

Case No. 21-421

---

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

---

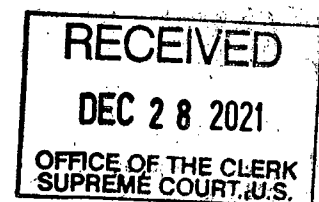
**PETITION FOR REHEARING OF WRIT OF CERTIORARI**

---

**Damian R. Nastri**  
6419 Julian Street  
Springfield, VA  
22150

***Pro Se* Petitioner**  
(703) 569-0414

---



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

---

No. 21-421

Damian R. Nastro, *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*

---

**PETITION FOR REHEARING OF WRIT OF CERTIORARI**

---

Pursuant to Rule 44 of this Court, the Petitioner, *Pro Se*, respectfully petitions this Honorable Court for rehearing.

1. This petition involves, *inter alia*, claims by the petitioner, for himself as an appellant of standing (and a class of **thousands** of others), that the Merit Systems Protection Board (MSPB or Board) – a Federal board that is strictly constituted, per statute, by three Presidentially-appointed and Senate-confirmed members;<sup>1</sup> whose agency head – acting or not – **must** be one of those three members;<sup>2</sup> and who is stipulated, even by Congress and the Board, to have a quorum of two – has been, since losing quorum in 2017, let alone since losing **all** members by 2019, able to be considered constructively exhausted as an administrative remedy, let alone *ultra vires* and insolvent.

---

<sup>1</sup> 5 U.S.C. § 1201

<sup>2</sup> 5 U.S.C. § 1203

2. Without regarding Petitioner's questions, the Appeals Court dismissed the case without answer, transfer, remand, or any guidance for the *Pro Se* appellant; without permitting rehearing, and without recognizing this Court's own precedence.<sup>3</sup>
  
3. This Court has found cases of arguably lesser magnitude or merit as "Cert-worthy", while multiple appeals Courts and this Court have ignored the bigger questions – matters of first impression caused by events unprecedented in history.<sup>4</sup>
  - a. This Court held that certain administrative law judges (ALJs) are "officers of the United States" and subject to the Constitution's Appointments Clause. *Lucia v. Securities and Exchange Commission*, 17-130, June 21, 2018.
  - b. This Court also determined that other administrative judges were "officers of the United States," who exercised "significant authority," and, therefore, were subject to the

---

<sup>3</sup> See, for example, *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 130 S. Ct. 2635 (2010); and, *NLRB v. Noel Canning*, 573 U.S. 513, 134 S. Ct. 2550 (2014), which reinforced the illegality of the current Board.

And, in the alternative argument, see, for example, *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 72 U.S. 10 (1963)<sup>3</sup>; and, *Walker v. Southern Ry.*, 385 U.S. 196, 87 S. Ct. 365, 17 L. Ed. 2d 294 [1966];<sup>3</sup> as well as the 2<sup>nd</sup> Circuit's holdings in *Fay v. Douds*, 172 F.2d 720 (2d Cir. 1949), ((accord, *Fitzgerald v. Hampton*, 467 F.2d. 755 (D.C. Cir. 1972)),<sup>3</sup> *et seq*, or related cases that, regardless, also relieved the Petitioners administrative exhaustion needs, *arguendo* they existed.

<sup>4</sup> This is the first time in history that the MSPB has had **no** Board Members.

Constitution's appointments clause. *United States v. Arthrex, Inc.*, 19-1434, June 21, 2021

- c. The Court has yet to regard that the system for holding ALJs accountable has been *ultra vires*, or otherwise defunct, for the same reasons in the immediate petition.

- i. The oversight of and administrative remedies for all ALJs, is the MSPB.

5 U.S.C. § 7521(a)

- 4. Though the Appeals Court failed and refused to regard the *Pro Se* Petitioner's superior questions, it entertained appellants who had the benefit of counsel, and regarded lesser scope (but still important) claims as to the legality of MSPB staff.<sup>5</sup>

- a. However, the Petitioner notes that whether MSPB staff who presume to be judges are lawful, which Petitioner contends they are not without Members – they are just the **trees**.

The legality of the MSPB is the **forest**.<sup>6</sup>

**5. A house divided against itself cannot stand.**

Though previously unknown and obfuscated by the

---

<sup>5</sup> *McIntosh v. Defense*, 19-2454

<sup>6</sup> The MSPB's staff, who intermediately hear cases on behalf of the Board, and who presume the title of 'Administrative Judge', are only empowered to do so **not only** when designated to such position by the Board, but because they must also have a case actively referred to them by the Board, which Petitioner argues **CANNOT** occur in the absence Board Members. 5 U.S.C. § 7701(b)(1)

government, they have similarly argued,  
albeit at a self-servingly lower standard.

- a. The Department of Defense has successfully had multiple cases dismissed by putative Board judges on grounds related to whether the Board's employees are empowered or can otherwise issue judgements.<sup>7</sup>
- b. The Department of Justice (DOJ) has also relied upon such to dismiss cases before the Board.<sup>8</sup>
- c. In fact, after this Court decided *Lucia*, and since the MSPB has not had an operable quorum, **the federal government has reportedly raised the argument in roughly 180 cases**, by December 2020 alone, as MSPB's spokesman told the media.<sup>9</sup>
- d. Numerous other Departments and Agencies have also argued for dismissal on grounds related to whether the Board's employees are properly empowered or can otherwise issue judgements.<sup>10</sup>

---

<sup>7</sup> *Martin v. DOD*, No. SF-0752-19-0687-I-2, 2020 WL 5291525 (M.S.P.B. Aug. 31, 2020); *Alston-Emerson v. DOD*, No. DC-0752-20-0346-I-2, 2020 WL 5291455 (M.S.P.B. Aug. 31, 2020); *Gipson v. DOD*, No. DC-531D-20-0665-I-1, 2020 WL 5521596 (M.S.P.B. Sept. 10, 2020).

<sup>8</sup> *Mitchell v. DOJ*, No. AT-0752-21-0167-I-1, 2021 WL 168664 (M.S.P.B. Jan. 12, 2021) (“**The agency [DOJ] asserts that the undersigned Administrative Judge lacks the authority to decide this appeal under *Lucia*.**”); *Easley v. DOJ*, No. AT-0752-20-0785-I-1, 2020 WL 7029547 (M.S.P.B. Nov. 24, 2020) (same).

<sup>9</sup> Complex appointments clause challenges throw some MSPB cases in limbo, Federal News Network, February 18, 2021: <https://federalnewsnetwork.com/workforce-rights/governance/2021/02/complex-appointments-clause-challenges-throw-some-mspb-cases-in-limbo/>

<sup>10</sup> See, e.g., *Joe v. Dep't of Health & Human Serv.*, No. DE-0752-21-0069-I-1, 2021 WL 414465 (M.S.P.B. Feb. 21, 2021); *Collins v. Dep't of Health & Human Serv.*, No. PH-0752-21-0042-I-1, 2020 WL 6877625 (M.S.P.B. Nov. 16, 2020);

- e. The Respondent (DHS) has multiple times argued for dismissal on grounds related to whether the Board's employees are properly empowered or can otherwise issue judgements.<sup>11</sup>
6. In the absence of *any* Court answering Petitioner's questions, **thousands** of appellants have had their cases stuck, pending reputed exhaustion, to first be heard by Members of the Board, even in the absence of the requisite quorum or any Members thereof, which there have not been for **years**; and to be stuck for **years** more.
7. Throughout this, the Board's General Counsel, who the petitioner believes to have been illegally qualified and premeditatedly burrowed in; an individual who was

---

Savage v. Dep't of Health & Human Serv., No. DC-0752-19-0805-I-4, 2020 WL 6269230 (M.S.P.B. Oct. 23, 2020); Johnson v. Dep't of Health & Human Serv., No. DC-0752-20-0538-I-1, 2020 WL 2516220 (M.S.P.B. May 12, 2020); Davis v. Dep't of Health & Human Serv., No. DC-315H-19-0806-I-2, 2020 WL 2516194 (M.S.P.B. May 11, 2020); Dews v. Dep't of Health & Human Serv., No. DC-0432-18-0190-I-3, 2020 WL 1852833 (M.S.P.B. Apr. 8, 2020); Holly v Dep't of Health & Human Serv., No. DC-0752-19-0548-I-2, 2020 WL 1130134 (M.S.P.B. Mar. 5, 2020); Kabria v. Dep't of Health & Human Serv., No. DC-1221- 20-0184-W-1, 2020 WL 231268 (M.S.P.B. Jan. 9, 2020); Barbour v. Dep't of Health & Human Serv., No. DC-1221-20-0234,W-1, 2020 WL 231222 (M.S.P.B. Jan. 8, 2020); Bonnenburg v. Dep't of Health & Human Serv., No. DC-3443-20-0233-I-1, 2020 WL 231225 (M.S.P.B. Jan. 8, 2020); Clark v. Selective Serv. Sys., No. DC-0752-20-0230-I-1, 2020 WL 997078 (M.S.P.B. Feb. 25, 2020); Tippie v. Dep't of Navy, No. DC-0752-20-0823-I-1, 2020 WL 6548647 (M.S.P.B. Nov. 3, 2020); Ogrysko, *supra* note 2 (noting Appointments Clause arguments by the Department of Veterans Affairs, the Department of Agriculture and the Equal Employment Opportunity Commission).

<sup>11</sup> See, for example, *Costello v. Dep't of Homeland Sec.*, No. DC-1221-21-0070, W-1, 2020 WL 7233762 (M.S.P.B. Dec. 4, 2020); and *Mouton-Miller v. Dep't of Homeland Sec.*, No. AT-1221-21-0039-W-1, 2020 WL 6548617 (M.S.P.B. Nov. 5, 2020).

**not** competitively selected and qualified via the merit system, was **not** the first assistant to the former Chief Executive and Administrative Officer (i.e. Chairman) of the Board, was **not** any one of the Members of the Board, and was **not** even appointed by any President, let alone confirmed by the Senate to the Board, has presumed to both run the Board and concurrently be his own General Counsel (i.e. Defensive Agent) and putative Inspector General (i.e. oversight).

8. The President's counsel (DOJ), who themselves have since officially contested the legality of MSPB staff, who have had cases dismissed because of such, and who waived their opportunity to rebut the Petition in the immediate case, also raised some of the same concerns to the former acting Chairman of the Board as the Petitioner has raised.

a. On a conference call with DOJ in Fall 2018, when the Board's acting Chairman mentioned that his term as the last Board Member expired in February 2019,

“Several (DOJ) attorneys grew alarmed and questioned whether the administrative judges could issue rulings legally without a board. If not, the judges, staff attorneys and support staff would be superfluous, they argued.

They said, 'If a nominee isn't confirmed, wouldn't the board have to close down?'"<sup>12</sup>

- b. And, while DOJ's attorneys told the Board's acting Chairman they would investigate the legality of continuing operations without a board, DOJ **never** even got back to the Board's acting Chairman.<sup>13</sup>
9. This Court has historically **granted** Certiorari for, and congruently **held** in cases of similar but less warrant.
- a. In 2010, this Court found that a Board not only cannot render decisions or exercise its powers without its quorum, but that a delegee group, including a portion of the Board itself, could not continue to exercise its delegated authority from the Board in the absence of the constituted delegating Board. *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 130 S. Ct. 2635 (2010)
  - b. In 2014, this Court affirmed a decision by the D.C. Circuit which invalidated the President's 2012 appointments of Members to the National Labor Relations Board (NLRB), and also invalidated the Order(s) thereof.
    - i. In doing so, this Court found that actions by a Federal Board that was unconstitutionally constituted were *ultra vires*, and that

---

<sup>12</sup> This grievance board for federal workers has one person left — and he's about to leave, Washington Post, February 12, 2019.

<sup>13</sup> *Ibid.*



the President had himself violated the Appointment's Clause of the Constitution. *NLRB v. Noel Canning*, 573 U.S. 513, 134 S. Ct. 2550 (2014)

**10. In addition to the Executive Branch, even Congress has same questions as the Petitioner.**

On February 28, 2019, the House, via the Board's committee of jurisdiction, held a hearing on the, "Effect of Vacancies and the MSPB."<sup>14</sup>

**The Chairman stated**, on the record, *inter alia*,

"Since January 7, 2017, the [MSPB] has been hobbled by two vacancies on its three-member Board, leaving it **without a quorum**. This is the **longest absence of a quorum in the history of the agency**. And **unlike** other agencies, the **vacant seats at the MSPB cannot simply be filled by an individual in an acting capacity**.

The sole remaining member...continues to serve in a one-year carryover term which will expire at the end of today—**today**.

Once his term expires—**today**—**the MSPB will be left without any Board members**. **If that agency is left without any principal officers, it's unclear**

---

<sup>14</sup> Effect of Vacancies and the MSPB, Hearing Report, Serial No. 116-04, Feb. 28, 2019

which functions employees of the agency can continue and which would need to be suspended...

There are **two** ways to avert a memberless Board. **Either** the Senate could confirm nominees... *or* Congress could pass a temporary extension of (the last remaining Board Member's) term, which is what we [the House] did the other day on the floor.

Unfortunately, the **Senate leadership opted not to allow the full Senate to confirm the Republican and Democratic nominees...**

But earlier this week, as I said, the House passed H.R. 1235, a bill offered by Chairman Cummings and myself, to temporarily extend Mr. Robbins' term for one more year. Unfortunately, the Senate failed to act on that bill and has **not even allowed** debate.

As a result, at 5 p.m. **today** we will enter *uncharted* territory. The Board will be **memberless** for the first time in its 40-year history.

The last two years of vacancies at the MSPB have also been **unprecedented**, and they've impaired the agency's mission. The **absence of a quorum** has **prevented** the Board from hearing final appeals of adverse agency actions, such as terminations, suspensions in excess of 14 days, reductions in grade or pay, reductions in force actions, denials of restoration of reemployment

rights, OPM determination in retirement cases, and Hatch Act violations, among many others.

The MSPB has also been **unable** to hear appeals of wrongful terminations and retaliations against whistleblowers, a prime concern of this committee. That means that MSPB is **unable** to enforce the law that this committee, and Congress, passed to protect the brave individuals who alert us to waste, fraud, and abuse...

The lack of a quorum has also resulted in a backlog of **1,975 cases**, according to the documents provided to the subcommittee. Acting Chairman Robbins has reportedly said that eliminating that backlog will take, at a minimum, **three years** to process. That is a clear example of justice delayed being **justice denied**.

The vacancies of **principal officers** at the agency are untenable. Federal employees deserve better. They deserve to have their appeals heard by the Board. Employees of the MSPB deserve to work at a fully functioning agency with leadership in place. And taxpayers deserve to have their government **capable** of carrying out the Nation's laws..."<sup>15</sup>

---

<sup>15</sup> Statement of Chairman Connolly, Subcommittee on Government Operations Committee on Oversight & Government Reform, U.S. House of Representatives, Hearing Report, Effect of Vacancies and the MSPB, Serial No. 116-04, Feb. 28, 2019, at pp 2-3.

11. At that hearing, the Committee also asked,

***“If the Senate fails to act and your term expires Friday, what happens to MSPB? Would the agency have to shut down all of its operations?”***<sup>16</sup>

In response, the only Board Member opined he did not ***“believe”*** the Board had to shut down **all** operations, because the Board’s alleged Continuity of Operations (COOP) plan listed staff to take on MSPB “administrative functions” in an emergency.<sup>17</sup>

**12. *Arguendo* COOP was possible, a Coup was obfuscated.**

- a. The day after that hearing, a **“First Amendment free speech”** website submitted a FOIA for MSPB’s COOP plan.<sup>18</sup>
- b. Records show MSPB’s staff sat on this FOIA for ~ **seven months**, after which they **denied** it.
- c. The MSPB’s staff next sat on the FOIA appeal for **another two months**, after which the Board’s General Counsel, who was using that plan to assert authority to activate and run the Board as its leader, subsumed the authority of the Board’s Chairman (who is MSPB’s FOIA appellate authority), and still partially denied release.
  - i. His partial release came **264 days after** he used it to take over the Board.

---

<sup>16</sup> *Id.* at Page 16.

<sup>17</sup> *Ibid.*

<sup>18</sup> [https://www.governmentattic.org/35docs/MSPBcoop\\_2018.pdf](https://www.governmentattic.org/35docs/MSPBcoop_2018.pdf)

- ii. The Plan showed it had been edited more times in the few months of apparent preparation for a coup, without a quorum of the Board, then it had throughout the preceding decade when it had a quorum.
- d. **Not** a word in the release mentioned the General Counsel, let alone empowered his coup.
- e. The altered COOP was an **unsigned** document.
- f. *Arguendo* it gave the General Counsel powers, the plan itself noted that **only the Chairman or acting Chairman had the authority to implement the COOP.**
- g. That COOP Plan itself states, "**The Delegations of Authority** specify who is authorized to act on behalf of the agency head or other officials for certain purposes," and cites a putative **April 2011 Delegations of Authority**, another unsigned document which regardless also does **not** give the General Counsel authority to take over the Board.<sup>19</sup>

13. Therefore, the continuance of the MSPB since 2019 has been based upon a non-quorum decided document of the MSPB (or staff thereof), and the idea that an overt choice by the President and/or Congress, as is their right & role **under the Constitution**<sup>20</sup> – to choose which candidates met the requirements in statute, 5 U.S.C. § 1201; or the

---

<sup>19</sup>[https://www.mspb.gov/foia/files/Organization\\_Functions\\_and\\_Delegations\\_of\\_Authority\\_1279407.pdf](https://www.mspb.gov/foia/files/Organization_Functions_and_Delegations_of_Authority_1279407.pdf)

<sup>20</sup> Appointments Clause, U.S. Const. Art. II, Sec. 2, Cl. 2.

Senate's choice not to confirm specific nominees, constituted a sudden emergency warranting COOP.<sup>21</sup>

- a. Since this is the premise upon which MSPB operates, Petitioner asserts it a reason, even severable from other petitioned arguments, upon which the Court can and must declare the acting head of the Board illegal, and the Board *ultra vires*, at least since March 1, 2019.

14. In the absence of the Courts overturning such, unelected, non-Presidentially-appointed, and non-Senate-confirmed bureaucrats can bypass the law and the Constitutional Role of either the President or Congress, at whim, and take over and operate a Federal Board or other agency.

15. As the Petitioner has prior noted, the last Board Member and the current General Counsel previously repeatedly shut down the MSPB, even by publicly certifying,

“The MSPB has **no** employees that...  
are necessary to perform activities expressly  
authorized by law...[or] are necessary to  
perform activities necessarily implied by law...  
[or] are necessary to the discharge of the  
President's constitutional duties and powers...  
[or] are necessary to protect life and property.”<sup>22</sup>

---

<sup>21</sup> A COOP plan is an effort designed to ensure that an agency's Primary Mission-Essential Functions continue to be performed during a wide range of emergencies, including localized acts of nature, accidents and technological or attack-related emergencies. National Security Presidential Directive 51 / Homeland Security Presidential Directive 20, May 4, 2007.

<sup>22</sup> *Shutdown Plan*, MSPB, Dec. 17, 2018

- a. But just months later, the same staff took the inverse position that they were **all** so important that **every** MSPB employee had to be activated via the COOP, let alone that the President or Congress's exercise of Constitutional authority constituted an emergency.<sup>23</sup>
16. The General Counsel's decision and actions to circumvent the Appointments Clause of the Constitution, let alone commit prohibited personnel practices, 5 U.S.C. § 2302(b)(12), to staff and run the Board – and operate and pay all employees via COOP, has been ongoing for over **1,000 days**.
17. While Petitioner argues the General Counsel did **not** qualify to take over the Board under the Appointments Clause, or the Federal Vacancies Reform Act, 5 U.S.C. § 3345, *et seq*, Congress made clear therein, *arguendo* the position or person did qualify, the acting officer could only do so for no longer than **210 days** from the date of vacancy. 5 U.S.C. § 3346(a)(1)
18. The Act makes clear that **only it, or an explicit statute,** are the **exclusive** means for authorizing an acting official. 5 U.S.C. § 3347
  - a. Therefore, since 5 U.S.C. § 3345 is not usable for such, since the Board had already used up its statutory provisions from 2017 through 2019,

---

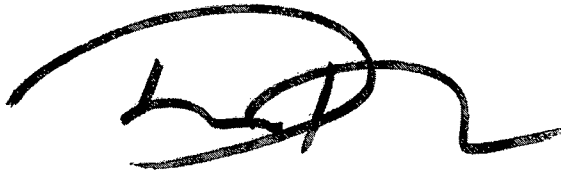
<sup>23</sup> ““Emergency” means any occasion or instance for which, *in the determination of the President*, Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States,” 42 U.S.C. § 5122

and since the President and/or Congress chose not to remedy such, the Board has been *ultra vires* since on or before March 1, 2019.

19. Therefore, this Court should grant Certiorari.

20. If this Court does not want to tackle such big questions, it should at least remand and compel the Appeals Court to answer petitioner's questions and regard his case.

Very Respectfully,

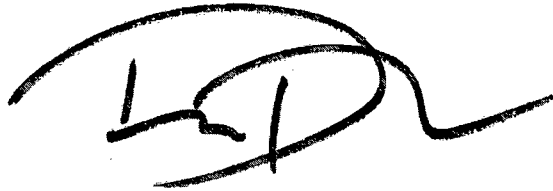
A handwritten signature in black ink, appearing to read 'D. Nastro', with a large, sweeping flourish above the name.

Damian R. Nastro, *Pro Se*



**Certificate of Petitioner**

The Petitioner also hereby certifies, under Rule 44(2) of this Court, that this Petition for Rehearing is founded in intervening circumstances of a substantial or controlling effect or other substantial grounds not previously presented, which are now presented, non-dilatorily, in good faith herein, and to the best of his ability while *Pro Se* and disabled; and, he begs all leave, allowances and accommodations of the Court with his petitions, in these proceedings, and therefore.

A handwritten signature in black ink, appearing to be 'D. N.', with a large, sweeping flourish above the letters.

Damian R. Nastri, *Pro Se*