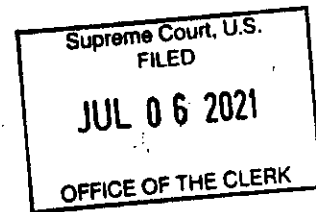


21-421

ORIGINAL

Case No.

In The
Supreme Court of the United States
Washington, D.C.



Damian R. Nastri,

Petitioner, Pro Se

v.

United States
Department of Homeland Security

Respondent

On Petition for a Writ of Certiorari to the
U.S. Court of Appeals for the Federal Circuit, *et al*

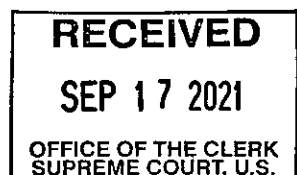
Nastri v. DHS, 21-1015, Fed. Cir., Oct 5, 2020.

Order issued April 6, 2021

PETITION FOR WRIT OF CERTIORARI

Damian R. Nastri
6419 Julian Street
Springfield, VA
22150

***Pro Se* Petitioner**



I. Questions Presented for Review

Can the U.S. Merit Systems Protection Board (hereafter MSPB, or Board); make decisions; solicit, hire, promote, transfer, reassign, or fire staff; select, refer, refuse, adjudicate or dismiss cases; retain in-house counsel; represent itself in Court and argue the position of the Board; have counsel serve as counsel to themselves, or concurrently serve as the chief executive of the Board, counsel for the chief executive and Board, Inspector General functional oversight for themselves and over the Board; or, be enabled to or otherwise obstruct due process or otherwise deprive the civil rights or civil liberties of complainants or other appellants – without *any* operable quorum of the Board; or, in the absence of *any* Presidentially-appointed and Senate-confirmed leader of the Board; or, without any Member thereof?

And, notwithstanding, or in the alternative, *arguendo* the Board was not insolvent or operating *ultra vires*, do this Court's holdings in *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 72 U.S. 10 (1963)¹, *Walker v. Southern Ry.*, 385 U.S. 196, 87 S. Ct. 365, 17 L. Ed. 2d 294 [1966],² as well as the 2nd Circuit's holdings in *Fay v.*

¹ Similar to the instant and underlying cases, this Court held exhaustion was not required, and prompt judicial review will be permitted, where claims involved questions of public or national importance. *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 72 U.S. 10 (1963), at 17.

² Similar to the instant and underlying cases, in a case involving a claim of an unfavorable personnel action, this Court analogously held that the plaintiff, who may have had to wait for years to be heard by the administrative agency, was not required to exhaust available

Douds, 172 F.2d 720 (2d Cir. 1949), ((accord, *Fitzgerald v. Hampton*, 467 F.2d. 755 (D.C. Cir. 1972)), ³ *et seq.*, or related, apply to appellants whose remedies before the Board, *et al*, have been constructively exhausted (whether by equivalently intolerable conditions for the specific petitioner, plaintiff or appellant), because of the Board's inability to provide timely review, relief, or due process of law; or for those who wish to be heard before a Court, because of the gravity of the questions and issues involved, or because the appellant can make a substantial showing that their Constitutional Rights were violated?

Furthermore, should the MSPB or the Office of Special Counsel (OSC), the so-called Special Counsel of the Board, comply with laws, rules, regulations, and the tenants of professional misconduct; can the MSPB remand for further investigation or otherwise hold the OSC accountable for violating same; and, can an appellant or other complainant to the MSPB or OSC, aggrieved and harmed by their violation of these, and deprived of their rights thereto, pursue legal claims in Court against them?

administrative remedies before commencing a court action. *Walker v. Southern Ry.*, 385 U.S. 196, 87 S. Ct. 365, 17 L. Ed. 2d 294 [1966])

³ The 2nd Circuit has held, and the DC Circuit has similarly held in accord, that exhaustion is not required when the petitioner has made a substantial showing that an agency action has violated his constitutional rights and the assertion of such rights is not "transparently frivolous." *Fay v. Douds*, 172 F.2d 720, at 723 (2d Cir. 1949); accord, *Fitzgerald v. Hampton*, 467 F.2d. 755 (D.C. Cir. 1972)

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IV. Petition for Writ Of Certiorari

Damian R. Nastri, *pro se*, a disabled, putatively-former, non-probationary, career-permanent, competitive service, line-of-duty injured law enforcement professional and military support employee of the Federal Executive Branch civil service; a putatively-protected EEO complainant, putatively-protected Federal witness of and regarding civil and criminal misconduct to and for both, the Federal Legislative and Executive branches; and a *bona fide*, lawful, U.S. government-determined whistleblower who suffered criminal retaliation and other prohibited personnel practices, *inter alia*, in retaliation for his (and his spouse's) whistleblowing and other Statutorily and Constitutionally protected activity, including for those other witnesses they helped in same – and of an entire class of putative petitioners – to seek a Writ of Certiorari from and for the Supreme Court of the United States, following violations of his and others' Constitutional Rights; and other unlawful and improper actions, exhaustion of remedies by both, the Federal Executive Branch, and Federal Judicial Branch, including multiple circuits thereof, i.e., the U.S. Court of the Appeals for the District of Columbia Circuit; and now, the U.S. Court of Appeals for the Federal Circuit.

V. Opinion Below

The decision by the Court of Appeals for the Federal Circuit, denying Mr. Nastri's appeal of prohibited

personnel practices, including Whistleblower Retaliation, and criminal retaliation of a witness; and violations of his Constitutional Rights; by the U.S. Department of Homeland Security (DHS); that Court's January 1, 2021, refusal regard the misfeasance, malfeasance, nonfeasance, and other illegal acts, including crimes, and violations of Constitutional Rights, by the U.S. Office of Special Counsel (OSC) preceding that; and, that Court's refusal to even recognize the foundational questions, as presented in the immediate case, as to the legality and operability of the Board, including its ability to prevent judicial review, judicial remedy or other due process of law, in either the absence of a quorum of the Board, or the absence of any Members of the Board – without ever even identifying a single judge, let alone the alleged panel that decided such; that Court's April 6, 2021, surreptitious remand to the illusory panel – which it then instantly denied, and then refusal to permit the requested rehearing en banc, which it also summarily denied – despite first impression questions before that Court of national importance, the lack of answer which threatened irreparable harm to thousands of appellants; and, that Court's concurrent failure to provide the petitioner any other avenues for any of his complaints, including even remand to the MSPB which their previous order simply derided, in the past presence aspirational, that , "Mr. Nastri **could have perhaps** appealed those decisions to the Merit Systems Protection Board;" and without explaining to the *pro se*

appellant his opportunities for review before this Court.⁴

VI. Jurisdiction

Mr. Nastri's *pro se* Petition for Review, On Petition for Rehearing En Banc, was denied on April 6, 2021.

Mr. Nastri, invokes this Court's jurisdiction under 28 U.S.C. § 1254(1), having timely filed a petition for writ of certiorari, and having endeavored, *pro se*, in good faith to follow the guidance of the Clerk of this Court thereafter.

VII. Constitutional Provisions Involved

United States Constitution, Amendment I:

"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...deprived of life, liberty, or property, **without** due process of law..."

United States Constitution, Amendment VII:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury **shall**

⁴ *Nastri v. DHS*, 21-1015, Fed. Cir., Oct 5, 2020. Order issued April 6, 2021, Mandate issued April 13, 2021.

be preserved..."

United States Constitution, Amendment IX:

"The enumeration in the Constitution, of certain rights, **shall not** be construed to deny or disparage others retained by the people."

Statutory Provisions or Regulations

Section 2 of Pub. L. 101-12, April 10, 1989

"[T]he primary role of the Office of Special Counsel is **to protect** employees, especially whistleblowers, from prohibited personnel practices; [and] (B) that the Office of Special Counsel **shall** act in the interests of employees who seek assistance from the Office of Special Counsel."

5 U.S.C. § 706

To the extent necessary to decision and when presented, the reviewing court **shall** decide **all** relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.

The reviewing court **shall**—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court **shall** review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C. § 1201

"The Merit Systems Protection Board is composed of 3 members appointed by the President, by and with the advice and consent of the Senate, not more than 2 of whom may be adherents of the same political party. The members of the Board shall be individuals who, by demonstrated ability, background, training, or experience are especially qualified to carry out the functions of the Board. No member of the Board may hold another office or position in the Government of the United States, except as otherwise provided by law or at the direction of the President. The Board shall have an official seal which shall be judicially noticed. The Board shall have its principal office in the District of Columbia and may have field offices in other appropriate locations."

5 U.S.C. § 1202(b)

"A member appointed to fill a vacancy occurring before the end of a term of office of the member's predecessor serves for the remainder of that term. Any appointment to fill a vacancy is subject to the requirements of section 1201. Any new member serving only a portion of a seven-year term in office may continue to serve until a successor is appointed and has qualified, except that such member may not continue to serve for more than one year after

the date on which the term of the member would otherwise expire, unless reappointed."

5 U.S.C. § 1202(c)

"Any member appointed for a 7-year term may **not** be reappointed to any following term but may continue to serve beyond the expiration of the term until a successor is appointed and has qualified, except that such member may **not** continue to serve for more than one year after the date on which the term of the member would otherwise expire under this section."

5 U.S.C. § 1203(a)

"The President shall from time to time appoint, by and with the advice and consent of the Senate, one of the members of the Merit Systems Protection Board as the Chairman of the Board. The Chairman is the chief executive and administrative officer of the Board."

5 U.S.C. § 1203(b)

"The President shall from time to time designate one of the members of the Board as Vice Chairman of the Board. During the absence or disability of the Chairman, or when

the office of Chairman is vacant, the Vice Chairman shall perform the functions vested in the Chairman."

5 U.S.C. § 1203(c)

"During the absence or disability of both the Chairman and the Vice Chairman, or when the offices of Chairman and Vice Chairman are vacant, the remaining Board member shall perform the functions vested in the Chairman."

5 C.F.R. § 1200.2 Board members and duties.

"(a) The Board has **three** members whom the President appoints and the Senate confirms. Members of the Board serve seven-year terms.

(b) The President appoints, with the Senate's consent, **one** member of the Board to serve as Chairman and chief executive officer of the Board. The President also appoints one member of the Board to serve as Vice Chairman. **If** the office of the Chairman is vacant or the Chairman cannot perform his or her duties, then the Vice Chairman performs the Chairman's duties. **If** both the Chairman and the Vice Chairman cannot perform their duties, then the remaining Board Member performs the Chairman's duties."

5 U.S.C. § 1204(a)

"The Merit Systems Protection **Board** shall—

(1) hear, adjudicate, or provide for the hearing or adjudication, of all matters within the jurisdiction of the Board under this title, chapter 43 of title 38, or **any** other law, rule, or regulation, and, subject to otherwise applicable provisions of law, take final action on any such matter;

(2) order **any** Federal agency or employee to comply with **any** order or decision issued by the Board under the authority granted under paragraph (1) of this subsection and enforce compliance with any such order; ...and,

(4) review, as provided in subsection (f), rules and regulations of the **Office of Personnel Management.**"

5 U.S.C. § 1204(e)(1)(B)(i)

"The Merit Systems Protection **Board** may, during an investigation by the Office of Special Counsel or during the pendency of any proceeding before the Board, issue any order which may be necessary to protect a witness or other individual from harassment..."

5 U.S.C. § 1204(j)

"The Chairman of the Board" may appoint such personnel as may be necessary to perform the functions of the Board. **Any** appointment made under this subsection **shall** comply with the provisions of this title, except that such appointment shall not be subject to the approval or supervision of the Office of Personnel Management or the Executive Office of the President (other than **approval required** under section 3324 or subchapter VIII of chapter 33)."

5 U.S.C. § 1213

"Whenever the Special Counsel receives information of a type described in subsection (a) of this section, the Special Counsel **shall** review such information **and**, within 45 days after receiving the information, determine whether there is a substantial likelihood that the information discloses a violation of any law, rule, or regulation, or gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health and safety."

5 U.S.C. § 1214(a)(1)(A)

"The Special Counsel **shall** receive **any** allegation of a prohibited personnel practice and **shall** investigate the

allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken."

5 U.S.C. § 1214(b)(2)(B)

"If, in connection with **any** investigation, the Special Counsel determines that there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken which requires corrective action, the Special Counsel **shall** report the determination together with any findings or recommendations to the Board, the agency involved, and to the Office of Personnel Management, and may report such determination, findings and recommendations to the President..."

5 U.S.C. § 7701(b)(1)

"**The Board** may hear any case appealed to it or may refer the case to an administrative law judge appointed under section 3105 of this title or other employee of the Board designated by the Board to hear such cases, except that in 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..."

5 U.S.C. § 7701(c)(2)

[The agency's decision may not be sustained under subsection (b) of this section if the employee ***or applicant for employment***—

(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

(B) shows that the decision was based on **any** prohibited personnel practice described in section 2302(b) of this title; or,

(C) shows that the decision was **not** in accordance with law.

5 U.S. Code § 7703(c)

"In **any** case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence"

VIII. Statement of the Case

In 1883, at the behest of the President, Congress created the Civil Service Commission (CSC), a bi-partisan, three-person commission designed, *inter alia*, to prevent political corruption, eliminate patronage, protect federal workers, and uphold the integrity of the civil service system.⁵ In 1978, the functions of the CSC were split between the Office of Personnel Management (OPM), and Merit Systems Protection Board (MSPB, or Board).⁶

Modeled after CSC, MSPB was created as a bi-partisan, unconflicted, three-person Board. 5 U.S.C. § 1203

It was codified that **The Chairman of the Board**, a Principal Officer of the United States, **is the Chief Executive and Administrative Officer of the Board**. 5 U.S.C. § 1203(a).

During the absence or disability of the Chairman, or when the office of Chairman is vacant, the Chairman's first deputy, **the Presidentially-Appointed and Senate-Confirmed Vice Chairman**, shall perform functions vested in the Chairman, as the Chief Executive and Administrative Officer of the Board. 5 U.S.C. § 1203(b)

And, during the absence or disability of both the Chairman and Vice Chairman, or when both the offices of

⁵ Pendleton Civil Service Reform Act

⁶ Reorganization Plan No. 2 of 1978 (43 F.R. 36037, 92 Stat. 3783) and the Civil Service Reform Act of 1978.

Chairman and Vice Chairman are vacant, under the law, **only the remaining** (Presidentially-Appointed and Senate-Confirmed) **Board Member**, can (and must) perform the functions vested in the Chairman, as the Chief Executive and Administrative Officer of the Board.
5 U.S.C. § 1203(c)

That is the statutory line of delegation for the Board to operate – a Board which was created to specifically be run by a Senate-confirmed, bi-partisan Board of three (or arguably, a quorum thereof). ***That is it. Period.***

On or about January 7, 2017, after the second of the only two remaining confirmed leaders of the MSPB, and of the only two remaining Members of the Board, Chairman Susan Tsui Grundman, departed the Board, with lawyers⁷ and journalists opining what this meant for the Board's operations, or seemingly regurgitating questionable information from others or the Board itself – and the Board lost the quorum it required to make any decisions, and therefore no longer had any operable quorum.⁸

After this, as the last remaining Member (Mark Robbins) was apparently preparing to take the conflicted roll of counsel for the Defense at the OPM, while concurrently

⁷ MSPB Chairman Resignation and the Impact on Board Operations, Harris Law Firm, <https://www.federaldisability.com/blog/2017/01/mspb-chairman-resignation-impact/>

⁸ No Quorum at MSPB Will Halt Decisions on Federal Employee Petitions, FedSmith, January 10, 2017. <https://www.fedsmith.com/2017/01/05/no-quorum-at-mspb-will-halt-decisions-on-federal-employee-petitions/>

remaining acting Chairman of the Board) and therefore the Chief Judge over his own Defense, he took actions to overturn MSPB policies which had been decided under a quorum of the Board.⁹

Inter alia, Mr. Robbins changed the policy from that which allowed an individual appellant (the only party with rights to hearings before the Board and rights to Court) to voluntarily rescind their own Petition for Reconsideration or other pending action for the Board and go to Court, to instead require the implicated government agency violators – Robbins impending Defense clients – to permit such, thereby depriving the appellants from their rights to judicial review or other due process, especially during the absence of **any** operable quorum of the Board under which MSPB could hear or act on those petitions or other motions; thereby leaving aggrieved appellants subject to retaliation or obstruction by the implicated violators.

In October 2018, while Mr. Robbins was preparing to burrow into the role of OPM General Counsel, and while allegations were pending with the MSPB General Counsel/IG regarding misconduct by the MSPB under Mr. Robbins, and violations by the OSC under Tristan

⁹ Congress felt so strongly that one agency, let alone one person, should not exercise function now held by both MSPB and OPM that in and since 1978, it separated those function out from the CSC into the separate agencies. In taking on both positions, Mark Robbins not only undid the well-established purpose of the law, and undermined the Merit System – or any appellants ability to a fair and impartial avenue, but essentially concurrently served as both the Chief Justice (i.e. Chairman of the MSPB) and Solicitor General (i.e. General Counsel of OPM).

Leavitt; while legal actions by OSC under Mr. Leavitt's signature were pending in Court against Mr. Robbins, and while Mr. Leavitt was under charges for misconduct at OSC by multiple individuals (including Mr. Nastri's spouse, a senior attorney under Mr. Leavitt at OSC),¹⁰ Mr. Robbins burrowed Mr. Leavitt – who had never regularly practiced law or held a merit based government job a day in his life, into the conflicted role of MSPB General Counsel/IG, as a Member of the Senior Executive Service, outside either the procedures of the Merit System, or the appointment of the President and confirmation of the Senate; thereby avoiding scrutiny of their conflicts.

On Mr. Leavitt's first day as MSPB General Counsel/IG, the MSPB General Counsel/IG shut down weeks or months of complaints by Mr. Nastri. And, though Mr. Nastri was an experienced Federal IG investigator whose similar prior disclosures had been confirmed as correct by both Congress and OSC, including under Mr. Leavitt, Mr. Nastri's charges against the MSPB (which implicated the OSC and Mr. Leavitt), and though those complaints not only reported the MSPB's illegal mishandling of and deprivation of any merit hearing in Mr. Nastri's cases pending for the Board, but also reported other alleged fraud, waste, abuse, mismanagement, and professional misconduct by MSPB staff attorneys and others, the MSPB

¹⁰ See, for example, the resulting case, *Alissandra G. Nastri v. Henry Kerner*, Special Counsel; and, U.S. Office of Special Counsel, *et al*, Civil Action No. 20-1334, D.D.C., May 19, 2020

General Counsel/IG summarily dismissed all the charges, without any investigation, under the false premise that no such allegations raised any issues cognizable under the Inspector General Act, nor did the MSPB General Counsel/IG refer or allow a single allegation to be referred to MSPB management, disparately in violation of the Board's own policies and prior practices.

And, though Mr. Nastri was disabled, and though he had reasonable and timely filed complaints of discrimination, these too were refused for any investigation by MSPB.

With certain Members of Congress's and others' belief that the MSPB was not properly serving the nation, following the law, or even needed in existence; and, the U.S. Senate's willful decision **not** to confirm **any** new replacements to the Board, on February 28, 2019, the, maximum legal period for carryover of the last remaining Member of the Board (Mark Robbins) already expired term as a Member of the Board itself also ran out.

The Board was left without **any** Member. 5 U.S.C. § 1202

Abusing his authority to seize control, since March 2019, Tristan Leavitt (the Board's reportedly unethically or illegally appointed; and irrefutably non-merit, non-competitively appointed, non-Presidentially-appointed and non-Senate Confirmed General Counsel) – who was not and had no claim to be any Member of the Board, has instead, ***sua sponte***, presumed to have subsumed the role of Chairman, holding himself out to,

concurrently no less, not only still be the General Counsel to a Board with no Members, but to himself also concurrently be the acting **Chief Executive and Administrative Officer** of the Board (i.e. Chairman).

In doing so, since March 2019, Mr. Leavitt, a licensed attorney subject to the rules of professional conduct, has, *sua sponte*, presumed to serve, *concurrently*, as his own boss, his own legal client, his own legal defensive agent, and his own Inspector General (IG) equivalent oversight, even while taking personnel actions on others without the authority to do so, while presuming to designate staff attorneys as “administrative judges”¹¹, while presuming the Board’s authority to delegate cases to these employees, and while representing the position of the Board – including in Court – without a single Member – a single client to tell him their position, even on cases that not a single Member of the Board had ever even heard, let alone decided – and therefore without any legal standing to do so.¹²

¹¹ The Board’s “administrative judges” are not to be confused with “Administrative Law Judges”. The former are simply career, unionized, civil servant, staff attorneys or other employees at the MSPB who subsume the title of “administrative judge” when delegated cases from the Board, while the latter are statutorily created independent ALJs. And while the Board is authorized ALJs, and though it has the ability to delegate cases to independent ALJ’s throughout government, it does not have them, and rarely ever uses them – even when cases involve whistleblowers against current or former OSC or MSPB Board Members or staff.

¹² In cases that directly implicated Mr. Leavitt and his purported staff in misconduct, and directly charged the Board, Mr. Leavitt has even entered himself and his subordinate as counsel for the Board, while concurrently

1. The Underlying Case in *Nastri v. DHS*

In 2016, after OSC had determined (but illegally failed to report) that Mr. Nastri had in fact suffered prohibited personnel practices by his current employer, the U.S. Department of Defense, and had been retaliated against for his whistleblowing and protected activity (including to Mr. Leavitt's former boss and Committee in Congress), but while OSC was illegally failing to protect him and correct matters as required, Mr. Nastri applied for other employment.

Relevant to the instant case, and as a tenured, permanent-career GS-1810-14 investigator, Mr. Nastri applied (on August 8, 2016) for a competitively announced GS-1810-13/14 investigator position, which (at full potential) still simply constituted a lateral transfer into the respondent agency, DHS, for assignment in its IG, for DHS's whistleblower protection and retaliation investigations program.

Unlike any position Mr. Nastri had ever applied to, due to his unique experience overseeing

claiming to be the head of the Board, and while claiming to argue the position of the Board and deprive petitioners of suit against the Board, in the absence of any Member of the Board, let alone a quorum thereof – including in cases that Mr. Leavitt irrefutably knew the appellant was a whistleblower who had been retaliated against and otherwise suffered prohibited personnel practices which the Board or the Court were required to overturn and correct. See, for example, and for inclusion in the instant case, *Nastri v. Tristan Leavitt, MSPB, et al*, 19-1130, DC Cir., June 14, 2019; *et seq.*

whistleblower retaliation investigations throughout the DoD and its military services, his expertise in both civilian and military whistleblower protections, his validated ability to diagnose the problems, failures, and illegalities of the nation's largest whistleblower programs, his experience in multiple civilian and military components of DHS and with Congress, and his other advanced training and experiences, Mr. Nastri was literally the single most qualified person in the entire world for this position, and to help develop and coordinate DHS's program – a fact that recognized by both DHS IG and OSC.

Mr. Nastri went through assessments, interviews and other checks, and was ultimately selected by DHS. However, since Mr. Nastri still needed to have his records cleared and corrected at DoD, as OSC had pledged and promised to do, he suggested the idea of his first coming over as a detail, to free up additional DHS funds to help the program during that initial period, whereafter – under the Merit Systems rules, he could be non-competitively transferred to DHS. DHS IGs leadership was amenable to this, and offered Mr. Nastri such as his option. Mr. Nastri elected such.

DHS IG even wanted Mr. Nastri so badly that they altered their hiring plans, rewrote his position description, modified the required security clearance, and all sorts of other things to get him.

Unfortunately, since OSC failed to prevent a subject of Mr. Nastri's whistleblowing, and a conflicted suspect in the cases OSC was investigating (William "Bill" Kraus), from interceding in matters; this only caused more problems.

Not only had multiple officials of the DHS IG offered Mr. Nastri the job, and congratulated him for such, but they notified him in late December 2016 that they were just waiting for his official Entrance on Duty (EOD) date as DHS staff to be assigned by HR, so he could start at DHS, in a matter of days, in his new job.

Just days later, in early January 2017, Mr. Nastri discerned that Mr. Kraus, a bar-licensed attorney, not only engaged in what appeared to be professional misconduct, but willfully committed what Mr. Nastri had credible reason to believe constituted fraud or other criminally false statements in the documents of Mr. Nastri's detail that Mr. Kraus was providing DHS.

Mr. Nastri promptly reported to the DHS IG, including via DHS IG's attorneys, and the DHS whistleblower program.

Proximately, Mr. Nastri's future supervisor at DHS – the head of DHS's whistleblower program no less – (unlawfully) tried to order Mr. Nastri not to make such

disclosures, not to use his own personal email account, not to exercise free speech.

Leaving town, due to the violations, and not even being specifically aware of much of this, Mr. Nastri emailed again before leaving the country on vacation.

Days later, the DHS IG rescinded his hiring, and the head of DHS's whistleblower program admitted to Mr. Nastri that he lost the job because of his email disclosing such allegations to the IG or because he did not comport with her (unlawful order) – apparently sent while he was on leave, by a person who was not even his supervisor yet – to not write the IG's office about such alleged misconduct like that.

DHS IG also boldly revealed that the DHS IG General Counsel's office and the DoD IG General Counsels office apparently colluded on the matter, and used Mr. Nastri's whistleblowing or other protected activity against him with his current superior, the acting DoD IG.

Mr. Nastri promptly began reporting DHS (and DoD's) violations and other misconduct to OSC. And - though OSC even conceded that, if not for Mr. Nastri sending those emails, he would have had the DHS job – DHS still resisted actually investigating his allegations.

As OSC still failed to protect him, and Mr. Kraus was

instead allowed to continued to retaliate against Mr. Nastri, and even illegally subsume the DoD's own defense against Mr. Nastri aforementioned OSC case with the Board (which, though OSC conceded he was a whistleblower who was retaliated in it, since he refused to quietly and insufficiently settle, without full corrective actions, as Mr. Leavitt, et al, wanted him to), Mr. Nastri was forced – outside the intent of Congress, to take the foundational case to the Board himself.

And therein, while the Board's "administrative judge" under Mr. Robbins refused to even properly regard or permit Mr. Nastri's interlocutory appeal challenging Mr. Kraus's conflicts or standing as counsel, and reporting evidence that Mr. Kraus, et al, had knowingly committed crimes and other professional misconduct before the Board, including knowingly suborning perjury.

But thereafter, Mr. Leavitt illegally suppressed Mr. and Mrs. Nastri's complaints at OSC, and sought to shut down Mr. Nastri's cases at OSC without the protection or assistance the law gave him rights to, if he would not accept a settlement to waive his claims against DoD that implicated Mr. Leavitt *et al*.

Then, Mr. Leavitt transferred to MSPB, and blocked all of Mr. Nastri's complaints of such at MSPB from any investigation either.

In January 2020, prior to that by which OSC no longer had a non-discretionary requirement to investigate, and since OSC had never prior initiated a formal case for Mr. Nastri's charges against DHS, he formally filed a new case against DHS with the OSC.

Despite the proper procedures for investigations, OSC not only assigned improperly and unethically conflicted staff to handle his case, but they never actually interviewed Mr. Nastri, allowed him to fully clarify or supplant his complaint, interviewed any subjects or witnesses, contacted the subject agency, or even sent him a formal closure in writing. Instead, on or about June 18, 2020, OSC apparently informally relayed to Mr. Nastri, via email, that they had ended their inquiry – and did not even recognize it as an inquiry into violations of the statutes Mr. Nastri filed under.

After wasting years with two illegally mishandled cases before the Board on related matters, including that which Mr. Leavitt was refusing to allow Mr. Nastri to proceed to Court with – even in the absence of any operable Board – and of the reasonable belief that there was no lawfully operable Board that could grant Mr. Nastri's requests for corrective actions, injunctive relief, or other protective orders, on August 24, 2020, he filed directly with what was supposed to be the

appropriate reviewing Court, the U.S. Court of Appeals for the Federal Circuit.

And therein, *inter alia*, he raised questions of first impression before that Court regarding, *inter alia*, the fact that the Board's regulations were illegally in violation of Federal Statutes, that the Board itself was illegally depriving appellants of their rights under the law – including their Constitutional Rights; that the Board concede its own inability to exercise most of its codified functions – including protective orders; and ultimately, that cases could be viewed as constructively exhausted since the Board had lost any operable quorum, let alone any Member of the Board; and, that the Court should declare it and all such.

The Federal Circuit failed to ever regard these questions of first impression and national importance, let alone much else of Mr. Nastri's *prima facie* case; and closed the case without discovery or any hearing, and without referring any of Mr. Nastri's claims anywhere else, or providing him any other recourse; or giving the *pro se* appellant any useful guidance – even though the Federal Circuit was specifically created to have primary jurisdiction on matters related to the MSPB, and to help *pro se* appellants – (just like the D.C. Circuit did with Mr. Nastri's previous related case, in which they also refused to regard any of his questions of national importance, failed to refer any of his claims against OSC, the MSPB or others

down to the DC District, and – while a subject in the case was on staff with the Court – that Court literally suppressed Mr. Nastri follow-on petition, until after the date it could be heard (and until after Mr. Nastri reported such misconduct to the DOJ and the Judiciary) and then they dismissed the bulk of his case, based upon Motions from the Board’s General Counsel, without ever considering the outstanding question as to whether the Board’s General Counsel had standing to represent as such, or whether the MSPB was operable or able to be forced as a required administrative route, in the absence of any Members).¹³

The Federal Circuit never even assigned any judges to Mr. Nastri’s case, and only later claimed to have designated and utilized a panel, after Mr. Nastri filed a Petition for Rehearing En Banc, as part of their April 6, 2021, summary dismissal of same – without regarding the foundation questions, and without recourse.¹⁴

XI. Reasons for Granting Petition

In addition to the Petitioner, thousands of other appellants have been unable to get a stay or other

¹³ *Nastri v. Tristan Leavitt, Merit Systems Protection Board, et al*, 19-1130, D.C. Cir., June 14, 2019

¹⁴ *Nastri v. DHS*, 21-1015, Fed. Cir., Oct 5, 2020.

protective order; a review of their petition for the erroneous mishandling of the oft cited as biased or otherwise incompetent MSPB staff attorneys who presume the title of Administrative Judge (AJ); or even pull themselves out of years of limbo by withdrawing their own voluntarily-submitted petition so they can seek due process in any Court without the leave of the of the defendant agency of the government – parties who don't enjoy the same initial rights to stay or merit hearing before the Board; or without first wasting many months or years before a Board that – even when it did function, rarely gave appellants the merit hearing they have a statutory right to, and almost never provided them any relief, let alone full corrective and compensatory relief.

In fact, though they tried to mislead with it, careful analysis of a 2019 article released under Mr. Leavitt's tenure revealed that only 19% of cases (5,000 of the 26,000 sampled cases) that are filed with the Board are even able to get a decision – **any** decision, even just in the interim by an inferior MSPB AJ, one way or the other, on the merits of their cases. And then, of those 19% of cases the MSPB actually let get any hearing on the merits, an average of just 18% of those 19% of cases – less than one-fifth the cases they allowed to proceed, which was itself less than one-fifth of the cases, get relief.¹⁵

¹⁵ *Issues of Merit, Insights and Analyses for Federal Human Capital Management*, at page 3, MSPB, May 2019.

That means that – even though the law states, and Congress asserted that complainants had a “**Right to a Hearing**,” even a “**Right to a Full Hearing**,” and that the rights to a hearing belonged to the appellant, and with the appellant was also the right to waive the hearing, thereby exhausting administrative process ¹⁶ -- less than one-fifth of MSPB cases get any hearing and decision on their case, and even then, less than one-fifth of less than one-fifth – or 3% -- of any such MSPB cases receive **any** such relief.

Congress also made clear their intention with the law that complainants who appealed matters relating to Federal employment to the MSPB had a **right** to a hearing, and the right to be represented. They further underscored that the rights to a hearing belonged to the appellant, and with the appellant was also the right to waive the hearing, thereby exhausting administrative process.¹⁷

It was this Court itself that wisely reminded the government that procedural due process rules are meant to protect persons from the mistaken or unjustified deprivation of life, liberty, or property. *Carey v. Piphus*, 435 U.S. 247, 259 (1978)

Moreover, “The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of

<https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1613653&version=1619487>

¹⁶ H. Conf. Rep. 95-1717 at 132, 134. Oct.5, 1978.

the facts or the law... At the same time, it preserves both the appearance and reality of fairness ... by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." *Marshall v. Jerrico*, 446 U.S. 238, 242 (1980); *Schweiker v. McClure*, 456 U.S. 188, 195 (1982)

At current, thousands of U.S. Citizens, including brave whistleblowers who risked their careers in such public service, have been or are being deprived of liberty, property, and even life – without due process, and without any accountability for the violators. Congress created a system with OSC and the MSPB that was supposed to help ensure that, but in truth, they have not been doing it for decades. Every few years Congress realizes it, holds hearings, changes laws, and makes demands. OSC and MSPB make promises. But in the end, and as the data shows, it's still a dysfunctional, broken, incestuous and otherwise illegal system.

And now, given the state of affairs at the MSPB, even *if* or when Congress decides to consider and confirm replacement, even assuming they would be capable people without conflicts, it will be years before the .Petitioner and hundreds to thousands of others could even get chance for a hearing before the board – and even then, the odds of that are as bad as the lottery – let alone any remedy. This is not the due process Congress or the Founding Fathers envisioned or the people are promised.

CONCLUSION

A shadow bureaucracy (i.e., MSPB staff), neither appointed by the President, nor confirmed by the Senate, nor operating under the supervision or active referral and delegation as required of anyone who had been appointed by the President nor Confirmed by the Senate to lead such – let alone the requisite quorum of such to operate, has been acting *ultra vires* for years, and preventing due process, judicial review ; and otherwise acting in concert, colluding with or accessories after the fact, with other conflicted bureaucrats (e.g., OSC), whom Congress has been trying to reign in for decades, demonstrating a clear insufficiency of the system.

This Honorable Court should grant certiorari; and, ensure the availability of the Courts, due process of law, and Constitutional Rights to petitioners, plaintiffs and appellants – for not only the petitioner, but also an entire class of current and former career Federal Employees (or qualifying applicants thereto), whistleblowers, U.S. Citizens who, at this point, number in the thousands or more – and this Court should do so whether it is inconvenient to the lower courts or the administrative agencies or not.

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