[ORAL ARGUMENT NOT YET SCHEDULED]

No. 15-1096

IN THE

United States Court of Appeals for the District of Columbia Circuit

ROBERT W. RODRIGUEZ (LIEUTENANT COLONEL, RETIRED),
Petitioner,

v.

VIRGINIA S. PENROD, CHIEF OF STAFF FOR THE OFFICE OF THE UNDER SECRETARY OF DEFENSE FOR PERSONNEL AND READINESS, U.S. DEPARTMENT OF DEFENSE,
Respondent.

Petition for Review of the Department of Defense Final Administrative Decision Under the Military Whistleblower Protection Act

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FINAL PETITIONER'S BRIEF

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Date: April 15, 2016

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. **Parties.**

Pursuant to Rule 28 of the Federal Rules of Appellate Procedure, the undersigned counsel certifies that the following are parties in this lawsuit:

1. Robert W. Rodriguez
2. Virginia S. Penrod

B. **Ruling Under Review.**

Undersigned counsel certifies that the decision under review is the ruling rendered by Ms. Virginia Penrod on March 6, 2015, upholding a partial grant of redress under 10 U.S.C § 1552 (Correction of Military Records) (Petitioner's Addendum, hereinafter "Add.," 11-13) and 10 U.S.C. § 1034 (Military Whistleblower Protection Act) (Add. 4-10), but denying other relief sought. The ruling is at Deferred Appendix ("DA") 1-5. Ms. Penrod served as the Chief of Staff for Under Secretary of Defense for Personnel and Readiness. There are no known citations to this agency decision.

C. **Related Cases**. Undersigned counsel certifies that there was a related Petition for Review, No. 13-1192, which was dismissed without prejudice. Although not directly related, Petitioner made several FOIA requests to various DoD entities, two of which are subject of a civil complaint before Hon. Ketanji Brown Jackson in the U.S. District Court for the District of Columbia, No. 14-101.

/s/ Joseph E. Schmitz

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GLOSSARY

Term	Definition
ABCMR	Army Board for Correction of Military Records
Add.	Petitioner's Addendum
APA	Administrative Procedure Act
AR	Army Regulation
ARBA	Army Review Board Agency
DAIG	Department of the Army Inspector General
DoDD	Department of Defense Directive
DoD IG	Inspector General of the Department of Defense
DA	Deferred Appendix
NGB	National Guard Bureau
ROI	Report of Investigation
SES	Senior Executive Service

STATEMENT OF JURISDICTION

Pursuant to Rule 28(a)(4) of the Federal Rules of Appellate Procedure and this Court's Order of September 3, 2015, that "the parties are directed to address in their briefs the issues presented in the motion to dismiss," *i.e.*, jurisdiction, Petitioner invokes both the statutory jurisdiction provided by the "Right of review" section of the Administrative Procedure Act ("APA"), 5 U.S.C. § 702 (Add. 1), and this Court's inherent equity jurisdiction, as explained below.

The Respondent issued a decision on March 6, 2015 (DA1-5), which concludes: "This action, on behalf of the Secretary of Defense, is the final administrative decision of the Department of Defense." Accordingly, Petitioner has exhausted his administrative remedies under both 10 U.S.C. § 1552 (Add. 11-13) and the Military Whistleblower Protection Act ("MWPA"), 10 U.S.C. § 1034 (Add. 4-10), and is now "seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority." 5 U.S.C. § 702 (Add. 1). Petitioner filed a timely Petition for Review on April 2, 2015 (Dkt # 1545692).

Appellate jurisdiction to review the agency's final action is granted by the "Right of review" section of the APA, 5 U.S.C. 702 (Add. 1), which provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled

to judicial review thereof." As neither 5 U.S.C. § 702 (Add. 1) nor § 703 (Add. 2) makes exclusive the subject matter jurisdiction of a district court or of an appellate court to review final agency action, in this setting the Supreme Court mandated in *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985), that "[a]bsent a firm indication that Congress intended to locate initial APA review of agency action in the district courts, we will not presume that Congress intended to depart from the sound policy of placing initial APA review in the courts of appeals." 470 U.S. at 745.

The Supreme Court in *Florida Power & Light* explained that efficiency justifies the statutory presumption in favor of review in the court of appeals rather than the district court where, as here, "[t]he task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court." 470 U.S. at 744 (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971)). "The most obvious advantage of direct review by a Court of Appeals is the time saved compared to review by a District Court, followed by a second review on appeal." *Id*. at 740 (internal quotation marks omitted)). Similarly, this Court has held that "a factual hearing in the District Court is unnecessary if judicial review is based upon the administrative record." *Investment Co. Inst. v. Board of Governors of Fed. Reserve Sys.*, 551 F.2d 1270, 1276 (D.C. Cir. 1977). Review should not be

"cut off" absent an explicit statutory provision so requiring. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967) ("judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress").

Appellate jurisdiction also rests on the Court's equitable powers. In *Nader v. Volpe*, 466 F.2d 261 (D.C. Cir. 1972), this Court followed the *Abbott Laboratories* precedent, observing that "nonstatutory remedies" are available when there is "a showing of patent violation of agency authority or manifest infringement of substantial rights irremediable by the statutorily-prescribed method of review." 466 F.2d at 266 (citing, *inter alia*, *Abbott Laboratories*); *see Association of Nat'l Advertisers, Inc. v. FTC*, 617 F.2d 611, 626 (D.C. Cir. 1979) ("appellants could properly resort to nonstatutory remedies . . . if they could show that the Commission's actions were patently *ultra vires* or patently violated substantial rights in a manner not remediable under [statute].").

This Petition for Review presents one of those egregious circumstances that warrant review by this Court through an exercise of "equitable powers[.]" *Nader v. Volpe*, 466 F.2d at 269. In his concurring opinion in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), Justice Harland noted: "Congress provided specially for the exercise of equitable remedial powers by federal courts, *see* Act of May 8, 1792, § 2, 1 Stat. 276; C. Wright, *Law*

of Federal Courts 257 (2d ed., 1970), in part because of the limited availability of equitable remedies in state courts in the early days of the Republic. *See Guaranty Trust Co. v. York*, 326 U.S. 99, 104-105 (1945). And this Court's decisions make clear that, at least absent congressional restrictions, the scope of equitable remedial discretion is to be determined according to the distinctive historical traditions of equity as an institution, *Holmberg v. Armbrecht*, 327 U.S. 392, 395-396 (1946); *Sprague v. Ticonic National Bank*, 307 U.S. 161, 165-166 (1939)." 403 U.S. at 404.

In addition where, as here, Congress has provided an administrative appeal within the MWPA that Petitioner has endeavored to follow, and the APA, 5 U.S.C. § 702 (Add. 1), does not specify whether the district court or court of appeals should conduct judicial review of that MWPA administrative appeal -- and in this matter as there is no need for District Court fact finding -- forcing a military whistleblower such as Petitioner to seek judicial review first in a trial court would be a violation of "the long-standing rule that a statute should not be construed to produce an absurd result." *Center for Biological Diversity et al. v. EPA*, 722 F.3d 401, 411 (D.C. Cir. 2013), quoting *Mova Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998); *cf. Mesa Air Group v. U.S. Dep't of Transportation*, 87 F.3d 498, 506 (D.C. Cir. 1996) (buttressing federal government-private party contractual holding with "*contra proferentem*").

In *Mova Pharmaceutical*, this Court explained: "In deciding whether a result is absurd, we consider not only whether that result is contrary to common sense, but also whether it is inconsistent with the clear intentions of the statute's drafters—that is, whether the result is absurd when considered in the particular statutory context." 140 F.3d at 1068. Interpreting Congress' silence in the MWPA as to the judicial review options available to military whistleblowers, such as Petitioner, as a requirement that those whistleblowers first seek judicial review of an administrative *appellate decision* in a trial court would both defy common sense and "is absurd when considered in the particular statutory context." *Id.*

Respondent's June 1, 2015, motion to "dismiss the petition for review in this matter for lack of subject matter jurisdiction" (Dkt #1555091) argues that: "Because district courts have general federal question jurisdiction under 28 U.S.C. § 1331 (Add. 14), the 'normal default rule' is that 'persons seeking review of agency action go first to district court rather than to a court of appeals'." Motion to Dismiss at 5. As shown above, the Supreme Court's default rule in *Florida Power* is exactly contrary to the Respondent's, in that *Florida Power* holds that "[a]bsent a firm indication that Congress intended to locate initial APA review of agency action in the district courts, we will not presume that Congress intended to depart from the sound policy of placing initial APA review in the courts of appeals." 470 U.S. at 745.

Petitioner reserves his right to address in his Reply Brief any and all jurisdictional arguments Respondent may make in her Respondent's Brief.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether Respondent, Chief of Staff for the Office of the Under Secretary of Defense for Personnel and Readiness, was properly appointed to act on behalf of the Secretary of Defense in deciding "to reverse or uphold the decision of the Secretary of the military department concerned" pursuant to the administrative appeal provision of the Military Whistleblower Protection Act, 10 U.S.C. § 1034(h) (Add. 9-10) (formerly 10 U.S.C. § 1034(g)), which provides:

> **Review by Secretary of Defense.—** Upon the completion of all administrative review under subsection (f), the member or former member of the armed forces . . . who made the allegation referred to in subsection (c)(1), if not satisfied with the disposition of the matter, may submit the matter to the Secretary of Defense. The Secretary shall make a decision to reverse or uphold the decision of the Secretary of the military department concerned in the matter within 90 days after receipt of such a submittal.

2. Whether Respondent, assuming *arguendo* she was properly appointed, included in her final decision purportedly on behalf of the Secretary of Defense under 10 U.S.C. § 1034(h) (Add. 9-10) (formerly 10 U.S.C. § 1034(g)), the requisite "satisfactory explanation for its action, including a 'rational connection between the facts found and the choice made.' *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)," *Motor Vehicles Mfgs. Ass'n v. State*

Farm Mutual Auto Ins. Co., 463 U.S. 29, 43 (1983), considering that Petitioner had raised the following non-frivolous due process claims in his administrative appeal to the Secretary of Defense, among other claims before the Secretary of Defense that were never addressed by either the Army Board for Correction of Military Records ("ABCMR") or by the Secretary of the Army, who in connection with Petitioner's whistleblower reprisal claims was "the Secretary of the military department concerned" 10 U.S.C. § 1034(h) (Add. 9-10)):

> (a) In the fall of 2011, after years of repeated attempts to obtain a readable copy of the DAIG's 1999 Supplemental Report of Investigation (1999 DAIG ROI), LTC Rodriguez discovered that this 1999 DAIG ROI, the primary document upon which the ABCMR had based its August 2010 decision not to grant full relief, was the product of a forged (and misspelled) signature of the four-star General "Approval Authority," the practical result of which was to reinstate the prior 1998 substantiation of whistleblower reprisal by the Inspectors General of the Army and of the Department of Defense under the Military Whistleblower Protection Act, for which substantiated reprisal LTC Rodriguez has never been granted any relief – and for which failure to grant any relief based upon whistleblower reprisal there is no "satisfactory explanation"; and
>
> (b) The Army deprived LTC Rodriguez of procedural due process when the ABCMR failed to follow procedures prescribed in the Military Whistleblower Protection Act, failed to forward its 18 April 2012 Report of Proceedings as "the decision document . . . to the Secretary of the Army for final decision" as required by Army Regulation 15-185, ¶2-13(b) (Add. 77), failed to advise LTC Rodriguez of his appellate right under 10 U.S.C. § 1034(h) (Add. 9-10), and failed to mail a copy of its 18 April 2012 Record of Proceedings to LTC Rodriguez' Counsel of Record, among other procedural failures, all of which failures were arbitrary, capricious, and contrary to 10 U.S.C. § 1034, as implemented by DOD Directive 7050.06 (Add. 42-57) -- and for which there is no agency explanation,

notwithstanding the Supreme Court's requirement that there be a "satisfactory explanation."

3. Whether the March 6, 2015, final decision purportedly on behalf of the Secretary of Defense by the Chief of Staff for the Office of the Under Secretary of Defense for Personnel and Readiness, assuming *arguendo* the Chief of Staff was properly appointed, was: "(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; [and/or] (D) without observance of procedure required by law." 5 U.S.C. § 706(2) (Add. 3).

STATUTES AND REGULATIONS

Pertinent parts of statutes and regulations are reproduced in the Addendum to this Brief.

STATEMENT OF THE CASE

Under the Military Whistleblower Protection Act ("MWPA"), 10 U.S.C. § 1034 (Add. 4-10) and DoDD 7050.06 (Add. 42-57), a present or former service member can apply for redress from injuries arising from a Whistleblower Complaint. The application is submitted to the appropriate service Board for the Correction of Military Records. For Army applicants, its Board derives its powers from 10 U.S.C. § 1552 (Correction of Military Records: Claims Incident Thereto)

(Add. 11-13), 32 CFR 581.3 (Army Board for Correction of Military Records) (Add. 18-25), and Army Reg. 15-185 (Army Board for Correction of Military Records) (Add. 70-84).

Petitioner was denied due process by the Chief of Staff for the Under Secretary of Defense for Personnel and Readiness, who was not properly appointed and who usurped the authority vested in either the Secretary of Defense or Deputy Under Secretary of Defense for Program Integration. Additionally, the Chief of Staff failure to grant Petitioner relief after having been provided with sufficient information to overrule the decision by the Army Board for Correction of Military Records -- which itself had acted arbitrarily, capriciously, and not in accordance with law -- was arbitrary, capricious, and not in accordance with law.

STATEMENT OF FACTS

Petitioner, a retired Army Lieutenant Colonel, was initially reprised against by his commanding officer who took retaliatory adverse actions in late 1996 and throughout 1997 after LTC Rodriguez had complained about fraudulent accounting for soldiers in the New York Army National Guard, a scandal that later became known as the "Ghost Soldier Scandal." *See* GAO Report of March 20, 2002 (DA334-39); New York State Office of State Inspector General Report of Investigation, *Alleged Fraud at the Division of Military and Naval Affairs*, Case # 0548-018-2000, May 22, 2002 (DA340-50)). These reprisals by his commanding

officer led to LTC Rodriguez being constructively discharged from the Army, which in turn barred LTC Rodriguez from even being considered for promotion to Colonel -- which promotion consideration would have taken place within months of his constructive discharge.

On August 1, 1996, petitioner filed his initial military whistleblower complaint with his superior officer at the time, and with the Inspector General of the New York Army National Guard. Subsequent to these "protected communications," and throughout 1997, LTC Rodriguez' commanding officer engaged in a series of adverse actions. Among other such actions, the commanding officer directed LTC Rodriguez' immediate supervisor to watch LTC Rodriguez closely and to report on his activities. A few months later, the commanding officer discovered that LTC Rodriguez had submitted an application to be credited with an additional Military Occupational Specialty. Rather than processing the packet in the usual administrative procedure, the Commanding officer screamed at the New York Army National Guard administration staff. He also reportedly stormed out of the State Headquarters with the application packet to return it to the officer who had forwarded it to State Headquarters. The next adverse action was in November 1997, when LTC Rodriguez' position was eliminated by State headquarters. Contrary to normal procedures, LTC Rodriguez

was not allowed to interview for other appropriate positions or even to swap positions with another officer who was closer to retirement.[2]

Petitioner's August 1, 1996, complaint was investigated as a whistleblower complaint by the Department of the Army Inspector General ("DAIG") who substantiated reprisal, which substantiated reprisal the Inspector General of the Department Defense ("DoD IG") approved, instructing LTC Rodriguez to seek relief for this reprisal in the ABCMR on September 17, 1998 (DA615-16).

In early 2007, Petitioner received a waiver for time from the Acting Deputy Assistant Secretary of the Army for the Army Review Board Agency for the submission of his ABCMR application. He submitted his application which was accepted by the ABCMR as timely (DA363-94). After ABCMR consideration, he received partial relief in the form of removal of one letter of reprimand and two efficiency reports from his military file; but, he was denied all other requested relief, including LTC Rodriguez' request for "promotion to colonel" (DA174-75;

[2] *See* January 3, 2012 Request for Consideration at pp. 43-49; (DA163-69); October 8, 2011 Statement of MG Joseph Taluto, Adjutant General New York State (DA557-59) ["Under like circumstances, other officers were afforded another position, swapping among officers or other personnel action in order to keep from discharging officers who wanted to stay. LTC Rodriguez was being treated as a "special case." He was involuntarily selected for retirement …" ¶10]; Statement of MG John Fenimore, Adjutant General New York State (DA560-61) ["He would never have retired if he was treated properly by the Army National Guard and essentially involuntarily discharged." ¶10]; Statement of Michael Finnegan, Counsel to the Governor (DA566-74) ["there were even several lieutenants colonel at Camp Smith who offered to trade positions … This was denied him and with no other recourse, Mr. Rodriguez was forced to retire." ¶39].

DA519-56). Petitioner submitted his reconsideration request on January 3, 2012, based on new evidence to include the forgery of the general officer's approval signature on a supplemental investigation by the Department of the Army IG (DA120-74). The ABCMR review on reconsideration (DA113-19) found that Petitioner had suffered "a number of injustices" (DA118, ¶6) but asserted that his claim for further relief was barred by *laches* for delaying his application (DA118, ¶7). This latter ABCMR holding was contradicted by the Board's prior decision granting partial relief and a waiver of time. The ABCMR *laches* argument was thus a "red herring" as it was not raised during the initial review, and even if it had been a valid argument before the Board waived it by its prior action in accepting the original application (DA174-75; DA519-56) and granting partial relief.[3] This was brought to the attention of Respondent's predecessor (DA78), and again when Respondent reviewed the full DoD Appeal packet (DA77-112).

[3] On August 5, 2010, the ABCMR granted partial relief in that "the Board recommends that all Department of the Army records of the individual concerned be corrected by removing the LOR, dated 26 February 1996, from his MPRJ and ensuring it is not filed in any of his records." (DA555). On August 10, 2010, Army Review Board Agency informed Petitioner that he was "granted further relief by removing the two OERs, one for the period ending 31 March 1996 and one for the period ending 1 September 1996, from your records and by having a Nonrated Statement placed in your records in their stead." (DA556). This partial relief was affirmed by Ms. Penrod who denied the other substantial relief requested including promotion to colonel and the associated emoluments.

On September 28, 2012, Petitioner submitted his administrative appeal to the Secretary of Defense in accordance to DoD Directive 7050.06 (DA77-112), which appeal Petitioner supplemented on October 22, 2012 (DA56-70). In response, on January 28, 2013, Respondent's predecessor issued a nine-line summary denial letter that referred to the wrong MWPA administrative appellant and the wrong branch of service (DA32). That decision was made by the Chief of Staff for the Under Secretary of Defense for Personnel and Readiness ("USD(P&R)"), who was not the person designated by law or regulation to process MWPA administrative appeals on behalf of the Secretary of Defense. On February 27, 2013, Petitioner brought several defects in the denial letter to the attention of the Chief of Staff, and requested reconsideration (DA33-39).

Rather than provide a more substantial analysis, six weeks later, on April 11, 2013, the Chief of Staff added a paragraph to his prior letter in which he now claimed that he had been appointed to process MWPA appeals by the Acting Under Secretary of Defense (P&R), and he further claimed falsely that he had transmitted his earlier decision to Petitioner (DA31-32), which he had not. The Chief of Staff did write that he "regret[ed] the error" relating to his prior letter.

Petitioner then filed a petition for review in this Court on May 31, 2013 (D.C. Cir. 13-1192). After issues were joined the parties entered into the D.C. Circuit's Appellate Mediation Program. They met under the supervision of

Appellate Mediator, Daniel K. Mayers, Esq. Among other things, Petitioner demonstrated that the Chief of Staff's appointment was defective as that position was unqualified by law and regulation. Indeed, for several years, DoD was using the service of unqualified individuals to conduct appeals under the provisions of the MWPA, 10 U.S.C. § 1034 (Add. 4-10) and DoD Directive 7050.06 (Add. 42-57).

The parties entered into a settlement requiring reconsideration of his Appeal to DoD with all rights and claims preserved if litigation were again necessary. (DA627-30.) In addition to the previous Appeal documentation, Petitioner provided four supplemental letters dated September 25, 2014 (DA6-30), October 21, 2014 (DA583-95), December 10, 2014 (DA596-625) and January 22, 2015 (DA626).

On March 6, 2015, the Respondent, in her capacity as the Chief of Staff and alleged successor of the prior reviewing official, rendered a short decision upholding the decision of the ABCMR (DA1-05). Again, the decision was almost three months late as it was due within 90 days of meeting with LTC Rodriguez on September 29, 2014. Additionally, the decision was made by a person who was not authorized by the MWPA, 10 U.S.C. § 1034(Add. 4-10) or DoD Directive 7050.06 (Add. 42-57) to act on behalf of the Secretary of Defense. As described more fully *infra*, the March 6, 2015 decision failed to address several points made

on the Appeal and those it considered were incorrectly determined; thus, rendering the decision arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law or if it was taken without observance of procedure required by law. 5 U.S.C. § 706(2)(A) (Add. 3).

Thereafter, Petitioner filed timely the instant Petition for Review on April 2, 2015.

SUMMARY OF ARGUMENT

This Petition for Review sheds light on a conflicts of interest-plagued and lawless sham of an administrative appeal to the Secretary of Defense process that is mandated by Congress to protect military whistleblowers such as Petitioner. This Court should vacate the result of that administrative appeal process, and remand to the Secretary of Defense with directions to effectuate the "whole loaf" of relief that is mandated by law when a military record correction board finds errors and injustices, as did the Army Board for Correction of Military Records ("ABCMR") based on the application of Petitioner. That "whole loaf" of relief, which according to Department of Defense precedent that Respondent has had an opportunity to distinguish but has failed to do so, includes retroactive promotion of Petitioner to Colonel (retired).

Purporting to act on behalf of the Secretary of Defense pursuant to 10 U.S.C. § 1034 (Add. 4-10), Respondent acted arbitrarily, capriciously, and otherwise

contrary to law, by failing to reverse the ABCMR decision on reconsideration that acknowledged multiple due process violations and whistleblower reprisal yet granted no relief whatsoever for those errors and injustices. In addition to Respondent acting arbitrarily, capriciously, and otherwise contrary to law in failing to reverse the ABCMR on the merits, Respondent failed to correct the ABCMR's lawless failure to "forward the decision document . . . to the Secretary of the Army for final decision" pursuant to AR 15-185, ¶2-13(b) (Add. 77) and DoDD 7050.06 ¶ 5.3.5. (Add. 48). Accordingly, Petitioner respectfully requests that this Court vacate and direct that the Secretary of Defense: (a) grant Petitioner the full relief requested based on the facts that, as explained below, "involve reprisals under the MWPA, confirmed by the DOD Inspector General"; and (b) provide "thorough and fitting relief," including retroactive promotion to Colonel (retired).

As explained throughout this Petitioner's Brief, although the ABCMR had acknowledged both, (a) multiple "errors or injustices," including the unconstitutional deprivation of Petitioner's procedural due process, and (b) reprisal under the MWPA, Petitioner has never been granted any relief whatsoever for the due process violations or for the substantiated reprisal summarized below:

1. Beginning on August 1, 1996, Petitioner made several disclosures of information protected by statute, *i.e.*, "protected communications," including

protected communications to an Inspector General and to the New York State Adjutant General.

2. On August 2, 1996, Petitioner informed his superior general that he had made such protected communications.

3. On October 16, 1996, the superior general took at least one adverse personnel action against Petitioner "by improperly issuing him an LOR" (DA IG ROI, March 19, 1998 (DA240) (which was part of an extended series of attempted reprisals in a "hostile work environment")).

4. During the course of the DAIG's reprisal investigation, the superior general failed to sustain his burden of establishing that the adverse personnel action would still have been taken, withheld, or threatened even if the protected communication had not been made.

In addition to the adverse personnel action already substantiated by DAIG as reprisal, the same the superior general further reprised against Petitioner by a pattern of multiple attempts to effectuate other adverse personnel actions, and ultimately by effectuating a "constructive discharge" of Petitioner from the Army in November 1997 (effective 1 December 1997).

The fully documented pattern of retaliation against a whistleblower transformed a retirement into a constructive discharge warranting the relief of "retroactive promotion." *Chappell v. Wallace*, 462 U.S. 296, 303 (1983) ("The

Board is empowered to order . . . retroactive promotion. 10 U.S.C. § 1552(c).");
cf. Shoaf v. Department of Agriculture, 260 F.3d 1336, 1140 (Fed. Cir. 2001)
(explaining the legal standard for establishing "constructive discharge" in the context of reprisal).

This Court should: (a) vacate the decision of Respondent not to grant further relief; and (b) direct the Secretary of Defense, for whom Respondent purported to issue the final decision on review, both to provide the "whole loaf" of relief to Petitioner that is warranted by the administrative record before this Court, including retroactive promotion to Colonel (retired), and to remedy the multiple instances of arbitrary and capricious official actions described below.

STANDING

Petitioner suffered injury when the Secretary of Defense and the Secretary of the Army and their respective subordinates failed to follow the procedures mandated by Congress under the MWPA in the conduct of a Whistleblower complaint, the processing of remedial action by a Board of Military Records, and an administrative appeal to the Secretary of Defense. All three failures are cognizable as Agency action and subject to Federal Court review.

ARGUMENT

I. STANDARD OF REVIEW

This a case of first impression under the MWPA, and other than APA case law in analogous situations, there is no known precedent discussing the standard for this Court's review of a Secretary of Defense final decision under the MWPA. In the analogous context of this Court's review of the District Court review of an ABCMR decision when there had *not* been an intermediary administrative appeal to the Secretary of Defense under the MWPA, this Court's explained its standard for review as follows:

> There are several venerable legal principles that control our review and disposition of this appeal. First, "[o]n review of a district court's grant of summary judgment in connection with the appeal of a decision of the ABCMR, 'we review the ABCMR's decision *de novo*, applying the same standards as the district court.'" *Fontana v. White*, 334 F.3d 80, 81, 357 U.S. App. D.C. 242 (D.C. Cir. 2003) (citation omitted). The same is true for a motion to dismiss. *See Miller v. Hersman*, 594 F.3d 8, 10, 389 U.S. App. D.C. 193 (D.C. Cir. 2010) ("We review *de novo* both a summary judgment and a dismissal for failure to state a claim." (citations omitted)). Relatedly, "[i]n a case like the instant one, in which the District Court reviewed an agency action under the APA, we review the administrative action directly, according no particular deference to the judgment of the District Court." *Holland v. Nat'l Mining Ass'n*, 309 F.3d 808, 814, 353 U.S. App. D.C. 417 (D.C. Cir. 2002) (citations omitted). In other words, we "do not defer to a district court's review of an agency [action] any more than the Supreme Court defers to a court of appeals' review of such a decision." *Novicki v. Cook*, 946 F.2d 938, 941, 292 U.S. App. D.C. 64 (D.C. Cir. 1991) (citation omitted).
>
> Second, "[s]imple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts

> should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37, 73 S. Ct. 67, 97 L. Ed. 54 (1952). Therefore, we are bound to adhere to the "hard and fast rule of administrative law, rooted in simple fairness, that issues not [***14] raised before an agency are waived and will not be considered by a court on review." *Nuclear Energy Inst. v. EPA*, 373 F.3d 1251, 1297, 362 U.S. App. D.C. 204 (D.C. Cir. 2004) (per curiam) (citations omitted).
>
> Third, it is generally understood that "decisions regarding the correction of military records are reviewable under the 'arbitrary and capricious' standard of APA § 706." *Kreis v. Sec'y of the Air Force*, 866 F.2d 1508, 1513, 275 U.S. App. D.C. 390 (D.C. Cir. 1989) (citing *Chappell v. Wallace*, 462 U.S. 296, 303, 103 S. Ct. 2362, 76 L. Ed. 2d 586 (1983)); *see also Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1404, 314 U.S. App. D.C. 345 (D.C. Cir. 1995) (applying 5 U.S.C. § 706 specifically to decisions of the ABCMR). Typically, we are guided by the "strong but rebuttable presumption that administrators of the military, like other public officers, discharge their duties correctly, lawfully, and in good faith." *Frizelle v. Slater*, 111 F.3d 172, 177, 324 U.S. App. D.C. 130 (D.C. Cir. 1997) (citations omitted) (internal quotation marks omitted). However, an agency decision is owed no deference if it fails to "give a reason that a court can measure . . . against the 'arbitrary or capricious' standard of the APA." *Kreis*, 866 F.2d at 1514--15; *see also Tripoli Rocketry Ass'n, Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 437 F.3d 75, 77, 369 U.S. App. D.C. 327 (D.C. Cir. 2006) (explaining that "no deference" is owed to an agency's "purported expertise" where its explanation "lacks any coherence").

Coburn v. McHugh, 679 F.3d 924, 929-30 (D.C. Cir. 2012); *cf. Tripoli Rocketry Ass'n, Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 437 F.3d 75, 77 (D.C. Cir. 2006) (explaining that “no deference” is owed to an agency's “purported expertise” where its explanation “lacks any coherence”).

Based on the same three "venerable legal principles" explained in *Coburn*, Petitioner respectfully urges the Court to apply a non-deferential *de novo* standard of review in this Petition for Review, guided by the APA case law cited above.[4]

II. RESPONDENT'S CLAIMED APPOINTMENT "TO REVERSE OR UPHOLD THE [WHISTLEBLOWER REPRISAL] DECISION OF THE SECRETARY OF THE MILITARY DEPARTMENT CONCERNED" VIOLATED DOD DIRECTIVE 7050.06, THE MILITARY WHISTLEBLOWER PROTECTION ACT, AND THE APPOINTMENTS CLAUSE TO THE U.S. CONSTITUTION

On December 17, 2012, Jessica Wright, who at the time was serving as the Senate-confirmed Assistant Secretary of Defense for Reserve Affairs (*see* http://docs.house.gov/meetings/AS/AS00/20130710/101105/HHRG-113-AS00-Bio-WrightJ-20130710.pdf), improperly designated a non-Senate confirmed SES official, whom Respondent claims to have replaced, "as the permanent successor to the DUSD(PI), for purposes of para 5.2 of DoDD 7050.06" (DA54-55), thereby allowing a non-Senate confirmed SES official to supervise the service secretaries in military whistleblower reprisal matters, in violation of 10 U.S.C. 1034 (Add. 4-10), the Federal Vacancies Reform Act of 1998 (Add. 115-25), Executive Order 13533 of March 1, 2010, titled "Providing an Order of Succession Within the Department of Defense" (Add. 28-29), and various DoD Directives, including

[4] There are additional standards of review at issue in the various subordinate levels of administrative procedure leading up to the final decision of Respondent on review, some of which are addressed *infra*.

DoDD 3020.04 of August 25, 2010 (Add. 26-29), DoDD 5124.02 of June 23, 2008 (Add. 30-41), and DoDD 7050.06 of July 23, 2007(Add. 42-57).

Even assuming *arguendo* that it was legitimate for Jessica Wright to be "performing duties of" the Principal Deputy Under Secretary of Defense on December 17, 2012, her approval on that date of an Action Memo recommendation designating an SES official to "make a decision to reverse or uphold the decision of the Secretary of the military department concerned" (10 U.S.C. § 1034(h), formerly § 1034(g), as implemented by DoDD 7050.06, ¶ 5.2.2.) (Add. 4-10 and Add. 45 respectively), which Congress had assigned to the Secretary of Defense in the Military Whistleblower Protection Act, 10 U.S.C. § 1034, violated:

> (a) Congress' intent, as evidenced in the Military Whistleblower Protection Act and the Federal Vacancies Reform Act of 1998 (Add. 115-25), to put the Secretary of Defense in a supervisory role over the military service secretaries as the final agency authorities in military whistleblower reprisal matters;
>
> (b) the President's intent to keep statutory duties assigned by Congress to Senate-confirmed DoD officials in the hands of Senate-confirmed DoD officials, as evidence in Executive Order 13533 of March 1, 2010, titled "Providing an Order of Succession Within the Department of Defense," (Add. 28-29) and
>
> (c) the Deputy Secretary of Defense's express intention in DoD Directive 5124.02 of June 23, 2008 (Add. 30-41), to limit any further delegation of the Secretary of Defense's authority to "make a decision to reverse or uphold the decision of the Secretary of the military department concerned" (10 U.S.C. 1034) (Add. 4-10) to either the Under Secretary of Defense for Personnel and Readiness (not the Principal Deputy) or to "the DUSD(PI)."

See DoDD 5124.02, ¶ 6.17 at p. 10 (Add. 39) ("The USD(P&R) is hereby delegated authority to . . . Exercise the authority of the Secretary of Defense under section 1034(g) of Reference (a) regarding review of final decisions of the Secretaries of the Military Department concerned on applications for correction of military records decided under Military Whistleblower Protection procedures. The USD(P&R) may redelegate this authority to the DUSD(PI)." Additional proof that the intended review authority is the USD(P&R) is found in the attached letter from the DoD IG who wrote in January 2015 that, "the revised directive and [Military Whistleblower] Guide both correctly identify the Office of the Under Secretary of Defense for Personnel and Readiness as the appellate authority for 10 U.S.C. 1034 complaints." (Add. 85). In the revised DoDD 7050.06 of April 17, 2015 (Add. 58-69), "the USD(P&R)" is designated at the official who "Reviews reports on the results of investigations conducted pursuant to this directive and section 1034 of [Title 10, United States Code]" (Add. 62).

Petitioner is not aware of any legal authority pursuant to which Jessica Wright, who at the time was serving as the Senate-confirmed Assistant Secretary of Defense for Reserve Affairs, even if she were at the same time also "performing duties" of the Principal Deputy Under Secretary of Defense for Personnel and Readiness on December 17, 2012, two weeks before Under Secretary of Defense Erin C. Conaton resigned, to place a non-Senate Confirmed SES officer in a

position to exercise, in effect, supervisory authority over the military service secretaries by virtue of being designated to "make a decision to reverse or uphold the decision of the Secretary of the military department concerned" under 10 U.S.C. § 1034 (Add. 4-10).

If Under Secretary Conaton was not able to perform her delegated duty to "Exercise the authority of the Secretary of Defense under section 1034(g) of Reference (a) [the Military Whistleblower Protection Act, 10 U.S.C. 1034] regarding review of final decisions of the Secretaries of the Military Department concerned on applications for correction of military records decided under Military Whistleblower Protection procedures" (DoDD 5124.02 of June 23, 2008 (Add. 39)) on December 17, 2012, the authority to exercise that delegated statutory duty reverted to the Deputy Secretary of Defense or ultimately back to the Secretary of Defense. On that date the position of Principal Deputy Under Secretary was vacant; hence, only Under Secretary Conaton had the regulatory competence to act as appellate authority on behalf of the Secretary of Defense. *Cf. Canning v. NLRB*, 705 F.3d 490, 507 (D.C. Cir. 2013) ("Because the [National Labor Relations] Board lacked a quorum of three members when it issued its decision in this case on February 8, 2012, its decision must be vacated.").

Jessica Wright's disrespect of Congressional intent behind 10 USC §1034 (Add. 4-10) is exacerbated by the fact that she approved an SES to oversee the

service secretaries' in military whistleblower reprisal matters barely six months after the Chairman and Ranking Member of the SASC had sent the letter included in the Addendum to this Brief to the Secretary of Defense, citing "systematic failure of the Department to protect military whistleblowers from reprisal [as being] a matter of grave concern." (Add. 86).

As demonstrated by the following chronology of how the statutory duty prescribed in 10 U.S.C. §1034(g) (Add. 8-9) that, "The Secretary [of Defense] shall make a decision to reverse or uphold the decision of the Secretary of the military department concerned," has been delegated to a non-Senate confirmed SES official within the Office of the Under Secretary of Defense for Personnel and Readiness, there as a blatant gap in the delegation trail that makes Respondent's final decision *ultra vires*:

- 2-26-2007: Secretary of Defense Robert Gates signed DoD Directive 5105.02 (Add. 126), "Deputy Secretary of Defense," proving that: "Deputy Secretary of Defense Gordon England has full power and authority to act for the Secretary of Defense and to exercise the powers of the Secretary of Defense upon any and all matters concerning which the Secretary of Defense is authorized to act pursuant to law";

- 6-22-08: Deputy Secretary of Defense Gordon England signed DoD Directive 5124.02 (Add. 30-41), "Under Secretary of Defense for Personnel and Readiness (USD(P&R))," providing that, *inter alia*: "The USD(P&R) is hereby delegated authority to: . . . 6.17. Exercise the authority of the Secretary of Defense under section 1034(g) of Reference (a) [Title 10, United States Code] regarding review of final decisions of the Secretaries of the Military Department concerned on applications for correction of military records decided under Military Whistleblower Protection procedures. The USD(P&R) may redelegate this authority to the DUSD(PI) [to whom

> Deputy Secretary of Defense Gordon England had previously delegated authority to review final decisions of the Secretaries of the Military Departments concerned on 7-23-07 in Paragraph 5.2 of DoD Directive 7050.06, 'Military Whistleblower Protection') (Add. 45).]";
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> - DELEGATION GAP: NO RE-DELEGATION OF AUTHORITY FROM THE USD(P&R) TO THE PRINCIPAL DEPUTY UNDER SECRETARY OF DEFENSE (PERSONNEL & READINESS) -- AND THE USD(P&R) HAD NO AUTHORITY TO REDELGATE THIS DUTY EXCEPT "TO THE DUSD(PI)" (*see* DoD Directive 5124.02, ¶6.17(Add. 39));
>
> - 12-17-12: Assistant Secretary of Defense for Reserve Affairs Jessica Wright initials her approval of an undated and unsigned by its author Action Memo "FOR: ACTING PRINCIPAL DEPUTY UNDER SECRETARY OF DEFENSE (PERSONNEL & READINESS)" from "P.M. Tamburrino, Chief of Staff, Office of the Under Secretary of Defense (Personnel and Readiness)," the recommendation in which Action Memo was: "Formally designate the position of the Chief of Staff, USD(P&R), as the permanent successor to the DUSD(PI), for the purposes of para. 5.2 of DoDD 7050.06 . . . to ensure uninterrupted performance of oversight, review, an appeal duties."

Thus, any delegation of duties under the MWPA and DoD Directives 3020.04 (Add. 26-29) and 7050.06 (Add. 42-57), to the Chief of Staff would be in contravention of the DoD Directives, the MWPA and the Appointments Clause of the Constitution, Article II, Section 2, Clause 2. *See National Labor Relations Board v. Canning*, --- U.S. ---, 134 S. Ct. 2550, 2558 (2014) ("*the Recess Appointments Clause sets forth a subsidiary, not a primary, method for appointing officers of the United States.* The immediately preceding Clause — Article II, Section 2, Clause 2 — provides the primary method of appointment. It says that the President 'shall nominate, and *by and with the Advice and Consent of the*

Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States' (emphasis added)."); *Andrade v. Lauer*, 729 F.2d 1475, 1494 (D.C. Cir. 1984) (Cause of action may arise when there is "a sufficient causal connection between their grievance" and the "alleged lack of authority because of their improper appointment.").

Accordingly, the Respondent's final decision on review should be vacated with directions for the Secretary of Defense, or his properly appointed delegate, on account of the egregiously arbitrary and capricious administrative record before this Court, to effectuate the equitable relief Petitioner has repeatedly requested through the ABCMR application process and then through the MWPA administrative appeal to the Secretary of Defense process, including retroactive promotion to Colonel. *Cf. Chappell v. Wallace*, 462 U.S. 296, 303 (1983) ("The Board is empowered to order . . . retroactive promotion. 10 U.S.C. § 1552(c).").

III. RESPONDENT DID NOT INCLUDE IN HER MARCH 6, 2015, FINAL DECISION THE REQUISITE "SATISFACTORY EXPLANATION FOR ITS ACTION, INCLUDING A 'RATIONAL CONNECTION BETWEEN THE FACTS FOUND AND THE CHOICE MADE'"

Assuming *arguendo* she was properly appointed, Respondent did not include in her final decision -- purportedly on behalf of the Secretary of Defense under 10 U.S.C. § 1034(h) (Add. 9-10) -- the requisite "satisfactory explanation for its

action, including a 'rational connection between the facts found and the choice made.' *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)," *Motor Vehicles Mfgs. Ass'n v. State Farm Mutual Auto Ins. Co*., 463 U.S. 29, 43 (1983). This failure by Respondent is especially egregious on the administrative record before this Court, considering that Petitioner raised the following non-frivolous due process claims in his administrative appeal to the Secretary of Defense, among other claims, multiple times -- and these non-frivolous due process claims were never addressed by either the Army Board for Correction of Military Records or by the Secretary of the Army:

> (1) In the fall of 2011, after years of repeated attempts to obtain a readable copy of the DAIG's 1999 Supplemental Report of Investigation (1999 DAIG ROI), LTC Rodriguez discovered that this 1999 DAIG ROI, the primary document upon which the ABCMR had based its August 2010 decision not to grant full relief, was the product of a forged (and misspelled) signature of the four-star General "Approval Authority," the practical result of which was to reinstate the prior 1998 substantiation of whistleblower reprisal by the Inspectors General of the Army and of the Department of Defense under the Military Whistleblower Protection Act, for which substantiated reprisal LTC Rodriguez has never been granted any relief – and for which failure to grant any relief based upon whistleblower reprisal there is no "satisfactory explanation"; and
>
> (2) The Army deprived LTC Rodriguez of procedural due process when the ABCMR failed to follow procedures prescribed in the Military Whistleblower Protection Act, failed to forward its 18 April 2012 Report of Proceedings as "the decision document . . . to the Secretary of the Army for final decision" as required by Army Regulation 15-185, ¶2-13(b) (Add. 77), failed to advise LTC Rodriguez of his appellate right under 10 U.S.C. § 1034(h) (Add. 9-10) (formerly 10 U.S.C. § 1034(g)), and failed to mail a copy of its 18

> April 2012 Record of Proceedings to LTC Rodriguez' Counsel of Record, among other procedural failures, all of which failures were arbitrary, capricious, and contrary to 10 U.S.C. § 1034(Add. 4-10), as implemented by DOD 7050.06 (Add. 42-57) -- and for which there is no agency explanation, notwithstanding the Supreme Court's requirement that there be a "satisfactory explanation."

But cf. Iowa v. FCC, 218 F.3d 756, 759 (D.C. Cir. 2000) ("the Commission's failure to address Iowa's argument requires that we remand this matter for the Commission's further consideration"); *Frizelle v. Slater*, 111 F.3d 172, 177 (D.C. Cir. 1997) (remanding where agency "did not respond to two ... arguments, which do not appear frivolous on their face and could affect the [agency's] ultimate disposition"); *AT&T Corp. v. FCC*, 86 F.2d 242, 247 (D.C. Cir. 1997) (remanding where Commission "completely failed to address" argument raised in ex parte letter); *Albino v. United States*, 78 F. Supp. 3d 148, 167 ((D.D.C. 2015) ("It is well-established that a decision by the ABCMR that fails to address a plaintiff's non-frivolous, material arguments is arbitrary.")

A. There is no "satisfactory explanation" in the administrative record for why LTC Rodriguez has never been granted any relief whatsoever for substantiated whistleblower reprisal

Respondent and her predecessor have now had three opportunities to address the indisputable fact that LTC Rodriguez has never been granted any relief whatsoever for what LTC Rodriguez described on page 15 of his September 28, 2012, Memorandum in Support of his appeal to the Secretary of Defense as

"acknowledged due process violations (and associated 'injustices') in connection with LTC Rodriguez' claims of reprisal under the Military Whistleblower Protection Act," and each time have declined to provide the requisite "satisfactory explanation." (DA92). As will be explained *infra*, this blatantly "arbitrary and capricious" agency action was brought to the attention of Respondent's predecessor in LTC Rodriguez' February 27, 2013, letter to Respondent's predecessor, (DA33-39) and was also brought to Respondent's attention by September 25, 2014 memorandum (DA6-30) and during the in-person meeting with Respondent on September 29, 2014.

Notwithstanding numerous opportunities to provide a "satisfactory explanation" for why LTC Rodriguez has never been granted any relief whatsoever for "acknowledged due process violations (and associated 'injustices') in connection with LTC Rodriguez' claims of reprisal under the Military Whistleblower Protection Act," the only explanation Respondent includes in her final decision amounted to six sentences on page two of her final decision concluding:

> I understand that you view the second DAIG ROI as a 'fraud' and 'cognizable crime,' based on the statement of the former Army Vice Chief of Staff that he does not recognize the signature on the 1999 ROI as his own. In 2012, the ABCMR reconsidered your case based on this evidence, and concluded that even if the second DAIG ROI were 'thrown out,' and the initial finding of reprisal remained in place, there still was insufficient evidence to justify the retroactive promotion –related relief you sought.

In other words, even assuming *arguendo* that Respondent is correct that, "there still was insufficient evidence to justify the retroactive promotion –related relief [LTC Rodriguez] sought," with which conclusion we disagree, the indisputable fact in the administrative record before this Court is that Respondent has failed to address the "non-frivolous, material" claim (*Albino v. United States*, 78 F. Supp. 3d at 167) that LTC Rodriguez has never been granted any relief whatsoever for "acknowledged due process violations (and associated 'injustices') in connection with LTC Rodriguez' claims of reprisal under the Military Whistleblower Protection Act."

Under DoD military whistleblower reprisal precedent, once the military whistleblower satisfies his burden of establishing the *prima facie* case of reprisal, the burden shifts to the DoD to "provide clear and convincing evidence that it would have taken the same actions had Complainant not made protected disclosures." Inspector General of the Department of Defense, "Appropriated Fund Employee Whistleblower Reprisal Investigation," Report No. 20121205-001932, (Dec. 2, 2013) (Add. 87-99.) ("We found the Agency did not provide clear and convincing evidence that it would have taken the same actions had Complainant not made protected disclosures.") p.11 (Add. 98); *see* Joseph Schmitz, *The*

Inspector General Handbook: Fraud, Waste, Abuse, and Other Constitutional "Enemies, Foreign and Domestic," p. 374 (2013) ("the burden shifts to the complained against official to establish – by a clear and convincing evidence standard – that . . . [t]he personnel action would still have been taken, withheld, or threatened even if the protected communication had not been made").

In effect, Respondent has admitted that LTC Rodriguez was reprised against on account of military whistleblower activities, and that the ABCMR awarded no relief whatsoever for that reprisal – but the Respondent herself provides no explanation whatsoever for this blatant lack of any relief for an acknowledged injustice, *i.e.*, military whistleblower reprisal. *But cf. Frizelle v. Slater*, 111 F.3d 172, 177 (D.C. Cir. 1997) (remanding where agency "did not respond to two ... arguments, which do not appear frivolous on their face and could affect the [agency's] ultimate disposition").

B. There is no "satisfactory explanation" in the administrative record for why LTC Rodriguez has never been granted any relief whatsoever for substantiated procedural due process violations

Respondent and her predecessor also have now had three opportunities to address the indisputable fact that LTC Rodriguez has never been granted any relief whatsoever for multiple substantiated procedural due

process violations. This blatantly "arbitrary and capricious" agency action was brought to the attention of Respondent's predecessor in the February 27, 2013, letter to Respondent's predecessor, and was also brought to Respondent's attention again during the in-person meeting with Respondent on September 29, 2014.

Pages two to three of LTC Rodriguez' February 27, 2013, letter to Respondent's predecessor, pointed out that there was no agency explanation whatsoever for rejecting the following three bases for appeal in our September 28, 2012, Memorandum, even though the Supreme Court requires a "satisfactory explanation" *(Burlington Truck Lines v United States, supra):*

> (1) LTC Rodriguez's Due Process Right, under U.S. Const., Amend. V, was violated when the Army failed to afford him "Notice and an Opportunity to be Heard" when he was denied a copy of the 1999 DAIG ROI which was contrary to the Fifth Amendment of the U.S. Constitution.[5] In connection with this basis for appeal, as explained on the first page of our Memorandum of Law, in the fall of 2011, after years of repeated attempts to obtain a readable copy of the DAIG's 1999 Supplemental Report of Investigation, LTC Rodriguez discovered that this primary document upon which the ABCMR had based its decision not to grant full relief in August 2010 was itself the product of a forged (and misspelled) signature of the 4-star Approval Authority.
>
> (2) LTC Rodriguez's Due Process Right, under U.S. Const., Amend. V, was violated when the Army failed to follow the Procedures prescribed in the Military Whistleblower Protection Act, and its own

[5] *See Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), quoted and applied in Inspector General of the Department of Defense Policy Memo, "Due Process in the Activities of the Office of the Inspector General," August 20, 2004 (DA351).

> rules, which failures impeded Secretary of Defense Review under 10 U.S.C. § 1034 (Add. 4-10) and were otherwise arbitrary, capricious, and contrary to law.
>
> (3) Our October 22, 2012, "supplemental authorities" letter brought to the attention of the Secretary of Defense "pertinent and significant authorities [which had] come to a parties attention after the party's brief has been filed," the rejection of which by the Secretary of Defense on appeal under §1034(g) of the Military Whistleblower Protection Act (Add. 8-9) has never been explained. Specifically, we brought to the Secretary of Defense's attention an Air Force Board for Correction of Military Records precedent practically on all fours with our appeal. The Air Force Board awarded a retroactive "direct promotion to the grade of colonel as if selected by the Calendar Year 2003 Colonel Central Selection Board" based on the applicant's contention that, "the 347 RWQ/GC's action to relieve him from command constituted both an injustice and an abuse of authority and that the reprisal referral OPR was based on the fact that he had filed an IO complaint against the wing commander." This supplemental authority directly supported our appellate briefing that the ABCMR should have awarded retroactive promotion to LTC Rodriguez and reversal by the Secretary of Defense is now warranted because the ABCMR had acknowledged "A Number of Injustices," including but not limited to the DAIG's 1998 Reprisal substantiation under the Military Whistleblower Protection Act, but failed to any relief whatsoever for reprisal.

February 27, 2013, Letter, pp. 2-3 (DA34-35).

Instead of providing the requisite "satisfactory explanation for its action, including a 'rational connection between the facts found and the choice made'" (*Motor Vehicles Mfgs. Ass'n., supra*) for any of these three specifically enumerated due process violations for which LTC Rodriguez has received no relief whatsoever, Respondent's March 6, 2015, final decision raised a number of straw men arguments only to knock each of them down, concluding: "there is

insufficient evidence that the ABCMR disregarded any law or regulation, or violated your due process rights during the original 2010 review and 2012 reconsideration of your case, by denying you notice of [sic], and an opportunity to be heard" (DA3).

The administrative record before this Court thus establishes that Respondent, notwithstanding multiple opportunities to do so, has never addressed the above three enumerated non-frivolous due process claims. *See Frizelle v. Slater*, 111 F.3d 172, 177 (D.C. Cir. 1997) (remanding where agency "did not respond to two . . . . arguments, which do not appear frivolous on their face and could affect the [agency's] ultimate disposition"); *Albino v. United States*, 78 F. Supp. 3d 148, 167 (D.D.C. 2015) ("It is well-established that a decision by the ABCMR that fails to address a plaintiff's non-frivolous, material arguments is arbitrary.").

Accordingly, this Court should hold that Respondent acted arbitrarily, and in light of the fact that this matter has already been remanded once, direct that the Secretary of Defense the Secretary of Defense, for whom Respondent purported to issue the final decision on review, to provide the "whole loaf" of relief to Petitioner that is warranted by the administrative record before this Court, including retroactive promotion, for the reasons explained below.

IV. RESPONDENT'S FINAL DECISION IS "ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION, OR OTHERWISE NOT IN ACCORDANCE WITH LAW; . . . CONTRARY TO CONSTITUTIONAL RIGHT, POWER, PRIVILEGE, OR IMMUNITY; . . . IN EXCESS OF STATUTORY JURISDICTION, AUTHORITY, OR LIMITATIONS, OR SHORT OF STATUTORY RIGHT; [AND/OR] WITHOUT OBSERVANCE OF PROCEDURE REQUIRED BY LAW"

Aside from the blatantly arbitrary elements of Respondent's final decision addressed in the previous section, Respondent would point out the following APA violations that warrant judicial review and the relief requested by Petitioner in this case of first impression under the MWPA. As explained below, the administrative appeal process through which Respondent issued her final decision that is on review is a sham. There is no prescribed "standard of review" for the appeal to the Secretary of Defense, and the ostensible administrative record before this Court includes evidence of an adversarial process wherein the Petitioner in this case is not allowed to review what amounts to an adversarial brief to the appellate decision maker (*i.e.*, to the Respondent).

A. There is no prescribed standard of review for the administrative appeal to the Secretary of Defense process required under the MWPA

At the beginning of Petitioner's efforts to submit an administrative appeal to the Secretary of Defense under 10 U.S.C. § 1034 (Add. 4-10), as had been suggested by the staff of the DoD OIG (*see* Add. 100 – August 1, 2012 Letter from DoD OIG), counsel for Petitioner (who previously had served as the

Senate-confirmed Inspector General of the Department of Defense) endeavored to ascertain precisely what the procedure was for pursuing such an administrative appeal. As a starting point, Counsel tried to contact the staff of the official identified in DoD Directive 7050.06, "Military Whistleblower Protection," July 23, 2007, as the "Deputy Under Secretary of Defense for Program Integration . . . Attention: Legal Policy." *Id*. ¶E3.3.5. at p.16. (Add. 57).

What Counsel for Petitioner soon ascertained was that the position of Deputy Under Secretary of Defense for Program Integration had been eliminated, and it was not clear if and when a replacement would be named for purposed of what DoD Directive 7050.06 described as "APPEAL TO THE SECRETARY OF DEFENSE." *Id*. ¶E3.3. at p.15. (Add. 56).

To make matters worse, Counsel for Petitioner soon ascertained from a staff attorney in the Office of Legal Policy that, in the words of the hand-out provided by that staff attorney, "10 U.S.C. § 1034 and DoDD 7050.06 do not address the appropriate standard of review to be applied" by the Secretary of Defense or his designee in any (Add. 101) "APPEAL TO THE SECRETARY OF DEFENSE." (Add. 56). This admitted lack of a prescribed "standard of review" for an administrative appeal process required by statute (10 U.S.C. § 1034) (Add. 4-10) is contrary to the most basic precepts of Anglo-American

jurisprudence. *See* William Blackstone, *Commentaries on the Law of England*, p. 45 (1765-1769) (explaining that all civil law is "a rule of civil conduct prescribed").[6]

A fortiori, this admitted lack of any prescribed "standard of review" is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2) (Add. 3). To compound this admitted lack of a prescribed "standard of review," even after Petitioner through Counsel complained about this lack of a prescribed standard, instead of prescribing a "standard of review," the Department of Defense re-issued DoD Directive 7050.06 on April 17, 2015 (Add. 58-69), this time with neither a prescribed "standard or review" nor a designated official within the Office of the Under Secretary of Defense for Personnel and Readiness to replace the previously designated "Deputy Under Secretary of Defense for Program Integration," whom the 2007 DoD Directive 7050.06 described as being responsible for: "On behalf of the Secretary of Defense, within 90 days of receipt of a[n administrative appeal under this Directive], review the final decision of the Secretary of the Military Department concerned . . . , and decide whether to

[6] *See also* THE INSPECTOR GENERAL HANDBOOK, *supra*, at 444 (explaining Blackstone's "four essential attributes of all man-made laws," including that all man-made laws "must be prescribed," as "the four essential elements of the Anglo-American tradition of transparent government").

uphold or reverse the decision of the Secretary of the Military Department concerned." *Id.* ¶5.2.2. at p.4 (Add. 45).

The lack of both a prescribed standard and a designated responsible official described above is reflected in what can only be described as a chaotic "Administrative Record" certified by Respondent to this Court. Accordingly, and for the other reasons described above, Petitioner urges the Court to rule that the final decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2) (Add. 3).

B. The "Appeal to the Secretary of Defense" under 10 U.S.C. § 1034 is a non-transparent adversarial process plagued by conflicts of interest wherein the Appellant (*i.e.*, the Petitioner in his matter) was not allowed to review what amounts to an adversarial brief provided to the appellate decision maker (*i.e.*, to the Respondent)

On November 19, 2015, Respondent filed, without seeking Petitioner's consent, what Respondent described as a "revised certified index to the administrative record in this case" (Dkt #1584516). On November 20, 2015, Petitioner objected by letter (Dkt #1584665), explaining that, what Respondent filed: (a) was neither a revision of any prior certification (at least not a revision by the same official), nor an index to "the administrative record" as defined by either 28 U.S.C. § 2112 ("Record on review and enforcement of agency orders") (Add. 15-17) or Rule 16(a) of the Federal Rules of Appellate Procedure ("Composition of the Record"); and (b) appears to be yet another effort by Respondent to avoid

simply certifying "the administrative record already in existence." *Camp v. Pitts*, 411 U.S. 138, 142 (1973) ("the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court").

The cover letter to Respondent's November 19, 2015, pleading explained: "We write to inform the Court that the government is filing a revised certified index to the administrative record in this case. The prior certified index omitted an internal Department of Defense memorandum that the government had included (following a voluntary waiver of privilege) in the administrative record of petitioner's prior petition for review. No other documents have been added or removed from the index."

This newly added "internal Department of Defense memorandum that the government had included (following a voluntary waiver of privilege)" in fact was NOT "in the administrative record of petitioner's prior petition for review." It was produced to Counsel for Petitioner only after Petitioner formally demanded that Counsel for Respondent in the first iteration of this petition for review, "promptly correct what [he] filed on January 13, 2014, in lieu of the 'certified index to the record' ordered by the Court on December 13, 2014, so that it properly reflects the record before Respondent P.M. Tamburrino when he made his January 28, 2013, and April 11, 2013, decisions" (both attached to the refiled Petition for Review).

In order for this Court to understand the nature of the flaws in what Respondent has certified as the requisite "index to the record," Petitioner hereby is providing the formal objection letter transmitted to Respondent last time, which prompted Respondent to produce the "internal Department of Defense memorandum" that Respondent this time purports to add to the administrative record on review. *See* Letter of February 14, 2014, from Joseph E. Schmitz to J. Gowel, counsel for Respondent P.M. Tamburrino (with enclosures) (Add. 102-14.)

In the Amended Certified Index dated November 19, 2015, the Respondent has provided one version of the Memorandum from Major Ryan D. Oakley, Deputy Director, Office of Legal Policy, to P.M. Tamburrino, Chief of Staff, Office of the Under Secretary of Defense for Personnel and Readiness, Re: Appeal of Army Board of Correction of Military Records (ABCMR) Decision—LTC Robert W. Rodriguez (Retired) (DA42-53). This "internal memorandum" is nothing other than an adversarial submission to the decisionmaker by an attorney within the Department of Defense who we now know was apparently collaborating with counsel for the ABCMR in what is supposed to be an "APPEAL TO THE SECRETARY OF DEFENSE" under the MWPA, 10 U.S.C. § 1034 (Add. 4-10). This type of secret collaboration would be analogous to a scenario where one of the law clerks for an appellate Judge of this Court was secretly collaborating with the law clerk for the District Court Judge whose ruling was on appeal to this Court

to prepare an appellate Judge's "bench memo" – and then pretended that this "bench memo" is part of the lower court's record on review.

The fact that Respondent would not only once but twice in this refiled petition for judicial review pretend to "certify" what is so blatantly not the "Administrative Record" before the Respondent when she made her final decision that is on review is *at best*: "(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; [and/or] (D) without observance of procedure required by law." 5 U.S.C. § 706(2) (Add. 3).

Accordingly, this Court should hold that Respondent acted arbitrarily, and in light of the fact that this matter has already been remanded once, direct that the Secretary of Defense the Secretary of Defense, for whom Respondent purported to issue the final decision on review, to provide the "whole loaf" of relief to Petitioner that is warranted by the administrative record before this Court, including retroactive promotion, as explained more fully below.

C. Respondent's final decision missed a statutory time deadline, and is therefore arbitrary, capricious, and not in accordance with law

Under the provisions of MWPA, 10 U.S.C. § 1034(h) (Add. 9-10), a military whistleblower who is "not satisfied with the disposition of the matter, may *submit*

the matter to the Secretary of Defense. The Secretary shall make a decision to reverse or uphold the decision of the Secretary of the military department concerned in the matter within 90 days after receipt of such a submittal" (emphasis added). Not only was Respondent's March 6, 2015, decision (DA1-05) rendered five and a half months after the 90 day deadline set by the MWPA (assuming the 90 days statutory clock began to tick after Petitioner's in-person meeting with Respondent on September 29, 2014), but her predecessor's decision was likewise issued on January 28, 2013 (DA32), four months after Petitioner submitting his administrative appeal to the Secretary of Defense on September 28, 2012, (DA77-112), and more than 90 days after Petitioner supplemented that appeal on October 22, 2012 (DA56-70).

Accordingly, the Court should rule that the final decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2) (Add. 3).

D. Respondent's final decision includes an unexplained departure from precedent, and is therefore arbitrary and capricious

In her final decision, Respondent wrote:

> I find that the ABCMR did not abuse its substantial discretion in denying the specific relief requested. Specifically, the Board concluded there was insufficient justification for the extraordinary relief you requested, to include retroactive promotion to Colonel (O-6) and resulting pay and benefits. I considered the Air Force BCMR case you submitted in rebuttal, along with a list of 28 other instances

> where a Secretarial-directed recommendation for promotion was granted. I find, however, that the ABCMR articulated legitimate reasons for its decision, based on the specific facts and circumstances of your case. [DA2-03]

As explained below, this is precisely the type of "unexplained departure from its precedent" that this Court held to be "arbitrary and capricious" in *Kreis v. Secretary of Air Force*, 406 F.3d 686, 687 (D.C. Cir. 2005).

Shortly after Petitioner submitted his appeal to the Secretary of Defense under 10 U.S.C. § 1034 (Add. 4-10), Petitioner discovered an Air Force Correction Board precedent for retroactive promotion to Colonel (O-6) that included similar factual circumstances to those that had been brief to the Army Board for Correction of Military Records in Petitioner's matter, and promptly brought this Air Force precedent to the attention of Respondent's predecessor in the form of a Rule 28(j)-type submission (DA56-70). When Petitioner met with Respondent on September 28, 2014, Petitioner reminded Respondent of this Air Force precedent for retroactive promotion, both in a "Read-Ahead" written submission (DA6-30) and then again orally at the meeting.

Based on this Court's precedent in *Kreis*, therefore, it was "arbitrary and capricious" for Respondent to dispose of this agency precedent with no explanation other than "I considered the Air Force BCMR case you submitted in rebuttal, along with a list of 28 other instances where a Secretarial-directed recommendation for promotion was granted. I find, however, that he ABCMR articulated legitimate reasons for its decision, based on the specific facts and circumstances of your

case." As this Court explained in *Kreis*, "It is axiomatic that '[a]n agency must treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so.' *Indep. Petroleum Ass'n of Am. v. Babbitt*, 92 F.3d 1248, 1258 (D.C. Cir. 1996). Therefore, the Board's conclusion . . . is arbitrary and capricious because it is inconsistent with its regulations and an unexplained departure from its precedent." *Kreis*, 406 F.3d at 687.

Having found errors and injustices, the ABCMR was required by law to grant relief to make Petitioner whole. As the U.S. Court of Appeals for the Federal Circuit explained in an analogous judicial review context:

> In *Sanders* [*v. United States*, 594 F.2d 808 (Ct.Cl. 1979)], *supra*, the Court of Claims described the nature of the relief that should be afforded by correction boards in the following broad terms –
>
> > The broad impact of correction board action was described in *Denton v. United States*, 204 Ct.Cl. 188, 195 (1974), . . . where we said:
> >
> > * * * In the context of the correction of a military record, this means that once a discretionary decision is made to correct a record, the grant of appropriate money relief is not discretionary but automatic. * * *
> >
> > Elsewhere we have said that where an applicant has convinced a correction board to correct his record it must not grant him "half-a-loaf" of relief. *DeBow v. United States*, 434 F.2d 1333, 193 Ct.Cl. 499 (1970) . . . He must be made "whole." *Ray v. United States*, 453 F.2d 754, 197 Ct.Cl. 1 (1972). In general, "[m]ilitary correction boards 'have an abiding moral sanction to determine, insofar as possible, the true nature of an alleged injustice and to take steps to grant thorough and fitting relief.'

> . . . " *Yee v. United States*, 512 F.2d 1383, 1387--88, 206 Ct.Cl. 388, 398 (1975).

> 594 F.2d at 813 (internal citations omitted); *see also Hamrick v. United States*, 96 F. Supp. 940, 943 (Ct. Cl. 1951) ("full correction of the error would require plaintiff's being put in the same position he would be in had the erroneous determination not been made").

Carlisle v. United States, 66 Fed. Cl. 627, 638, n. 11 (Fed. Cir. 2005). This Court has also cited *Sanders* as authoritative case law. *See, e.g., Frizelle v. Slater*, *supra*, 111 F.3d at 177; *Van Drasek v. Lehman*, 762 F.2d 1065, 1071 (D.C. Cir. 1985) (noting that *Sanders* was "cited with approval in *Chappell v. Wallace*, 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983)").

Accordingly, this Court should hold that Respondent acted in an arbitrary and capricious manner, and in light of the fact that this matter has already been remanded once (by agreement of the parties in No. 13-1192), direct that the Secretary of Defense effectuate the "whole loaf" of relief required by law, including retroactive promotion to Colonel, because Respondent and her predecessor have had multiple opportunities to explain, yet have failed to articulate an adequate explanation, why retroactive promotion should not be awarded based on agency precedent in the administrative record now before this Court. Respondent's failure to provide such an explanation was an arbitrary and capricious "unexplained departure from its precedent." *Kreis*, 406 F.3d at 687.

CONCLUSION

For the foregoing reasons, this Court should (a) vacate the decision of Respondent not to grant further relief, and (b) direct the Secretary of Defense, for whom Respondent purported to issue the final decision on review, to

- provide the "whole loaf" of relief to Petitioner that is required based on the administrative record before this Court, including retroactive promotion to Colonel (retired);
- provide for periodic independent reviews of the military whistleblower administrative appeal process required by 10 U.S.C. 1034 (Add. 4-10) to ensure that:
    - the decision-maker is a properly appointed Senate-confirmed official, senior to the Service Secretaries, with delegated authority to act on behalf of the Secretary of Defense in deciding military whistleblower administrative appeals;
    - the standard of review for those appeals is prescribed;
    - conflicts of interest throughout that administrative appeal process are avoided; and
    - military whistleblower appellants such as Petitioner are afforded the "essential constitutional promises" of procedural due process required by the 5th Amendment, including "notice

and an opportunity to be heard . . . at a meaningful time and in a meaningful manner." *Hamdi v. Rumsfeld*, 542 U.S. at 533 (internal quotes and cites omitted).

Date: April 15, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,771 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2013 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that, on this 15th day of April 2016, I electronically filed the original of the foregoing document and the related Addendum with the clerk of this Court by using the CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Joseph E. Schmitz
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