

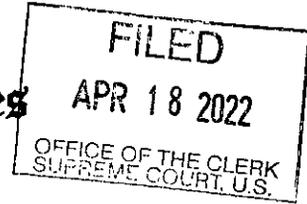
21-1510  
No. \_\_\_\_\_

ORIGINAL

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In The  
**Supreme Court of the United States**



—◆—  
DAVID P. MARANA,

*Petitioner,*

vs.

DEPARTMENT OF THE ARMY,

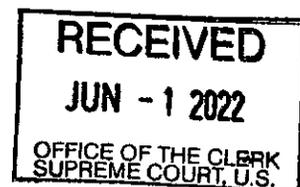
*Respondent.*

—◆—  
**On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Federal Circuit, Washington, DC**

—◆—  
**PETITION FOR A WRIT OF CERTIORARI**

—◆—  
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## QUESTIONS PRESENTED

1. What court, tribunal, and or investigative agency ensures that information with redacted information when presented as evidence is valid, legal, and not used for misinformation?
2. Is “..such that a reasonable person could conclude..” as used in whistleblowing retaliation cases and jurisprudence, valid, applicable, given significant consideration, and fair, when applied to subcultures – as in military healthcare is a subculture within the military, and military is a subculture of U.S. population). Subcultures often have unique highly specialized attributes, purpose and dynamics – including communications and where the general population “reasonable person” may be devoid of basic information and or familiarity of the subculture that a “reasonable person” of a subculture customarily possesses.
3. In retaliation cases where a common individual is involved, and or, several individuals with common interests and motivation are involved, in multiple situations suggestive of retaliation; why is “merger of factors” that constitutes a nexus not given consideration?
4. End justifies the means, and vice versa. Are military federal agencies immune to legal liabilities for reporting and or submitting untruthful or misleading information when action is backed by commander’s discretionary authority?

**QUESTIONS PRESENTED** – Continued

5. Can military commanders with discretionary authority change definitions and or interpretation of congressional legislative rules or mandates such as the HIPAA privacy rule exemptions?
6. What has precedence HIPAA privacy rule or Patriot Act?
7. With concurrent and or competing active military missions, who has priority in the application of Army Regulation (AR) 40-66 (“ . . . carrying out any other activity necessary to the proper execution of the Army’s mission”). Military health services commander (dual health care missioned) or warfighter commander?
8. Can military healthcare commanders with their discretionary authority apply HIPAA privacy rule to withhold and or be passive with sharing significant or relevant soldier protected health information that could be critical for warfighter commanders optimum command and control and to execute national defense and or homeland security missions?
9. More

NOTE: I offer the clarification and resolution of numbers 7 and 8 above especially to the Fort Gordon military intelligence and cybersecurity warfighting commanders and unit leaders whom I had the privilege and honor to serve as medical readiness liaison, and of whom voiced their frustration with previous lack of support from DDEAMC. I hope and pray they will be empowered.

**RELATED CASES**

Douglas v. Veterans Administration, 5 MSPR 280 (MSPB 1981)

Yunus, at 1371; Carney v. Department of Veteran's Affairs, 121 M.S.P.R. 446 11 (2014)

LaChance v. White, 174 F.3d 1378 (Fed Cir. 1999)

Mintzmyer v. Department of the Interior, 84 F.3d 419, 422 (Fed Cir. 1996)

Ellison v. Merit Systems Protection Board, 7 F.3d 1031, 1037 (Fed. Cir. 1993)

Chavez v. Department of Veterans Affairs, 120 M.S.P.R. 285, 19 (2013)

Langer v. Department of the Treasury, 265 F.3d 1259, 1266 (Fed. Cir. 2001)

Parikh v. Department of Veterans Affairs, 116 M.S.P.R. 197, 14 (2011)

Chambers v. Department of Interior, 515 F.3d 1362, 1369 (Fed. Cir. 2008)

Aquino v. Department of Homeland Security, 121 M.S.P.R. 35, 13 (2014)

Savage v. Department of the Army, 122 MSPR 612, 627, 629 23, 27 (2015)

## TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED .....	i
RELATED CASES .....	iii
TABLE OF CONTENTS .....	iv
TABLE OF AUTHORITIES .....	vi
PETITION FOR WRIT OF CERTIORARI.....	1
OPINIONS BELOW.....	1
JURISDICTION.....	1
STATUTES .....	2
CONSTITUTIONAL PROVISIONS INVOLVED ....	3
STATEMENT OF THE CASE.....	4
1. Nexus(s).....	6
A. Whistleblow (recent; below whistle- blow precedes this).....	6
B. Whistleblow #1 (earlier).....	8
REASONS FOR GRANTING THE WRIT.....	11
A. Fair Trial and Justice .....	11
a. Office of Special Counsel (OSC File No. MA-19-3554).....	11
b. Merit Systems Protection Board (Case No. AT-1221-20-0543-W-1).....	11
c. U.S. Court of Appeals for the Federal Circuit (Docket No. 2021-1463).....	12
d. Discussion.....	12

## TABLE OF CONTENTS – Continued

	Page
B. For Good Government .....	15
a. Discussion.....	15
b. Recommendation .....	27
CONCLUSION.....	30

## APPENDIX

United States Merit Systems Protection Board, Atlanta Regional Office, Decision, Filed April 26, 2022 .....	App. 1
United States Court of Appeals for the Federal Circuit, Opinion, Filed January 20, 2022.....	App. 4
United States Court of Appeals for the Federal Circuit, Judgment, Filed January 20, 2022.....	App. 19
United States Merit Systems Protection Board, Atlanta Regional Office, Decision, Filed Octo- ber 2, 2020 .....	App. 20
U.S. Office of Special Counsel, Email, Sent March 24, 2020.....	App. 31
U.S. Office of Special Counsel, Email, Sent March 24, 2020.....	App. 34
Acronyms and or Definitions.....	App. 38

## TABLE OF AUTHORITIES

	Page
CONSTITUTIONAL PROVISIONS	
U.S. Const. amend. I .....	3
U.S. Const. amend. V .....	4
U.S. Const. amend. XIV .....	4
STATUTES	
5 USC 2301 .....	2
5 USC 2302(a)(2)(A)(xii) .....	2, 5
5 USC 2302(b) .....	2
5 USC 7701 .....	2
29 USC 206(d) .....	2
29 USC 791 .....	2
42 USC 2000e .....	2
Patriot Act .....	2
REGULATIONS	
5 CFR Administrative Personnel; Merit Systems Protection Board; Principles of Ethical Con- duct .....	2
45 CFR 164.506 .....	2, 5
Army Regulation (AR) 40-66 .....	2

TABLE OF AUTHORITIES – Continued

	Page
RULES	
HIPAA Privacy Rule.....	<i>passim</i>
Sup. Ct. R. 10 .....	1

## **PETITION FOR WRIT OF CERTIORARI**

I, David P. Marana, an honorably retired army nurse corps officer and a former department of the army civilian employee, residing at my home and now unemployed due to military veteran health disability limitations exacerbated by the agency's wrongful and malicious removal personnel action, respectfully petitions this court for a writ of certiorari.



## **OPINIONS BELOW**

The order, and or judgment, and or opinions of the following is reproduced in the Appendix. U.S. CAFC filed January 20; MSPB initial decision dated October 2, 2020 which became final; OSC letters dated March 24, 2020.



## **JURISDICTION**

Date of Entry of Judgement by U.S. CAFC is January 20, 2022. This filing is within the 90-day requirement.

As a self-represented individual, and with no MSPB Judge quorum, I opted to follow U.S. CAFC information and file a Petition for a Writ of Certiorari due to compelling reasons (including for good government and decision time essence, possible statute conflict, possible agency unlawful practice and or abuse of authority, others) (Supreme Court Rule 10), and

thereafter, as prompted by MSPB admin judge, I acquiesced and requested MSPB case "dismissal with prejudice."

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**STATUTES**

5 USC 2301 Merit Systems Principles (MSP)

5 USC 2302(b) Prohibited Personnel Practices (PPP)

5 USC 2302(a)(2)(A)(xii) "Any other significant change in duties, responsibilities, or working conditions"

5 USC 7701 Affirmative Defense (Harmful error 1201.4(r))

42 USC 2000e Civil Rights Act of 1964

29 USC 206(d) Equal Pay Act, Fair Labor Standards Act of 1938

29 USC 791 Rehabilitation Act of 1973

5 CFR Administrative Personnel; Merit Systems Protection Board; Principles of Ethical Conduct

HIPAA Privacy Rule

45 CFR 164.506 (Uses and Disclosures for Treatment, Payment, and Healthcare Operations)

Patriot Act

Army Regulation (AR) 40-66: Disclosure without consent of the patient (2-4); Request from personnel within the DOD (a); The MTF/DTF may, subject to

specific terms and conditions addressed in DOD 6025.18-R, Ch. 7, use of PHI or disclose PHI to DOD employees who have an official need for access in the performance of their duties in the following situations (without the individual's authorization or opportunity to object) (1); When required by law or Government regulations. Examples of regulatory programs that do not require a Soldier's authorization for PHI disclosure. PHI released under these program will be in accordance with the governing policy as described below (a); To carry out activities under the authority of AR 40-5 to safeguard the health of the community; To report mental status evaluations according to guidance from MEDCOM (MCHO-CL-H) (12); According to other regulations carrying out any other activity necessary to the proper execution of the Army's mission (19); For public health purposes (b); For judicial or administrative proceedings (e); To avert a serious threat to health or safety (j).

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### **CONSTITUTIONAL PROVISIONS INVOLVED**

United States Constitution, First Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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**STATEMENT OF THE CASE**

My case pertains to DDEAMC's selective and furtive application of the HIPAA privacy rule tied with mischaracterizations and other agency mismanagement

and lack leadership – to support the ubiquitously used of “unbecoming of a federal employee” allegation, rubber-stamped with commander’s federally granted discretionary authority, to justify my removal from federal service in retaliation for my multiple whistleblowing(s) ranging from the ordinary to whistleblowing that meets the current definition of whistleblowing prohibited personnel practices (PPP) and current criteria constituting a “nexus.” Prior to my removal, I made known other issues including ones affecting unit and soldier readiness and command and control. Between my earlier and my most recent significant whistleblowing reports, I experienced hostile environments or “any other significant change in duties, responsibilities, or working conditions” (5 USC 2302(a)(2)(A)(xii)).

My alleged HIPAA privacy rule violation was in the performance of my GS-12 nurse case manager position description; tempered with the following: a. Professional and or army case management guides, healthcare industry best practices and standards, certifications in case management and healthcare quality; b. Merit systems principles; c. Military values expected of military officers including righteousness, integrity and personal courage; d. Department of Defense’ TeamSTEPPS; e. The HIPAA privacy rule exemptions (45 CFR 164.506. Health care operations; quality “. . . improvement activities, population-based activities relating to improving health or reducing healthcare cost, and case management and care coordination”).

Absent the HIPAA privacy violation allegation, there is no significant alibi to justify removal personnel actions. What is left is Dwight David Eisenhower Army Medical Center, Department of the Army Whistleblowing Prohibited Personnel Practice.

**1. Nexus(s)**

**A. Whistleblow (recent; below whistleblow precedes this)**

a. Heart disease and stroke are in the top five causes of death in the United States according to CDC MMWR. Blood anticoagulation is important in preventing clot formation which can cause heart attack and stroke. Patient monitoring and follow-up is important to ensure medication compliance, side effects, and patient welfare and safety. The blood anticoagulation (or coumadin) clinic at DDEAMC generated a backlog of patients overdue for, or needing follow-up during Mr. Brunson's tenure as clinic nurse. Because of its existence, I surmised this was allowed by chain of command and ultimately COL Ristedt and commander's discretionary authority. I was projected to replace Mr. Brunson who had left. During concurrent clinic orientation and training; awaiting human resource (HR) reassignment processes; and awaiting other job openings compatible with my GS 12 level, pay and NCM PD, I was directed by Dr. David Bookstaver, clinic director, to help with patient care and follow-up. This was when I initially became aware of the backlog and significant risk to patient health and safety. I

initially informed MAJ Bruce Brown, chief of PAD, of the patient follow up issue when he and I were in attendance of the same basic life support (BLS) training.

Ms. Susan Wodarz, proposed my removal. She was the clinical nurse officer in charge (CNOIC) of Cardiology with which coumadin clinic is under. She is the nurse supervisor and likely job performance rater for nurse Mr. Brunson. Coumadin clinic and patient-care follow-up deficiency is a reflection on Ms. Wodarz. She referenced documents (packet), for which me and Mr. Ellis – my AFGE representative, were each given copies, to counsel me on her decision to propose my removal. There were documents including emails in the packet that had COL DeAngelo's name along with Ms. Franey. Ms. Franey and I had a disagreement about cancer patient care. Disagreement and case relevant communication between COL DeAngelo and Ms. Franey is revealed in email in the packet.

Major Orr decided to remove me. He is an officer in charge of cardiology. He is OIC for services under cardiology including coumadin clinic. Ms. Wodarz is his head nurse. He is likely supervisor and job performance rater for Ms. Wodarz. Coumadin clinic and patient-care follow-up deficiency is a reflection on Major Orr and cardiology. He referenced the same documents Ms. Wodarz referenced but with the addition of Ms. Wodarz written proposal for removal.

Based on documents in the proposal for removal packet, Major (MAJ) Bruce Brown, chief of patient administration division (PAD), reported my alleged

HIPAA violation. He stated he was made aware of violation by an individual but did not reveal the individual's identity. He helped investigate and compile Agency's proposal for removal packet. He has the motivation to have animosity toward me. This can be gleaned from email used to illustrate HIPAA privacy violation. This email was redacted of information that provides context to justify that my alleged HIPAA violation is operational. MAJ Brown then cites that my actions had nothing to do with the operation. There are inconsistencies in MAJ Brown's other statements. There are other documents in the proposal for removal packet that appear excessively redacted of information. There are inconsistencies between documents in the packet and my personal file.

#### **B. Whistleblow #1 (earlier)**

Cancer, as with heart disease above, is in the top five causes of death in the United States according to CDC MMWR. I learned about problems with Cancer patient care when assigned to the Hematology oncology section headed by Dr. Delmas. The fact that it existed, I surmised it was allowed by the commander's discretionary authority. Commander at that time was COL Weber. In discussing cancer patient care issues, and what needs to be done to address issues, Dr. Delmas verbally informed me that DDEAMC cancer care did not meet accreditation in previous years. The reason is because of a lack of leadership support. Also, Dr. Delmas expressed to me he "does not like confrontations." I realized the extent of the problem when I

started taking care of cancer patients and fulfilling what needs to be done to meet accreditation. Additionally, Ms. Hightower – oncology nurse and Ms. Rogers (research) shared their own experiences and observations about problems within hematology oncology. Common to both is leadership problems. Further, Ms. Hightower shared with me a patient care issue disagreement she had with Ms. Franey. I commented on this in an email with Ms. Franey which she denied. Our email exchange was not friendly. I regret my use of words. I should not have allowed her denial and the words she used in kind to incite me.

We also had a disagreement about transcription of email messages, and DDEAMC lack of written policy thereof. The preceding was portrayed as HIPAA violation in the proposal for removal packet.

I reported this cancer patient care issue to DDEAMC commander and others at that time. I expressed concern about reprisal. I was reassured there will be none. However, still under Medicine, I experienced multiple hostile environments.

This nexus was negated by OSC and MSPB/U.S. CAFC judges as remote. However, this was made proximate by inclusion of documents – related to the cancer care issue, in the pre-proposal for removal packet referenced in the above.

COL Deangelo above is chief of Medicine. All three – Coumadin clinic, Cardiology, and Hematology Oncology (cancer care) are under Medicine. Both Ms. Wodarz and MAJ Orr are subordinates to and likely under

COL Deangelo's supervisory and job performance rating scheme.

COL Ristedt, hospital commander, was set to be replaced and transitioned from hospital command. During previous change of command from COL Weber to COL Ristedt, the officiating general officer cited Fort Gordon's achievement in being number one in medical readiness two (MRC2) reset CONUS-wide, as one of COL Weber's command tour achievements. I was instrumental in the achievement. It is unlikely that backlog of patients needing the critical anticoagulation medication follow-up is something that the responsible and accountable person would claim as an achievement or wanted publicized. Few days prior to my removal, Ms. Michelle Cobb, human resources, met with COL Ristedt and informed him of the contents of my letter addressing the agency's management directed reassignment (MDR) memo for me. My letter included information about the coumadin follow up issue. It was then that COL Ristedt withdrew the MDR. A few days later MAJ Orr removed me.

Copies of the packet were submitted as exhibits to the Office of Special Counsel (OSC), and later, the administrative judge, Merit Systems Protection Board (MSPB).



**REASONS FOR GRANTING THE WRIT****A. Fair Trial and Justice****a. Office of Special Counsel (OSC File No. MA-19-3554)**

Stressed about removal and not knowing about whistleblowing PPP retaliation nexuses, I presented OSC with multiple events, situations, and or individual motivations as reasons for the agency to retaliate against me. With much of my verbal and written emphasis suggesting scrutiny of the proposal for removal packet for errors of commission, omission, inconsistencies, and wrongdoing, the Office of Special Counsel's verbal feedback and eventual final report did not appear to me that agency wrongdoing is something that OSC investigates. OSC focused on its perspective of whistleblowing nexuses. Additionally, OSC asked for but did await my feedback regarding the preliminary report before its finalization.

**b. Merit Systems Protection Board (Case No. AT-1221-20-0543-W-1)**

Administrative judge was provided with a copy of the OSC final report. Agency and I each provided the admin judge with documents as ordered. In my pleading and or submission, I stated OSC requested my feedback on preliminary report but that it did not await completion of my comments. I tried my best to provide show of cause as ordered by admin judge but was unsuccessful. Agency mischaracterized my assertions. The admin judge asked for and I provided an

affirmative defense statement including agency wrongdoing. This was largely not considered in admin judge's preliminary decision which became final.

**c. U.S. Court of Appeals for the Federal Circuit (Docket No. 2021-1463)**

The Court of Appeals for the Federal Circuit reviewed documents they were presented. CAFC judgement did not address my assertion of agency wrongdoing. I do not fully understand and I am presuming that the specific reason for remand was so that if supported by MSPB admin judge, decision will be all for MSPB.

**d. Discussion**

For greater than 30 years, I have contributed immensely and largely consistently to our country as military on active duty and as a civilian federal employee. There is a preponderance of evidence for the preceding. My positive contributions throughout my various and multitude of engagements would not have materialized if I allowed states of passivity, mediocrity, status quo maintenance, misplaced fear and intimidation by co-workers and or superiors, and or states of preposterousness or frivolousness to restrict my actions. As with other individuals in history I strongly believe individuals, regardless of rank, race, creed or stature, can provide even a singular but impactful positive contribution of national and or global significance or of progress and betterment of societies and humankind.

While on active military duty and as a federal employee, I was guided by: our Constitution, oath of office – “. . . defend and protect . . . from enemies . . . domestic”; and the ingrained high expectations of military officers including and especially of righteousness, tempered with morals and ethics based on my Roman Catholic values and beliefs. Despite retirement from active military duty and having been removed from federal service, my values have not changed.

It has been almost three years since my removal. Agency's personnel actions have been life changing. It aggravated my VA-adjudicated disabilities. It rendered emotional pain and suffering for me and my family. It deprived me of my professional abode and destroyed my future professional career which I invested resources to prepare for. It took away potential for my increasing income-earnings commensurate with higher-paying jobs I had planned to pursue. With a whistleblowing history, it is not difficult to be blacklisted, and subtly, justifiably, and permanently ostracized. OPM through USAJobs avails federal agencies various hiring pools from which to select potential employees. Agencies have direct hire authority. Agencies have prerogative to determine duration of job announcements. Others.

I had suffered and continue to suffer emotionally and physically for the last three years. Finding, soul-searching, and praying to Almighty God daily to find life encouragement. I have endured and continue to grapple with difficulties, especially with being pro se, and continue to use personal funds to pursue fairness,

justice, righteousness, and betterment not only for me but for fellow American, our government, our country.

The current MSPB institutions, systems and processes, and subsequent judicial systems and processes is a deterrent for the dedicated, hardworking well-intentioned employees who would whistle blow for righteousness' sake. It is critically in need for revamping.

My son, a U.S. Air Force Academy graduate, who our government has invested significant monies for his military education and training, but has been affected by my untoward removal from federal service by the Department of the Army – which I have served with utmost dedication and multiple positive contributions for more than three decades; and which my late father – a WW2 Bataan Death March survivor served with great dedication and tremendous sacrifice, needs to recover and be cleared so he can fly and continue our families' legacy of comprehensive, dedicated and selfless service with greater positive contribution to our country.

As in criminal cases, where the accused has the right to face their accuser, my removal from federal law is comparably grave. I feel it necessitates the same. My removal was not only an administrative error but a whistleblowing PPP executed collaboratively, furtively, likely unlawful, and has a larger national impact and significance including healthcare, homeland security, and taxpayer funds, and that national awareness and a federal, multi-department, multi-agency, collaborative issue resolution is necessitated. Because of this, I

plan to request subpoenas for the following to appear in court for my questioning: Chair of congressional federal government agencies oversight committee, Secretary of Defense, Chair of the Joint Chiefs of Staff, Secretary of the Army, Chief of Staff of the Army, Director of Defense Health Agency, Secretary of Homeland Security, Secretary of Health and Human Services, and everyone directly and indirectly involved with my removal; including MAJ Brown's anonymous informant. I plan to request the unredacted version of all evidence presented but with redaction especially email and string used to illustrate HIPAA violation in the proposal for removal packet. I plan to request copies of job performance evaluations and support documents of individuals directly and indirectly involved with my removal.

## **B. For Good Government**

### **a. Discussion**

There are 250,000 deaths due to medical error per year in the U.S. This is reflected in the Institute of Medicine landmark report "To Err is Human: Building a Safer Health System." Although there are subsequent reports challenging the validity of this study, it is collectively agreed-upon that medical error do occur. Key to addressing and or minimizing medical errors is communication. "High reliability" healthcare organizations are known for and champion the preceding. Communication is highlighted in DOD Team-STEPPS program. During my tenure at DDEAMC

TeamSTEPPS is not given emphasis as intended by DOD. Effective communication is essentially synonymous to best practices in healthcare. Prompt and fluid lessons-learned information sharing, especially of patient care errors, is critical. The rigid chain of command in military health care – composed of individual with human frailties, is an impediment. Addressing issues at the lowest level, is perhaps beneficial especially for confined resource management and mid-leadership development. However, with the preceding containment, facility-wide and overall patient welfare, safety and betterment of healthcare facility is not served. Unknown, preventable risks and or injury including death cannot be stopped or mitigated. Lack of protection for righteous individuals who want to report an actual or potential issue but does not meet the current government's definition Whistleblowing PPP is a significant impediment. The current system beginning from OSC grievance, the MSPB and higher court's administrative processes and requirements, the adjudication and judgments based on "tried-and-true" case precedents and current statues, the length of time and ordeal experienced with the preceding and other negative experiences, are significant deterrents. Lastly, the rigidity of the clerk of court of the supreme court, in approving writ of certiorari, though quite reasonably sound and lawful, is a deterrent. I now, personally know and fellow-Americans will soon be aware. It is highly unlikely federal healthcare agencies and ultimately congressional federal government oversight committee members are unaware of the above.

The military and medicine fundamentally have different intent, purpose, and philosophy. Although they may overlap during martial operations, with military medicine and or healthcare system in a supportive role. Moreover, medical personnel, who are soldiers, may have to ultimately, when necessary, engage the enemy as in the main purpose of warfighters. Discretionary authority granted the military and military operations is lawful and rightful with the preceding. Especially with a volunteer force, with no vote. However, the military health system has a dual purpose. It provides services to both active military and civilians in peace time and in war. Military health care beneficiaries including retirees and family members, whom I am one and with whom I represent, have patient care specific rights as well as the rights afforded by the U.S. Constitution. Among others, we have the right to determine happiness per our constitution. We have the right to agree or disagree with health care services we receive or are provided by the military health system – including military treatment facilities headed by active-duty treatment facility commanders.

As customers of health care services, we have the right to be informed of and agree or disagree with the quality of health care we receive including our contentment with follow-up care and coordination of our care. We have the right to agree or disagree with all patient care services including those that are enforced by commander's discretionary authority. We have the right to be informed of and gauge our happiness when we are rendered health care service that is not fully supported

and or lowered in priority as determined by commanders' discretion. We have to right to agree or disagree, and vote for governmental representatives who determine our government thru legislature including granting of discretionary authority to military commanders which includes military health care commanders.

There is a significant and deleterious dichotomy between safe and best practices in healthcare, and the current Merit Systems Protection Board (MSPB) and whistleblowing PPP. While healthcare best practice uses lesson-learned from even the minutia of near-miss mishaps or medical errors and uses the information for a greater good in the provision of safe, quality care and injury prevention, the current MSPB-related systems, has evolved mainly into a screening, immediate and persistent, whistleblowing and nexus component-nullifying, and retaliation issue claim dismissal program supported by adjudicated case precedents. Additionally, there are issues that are laundered thru confidential settlements, are unspoken, and eventually forgotten. Reasons can be varied including human predisposition for individual self-edifications and or gains, and or for organizations to defend against liabilities.

Dedicated agency legal representatives are masters. Individuals who, unlike medical professionals in general, are not indoctrinated with the Hippocratic oath to "do no harm." In military health care, the preceding can be fortified by the catchall discretionary authority afforded to commanders who are similarly subject to human frailties.

In military health care, the checks and balances afforded by case managers and others designated to confront, minimize or prevent actual and potential patient care issues that can translate to increased care cost are and can be easily stifled directly or indirectly including by military traditions and systems such as the rigid enforcement of the chain of command communications and addressing issues at the lowest level possible. It is good for resource management. It is not good for patient safety.

It is commonly known and advised in health care that safety is everyone's responsibility. The expectation does not readily translate to righteous actions since, once again, there is the humanness component of maintaining favorable and beneficial relationships and or protecting mutual best interests. Reporting or whistleblowing of issues is the beginning of resolution or the prevention of future issues. Because reprisals come in various forms and ways and is not confined to the obvious and or the most severe or significant end of the retaliation spectrum, who would want to report even minor patient care issues if they have no protection from reprisals? And whether they report or not, their government employment salary will remain unchanged? Possibly one of the bases for "Good enough for government work" which I have heard from others while employed with the VA and at DDEAMC.

Because the governments' criteria or definition of what qualifies for whistleblowing PPP protection is so high and strict, it is essentially useless. It is a rhetoric.

It is a farce. It is dangerous and a threat to Americans in healthcare settings.

The matured institutionalization of the MSPB systems and practices, the predictability and familiarity with what constitute a whistleblowing PPP, and with a compensated individual specialized and dedicated to ensure the best interest of agency, it is not too difficult to prevent events and avoid creating evidence that would reflect whistleblowing PPP nexus(es). For instance, Agency has an internal unspoken policy not to use email – the perfect evidence, to communicate patient care issues with healthcare partners. Even when email is used, healthcare providers have the ready and often legitimate alibi not to respond to emails by using patient care acuity priorities and or agency demands for patient-care productivity.

Moreover, the military or military health system is a subculture within the military subculture with its unique customs and traditions, and dynamics including communications, and is unlike the general U.S. populace. In accomplishing military missions, there are specified and unspecified or implied tasks. Specified task is often clear and documented. Implied tasks, the unspoken and often initially undocumented military projected activity. Both are comparably important and effective in accomplishing missions and or the meeting the desires or mandates of leadership. The “reasonable person” as use in jurisprudence, and may have been used by OSC, but lacking fundamental subculture familiarity specifics or is unfamiliar with the HIPAA privacy specifics, or is under presumption of

the often-presumed righteousness default deferred to Agency, is not entirely fair. Lack of communication evidence does not necessarily mean lack of knowledge of event, lack of instruction to carryout retaliation. In my case, there is hardcopy evidence of communication.

There are many deterrents and or stiflers for the righteous and righteous behavior in reporting errors and or wrongdoings. Add to it the protracted length of time, resources and expense, other untoward experiences involved with attempting to, as in my case, find resolution thru a cascade of pseudo-judicial and eventually the court systems that are bureaucratic and not immune to administrative errors – as with my experience with the OSC and U.S. CAFC.

Collectively, we as a nation have created a government-supported, current case precedents justified, and with the health care aspect of the military, that is long overdue to be addressed, a microcosmic and harmful autocracy.

As with the fundamental and critical “checks and balances” of our beloved democracy, an individual federal employee, being in the “trenches,” can possess important knowledge that serves as microcosmic “check and balances” when used soundly and appropriately by astute hierarchical leaders. The preceding is significant especially because of human imperfection – which leaders are not exempted. The landmark study and report by the department of defense (DOD) “To Err is Human” illustrates human imperfections and its impact in U.S. healthcare. DOD’s TeamSTEPPS is a viable and

practical solution to the preceding. However, as in my experience and observations while with DDEAMC, TeamSTEPPS is not a common and principal operational guideline. Concurrent, restrictive, and stifling military chain of command form of communication, seeming self-interests and or individual or organizational need for self-preservation or edifications, liability avoidance – including short term individual goals and objectives – such as the coveted successful command tour, and other concurrent priorities – such as business activities with immediate and or apparent benefits and rewards – clinic/provider patient care productivity, stability and longevity of programs such as to support graduate medical education program – that has short, long, professional and econo-societal impact, that can qualify as and ultimately be reflected as an accolade on ones' tour performance evaluations, can be impediments to optimal and enduring application of TeamSTEPPS and reaping its benefits.

The MSPB may have been optimal in years past. Possibly, ongoing individual federal agency performance reports to congress may still report relatively favorable information justifying its current existence. If statistically based, it is known that numerical information and interpretations is not immune to manipulation. Government-generated direct survey of military health care beneficiaries' health care experiences is not entirely accurate as there are still many patients whom I cared for, expressed distrust of survey participant anonymity, expressed fear of negative repercussions; fear of offending their doctors and

destroying relationship. Patients still largely view their doctors as knows best and not prone to errors. In healthcare settings where active duty is given priority and received more direct benefits from MTFs than their civilian – family members, beneficiary counterparts, civilians’ beneficiaries are essentially at the mercy of agency providers for their needed care. Protected reporting or whistleblowing is critical at all levels, for reasons from minor issues to significant, and should be ubiquitously used for checks and balances, hold all accountable as per merit systems principles, to ensure utmost – proactive, ongoing, and enduring comprehensive efforts for patient health, safety and welfare, leverage with sound taxpayer funds stewardship.

Before I learned about the congressional oversight committee, I asserted verbally and in documents I submitted with this case, in general and based on my on-going experience, that the federal government is overall contributory to the pervasiveness of – heart disease and cancer as falling in in the top 5 cause of death as reported by the CDC by allowing current MSPB institution and systems and processes to thrive. The legal catchall, discretionary authority given to commanders by the government when used by MHS commanders – with a dual mission can be used as a double-edge sword and the perpetuation of an autocracy that is principally repressive, especially to the ignorant of their healthcare rights, and practically unsafe if not harmful to and costly for Americans.

In near time, as in our history, fellow Americans at large will become aware of their military healthcare

and military healthcare commander's discretionary authority issues and well as MSPB-related issues and will eventually vote their general happiness. Americans will vote their happiness with federal government congressional oversight committee and committee members. Military veterans will vote on how our government treats a fellow veteran who, as I have, advocated for their and their loved-one's best interest. Veterans with disabilities will vote for how our government treats a disabled veteran who still want to continue dedicated service of positive contributions to our country and not be a ward to society. Americans will vote on the discretionary care their military-associated relatives and loved-ones received from the military health service system. Americans will determine and vote their agreement or disagreement regarding agency's discretionary mismanagement of cancer patients and patient on anticoagulation therapy, contributing to the pervasive top 5 cause of U.S. morbidity and mortality, and whether it meets governments definition of "specific danger to public health and safety" – a nexus requirement.

America's sons and daughters, and future generations, will become aware of the department of the army's values and high standard expectation especially of military officers and with regard to righteousness, integrity, personal courage and the championing of the preceding. And that when the preceding is embodied and executed by an individual within the department of the army, they will be relentlessly discredit and destroyed directly or indirectly and through

the efforts and methodologies of agency's representatives.

Based on my recent past and ongoing experiences, the current MSPB and associated systems including whistleblowing PPP retaliation protection, case adjudication systems and processes, and as a promoter of the merit systems principles, health, safety and welfare of Americans, and for good government, is a farce. It is a disappointment to me. Before my negative experiences, I had high hopes and expectations of the MSPB in upholding and championing the merit principles and employee protection from whistleblowing retaliation PPP. I come to find out that it is actually a deterrent for current and future righteous federal employees. Congress and Judiciary need to address this in synergy to recover and or revamp what has become a mere rhetorical congressional institution, that is essentially penalizing the righteous and dedicated federal employee.

In my opinion, congressional oversight committees' effort to fund the MSPB and carefully appoint three MSPB judges to address case backlog is good but falls short of what is critically needed to recover and re-operationalized the ideals of the merit systems principles to strongly support and facilitate an enduring good government. There are many areas in the current MSPB institutions, systems, and processes that are obsolete, inadequate and or apt for circumvention, rendering unfairness, injustice, pain and suffering, disappointments, and deterrence to the righteous.

Regardless of each of the three judges' qualification and intentions, they will be presented with "tried-and-true" case precedents in support arguments. It is known that MSPB appeals are rarely overturned. I believe it is very unlikely for agency representatives not to know this. One quick way to dispose of a whistleblower is to funnel individual, as in my case, using even questionable methods, such as selective application of HIPAA privacy mandate, legitimized by commanders' other alibis and ultimately discretionary authority, into the MSPB processes.

The new judges and their eventual future successors need to be provided with tools and supreme court pioneering decisions that will make MSPB systems as originally purposed by congress, for legal representatives to be appropriately tooled but careful, and for MSPB judges to be genuinely fair, current if not cutting-edge, in their adjudications and gatekeeping function for higher courts. Achieved, it is likely that true fairness and justice will be rendered to the 2000 appeal backlog cases. Achieved, it is likely none will attempt for a writ of certiorari but only to be dumped along with the 99 percenters. This will minimize frustrations, disgruntlement, further pain and suffering of righteous federal employees, minimize government waste and/or personnel/agency performance mediocrity, hold leadership accountable for misdeeds, and encourage them to be guided by sound righteous standards. Other than for the encouragement of federal employees and future federal employees, this will promptly facilitate and support an enduring good

government, that is safe to Americans and beneficial to the same and our country. Americans deserves nothing less.

I volunteered my case to the congressional oversight committee to be used in revamping the MSPB. My case has the intricacies that illustrates actual and potential problems with current retaliation and whistleblowing PPP program. This is a significant issue. Legislature and Judiciary need to address this issue collaboratively and in synergy.

#### **b. Recommendation**

Briefly, below are potential targets in revamping the MSPB and enhancing the intent of whistleblowing PPP retaliation protection:

1. To avoid misuse of and or circumvention of current and or obsolete statutes.
2. To prevent concealment of critical information or falsification of documents via incidental but legitimate redaction of PII/PHI in documents used in judicial proceedings.
3. To discourage abuse or misuse of health-care commander's discretionary authority that may render an autocracy in the delivery of care to civilian beneficiaries.
4. To discourage agencies from developing or instituting internal practices that is mainly aimed, not for patient care best practices but for covering wrongdoing and preventing the creation of liability evidence (such as the

non-use of e-mail – proof of wrongdoing) chain of command/tiered-stifling; not developing formal standard operating procedure (SOP) or policy with regard to transcription of email into health record.

5. To facilitate information sharing and or communication of actual and or potential health and safety related risks, threats, or events.

6. To re-validate the existence of and or justify government investment in the MSPB, and the Office of Special Counsel coverage of the Department of Defense, Department of the Army with regards to investigating Whistleblowing retaliation.

7. To empower federal workers in pursuance of righteousness including overall welfare and safety of individuals, efficiency and success in mission, good stewardship of taxpayer dollars, embodiment of the merit systems principles and overall good government.

8. To encourage agency leaders to respect employees and value their input and recognize their contributions

9. To render military line commanders' utmost – prompt or proactive comprehensive health/medical information from medical authorities that can impact warfighter Unit mission accomplishment and soldier and unit readiness and to widely educate thereof of this authority.

10. To grant military line commanders authority to disposition soldiers who are in the Medical Evaluation Board and to widely educate thereof of this authority.

11. Judiciary and Legislature need to promptly work in synergy to revamp the current MSPB systems and processes to minimize actual and potential health and safety risks to Americans, for sound stewardship of taxpayer dollars and government resources, and for good government.

12. Minimize loopholes, adjudication processing delays.

13. Most of my hardworking and dedicated previous NCM colleagues and federal employee DAC and VA acquaintances familiar with my achievements, contributions, morality and ethical principles I represent, are awaiting outcome of my case. They are now fearful and need to be promptly re-empowered.

14. Promptly re-empower the now likely discouraged but previously principled and dedicated federal employee who may comprise the 2000 MSPB appeal backlog cases.

15. Prevent misuse of HIPAA privacy rule.

16. More



**CONCLUSION**

For the foregoing reasons, I respectfully request that this Court issue a writ of certiorari.

Respectfully submitted by,

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