 to avoid being in apparent and/or actual conflict.

Whether the U.S. Court of Appeals for the Sixth Circuit, in affirming MSPB's failure to recuse, has

QUESTIONS PRESENTED – Continued

properly decided an important constitutional question – what is the constitutional floor for recusal in agency adjudications? – that has not been, but should be, settled by this Court.

Whether the U.S. Court of Appeals for the Sixth Circuit, in affirming MSPB's failure to recuse, issued a decision that conflicts with this Court's decisions in several cases, including *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437 (1927); *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623 (1955), and others where judicial disqualification did rise to a constitutional level.

PARTIES TO THE PROCEEDING

Petitioner Joseph P. Carson, PE, was the appellant in the Individual Right of Action (IRA) federal whistleblower appeal at the U.S. Merit Systems Protection Board (MSPB) and petitioner in the court of appeals proceedings. The U.S. Department of Energy (DOE) was the agency in the IRA appeal. MSPB was the respondent and DOE was an intervenor in the court of appeals proceedings.

RELATED CASES

Carson v. Department of Energy, docket no. AT-1221-19-0536-W-2 (2020 MSPB LEXIS 308). U.S. Merit Systems Protection Board, initial decision issued January 28, 2020.

Carson v. Merit Systems Protection Board; Department of Energy, Intervenor, docket no. 20-3459 (2021 U.S. App. LEXIS 14691. U.S. Court of Appeals for the Sixth Circuit, Judgement entered May 17, 2021.

Carson v. Merit Systems Protection Board; Department of Energy, Intervenor, docket no. 20-3459. U.S. Court of Appeals for the Sixth Circuit, Judgement entered September 9, 2021.

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OPINION BELOW

On May 17, 2021, the U.S. Court of Appeals for the Sixth Circuit issued a nonprecedential disposition in *Carson v. Merit Systems Protection Board*, docket no. 20-3459 (see Appendix page 1 (App. 1)). The Sixth Circuit decision is reported at 2021 U.S. App. LEXIS 14691. It affirmed the unpublished final decision of the Merit Systems Protection Board (MSPB), that determined MSPB lacked jurisdiction to consider Mr. Carson whistleblower reprisal appeal on the merits, in *Carson v. Department of Energy*, Docket no. AT-1221-19-0536-W-2 (2020 MSPB LEXIS 308) (see App. 16). Because MSPB's decision was about its jurisdiction, it became the respondent in Mr. Carson's appeal to the Sixth Circuit.

JURISDICTION

This Court's jurisdiction to review the circuit court's May 17, 2021, decision on a writ of certiorari is based on 28 U.S.C. §1254(1). On September 9, 2021, the circuit court issued its denial of Petitioner's Motion to Reconsider (see App. 27). Associate Justice Kavanaugh granted petitioner's request for an extension of time and directed it be filed on or before February 6, 2022. The Sixth Circuit has jurisdiction over Final Decisions of the MSPB in whistleblower reprisal appeals pursuant to 5 U.S.C. §7703(b)(1)(B).

CONSTITUTIONAL PROVISIONS INVOLVED

The "due process of law" requirements of Amendments V and XIV of the U.S. Constitution.

STATEMENT OF THE CASE

Joseph Carson ("Carson," "Joe Carson"), is a licensed professional engineer (PE) and 31-year-long employee of the Department of Energy (DOE).[1] He has been a federal agency whistleblower for 30 years. Between 1994 and 2002 he prevailed in no fewer than eight separate decisions of the Merit Systems Protection Board (MSPB) in whistleblower related litigation stemming from his whistleblower disclosures about worker and public health and safety issues in the Department of Energy and its contractor operated facilities.[2]

Mr. Carson grew up in Brooklyn, NY and is named for his grandfather, who was a New York City fireman.

[1] He is also a preference-eligible veteran, having served as an engineering division officer on nuclear submarines from 1976-82.

[2] His defending and upholding engineering ethics and the merit principles as a PE and DOE whistleblower played a positive, perhaps significant, role in the passage of the Energy Employee Compensation Program Compensation Act of 2000, Title XXXVI of Pub. L. 106-398, the National Defense Authorization Act of FY 2001. Since its passage, well over 100,000 DOE/DOE contractor employees or their survivors have received over 15 billion dollars in compensation for being exposed – without their knowledge or proper protection – to unsafe or unhealthy conditions in DOE facilities during the Cold War.

His strongest initial and lasting reaction to the terrorist attack of 9/11, knowing firsthand the deep-seated dysfunction and corruption in the custodian of America's nuclear stockpile and the lead federal agency for securing nuclear weapons materials around the world, is RELIEF – at least the attack was not nuclear!

He realized that DOE's repeated, years-long, campaigns of reprisal against him did not occur in a vacuum, it was enabled by the failure or refusal of the U.S. Office of Special Counsel (OSC) and the Merit Systems Protection Board (MSPB) to discharge a significant number of their non-discretionary statutory duties to protect employees who report government law-breaking. MSPB's and OSC's failure or refusal to protect him, he also realized, applied to the hundreds of other patriotic federal agency employees who seek protection from agency reprisal annually, since the OSC and MSPB were created on January 1, 1979, by the Civil Service Reform Act (CSRA) of 1978, Pub. L. 95-454.

On December 12, 2017 a new federal law, requiring agencies to create and maintain working conditions conducive to federal employees making whistleblower disclosures, was enacted. Mr. Carson believes his and other advocates' many years of communicating with Members of Congress about the inability to obtain an objective resolution of his whistleblower disclosures contributed its enactment.[3]

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[3] See 5 U.S.C. §4302(b), added by Pub.L. 115-91, the National Defense Authorization Act of 2018.

On September 11, 2018, Mr. Carson made a comprehensive whistleblower disclosure to DOE Secretary Rick Perry and the other supervisors and managers in this chain of command. His disclosure made a number of specific allegations of statutory violations by DOE and OSC. It also included one disclosure alleging violations of the CSRA by the MSPB.[4]

On December 6, 2018, not having received even an acknowledgment from anyone in his management chain about his comprehensive whistleblower disclosure, Mr. Carson filed a whistleblower reprisal complaint with OSC, assertinging the failure or refusal of his management to comply with their duties to obtain a timely and objective resolution of his whistleblower disclosures created a significant change in his working conditions.

On March 29, 2019, OSC informed Mr. Carson that it had closed its investigation of his whistleblower reprisal complaint on the basis that until MSPB ruled that under the new statute the failure of an agency to create and maintain working conditions conducive to whistleblowing could create a significant change in the

[4] That the Members of MSPB had failed or refused, since the creation of MSPB in 1979, to "report to the President and to the Congress as to whether the public interest in a civil service free of prohibited personnel practices is being adequately protected," per an independent clause of 5 U.S.C. §1204(a)(3).

working conditions of an agency whistleblower, OSC would not assume MSPB would consider it one.[5] [6]

On June 2, 2019, Mr. Carson, via his attorney, filed an individual right of action (IRA) whistleblower reprisal appeal with MSPB, claiming that the failure of his management in DOE to create and maintain working conditions conducive to his obtaining a resolution of his whistleblower disclosures created "a significant change to his working conditions." The relief he sought was simply that – an objective resolution of his whistleblower disclosures.[7] [8]

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[5] OSC separately informed Mr. Carson of his right to file an individual right of action (IRA) appeal with MSPB on this date.

[6] By law, OSC can intervene on behalf of the whistleblower in their appeals at MSPB and file amicus curiae briefs supporting the whistleblower in Appellate or Supreme Court reviews of MSPB decisions in whistleblower appeals per 5 U.S.C. §1212(c) and (h). This authority is consistent with its statutory duty, by the Federal Whistleblower Protection Act (WPA) of 1989, Pub. L. 101-12, to "act in the interests" of federal agency whistleblowers and making their protection OSC's paramount mission. OSC has a responsibility to help shape the interpretation of federal whistleblower law at MSPB and its reviewing courts in ways that broaden, not narrow, its provisions. Because OSC has not attempted to help create precedent at MSPB or the Courts about the interpretation of the whistleblower laws at issue in this appeal there is no relevant precedent for the 1994 law, Pub.L. 103-424, that created the personnel action of "any significant change . . . in working conditions," or the 2017 law, Pub.L. 115-91, that requires agencies to create and maintain working conditions conducive to employee whistleblowing.

[7] By 5 U.S.C. §2302(a)(2)(A)(xii), a personnel action includes a "significant change in working conditions."

[8] More specifically, for the Secretary of Energy to direct the Attorney General to issue opinions on the interpretation of the

On June 12, 2019, MSPB Administrative Judge (AJ) Brian Bohlen, issued an Order that acknowledged Mr. Carson's appeal, and directed he submit a filing regarding MSPB's jurisdiction to adjudicate the appeal.

On June 20, 2019, Mr. Carson's attorney filed a motion requesting the disqualification/recusal of the MSPB AJ and that the appeal be reassigned to a judicially independent Administrative Law Judge (ALJ), because MSPB would be the judge in its own cause given: 1) the previous litigation about Mr. Carson's whistleblower disclosure against MSPB, 2) the specifics of the whistleblower disclosure against MSPB, and 3) the relief sought for the whistleblower disclosure against MSPB required a determination of whether MSPB was in compliance with the reporting requirement in the CSRA.

The next day, June 21, 2019, MSPB AJ Bohlen denied the motion and described it as "frivolous." In denying the motion, he equated Mr. Carson's whistleblower disclosure against MSPB in the current appeal with his whistleblower disclosures against OSC in a previous IRA appeal. He determined that since MSPB did not assign previous IRA appeal – which only involved whistleblower disclosures against OSC – to an ALJ, it did not need to do so in the present appeal, despite its

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civil service laws subject to Mr. Carson's whistleblower disclosures, per 28 U.S.C. §512.

also involving a whistleblower disclosure against MSPB. (See App. 10).[9]

On July 1, 2019, Mr. Carson filed a motion to certify an interlocutory appeal, to preserve his objection to the Order of June 21, 2019.

On July 2, 2019, the appeal was dismissed without prejudice to refile, based on OSC's reopening the underlying whistleblower reprisal complaint. The OSC then closed the Complaint again several months later.

On October 1, 2019, Mr. Carson re-filed the IRA appeal. In his re-filed appeal, he renewed his request that the MSPB AJ recuse and assign the appeal to a judicially independent ALJ, given MSPB would otherwise be the judge in its own cause.

On October 28, 2019, MSPB AJ Bohlen issued an Order acknowledging the refiled IRA appeal and denying the recusal request (see App. 12, 13, 14). The AJ acknowledged MSPB had recused from another of Mr. Carson's previous IRA appeals. This previous IRA appeal had contained the same whistleblower disclosure against MSPB. In the previous appeal, MSPB assigned it to a judicially independent ALJ. Despite that, the MSPB AJ determined that because the previous IRA appeal also claimed that MSPB had taken a personnel action against Mr. Carson, a claim not made in the IRA

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[9] *Carson v. OSC*, MSPB docket no. AT-1221-15-0092-W-1. The initial decision in this appeal was issued on January 13, 2015; 2015 MSPB LEXIS 219. The final decision was issued on August 17, 2015; 122 M.S.P.R. 597; 2015 MSPB LEXIS 7121.

before him, MSPB did not need to recuse and assign the appeal to a judicially independent ALJ.[10]

Mr. Carson subsequently filed a motion to certify an interlocutory appeal of the recusal issue to preserve his objection to MSPB's decision not to recuse.

Mr. Carson also made a discovery request on MSPB, regarding his whistleblower disclosure against it and MSPB's refusal to recuse from adjudicating his whistleblower appeal. MSPB denied his discovery request.[11] Mr. Carson then motioned MSPB to issue a subpoena against MSPB to obtain the discovery. [12]

On January 28, 2020, MSPB issued its initial decision. It determined that MSPB lacked jurisdiction to

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[10] *Carson v. MSPB*, docket no. AT-1221-14-0637-W-1. The initial decision of the ALJ was issued on November 6, 2014; 2014 MSPB LEXIS 7674. The Full Board recused from reviewing it and issued a final Order affirming it on December 23, 2014; 2014 MSPB LEXIS 8920.

[11] From the response of the General Counsel of MSPB, Tristan Leavitt, denying his discovery request: " . . . I find that the production of the information requested in the above-listed items would reveal confidential, sensitive, or privileged information relating to internal agency policy and decision-making processes, or other information that would be inappropriate for release."

[12] In his motion to obtain a subpoena against MSPB to obtain the discovery, Mr. Carson detailed how MSPB's denial of his discovery request did not comply with relevant MSPB precedent. MSPB denied his motion to subpoena MSPB for discovery as part of its initial decision, see its footnote 2 on App. 26. MSPB reasoned the motion was mooted by the initial decision's jurisdictional determination. However, some of the sought for discovery was for information relevant to whether MSPB's decision not to recuse reflected actual – not presumptive – bias on its part.

consider Mr. Carson's appeal on the merits. The decision made no mention of the recusal issue. It determined, citing neither precedent, law or other authority, that despite the new law requiring agencies to create and maintain working conditions conducive to whistleblowing, no significant change in Mr. Carson's working conditions occurred when his management chain ignored his whistleblower disclosures. (See App. 23-26). It denied Mr. Carson's pending motion for a subpoena against MSPB to obtain discovery, including about its refusal to recuse, as moot.

Pursuant to MSPB regulation, Mr. Carson let the MSPB initial decision automatically become final. Thereafter Mr. Carson sought review in the U.S. Court of Appeals for the Sixth Circuit. The Appeal was docketed on April 28, 2020.[13] [14]

Mr. Carson also retained an expert in legal and judicial ethics, Mark Harrison, to provide his independent opinion on MSPB's non-recusal. Mr. Harrison issued his report to Mr. Carson on August 25, 2020 that opined that MSPB had violated Mr. Carson's Constitutional right to due process in its refusal to recuse. Mr.

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[13] By 5 C.F.R. §1201.113, MSPB initial decisions automatically become final 35 days after their issuance, unless a petition for review of the initial decision is filed with the full MSPB. The Sixth Circuit had jurisdiction over the now final decision of the MSPB in Mr. Carson whistleblower reprisal appeal pursuant to 5 U.S.C. §7703(b)(1)(B).

[14] When initially docketed, the Court mistakenly listed DOE as respondent, instead of MSPB. By 5 U.S.C. §7703(a)(2), MSPB was the proper respondent as the MSPB decision was that it lacked jurisdiction to consider the appeal on its merits.

Carson was able to add Mr. Harrison's report to the case record at the Sixth Circuit.[15]

MSPB's brief to the Sixth Circuit barely addressed the recusal issue. It did not mention the specifics of Mr. Carson's whistleblower disclosure against it, nor that to find for Mr. Carson it would be required to rule that he has a reasonable belief in the disclosure, or to order corrective action that could directly impact it. Instead, it claimed that since the current appeal did not allege MSPB had committed a personnel action against Mr. Carson, it had no need to recuse. MSPB's brief did not cite its own precedent, that it would apply the recusal requirements, including the mandatory recusal requirements, of 28 U.S.C. §455, when relevant, to its adjudications.[16]

At the Sixth Circuit DOE sought and obtained intervenor status on the basis that some of its whistleblower disclosures involved it. However, DOE's brief to the Court focused on the recusal issue, again avoiding and ignoring Mr. Carson's disclosures. DOE's brief did not, however, directly contest Mr. Carson's claim that

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[15] Among many other professional achievements and contributions related to legal and judicial ethics, Mr. Harrison chaired the American Bar Association (ABA) Joint Commission to Evaluate the Model Code of Judicial Ethics during its existence from 2003-2007, see https://www.americanbar.org/groups/professional_responsibility/policy/judicial_code_revision_project/about/. Mr. Harrison died in January 2021, shortly after he agreed to consider writing another independent expert opinion on the recusal issue, in response to the briefs of MSPB and DOE.

[16] See *Washington v. Department of Interior*, 81 MSPR 101, 104 (1999); 1999 MSPB LEXIS 219.

the MSPB would be the judge in its own cause if it considered whether Mr. Carson had reasonable belief in his whistleblower disclosure against it, a determination necessary for MSPB to order the corrective action here – an Attorney General opinion interpreting MSPB's statutory duty and compliance. Nor did it claim there was no MSPB precedent that it would apply the non-discretionary recusal requirements of 28 U.S.C. §455(b)(2)-(5), when relevant, to its adjudications. Nor did it contest Mr. Carson's claim that the requirements of 28 U.S.C. §455(b)(5), if applied, required MSPB's recusal.

Instead, DOE made the same argument as MSPB – that since the current IRA appeal did not include a claim that MSPB had committed a personnel action against Mr. Carson, it was fundamentally different from the previous IRA appeal that contained the same whistleblower disclosure and, therefore, did not require MSPB's recusal. DOE's brief acknowledged both appeals involved the same whistleblower disclosure against MSPB, but it did not acknowledge that both appeals sought the same corrective action.

On May 17, 2021 the Sixth Circuit issued a non-precedential decision. Regarding the recusal issue, it determined that MSPB did not abuse its discretion in adjudicating the appeal because Mr. Carson's current appeal did not allege a personnel action against him by MSPB. It did not address Mr. Carson's arguments about MSPB being the judge in its own cause based on its needing to determine Mr. Carson has reasonable belief in his whistleblower disclosure against it to order

the sought for corrective action. It did not address Mr. Carson's efforts to obtain discovery about MSPB's decision not to recuse and MSPB's reasoning for denying them. It did not address MSPB precedent that it would apply the mandatory recusal requirements of 28 U.S.C. §455 when appropriate and MSPB's refusal to do so or even explain why it would not.

REASONS FOR GRANTING THE PETITION

I. The Resolution of His Whistleblower Disclosure Against MSPB Could Have Compelling Positive Impact on Our Democracy

The Civil Service Reform Act (CSRA) of 1978, Pub.L. 95-454, created an elaborate statutory scheme, with multiple agencies performing complimentary functions, to ensure federal agency employment practices are merit-based, not corruption-based.

It also codified the interest of employee's in their federal employment and established nine merit principles as the statutory bedrock for federal agency employment practices. Since the merit principles are not self-executing or inherently enforceable as written, the CSRA also codified in law prohibited personnel practices (PPPs), which are agency violations of one or more merit principles in various aspects of their employment practices.[17]

[17] The merit principles are found at 5 U.S.C. §2301(b). Prohibited personnel practices are listed at 5 U.S.C. §2302(b).

By the CSRA:

1. Agency heads are responsible to "prevent PPPs" in their agencies by 5 U.S.C. 2302(c)(2)(A).

2. OSC is responsible to "protect agency employees from PPPs" by 5 U.S.C. §§1212(a)(1) and 1214(a)

3. MSPB is responsible to: 1) adjudicate agency employee claims of PPPs, and 2) report to the President and the Congress whether agency employees are adequately protected from PPPs by 5 U.S.C. §1204(a).

4. The President is responsible to "take any action. . . . necessary to ensure that personnel management is based on and embodies the merit system principles" – which necessarily includes agency employees being adequately protected from PPPs – by 5 U.S.C. §2301(c).

In engineering terms, MSPB's failure or refusal to make its required report to the President is a "single point of failure" for this entire complex statutory scheme – i.e., the alarm intended to inform the President when the complex system to ensure merit-based

federal agency employment is broken, is, itself, broken.[18] [19]

The appeal involves "extreme facts" necessary for a recusal issue to rise to the constitutional level.[20]

These "extreme facts" include:

1. Mr. Carson has been bringing this whistleblower disclosure forward for many years, the only reason it remains unresolved is because MSPB has refused to

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[18] Was the "public interest in a civil service free of prohibited personnel practices being adequately protected" at 9/11? Going to war in Iraq for false pretenses? The 2008 economic meltdown? Approaching 1,000,000 American deaths from Covid? etc. If the answer is "no," and it is not recognized and corrected, the low trust levels polls indicate Americans have in their government will likely continue to erode. On the other hand, if the answer is "no" and MSPB reports it, then a previously unidentified causal factor for much which has befallen and besets America in recent decades is exposed – and can be readily corrected, at least in comparison to other challenges.

[19] Mr. Carson served as an engineering division officer on nuclear submarines for six years, the control room alarms lights for the engineering systems were tested at least daily. The warning and alarm lights of automobiles are tested whenever the auto is started. Engineers know that a broken alarm light can spell disaster for a complex engineering system – see the Boeing Max 737 crashes and the Three Mile Island nuclear power plant meltdown.

[20] See *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 887-888 (2009) for a discussion of the "extreme facts" present in prior cases where the Supreme Court determined a recusal issue reached the constitutional level.

adjudicate it properly under the relevant laws and the Constitution;

2. The likelihood that MSPB's jurisdictional ruling was motivated by actual bias – not just presumptive bias – which MSPB may have also abused attorney-client privilege to conceal;[21]

3. MSPB, to rule for Carson, must determine his belief that the MSPB and Senate Confirmed Members since 1979 have been in violation of the law since 1979 is correct;[22] and,

4. If MSPB ruled for Carson, the result could establish that the Board members of MSPB have failed – since its creation in 1979 – to perform what is possibly their most crucial statutory duty for protecting merit-based employment in federal agencies. Such a result would provide reason for President to remove one or more Board members for cause.

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[21] If this Court rules that MSPB violated Mr. Carson's Constitutional Due Process rights in refusing to recuse, perhaps it will spur an investigation of whether MSPB abused attorney-client privilege in denying discovery and in responding to a FOIA suit to conceal its actual bias against Mr. Carson's efforts to obtain a resolution of his whistleblower disclosure.

[22] By 5 U.S.C. §2302(b)(8) a federal agency employee must demonstrate "reasonable belief" that their whistleblower disclosure is correct for it to be "protected." This requirement is captured in MSPB regulations at 5 C.F.R. §1209.4(b).

5. MSPB, had it recused, would then become a party to this appeal, by its own regulation.[23]

6. This appeal is, in its whistleblower disclosure and relief sought, near identical to an earlier appeal where MSPB did recuse.[24]

II. MSPB Violated This Court's Precedent Regarding the Common-Law Rule for Recusal – It was "the Judge in its Own Cause"

The MSPB decision and Sixth Circuit's affirmation is in conflict with the following precedents of this Court.

From *Caperton v. Massey*, 556 U.S. 868, 876 (2009)

> The *Tumey* Court (*Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927)) concluded that the Due Process Clause incorporated the common-law rule that a judge must recuse himself when he has "a direct, personal, substantial, pecuniary interest" in a case. *Ibid.* This rule reflects the maxim that

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[23] See 5 C.F.R. §1201.34. Since MSPB – or at least its Board Members – could be directly affected by the outcome of Mr. Carson's appeal, MSPB would intervene in the appeal.

[24] See App. 8, 9, 12, 13, and 14. The whistleblower disclosure against MSPB and the relief sought – the opinion of the Department of Justice (DOJ) on the interpretation of 5 U.S.C. §1204(a)(3) were the same, the only difference is the agency that would obtain the opinion from DOJ – MSPB in the prior appeal; DOE in the present one.

> "[n]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity." The Federalist No. 10, p. 59 (J. Cooke ed.1961) (J. Madison);

In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623 (1955)

> No man can be a judge in his own case.
>
> No man is permitted to try cases where he has an interest in the outcome.
>
> It is axiomatic that "[a] fair trial in a fair tribunal is a basic requirement of due process."

In his whistleblower appeal, Mr. Carson claims that the Senate-Confirmed members of MSPB, since its creation on January 1, 1979 have failed or refused to comply with their statutory duty to "report to the President and to the Congress as to whether the public interest in a civil service free of prohibited personnel practices is being adequately protected," per 5 U.S.C. §1204(a)(3). As corrective action, he requests the Department of Justice issue its opinion on the interpretation of that duty.

If Mr. Carson's whistleblower disclosure is thus vindicated, the President would have reason to remove one or more of the Members of the Board for cause – a

result with "direct, personal, substantial, pecuniary interest" for the Members of the Board.[25] [26]

In a previous whistleblower appeal involving this whistleblower disclosure against MSPB, Mr. Carson claimed MSPB management was improperly ignoring it. That was the only substantive difference. In that appeal, MSPB did recuse, see App. 8, 9, 12 and 13, consistent with its regulation that addresses when its Members recuse from an appeal of an MSPB employee.[27]

Since the commencement of this MSPB Appeal, Mr. Carson has claimed that MSPB, because it would be directly impacted by its corrective action, is a party to it – an intervenor – by its regulation at 5 C.F.R. §1201.34. MSPB did not disavow this claim, but still determined, regardless of its interest in the outcome of the appeal, it could still conduct an impartial

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[25] See 5 U.S.C. §1202(d). MSPB has lacked a quorum since January 2017 and any members since February 2019. Tristan Leavitt, its General Counsel and Acting Chief Executive and Administrative Officer since March 1, 2019, is a one of President Biden's pending nominees to the MSPB. Mr. Leavitt could have directed MSPB assign Mr. Carson's appeal to an ALJ.

[26] By MSPB own recent court filing, its Administrative Judges (AJs) have no judicial independence – their initial decisions become final only by the permission of the Members of MSPB, see MSPB's intervenor filing of October 22, 2021 in *McIntosh v. Department of Defense*, US Court of Appeals for Federal Circuit, docket no. 19-2454, page 7.

[27] 5 C.F.R. §1201.13 addresses how MSPB will recuse from the adjudication of appeals by its own employees to comply with the Constitution's due process requirements – the appeal will be assigned to a judicially independent ALJ and the MSPB Board members will recuse from an appeal of the ALJ's initial decision, so the ALJ's decision will become final.

adjudication. The Sixth Circuit found MSPB did not abuse its discretion in making that determination. In their determinations, both the MSPB and Sixth Circuit relied on the fact that, in his whistleblower appeal, Mr. Carson sought an order directing the DOE obtain a resolution of his whistleblower appeal, instead of seeking MSPB to order itself to do so, unlike his previous appeal.

III. The Constitutional Due Process Requirements for Recusal in Agency Adjudications is an Important Question of Federal Law that has not been, but should be, settled by this Court

There is no specific Supreme Court precedent regarding the application of the Constitution's due process requirements for recusal in agency adjudications. Additionally, given the statutory deference Courts generally give to agency adjudications, such as in this case, such precedent could be significant value.

Professor Louis Virelli from Stetson University elaborates on the non-existence of such precedent and the value such precedent could provide to such Agency Adjudications in a recent report assessing federal agency recusal standards.[28]

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[28] Louis J. Virelli, III, Administrative Recusal Rules: A Taxonomy and Study of Existing Recusal Standards for Agency Adjudicators, May 14, 2020) (Report to the Admin. Conf. of the U.S., "Final Version"), https://www.acus.gov/report/administrative-recusal-rules-taxonomy-and-study-existing-recusal-standards-agency-0.

Had such precedent existed, Mr. Carson's whistleblower disclosure might well be resolved by now.

CONCLUSION

For the above reasons, the Court should grant this petition, vacate both the decision of the Sixth Circuit and underlying MSPB decision, and remand the appeal to the MSPB with instructions to assign to an ALJ to adjudicate, consistent the V and XIV Amendments to the U.S. Constitution and the intent with its governing Statutes and Regulations.

Respectfully submitted,

F. DOUGLAS HARTNETT
ELITOK & HARTNETT AT LAW
1101 – 30th Street, NW, #500
Washington, DC 20007
(202) 965-0529
dhartnett@elitokandhartnett.com

Attorney for Petitioner