

Transcript of oral argument in Carson v. Merit Systems Protection Board, docket no. 2015-3135; -3211, at US Court of Appeals for the Federal Circuit, on February 8, 2017. A “first draft” transcription of the oral argument audio file was produced by “TranscribeMe!,” a commercial service. Mr. Carson then added names and times as well as made some corrections to the transcription.

Presiding Judge Pauline Newman
Judge Kathleen M. O’Malley
Judge Kimberly A. Moore

Mr. Loring Justice for Mr. Carson
Mr. Jeffrey Gauger for Merit Systems Protection Board

Clerk: The United States Court of Appeals for the Federal Circuit is now open and in session. God save the United States and this Honorable Court.

Judge Newman: Thank you. Be seated. The first argued case this morning is number 15-3135, Carson against Merit Systems Protection Board, Mr. Justice.

Mr. Justice (0:35): May it please the Honorable Court, there is one question at the guts of this appeal. That question simply is, is the Office of Special Counsel ignoring and refusing to perform certain minor but important nondiscretionary statutory duties with retaliatory animus because Mr. Carson has reported to it and reported about it a significant change in his working conditions? That’s really it. And it is a significant change in his working conditions for a number of reasons, but-- one of the most important of which, is because the 1994 amendment to the Whistleblower Protection Act and the 2012 Whistleblower Protection Enhancement Act both reflect an intent of Congress, that that catchall provision came into our law with the intent-- and this is a quote to catch "any action that was retaliatory in nature, regardless of form." So it's sort of implicit in our honorable opponent's brief that working conditions should not be interpreted that broadly, and should be something in the nature of, perhaps, if someone were required to sit by asbestos or another dangerous substance. But it's clear Congress wanted that to be interpreted very--

Judge O’Malley (2:00): I guess I'm still not understanding what you're saying. I mean, as I understand your argument, you're saying that others will be chilled. He obviously hasn't been chilled, right? He keeps making these reports. Whether they get acted on or not, he hasn't been chilled in his willingness to make the reports, right?

Mr. Justice (2:20): Well, yes. But when he referenced to other people below, he was referencing that as a test. What you're saying is correct and my client may be un-chillable, but that's not really the test in our view, respectfully. The test that could be used, that he was positing, was, possibly, maybe you should use things like Burlington or Shivaee, and think about whether or not it would deter a reasonably situated employee of when they are ignored in this way. And he was just positing that. There was no actual [crosstalk]--

Judge O’Malley (2:50): Is there any other procedural vehicle by which you could try to force, essentially, the OSC to do its job?

Mr. Justice (2:56): I am not aware. There have been suggestions of mandamus. However, I'm not sure that that's applicable. We do think here, or especially these are genuine case in controversy because it has an effect on him in terms of his working conditions if they're not processing in both account.

Judge O'Malley (3:20): Generally, if an agency completely fails to take action or do its job, then under the APA there's the ability to make a challenge or to seek mandamus in the district court. Right?

Mr. Justice (3:30): There is. That is a remedy. We don't believe it forecloses this remedy. But what you're saying is absolutely correct. But we do not believe it forecloses this remedy because of the following reasons. That, ignoring Mr. Carson's complaints, because he is Mr. Carson and he's made disclosures about OSC, puts him in a state, this is different than a lot of other employees in that, because of their retaliatory animus against him, he doesn't have a functioning OSC to go to. So even if it might be a better way to go, to make that mandamus action in the United States, the district court, certainly here he fits within this statute as well. So it's two sides.

Judge O'Malley (4:14): Do you have any evidence that OSC acts more quickly on complaints by other complainants?

Mr. Justice (4:20): As far as more quickly, we don't have direct evidence of that. Of course, because of that, so the answer is no. But because of the [quid?] nature and the circular reasoning and saying there's no personal action, and there's no jurisdiction, of course will never be in a position to get to that unless we stop OSC respectfully from defining downward the catchall category and defining downward personnel action in contravention of congress.

Judge O'Malley (4:47): But isn't it, with all due respect to OSC, isn't there a report from the inspector general that says they're notoriously bad about doing this job?

Mr. Justice (5:00): They are notoriously bad about doing this job, but remember the record [crosstalk]--

Judge O'Malley (5:08): In other words, they're non-discriminatory in terms of their failure to make these decisions.

Mr. Justice (5:15): They're non-discriminatorially bad to everyone is an argument. Let me tell you why that I don't believe that that works here to destroy Mr. Carson's claim, but I certainly see the point. The reason that doesn't work to destroy Mr. Carson's claim here, Judge O'Malley, is because that- given the light most favorable to him- given that they only disputed on personnel action below, right now in this record for-- essentially we're here on a motion to dismiss, essentially is how we got up here or the equivalent thereof. For purposes of this record right now, they did act with retaliatory animus toward him, and they were having particular retaliatory animus against him. So they're really bad, in essence if you believe that report, for everyone and they're super really bad on my client, and that is the issue.

Judge O'Malley (6:00): And where do we infer that they're particularly bad on your client?

Mr. Justice (6:05): Well, that's the record below, and that's not disputed yet. If OSC had wanted to fight that battle out with Mr. Carson, it had to fight it out below. It did not fight that battle below. So, that's the record as it exists, and what I believe Mr. Carson and myself hopefully intend to prove if we get a chance to go back below.

But essentially viewing the evidence in the light most favorable to Mr. Carson, he brought that claim of that nature. And OSC didn't challenge on that basis. They could have said, "Hey, we do this to everybody. And you were non-discriminatorily not functioning very well, and this is not a problem for you." They didn't say that. On the record right now, Mr. Carson's allegations have to be accepted as true, and that's why. And I respect--

Judge O'Malley (6:54): Let me give you an analogy.

What if he had made a complaint to OSHA or putting aside the split case issue to the EEOC, and those entities failed to respond. Could you bring all them before the Merit Systems Protection Board?

Mr. Justice (7:12): It would depend on whether he had credible-- in essence in this case here, it's circumstantial. In other evidence, a good faith-basis to opine, if they're singling him out. And so, there'd be one little caveat that I'd back on, it would be would he have any basis or any thought, or any reasoning to say that they were singling him out because of his history of raising concerns and things like this. It would all be whether you could infer that. **Judge O'Malley (7:35):** Your theory on why the OSC is singling him out is that he's had multiple claims, or because one of his complaints has been about OSC?

Mr. Justice (7:46): Both. He has multiple complaints and he's made them about OSC specifically, and it's failure to perform in accordance with the intent of congress. And so that's the theory, is that the complaints are about OSC and then they're just tired of this guy with multiple complaints. There's more than one theory on that, and you've encapsulated exactly the two principal ones with your question.

Judge O'Malley (8:12): Can you give me any example of a case where we have-- a third party agency where a report or a complaint has been made like OSHA, like OSC, anything else where we've authorized the actions to go before the MSPB.

Mr. Justice (8:35): The closest is Weed, where it was determined in Weed that you don't have to be in a direct relationship. That is your employing agency, it doesn't have to be the one discriminating against him, it is possible that another agency that is not your agency--

Judge O'Malley (8:50): Right, but that's a very different-- because that was actually an employing agency and there were categories of exceptions that were laid out This doesn't fall into any of those categories.

Mr. Justice (8:58): It doesn't follow directly into any of the categories that were referenced in Weed. That is undoubtedly true in the narrow sense but by logic and reason it fits within any other significant change in working environment or work place conditions of the Whistleblower Protection Act as amended in 1994. So our argument is not necessarily that this is a simple skip from the precedent of Weed or this is just a hop from the precedent of Weed. It's close to Weed, but you're right. There's some differences, but we say logic and reason--

Judge O'Malley (9:38): But we've opened the door for you. The question is whether it opens a garage door.

Mr. Justice (9:40): Basically, yes. And it does for this reason, here's why you should construe it that way to open the garage door. The reason you should is because of the intent of Congress in the Whistleblower Protection Act of-- excuse me, in the Reform Act of 1994 with the amendment in the 2012 Enhancement Act when they said they want to catch any action that has retaliatory animus to protect the merit system, and they want to catch it regardless of form, and both those were quotes of congress. So that's why the Weed precedent that has cracked the door should open it up and we're only asking for minor perfunctory duties out of OSC. We're not asking for anything that will shatter the federal budget or will be earth shaking. We're simply asking for those minor non-discretionary statutory processing type duties and so that's why we believe it's a reasonable ask. And it has to mean something. If you look at our honorable colleagues brief, they do cite a lot of pre-catch-all case law. And it does seem as though, from time-to-time, that OSC and MSPB are, I don't want to say pretending, but acting as if the 1994 amendments mean nothing and that catch-all category isn't there.

Judge O'Malley (10:58): Well, I agree. The catch-all category is important, and there's all kinds of things you can envision. But I guess what I'm still trying to understand is it'd be one thing if you could argue that he was chilled in making complaints because he was so afraid that they would not be listened to. But you're not making that argument because, as you say, he appears to be unchillable.

Mr. Justice (11:20): Yes, that's right. The important factors are that a reasonable person would be chilled. A reasonable employee would be chilled, and that's the test. And if there's retaliatory animus, remember the non-discretionary duties in processing his complaints, they didn't do it. Under our theory of the case, this has to be accepted right now. So he gets that. He has been harmed. Now, does the fact he's so persistent and unchillable because he loves this statute and cares about it, is that in some way relevant? Well, you might speak about it as you are in terms of, "Well, it didn't chill him," and I get that point. But because it would chill a reasonable employee, if you want to pull down from that case law that talks about the chilling effect on a reasonable employee, you could. And we were just offering that as an option to give the panorama of the case law before this honorable court. But at the end of the day, the facts of the record right now are they didn't do those non-discretionary duties because he's Joe Carson and because he's done what he's done in terms of complaining about their performance. And so, while the undoubted answer to your question is correct, he was not chilled, we don't think that is fatal in any way respectfully. I would like, if there are no questions, to reserve for rebuttal. Or was there questions?

Judge Newman (12:34): Yes. No, so you will save your rebuttal time. Let's hear from the Board.

Mr. Justice: Thank you.

Judge Newman: Mr. Gauger.

Mr. Gauger (12:40): Good morning. And may it please the court, this really is a petition for mandamus that's been cloaked as an MSPB appeal. But of course, the MSPB doesn't have mandamus authority. It's an administrative agency. The MSPB does not have general oversight over the Office of Special Council.

Judge O'Malley (13:00): Could a petition for mandamus be filed? I mean, that's a question I have because Office of Special Council isn't really an agency per se. So could he file a petition for mandamus to force them to do their job?

Mr. Gauger (13:15): I'm uncertain whether District Court would accept that or not. I know Mr. Carson has previously filed for writs of mandamus in District Court, but I don't know if it was against the Office of Special Council. So he could try that.

Judge O'Malley (13:30): But, but, but--

So when you say it's a petition for mandamus, is there--

-- would it be possible?

Mr. Gauger: In District Court?

Judge O'Malley: Yeah.

Mr. Gauger: In District Court. I mean I can't say for sure what a District Court would do, but--

Judge O'Malley: Okay. So you haven't researched that question?

Mr. Gauger: No, I haven't found a writ of mandamus against the Office of Special Counsel. I believe he went to

District-- he's gone to District Court--

Judge O'Malley (13:50): But has anyone ever filed a writ of mandamus against Office of Special Counsel, or do you think in your professional opinion that anyone could?

Mr. Gauger: Well, it's an extraordinary writ, so I think the likelihood of its success is very poor.

Judge O'Malley: Putting that aside--

Mr. Gauger: Putting that aside, sure, they could file a petition for mandamus against the Office of Special Counsel. They could do that against virtually any federal agency--

Judge Newman (14:15): So what is the authority of the board if they feel that they aren't getting from the OSC what the statute says the OSC should do?

Mr. Gauger (14:25): Prior to 1989, there was nothing. If you filed a complaint with Special Counsel and you didn't get the result that you wanted, there was really nothing you could do. In this DC Circuit case called Wren, the Court cites in its decision that said you might be able to go to District Court, but even that case didn't say you could. It said you might be able to go to District Court and seek mandamus. So in 1989, Congress created this IRA appeal. And it gives the complainant who went to Special Counsel and did not get a favorable result the opportunity to come to the MSPB and prove their case at the MSPB.

Judge O'Malley (15:02): But only if they got a result. So if they sit on it for 10 years, which is what the OIG report says often happens, and they get no result, they can't appeal it, right?

Mr. Gauger (15:18): Well, that would be a different scenario.

Judge O'Malley (15:20): I mean, isn't that the scenario he says he has here, that he's filed four complaints and they have taken no action on them?

Mr. Gauger (15:25): That's not my understanding. My understanding is that they closed his complaints, and he believes that they should be investigated.

Judge Newman: They closed without taking action.

Mr. Gauger: Closed without taking action. So under the Whistleblower Protection Act, he has the right to come to the MSPB and prove his case.

Judge Newman: So that's even worse, is it not, when they're required to take action or-- unless it's totally meritless or they're required to investigate?

Mr. Gauger: Well, first, my point is the MSPB doesn't have the authority to-- the right to go to the MSPB and file an IRA appeal is not-- should not be equated with the MSPB having some sort of power to tell the OSC what to do. It doesn't have that power.

Judge Newman (16:05): Do they have independent investigatory authority? Suppose they feel that this has been inadequately investigated and what they've been told, let's say prima facie, makes the case and there's been no investigation. What is the authority of the MSPB?

Mr. Gauger (16:25): The MSPB can hear an appeal from that individual. They can come and prove their own case since the special counsel's not pursuing it. They could come at the MSPB and prove it themselves. They will have the burden to bring evidence and prove their case. There is this threshold requirement of making non-frivolous

allegations that this court set out in the Yunus case to have-- for the MSPB to have jurisdiction over these IRA appeals. And that's where this fails because, like I said, this is really a mandamus petition--

Judge Moore (17:00): So for anyone of the complaints that he lodged with OSC, that he was unhappy that they closed, for any one of them, he could have just automatically gone to the MSPB and filed an IRA and you all would have evaluated the sufficiency of his evidence alleging whatever violations he was alleging. So he had a full opportunity to have each one of those individual complaints that he made reviewed by the MSPB. He just chose not to avail himself of that particular cause of action.

Mr. Gauger (17:28): That's absolutely correct. So instead of coming to the MSPB, he filed another complaint with OSC naming the Special Counsel as the person that took a personnel action against him. Now the Whistleblower Protection Act--

Judge O'Malley (17:45): Now let me understand, because I thought that the only right for an individual right of action appeal was where an actual decision had been rendered by the OSC, but that a refusal to even investigate did not give rise to a right for appeal. Am I wrong?

Mr. Gauger (18:00): What the OSC does it closes out its investigation, this is regarding reprisal complaints. They close their investigation and they give that individual appeal rights, describing the right to come to the MSPB and prove their claim. That's the case when OSC decides not to prosecute the individual who's accused of being a retaliatory individual.

Judge O'Malley (18:25): Right. But isn't there a difference between refusing to even investigate and refusing not to prosecute?

Mr. Gauger (18:30): Here Carson is saying that OSC won't do either. I don't know that there's a difference in terms of a right to file an IRA appeal. As soon as that investigation's closed they can come and go to the MSPB and have that individual right of action, which Congress provided in '89. So that is his remedy. His remedy is not to file another complaint with OSC naming the special counsel herself as the wrongdoer. Of course the special counsel doesn't have authority to take a personnel action against Mr. Carson. Mr. Carson's not a federal-- not a OSC employee. He's not OSC personnel. And the Whistleblower Protection Act and 2302(b) specifically says it has to be an employee with personnel authority.

Judge O'Malley (19:17): Well, but the Board refused to base its decision on that theory, right? They rejected that expressly. They were only basing its decision on that-- the absence of any kind of adverse personnel action.

Mr. Gauger (19:31): Well, that's true. The Board--

Judge O'Malley (19:38): I mean, you argued to the Board that he wasn't their employee so he shouldn't be allowed to go forward, and the Board said, "No, we're not going to rely on that theory."

Mr. Gauger (19:47): Well, what the Board said is it's not going to categorically say that you have to be an employee of the agency you're complaining about.

Judge O'Malley (19:55): Well, expressly refused to base its decision on that theory. So you can't argue that theory to us because we can't rely on a theory that the board didn't rely on.

Mr. Gauger (20:00): No, I think it's still the case that there's two things that have to be there. It has to be a personnel action and there has to be an individual who has authority to take that personnel action. That remains true. Now the

employee doesn't have to be employed by that agency. They could be an applicant, as was the case in Ruggieri and Weed, the case that counsel was talking about in both cases, those were individuals who were attempting to obtain employment within an agency.

Judge O'Malley (20:30): I'm not disagreeing with you that you had a valid argument to make to the Board, and I don't necessarily think if I were on the board I would have made the decision to say categorically, I'm not basing-- I'm not going to decide that question. But they absolutely didn't decide that question, right? So we can't.

Mr. Gauger (20:46): I believe the board did say that the Special Counsel doesn't have personnel authority. I think that is in the decision, I can--

Judge O'Malley: No, they quoted you by saying that but they did not rely on it.

Mr. Gauger: Well I'm representing the MSPB, not OSC.

Judge O'Malley (21:00): Right, but I'm saying the Board did not say that. The Board said, "We're not going to address that quote. We're not going to rely on that argument."

Mr. Gauger (21:10): I think what the Board said is, "There's no categorical rule saying that you have to be an employee of the agency that you're complaining about." But that's different again from saying that-- I mean it's right in the statute. There has to be personnel authority. The person taking the action has to have personnel authority. 2302(b) actually begins by saying, "Any employee who has authority to take..." And it goes on to say personnel action which is defined in 2302(a), so that person has to have authority. That's different than saying that this individual has to be an employee of the agency they're complaining about. So there's no personnel action, there's no one-- the Special Counsel doesn't have authority to take a personal action against Mr. Carson because she is not his employer, she's not in his chain of command, she's not deciding whether he should be hired, none of those things. And further, I think there was a question about whether there was any precedent supporting this argument that Mr. Carson's making, and there isn't. There's nothing that says that you can file a complaint against a Special Counsel when the Special Counsel has an unfavorable disposition of your complaint. And finally, I think another way of looking at this is the fact that there's no remedy. What is the remedy that Mr. Carson asked for? Well, in his complaint to OSC he said the remedy he wanted was for OSC to "stop breaking the law." Well, that's very much like mandamus. And that's not something that the MSPB has authority to order OSC to do anything like that. It has authority to hear IRA appeals, and that's it.

Judge Newman (22:55): So what does the MSPB do if-- so often we see a perfunctory-- the OSC just doesn't say anything except that they're not going to investigate or whatever the answer is. Whatever you were asking me the answer is "no." And so if the MSPB feels that further investigation is needed, what is their recourse?

Mr. Gauger (23:20): So Congress did not give the MSPB authority to look into OSC the investigation.

Judge Newman (23:25): Because they thought the OSC would do it. They thought that they had a full-- if we just look at the face of the statute, but let's say that the OSC doesn't do what may have been contemplated. Now what?

Mr. Gauger (23:40): Well, again, the remedy that Congress provided is, that individual can come to the MSPB and prove their case since the Special Counsel is not taking it any further. They can take it further by coming to the MSPB. If they meet the threshold requirements, they can have a hearing, and they can put on evidence, and they can prove their case. That's what congress provided.

Judge Newman (24:02): But there's a gap, isn't there? Because the appellant, the petitioner, the employee presents the case. Who is to present the other side?

Mr. Gauger: At the Board?

Judge Newman (24:16): Well, wherever the decision is being made. I mean, that's what this entire elaborate structure with the OSC is supposed to be, is it not? And even-handed investigation to bring out the facts on all sides. And so we don't have that. We see it, I think, perhaps too often that the investigation is closed without explanation.

Mr. Gauger (24:45): I don't know if that's true or false, but if it is true, then it would be Congress that would do something about that. Obviously not the MSPB since the MSPB doesn't oversee the Special Counsel. It would be Congress and ultimately the Special Counsel's a Presidential appointee--

Judge Newman: You're saying that the--

Mr. Gauger: --who could be removed by the president.

Judge Newman (25:00): So you're saying the MSPB is powerless to somehow obtain the information that it needs in order to exercise its charge of reviewing and deciding whether this person was inappropriately treated?

Mr. Gauger (25:20): I'm saying the that MSPB does not have authority to oversee OSC investigations. All it has is this IRA-- it has the authority to hear IRA appeals, and that's it. It doesn't have authority to go over that.

Judge Newman (25:32): Why can't the MSPB hire an investigator?

Mr. Gauger: If Congress gave the MSPB authority to hire an investigator it could do that, but Congress does not give an MSPB that authority. So the only authority that the MSPB has, again, is to hear IRA appeals.

Judge Newman (25:48): But the powerful intent of Congress entrusted to the MSPB is to assure that whistle-blowers get a fair hearing. And you're saying that you can't do it unless you go back and get another act of Congress?

Mr. Gauger (26:00): I think that the authority that you were mentioning was to investigate the claims as it-- to investigate OSC's handling claims. MSPB doesn't have that authority [crosstalk].

Judge Newman: They now provide it for the IRA, so that there is a recourse explicitly provided.

Mr. Gauger: The recourse provided is not the MSPB doing its own investigation. The recourse provided is that--

Judge Newman: That's the problem.

Mr. Gauger (26:25):--you could hear these claims as an administrative tribunal. And of course, as this court's said over and over again, the MSPB only has the statutory authority that it has, nothing further. It's not a court. It doesn't have any equitable powers. All it can do is do what is in the statute, what authority Congress gave it. And Congress gave it this IRA appeal authority. And Mr. Carson, of course, could have availed himself with that instead of filing yet another complaint with the Special Counsel, against the Special Counsel herself, which is not a process that Congress created. There's nothing in the Whistleblower Protection Act that gives someone the right to file a complaint against the Special Counsel if they don't like the fact that the Special Counsel closed a complaint.

Judge Newman (27:10): So it doesn't fulfill the legislative intent. And you say everybody is helpless to remedy that?

Mr. Gauger (27:25): I didn't say that everybody is helpless to remedy that. I think that the remedy, ultimately, is Congress and the President, as with any other agency or any other Presidential appointee. Ultimately, in the case of the Special Counsel, the Special Counsel can be removed for neglect of duty by the president.

Judge Moore (27:38): Or, in an individual case, mandamus could potentially be filed in District Court.

Mr. Gauger: Potentially. Right. And, again, the MSPB doesn't have mandamus authority, as I started with. And I see that my time is expired. So unless there are any further questions, I'd ask the court to affirm the MSPB's decision dismissing for lack of jurisdiction.

Judge Newman: Anything else for Mr. Gauger? More questions? Thank you, Mr. Gauger.

Mr. Gauger (28:00): Thank you.

Judge Newman: Mr. Justice.

Judge O'Malley: How do you deal with the remedy question?

Mr. Justice (28:14): Well, the remedy question here is simply-- and I think there are a couple of remedy questions. One is, what is the possibility of mandamus? And then the other is, what is the remedy that Mr. Carson seeks? Remember, he's just asking for the performance of those certain nondiscretionary duties in (5 USC) 1213 that he's entitled to, just a mere investigation to the extent necessary to determine if a prohibited personnel practice has been taken. So I thought that was one of the things in hearing the appellee's argument that I thought I could quickly distinguish, is that Mr. Carson-- or at least I realize that Mr. Carson is not the Attorney General of the United States and is not necessarily a private Attorney General here. But remember, he's just asking for [inaudible]--

Judge O'Malley: Are you sure he doesn't think he is with all the filings?

Mr. Justice (29:07): Well, but at least on this point, he's got it right because he has this right. He has a personal right to those nondiscretionary duties, the substantial likelihood determination, certain very procedural rights--

Judge Moore (29:20): None of those have to do with his working conditions, his personal right to have those things done. You file a mandamus. Do you know how many times we get mandamus because one court or another or a board or another isn't acting on something swiftly enough to someone's liking. Sometimes we grant them because we say, "Yeah, it's taking too long." Sometimes we don't. We don't happen to be the proper forum for your mandamus in this case but there is one you can at least try, the district courts. If you're not happy with the actions of OSC, you can try-- because they're not acting swiftly enough, not acting at all, refusing to act, you can try to pursue that through mandamus like so many people do with us on the areas over which we oversee.

Mr. Justice (29:55): Here is what I would say to that. Number one, I'm not saying that he can't file a mandamus. I do respectfully think it's notable that the appellee of the MSPB that should know in essence there was no clear unequivocal answer on whether a mandamus would be tolerated.

Judge Moore (30:18): Wait, why should they know? They wouldn't be the body to decide the mandamus. They wouldn't even be a party in the suit regarding the mandamus. So you'd expect a government counsel to know whether you should be able to file a mandamus in an unrelated suit where they wouldn't be a party, would have no say, wouldn't participate, but nonetheless you expect him to stand up here. None of that is in your brief. So you expect him to stand up here and know the answer to a complex legal question that a different branch of government would have to decide. That's your complaint?

Mr. Justice (30:40): No. Only if that would operate in lieu of Mr. Carson being entitled to the remedy that he's entitled to under 5 USC. So we have to think of it like this in Mr. Carson's respectful view, and that is, is the importance of OSC so critical that if the OSC ignores an employee because that employee has done protected things,

that that doesn't change the working commissions. The default state of the merit system in the United State federal employment should be a functioning OSC. If an OSC is not protecting a particular employee-- one more point I want to make before I run out of time, is he got a reprimand and he's saying they did not act on his complaint about his reprimand that he got at DOE because he's Joe Carson and he has this relationship where they had animus toward him. So that is very, very different. He may have a right to mandamus but he's not limited to mandamus because his working conditions have been changed given how congress defined working conditions. Thank you.

Judge Newman: Any more questions for Mr. Justice? Thank you. Thank you both. The case is taken under submission.