No. 2011-3207

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JOHN BERRY, Director, Office of Personnel Management,
Petitioner,

v.

RHONDA K. CONYERS and DEVON HAUGHTON NORTHOVER,
Respondents,

and
MERIT SYSTEMS PROTECTION BOARD,
Respondent.

Petition for Review of the Merits Systems Protection Board in Consolidated Case Nos. CH0752090925-R-1 and AT0752100184-R-1

SUPPLEMENTAL BRIEF FOR THE ACTING DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, ON REHEARING *EN BANC*

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STATEMENT OF RELATED CASES

No other petition in or from the present actions has previously been before this or any other appellate court, and counsel is not aware of any related cases currently pending before this Court. A number of cases raising the issue presented in these cases are pending before the Merit Systems Protection Board. *See, e.g., Brown v. Dep't of Defense*, CH-0752-10-0294-I-2 (initial decision Aug. 18, 2011); *Early v. Dep't of Defense*, CH-0752-11-0039-I-2 (initial decision Oct. 5, 2011); *Flores v. Dep't of Defense,* DA-0752-10-0743-I-3 (initial decision Jan. 13, 2012); *Hudson v. Dep't of Defense*, CH-0752-11-0682-I-1 (initial decision Feb. 14, 2012); *Ingram v. Dep't of Defense,* No. DC-0752-10-0264-I-4 (initial decision July 6, 2011); *Marshall v. Dep't of Defense*, CH-0752-10-0903-I-2 (initial decision Aug. 19, 2011); *Marshall v. Dep't of Defense,* CH-0752-10-0499-I-3 (initial decision Dec. 20, 2011); *Medley v. Dep't of Defense*, No. 0752-13-0167-I-1; *Woods v. Dep't of Defense*, CH-0752-11-0047-I-2 (initial decision May 20, 2011).

INTRODUCTION AND SUMMARY

Pursuant to this Court's order of January 24, 2013, the Acting Director of the Office of Personnel Management ("OPM")[1] respectfully submits this brief on rehearing *en banc*. This brief addresses the four questions the Court ordered the parties to answer in their supplemental briefs. ADD2-3.

1. The answer to the first question is that *Department of Navy v. Egan*, 484 U.S. 518 (1988), plainly forecloses review by the Merit Systems Protection Board ("Board") of the merits of a determination that an employee is ineligible for a national security sensitive position. The principles set forth in the Supreme Court's decision in *Egan*, which was made in the context of the determination that an employee is ineligible for a security clearance, apply with equal force to a determination that an employee is ineligible to occupy a national security sensitive position. The "constitutional investment of power" in the President that is discussed in *Egan* is the power of the President to protect our nation's borders, our interests abroad, and our nation's people from threats to our national security, and to manage the federal workforce to protect the interests of national security. *Egan*, 484 U.S. at 527. This constitutional authority is not limited to the protection of classified information, but includes controlling access to national security sensitive positions, defined in Executive Order

[1] John Berry is no longer the Director of OPM. Elaine Kaplan, Acting Director of OPM, should be substituted pursuant to Fed. R. App. P. 43(c).

10,450 as those in which an occupant "could bring about, by virtue of the nature of the position, a material adverse effect on the national security." E.O. 10,450, § 3 (Apr. 27, 1953), 18 Fed. Reg. 2489, 3 C.F.R. 936 (1949-1953), *reprinted as amended in* 5 U.S.C. § 7311. The eligibility determinations in these cases were made under E.O. 10,450, the same executive order at issue in *Egan*.

The panel majority correctly recognized that individuals in national security sensitive positions may produce equal, or indeed greater, harm to national security than persons provided security clearances. They may do so through acts or omissions unrelated to the disclosure of classified information, by allowing, for example, unauthorized and dangerous materials to cross our nation's borders, allowing contraband into correctional facilities housing terrorists, tampering with air traffic control systems, or interfering with large-scale military computer systems. ADD25-28 & n.18. Employees in national security sensitive positions are in a position to be able to cause such exceptional national harm by virtue of their particular roles in the federal workforce. And as the panel correctly noted, it is the Executive Branch that has the necessary expertise to make judgments about the risks inherent in such positions, whether or not those risks concern classified information. ADD22.

Respondents and amici err in urging that the government seeks to deprive employees in national security sensitive positions of their adverse action appeal rights and whistleblower protections. The government agrees that merit system principles

prohibiting discrimination, retaliation against whistleblowers, and other prohibited personnel practices always apply to individuals in national security sensitive positions. Employees in national security sensitive positions at covered agencies, who may or may not have a security clearance, receive full Board review of the underlying merits of adverse actions. It is only when an agency takes an action against an employee on the basis of its assessment of the national security risks presented by the employee's occupation of a national security sensitive position that Board review of the merits of the assessment is precluded. And even in those cases the employee is entitled to Board review of whether the employee received the procedural protections to which he or she was entitled.

It is, in fact, respondents who present a sweeping argument to this Court, arguing that Board review is available in all cases in which an agency removes an employee from a national security sensitive position that does not require eligibility for access to classified information, even where that determination is based entirely on predictive judgments and the weighing of security risks that arise out of matters or circumstances that do not in any respect involve employee misconduct. Thus, it is respondents' position that the Board may review the merits of an agency's conclusion to remove an employee from a national security sensitive position even where the employee has relatives or associates with ties to terrorist organizations, or where the employee has amassed large debts that make him or her susceptible to coercion. The

Board is simply poorly positioned to determine the extent to which such issues create unacceptable national security risks. For unlike the run of the mine adverse action case, the sole focus of a national security determination is on the probability of future behavior that could adversely affect national security.

Respondents' and amici's arguments amount, at base, to a quarrel with the Supreme Court's conclusion in *Egan* that the Board may not review the merits of an agency's national security determinations. Respondents and amici urge this Court to accept, with no evidentiary basis, that government agencies are conspiring to subvert Board review by designating positions as national security sensitive in order to, at some future date, remove employees at will. Not only does this argument hinge on a complete misunderstanding of how security determinations are made, it disregards the presumption of regularity that attaches to government action.

2. This Court's second question is answered by the fact that in *Egan*, the Supreme Court held that the Civil Service Reform Act ("CSRA") "by its terms does not confer broad authority on the Board to review a security-clearance determination,"484 U.S. at 530, and no congressional action before or after *Egan* calls into question that conclusion or its application in this case. Reliance on the 1990 Civil Service Due Process Amendments misconceives the government's argument. That Congress chose to make modifications regarding which employees are exempt from certain provisions of the CSRA has no bearing on the issue in this case because the

government has not argued that Mr. Northover and Ms. Conyers are exempt from the CSRA.

Respondents' reliance on the 2004 and 2008 National Defense Authorization Acts is similarly misplaced. The 2008 Act simply placed Department of Defense ("DoD") employees in the same position they were in 2004, at which time, just as today, *Egan* applied. Moreover, DoD's modified appeal procedures would have had no effect on determinations regarding eligibility for national security sensitive positions or whether the merits of such determinations could be reviewed by the Board. Nor do any of Congress's actions with respect to whistleblowing protections have any relevance under *Egan*. This case does not involve whistleblowing, and, as the Supreme Court made clear in *Egan*, when construing a statute, courts are reluctant to intrude on the President's exercise of foreign affairs and national security prerogatives unless Congress has "specifically" so provided. 484 U.S. at 530. Nothing in the 1990, 2004, 2008, and 2012 Acts cited by respondents and amici authorizes Board review of national security determinations.

3. With respect to the third question, Executive Branch determinations regarding eligibility for a security clearance and eligibility for a national security sensitive position are made using comparable standards and adjudicative guidelines. The predictive judgments required—which the Supreme Court held in *Egan* are not subject to Board veto—are identical. Agencies are directed to focus on susceptibility

to coercion, trustworthiness, loyalty, and reliability, and to conduct background investigations of an appropriate level. *See* E.O. 12,968, §§ 1.2(c)(1), 3.1(b), 60 Fed. Reg. 40245 (August 2, 1995), 3 C.F.R. 391 (1996); E.O. 10,450, §§ 3(a), 3(b), 8(a). In both cases, eligibility must be clearly consistent with national security, with all doubts resolved in favor of national security. E.O. 10,450, §§ 2, 3(a), 3(b), 8(a); E.O. 12,968, § 3.1. In DoD, the procedures used to make the determinations are the same, and the same team of individuals makes both types of determinations. If an individual is dissatisfied with a determination, the internal agency review procedures are the same as well.

4. The answer to the Court's final question, how the Board might handle an appeal from an agency determination that an individual is not eligible to hold a national security sensitive position, is that it cannot. First, the determination that an employee is not eligible to occupy a national security sensitive position is not an adverse action within the meaning of the applicable statute. Although the Board can review the adverse action that follows a negative eligibility determination, its review is limited to determining whether the position was, in fact, designated national security sensitive, and whether the individual was determined to be ineligible for his or her position.

Second, any Board review of the merits of a determination that an individual is ineligible for a national security sensitive position is incompatible with E.O. 10,450, in

which the President entrusted agencies with the responsibility to ensure that the employment and retention of employees is consistent with the interests of national security. In particular, Board review includes the authority to order reinstatement of an employee to a specific position, and to do so using a preponderance-of-the-evidence standard. This conflicts with the legal requirement that employment in a national security sensitive position be allowed only where clearly consistent with the interests of national security. If the Board exercises its own independent judgment and overturns an expert agency determination that an employee is ineligible for a national security sensitive position under its preponderance-of-the-evidence review and orders reinstatement of the employee to such a position, the agency's compliance with that order would violate E.O. 10,450. Nothing short of total deference to the merits of an agency's determination regarding eligibility for a national security sensitive position is consistent with *Egan*, E.O. 10,450, the text of the CSRA, and the nature of the determination at issue.

Deferential review by the Board of national security determinations by agencies would not resolve the matter. The Board is not qualified to evaluate questions of susceptibility to coercion, loyalty, and trustworthiness; only agency officials are qualified to make such determinations given their expertise, familiarity with the particular national security sensitive position, the intelligence available to them, and their experience in handling and evaluating information bearing on national security.

For this very reason, the Supreme Court in *Egan* did not narrow the Board's review of eligibility decisions; the Court precluded Board review of such determinations. The same result is required here.

For all of these reasons, and the reasons given in our briefs before the panel, the Board's decisions must be reversed.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this petition for review pursuant to 5 U.S.C. § 7703(d). The Board issued its decisions on December 22, 2010, and dismissed the Director's timely requests for reconsideration on March 7, 2011. JA1; JA41; JA707-11.[2] The Director timely filed a petition for review on May 6, 2011. 5 U.S.C. § 7703(d); Fed. Cir. R. 47.9(a). On August 17, 2012, a panel of this Court, by a two-to-one vote, reversed the Board's decisions. On January 24, 2013, this Court granted respondents' petition for rehearing *en banc* and ordered this supplemental briefing on certain questions.

The Board's decision is final and appealable under the collateral order doctrine, as this Court held on August 17, 2011, when it granted the Director's petition. *See Berry v. Conyers*, Misc. No. 984, Order of August 17, 2011, JA879-82.[3]

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[2] "JA" refers to the joint appendix filed with the initial briefs.

[3] Respondents again argue that this Court was without jurisdiction to entertain the Director's petition for review. In its unanimous opinion granting the petition for review, a panel of this Court held that the Board's decisions were appealable under the

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STATEMENT OF THE ISSUE

The question presented is whether the principles set forth by the Supreme Court in *Egan* prohibit the Board from overruling an agency's expert determination that an employee is ineligible to occupy a government employment position that is national security sensitive if the position does not also require eligibility for access to classified information.

STATEMENT

I. REVIEW PROCEDURES BEFORE THE MERIT SYSTEMS PROTECTION BOARD

A. When a federal agency takes an "adverse action" against an employee, that employee is entitled to the protections of 5 U.S.C. § 7513. An "adverse action" is defined by statute as "(1) a removal; (2) a suspension for more than 14 days; (3) a

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collateral order doctrine and that the Court thus had jurisdiction to hear the petition. JA 879-82 (Judges Bryson, Linn, and Prost). The panel that decided the merits of the case did not question that conclusion, neither the majority (Judges Wallach and Lourie) nor the dissent (Judge Dyk). That non-mutual collateral estoppel does not apply to the government, *see United States v. Mendoza*, 464 U.S. 154 (1984), does not advance the employees' argument. Employees' Brief ("Em.") 5. It is not necessary to prove that the government will be estopped in a future case from raising the arguments it raises here, in order to demonstrate application of the collateral order doctrine.

The Board also now asserts that under *Kloeckner v. Solis*, 133 S. Ct. 596 (2012), this Court does not have jurisdiction. Board xviii. But *Kloeckner*, which interpreted 5 U.S.C. § 7703(b), has no bearing on the Director's statutory authority to petition this Court for review, which is set forth in 5 U.S.C. § 7703(d). Although section 7703(b) contains a special provision dealing with the filing of discrimination cases, section 7703(d) contains no similar requirement.

reduction in grade; (4) a reduction in pay; and (5) a furlough of 30 days or less." 5 U.S.C. § 7512.

The protections afforded to an employee who is subject to an adverse action "include written notice of the specific reasons for the proposed action, an opportunity to respond to the charges, the requirement that the agency's action is taken to promote the efficiency of the service, and the right to review of the action by Board." *Romero v. Dep't of Defense*, 527 F.3d 1324, 1327 (Fed. Cir. 2008).

B. Upon an appeal by an aggrieved employee to challenge an adverse action, the Merit Systems Protection Board may sustain the agency's action only if the agency demonstrates that its decision is supported by a preponderance of the evidence. 5 U.S.C. § 7701(c)(1)(B). The Board may mitigate or reduce the agency's penalty based on what are known as "Douglas factors." *See Douglas v. Veterans Admin.*, 5 M.S.P.R. 280, 305 (1981) (considering, *e.g.*, "the employee's past disciplinary record" and the "consistency of the penalty with those imposed upon other employees for the same or similar offenses").

The OPM Director may petition for reconsideration by the Board of the Board's final decision when the Director determines that "the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive." 5 U.S.C. § 7703(d)(1). The OPM Director also may

obtain further review of a final Board decision by filing in the Federal Circuit a petition for judicial review "if the Director determines, in his discretion, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive." 5 U.S.C. § 7703(d)(2).

II. NATIONAL SECURITY SENSITIVE POSITIONS

A. 1. Pursuant to the President's constitutional obligation to ensure national security, he has directed in E.O. 10,450 that federal agency heads establish security programs to ensure that "the employment and retention . . . of any civilian officer or employee . . . is clearly consistent with the interests of the national security," and to designate positions as "sensitive" when "the occupant of [the position] could bring about, by virtue of the nature of the position, a material adverse effect on the national security." E.O. 10,450, §§ 2, 3(b). These positions are national security "sensitive" positions.

Some, but not all, employees who hold such national security sensitive positions under E.O. 10,450 require eligibility for access to classified information in order to perform their jobs. Authorization to access classified information requires a security clearance, and eligibility for a security clearance is determined by the agency

head or designated official.[4] E.O. 12,968 specifies that grants of security clearances must be "kept to the minimum required for the conduct of agency functions . . . based on a demonstrated, foreseeable need for access." E.O. 12,968, § 2.1(b); *see also id.* §§ 1.2(a), 1.2(c)(2), 3.1.[5]

Consistent with these principles, OPM's regulations implementing E.O. 10,450 define "national security [sensitive] position" to include not only those positions "that require regular use of, or access to, classified information," but also those positions "that involve activities of the Government that are concerned with the protection of the nation from foreign aggression or espionage, including development of defense plans or policies, intelligence or counterintelligence activities, and related activities concerned with the preservation of the military strength of the United States." 5 C.F.R. § 732.102(a).[6]

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[4] Department of Defense regulations define "security clearance" as "[a] determination that a person is eligible under the standards of this part for access to classified information." 32 C.F.R. § 154.3(t).

[5] Even employees who hold national security sensitive positions and are granted a security clearance are given actual access to classified information only if it is determined that they "need to know" the particular information at issue in each instance. E.O. 12,968, § 2.5; *see also id.* §§ 1.1(h), 1.2(a), 1.2(c)(2).

[6] OPM has proposed revised regulations, and on January 25, 2013, the President issued a memorandum: "Rulemaking Concerning the Standards for Designating Positions in the Competitive Service as National Security Sensitive and Related Matters." 78 Fed. Reg. 7253 (Jan. 31, 2013). The memorandum provides that "[t]he Director of National Intelligence and the Director of the Office of Personnel Management shall jointly propose the amended regulations contained in the Office of Personnel Management's notice of proposed rulemaking in 75 Fed. Reg. 77783

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DoD regulations provide guidance to DoD employees on DoD's program to implement executive orders 10,450 and 12,968. The DoD regulation specifies that "[c]ertain civilian positions within DoD entail duties of such a sensitive nature, including access to classified information, that the misconduct, malfeasance, or nonfeasance of an incumbent in any such position could result in an unacceptably adverse impact upon national security. These positions are referred to . . . as sensitive positions" 32 C.F.R. § 154.13(a).[7] DoD policy further provides that the designation of national security sensitive positions—regardless of whether they require eligibility for access to classified information—"is held to a minimum consistent with mission requirements." 32 C.F.R. § 154.13(d).

2. National security sensitive positions are sub-categorized as "noncritical-sensitive," "critical-sensitive," or "special-sensitive," based on the degree of harm that a person in the position could cause to national security. 5 C.F.R. § 732.201(a). Pursuant to OPM implementing guidance issued under 5 C.F.R. § 732.201(b), a "noncritical-sensitive" position is one in which the occupant has the potential to cause

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(December 14, 2010), with such modifications as are necessary to permit their joint publication." *Ibid.*

[7] DoD is currently in the process of amending its regulations setting forth the Department's policies for assignment to national security sensitive duties and access to classified information. *See* 76 Fed. Reg. 5729 (Feb. 2, 2011) (part 156 regulations). This process includes revising the Department's part 154 regulations, which codify in large part Department of Defense Regulation 5200.2R, "Personnel Security Program." *See id.* at 5729 ("The procedural guidance for the [Department of Defense] [personnel security program] is currently being updated.").

damage to national security up to the "significant or serious level." Position Designation of National Security and Public Trust Positions (2009 version), JA326. "Critical-sensitive" positions are those where the occupant of the position would have the potential to cause "exceptionally grave damage" to national security, and "special-sensitive" positions are those where the occupant of the position would have the potential to cause "inestimable" damage to national security. *Ibid.*

B.1. To occupy a national security sensitive position, an individual must undergo a background check to determine that the individual is not susceptible to coercion or influence, is loyal and trustworthy, and to ensure that employment of the individual is "clearly consistent with the interests of the national security," as required by E.O. 10,450, §§ 2, 3(a), 3(b) (requiring full field investigation to determine eligibility for national security sensitive positions); *id.* § 8(a). Significantly, these standards are materially the same as those that govern the determination whether an individual is eligible for a security clearance, which authorizes access to classified information. *See* E.O. 12,968, § 3.1.

2. DoD has four[8] "central adjudication facilities," which make national security determinations based on background checks that have been conducted by OPM.[9]

[8] At the beginning of this litigation, DoD had nine such facilities, as explained in our initial briefs. DoD has since consolidated the facilities.

[9] OPM is the single largest investigative service provider within the

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DoD facilities make decisions on eligibility for security clearances and also decisions on eligibility to hold national security sensitive positions. *See Romero v. Dep't of Defense*, 658 F.3d 1372, 1374 (Fed. Cir. 2011); 32 C.F.R. §§ 154.41, 154.3(cc) (defining "[u]nfavorable personnel security determination" to include both denial of a security clearance for access to classified information and non-appointment to a national security sensitive position).

DoD's adjudication process "involves the effort to assess the probability of future behavior, which could have an effect adverse to the national security. . . . It is invariably a subjective determination, considering the past but necessarily anticipating the future." 32 C.F.R. § 154.40(b); *see also* DoD Directive 5200.2, § 3.5 (April 9, 1999) ("A determination of eligibility for access to classified information or assignment to sensitive duties is a discretionary security decision based on judgments by appropriately trained adjudicative personnel.").

C. Under E.O. 12,968, § 5.2, when a security clearance is denied or revoked, the agency at issue must generally provide the employee or applicant "as comprehensive and detailed a written explanation of the basis for that conclusion as

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Federal Government, including for employment in the competitive service, for the Department of Defense under section 906 of Public Law 108-136, 5 U.S.C. § 1101 note, and for security clearances generally under 50 U.S.C. § 435b(c)(1). Some agencies conduct their own background investigations for limited purposes, including the Department of Justice and Department of Homeland Security.

the national security interests of the United States and other applicable law permit."[10] The employee or applicant must also be given the opportunity to respond in writing and obtain counsel. The agency must provide for an appeal to "a high level panel, appointed by the agency head, which shall be comprised of at least three members, two of whom shall be selected from outside the security field." *Id.* § 5.2(a)(6).

DoD fully complies with these requirements and provides access to a high-level review panel for all employees occupying national security sensitive positions, regardless of whether the employee holds a security clearance. When a DoD adjudication facility makes an unfavorable national security determination—whether or not regarding a security clearance—the employee or applicant is given "[a] written statement of the reasons why the unfavorable administrative action is being taken. The statement shall be as comprehensive and detailed as the protection of sources afforded confidentiality under the provisions of the Privacy Act of 1974 (5 U.S.C. 552a) and national security permit." 32 C.F.R. § 154.56(b)(1). The employee is given an opportunity to respond in writing and may request a hearing before an administrative judge at the Defense Office of Hearing and Appeals, who makes a recommendation to the review panel. *See Romero*, 658 F.3d at 1375. The DoD's Personnel Security Program Regulation 5200.2-R (32 C.F.R. 154) provides for an on-

[10] Sections 5.2(d) and (e) provide exceptions to these procedures when an agency head determines that the procedures cannot be invoked in a manner consistent with the national security. E.O. 12,968, § 5.2(d)-(e).

the-record proceeding before an Administrative Judge of the Defense Office of Hearings and Appeals, which results in a verbatim transcript (Appendix 13 at AP13.1.3), and includes the opportunity to be represented by counsel or a personal representative (Appendix 13 at AP13.1.5.1) and to present or cross-examine witnesses. *See* Memorandum from the Under Secretary of Defense (Intelligence), Nov. 19, 2007. The employee or applicant may then appeal to the independent review panel constituted under E.O. 12,968, as described above. E.O. 12,968, § 5.2(a)(6). The decision of the panel is in writing. *Ibid.*

D. In *Department of Navy* v. *Egan*, 484 U.S. at 530, the Supreme Court held that the denial of a security clearance is not an "adverse action" that can be reviewed by the Board under the CSRA.

In that case, the respondent's job duties involved physical access to the interiors of nuclear submarines. *See Egan v. Dep't of Navy*, 28 M.S.P.R. 509, 512, 522 (1985) (describing Mr. Egan's position as "Laborer Leader"); *see also Dep't of Navy v. Egan*, Government's Reply Brief, at *1, *available at* 1987 WL 880379 (describing Mr. Egan's duties as including knowledge of the arrivals and departures of nuclear submarines); *Egan v. Dep't of Navy*, 802 F.2d 1563, 1576 n.5 (Fed. Cir. 1986) (Markey, C.J., dissenting). The Navy denied the respondent a security clearance that was necessary to his noncritical national security sensitive position, and the respondent was then removed from his position

The respondent sought Board review of his removal from his position, *Egan*, 484 U.S. at 521-22, but the Supreme Court concluded that the Board did not have "authority by statute to review the substance of an underlying decision to deny or revoke a security clearance in the course of reviewing an adverse [employment] action." *Id.* at 520, 530.

The Court made clear that the Board's review was limited to "determin[ing] . . . whether in fact clearance was denied, and whether transfer to a nonsensitive position was feasible." *Id.* at 530. The Court explained that "[n]othing in the [Civil Service Reform] Act directs or empowers the Board to go further." *Ibid.*

Although when this Court decided the case, it had applied a strong presumption favoring appellate review of agency decisions, *Egan*, 802 F.2d at 1569, the Supreme Court held that that presumption of review "is not without limit, and it runs aground when it encounters concerns of national security, as in this case, where the grant of security clearance to a particular employee, a sensitive and inherently discretionary judgment call, is committed by law to the appropriate agency of the Executive Branch." 484 U.S. at 527.

The *Egan* Court explained that the President has delegated his constitutional authority to protect national security to Executive Branch agency heads. *See* E.O. 10,450 (Apr. 27, 1953), 18 Fed. Reg. 2489; E.O. 10,865 (Feb. 20, 1960), 25 Fed. Reg. 1583, as amended by E.O. 10,909 (Jan. 17, 1961), 26 Fed. Reg. 508; E.O. 12,968

(August 2, 1995), 60 Fed. Reg. 40245; E.O. 13,467 (June 30, 2008), 73 Fed. Reg. 38103. And the Supreme Court recognized that an agency's decision whether to grant a security clearance entails a prediction as to whether an individual is likely to compromise classified information, and it held that "[p]redictive judgment of this kind must be made by those with the necessary expertise in protecting classified information." *Egan*, 484 U.S. at 529. The Court in *Egan* emphasized that:

> For reasons . . . too obvious to call for enlarged discussion . . . the protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it. Certainly, it is not reasonably possible for an outside nonexpert body to review the substance of such a judgment and to decide whether the agency should have been able to make the necessary affirmative prediction with confidence. Nor can such a body determine what constitutes an acceptable margin of error in assessing the potential risk.

Ibid. (internal quotation marks omitted).

This Court has thus recognized that, under *Egan,* "when an agency action is challenged under the provisions of chapter 75 of title 5, the Board may determine whether a security clearance was denied, whether the security clearance was a requirement of the appellant's position, and whether the procedures set forth in section 7513 were followed, but the Board may not examine the underlying merits of the security clearance determination." *Hesse v. Dep't of State*, 217 F.3d 1372, 1376 (Fed. Cir. 2000).

III. FACTS AND PRIOR PROCEEDINGS

A. Respondents Rhonda Conyers and Devon Northover were determined to be ineligible to occupy national security sensitive positions within DoD. Both were serving in national security sensitive positions, though neither position required a security clearance. JA376. Following on DoD's adverse eligibility determinations, they were indefinitely suspended (because no non-sensitive position was available) and demoted, respectively. ADD59, 94.

The two individuals challenged DoD's actions in separate proceedings, and DoD contended in both cases that *Egan* precluded review of the merits of the agency's determination that the particular respondent was not eligible to hold a national security sensitive position. After administrative judges issued conflicting decisions on this issue, the Board, in a split decision, held that *Egan* limits the Board's review of the merits of a security-based eligibility determination only in cases involving eligibility for security clearances. JA1; JA41.

The Board remanded the cases to the agency. Ms. Conyers's case has since been dismissed as moot after the government provided Ms. Conyers with back pay and other relief.[11] Mr. Northover's case was dismissed without prejudice to refiling

[11] That no ongoing dispute exists between Ms. Conyers and DoD does not render this petition for review moot, as the panel majority recognized, because OPM has sufficient ongoing interests to satisfy Article III. ADD11 n.5 (citing *Horner v. Merit Sys. Protection Bd.*, 815 F.2d 668, 671 (Fed. Cir. 1987)). Such an approach presents no

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following this Court's resolution of the Director's petition for review. JA900-905; JA1821.

B. The Director OPM petitioned this Court for review under 5 U.S.C. § 7703(d), and the Court granted the petition, explaining that the decision is appealable under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). *See Berry v. Conyers*, Misc. No. 984, Order of August 17, 2011, JA881-82.

After full briefing and oral argument, this Court reversed the Board's decisions. The panel majority held that *Egan* "prohibits Board review of agency determinations concerning the eligibility of an employee to occupy a 'sensitive' position regardless of whether the position requires access to classified information." ADD7. The Court rejected respondents' argument that *Egan* is limited solely to cases involving security clearances, and ruled that "*Egan* cannot be so confined." ADD13. The panel held that the principles set forth in *Egan* "require that courts refrain from second-guessing Executive Branch agencies' national security determinations concerning eligibility of an individual to occupy a sensitive position, which may not necessarily involve access to classified information." ADD13-14.

Article III problems. *See Horner*, 815 F.2d at 671; *cf. Camreta v. Greene*, 131 S. Ct. 2020, 2029 (2011) (finding no Article III problem where officials who received qualified immunity for their actions appealed a constitutional ruling). The government petitioned for review of the *Conyers* decision only after the Board denied the government's motion to dismiss as moot. *See* JA 392-93.

The panel majority stated that Congress "has the power to guide and limit the Executive's application of its powers," but it found that the CSRA does not impose such limits or make reviewable the security-related judgments of the Executive Branch. ADD15. On the contrary, the panel explained, the Supreme Court established in *Egan* that "the CSRA did not confer broad authority to the Board in the national security context." *Ibid.* Moreover, the panel rejected respondents' argument that the existence of a pre-CSRA provision allowing for summary suspension and removal of employees based upon national security concerns, 5 U.S.C. § 7532,[12] demonstrates that applying *Egan* where the agency has taken action pursuant to other provisions of the CSRA would render section 7532 a nullity. ADD17-18. The majority further explained that the Supreme Court rejected a virtually identical argument in *Egan*, holding that "§ 7532 does not preempt § 7513 and that the two statutes stand separately and provide alternative routes for administrative action." ADD18 (citing *Egan*, 484 U.S. at 532).

The panel reasoned that E.O. 10,450 does not mention "classified information" but instead is concerned with whether the occupant of a position could have "a material adverse effect on the national security," and the panel described respondents'

[12] The statutory definition of "adverse action" set forth in section 7512 excludes from the definition any suspensions or removals that are made under section 7532, which is a special provision that allows the head of an agency to remove an employee when "he determines that removal is necessary or advisable in the interests of national security." 5 U.S.C. § 7532.

focus on eligibility for a security clearance as "misplaced" because "Government positions may require different types and levels of clearance, depending upon the sensitivity of the position sought." ADD23 & n.16. The panel also stated that "*Egan*'s core focus is on 'national security information,' not just 'classified information.'" ADD20. And, the panel explained, because E.O. 10,450 requires agencies to make a determination that an individual's eligibility to hold a national security sensitive position is "clearly consistent with the interest of national security," the Supreme Court's concerns in *Egan* that this standard "conflicts with the Board's preponderance of the evidence standard" apply equally here. ADD24 (internal quotations omitted).

Finally, the panel observed that it is "naive to assume that employees without direct access to already classified information cannot affect national security." ADD25. The panel concluded that "[d]efining the impact an individual may have on national security is the type of predictive judgment that must be made by those with necessary expertise," ADD27, and the Board "cannot review the merits of Executive Branch agencies' determinations concerning eligibility of an employee to occupy a sensitive position that implicates national security." ADD30-31.

Judge Dyk dissented, opining that the majority's decision "nullifies" the CSRA. ADD38. In his view, *Egan*'s holding is limited to the "*narrow*" question whether the Board had authority to review security clearance decisions. ADD53-54.

On January 24, 2013, this Court granted respondents' petition for rehearing en banc and vacated the panel's order.

ARGUMENT

I. THE *EGAN* RULING IS NOT CONFINED TO DETERMINATIONS THAT AN INDIVIDUAL IS INELIGIBLE FOR A SECURITY CLEARANCE, BUT APPLIES EQUALLY TO DETERMINATIONS THAT AN INDIVIDUAL IS INELIGIBLE FOR A NATIONAL SECURITY SENSITIVE POSITION BECAUSE OF NATIONAL SECURITY RISKS, SUCH THAT *EGAN* FORECLOSES BOARD REVIEW OF SUCH DETERMINATIONS UNDER CHAPTER 75.

A. *Egan* Is Grounded In The President's Constitutional Authority Over National Security, Which Includes The Authority To Determine Eligibility Not Only For Security Clearances But Also For National Security Sensitive Positions, Which Pose Comparable Risks Of Adverse Effects On National Security.

1. The Supreme Court in *Egan* expounded upon the constitutional authority over national security matters that flows from the President's role as the "Commander in Chief of the Army and Navy of the United States." U.S. Const. Art. II, § 2; *Egan*, 484 U.S. at 527. The Court explained that in recognition of this constitutional power "courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Egan*, 484 U.S. at 530.

This "constitutional investment of power" provides the President authority to protect our national security, including protecting our nation's borders, our interests abroad, and our nation's people from threats to national security. *Id.* at 527. The President has explained that the protection of national security is a consideration in federal employment and requires "that all persons privileged to be employed in the

departments and agencies of the Government, shall be reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States." E.O. 10,450.

That the national security determinations here fall within *Egan* is confirmed by the fact that determinations regarding eligibility for a security clearance and eligibility for a national security sensitive position are made using comparable standards and—at DoD—comparable adjudicative guidelines, and involve the same complex predictive judgments of whether a particular individual poses an unacceptable risk to national security. In both cases, the President has directed agencies to focus on susceptibility to coercion, trustworthiness, loyalty, and reliability, and to conduct background investigations of an appropriate level. *See* E.O. 12,968, §§ 1.2(c)(1), 3.1(b), 60 Fed. Reg. 40245 (August 2, 1995), 3 C.F.R. 391 (1996); E.O. 10,450, §§ 3(a), 3(b), 8(a). And, in both cases, the President has required that eligibility must be clearly consistent with national security, with all doubts resolved in favor of national security. E.O. 10,450, §§ 2, 3(a), 3(b); 8(a); E.O. 12,968, § 3.1. *See also* 32 C.F.R. § 154.42(b) & app. H (DoD regulations applying common adjudicative guidelines to eligibility for access to classified information and assignment to sensitive duties).

2. Employees who work in positions that are designated as national security sensitive are in positions where they can cause significant harm to national security, regardless of the fact that their positions do not require security clearances for access

to classified information. E.O. 10,450, § 3; 5 C.F.R. § 732.201. The fact that an employee need not access to classified information for a particular national security sensitive position does not mean that the employee in that position poses less risk to the interests of national security or less directly implicates the President's authority to protect national security than an employee authorized to access classified information. For example, employees in positions that protect military supply lines or prevent terrorists from entering the country may pose a more immediate and direct risk to national security than some employees who have security clearances. And the level of position designation is not necessarily tied to access to classified information, either. An employee who holds a "critical-sensitive" position may not have a security clearance, for example, while a "non-critical sensitive" position may require a security clearance.

The Board ruled broadly that it can review the merits of a determination that an employee is ineligible to occupy a sensitive national security position, whenever the determination results in an adverse action, provided that the employee does not require access to classified information or eligibility for such access. Such positions, the Board acknowledged, can include those involving "protection of the nation from foreign aggression or espionage" and the "development of defense plans or policies, intelligence or counterintelligence activities, and related activities concerned with the preservation of the military strength of the United States." ADD75-76 (quoting 5

C.F.R. § 732.102(a)(1)). The Board's assertion of authority here to review national security determinations thus extends to *all* national security sensitive employees, no matter the risk. The Board's narrow focus on access to classified information ignores that fact.

3. While the plaintiff in *Egan* contested a decision related to a security clearance, the reasoning of *Egan* was based on the President's ability to protect national security, not just his ability to protect classified information. The reasoning of *Egan* depended on the President's authority to protect national security, his delegation of that authority to Executive Branch agencies, and the fact that the kinds of predictive judgments required to determine which employees should be entrusted with national security responsibilities are inherently discretionary judgments that are left to the expertise of the agencies that employ them. Respondents' attempt to restrict the President's role in protecting national security to the ability to classify information is contrary to that *Egan* principle and should be rejected. *See, e.g.,* Employees' Brief ("Em.") 29-30 (suggesting that the President's ability to classify information is the only relevant means of protecting national security).

4. That *Egan* applies does not mean that employees who are granted security clearances or occupy national security sensitive positions are deprived of the protections provided in Chapter 75 of the CSRA. Just as the Supreme Court's

decision in *Egan* did not "swallow the rule of civil service law," Board 18, neither does the government's position in this case.

First, *Egan* did not eliminate the merit system principles. These merit system principles—which prohibit discrimination, retaliation against whistleblowers, and other prohibited personnel practices—apply to individuals in covered agencies regardless of whether they serve in national security sensitive positions. *See* 5 U.S.C. Chapter 23.

Second, employees in national security sensitive positions receive full Board review of adverse actions taken for any reason unrelated to eligibility to hold a national security sensitive position. The Board has reviewed such determinations involving employees in national security sensitive positions, and it will continue to do so under the government's position in these cases.

In other words, it is only when an agency takes an action against an employee on the basis of its assessment of the national security risks presented by the employee's occupation of a national security position that Board review of the merits is precluded. And it is only the agency's underlying determination to revoke or deny eligibility that may not be reviewed; as this Court has explained, the employee is still entitled to Board review of whether the position requires a clearance (and by analogy, whether it was, in fact, designated national security sensitive) and whether the procedures set forth in section 7513 were followed. *Robinson v. Dep't of Homeland Sec.*,

498 F.3d 1361, 1366 (Fed. Cir. 2007). Indeed, this Court has closely examined whether an agency has followed requisite procedures for reviewing national security determinations. *See Romero v. Dep't of Defense*, 527 F. 3d at 1329; *see also King v. Alston*, 75 F.3d 657 (Fed. Cir. 1996); *Cheney v. Dep't of Justice*, 479 F.3d 1343 (Fed. Cir. 2007).[13]

An agency's determination that an employee is ineligible for a national security sensitive position is not itself an "adverse action" subject to review under the CSRA. And that makes sense because adverse actions are limited to actions against an employee such as a reduction in pay, removal, extended suspension, reduction in grade, or furlough. 5 U.S.C. § 7512; *Egan*, 484 U.S. at 530. A determination that an employee is ineligible to occupy a national security sensitive position is not such an action in and of itself. Indeed, where an employee may be transferred to a non-sensitive position at the same grade and pay, such a determination may not even result in an adverse action.

In this sense, it is respondents' and amici's arguments in this Court that are sweeping: respondents propose that the Board may review an agency's assessment of the national security risks attendant to an individual's continued employment in a

[13] *Cf. Rattigan v. Holder*, 689 F.3d 764 (D.C. Cir. 2012). That decision does not conflict with the government's position in this case. The panel in that case confirmed that *Egan* extends beyond the mere revocation or denial of a security clearance and covers all "security clearance-related decisions made by trained Security Division personnel." *Id.* at 768. The security-related decisions that employees are ineligible to occupy national security sensitive positions are not subject to judicial review even under the majority's analysis in *Rattigan*.

national security position in every case. This would include, for example, decisions regarding employees at the Department of Homeland Security who are responsible for preventing the entry into the United States of organisms and other matter that could be used for biological warfare or terrorism, and preventing terrorists and terrorist weapons from entering the United States. It would also include, for example, Board review of DoD determinations of ineligibility of employees who seek to work in nuclear or chemical areas, whose work includes driving trucks loaded with jet fuel or other extremely dangerous materials, contrary to the principles of *Egan*. And substantively it would apply, for example, to predictive judgments regarding the risks presented by an employee's association with relatives and others in foreign countries that may be hostile to the United States. *See, e.g., Hegab v. Long*, ___F.3d___ (4th Cir. April 25, 2013), *available at* 2013 WL 1767628 (dismissing case seeking review of agency's determination that plaintiff posed a security risk based on connections to foreign countries). It would also include determinations that, for example, indebtedness might render an employee subject to coercion. In many of these cases, unlike the run of the mine adverse action cases presented to the Board, the employee has engaged in no misconduct, but a security risk is nonetheless presented. The Board is simply not equipped to review the inherently discretionary predictive judgments underlying the assessment of whether these and other issues create national security risks in a given case.

B. *Egan* Forecloses Board Review Of Ineligibility Determinations For National Security Sensitive Positions And It Demonstrates That The Various Arguments Advanced By Respondents And Their *Amici* Are Meritless

1. Respondents' and amici's reliance on express exclusions from the CSRA and WPA is without force. The government is not attempting to "carve out an exception from the CSRA and Whistleblower Protection Act (WPA)." Office of Special Counsel ("OSC") 4. First, this case does not involve the WPA. Second, the exclusion of certain groups of employees from certain provisions of the CSRA demonstrates nothing with respect to Congress's intent for reviewability or not of determinations of eligibility to occupy national security sensitive positions, which is agency conduct not covered by those statutes. *See* National Treasury Employees Union ("NTEU") 14. Precisely the same argument could be made regarding employees with security clearances authorizing access to classified information, and yet the *Egan* Court held that the Board's review under the CSRA does not extend to review of the merits of a determination to revoke a security clearance.

2. The various other arguments advanced by respondents and amici in an effort to distinguish this case from *Egan* are largely identical to those made by respondent and amici in *Egan* and, at base, constitute a quarrel with *Egan* itself. They claim, for example, that there is a presumption of judicial review and that the CSRA does not provide an exception for national security determinations. But the Supreme

Court explained in *Egan* that the presumption of review "runs aground when it encounters concerns of national security." *Egan*, 484 U.S. at 527.

Relying on another argument expressly rejected in *Egan*, respondents assert that by enacting 5 U.S.C. § 7532, which allows for the summary suspension and removal of an employee from federal government employment when necessary for national security reasons, Congress intended that the Board review national security determinations made under provisions of law other than section 7532. These arguments were expressly rejected in *Egan*, and must be rejected here as well. *See Egan*, 484 U.S. at 527; *Id.* at 530; *compare id.* at 533, *with id.* at 535 (White, J., dissenting). The Court recognized that section 7532 provides an alternative means of removing an employee on national security grounds on a much more summary basis—for example, it provides for no process before suspension and no review outside of the procedures prescribed by the agency—but the Court held that the existence of this mechanism provided no basis for allowing review of Executive Branch national security determinations. As the Supreme Court described in *Carlucci v. Doe*, 488 U.S. 93, 102 (1988) (quoting *Cole v. Young,* 351 U.S. 536, 546 (1956)), section 7532 removal is appropriate only where "delay from invoking 'normal dismissal procedures' could 'cause serious damage to the national security.'" In other circumstances, an agency should proceed under section 7513. Moreover, the effect of suspension and removal under section 7532 is distinct from a denial of eligibility to occupy a national security

sensitive position. If an employee is removed under section 7532, he is removed entirely from the agency, and may not seek any future government employment without consultation with OPM. *See Egan*, 484 U.S. at 532; 5 U.S.C. § 7312. By contrast, under section 7513, an employee may be eligible for transfer to a nonsensitive position within the same agency or employment in another agency.

The Supreme Court in *Egan* was also unpersuaded by the argument that the Board should be able to review determinations regarding security clearances authorizing access to classified information because those determinations concern the kinds of facts and judgments that the Board has expertise in evaluating. *See* Brief of Amicus Curiae National Federation of Federal Employees, *Dep't of Navy v. Egan*, at *9, *available at* 1987 WL 880364; *see* Board 42-45. Yet, the Board in this case asserted that DoD's determinations here should be reviewable because they do not involve the merits of national security determinations in that they relate to evaluation of past conduct and financial difficulties. Board 19. That reasoning cannot be squared with *Egan*. The Navy's evaluation of Mr. Egan concerned his past criminal conduct and participation in an alcohol rehabilitation program, and the relevant E.O.s make no distinctions along the lines suggested by the Board. E.O. 12,968 directs the agency to consider an employee's "sound judgment, as well as freedom from conflicting allegiances and potential for coercion." E.O. 12,968, § 3.1(b); *see also* 32 C.F.R. § 147.8. E.O. 10,450, § 8(a)(1) directs an agency to consider "[a]ny behavior, activities, or

associations which tend to show that the individual is not reliable or trustworthy [and]. . . . [a]ny facts which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of the national security." These last factors require an agency to make expert judgments that might in no way be tied to fault or wrongdoing by the employee. And DoD regulations specifically contemplate consideration of "[e]xcessive indebtedness, recurring financial difficulties, or unexplained affluence." 32 C.F.R. § 154.7(*l*). Financial irresponsibility can, in certain circumstances, indicate poor self-control, calling into question the employee's reliability and trustworthiness. Moreover, financial pressures, even without any fault on the part of the employee, may render that employee susceptible to coercion.

3. Amici and respondents criticize at length DoD's designations of the positions in this case as national security sensitive, but that issue is not before the Court. The parties *agree* that DoD has the authority to identify positions that are national security sensitive and that such identification is not subject to Board review. *See* Board 44 (citing *Skees v. Dep't of the Navy*, 864 F.2d 1576, 1578 (Fed. Cir. 1989), and agreeing that Board does not have jurisdiction to determine whether a position is properly designated as sensitive). DoD here identified the positions at issue in these cases as ones that create the potential for an adverse effect on national security and are thus deemed national security sensitive positions.

Respondents' and amici's reliance on *Cole v. Young,* 351 U.S. 536 (1956), similarly misses the mark. OSC 11-12; *see also* Government Accountability Project ("GAP") 22; Board 28. *Cole* concerned positions that were not "affected with the 'national security.'" *Cole*, 351 U.S. at 543. Positions designated as national security sensitive under E.O. 10,450 are, by definition, concerned with national security.

4. The number of employees in national security sensitive positions is not cause for a different result, and, in fact, illustrates the breadth of the Board's decision. The numbers cited by amici are also incomplete. The number of employees in national security sensitive positions quoted in OSC's brief is the total number of employees in such positions, including those who have a security clearance which makes them eligible for access to classified information. OSC 4; NTEU 12. DoD currently estimates that nearly 300,000 of DoD noncritical sensitive positions require security clearances, and there is no question of *Egan*'s applicability to these positions.

The President, through E.O. 10,450, has directed agencies to designate positions as national security sensitive when the occupant of the position could have a "material adverse effect on the national security." It should come as no surprise that DoD has a large number of employees who, by virtue of their particular employment positions at DoD, could have a material adverse effect on national security.

Respondents and amici contend that there may be over-designation of national security sensitive positions. The same claim could have been asserted with regard to

determinations regarding security clearances that the Supreme Court held in *Egan* were not subject to Board review.[14] In any event, agencies are not free to designate positions as national security sensitive on a whim. *See* Board 24. Agencies must follow the direction of E.O. 10,450 and guidance provided by agencies charged with issuing relevant regulations. 5 C.F.R. § 732.102(a); *see* note 6, *supra.* And, indeed, DoD guidance recognizes the principle that "the designation of sensitive positions is held to a minimum consistent with mission requirements." 32 C.F.R. § 154.13(d). In any event, any over-designation of specific positions as sensitive would not somehow make reviewable individualized, expert determinations about whether particular individuals are eligible to occupy national security sensitive positions. Respondents argue that Board review should be permitted in all cases to protect those individuals whose positions are overdesignated. But the converse argument is more compelling: permitting Board review for everyone would require Board review for individuals with obvious national security implications.

[14] There is no reason to believe that there are greater over-designation concerns with respect to national security sensitive positions than with respect to security clearance determinations. *See* OSC 5-6. It is also no answer to state that the cost of required background investigations acts as a check on security clearances. OSC 25-26. OSC misunderstands the connection between national security sensitive positions and security clearances. The same investigation (and cost) applies for individuals in noncritical sensitive positions whether or not they possess secret level security clearances. *See, e.g.,* Investigations Reimbursable Billing Rates, *available at* http://www.opm.gov/investigations/background-investigations/federal-investigations-notices/2012/fin12-07.pdf.

Amici also ignore the "presumption of regularity" that attaches to an official's performance of his or her duties. *See Sickels v. Shinseki,* 643 F.3d 1362, 1366 (Fed. Cir. 2011). Indeed, amici turn this principle on its head, urging this Court to assume that agencies will attempt to avoid OSC or Board scrutiny "by designating positions as sensitive to insulate adverse actions from review." OSC 5; *see also* GAP 6; NTEU 10; Em. 22. These arguments, based purely on speculation, ignore the separation that exists between designation of positions as sensitive, determinations of whether specific individuals are eligible to occupy a sensitive position, and individual employment decisions. As explained, at DoD, agency officials make designation determinations, and four central adjudication facilities make national security determinations based on background checks. *See Romero*, 658 F.3d at 1373-74; 32 C.F.R. §§ 154.41, 154.3(cc). Under these circumstances, an individual supervisor is not in a position to use an eligibility determination as a means to be rid of a troublesome employee. *See also* GAP 26. Further, as noted above, employees in national security sensitive positions retain their full adverse action and other rights where the action proposed is based on misconduct or poor performance unrelated to national security concerns.

II. NO CONGRESSIONAL ACTION PRE OR POST-*EGAN* DEMONSTRATES THAT CONGRESS INTENDED BOARD REVIEW OF DETERMINATIONS THAT AN EMPLOYEE IS INELIGIBLE TO OCCUPY A NATIONAL SECURITY SENSITIVE POSITION.

In *Egan*, the Supreme Court explained that "[n]othing in the [CSRA] directs or empowers the Board" to go further than determining whether a position required a security clearance, whether clearance was denied, and whether a transfer was possible. 484 U.S. at 530. Critical to the Court's reasoning was its determination that Congress did not intend for review of national security determinations in the CSRA; the Court explained that it "consider[ed] generally the statute's express language along with the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Ibid.* (quotations omitted). In doing so, the Supreme Court rejected the argument that the alternative found in section 7532 indicates that Board review of national security determinations is available under section 7513. *See* Em. 38-39. As demonstrated above, that reasoning depended on the national security basis for the determination, not on the fact of a security clearance authorizing access to classified information, as opposed to occupation of a national security sensitive position. As explained, such positions, by definition, have the potential to cause significant damage to national security. *See* E.O. 10,450, § 3(b).

In light of the Supreme Court's decision in *Egan*, nothing short of an express rejection by Congress of the Supreme Court's reasoning in *Egan* would lead to a

different analysis. Congress has not amended the CSRA to broaden the Board's review under section 7513, and Congress is presumed to be aware of the Supreme Court's interpretation of the CSRA in *Egan*. *See Gomez-Perez v. Potter*, 553 U.S. 474, 488 (2008). Respondents and amici thus err in relying upon statutes enacted post-*Egan* to argue that Congress has limited *Egan* to employees with security clearances.

A. Respondents' implication that Congress somehow limited *Egan* relies on a misunderstanding of the 2004 and 2008 National Defense Authorization Acts. Em. 40. The 2004 Act provided for a comprehensive overhaul of DoD's human resources system. As particularly relevant here, the 2004 Act provided that "[t]he Secretary . . . may establish an appeals process that provides employees of DoD organizational and functional units that are included in the National Security Personnel System ["NSPS"] fair treatment in any appeals that they bring in decisions relating to their employment." National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1101(a), 117 Stat. 1392 (2003). The Act also provided for several other modifications to DoD's personnel system, including a pay for performance system and modifications to certain collective bargaining rights. *Id.*

DoD and OPM jointly promulgated regulations in November 2005 to implement the 2004 Act. With respect to the appeals process, as the D.C. Circuit described these regulations in *American Federation of Government Employees, AFL-CIO v. Gates*, 486 F.3d 1316, 1330 (D.C. Cir. 2007):

> [A]n employee first appeals an adverse employment decision to an administrative judge. After the administrative judge issues an initial decision, the losing party may appeal to designated DoD officials. See 5 C.F.R. § 9901.807(a), (g). After this appeal to the Department, further appeal may be taken to the independent Merit Systems Protection Board. *Id.* § 9901.807(h). Finally, the decision of the Merit Systems Protection Board is subject to judicial review in the courts. *Id.* § 9901.807(i).

See also DoD Human Resources Management and Labor Relations System, 70 Fed. Reg. 66,116, 66,119, 66,208 (Nov. 1, 2005) (§ 9901.807).

The dissenting judge on the panel in the instant case characterized that regulatory scheme as "a less draconian version of the agency authority asserted" here. ADD47. But that statement misunderstands the changes proposed in the NSPS. NSPS was designed to apply to all DoD employees, including the approximately three hundred thousand employees in non-sensitive positions. It was not designed to, and did not, affect the agency's determinations to grant security clearances or employment in national security sensitive positions. Those determinations continued to be made in the same manner; and both determinations were not subject to Board review before, during, or after the 2004 and 2008 Acts. The 2008 Act simply negated certain of the changes that the 2004 Act had authorized. Neither Act was concerned with the application of *Egan*.

That the short-lived National Security Personnel System also provided for special procedures for offenses that "'have a direct and substantial adverse impact on

[DoD's] national security mission,'" is not to the contrary. *See* Board 37. Those procedures applied to all employees and were not the equivalent of a determination to revoke a security clearance (which all parties agree is not subject to Board review under *Egan*) or eligibility for a national security sensitive position.

NSPS did more than add an additional layer of agency review in the employee appeals process; it fundamentally altered certain labor-management relations and pay structures. It was strongly opposed from its inception, and federal employee unions filed suit to challenge various regulations, focusing primarily on the changes to collective bargaining, but also objecting to the new appeals process. *See American Federation of Government Employees*, 486 F.3d at 1316. It is clear that Congress's concerns likewise focused primarily on collective bargaining. *See, e.g.,* H.R. Rep. No. 110-146, at 394 (May 11, 2007) ("The committee is concerned that the implementing regulations, issued in November, 2005, exceeded congressional intent, especially with respect to limitations on employee bargaining rights."); S. Rep. No. 110-77, at 11 (June 5, 2007) (Committee Overview: "Repealing the existing authority of DoD to establish a new labor relations system under the National Security Personnel System (NSPS). This would guarantee the rights of DOD employees to union representation in NSPS.").

The new appeals process was never implemented, and the National Defense Authorization Act of 2008, Pub. L. No. 110-181, § 1106(a) "amended 5 U.S.C. § 9902, retaining authority for performance-based pay and classification and compensation

flexibilities, but substantially modifying" other components of the law, including collective bargaining rights and appeal rights, which were returned to "Governmentwide rules." National Security Personnel System, 73 Fed. Reg. 56,344, 56,346 (Sept. 26, 2008). That Congress chose to repeal a never-implemented and unpopular overhaul to DoD's personnel system has no bearing on the issue in this case.

B. As an initial matter, this case does not involve the WPA or any allegations that employment actions were taken in response to whistleblower activities.[15] Respondents have not alleged that they engaged in any protected disclosures. Arguments regarding the WPA and the Whistleblower Protection Enhancement Act are thus misplaced.

OSC's reliance on Congress's actions with respect to the Transportation Security Administration ("TSA") in the Whistleblower Protection Enhancement Act ("WPEA"), Pub. L. No. 112–199, 126 Stat. 1465 (2012), is also misplaced. OSC 17-19. OSC argues that expansion of whistleblower protection to TSA employees is

[15] The WPA prohibits taking a "personnel action" with respect to an employee because of a protected disclosure. 5 U.S.C. § 2302(b)(8). The Act defines a "personnel action" to include any "adverse action" under 5 U.S.C. § 7512, and, in addition, various other employment actions. 5 U.S.C. § 2302(a)(2)(A). This Court has not had the occasion to address whether this definition includes a determination regarding an employee's eligibility for a national security sensitive position (an issue not presented in this case), although it has ruled that it does not include the revocation of a security clearance. *See Hesse v. Dep't of State*, 217 F.3d 1372, 1376 (Fed. Cir. 2000).

evidence of Congress's intent to extend Board jurisdiction over employees in national security sensitive positions generally, and in the context of determinations to occupy national security sensitive positions in particular. Although TSA employees may hold national security sensitive positions, holding a national security sensitive position does not exempt one from the WPA. If an employee is removed for misconduct or poor performance, for example, and the employee is covered by the relevant provisions of the CSRA, the Board may review that adverse action. And even if this Court were ultimately to rule that *Egan* precludes WPA review of ineligibility determinations (an issue not presented here) the Board would still be able to review any other personnel action alleged to be retaliatory;[16] review of the merits would be precluded only where the determination was based on a judgment regarding national security risks.

Moreover, as OSC explains in its brief, in enacting the WPEA, Congress sought to remedy what it viewed as an improper narrowing of the definition of "'the type of disclosure that qualifies for whistleblower protection.'" OSC 17. That specific purpose concerning the definition of protected disclosures does not support OSC's sweeping assertion that Congress also intended to thereby grant the Board review of agency determinations of employee ineligibility for national security sensitive positions.

[16] The DoD Inspector General maintains a program to provide whistleblower protections. *See* DoD Directive 5106.01, § 5(s).

III. THERE ARE NO RELEVANT DIFFERENCES BETWEEN THE CRITERIA FOR DETERMINING ELIGIBILITY FOR A SECURITY CLEARANCE AND THE CRITERIA FOR DETERMINING ELIGIBILITY TO HOLD A NATIONAL SECURITY SENSITIVE POSITION.

The determination that an employee is eligible for a security clearance and the determination that an employee is eligible to hold a national security sensitive position are materially identical. The predictive judgments required—which the Supreme Court held in *Egan* are not subject to Board review—are identical. Agencies are directed to focus on susceptibility to coercion, loyalty, trustworthiness, and reliability, and to conduct background investigations of an appropriate level. *See* E.O. 12,968, §§ 1.2(c)(1), 3.1(b); E.O. 10,450, §§ 3(a), 3(b), 8(a). Under E.O. 10,450—the executive order at issue both in *Egan* and in this appeal—agencies must ensure that federal employment is "clearly consistent with the interests of the national security." E.O. 10,450, § 2. Likewise, under E.O. 12,968, issued after the *Egan* decision, security clearances "shall be granted only where facts and circumstances indicate access to classified information is clearly consistent with the national security interests of the United States, and any doubt shall be resolved in favor of the national security." E.O. 12,968, § 3.1(b); *see also id.* § 7.2(c) (reaffirming E.O. 10,450).

As further evidence that the nature of these decisions is the same, the President, in E.O. 13,467 (June 30, 2008), created a "Security Executive Agent" (the Director of National Intelligence) whose duties include "the oversight of

investigations and determinations of eligibility for access to classified information or eligibility to hold a sensitive position made by any agency; . . . developing uniform and consistent policies and procedures to ensure the effective, efficient, and timely completion of investigations and adjudications relating to determinations of eligibility for access to classified information or eligibility to hold a sensitive position." E.O. 13,467, § 2.3(c).

OPM regulations also recognize the symmetry of these national security determinations. For example, 5 C.F.R. § 732.301 requires that an agency provide certain minimum procedures when it makes either a "placement or clearance decision." And, as OPM has explained, the same form, the SF-86, is used for investigations of national security sensitive positions regardless of whether the employee has access to classified information. *See* JA290.

Similarly, DoD treats its national security determinations consistently, whether involving eligibility for security clearances or national security sensitive positions. DoD has four central adjudication facilities, which make national security determinations based on background checks. The facilities—indeed, the same individuals—make both decisions determining eligibility for security clearances and national security sensitive positions. *See Romero*, 658 F.3d at 1373-74; 32 C.F.R. §§ 154.41, 154.3(cc) (defining "[u]nfavorable personnel security determination" to include both access to classified information and appointment to a national security

sensitive position). In DoD, the determination of eligibility for a national security sensitive position is made by the same decisionmakers making the same type of judgment based on the same factors as determinations regarding eligibility for security clearances. *See Egan*, 484 U.S. at 529.

DoD also provides the same procedures to employees who receive unfavorable security personnel determinations, whether they hold a security clearance or not. When an adjudication facility makes an unfavorable national security determination, the employee or applicant is given "[a] written statement of the reasons why the unfavorable administrative action is being taken. The statement shall be as comprehensive and detailed as . . . national security permit[s]." 32 C.F.R. § 154.56(b)(1). The employee is given an opportunity to respond in writing and may request a hearing before an administrative judge at the Defense Office of Hearing and Appeals, who makes a recommendation to the review panel. *See Romero*, 658 F.3d at 1375. The DoD's Personnel Security Program Regulation 5200.2-R (32 C.F.R. 154) provides for an on-the-record proceeding before an Administrative Judge of the Defense Office of Hearings and Appeals, which results in a verbatim transcript (Appendix 13 at AP13.1.3), and includes the opportunity to be represented by counsel or a personal representative (Appendix 13 at AP13.1.5.1) and to present or cross-examine witnesses. *See* Memorandum from the Under Secretary of Defense (Intelligence), Nov. 19, 2007. The employee or applicant may then appeal to the

independent review panel constituted under E.O. 12,968, as described above. E.O. 12,968, § 5.2(a)(6). The decision of the panel is in writing. *Ibid.*

OSC and the Board make much of the fact that E.O. 12,968 and its procedural protections apply only to determinations regarding access to classified information. OSC 26; Board 42. But that does not mean that those same protections, or better, do not apply to determinations regarding national security sensitive positions. DoD, which employs the majority of individuals in national security sensitive positions who do not also have security clearances, has the identical protections for determinations of ineligibility to occupy national security sensitive positions, as it does for security clearances. 32 C.F.R. § 154.56.[17]

OSC further relies on a recent Presidential Policy Directive 19 (Oct. 10, 2012) that provides certain procedures for employees who assert that an agency denied or revoked their security clearance in retaliation for protected whistleblowing, to argue

[17] Amicus GAP's claim that the Department of Justice does not apply the same internal procedures for review of ineligibility determinations to occupy national security sensitive positions misconceives the facts in *Doe v. Department of Justice*. GAP 23. In that case, the employee was required to maintain eligibility for a security clearance, even though he did not have current access to classified information. The Board rejected a distinction between a situation in which an employee must maintain eligibility for access to classified information and a situation in which an employee has the agency's permission to actually access classified information. *See* 2012 M.S.P.B. 95 (Aug. 9, 2012), ¶ 20 (pending before this Court in No. 2012-3204). The case is not relevant to the question of what procedures apply when an employee is found ineligible to occupy a national security sensitive position.

that a distinction exists between eligibility determinations for national security sensitive positions and for security clearances. OSC 26-28. As OSC describes, prior to amendment, the WPEA contained language that would have allowed an appeal of an allegedly retaliatory revocation of a security clearance to an executive agency board. *See* OSC 20. Congress removed that language before passing the Act, and the President thereafter responded with the Presidential Policy Directive. That the President responded to a particular area of concern that came to his attention—and legislation that dealt specifically with security clearance determinations and not national security sensitive positions more broadly—provides no basis to speculate about procedures he deems appropriate for national security sensitive positions.

Moreover, the Presidential Policy Directive affected the rights of employees of certain intelligence components, who are excluded from the WPA, *see* 5 U.S.C. § 2302(a)(2)(C)(iii); Directive F(3). It thus has no effect on employees who work in components covered by the WPA, including the employees in these cases. And the Directive does not provide for third party review by an inexpert adjudicator like the Board or for judicial review, but rather establishes an internal board of experts drawn from the intelligence community to review claims by intelligence community personnel.

IV. THE BOARD IS NOT WELL POSITIONED TO SECOND-GUESS THE PREDICTIVE JUDGMENTS THAT UNDERLIE AGENCY INELIGIBILITY DETERMINATIONS.

A. Board review of the merits of a determination that an individual is not eligible for a national security sensitive position is simply incompatible with E.O. 10,450. Under E.O. 10,450, an individual may be employed in a national security sensitive position only when an agency can make an affirmative prediction that doing so is clearly consistent with national security. As the Court held in *Egan*, a "[p]redictive judgment of this kind must be made by those with the necessary expertise." *Egan*, 484 U.S. at 529. These types of determinations are "committed to the broad discretion of the agency responsible." *Ibid.* In particular, agency officials must determine the acceptable margin for error in a given case to determine whether an individual is eligible to occupy a national security sensitive position. *Ibid.* ("Nor can such a body determine what constitutes an acceptable margin of error in assessing the potential risk.").

Under the Board's decision, the Board will be called upon to evaluate the whole realm of agency personnel decisions related to national security. In these cases, for example, DoD exercised its predictive judgment about whether respondents would pose a risk to national security, *Egan*, 484 U.S. at 528-29, and concluded it had concerns with respect to the employees' unpaid debts and financial irresponsibility. Such irresponsibility can indicate poor self-control, calling into question the

employee's reliability and trustworthiness, or can point to financial pressures that might make the employee susceptible to coercion, absent any fault on the part of the employee. *See* JA122; JA159; *see also* DoD 5200.2-R, §§ C2.1, C2.2, C2.2.1.12. But that is merely one kind of security concern an agency may have regarding an employee. Agencies consider a host of factors in determining whether an individual's employment in a national security sensitive position is clearly consistent with national security. *See Egan*, 484 U.S. at 527 (describing this "sensitive and inherently discretionary judgment call").

An agency might, for example, have reason to question an employee's ties to a foreign country and whether those connections indicate "that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of the national security." *See* E.O. 10,450, § 8(a)(1)(v). The agency's analysis might consider the duration and intimacy of the relationships in question, the political condition of the foreign country, and the particular national security vulnerabilities of the national security sensitive position, among other things. These concerns have no connection to fault or misconduct. A national security analysis thus presents unique considerations that are not amenable to resolution through a suitability determination or a conduct-based adverse action.

The Board, as an outside non-expert body, is in no position to "determine what constitutes an acceptable margin of error in assessing the potential risk" to national

security posed by the employee. *Egan*, 484 U.S. at 529. In attempting to do so, the Board will be required to weigh the employee's and agency's competing assertions of the requirements of national security, and, as the Board recognized in its decision in *Egan*, "[i]f the Board were to exercise complete review over the underlying security clearance determination, it would inevitably be faced with agency exposition of highly sensitive materials and Board determinations on matters of national security." *Egan v. Dep't of Navy*, 28 M.S.P.R. 509, 518 (1985). The Board has not explained how it could protect the Executive's national security interests during its proposed broad and far-reaching review. Respondents contend that the government may fully protect its interests by seeking to seal the record in Board cases. Em. 50; *see also* OSC 29. But the harm from Board review is not limited to disclosure of national security information, and the same argument would, of course, apply to decisions to revoke or deny security clearances for access to classified information.

Moreover, preponderance of the evidence review is fundamentally incompatible with an agency's affirmative prediction that an individual's employment is not "clearly consistent with the interests of the national security." E.O. 10,450. Indeed, the Supreme Court has recognized this inherent incompatibility: "It is difficult to see how the Board would be able to review security-clearance determinations under a preponderance of the evidence standard without departing from the 'clearly consistent with the interests of the national security' test. The clearly consistent

standard indicates that security-clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. The Court went on to explain that "[p]lacing the burden on the Government to support the denial by a preponderance of the evidence would inevitably shift this emphasis and involve the Board in second-guessing the agency's national security determinations." *Ibid.* Thus, the Court recognized that it was "extremely unlikely that Congress intended such a result when it passed the Act and created the Board." *Egan*, 484 U.S. at 531-32.

Indeed, the Board's proposed review would apply preponderance-of-the-evidence review to the whole field of agency determinations, including for example, a judgment that an employee's relatives in foreign countries may create divided loyalties and make employment in particular national security sensitive positions inconsistent with national security. Such determinations are highly context-specific, depending, among many other factors, on the nature of the employee's position, its location, and the employee's access to agency systems. This is precisely the type of determination that the Supreme Court held was not subject to second-guessing by a non-expert outside body. *See Egan*, 484 U.S. at 529.

B. It is no answer to urge that the Board is familiar with evaluating employee conduct. The national security determinations at issue in these cases are not determinations that an employee's conduct has negatively affected agency operations. They are instead evaluations of the individual's *potential* to compromise national

security made by agency officials. As the Supreme Court explained in *Egan*, an adverse national security determination "does not equate with passing judgment upon an individual's character. Instead, it is only an attempt to predict his possible future behavior . . . It may be based, to be sure, upon past or present conduct, but it also may be based upon concerns completely unrelated to conduct." *Egan*, 484 U.S. at 528.

Amici in *Egan* also argued that the Board could review security clearance determinations because those determinations concerned the kinds of facts and judgments that the Board had expertise in evaluating. *See* Brief of Amicus Curiae National Federation of Federal Employees, at *9, *available at* 1987 WL 880364. The Supreme Court nonetheless held that the Board did not have jurisdiction to review the merits of an agency's security clearance determination. Respondents' and amici's similar argument in these cases must also be rejected.

Predictive judgments of whether an individual's employment in a national security sensitive position is clearly consistent with the interest of national security—whether or not the individual requires eligibility for a security clearance—must be made by agency officials familiar with the nature and duties of the position, the position's degree of sensitivity and role in the agency's mission, and the ways in which its occupant could bring about damage to national security. This risk analysis is entrusted to agency officials, just as a determination to designate a position as sensitive is entrusted to agency officials. *See Skees*, 864 F.2d at 1578. The Board has

expertise in merit systems principles and prohibited personnel practices, as amicus GAP notes. GAP 16. The Board, in contrast, lacks institutional competence to determine how and to what degree the duties of a particular position allow its incumbent to jeopardize national security and, in light of the duties of the particular position, what features of an individual's background could pose an unacceptable risk to national security.

Respondents point to the Board's decisions in *Adams v. Dep't of the Army*, 105 M.S.P.R. 50, 55 (2007), and *Jacobs v. Dep't of the Army*, 62 M.S.P.R. 688 (1994), among others, as demonstrating that the Board may review national security eligibility determinations. *See* Em. 51-52; Board 42-44; NTEU 20. Even assuming *Adams* and similar cases were correctly decided, the underlying decisions in those cases were not eligibility determinations, but instead "withdrawal or revocation of [an agency's] certification or other approval of the employee's fitness or other qualifications to hold his position." *Adams v. Dep't of the Army*, 105 M.S.P.R. 50, 55 (2007). For example, *Jacobs* involved an employee's failure to remain eligible for the Chemical Personnel Reliability Program, and *Adams* involved the agency's information assurance program. *Id.* at 693.[18]

[18] It can hardly be suggested that Congress's failure to act after two Board decisions more than thirteen years apart indicates its intent to narrow the scope of *Egan*. *Cf.* Em. 42. Indeed, the Board in *Jacobs* considered whether the determination in that case raised issues "*similar enough* to those raised by security clearance

Continued on next page.

The determinations at issue in these cases do not involve questions about an employee's "fitness" or "qualifications," but rather whether the agency is able to affirmatively conclude that employing an individual in a particular position is "clearly consistent" with national security and, as explained, are materially identical to security clearance determinations. E.O. 10,450, § 3. National security judgments consider factors that would not be relevant in a fitness determination, for example, an employee's susceptibility to coercion because of the presence of relatives in a country hostile to the United States.

C. Underscoring the error of its position, the Board claims not only authority to review the merits of an eligibility determination,[19] but also the authority to order the reinstatement of an employee into a particular position where an agency has determined the individual cannot be employed in that position in a manner clearly consistent with national security. If the Board exercises its own independent judgment and overturns an expert agency determination that an employee is ineligible for a national security sensitive position under its preponderance-of-the-evidence review and orders reinstatement of the employee to such a position, the agency's compliance

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determinations." 62 M.S.P.R. at 693 (emphasis added). Respondents' reading of those cases as indicating that *Egan* was confined to security clearance determinations is thus incorrect.

[19] The Board has asserted that it would apply its usual standards governing misconduct in these cases, which would include application of the *Douglas* factors to mitigate any agency "penalty." *See* ADD113; *Douglas v. Veterans Admin.*, 5 M.S.P.R. 280 (1981).

with that order would violate E.O. 10,450, which charges *agency heads* with ensuring that employment in a sensitive position only occurs when clearly consistent with national security. Congress cannot have intended this result.[20]

The employee respondents point to section 7532 as a response to the impossible position the Board's decision places agencies in. *See* Em. 49. But this is no answer. As explained, section 7532 does not mitigate the Board's error in these cases, and the *Egan* Court plainly rejected the argument that section 7532 indicates that review of the merits of an agency's national security determination is subject to review under section 7513.

D. Nothing short of total deference to the merits of the agency's determination regarding eligibility for a national security sensitive position is appropriate. Anything less is likewise inconsistent with *Egan*, the text of the CSRA, and the nature of the determinations at issue.

The Supreme Court's decision in *Egan* did not narrow the scope of the Board's review over the agency's national security determination by suggesting that greater deference was required, but instead foreclosed it completely. Moreover, there simply is no textual basis to create a special standard for review of agency determinations that

[20] Indeed, under the Board's decisions, it is not only administrative judges who are authorized to delve into the merits of national security determinations, but also arbitrators under 5 U.S.C. § 7121(e), when an employee has elected to proceed to arbitration.

an employee is ineligible to occupy a national security sensitive position. *See* 5 U.S.C. § 7701(c)(1)(A) (providing a different standard of review for performance evaluations). And, as explained, the national security determinations at issue in this case are discretionary judgment calls that must be made by the expert agency officials entrusted with those decisions. These determinations may not be second-guessed, even under a "deferential" standard of review.

CONCLUSION

The decisions of the Board should be reversed.

Respectfully submitted,

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MAY 2013

ADDENDUM

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NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

JOHN BERRY, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT,
Petitioner,

v.

RHONDA K. CONYERS AND DEVON HAUGHTON NORTHOVER,
Respondents,

and

MERIT SYSTEMS PROTECTION BOARD,
Respondent.

2011-3207

Petition for Review of the Merit Systems Protection Board in consolidated case nos. CH0752090925-R-1 and AT0752100184-R-1.

Before RADER, *Chief Judge*, NEWMAN, LOURIE, BRYSON[*], DYK, PROST, MOORE, O'MALLEY, REYNA, and WALLACH, *Circuit Judges*.

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[*] Judge Bryson assumed senior status on January 7, 2013, after participating in the decision regarding rehearing en banc.

PER CURIAM.

O R D E R

Separate petitions for rehearing en banc were filed by Respondent Merit Systems Protection Board ("MSPB") and Respondents Rhonda K. Conyers ("Conyers") and Devon Haughton Northover ("Northover"). A single response was invited by the court and filed by Petitioner.

The petitions for panel rehearing were considered by the panel that heard the appeal, and thereafter the petitions for rehearing en banc, response, and brief of amici curiae were referred to the circuit judges who are authorized to request a poll of whether to rehear the appeal en banc. A poll was requested, taken, and the court has decided that the appeal warrants en banc consideration.

Upon consideration thereof,

IT IS ORDERED THAT:

(1) The petitions for panel rehearing of Respondent MSPB and Respondents Conyers and Northover are denied.

(2) The petitions for rehearing en banc of Respondent MSPB and Respondents Conyers and Northover are granted.

(3) The court's opinion of August 17, 2012 is vacated, and the appeal is reinstated.

(4) The parties are requested to file new briefs. The briefs should, inter alia, address the following issues:

a. Does the Supreme Court's ruling in *Department of the Navy v. Egan*, 484 U.S. 518 (1988), foreclose MSPB review of the merits of determinations that an employee is ineligible for a "sensitive" position, or is the ruling confined to determinations that an employee is ineligible to hold a security clearance?

b. To what extent, if any, has Congressional action pre or post-Egan demonstrated that Congress intended to preserve MSPB review of adverse actions with respect to employees holding "sensitive" positions that do not involve intelligence agencies or security clearances?

c. What are the differences between the relevant processes and criteria associated with obtaining security clearances, and those involved in determining whether an individual is deemed eligible to hold a "non-critical sensitive" or "critical sensitive" position that does not require a security clearance?

d. What problems, if any, would the MSPB encounter in determining adverse action appeals for employees holding "sensitive" positions not requiring a security clearance; to what extent should the MSPB defer to the agency's judgment on issues of national security in resolving such adverse action appeals?

(5) This appeal will be heard en banc on the basis of the additional briefing ordered herein and oral argument. An original and 30 copies of new en banc briefs shall be filed, and two copies of each en banc brief shall be served on opposing counsel. The en banc briefs of Conyers, Northover, and the MSPB are due 45 days from the date of this order. The en banc response brief is due within 30 days of service of the new en banc briefs of Conyers, Northover, and the MSPB, and the reply briefs within 15 days of service of the response brief. Briefs shall adhere to the type-volume limitations set forth in Federal Rule of Appellate Procedure 32 and Federal Circuit Rule 32.

(6) The court invites the views of amici curiae. Any such amicus briefs may be filed without consent and leave of court but otherwise must comply with Federal Rule of Appellate Procedure 29 and Federal Circuit Rule 29.

(7) Oral argument will be held at a time and date to be announced later.

FOR THE COURT

January 24, 2013
Date

/s/ Jan Horbaly
Jan Horbaly
Clerk

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United States Court of Appeals for the Federal Circuit

JOHN BERRY, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT,
Petitioner,

v.

RHONDA K. CONYERS AND DEVON HAUGHTON NORTHOVER,
Respondents,

and

MERIT SYSTEMS PROTECTION BOARD,
Respondent.

2011-3207

Petition for Review of the Merit Systems Protection Board in Consolidated Case Nos. CH0752090925-R-1 and AT0752100184-R-1.

Decided: August 17, 2012

ABBY C. WRIGHT, Attorney, Appellate Staff, Commercial Litigation Branch, United States Department of Justice, of Washington, DC, argued for petitioner. With her on the brief were TONY WEST, Assistant Attorney General, JEANNE E. DAVIDSON, Director, TODD M.

HUGHES, Deputy Director, ALLISON KIDD-MILLER, Senior Trial Counsel, and DOUGLAS N. LETTER, Attorney. Of counsel on the brief were ELAINE KAPLAN, General Counsel, KATHIE A. WHIPPLE, Deputy General Counsel, STEVEN E. ABOW, Assistant General Counsel, Office of the General Counsel, Office of Personnel Management, of Washington, DC.

ANDRES M. GRAJALES, American Federation of Government Employees, of Washington, DC, argued for respondents Rhonda K. Conyers and Devon Haughton Northover. With her on the brief were DAVID A. BORER, General Counsel, and JOSEPH F. HENDERSON, Deputy General Counsel.

JEFFREY A. GAUGER, Attorney, Office of the General Counsel, Merit Systems Protection Board, of Washington, DC, argued for respondent. With him on the brief were JAMES M. EISENMANN, General Counsel, and KEISHA DAWN BELL, Deputy General Counsel.

ARTHUR B. SPITZER, American Civil Liberties Union of the Nation's Capital, of Washington, DC, for amici curiae American Civil Liberties Union of the National Capital Area. With him on the brief were GREGORY O'DUDEN, General Counsel, LARRY J. ADKINS, Deputy General Counsel, JULIE M. WILSON, Associate General Counsel, and PARAS N. SHAH, Assistant Counsel, National Treasury Employees Union, of Washington, DC.

Before LOURIE, DYK, and WALLACH, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* WALLACH.
Dissenting opinion filed by *Circuit Judge* DYK.

WALLACH, *Circuit Judge*.

The Director of the Office of Personnel Management ("OPM") seeks review of the decision by the Merit Systems Protection Board ("Board") holding that the Supreme Court's decision in *Department of the Navy v. Egan*, 484 U.S. 518 (1988), limits Board review of an otherwise appealable adverse action only if that action is based upon eligibility for or a denial, revocation, or suspension of access to classified information. *Egan*, however, prohibits Board review of agency determinations concerning eligibility of an employee to occupy a "sensitive" position, regardless of whether the position requires access to classified information. Accordingly, we REVERSE and REMAND.

I. BACKGROUND

Rhonda K. Conyers ("Conyers") and Devon Haughton Northover ("Northover" and collectively, "Respondents")[1] were indefinitely suspended and demoted, respectively, from their positions with the Department of Defense ("Agency") after they were found ineligible to occupy "noncritical sensitive" positions.[2] Ms. Conyers and Mr.

[1] Although the Board, Ms. Conyers, and Mr. Northover are all Respondents, we refer to the Board as the "Board" and "Respondents" will refer to Ms. Conyers and Mr. Northover.

[2] Departments and agencies of the Government classify jobs in three categories: "critical sensitive," "noncritical sensitive," and "nonsensitive." *Egan*, 484 U.S. at 528. The underlying cases involve "noncritical sensitive" positions, which are defined as: "*Positions with potential to cause damage to . . . national security*, up to and including damage at the significant or serious level. These positions include: (1) Access to Secret, "L," Confidential classified information[;] (2) *Any other positions with*

Northover independently appealed the Agency's actions to the Board. In both appeals, the Agency argued that, because Respondents' positions were designated "noncritical sensitive," the Board could not review the merits of the Agency's determinations under the precedent set forth in *Egan*.

A. The *Egan* Holding

In *Egan*, the Supreme Court held that the Board plays a limited role in adverse action cases involving national security concerns. The respondent in *Egan* lost his laborer's job at a naval facility when he was denied a required security clearance. 484 U.S. at 520. Reversing our decision in *Egan v. Department of the Navy*, 802 F.2d 1563 (Fed. Cir. 1986), *rev'd*, 484 U.S. 518 (1988), the Court held that the Board does not have authority to review the substance of the security clearance determination, contrary to what is required generally in other adverse action appeals. 484 U.S. at 530-31. Rather, the Court held that the Board has authority to review only: (1) whether an Executive Branch employer determined the employee's position required a security clearance; (2) whether the clearance was denied or revoked; (3) whether the employee was provided with the procedural protections specified in 5 U.S.C. § 7513; and (4) whether transfer to a nonsensitive position was feasible. *Id.* at 530.

B. Ms. Conyers's Initial Proceedings

Ms. Conyers occupied a competitive service position of GS-525-05 Accounting Technician at the Defense Finance and Accounting Service. *Conyers v. Dep't of Def.*, 115 M.S.P.R. 572, 574 (2010). Following an investigation, the Agency's Washington Headquarters Services ("WHS")

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potential to cause harm to national security to a moderate degree . . . ." J.A. 326 (emphasis added).

Consolidated Adjudications Facility ("CAF") discovered information about Ms. Conyers that raised security concerns. J.A. 149-52. As a result, effective September 11, 2009, the Agency indefinitely suspended Ms. Conyers from her position because she was denied eligibility to occupy a sensitive position by WHS/CAF. *Conyers*, 115 M.S.P.R. at 574. The Agency reasoned that Ms. Conyers's noncritical sensitive "position required her to have access to sensitive information," and because WHS/CAF denied her such access, "she did not meet a qualification requirement of her position."[3] *Id.* at 574.

Ms. Conyers appealed her indefinite suspension to the Board. *Id.* In response, the Agency argued that *Egan* prohibited Board review of the merits of WHS/CAF's decision to deny Ms. Conyers eligibility for access "to sensitive or classified information and/or occupancy of a sensitive position." *Id.* On February 17, 2010, the administrative judge issued an order certifying the case for an interlocutory appeal and staying all proceedings pending resolution by the full Board. *Id.* at 575. In her ruling, the administrative judge declined to apply *Egan* and "informed the parties that [she] would decide the case under the broader standard applied in . . . other [5 U.S.C.] Chapter 75 cases which do not involve security clearances." *Id.* (brackets in original).

[3] The record indicates that Ms. Conyers requested an appearance before an administrative judge with the Defense Office of Hearings and Appeals ("DOHA") regarding her denial of eligibility to occupy a sensitive position. *Conyers*, 115 M.S.P.R. at 574; J.A. 123. DOHA ultimately denied relief. *Conyers*, 115 M.S.P.R. at 574. The Agency subsequently removed Ms. Conyers effective February 19, 2010. *Id.*

C. Mr. Northover's Initial Proceedings

Mr. Northover occupied a competitive service position of GS–1144–07 Commissary Management Specialist at the Defense Commissary Agency. *Northover v. Dep't of Def.*, 115 M.S.P.R. 451, 452 (2010). Effective December 6, 2009, the Agency reduced Mr. Northover's grade level to part-time GS–1101–04 Store Associate "due to revocation/denial of his Department of Defense eligibility to occupy a sensitive position." *Id.* at 453. In its Notice of Proposed Demotion, the Agency stated that Mr. Northover was in a position that was "designated as a sensitive position" and that WHS/CAF had denied him "eligibility for access to classified information and/or occupancy of a sensitive position." *Id.* at 453 (citation omitted).

Mr. Northover subsequently appealed the Agency's decision to the Board. *Id.* In response, the Agency argued it had designated the Commissary Management Specialist position a "moderate risk" national security position with a sensitivity level of "noncritical sensitive," and under *Egan*, the Board is barred from reviewing the merits of an agency's "security-clearance/eligibility determination." *Id.*

On April 2, 2010, contrary to the ruling in *Conyers*, the presiding chief administrative judge ruled that *Egan* applied and that the merits of the Agency's determination were unreviewable. *Id.* The chief administrative judge subsequently certified his ruling to the full Board. *Id.* All proceedings were stayed pending resolution of the certified issue. *Id.*

D. The Full Board's Decision in *Conyers* and *Northover*

On December 22, 2010, the full Board affirmed the administrative judge's decision in *Conyers* and reversed

the chief administrative judge's decision in *Northover*, concluding that *Egan* did not apply in cases where security clearance determinations are not at issue. *Conyers*, 115 M.S.P.R. at 590; *Northover*, 115 M.S.P.R. at 468. Specifically, the Board held that *Egan* limited the Board's review of an otherwise appealable adverse action only if that action is based upon eligibility for or a denial, revocation, or suspension of access to classified information. [4] *Conyers*, 115 M.S.P.R. at 590; *Northover*, 115 M.S.P.R. at 467-68. Because Ms. Conyers and Mr. Northover did not occupy positions that required access to classified information, the Board concluded that *Egan* did not preclude Board review of the underlying Agency determinations. *Conyers*, 115 M.S.P.R. at 585; *Northover*, 115 M.S.P.R. at 464.

OPM moved for reconsideration of the Board's decisions, which the Board denied. *Berry v. Conyers, et al.*, 435 F. App'x 943, 944 (Fed. Cir. 2011) (order granting OPM's petition for review). OPM petitioned for review to this court, and the petition was granted on August 17, 2011. *Id.* We have jurisdiction to review the Board's final decision under 5 U.S.C. § 7703(d) and 28 U.S.C. § 1295(a)(9).[5]

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[4] The Board considered "security clearance" to be synonymous to "access to classified information." *Conyers*, 115 M.S.P.R. at 580.

[5] On remand, *Conyers* was dismissed as moot, and *Northover* was dismissed without prejudice to file again pending the resolution of this petition. J.A. 900-05; 1821. To the extent there are any Article III case or controversy concerns as a result of these dismissals, we find that OPM, at the least, maintains sufficient interests in this petition to satisfy any Article III case or controversy requirement. *See Horner v. Merit Sys. Protection Bd.*, 815 F.2d 668, 671 (Fed. Cir. 1987) ("We have no

II. STATUTORY GROUNDS FOR NATIONAL SECURITY BASED REMOVAL OF GOVERNMENT EMPLOYEES

The statutes provide a two-track system for removal of employees based on national security concerns. *Egan*, 484 U.S. at 526. In particular, relevant provisions of the Civil Service Reform Act of 1978 ("CSRA" or the "Act"), Chapter 75 of Title 5 of the United States Code entitled, "Adverse Actions," provides two subchapters related to removals. The first, subchapter II (§§ 7511-7514), relates to removals for "cause." Under § 7512, an agency's indefinite suspension and a reduction in grade of an employee, as here, may qualify as "adverse actions." 5 U.S.C. § 7512(2)-(3). An employee subject to an adverse action is entitled to the protections of § 7513, which include written notice of the specific reasons for the proposed action, an opportunity to respond to the charges, the requirement that the agency's action is taken to promote the efficiency of the service, and the right to review by the Board of the action. An employee removed for "cause" has the right, under § 7513(d), to appeal to the Board. On review of the

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question that the issue of the [Office of Special Counsel]'s authority to bring a general disciplinary action against an employee, and in turn the issue of the board's jurisdiction to hear such a case, the latter being dependent on the former, is of vital interest to OPM, which has administrative responsibility for personnel practices and policies throughout most parts of government. These interests are more than sufficient to satisfy the section 7703(d) requirements and any Article III case or controversy requirement."); *see also Berry*, 435 F. App'x at 945 (granting petition for review because "[w]e agree that the issues in the Board's orders raise an issue of such interest, i.e., whether the agency must disclose its determinations regarding what it classifies as issues of national security and must litigate the merits of such a determination, and thus are subject to immediate review.").

action by the Board under § 7701,[6] the Board may sustain the agency's action only if the agency can show that its decision is supported by a preponderance of the evidence. 5 U.S.C. § 7701(c)(1)(B). [7]

The second, subchapter IV (§§ 7531-7533), relates to removals based upon national security concerns. An employee suspended under § 7532(a) is not entitled to appeal to the Board. Nonetheless, the statute provides for a summary removal process that entitles the employee to specified pre-removal procedural rights, including a hearing by an agency authority. 5 U.S.C. § 7532(c).

III. *EGAN*'S APPLICATION TO *CONYERS* AND *NORTHOVER*

The Board and Respondents urge this court to limit *Egan*'s application to security clearance determinations, reasoning that national security concerns articulated in that case pertain to access to classified information only. *Egan* cannot be so confined. Its principles instead require that courts refrain from second-guessing Executive Branch agencies' national security determinations concerning eligibility of an individual to occupy a sensitive position, which may not necessarily involve access to

[6] 5 U.S.C. § 7701 provides, in relevant part: "An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation." 5 U.S.C. § 7701(a). It is undisputed that Respondents are "employees" as defined in the applicable statutes in this case. *See* 5 U.S.C. § 7511(a)(1)(A) ("[E]mployee means . . . an individual in the competitive service . . . .").

[7] The two cases on appeal here proceeded pursuant to 5 U.S.C. § 7513(d).

classified information. For the following reasons, *Egan* must apply.

A. *Egan* Addressed Broad National Security Concerns That Are Traditionally the Responsibility of the Executive Branch

Egan, at its core, explained that it is essential for the Executive Branch and its agencies to have broad discretion in making determinations concerning national security. Affording such discretion to agencies, according to *Egan*, is based on the President's "authority to classify and control access to information bearing on national security and to determine" who gets access, which "flows primarily from [the Commander in Chief Clause] and exists quite apart from any explicit congressional grant." 484 U.S. at 527. *Egan* also recognized the general principle that foreign policy is the "province and responsibility of the Executive." *Id.* at 529 (citation omitted). Accordingly, the Court reasoned:

> [I]t is not reasonably possible for an outside nonexpert body to review the substance of such a[n agency determination concerning national security] and to decide whether the agency should have been able to make the necessary affirmative prediction [that a particular individual might compromise sensitive information] with confidence. Nor can such a body determine what constitutes an acceptable margin of error in assessing the potential risk.

Id. Hence, unless Congress specifically has provided otherwise, courts traditionally have shown "great deference" to what "the President—the Commander in Chief—has determined . . . is essential to national security." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 24, 26 (2008) (citation omitted).

Despite the undisputed role of the Executive within this realm, Respondents argue applying *Egan* to these cases "may deprive either the Congress or the Judiciary of all freedom of action merely by invoking national security." Resp'ts' Br. 23. Certainly, under the Constitution, Congress has a substantial role in both foreign affairs and national security. Congress, therefore, has the power to guide and limit the Executive's application of its powers. Nevertheless, no controlling congressional act is present here.

As *Egan* recognized, the CSRA did not confer broad authority to the Board in the national security context.[8]

[8] The dissent states the majority has "completely fail[ed] to come to grips with the [CSRA]." Dissent Op. at 7. In 1990, the CSRA was amended after the Court's decision in *U.S. v. Fausto*, 484 U.S. 439 (1988). There, the Court decided that the CSRA's silence regarding appeal rights for non-preference eligible members of the excepted service reflected congressional intent to preclude any review under chapter 75 for such employees. *Id.* at 448. In response, Congress passed the Civil Service Due Process Amendments ("1990 Amendments") expanding the Board's jurisdiction to some, but not all, non-preference eligible excepted service employees. Pub. L. No. 101–376, 104 Stat. 461 (1990).

The dissent construes the 1990 Amendments as extending by implication Board review of agency determinations concerning sensitive positions. Dissent Op. at 10. Because certain agencies, such as the Federal Bureau of Investigation, Central Intelligence Agency, and National Security Agency were expressly exempted, the dissent posits that Board review must extend to all other positions that were not excluded. *Id.* at 11. Certain employees of the General Accounting Office, the Veterans Health Sciences and Research Administration, the Postal Service, the Postal Rate Commission, and the Tennessee Valley Authority, however, were also excluded, because separate statutes excluded the employees of these agencies from the normal appeals process. H.R. Rep. No. 101-328 at 5

484 U.S. at 530-31 ("An employee who is removed for 'cause' under § 7513, when his required clearance is denied, is entitled to the several procedural protections specified in that statute. The Board then may determine whether such cause existed, whether in fact clearance was denied, and whether transfer to a nonsensitive position was feasible. *Nothing in the Act, however, directs or*

(1989), *reprinted in* 1990 U.S.C.C.A.N. 695. Thus, the dissent's view that Congress "crafted some exceptions for national security and not others" is speculative because "national security" was not a factor providing for these exclusions.

Similarly, the dissent refers to the Department of Defense's ("DOD") creation of the National Security Personnel System ("NSPS") in 2003 to further support the notion that Congress spoke on the issue before this court. Dissent Op. at 15. The dissent's position is neither supported by statutory language nor legislative history. The statute creating the NSPS, the subsequent repeal of certain regulations concerning the DOD's appeals process, and the ultimate repeal of the statute creating the NSPS itself in 2009, do not show that Congress intended to preclude the DOD from insulating employment decisions concerning national security from Board review. NSPS was established to overhaul the then-existing personnel management system and polices of the DOD. *See* National Defense Authorization Act, Pub. L. 108–136, 117 Stat. 1392 (2003). In 2009, NSPS was repealed largely due in part to strong opposition from labor organizations regarding issues of collective bargaining. *See* Department of Defense Human Resources Management and Labor Relations Systems, 70 Fed. Reg. 66,123; *see also* S. Rep. No. 111-35 at 185 (2009) ("[T]he committee has received many complaints from DOD employees during the 5 years during which the [DOD] has sought to implement NSPS, to the detriment of needed human capital planning and workforce management initiatives."). There is nothing in these statutes that shows Congress intended Board review of agency determinations pertaining to employees in sensitive positions.

empowers the Board to go further.") (emphasis added). As a result, Congress presumably has left the President and Executive Branch agencies broad discretion to exercise their powers in this area. *See Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981) ("Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act," and "[s]uch failure of Congress . . . does not, 'especially . . . in the areas of foreign policy and national security,' imply 'congressional disapproval' of action taken by the Executive.") (quoting *Haig v. Agee*, 453 U.S. 280, 291 (1981)). Accordingly, when "the President acts pursuant to an express or implied authorization from Congress," his actions should be "supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion . . . rest[s] heavily upon any who might attack it." *Id.* at 668 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)). Courts thus must tread lightly when faced with the potential of second-guessing discretionary agency determinations concerning national security.

The existence of § 7532 does not alter the agencies' broad discretion to exercise their powers in the national security context. The Board and Respondents argue that Congress has spoken directly on the issue of removal for national security concerns by enacting § 7532, and that applying *Egan* in this instance "would in essence allow the Executive to replace § 7532 with § 7513 . . . rendering § 7532 a nullity." Resp'ts' Br. 24-25; *see* Board's Br. 42-43. This argument is similar, if not identical, to those rejected by the *Egan* Court. 484 U.S. at 533 ("The argument is that the availability of the § 7532 procedure is a 'compelling' factor in favor of Board review of a security-clearance denial in a case under § 7513.").

In *Egan*, the Court observed the alternative availability of § 7513 and § 7532. *Id.* at 532. Specifically, the Court acknowledged that § 7532 does not preempt § 7513 and that the two statutes stand separately and provide alternative routes for administrative action. *Id.* In addition, the Court found that the two sections were not anomalous, but merely different. *Id.* at 533. The Court also found that one section did not necessarily provide greater procedural protections than the other. *Id.* at 533-34.

The Court in *Carlucci v. Doe*, 488 U.S. 93 (1988), further articulated and clarified § 7532's applicability. In that case, the Court determined that the summary removal mechanism set out in § 7532, as well as 50 U.S.C. § 833,[9] were discretionary mechanisms in cases involving dismissals for national security reasons. *Id.* at 100. The Court found that § 7532 was not mandatory, but rather permissive: "'Notwithstanding other statutes,' the head of an agency 'may' suspend and remove employees 'in the interests of national security.'" *Id.* (quoting § 7532) (finding nothing in the legislative history of § 7532 indicating that the statute's procedures are the exclusive means for removals on national security grounds or that § 7532 displaces the otherwise applicable removal provisions of the agencies covered by the section). Therefore, it was held that the National Security Agency was not required to apply either § 7532 or § 833 and could have acted under

[9] 50 U.S.C. § 833 was a summary removal provision in the 1964 National Security Agency Personnel Security Procedures Act, 50 U.S.C. §§ 831-35 (repealed October 1, 1996).

its ordinary dismissal procedure if it so wished.[10] *Id.* at 99-100.

Moreover, *Carlucci* held that Congress enacted § 7532 to "supplement, not narrow, ordinary agency removal procedures." *Id.* at 102. The Court reasoned that because of its summary nature, "Congress intended § 7532 to be invoked only where there is 'an immediate threat of harm to the national security' in the sense that the delay from invoking 'normal dismissal procedures' could 'cause serious damage to the national security.'" *Id.* (quoting *Cole v. Young*, 351 U.S. 536, 546 (1956)). Consequently, should § 7532 be mandatory as the Board and Respondents effectively argue, it would become the exclusive procedure in this case and similar cases, and "no national security termination would be permissible without an initial suspension and adherence to the *Cole v. Young* standard." *Id.* Given *Carlucci*'s teaching, we are unconvinced that Congress intended any such result when it

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[10] The *Carlucci* Court also affirmed *Egan*'s conclusion regarding §§ 7513 and 7532:

> We thus agree with the conclusion of the Merit Systems Protection Board in a similar case that "section 7532 is not the exclusive basis for removals based upon security clearance revocations," *Egan v. Department of the Navy*, 28 M.S.P.R. 509, 521 (1985), and with the Court of Appeals for the Federal Circuit that "[t]here is nothing in the text of section 7532 or in its legislative history to suggest that its procedures were intended to preempt section 7513 procedures whenever the removal could be taken under section 7532. The language of section 7532 is permissive." *Egan v. Department of the Navy*, 802 F.2d 1563, 1568 (Fed. Cir. 1986), *rev'd*, 488 U.S. 518 (1988).

Carlucci, 488 U.S. at 104.

enacted § 7532. *Id.* Accordingly, eligibility to occupy a sensitive position is a discretionary agency determination, principally within the purview of the Executive Branch, the merits of which are unreviewable by the Board.

B. *Egan*'s Analysis Is Predicated On "National Security Information"

The Board and Respondents conflate "classified information" with "national security information," but *Egan* does not imply those terms have the same meaning.[11] In fact, *Egan*'s core focus is on "national security information," not just "classified information." 484 U.S. at 527 (recognizing the government's "compelling interest in withholding *national security information*") (emphasis added). As *Egan* noted, the absence of a statutory provision in § 7512 precluding appellate review of determinations concerning national security creates a presumption in favor of review. *Id.* The Court, nevertheless, held that this "proposition is not without limit, and *it runs aground when it encounters concerns of national security*, as in this case, where the grant of security clearance to a particular employee, a sensitive and inherently discretionary judgment call, is committed by law to the appropriate agency of the Executive Branch." *Id.* (emphasis added).[12] *Egan* therefore is predicated on broad national security concerns, which may or may not include issues of access to

[11] Likewise, the dissent's key error is that it conflates "authority to classify and control access to information bearing on national security" with "the authority to protect classified information." Dissent Op. at 24-25.

[12] It is clear from the use of the clause "as in this case" following the "runs aground" clause that national security concerns are the Supreme Court's general proposition, and security clearances simply exemplify the types of concerns falling within this broad category.

classified information. Thus, *Egan* is not limited to adverse actions based upon eligibility for or access to classified information.

In addition, sensitive positions concerning national security do not necessarily entail access to "classified information" as the Board and Respondents contend. The Board cites *Cole v. Young* and references the Court's discussion of the legislative history of the Act of August 26, 1950[13] in support of its proposition that national security concerns relate strictly to access to classified information. However, the Board's analysis is flawed.

Cole held that a sensitive position is one that *implicates* national security, and in defining "national security" as used in the Act of August 26, 1950, the Court concluded that the term "was intended to comprehend only those activities of the Government that are *directly concerned with the protection of the Nation from internal subversion or foreign aggression*, and not those which contribute to the strength of the Nation only through their impact on the general welfare." 351 U.S. at 544 (emphasis added).[14] Thus, even in *Cole*, sensitive posi-

[13] The Act of August 26, 1950, Pub. L. No. 81-733, ch. 803, 64 Stat. 476 (1950), gave heads of certain departments and agencies of the Government summary suspension and unreviewable dismissal powers over their civilian employees, when deemed necessary in the interest of the national security of the United States. *Conyers*, 115 M.S.P.R. at 580 n.17. The Act was the precursor to 5 U.S.C. § 7532. *Id.*

[14] It follows that an employee can be dismissed 'in the interest of the national security' under the Act only if he occupies a *'sensitive' position*, and thus that a condition precedent to the exercise of the dismissal authority is a determination by the agency head that the *position occupied is one affected with the 'national security*.'" *Cole*, 351

tions were defined as those that involve national security information and not necessarily those that involve classified information.

Indeed, "sensitive positions" that can affect national security and "access to classified information" are parallel concepts that are *not* necessarily the same. As the Court reasoned:

> Where applicable, the Act authorizes the agency head summarily to suspend an employee pending investigation and, after charges and a hearing, finally to terminate his employment, such termination not being subject to appeal. There is an obvious justification for the summary suspension power where the employee occupies a "sensitive" position in which he could cause serious damage to the national security during the delay incident to an investigation and the preparation of charges. *Likewise*, there is a reasonable basis for the view that an agency head who must bear the responsibility for the protection of classified information committed to his custody should have the final say in deciding whether to repose his trust in an employee who has access to such information.

Cole, 351 U.S. at 546 (emphasis added).[15] Hence, contrary to the Board and Respondents' contentions, "classi-

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U.S. at 551 (emphasis added). Accordingly, the Court in *Cole* remanded the case to determine whether the petitioner's position was one in which he could adversely affect national security. *Id.* at 557.

[15] By using the word, "likewise," the Court compares the two concepts, "sensitive positions" and "access to classified information." In doing so, it makes clear that they are parallel concepts that are not the same.

fied information" is not necessarily "national security information" available to an employee in a sensitive position.

The Board and Respondents' focus on one factor, eligibility of access to classified information, is misplaced.[16] Government positions may require different types and levels of clearance, depending upon the sensitivity of the position sought. *Egan*, 484 U.S. at 528. A government appointment is expressly made subject to a background investigation that varies in scope according to the degree of adverse effect the applicant could have on national security. *Id.* (citing Exec. Order No. 10,450, § 3, 3 C.F.R. 937 (1949-1953 Comp.)). As OPM states: "An agency's national security calculus will vary widely depending upon, *inter alia*, the agency's mission, the particular

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[16] The centerpiece of the *Egan* analysis, Executive Order No. 10,450, makes no mention of "classified information." Exec. Order No. 10,450, § 3, 3 C.F.R. 937 (1949-1953) ("The head of any department or agency shall designate, or cause to be designated, any position within his department or agency the occupant of which could bring about, by virtue of the nature of the position, *a material adverse effect on the national security as a sensitive position*.") (emphasis added). In addition, other relevant statutes and regulations define "sensitive" position in the broadest sense by referring to "national security" generally. *See* 10 U.S.C. § 1564 ("Security clearance investigations . . . (e) *Sensitive duties*.--For the purposes of this section, *it is not necessary for the performance of duties to involve classified activities or classified matters* in order for the duties to be considered sensitive and critical to the national security.") (emphasis added); *see also* 5 C.F.R. § 732.102 ("(a) For purposes of this part, the term *national security position* includes: (1) Those positions that involve activities of the Government that are *concerned with the protection of the nation from foreign aggression or espionage* . . . .") (emphasis added).

project in question, and the degree of harm that would be caused if the project is compromised." OPM's Br. 33. As a result, an agency's determination in controlling access to national security information entails consideration of multiple factors.

For example, categorizing a sensitive position is undertaken without regard to access to classified information, but rather with regard to the effect the position may have on national security. *See* Exec Order No. 10,450 § 3. Similarly, predictive judgments[17] are predicated on an individual's potential to compromise information, which might be unclassified. Consequently, the inquiry in these agency determinations concerning national security is not contingent upon access to classified information.

Finally, *Egan*'s concerns regarding the agencies' "clearly consistent with the interests of national security" standard conflicting with the Board's preponderance of the evidence standard apply equally here. *Egan* held that:

> As noted above, security clearance normally will be granted only if it is "clearly consistent with the interests of the national security." The Board, however, reviews adverse actions under a preponderance of the evidence standard. § 7701(c)(1)(B). These two standards seem inconsistent. It is difficult to see how the Board would be able to review

[17] A predictive judgment of an individual is "an attempt to predict his [or her] possible future behavior and to assess whether, under compulsion of circumstances or for other reasons, he [or she] might compromise sensitive information. It may be based, to be sure, upon past or present conduct, but it also may be based upon concerns completely unrelated to conduct such as having close relatives residing in a country hostile to the United States." *Egan*, 484 U.S. at 528-29.

> security-clearance determinations under a preponderance of the evidence standard without departing from the "clearly consistent with the interests of the national security" test. The clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials. Placing the burden on the Government to support the denial by a preponderance of the evidence would inevitably shift this emphasis and involve the Board in second-guessing the agency's national security determinations.

484 U.S. at 531. An agency's determination of an employee's ineligibility to hold a sensitive position must be "consistent with the interests of national security." *See* Exec. Order No. 10,450, § 3. Thus, such agency determinations cannot be reviewable by the Board because this would improperly place an inconsistent burden of proof upon the government. Accordingly, *Egan* prohibits review of Executive Branch agencies' national security determinations concerning eligibility of an individual to occupy a sensitive position, which may not necessarily involve access to classified information.

IV. UNCLASSIFIED INFORMATION CAN HAVE A MATERIAL ADVERSE EFFECT ON NATIONAL SECURITY

National security concerns render the Board and Respondents' positions untenable. It is naive to suppose that employees without direct access to already classified information cannot affect national security. The Board and Respondents' narrow focus on access to classified

information ignores the impact employees without security clearances, but in sensitive positions, can have.[18]

[18] There are certainly numerous government positions with potential to adversely affect national security. The Board goes too far by comparing a government position at a military base commissary to one in a "Seven Eleven across the street." Oral Argument at 28:10–15, *Berry v. Conyers, et al.*, 2011-3207, available at http://www.cafc.uscourts.gov/oral-argument-recordings/search/audio.html. Commissary employees do not merely observe "[g]rocery store stock levels" or otherwise publicly observable information. Resp'ts' Br. 20. In fact, commissary stock levels of a particular unclassified item – sunglasses, for example, with shatterproof lenses, or rehydration products – might well hint at deployment orders to a particular region for an identifiable unit. Such troop movements are inherently secret. *Cf. Near v. State of Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931) ("When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right . . . . No one would question but that a government might prevent actual obstruction to its recruiting service or the *publication of the sailing dates of transports or the number and location of troops*.") (citing *Schenck v. United States*, 294 U.S. 47, 52 (1919)) (emphasis added). This is not mere speculation, because, as OPM contends, numbers and locations could very well be derived by a skilled intelligence analyst from military commissary stock levels. *See* Oral Argument at 13:19-14:03, *Berry v. Conyers, et al.*, 2011-3207, available at http://www.cafc.uscourts.gov/oral-argument-recordings/search/audio.html (Q: "Can a position be sensitive simply because it provides observability? That is, one of these examples that was given was someone working at a commissary; it seems to me that someone working at a commissary has an opportunity without access to classified information to observe troop levels, potential for where someone is going, from what they are buying, that sort of thing." A: "I think that is right your

Defining the impact an individual may have on national security is the type of predictive judgment that must be made by those with necessary expertise. *See Egan*, 484 U.S. at 529 ("The attempt to define not only the individual's future actions, but those of outside and unknown influences renders the 'grant or denial of security clearances . . . an inexact science at best.'") (quoting *Adams v. Laird*, 420 F.2d 230, 239 (D.C. Cir. 1969)). The sources upon which intelligence is based are often open and publically available. Occasionally, intelligence is obtained from sources in a fashion the source's government would find improper. Occasionally, those means of obtention are coercive and/or subversive.[19]

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honor. We agree with that, and I think in *Egan*, he, Mr. Egan worked on a nuclear submarine. And so, part of it was simply from what he was observing by coming and going of a nuclear submarine. And so, sensitivity can be the place where the employee works, what are they able to observe, what could they infer from, what you say, from the purchases and shipments . . . .").

[19] For example, the intelligence community may view certain disparaging information concerning an employee as a vulnerability which can be used to blackmail or coerce information out of the individual. *See Egan*, 484 U.S. at 528 (recognizing that the government has a compelling interest in protecting truly sensitive information from those who, "under compulsion of circumstances or for other reasons . . . might compromise sensitive information."); *see also* Exec. Order 10,450, § 8 ("[I]nvestigations conducted . . . shall be designed to develop information as to whether the employment or retention in employment . . . is clearly consistent with . . . national security . . . . Such information [relating, but not limited to] . . . (ii) Any deliberate misrepresentations, falsifications, or omissions of *material facts* . . . (iii) Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, sexual perversion, or *financial irresponsi-*

This area of National Security Law is largely about preventing human source intelligence gathering in a manner which does not, in an open society, unnecessarily limit the public's right to access information about its government's activities. Still, there clearly is a need for such prevention. Within the sphere of national security limitations on government employment, our society has determined that courts should tolerate and defer to the agencies' threat limiting expertise. *See id.*

While threats may change with time, *Egan*'s analysis remains valid. The advent of electronic records management, computer analysis, and cyber-warfare have made potential espionage targets containing means to access national security information vastly more susceptible to harm by people without security clearances. The mechanics of planting within a computer system a means of intelligence gathering are beyond the ken of the judiciary; what matters is that there are today more sensitive areas of access than there were when *Egan* was authored. Its underlying analysis, nevertheless, is completely applicable—the President, as Commander-in-Chief, has the right and the obligation, within the law, to protect the government against potential threats. *Egan*, 484 U.S. at 527.

Some rights of government employees are certainly abrogated in national security cases. The Board and Respondents must recognize that those instances are the result of balancing competing interests as was the case in *Egan* and as is the case here. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) ("[T]he process due in any given instance is determined by weighing the 'private interest that will be affected by the official action' against the

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bility.") (emphasis added). Hence, as the Agency found, information regarding Ms. Conyers's debt is a reasonable concern. *See* J.A. 149-52.

Government's asserted interest, 'including the function involved' and the burdens the Government would face in providing greater process.") (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).[20] Hence, as Lord Cyril Radcliffe noted, security must be weighed against other important questions "in that free dialogue between government . . . and people" out of which public life is built.[21]

In our society, it has been accepted that genuine and legitimate doubt is to be resolved in favor of national security.[22] *See Egan*, 484 U.S. at 527; *see also United*

[20] Working for the government is not only an example of civic duty but also an honorable and privileged undertaking that citizens cannot take lightly. This is especially true when the government position implicates national security. In other words, being employed by a government agency that deals in matters of national security is not a fundamental right. Accordingly, the competing interests in this case undoubtedly weigh on the side of national security.

[21] 218 Parl. Deb., H.L. (5th ser.) (1967) 781-83, available at http://hansard.millbanksystems.com/lords/1967/jul/06/the-d-notice-system-radcliffe-committees (discussing the publication of a story concerning national security).

[22] Although adverse actions of this type are largely unreviewable, courts may examine allegations of constitutional violations or allegations that an agency violated its own procedural regulations. *See, e.g.*, *Egan*, 484 U.S. at 530. For example, the government's invocation of national security authority does not preclude judicial review in instances involving fundamental rights. *See Hamdi*, 542 U.S. at 529-30 (finding due process violation of those classified as "enemy combatants" and affording great weight to physical liberty as a fundamental right). On the other hand, courts generally do not accord similar weight to an individual in cases concerning national security where no such fundamental right is implicated. *See, e.g.*,

States v. Robel, 389 U.S. 258, 267 (1967) ("[W]hile the Constitution protects against invasions of individual rights, it does not withdraw from the Government the power to safeguard its vital interests . . . . The Government can deny access to its secrets to those who would use such information to harm the Nation.") (citation omitted). That was the philosophical underpinning of *Egan* and it is the holding of this court today. Accordingly, the merits of these agency determinations before us are not reviewable by the Board.

V. CONCLUSION

For the foregoing reasons, the Board cannot review the merits of Executive Branch agencies' national security determinations concerning eligibility of an employee to

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Bennet v. Chertoff, 425 F.3d 999, 1004 (D.C. Cir. 2005) (holding that substantial evidence of national security concerns as a contemporaneous reason for the agency's action in a Title VII case was enough for resolution in favor of executive discretion). In other very limited circumstances, Title VII claims raised in the context of a security clearance investigation may be justiciable. In *Rattigan v. Holder*, --- F.3d ----, No. 10-5014, 2012 WL 2764347 (D.C. Cir. July 10, 2012), the court held that: (1) "*Egan*'s absolute bar on judicial review covers only security clearance-related decisions made by trained Security Division personnel and does not preclude all review of decisions by other FBI employees who merely report security concerns," *id.* at *3; and (2) "Title VII claim[s] may proceed only if . . . [it can be shown] that agency employees acted with a retaliatory or discriminatory motive in reporting or referring information that they knew to be false," *id.* at *7. Although distinguishable from this case because *Rattigan* is specific only to security clearances, *Rattigan* does emphasize the importance of predictive judgments and the deference that courts must afford Executive Branch agencies in matters concerning national security. *Id.* at *3-5.

occupy a sensitive position that implicates national security. As OPM notes, "there is nothing talismanic about eligibility for access to classified information." OPM's Br. 27. The core question is whether an agency determination concerns eligibility of an employee to occupy a sensitive position that implicates national security. When the answer to that question is in the affirmative, *Egan* applies and the Board plays a limited role in its review of the determination. We REVERSE and REMAND for further proceedings consistent with this decision.

REVERSED AND REMANDED

United States Court of Appeals for the Federal Circuit

JOHN BERRY, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT,
Petitioner,

v.

RHONDA K. CONYERS AND DEVON HAUGHTON NORTHOVER,
Respondents,

and

MERIT SYSTEMS PROTECTION BOARD,
Respondent.

2011-3207

Petition for Review of the Merit Systems Protection Board in consolidated case nos. CH0752090925-R-1 and AT0752100184-R-1.

DYK, *Circuit Judge*, dissenting.

The majority, reversing the Merit Systems Protection Board ("Board"), holds that hundreds of thousands of federal employees—designated as holding national security positions—do not have the right to appeal the merits of adverse actions to the Board simply because the Department of Defense has decided that such appeals should not be allowed.

The majority reaches this conclusion even though the Civil Service Reform Act of 1978 ("CSRA"), 5 U.S.C. § 1101 et seq., unquestionably gives these employees the right to appeal the merits of adverse agency personnel actions to the Board, and Congress has acted specifically to deny Board jurisdiction under the CSRA with respect to certain national security agencies—the Central Intelligence Agency ("CIA"), the Federal Bureau of Investigation ("FBI"), and intelligence components of the Department of Defense—but has not exempted the non-intelligence components of the Department of Defense involved here. And the majority reaches this conclusion despite the fact that Congress in 2003 authorized the Department of Defense to create just such an exemption for its non-intelligence components and then repealed that authorization in 2009. The majority offers little explanation as to how its decision can be consistent with the CSRA other than to dismissively state that "no controlling congressional act is present here." Majority Op. at 11.

The majority's sole ground for its reversal of the Board is the Supreme Court's decision in *Department of the Navy v. Egan*, 484 U.S. 518 (1988). What the Supreme Court itself characterized as the "narrow" decision in *Egan* does not remotely support the majority's position. *See id.* at 520. It simply holds that where access to classified information is a necessary qualification for a federal position, revocation of a security clearance pursuant to the predecessor of Executive Order No. 12,968, 60 Fed. Reg. 40,245 (Aug. 2, 1995), is a ground for removal, and that the merits of the security clearance revocation are outside the Board's jurisdiction. The employees' positions here required no such access, and the employees in question had no security clearances. Far from supporting elimination of Board jurisdiction in such circumstances, *Egan* explicitly recognized that national security employ-

ees could challenge their removal before the Board. 484 U.S. at 523 n.4 (noting that where the agency fails to invoke the summary removal procedures of 5 U.S.C. § 7532, an employee's "removal . . . presumably would be subject to Board review as provided in § 7513.").

The breadth of the majority's decision is exemplified by the low level positions involved in this very case. Ms. Conyers served as a GS-05 Accounting Technician (approximately $32,000 to $42,000 annual salary range) at the Defense Finance and Accounting Service. Mr. Northover was employed by the Defense Commissary Agency as a GS-07 Commissary Management Specialist (approximately $39,000 to $50,000 annual salary range), where he performed inventory control and stock management duties. I respectfully dissent.[1]

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[1] Quite apart from the merits, it seems to me that Ms. Conyers's case is moot. The Office of Personnel Management ("OPM") admits that "no ongoing dispute exists between Ms. Conyers and the Department of Defense." OPM Br. at 20 n.12. Relying on *Horner v. Merit Systems Protection Board*, 815 F.2d 668 (Fed. Cir. 1987), the majority notes that although the appeal as to Ms. Conyers was dismissed as moot, "OPM . . . maintains sufficient interests in this petition to satisfy any Article III case or controversy requirement." Majority Op. at 7 n.5. I disagree. OPM's only interest in Ms. Conyers's case is in securing an advisory opinion on the requirements of federal law. Nothing is better established than the impermissibility under Article III of rendering such advisory opinions. *See Flast v. Cohen*, 392 U.S. 83, 96 (1968) ("[I]t is quite clear that the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions." (internal quotation marks omitted)).

Horner is readily distinguishable from this case. In *Horner*, the result of the appeal would have had consequences for the employee, as "the disciplinary action against him [would] be a nullity if [the court] overturn[ed]

I

At the outset, it is important to be clear about the exact nature of the majority's decision. Under the majority's expansive holding, where an employee's position is designated as a national security position, *see* 5 C.F.R. § 732.201(a),[2] the Board lacks jurisdiction to review the underlying merits of any removal, suspension, demotion, or other adverse employment action covered by 5 U.S.C. § 7512. The majority holds that "the Board cannot review the merits of Executive Branch agencies' national security determinations concerning eligibility of an employee to occupy a sensitive position that implicates national security." Majority Op. at 26. The majority concedes that its holding renders "adverse actions of this type [ ] largely unreviewable."[3] Majority Op. at 25 n.22. Thus, the

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the board's decision." 815 F.2d at 671. In this case, even if the Board is overturned, Ms. Conyers will not be affected because she has already received all relief to which she is entitled based on her suspension. *See Cooper v. Dep't of the Navy*, 108 F.3d 324, 326 (Fed. Cir. 1997) ("If an appealable action is canceled or rescinded by an agency, any appeal from that action becomes moot.").

[2] 5 C.F.R. § 732.201(a) provides, "the head of each agency shall designate, or cause to be designated, any position within the department or agency the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security as a sensitive position at one of three sensitivity levels: Special–Sensitive, Critical–Sensitive, or Noncritical–Sensitive."

[3] As OPM recognizes, under the rule adopted by the majority, "[t]he Board's review . . . is limited to determining whether [the agency] followed necessary procedures . . . [and] the merits of the national security determinations are not subject to review." OPM Br. at 25; *see also Egan*, 484 U.S. at 530. "The Board's review does not . . . include the merits of the underlying determination that Mr. Northover and Ms. Conyers were not eligible to occupy a

majority's holding forecloses the statutorily-provided review of the merits of adverse employment actions taken against civil service employees merely because those employees occupy a position designated by the agency as a national security position.

The majority's holding allows agencies to take adverse actions against employees for illegitimate reasons, and have those decisions shielded from review simply by designating the basis for the adverse action as "ineligibility to occupy a sensitive position." As the Board points out, the principle adopted by the majority not only precludes review of the merits of adverse actions, it would also "preclude Board and judicial review of whistleblower retaliation and a whole host of other constitutional and statutory violations for federal employees subjected to otherwise appealable removals and other adverse actions." Board Br. at 35. This effect is explicitly conceded by OPM, which agrees that the agency's "liability for damages for alleged discrimination or retaliation" would not be subject to review. OPM Br. at 25.

OPM's concession is grounded in existing law since the majority expands *Egan* to cover all "national security" positions, and *Egan* has been held to foreclose whistleblower, discrimination, and other constitutional claims. Relying on *Egan*, we have held that the Board lacks jurisdiction where a petitioner alleges that his security clearance had been revoked in retaliation for whistleblowing. *See Hesse v. Dep't of State*, 217 F.3d 1372, 1377-80 (Fed. Cir. 2000), *cert. denied*, 531 U.S. 1154 (2001). So too, the majority's decision renders unreviewable all claims of discrimination by employees in national security positions under Title VII of the Civil Rights Act of 1964,

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sensitive position for national security reasons." OPM Reply Br. at 15.

42 U.S.C. § 2000e-5. Several circuits have held that courts lack jurisdiction to adjudicate discrimination claims where the adverse action is based on a security clearance revocation because "a Title VII analysis necessarily requires the court to perform some review of the merits of the security clearance decision," which is prohibited by *Egan*. *Brazil v. U.S. Dep't of the Navy*, 66 F.3d 193, 196 (9th Cir. 1995); *see Bennett v. Chertoff*, 425 F.3d 999, 1003 (D.C. Cir. 2005) ("While [the plaintiff] claims that [the agency's] security clearance explanation is pretextual, . . . a court cannot adjudicate the credibility of that claim.").[4] Indeed, in this case, Mr. Northover's discrimination claims were dismissed without prejudice pending the outcome of this appeal. Constitutional claims by employees occupying national security positions are also barred by the majority's decision despite the majority's contrary protestations. In *El-Ganayni v. U.S. Department of Energy*, 591 F.3d 176, 184-86 (3d Cir. 2010), the Third Circuit held that a plaintiff could not prevail on his First Amendment and Fifth Amendment claims where he alleged his security clearance had been revoked in retaliation for constitutionally protected speech and/or based on his religion and national origin.

[4] *See also Tenenbaum v. Caldera*, 45 F. App'x 416, 418 (6th Cir. 2002); *Ryan v. Reno*, 168 F.3d 520, 523-24 (D.C. Cir. 1999); *Becerra v. Dalton*, 94 F.3d 145, 149 (4th Cir. 1996); *Perez v. FBI*, 71 F.3d 513, 514-15 (5th Cir. 1995) ("Because the court would have to examine the legitimacy and the possibly pretextual nature of the [agency's] proffered reasons for revoking the employee's security clearance, any Title VII challenge to the revocation would of necessity require some judicial scrutiny of the merits of the revocation decision." (footnote omitted)).

II

The majority completely fails to come to grips with the statute, the fact that it provides for review of the merits of the adverse agency action involved here, and that the majority's holding effectively nullifies the statute.

The primary purpose of the CSRA—providing review of agencies' adverse employment actions—was to ensure that "[e]mployees are . . . protected against arbitrary action, personal favoritism, and from partisan political coercion." S. Rep. No. 95-969, at 19 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2741. In order to ensure such protection, the CSRA created the Board to be "a quasi-judicial body, empowered to determine when abuses or violations of law have occurred, and to order corrective action." *Id.* at 24. The protections were afforded to the vast majority of employees of the executive branch.

Subchapter II of Chapter 75 of the CSRA explicitly gives every "employee" the right to seek Board review of adverse employment actions. 5 U.S.C. § 7513(d); *see also id.* § 7701. The term "employee" is defined to include all employees in the competitive or excepted services[5] who are not serving a probationary period or under temporary

[5] The "competitive service" consists of "all civil service positions in the executive branch" with the exception of those positions that are specifically exempted by statute, those positions which are appointed for confirmation by the Senate (unless included by statute), and those positions that are in the Senior Executive Service; other civil service positions that have been "specifically included in the competitive service by statute"; and "positions in the government of the District of Columbia which are specifically included in the competitive service by statute." 5 U.S.C. § 2102(a). The "excepted service" consists of all "civil service positions which are not in the competitive service or the Senior Executive Service." *Id.* § 2103(a).

appointment, and who, in the case of excepted service employees, has completed two years of specified service.[6] An employee is entitled to appeal "a removal," "a suspension for more than 14 days," "a reduction in grade" or pay, or "a furlough of 30 days or less" to the Board. *Id.* § 7512.

In order to determine whether an adverse action constitutes arbitrary agency action, the Board necessarily examines the merits of the underlying agency decision.[7]

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[6] The statute defines an "employee" as:

> (A) an individual in the competitive service--
> (i) who is not serving a probationary or trial period under an initial appointment; or
> (ii) who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less;
>
> (B) a preference eligible in the excepted service who has completed 1 year of current continuous service in the same or similar positions--
> (i) in an Executive agency; or
> (ii) in the United States Postal Service or Postal Regulatory Commission; and
>
> (C) an individual in the excepted service (other than a preference eligible)--
> (i) who is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service; or
> (ii) who has completed 2 years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment limited to 2 years or less . . . .

5 U.S.C. § 7511(a)(1).

[7] *See Adams v. Dep't of the Army*, 105 M.S.P.R. 50, 55 (2007), *aff'd*, 273 F. App'x 947 (Fed. Cir. 2008) ("[W]hen the charge consists of the employing agency's withdrawal or revocation of its certification or other approval of the employee's fitness or other qualifications to hold his position, the Board's authority generally

Under 5 U.S.C. § 7513, an agency may take an adverse employment action against an employee "only for such cause as will promote the efficiency of the service." *Id.* § 7513(a). In order to demonstrate that the adverse action will promote the efficiency of the service, "the agency must show by preponderant evidence that there is a nexus between the misconduct and the work of the agency, i.e., that the employee's misconduct is likely to have an adverse impact on the agency's performance of its functions." *Brown v. Dep't of the Navy*, 229 F.3d 1356, 1358 (Fed. Cir. 2000). In evaluating whether the agency has satisfied the nexus requirement, "[t]he Board routinely evaluates such factors as loyalty, trustworthiness, and judgment in determining whether an employee's discharge will promote the efficiency of the service." *James v. Dale*, 355 F.3d 1375, 1379 (Fed. Cir. 2004) (quoting *Egan*, 484 U.S. at 537 n.1 (White, J., dissenting)). This merits evaluation is not modified merely because the removal is cloaked under the cloth of being "in the interests of national security."

The decision by Congress to afford such review to the great majority of federal employees is made clear from the history of the CSRA. Initially, review of adverse actions was extended only to preference eligibles.[8] *See United States v. Fausto*, 484 U.S. 439, 444 (1988). In 1978, Subchapter II of Chapter 75 of the CSRA was enacted to extend protections to employees in the competitive service in addition to preference eligibles, but generally not to employees in the excepted service. *See* Civil Service

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extends to a review of the merits of that withdrawal or revocation.").

[8] A "preference eligible" generally includes veterans discharged under honorable conditions, disabled veterans, and certain family members of deceased or disabled veterans. *See* 5 U.S.C. § 2108(3).

Reform Act of 1978, Pub. L. No. 95-454, § 204(a), 92 Stat. 1111. In *United States v. Fausto*, 484 U.S. at 444, 455, the Supreme Court held that the CSRA did not cover non-preference eligible excepted service employees and that such employees could also not seek review of an adverse action in a suit for back pay in what is now the United States Court of Federal Claims.

In 1990, in response to *Fausto*, Congress expanded the CSRA to apply to all federal government employees in the competitive and excepted services with narrow exceptions (discussed below). *See* Civil Service Due Process Amendments, Pub. L. No. 101-376, 104 Stat. 461 (1990). In expanding the CSRA's reach to include employees in the excepted service, Congress recognized that "no matter how an employee is initially hired, that employee acquires certain expectations about continued employment with the Government. . . . [Excepted service employees] should have the same right to be free from arbitrary removal as do competitive service employees." H.R. Rep. No. 101-328, at 4 (1989), *reprinted in* 1990 U.S.C.C.A.N. 695, 698.

Both Ms. Conyers and Mr. Northover held permanent positions in the competitive service and both had completed more than one year of "current continuous service under other than a temporary appointment." Thus, both fall squarely within the definition of "employee" under the statute. Ms. Conyers was indefinitely suspended and Mr. Northover was reduced in grade, both adverse actions which entitle them to seek Board review. Thus, the Board had jurisdiction over both Ms. Conyers's and Mr. Northover's appeals.

That Congress clearly intended that Board review extend to these employees is made apparent by Congress's decision to craft specific exceptions to Board jurisdiction where national security was a concern, and not to extend

such exceptions to the positions involved here. In expanding the CSRA's coverage to excepted service employees in 1990, Congress created exceptions for specified employees based on national security concerns. Congress excluded particular government agencies, such as the FBI and the National Security Agency ("NSA"), "because of their sensitive missions," and also recognized that other agencies, such as the CIA, had already been specifically excluded from the CSRA by separate statute. *Id.* at 5. In 1996, the exceptions were expanded to cover all "intelligence component[s] of the Department of Defense."[9] 5 U.S.C. § 7511(b).

Congress's decision to specifically exempt certain national security positions from the protections of the CSRA provides strong evidence that it intended that Board review extend to other positions classified as national security positions that were not exempted. As the Supreme Court noted in *United States v. Brockamp*, 519

[9] The 1990 amendment originally excluded *inter alia* "the National Security Agency [and] the Defense Intelligence Agency" from Chapter 75 of the CSRA. Pub. L. No. 101-376, § 2. However, in 1996, Congress eliminated this language and replaced it with "an intelligence component of the Department of Defense." Pub. L. No. 104-201, § 1634(b), 110 Stat. 2422 (1996). The current version of the statute contains this language. *See* 5 U.S.C. § 7511(b). An "intelligence component of the Department of Defense" includes the NSA, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, and "[a]ny other component of the Department of Defense that performs intelligence functions and is designated by the Secretary of Defense as an intelligence component of the Department of Defense." 10 U.S.C. § 1614(2). Neither the Defense Finance and Accounting Service (where Ms. Conyers was employed), nor the Defense Commissary Agency (where Mr. Northover was employed) is an "intelligence component of the Department of Defense."

U.S. 347, 352 (1997), an "explicit listing of exceptions . . . indicate[s] to us that Congress did not intend courts to read other unmentioned . . . exceptions into the statute that it wrote." *See also TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) ("Where Congress explicitly enumerates certain exceptions . . . additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980)). The governing principle is simple enough. Where Congress has crafted some exceptions for national security and not others, employees are entitled to Board review of the merits of adverse employment actions, regardless of the Department of Defense's or the majority's views that additional exceptions for national security positions would be desirable. Significantly too, in enacting 5 U.S.C. § 7532,[10] Congress provided an alternative mechanism to bypass the Board for national security purposes—an alternative not invoked here.

The majority contends that Congress's decision to exempt the FBI, CIA, and intelligence components of the Department of Defense based on national security concerns is "speculative because 'national security' was not a factor providing for these exclusions." Majority Op. at 12

[10] Under section 7532, "the head of an agency may suspend without pay an employee of his agency when he considers that action necessary in the interests of national security." 5 U.S.C. § 7532(a). "[T]he head of an agency may remove an employee [who has been] suspended . . . when, after such investigation and review as he considers necessary, he determines that removal is necessary or advisable in the interests of national security. The determination of the head of the agency is final." *Id.* § 7532(b). Although the agency may summarily remove an employee under section 7532, that section also provides for certain procedural protections to an employee before he or she can be removed. *See id.* § 7532(c).

n.8. The majority is clearly mistaken, as both the language and the legislative history of the exemptions created for these agencies demonstrate that these exemptions were specifically granted based on the potential impact that employees in these agencies could have on national security.

Adverse actions taken against CIA employees are governed by 50 U.S.C. § 403-4a, which was originally enacted pursuant to the National Security Act of 1947, Pub. L. No. 80-253, § 102(c), 61 Stat. 495, 498. In enacting the National Security Act of 1947, Congress acknowledged that one of the central purposes of the Act was to "establish[] a structure fully capable of safeguarding *our national security promptly and effectively*." S. Rep. No. 80-239, at 2 (1947) (emphasis added). To that end, Congress provided the Director of the CIA plenary authority to "terminate the employment of any officer or employee of the [CIA] whenever he shall deem such termination necessary or advisable in the interests of the United States." Pub. L. No. 80-253, § 102(c); *see also* 50 U.S.C. § 403-4a(e)(1).

In 1964, Congress crafted a similar exemption for employees of the NSA, modeling it after that created for the CIA in 1947. *See* Act of Mar. 26, 1964, Pub. L. No. 88-290, § 303(a), 78 Stat. 168, 169. In providing this exemption, Congress explicitly recognized that "[t]he responsibilities assigned to the [NSA] are so great, and the consequences of error so devastating, that authority to deviate from a proposed uniform loyalty program for Federal employees should be granted to this Agency." S. Rep. No. 88-926, at 2 (1964). Congress also noted that the exemption "recognizes the principle that the responsibility for control of those persons who are to have access to highly classified information should be accompanied by commensurate authority to terminate their employment when their

retention and *continued access to extremely sensitive information is not clearly consistent with the national security*." *Id.* (emphasis added).

When Congress expanded Chapter 75 to cover employees in the excepted service in 1990, it continued to exclude the FBI, CIA, and NSA, acknowledging that "[t]he National Security Act of 1946 [sic] provides the Director of the [CIA] with plenary authority to deal with personnel of the CIA," and explained that it had "preserved the status quo in relation to the FBI and NSA *because of their sensitive missions*." *See* H.R. Rep. No. 101-328, at 5 (emphasis added). In 1996, Congress passed the National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, 110 Stat. 2422 (1996), creating a new exemption for all "intelligence components of the Department of Defense," *id.* §§ 1632-33. This exemption is codified at 10 U.S.C. §§ 1609 and 1612, which explicitly provide the Secretary of Defense with authority to take adverse action against certain employees where "the procedures prescribed in other provisions of law [i.e. the provisions of Chapter 75] . . . cannot be invoked in a manner *consistent with the national security*." 10 U.S.C. § 1609(a)(2) (emphasis added); *see also id.* § 1612 ("Notwithstanding any provision of chapter 75 of title 5, an appeal of an adverse action by an individual employee . . . shall be determined within the Department of Defense."). Thus, that Congress intended to exclude these agencies from the protections of Chapter 75 for national security reasons is undeniable.

The majority also appears to argue that Congress's decision to craft other exemptions for employees of other government agencies is somehow inconsistent with the notion that Congress's exclusion of the FBI, CIA, and NSA was for national security reasons. However, Congress, in enacting the CSRA, excluded certain non-intelligence agencies, such as the General Accounting

Office, the Veterans Health Sciences and Research Administration, the Postal Service, the Postal Rate Commission, and the Tennessee Valley Authority because the employees of these agencies were already provided with appeal rights through alternative mechanisms. *See* H.R. Rep. No. 101-328, at 5.

Finally, if Congress's legislative creation of certain exemptions based upon national security concerns were not enough to refute the majority's construction, there has also been an express decision by Congress to deny the national security exemptions claimed here by the Department of Defense for its non-intelligence components. In 2003, Congress enacted legislation that allowed the Department of Defense to exclude employees holding national security positions from the review procedures provided by Chapter 75 of the CSRA. *See* National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1101, 117 Stat. 1392 (2003). This legislation provided that the Secretary may "establish . . . a human resources management system [the National Security Personnel System ("NSPS")] for *some or all* of the *organizational or functional units* of the Department of Defense." *Id.* § 1101(a) (codified at 5 U.S.C. § 9902(a)) (emphasis added). Among other things, the Secretary was permitted to promulgate regulations to "establish an appeals process that provides employees . . . fair treatment in any appeals that they bring in decisions relating to their employment." *Id.* (codified at 5 U.S.C. § 9902(h)(1)(A)). Following the Secretary's promulgation of such regulations, "[l]egal standards and precedents applied before the effective date of [the NSPS] by the [Board] and the courts under chapters 43, 75, and 77 of [the CSRA] shall apply to employees of organizational and functional units included in the [NSPS], *unless such standards and precedents are inconsistent with legal*

standards established [by the Secretary]." *Id.* (codified at 5 U.S.C. § 9902(h)(3)) (emphasis added). In other words, the Secretary's regulations could bar review by the Board.

Pursuant to the statutory authorization, the Secretary promulgated regulations that in fact limited the Board's authority. *See* Department of Defense Human Resources Management and Labor Relations Systems, 70 Fed. Reg. 66,116 (Nov. 1, 2005). Under the regulations, "[w]here it is determined that the initial [Board] decision has a direct and substantial adverse impact on the Department's national security mission, . . . a final [Department of Defense] decision will be issued modifying or reversing that initial [Board] decision." *Id.* at 66,210 (codified at 5 C.F.R. § 9901.807(g)(2)(ii)(B)). Thus, a Board decision reversing an agency's adverse action was subject to veto by the agency if it was determined to have "a direct and substantial adverse impact on the Department's national security mission"—a less draconian version of the agency authority asserted here. Also, under the regulations, if the Secretary determined "in his or her *sole, exclusive, and unreviewable discretion* [that an offense] has a direct and substantial adverse impact on the Department's national security mission," *id.* at 66,190 (codified at 5 C.F.R. § 9901.103) (emphasis added), the Board could not mitigate the penalty for such an offense, *id.* at 66,210 (codified at 5 C.F.R. § 9901.808(b)).

On January 28, 2008, Congress amended the NSPS statute to eliminate the Department of Defense's authority to create a separate appeals process and invalidate the existing regulations limiting Board authority established by the Secretary, *see* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1106(a), (b)(3), 122 Stat. 3, 349, 356-57, bringing the "NSPS under Governmentwide rules for disciplinary actions and employee appeals of adverse actions," National Security

Personnel System, 73 Fed. Reg. 56,344, 56,346 (Sept. 26, 2008).[11] The repeal of the Department of Defense's authority to create a separate appeals process (exempting employees from Board review) and the repeal of Secretary's regulations implementing this appeals process demonstrate conclusively that Congress intended to preclude the Department of Defense from insulating adverse employment decisions as to employees of non-intelligence components from Board review on the merits.

The majority's argument to the contrary is unconvincing. The majority is incorrect in suggesting that the repeal of these provisions was due to concerns about collective bargaining. *See* Majority Op. at 12 n.8. In fact, the provisions of the NSPS limiting collective bargaining were addressed in a 2008 amendment to a separate provision in response to litigation brought by labor organizations on behalf of Department of Defense employees.[12] *See Am. Fed'n of Gov't Emps., AFL-CIO v. Gates*, 486 F.3d 1316 (D.C. Cir. 2007). The 2008 amendment to the collective bargaining provisions had nothing to do with the repeal of the Chapter 75 exemption authority or the repeal of the regulations restricting adverse action appeal rights. As the Department of Defense itself noted, the restoration of adverse action appeal rights to its

[11] The remaining statutory provisions creating the NSPS were ultimately repealed on October 28, 2009. *See* National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 1113(b), 123 Stat. 2190, 2498 (2009); *see also* National Security Personnel System, 76 Fed. Reg. 81,359 (Dec. 28, 2011) (repealing regulations implementing the NSPS effective January 1, 2012).

[12] The provisions of the NSPS concerning collective bargaining were contained in subsection (m) of 5 U.S.C. § 9902, whereas the provisions relating to adverse action appeal rights were contained in subsection (h), and had nothing to do with collective bargaining.

employees was designed to "[b]ring[] NSPS under Governmentwide rules for disciplinary actions and employee appeals of adverse actions." National Security Personnel System, 73 Fed. Reg. at 56,346. The Department of Defense cannot now claim authority specifically denied by Congress.

III

The majority suggests that cases such as *Dames & Moore v. Regan*, 453 U.S. 654 (1981), and *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), recognizing the existence of Presidential authority to act even when Congress has not, support the agency action here. *See* Majority Op. at 13. There are three serious flaws with this argument. First, as the majority itself recognizes, the President cannot act contrary to congressional legislation except perhaps in the most unusual circumstances—which are not claimed to exist here.[13] As described immediately above, Congress has acted to provide for Board review.

Second, this case does not involve a Presidential action. *Dames* and *Youngstown* both involved agency action taken pursuant to an Executive Order of the President. *See Dames*, 453 U.S. at 662-63 (Executive Order authorized the Secretary of the Treasury to promulgate regulations to block the removal or transfer of all property held by the government of Iran); *Youngstown*, 343 U.S. at 582-83 (Executive Order directed the Secretary of Commerce to seize the nation's steel mills). The only Executive

[13] *See Youngstown*, 343 U.S. at 637 (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.").

Orders that are potentially relevant here are Executive Order No. 12,968, 60 Fed. Reg. 40,245, and Executive Order No. 10,450, 18 Fed. Reg. 2489. Neither grants the agency the authority it now seeks.

Executive Order No. 12,968, prior versions of which formed the basis for *Egan*, relates exclusively to "access to classified information." It delegates to the heads of executive agencies the responsibility to "establish[] and maintain[] an effective program to ensure that access to classified information by each employee is clearly consistent with the interests of the national security," and sets forth the conditions under which employees may be granted access to classified information. Exec. Order No. 12,968, § 1.2(b)-(e), 60 Fed. Reg. at 40,246-47. It provides that an agency's decision to revoke an employee's security clearance shall be "final." *Id.* § 5.2(b). Executive Order No. 12,968 has nothing to do with this case because the agency's adverse employment actions against Ms. Conyers and Mr. Northover were not based on denials of eligibility to access classified information, and neither position involved in this case required a security clearance or access to classified information.

Executive Order No. 10,450 provides that the heads of government agencies and departments "shall be responsible for establishing and maintaining within [their] department or agency an effective program to insure that the employment and retention in employment of any civilian officer or employee within the department or agency is clearly consistent with the interests of the national security." Exec. Order No. 10,450, § 2, 18 Fed. Reg. at 2489. The order also delegates to agencies the authority to determine investigative requirements for positions "according to the degree of adverse effect the occupant of the position . . . could bring about . . . on the national security." *Id.* § 3; *see also* 5 C.F.R. § 732.201

(setting forth the three levels of sensitivity). Nothing in the order in any way suggests that those falling into a sensitive category should be exempt from Board review. Rather, the order provides for the alternative removal mechanism provided in section 7532. Where an agency head determines that continued employment of an employee is not "clearly consistent with the interests of the national security," the agency head "shall immediately suspend the employment of the person involved if he deems such suspension necessary in the interests of the national security and, following such investigation and review as he deems necessary, the head of the department or agency concerned shall terminate the employment of such suspended officer or employee whenever he shall determine such termination necessary or advisable in the interests of the national security, in accordance with the said act of August 26, 1950."[14] *Id.* § 6. As the Supreme Court previously noted, "it is clear from the face of the Executive Order that *the President did not intend to override statutory limitations on the dismissal of employ-*

[14] The Act of Aug. 26, 1950, Pub. L. No. 81-733, 64 Stat. 476, was the predecessor to 5 U.S.C. § 7532. It provided:

> [N]otwithstanding . . . the provisions of any other law, [designated agency head] may, in his absolute discretion and when deemed necessary in the interest of national security, suspend, without pay, any civilian officer or employee of the [agency] . . . . The agency head concerned may, following such investigation and review as he deems necessary, terminate the employment of such suspended civilian officer or employee whenever he shall determine such termination necessary or advisable in the interest of the national security of the United States, and such determination by the agency head concerned shall be conclusive and final.

ees, and promulgated the Order solely as an implementation of the 1950 Act," i.e., what is now 5 U.S.C. § 7532. *Cole v. Young*, 351 U.S. 536, 557 n.20 (1956) (emphasis added). The "statutory limitations" in question in *Cole* required review of adverse employment actions with respect to those employees enjoying veterans' preference rights, and served as the predecessor of the current Chapter 75 which protects federal civil service employees generally. *See* Veterans' Preference Act of 1944, ch. 287, 58 Stat. 387, 390-91.[15] If Executive Order No. 10,450 did not override the earlier limited protections, it can hardly be read to override the later-enacted expanded protections in the current CSRA. Thus, neither Executive Order No. 12,968 nor Executive Order No. 10,450 authorizes agencies to insulate adverse employment actions from Board review where the employees occupy a national security position, outside the context of security clearance revocations or actions under section 7532—neither of which exists here.

Third, neither *Dames* nor *Youngstown* supports *agency* (as opposed to Presidential) action independent of congressional authorization. An agency cannot administratively create authority for agency action. "Agencies are created by and act pursuant to statutes." *Elgin v. Dep't of the Treasury*, 132 S. Ct. 2126, 2136 n.5 (2012). An agency may not act "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706. Agencies "act[] as a delegate to the legislative power," and

[15] Prior to enactment of the CSRA in 1978, "only veterans enjoyed a statutory right to appeal adverse personnel action to the Civil Service Commission (CSC), the predecessor of the MSPB." *Fausto*, 484 U.S. at 444; *see also* 5 U.S.C. § 7701 (1976) ("A preference eligible employee . . . is entitled to appeal to the Civil Service Commission from an adverse decision . . . of an administrative authority so acting.").

"[a]n agency may not finally decide the limits of its statutory power. That is a judicial function." *Social Sec. Bd. v. Nierotko*, 327 U.S. 358, 369 (1946). As the Supreme Court noted in *Ernst & Ernst v. Hochfelder*, even where an agency has been given the authority to fill gaps in the statute, "[t]he rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is the power to adopt regulations to carry into effect the will of Congress as expressed by the statute." 425 U.S. 185, 213-14 (1976) (internal quotation marks omitted); *see also Addison v. Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 616 (1944) ("The determination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested."). Where, as here, Congress has not authorized the agency to limit Board review of its decisions, and has indeed revoked such authorization, the agency acts in excess of its statutory authority.

IV

The majority contends that the Supreme Court's decision in *Department of the Navy v. Egan*, 484 U.S. 518, supports the exemption of all national security positions from Board jurisdiction over the merits of adverse actions. Majority Op. at 10-12. However, the Supreme Court itself made clear that *Egan*'s holding is limited to addressing the "*narrow* question" of "whether the [Board] has authority by statute to review the substance of an underlying decision to *deny or revoke a security clearance* in the course of reviewing an adverse action." *Egan*, 484 U.S. at 520 (emphasis added). Indeed, every other circuit that has considered *Egan* has uniformly interpreted it as

relating to security clearance determinations.[16] The *Egan* Court treated the revocation or denial of a security clearance as a failure to satisfy a job qualification where determinations as to underlying basis for the qualification—whether a security clearance should be granted—had been constitutionally committed to the discretion of another party—the President. *See id.* at 520 ("[A] condition precedent to Egan's retention of his employment was 'satisfactory completion of security and medical reports.'"); *id.* at 522 ("Without a security clearance, respondent was not eligible for the job for which he had been hired."); *see also id.* at 527 ("The authority to protect [classified] information falls on the President as head of the Executive Branch and as Commander in Chief.").

Where an employee fails to satisfy a qualification required for a position and the determination as to whether the employee is eligible for the qualification is committed to the discretion of a third party, it is unsurprising that the Board's inquiry is limited to whether the job was

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[16] *See, e.g.*, *Rattigan v. Holder*, No. 10-5014, 2012 WL 2764347, at *3 (D.C. Cir. July 10, 2012) ("*Egan*'s absolute bar on judicial review covers only security clearance-related decisions made by trained Security Division personnel . . . ."); *Zeinali v. Raytheon Co.*, 636 F.3d 544, 549-50 (9th Cir. 2011) ("The core holding[] of Egan . . . [is] that federal courts may not review the merits of the executive's decision to grant or deny a security clearance."); *Makky v. Chertoff*, 541 F.3d 205, 213 (3d Cir. 2008) ("[Courts] have jurisdiction to review [claims that] do[] not necessarily require consideration of the merits of a security clearance decision."); *Duane v. U.S. Dep't of Defense*, 275 F.3d 988, 993 (10th Cir. 2002) ("*Egan* held that the Navy's substantive decision to revoke or deny a security clearance-along with the factual findings made by the AJ in reaching that decision-was not subject to review on its merits by the Merit Systems Protection Board.").

conditioned on a particular qualification and whether the employee's qualifying status had been revoked. *See id.* at 530. In this vein, the Board has held that it lacks authority to evaluate the merits of a decision to revoke an attorney's bar license, or an employee's reserve membership, where such license or membership is required for a particular government position. *See, e.g.*, *Buriani v. Dep't of the Air Force*, 777 F.2d 674, 677 (Fed. Cir. 1985) (holding that the Board should not examine the merits of the Air Force's decision to remove an employee from reserve membership); *McGean v. NLRB*, 15 M.S.P.R. 49, 53 (1983) (holding that "the Board is without authority to review the merits" of a decision to suspend an attorney's membership in the Bar).[17]

Contrary to the majority, *Egan* turned solely on the President's constitutional "authority to classify and control *access to information* bearing on national security

[17] *See Williams v. U.S. Postal Serv.*, 35 M.S.P.R. 581, 589 (1987) ("[T]he Board's refusal to examine reasons for bar decertification where the employee is removed for failure to maintain bar membership is firmly grounded in its refusal to collaterally attack the decision of another tribunal, statutorily charged with the authority to render the decision under review. . . . The Board also affords discretion to the military on matters peculiarly within its expertise because '[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian' and it is not within the role of the judiciary to intervene in the orderly execution of military affairs." (quoting *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953))); *see also Christofili v. Dep't of the Army*, 81 M.S.P.R. 384, 392 (1999) ("It is well-settled that the regulation of the practice of law and the discipline of members of a state bar is exclusively a state court matter."); *Egan v. Dep't of the Navy*, 28 M.S.P.R. 509, 518 (1985) ("In all these contexts, the underlying actions, *i.e.*, termination of reserve status . . . and bar decertification, are committed to appropriate procedures within the respective entities . . . .").

and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person *access to such information*." 484 U.S. at 527 (emphasis added). Just as the authority to revoke an attorney's bar license or a military member's reserve status lies with an expert third party (the highest court of a state or the military), the authority to protect classified information "falls on the President as head of the Executive Branch and as Commander in Chief." *Id.* As the Supreme Court noted, Presidents have exercised such authority through a series of Executive Orders. *Id.* at 528 (citing Executive Orders); *see also* Exec. Order No. 12,968, 60 Fed. Reg. 40,245. As noted, those Executive Orders provide that the agency decision to revoke a security clearance shall be "final." As discussed above, no similar Executive Order purporting to make the agency decision "final" exists here. Contrary to the majority, *Egan* has been uniformly treated as limited only to limiting review of the underlying merits of the Executive Branch's decision to revoke or deny a security clearance, and has not been expanded to apply to all conduct that may have the potential to impact national security. *See, e.g.*, *Bennett*, 425 F.3d at 1002 ("[T]he two determinations [suitability for federal employment and eligibility for security clearance] are subject to different processes of review: whereas suitability determinations are subject to appeals to the Merit Systems Protection Board and subsequent judicial review, security clearance denials are subject to appeal within the agency." (internal citations omitted)).[18] *Egan* itself recognized that national security

[18] *See also, e.g.*, *Jacobs v. Dep't of the Army*, 62 M.S.P.R. 688, 695 (1994) ("The Supreme Court's decision in *Egan* was narrow in scope and specifically applied only to security clearance revocations."); *Cosby v. Fed. Aviation Admin.*, 30 M.S.P.R. 16, 18 (1986) ("*Egan* addresses only those adverse actions which are based substantially on an

employees can otherwise challenge adverse employment actions before the Board, such that Egan's "removal . . . presumably would be subject to Board review as provided in § 7513." 484 U.S. at 523 n.4. In this case, Ms. Conyers and Mr. Northover were not required to have a security clearance in order to hold their respective positions. Thus, *Egan* is inapplicable.

The majority's reliance on *Carlucci v. Doe*, 488 U.S. 93 (1988), is also misplaced. Unlike the employees here, the NSA employee in *Carlucci* had been specifically exempted from the provisions of the CSRA providing for Board review of adverse actions. *See id.* at 96; *see also* 10 U.S.C. § 1612(3) (providing that appeals of such adverse actions must take place exclusively within the Department of Defense pursuant to procedures prescribed by the Secretary).

* * *

In summary, Congress's decision is clear—with the exception of designated agencies such as the CIA, FBI, and intelligence components of the Department of Defense, employees may challenge the merits of adverse actions before the Board. At the same time Congress has provided a safety valve in section 7532, allowing the agencies to summarily remove employees "when, after such investigation and review as [the agency head] considers necessary, he determines that removal is necessary or advisable in the interests of national security." 5 U.S.C. § 7532(b). It is not the business of the Department of Defense, the Office of Personnel Management, or this court to second-guess the congressional decision to provide Board review. I respectfully dissent.

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agency's revocation or denial of an employee's security clearance.").

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 247

Docket Nos. CH-0752-09-0925-I-1
CH-0752-09-0925-I-2

Rhonda K. Conyers,

Appellant,

v.

Department of Defense,

Agency.

December 22, 2010

Andres M. Grajales, Esquire, Washington, D.C., for the appellant.

Cynthia C. Cummings, Esquire, Columbus, Ohio, and Frank M. Yount, Esquire, Indianapolis, Indiana, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member
Member Rose issues a dissenting opinion.

OPINION AND ORDER

¶1 This appeal is before the Board on interlocutory appeal from the administrative judge's February 17, 2010 order. The administrative judge stayed the proceedings and certified for Board review her ruling that she would not apply the limited scope of Board review set forth in *Department of the Navy v. Egan*, 484 U.S. 518, 530-31 (1988), in adjudicating the appellant's indefinite suspension. For the reasons discussed below, we AFFIRM the administrative judge's ruling AS MODIFIED by this Opinion and Order, VACATE the stay

order, and RETURN the appeal to the administrative judge for further adjudication consistent with this Opinion and Order.

BACKGROUND[1]

¶2 Effective September 11, 2009, the agency indefinitely suspended the appellant from the competitive service position of GS-525-05 Accounting Technician at the Defense Finance and Accounting Service (DFAS).[2] Initial Appeal File (IAF), Tab 5, Subtabs 4i, 4j. The agency took the action because the appellant had been "denied eligibility to occupy a sensitive position by [the agency's] Washington Headquarters Services (WHS) Consolidated Adjudications Facility (CAF), and we are awaiting a decision on your appeal of the CAF's denial from the Defense Office of Hearing and Appeals (DOHA) Administrative Judge."[3] *Id.*, Subtab 4i at 1. The agency stated that the appellant's position required her to have access to sensitive information, the WHS/CAF had denied her such access, and therefore she did not meet a qualification requirement of her position. *Id.* In its notice of proposed indefinite suspension, the agency stated that the reason for the proposal was the WHS/CAF's decision to deny the

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[1] In deciding this interlocutory appeal, we have relied on the current evidentiary record, the undisputed allegations of the parties, and the parties' stipulations. Because the record is not fully developed, the administrative judge should reopen the record when deciding the appeal. Except for the parties' stipulations, she may reexamine any factual matter mentioned in this Opinion and Order. *See, e.g., Olson v. Department of Veterans Affairs*, 92 M.S.P.R. 169, ¶ 2 n.1 (2002).

[2] The appellant was a permanent employee with a service computation date of September 3, 1985. Initial Appeal File, Tab 5, Subtab 4j.

[3] The record indicates that the DOHA administrative judge issued a recommendation in the appellant's favor, but that on September 15, 2009, the Clearance Appeal Board did not accept the recommendation and denied her appeal. IAF, Tab 10, Ex. A. The agency subsequently removed the appellant effective February 19, 2010. Petition For Review (PFR) File, Tab 25, Ex. 1. The Board denied the appellant's motion to incorporate her removal into this appeal. *Id.*, Tab 32.

appellant "eligibility for access to sensitive or classified information." IAF, Tab 5, Subtab 4g.

¶3 The appellant filed an appeal of her indefinite suspension. IAF, Tab 1. In responding to the appeal, the agency stated that the appellant's position had been designated non-critical sensitive (NCS) under the Department of Defense Personnel Security Program Regulation, that her position required her to access "sensitive or classified information," and that, under *Egan*, the Board cannot review the merits of the WHS/CAF's decision to deny her eligibility for access "to sensitive or classified information and/or occupancy of a sensitive position."[4] *Id.*, Tab 5, Subtab 1 at 1-2, 5-6.

¶4 On February 17, 2010, the administrative judge issued an Order Granting Motion for Certification of Interlocutory Appeal and Staying Proceeding. IAF 2, Tab 4 at 2. The administrative judge stated that she had "informed the parties that [she] would decide the case under the broader standard applied in *Adams* [*v. Department of the Army*, 105 M.S.P.R. 50 (2007), *aff'd*, 273 F. App'x 947 (Fed. Cir. 2008)] and other [5 U.S.C.] Chapter 75 cases which do not involve security clearances;" that the agency moved to certify this ruling for interlocutory appeal;[5] and that the regulatory requirements for certifying her ruling had been satisfied.

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[4] The administrative judge subsequently issued a January 13, 2010 initial decision dismissing the appeal without prejudice. IAF, Tab 13. The appellant filed a petition for review of the initial decision, PFR File, Tab 2, but the administrative judge docketed her January 13, 2010 initial decision as the appellant's refiled appeal, IAF 2, Tab 1, thereby mooting the petition for review.

[5] For the first time at oral argument, and then again in its closing brief, the agency asserts that it did not request an interlocutory appeal. Transcript (Tr.) at 23; PFR File, Tab 43 at 3. However, the February 17, 2010 Order expressly noted that the administrative judge was granting the *agency's motion* to certify the issue for interlocutory appeal. IAF 2, Tab 4 at 2. The agency did not dispute the administrative judge's characterization of the origin of this interlocutory appeal until over seven months later at oral argument in this matter. In any event, as we explain below, we find that the administrative judge properly certified her ruling for interlocutory appeal.

She therefore granted the agency's motion and stayed proceedings pending the Board's resolution of the certified ruling. *Id.* at 2.

¶5 The Board found that this interlocutory appeal presented the same legal issue as that presented by the interlocutory appeal in *Northover v. Department of Defense*, MSPB Docket No. AT-0752-10-0184-I-1. The Board determined that, before deciding these appeals, it was appropriate to permit the Office of Personnel Management (OPM) and interested amici to express their views on the issue. The Board therefore asked OPM to provide an advisory opinion interpreting its regulations in 5 C.F.R. Part 732, National Security Positions. PFR File, Tab 1. In doing so, the Board stated that the appellant occupied a position that the agency had designated NCS pursuant to 5 C.F.R. § 732.201(a), *id.* at 1, and that the appeal "raise[d] the question of whether, pursuant to 5 C.F.R., Part 732, National Security Positions, the rule in *Egan* also applies to an adverse action concerning a [NCS] position due to the employee having been denied continued eligibility for employment in a sensitive position," *id*. at 2. The Board also issued a notice of opportunity to file amicus briefs in these appeals. 75 Fed. Reg. 6728 (Feb. 10, 2010). OPM submitted an advisory opinion and a supplementary letter, five amici submitted briefs,[6] and the parties submitted additional argument. PFR File, Tabs 4-8, 10, 15-17.

¶6 On September 21, 2010, the Board held oral argument in *Conyers* and *Northover*.[7] The Board heard argument from the appellants' representative, the

[6] The five amici are the American Federation of Government Employees, which also represents the appellant; the National Treasury Employees Union; the National Employment Lawyers Association/Metropolitan Washington Employment Lawyers Association; the Equal Employment Opportunity Commission; and the Government Accountability Project. PFR File, Tabs 4-8.

[7] The agency submitted several motions to dismiss the appeal as moot, which were opposed by the appellant. The Board denied these motions on the basis that the agency failed to meet the criteria for finding the appeal moot. PFR File, Tabs 25, 31-32, 35-37. While continuing to so argue, *id*., Tab 43, Br. at 1 n.1, the agency has nevertheless failed to demonstrate that this appeal is moot for the reasons the Board explained in its

agency's representatives, and representatives for the amici from the Government Accountability Project and the National Treasury Employees Union.[8] The Board allowed the parties and amici to submit written closing arguments by October 5, 2010. Tr. at 79; PFR File, Tab 40. The parties, the National Treasury Employees Union, and the Government Accountability Project submitted closing arguments. PFR File, Tabs 41-43, 45-46. In addition, on October 5, 2010, the Office of the Director of National Intelligence (ODNI), Office of General Counsel requested an opportunity to file an "advisory opinion," *id.*, Tab 44, and the Board granted ODNI an opportunity to submit a statement presenting its position, *id.*, Tab 47. The Board also provided the parties and amici with an opportunity to reply to ODNI's filing. *Id.* ODNI filed a statement and the appellant filed a response to the statement. *Id.*, Tabs 48, 49. The record closed on October 25, 2010. *Id.*, Tab 47. The Board has considered the entire record in ruling on this interlocutory appeal.

ANALYSIS

The administrative judge properly certified her ruling for review on interlocutory appeal.

¶7 An interlocutory appeal is an appeal to the Board of a ruling made by an administrative judge during a proceeding. An administrative judge may certify an interlocutory appeal if she determines that the issue presented is of such importance to the proceeding that it requires the Board's immediate attention. Either party may make a motion for certification of an interlocutory appeal, or the administrative judge may certify an interlocutory appeal on her own motion. If

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previous orders. If necessary, the administrative judge should address the mootness issue on return of this appeal.

[8] OPM declined the Board's invitation to present oral argument. PFR File, Tab 27; Tr. at 4.

the appeal is certified, the Board will decide the issue and the administrative judge will act in accordance with the Board's decision. *See* 5 C.F.R. § 1201.91.

¶8 An administrative judge will certify a ruling for review if the record shows that the ruling involves an important question of law or policy about which there is substantial ground for difference of opinion; and an immediate ruling will materially advance the completion of the proceeding, or the denial of an immediate ruling will cause undue harm to a party or the public. *See* 5 C.F.R. § 1201.92. An administrative judge has the authority to stay the hearing while an interlocutory appeal is pending with the Board. 5 C.F.R. § 1201.93(c).

¶9 We find that the requirements for certifying a ruling on interlocutory appeal have been satisfied in this appeal. Previously, in *Crumpler v. Department of Defense*, 113 M.S.P.R. 94 (2009),[9] the Board recognized that the legal issue presented here would have potentially far-reaching implications across the federal civil service. *Id*., ¶ 6. Thus, the administrative judge's ruling involves an important question of law or policy. Moreover, we find that there is substantial ground for difference of opinion concerning the question of whether the limited scope of Board review set forth in *Egan* applies here and that an immediate ruling will materially advance the completion of the proceeding. Therefore, the administrative judge properly certified her ruling for review on interlocutory appeal. *See, e.g.*, *Fitzgerald v. Department of the Air Force*, 108 M.S.P.R. 620, ¶ 6 (2008).

This appeal does not warrant application of the limited Board review prescribed in *Egan*.

¶10 In creating the Merit Systems Protection Board, Congress expressly mandated that the Board adjudicate all matters within its jurisdiction. 5 U.S.C. § 1204. Congress further provided that an employee, as defined in 5 U.S.C.

[9] A settlement agreement was reached in *Crumpler* before the Board had the occasion to address the issue.

§ 7511, against whom certain adverse actions are taken, has the right to invoke the Board's jurisdiction under 5 U.S.C. § 7701. 5 U.S.C. § 7513(d). Such appealable adverse actions include suspensions for more than 14 days. 5 U.S.C. § 7512(2). Congress also clearly delineated the scope of our review in non-performance adverse action appeals by requiring that the Board determine whether the agency's decision is supported by preponderant evidence and promotes the efficiency of the service, and whether the agency-imposed penalty is reasonable. *See* 5 U.S.C. §§ 7513(a); 7701(b)(3) and (c)(1);[10] *Gregory v. Department of Education*, 16 M.S.P.R. 144, 146 (1983). More specifically, in appeals such as this, when the charge involves an agency's withdrawal of its certification or approval of an employee's fitness or other qualification for the position, the Board has consistently recognized that its adjudicatory authority extends to a review of the merits of that withdrawal. *See Adams*, 105 M.S.P.R. 50, ¶ 10.

¶11 The instant appeal falls squarely within our statutory jurisdiction. Specifically, at the time of the action giving rise to this matter, the appellant had been a permanent employee in the competitive service with a service computation date of September 3, 1985. IAF, Tab 5, Subtab 4j. She therefore comes within the definition of "employee" in 5 U.S.C. §§ 7511(a)(1)(A)(ii), which the agency does not dispute. On September 11, 2009, DFAS indefinitely suspended her from her position of GS-525-05 Accounting Technician. *Id.*, Subtabs 4i, 4j. That suspension extended beyond 14 days, and therefore, constitutes an appealable action under 5 U.S.C.§§ 7512(2); 7513(b).

¶12 The agency contends, however, that because this appeal involves the denial of eligibility to occupy an NCS position, it is subject only to the limited review

[10] The Board's review may also include assessing whether, when taking the adverse action, an agency has engaged in a prohibited personnel practice, such as, e.g., race discrimination, disability discrimination, or reprisal for protected whistleblowing. 5 U.S.C. §§ 7701(c)(2)(B), 2302(b).

prescribed by the Supreme Court in *Egan*. IAF, Tab 5, Subtab 1 at 1-2, 5-6; PFR File, Tab 17, Resp. at 4-12, 14-15. In *Egan*, the Court limited the scope of Board review in an appeal of an adverse action based on the revocation or denial of a "security clearance." There, the Court held that the Board lacks the authority to review the substance of the security clearance determination or to require the agency to support the revocation or denial of the security clearance by preponderant evidence, as it would be required to do in other adverse action appeals. Rather, the Court found that the Board has authority to review only whether the employee's position required a security clearance, whether the clearance was denied or revoked, whether the employee was provided with the procedural protections specified in 5 U.S.C. § 7513, and whether transfer to a nonsensitive position was feasible. 484 U.S. at 530-31; *see also Hesse v. Department of State*, 217 F.3d 1372, 1376 (Fed. Cir. 2000).

¶13 During the course of this interlocutory appeal, the parties stipulated[11] as follows concerning security clearances and access to classified information:

> The parties agree that the positions held by appellants Conyers and Northover did not require the incumbents to have a confidential, secret or top secret clearance. The parties also agree that the positions held by appellants Conyers and Northover did not require the incumbents to have access to classified information.

PFR File, Tab 24. In other words, the appellant is not required to have a security clearance and she is not required to have access to classified information. Therefore, we conclude that *Egan* does not limit the Board's statutory authority to review the appellant's indefinite suspension appeal. We further conclude that *Egan* limits the Board's review of an otherwise appealable adverse action only if that action is based upon a denial, revocation or suspension of a "security

[11] Parties may stipulate to any matter of fact, and the stipulation will satisfy a party's burden of proving the fact alleged. *See* 5 C.F.R. § 1201.63.

clearance," i.e., involves a denial of access to classified information or eligibility for such access, as we more fully explain below.

¶14 We therefore direct the administrative judge, on return of this appeal, to conduct a hearing consistent with the Board's statutory duty to determine whether the appellant's indefinite suspension is supported by a preponderance of the evidence, promotes the efficiency of the service and constitutes a reasonable penalty. *See* 5 U.S.C. §§ 7513(a); 7701(b)(3) and (c)(1). As contemplated by the Board's statutory mandate and our precedent, this adjudicatory authority extends to a review of the merits of the agency's denial of the appellant's eligibility to occupy a NCS position. *See Adams*, 105 M.S.P.R. 50, ¶ 10.

¶15 In *Egan*, the Court characterized its decision as addressing the "*narrow question* presented by this case [namely] whether the [Board] has authority by statute to review the substance of an underlying decision to deny or revoke a security clearance in the course of reviewing an adverse action." 484 U.S. at 520 (emphasis added). In holding that it did not, the Court relied primarily on the premise that the President, as Commander in Chief under the Constitution, had authority to classify and control access to information bearing on national security and that such authority exists apart from any explicit Congressional grant. It concluded therefore that "the grant of security clearance to a particular employee . . . is committed by law to the appropriate agency of the Executive Branch." *Id.* at 527. The Court thus found that "'an agency head who must bear the responsibility for the protection of classified information committed to his custody should have the final say in deciding whether to repose his trust in an employee who has access to such information.'" *Id.* (quoting *Cole v. Young*, 351 U.S. 536, 546 (1956)).

¶16 We believe that the *Egan* Court's limitation of the Board's statutory review authority must be viewed narrowly, most obviously because the Court itself so characterized its holding in that case. Moreover, the Court's rationale rested first and foremost on the President's constitutional authority to "classify and control

access to information bearing on national security" and does not, on its face, support the agency's effort here to expand the restriction on the Board's statutory review to any matter in which the government asserts a national security interest. *Egan*, 484 U.S. at 527-528. In fact, although Mr. Egan held a position that was designated as NCS, *Egan*, 484 U.S. at 521, the Court's limitation of Board review was based on the requirement that he hold a security clearance and on the government's need to protect the classified information to which he had access. *Id.* at 527-30. Nothing in *Egan* indicates that the Court considered the NCS designation alone as sufficient to preclude Board review of the merits of the determination underlying Mr. Egan's removal.[12]

¶17 Nor is there any basis upon which to assume that the Court in *Egan* used the term "security clearance" to mean anything other than eligibility for access to, or access to, classified information. In that regard, we note that the words "security clearance" historically have been used as a term of art referring to access to classified information, and they are not synonymous with eligibility to occupy a sensitive position. *See, e.g., Jones v. Department of the Navy*, 978 F.2d 1223, 1225 (Fed. Cir. 1992) (quoting *Hill v. Department of the Air Force*, 844 F.2d 1407, 1411 (10th Cir. 1988) and describing a "security clearance [as] merely temporary permission by the Executive for access to national secrets"). In addition, the agency in this appeal has conceded that "determinations whether to grant an individual a security clearance and whether an individual is eligible to

[12] In *Egan*, the Department of the Navy's designation of a position as "noncritical-sensitive" was defined by the applicable Chief of Naval Operations Instruction to include "[a]ccess to Secret or Confidential information." 484 U.S. at 521 n.1. By contrast, here, the agency's designation of the appellant's position as NCS pursuant to OPM regulations includes no such requirement for access to, or eligibility for access to, any classified information. Indeed, the parties stipulated that the appellant is not required to have a security clearance and she has no need for access to any classified information.

occupy a national security sensitive position are separate inquiries." PFR File, Tab 17, Agency Resp. at 5 n.5.

¶18 Executive Order No. 12,968 (Aug. 2, 1995) ("Access to Classified Information"), although failing to provide an explicit definition of "security clearance," pertinently provides that "[n]o employee shall be granted access to classified information unless that employee has been determined to be eligible in accordance with this order and to possess a need-to-know." *Id.*, Section 1.2 (a). Executive Order No. 12,968 further provides that employees shall not be granted access to classified information unless they have: (1) Been determined "eligible" for access by "agency heads or designated officials" under Section 3.1 "based on a favorable adjudication of an appropriate investigation of the employee's background;" (2) a demonstrated need-to-know; and (3) signed a nondisclosure agreement. *Id.*, Section 1.2(c)(1)-(3). The Department of Defense Personnel Security Program Regulation, consistent with the above, defines "security clearance" as "[a] determination that a person is eligible under the standards of [32 C.F.R. Part 154] for access to classified information." 32 C.F.R. § 154.3(t). We thus conclude that *Egan* limits the Board's statutory review of an appealable adverse action only when such review would require the Board to review the substance of the "sensitive and inherently discretionary judgment call . . . committed by law to the . . . Executive Branch" when an agency has made a determination regarding an employee's access to classified information, i.e., a decision to deny, revoke or suspend access, or eligibility for access to classified information. *Egan*, 484 U.S. at 527. Our use of the term "security clearance" in this Opinion and Order includes this specific understanding.[13]

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[13] Member Rose suggests in dissent that when the *Egan* Court used the term "security clearance," it did not use it as a term of art limited to the grant of access to, or eligibility for access to, classified information. Rather, she suggests that *Egan*, "when read as a whole," shows that the Court was more generally concerned with any "discretionary national security judgments committed to agency heads, regardless of whether the employee … needed access to classified information as part of his job." As

¶19 Furthermore, prior to the Board's now vacated decision in *Crumpler v. Department of Defense*, 112 M.S.P.R. 636 (2009), *vacated*, 113 M.S.P.R. 94 (2009), the Board had long considered *Egan*'s restriction on its statutory review as confined to adverse actions based on security clearance revocation and refused to extend the restriction to non-security clearance appeals where the actions arguably implicated national security. *See, e.g., Jacobs v. Department of the Army*, 62 M.S.P.R. 688 (1994); *Adams*, 105 M.S.P.R. 50. In *Jacobs*, the Board held that it had the authority to review a security guard's disqualification from the Chemical Personnel Reliability Program based on his alleged verbal assault of a security officer. 62 M.S.P.R. at 689-90, 694. The Board stated:

> The role of protecting that national chemical weapons program is, without doubt, a very important role. The importance of that role, however, should not divest civilian employees who work in that program of the basic employment protections guaranteed them under law. Neither should the 'military' nature of such employment, nor should the program's requirements for the ability to react to changing situations with dependability, emotional stability, proper social adjustment, sound judgment, and a positive attitude toward program objectives and duly constituted authority.

Id. at 694. The Board explicitly found as follows:

> The Supreme Court's decision in *Egan* was narrow in scope and specifically applied only to security clearance revocations. As the protector of the government's merit systems, the Board is not eager to expand the scope of the rationale in *Egan* to divest federal employees whose positions do not require a security clearance of basic protections against non-meritorious agency actions.

Id. at 695.

¶20 In *Jacobs*, the Board further addressed the agency's concern, expressed also in this appeal, PFR File, Tab 17, Resp. at 6-7, that as an outside non-expert

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we thoroughly explain in our opinion today, such an expansive reading of *Egan* ignores the facts and much of the analysis in *Egan*, numerous decisions of the Federal Circuit and Board interpreting *Egan* over the last 20 years, as well as the definition of security clearance found in the Department of Defense's own regulation.

body, the Board should not second-guess its attempts to predict the appellant's future behavior. The Board found that most of the removal actions taken by agencies are based at least in part on an attempt to predict an employee's future behavior. It noted that, in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981), the Board set forth a range of factors that an agency should consider in making a penalty determination, which included an estimate of the employee's rehabilitation potential. The Board found that the basis of progressive discipline is that an employee who has engaged in repeated misconduct will be likely to do so again in the future. *Jacob*s, 62 M.S.P.R. at 695. Thus, when an agency acts based on such predictive judgments in imposing a penalty, the Board is required by its statutory mandate to evaluate the propriety of those agency judgments.[14] *Douglas* and *Jacobs* are not isolated cases, as the Board's case law is replete with decisions in which the Board has reviewed an agency's predictions regarding an employee's future conduct and potential for rehabilitation. *See Jacob*s, 62 M.S.P.R. at 695.

¶21 Similarly, in *Adams*, the Board found that *Egan* did not preclude its review of the propriety of the agency's denial of access to sensitive personnel information in an appeal of a human resources assistant's removal for "failure to maintain access to the Command computer system." 105 M.S.P.R. 50, ¶¶ 6, 9-12. The Board acknowledged the agency's argument, similar to that made in this appeal, PFR File, Tab 17, Resp. at 7, that the suspension of computer access was not an appealable adverse action, that the federal government had not waived its sovereign immunity from challenges to such actions, and that the Board's authority to review those actions was barred under *Egan*. *See Adams*, 105 M.S.P.R. 50, ¶ 9. But the Board found no merit to those arguments. It noted that the agency did not deny that, in 5 U.S.C. § 7513, Congress has authorized the

[14] The record before us lacks evidence of any "delicate national security judgments that are beyond [the Board's] expertise" as suggested by the dissent.

Board to adjudicate removals. As previously noted, the Board found that adjudication of such an appeal requires the Board to determine whether the agency has proven the charge or charges on which the removal is based; and, when the charge consists of the employing agency's withdrawal or revocation of its certification or other approval of the employee's fitness or other qualifications to hold his position, the Board's authority generally extends to a review of the merits of that withdrawal or revocation. *Id.*, ¶ 10.

¶22 In *Adams*, the Board acknowledged "narrow exceptions" to the Board's authority to review the merits of agency determinations underlying adverse actions, and found that one such exception was addressed in *Egan*. It distinguished *Egan*, however, as follows:

> The present appeal does not involve the national security considerations presented in *Egan*. While the agency's computer system provides employees with access to sensitive information, the agency has acknowledged that the information is not classified and has indicated that it does not consider access to that information to be equivalent to possession of a security clearance. . . . The decision to suspend the appellant's computer access is similar instead to determinations the Board has found it has the authority to review.

Adams, 105 M.S.P.R.50, ¶ 12.[15]

¶23 In addition to our longstanding precedent, however, we are guided by the Supreme Court's opinion in *Cole v. Young*, 351 U.S. 536 (1956),[16] cited with

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[15] In addition to *Jacobs* and *Adams*, the Board has held that, despite *Egan*, it has the authority to review the decision of an agency credentials committee to revoke an employee's clinical privileges, when that revocation was the basis for the employee's removal, *Siegert v. Department of the Army*, 38 M.S.P.R. 684, 687-91 (1988); and to review the validity of a medical determination underlying the removal of an air traffic control specialist, *Cosby v. Federal Aviation Administration*, 30 M.S.P.R. 16, 18-19 (1986).

[16] Member Rose sees little value in the Supreme Court's *Cole* decision, in part because it was decided in 1956, "22 years before the Civil Service Reform Act." As we note in our decision, though, *Cole* specifically addressed the "Act of August 26, 1950," the predecessor to 5 U.S.C. § 7532. Further, Executive Order No. 10,450, significantly relied on by the dissent, was promulgated in 1953 to implement the 1950 Act. In

approval in *Egan*, 484 U.S. at 529, which provides persuasive and considerable support for viewing *Egan* as narrowly limited to appeals involving security clearances. There, the Court addressed whether the removal of a preference-eligible veteran employee of the Department of Health, Education, and Welfare was authorized under the Act of August 26, 1950 (the Act).[17] In ruling that

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addition, the relevant regulations issued by OPM, and relied on by Member Rose to find that the Board lacks authority to review the adverse action at issue, are based on Executive Order No. 10,450, and OPM has advised the Board that the regulations do not create or diminish any employee appeal rights.

[17] The Act was the precursor to 5 U.S.C. § 7532 and gave to the heads of certain government departments and agencies summary suspension and unreviewable dismissal powers over civilian employees when deemed necessary "in the interest of the national security of the United States." This express provision within the Civil Service Reform Act (CSRA) for accommodating national security concerns further undermines the agency's claim that the President's constitutional authority as Commander in Chief preempts our statutory review. The argument is tenuous, at best, insofar as it rests upon the misguided premise that the President alone possesses power in the area of national security. Instead, the Constitution gives Congress the power "to declare war" (Art. 1, sec. 8, cl. 11), "to raise and support Armies" (Art. 1, sec. 8, cl. 12), "to provide and maintain a Navy" (Art. 1, sec. 8, cl. 13) and "to make Rules for the Government and Regulation of the land and naval Forces" (Art. 1, sec. 8, cl. 14), and, thus, plainly establishes that Congress also has authority with regard to ensuring national security. *Cf. U.S. v. North*, 708 F. Supp. 380, 382 (D.D.C. 1988) (rejecting plaintiff's constitutional argument that "the asserted primacy of the White House in foreign affairs" precludes prosecution for false Congressional testimony, the court looked to various constitutional provisions in recognizing that "Congress surely has a role to play in aspects of foreign affairs….")

The CSRA is the comprehensive scheme created by Congress governing federal employment. *See U.S. v. Fausto*, 484 U.S. 439, 443 (1988). In 5 U.S.C. § 7532, Congress expressly delineated those areas where Board review is circumscribed due to national security concerns. There is no evidence that Congress intended that the President could unilaterally and broadly expand these exceptions so as to effectively eliminate Board and judicial review of the reasons underlying adverse actions taken against federal employees, such as the appellant, whose positions do not require access, or eligibility for access, to classified information. Absent any indication that Congress contemplated and ordained such a result, we believe that *Egan's* exception to the Board's statutory jurisdiction must be read narrowly.

Executive Order No. 10,450[18] did not trump the employee's statutory veterans' preference rights, the *Cole* Court interpreted "national security" as used in the Act.[19] *Cole*, 351 U.S. at 538. Significantly, in so doing, the *Cole* Court did not avoid review of the removal or identify any rule of limited review merely because the Executive Branch of the government alleged that matters of "national security" were at issue.[20] Moreover, although the Court determined that an employee may be dismissed using the summary procedures and unreviewable dismissal power authorized by the 1950 statute only if he occupied a "sensitive" position, the Court plainly equated having a "sensitive" position with having access to classified information. *Id.* at 551, 557 n.19. The *Cole* decision thus clearly supports the Board's determination that its statutory jurisdiction over an otherwise appealable action cannot be preempted by an agency's generalized claim of "national security."[21]

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[18] Executive Order No. 10,450 was promulgated in April 1953 to provide uniform standards and procedures for agency heads in exercising the suspension and dismissal powers under the 1950 Act. *Cole*, 351 U.S. at 551. It also extended the Act to other agencies. *See id.* at 542.

[19] The Supreme Court's *Cole* decision and its decision in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), plainly contradict the dissent's bold claim that an agency's decision "that retaining an employee would be inconsistent with the interests of national security has never been subject to third-party review before today." In both cases, the Court subjected agency claims regarding national security to judicial scrutiny. *See also* note 21 *supra*.

[20] The *Cole* Court notably stated that it would not lightly assume that Congress intended to take away the normal dismissal procedures of employees "in the absence of some overriding necessity, such as exists in the case of employees handling defense secrets." 351 U.S. at 546-47.

[21] Even in cases where the Executive Branch has sought to defend its action on the grounds of protecting classified information, the Court has not abstained from subjecting such assertions to searching judicial scrutiny. *See Von Raab*, 489 U.S. 656. There, employees challenged the Customs Service decision to subject whole categories of employees to random drug-testing on the basis of their presumed access to classified information. Deeming the record insufficient to determine whether the agency overreached, the Court remanded to the Fifth Circuit with instructions to "examine the

¶24 In this regard, we agree with the appellant that the potential impact of the agency's argument that *Egan* precludes the Board from reviewing the merits of an agency's adverse action, even when security clearances are not involved, is far-reaching. Accepting the agency's view could, without any Congressional mandate or imprimatur, preclude Board and judicial review of alleged unlawful discrimination, whistleblower retaliation, and a whole host of other constitutional and statutory violations for multitudes of federal employees subjected to otherwise appealable removals and other adverse actions. *See El-Ganayni v. Department of Energy*, 591 F.3d 176, 184-186 (3d Cir. 2010) (First Amendment claim and Fifth Amendment Equal Protection claim must be dismissed because legal framework would require consideration of the reasons a security clearance was revoked); *Bennett v. Chertoff*, 425 F.3d 999, 1003-04 (D.C. Cir. 2005) (adverse action based on denial or revocation of a security clearance not actionable under Title VII of the Civil Rights Act of 1964); *Hesse*, 217 F.3d at 1377 (*Egan* precludes Board review of Whistleblower Protection Act whistleblower claims in indefinite suspension appeal); *Ryan v. Reno*, 168 F.3d 520, 524 (D.C. Cir. 1999) (adverse action based on denial of a security clearance not actionable under Title VII of the Civil Rights Act of 1964); *Jones*, 978 F.2d at 1225-26 (no employee has a "property" or "liberty" interest in a security clearance or access to classified information and thus no basis for a constitutional right); *Pangarova v. Department of the Army*, 42 M.S.P.R. 319, 322-24 (1989) (*Egan* precludes the Board from reviewing discrimination or reprisal allegations intertwined with the agency's denial of a security clearance).

¶25 Therefore, we find that the Supreme Court's decision in *Egan* does not support the conclusion that the Board lacks the authority to review the

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criteria used by the [Customs] Service in determining what materials are classified and in deciding whom to test under this rubric." *Id.* at 678.

determination underlying the agency's indefinite suspension here.[22] The Board may exercise its full statutory review authority and review the agency's determination that the appellant is no longer eligible to hold a "sensitive" position, because this appeal does not involve a discretionary agency decision regarding a security clearance.[23]

The agency's decision to characterize the appellant's position as a national security position and to designate it NCS is insufficient to limit the Board's scope of review to that set forth in *Egan*.

¶26 In 5 C.F.R. Part 732, OPM set forth "certain requirements and procedures which each agency shall observe for determining national security positions pursuant to Executive Order No. 10450 – Security Requirements for Government Employment (April 27, 1953), 18 FR 2489, 3 CFR 1949-1953 Comp., p. 936, as amended." 5 C.F.R. § 732.101. OPM's regulations state that the term "national security position" includes:

> (1) Those positions that involve activities of the Government that are concerned with the protection of the nation from foreign aggression or espionage, including development of defense plans or policies, intelligence or counterintelligence activities, and related activities

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[22] We are not finding that the Board has the authority to determine whether the agency has properly designated the appellant's position as NCS. *See Skees v. Department of the Navy*, 864 F.2d 1576, 1578 (Fed. Cir. 1989) (Board lacks the authority to review an agency's determination that a position requires a security clearance); *Brady v. Department of the Navy*, 50 M.S.P.R. 133, 138 (1991) (Board lacks the authority to review an agency's determination to designate a position as NCS). We are simply finding that the agency's decision to designate a position as a "national security" position or as a "sensitive" one, standing alone, does not limit the Board's statutory review authority over an appealable adverse action. We note that the agency has not contested the appellant's assertion that DFAS has designated 100% of its positions as sensitive.

[23] We recognize that Congress has specifically excluded groups of employees from having Board appeal rights or from having protection against prohibited personnel practices, such as employees of the Central Intelligence Agency, the Federal Bureau of Investigation, and intelligence components of the Department of Defense. *See* 5 U.S.C. §§ 2303(a)(2)(C), 7511(b)(7), (8). Congress has not similarly excluded the agency in the current appeal.

> concerned with the preservation of the military strength of the United States; and
>
> (2) Positions that require regular use of, or access to, classified information.

5 C.F.R. § 732.102(a). The regulations further provide:

> For purposes of this part, the head of each agency shall designate, or cause to be designated, any position within the department or agency the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security as a sensitive position at one of three sensitivity levels: Special-Sensitive, Critical-Sensitive, or Noncritical-Sensitive.

5 C.F.R. § 732.201(a). The agency argues that, although the appellant's position did not require a security clearance, the Board is nevertheless precluded under *Egan* from reviewing whether she was improperly suspended based upon the agency's determination that she was ineligible to occupy a national security position. PFR File, Tab 43, Br. at 7. We disagree.

¶27 OPM's interpretation of its own regulations at 5 C.F.R. Part 732 supports the conclusion that our review of an adverse action is not limited by *Egan* solely based on the agency's designation of the position as a national security position or as "sensitive." In that regard, OPM has not interpreted its regulations to preclude the usual scope of Board review for adverse actions taken against employees based on ineligibility to occupy NCS positions. Rather, OPM concluded that the Board cannot determine the scope of its review by referring to 5 C.F.R. Part 732. PFR File, Tab 10, Advisory Op. at 3. OPM stated:

> OPM's regulations in 5 C.F.R. Part 732 are silent on the scope of an employee's rights to Board review when an agency deems the employee ineligible to occupy a sensitive position. The regulations do not independently confer any appeal right or affect any appeal right under law.

Id. at 2. It similarly stated concerning its regulations:

> [T]hey do not address the scope of the Board's review when an agency takes an adverse action against an employee under 5 U.S.C. § 7513(a) following an unfavorable security determination. Likewise, OPM's adverse action regulations in 5 C.F.R. Part 752 do

> not address any specific appellate procedure to be followed when an adverse action follows an agency's determination that an employee is ineligible to occupy a sensitive position.

Id. at 3. Thus, OPM has not interpreted its own regulations as precluding the Board's usual scope of review in these appeals.

¶28 In its October 18, 2010 statement, ODNI refers to Executive Order No. 13,467 (June 30, 2008), in arguing that the limited scope of Board review set forth in *Egan* should apply in this appeal. PFR File, Tab 48, Statement at 1. ODNI notes that Executive Order No. 13,467, which is entitled "Reforming Processes Related to Suitability for Government Employment, Fitness for Contractor Employees, and Eligibility for Access to Classified National Security Information," designated the Director of National Intelligence (DNI) as the Security Executive Agent (SEA) for the federal government. *Id.* at 1. It further notes that, in setting forth the SEA's responsibilities relating to overseeing investigations, developing policies and procedures, issuing guidelines and instructions, serving as a final authority, and ensuring reciprocal recognition among agencies, the Executive Order consistently referred to that authority as relating to both determinations of eligibility for access to classified information or eligibility to hold a sensitive position. *Id.* at 1-2. It thus argues that the President has given the DNI "oversight authority over eligibility determinations, whether they entail access to classified information or eligibility to occupy a sensitive position, regardless of sensitivity level." *Id.* at 2.

¶29 ODNI appears to be arguing, as does the agency, that because executive orders refer to both eligibility for access to classified information and eligibility to occupy a sensitive position -- or because the agency decided to adjudicate determinations involving access to classified information and eligibility to occupy a sensitive position through the same WHS/CAF process -- the same Board review authority must necessarily apply. Neither ODNI nor the agency has

shown that such a circular argument provides a basis for limiting the statutory scope of our review in adverse action appeals.

¶30 For the first time at oral argument and in its closing brief, the agency apparently argues that, following *Egan*, Congress has imposed another limitation on the Board's review authority by enacting 10 U.S.C. § 1564(e). Tr. at 31-32; PFR File, Tab 43, Br. at 5. Section (e) provides as follows:

> Sensitive Duties. - For the purpose of this section, it is not necessary for the performance of duties to involve classified activities or classified matters in order for the duties to be considered sensitive and critical to national security.

¶31 We find that the agency has failed to show that 10 U.S.C. § 1564 imposes an additional Congressional limitation on the Board's review authority. Section 1564 is entitled "Security clearance investigations." Subsection (a) sets outs the reason for the section as follows:

> Expedited Process. - The Secretary of Defense shall prescribe a process for expediting the completion of the background investigations necessary for granting security clearances for Department of Defense personnel and Department of Defense contractor personnel who are engaged in sensitive duties that are critical to the national security.

Thus, the statutory section as a whole reveals that it is concerned with the process for granting security clearances, which are not at issue in this appeal.[24] In any event, the statute does not limit the Board's authority to adjudicate adverse action appeals.

¶32 We therefore find that the Board has the authority to review the merits of the agency's decision to find the appellant ineligible to occupy an NCS position,

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[24] In that regard, we note that the statute does not explicitly define "security clearances" as anything other than eligibility for access to, or access to, classified information. We reject the agency's attempt to equate "security clearances" with its decisions to designate positions as "sensitive" or to find that employees are no longer eligible for such sensitive positions. Absent a requirement that an employee have access to classified information, or be eligible for such access, *Egan* does not limit the Board's review of an appealable adverse action taken against a covered employee.

and that the Board's authority to exercise its statutory review of the appellant's indefinite suspension is not limited by *Egan*. Applying the full scope of Board review in appeals such as this will not prevent agencies from taking conduct-based adverse actions or suitability actions in appropriate cases. Likewise, agencies may respond to urgent national security issues, even for employees who do not have eligibility for access to, or access to, classified information, by exercising their statutory authority to impose indefinite suspensions and removals through the national security provisions in 5 U.S.C. § 7532. *See, e.g., King v. Alston*, 75 F.3d 657, 659 n.2 (Fed. Cir. 1996). Here, however, the agency did not choose to act under 5 U.S.C. § 7532, an option the dissent fails to mention. If the agency believed that a Board appeal would involve delicate national security matters beyond the Board's expertise, or that a Board order might create a conflict with its national security obligations pursuant to Executive Order No. 10,450, it could have exercised its authority pursuant to 5 U.S.C. § 7532. *See id*.

¶33 The agency argues that a Board decision to reverse its action would place it in an impossible position because it must either violate an agency head's decision and allow an employee "who presents a national security risk" to occupy a sensitive position or violate the Board's order. PFR File, Tab 17, Resp. at 8-9. We note, however, that the agency's own actions belie its concern. Although on June 27, 2007, the WHS/CAF issued the appellant its tentative decision to deny her eligibility to occupy her NCS position, the agency did not issue its decision to actually suspend her from the position until September 3, 2009. IAF, Tab 5, Subtabs 4b, 4i. Thus, the agency kept the appellant in her NCS position for over two years after making a tentative determination to deny her eligibility. Although the appellant was admittedly proceeding through the agency's internal review process during part of this time, the record does not indicate that the agency took any action between the appellant's September 22, 2007 response to its tentative determination to deny her eligibility and its February 18, 2009 decision to deny her eligibility, i.e., for over one year. *Id.*, Subtabs 4d, 4e. Therefore, the

agency's own actions do not support its fear of being put in an impossible position by the possibility that the Board might disagree with its decision and order reinstatement.

The interlocutory appeal must be returned for further proceedings.

¶34 Because *Egan*'s limited scope of Board review does not apply in this appeal, Board review of the challenged indefinite suspension includes consideration of the underlying merits of the agency's reasons to deny the appellant eligibility to occupy an NCS position. The administrative judge should thus adjudicate this appeal under the generally applicable standards the Board applies in adverse action appeals, including the legal principles governing off-duty or on-duty conduct as applicable.

ORDER

¶35 Accordingly, we vacate the stay order issued in this proceeding and return the appeal to the administrative judge for further processing and adjudication consistent with this Opinion and Order.

FOR THE BOARD:

_____

William D. Spencer
Clerk of the Board
Washington, D.C.

DISSENTING OPINION OF MARY M. ROSE

in

Rhonda K. Conyers v. Department of Defense

MSPB Docket Nos. CH-0752-09-0925-I-1 & CH-0752-09-0925-I-2

¶1 As explained below, I would hold that the Board cannot review the reasons underlying the agency's determination that the appellant is no longer eligible to occupy a sensitive position. When Congress created the Merit Systems Protection Board, it did not mean to limit (assuming it could have) the longstanding discretion vested in the President and agency heads over national security matters. The substance of an agency's decision that retaining an employee would be inconsistent with the interests of national security has never been subject to third-party review before today, and I would hold that it is not subject to such review.

BACKGROUND

¶2 The appellant was a GS-525-05 Accounting Technician with the Defense Finance & Accounting Service. By authority of Executive Order No. 10,450 and 5 C.F.R. Part 732, the agency designated the appellant's position as "non-critical sensitive," based on its judgment that the incumbent "could bring about, by virtue of the nature of the position, a material adverse effect on the national security." Initial Appeal File (IAF), Tab 5, Subtab 4A; *see* 5 C.F.R. § 732.201(a). Effective September 11, 2009, the agency suspended the appellant indefinitely because the agency's Washington Headquarters Services (WHS) Consolidated Adjudications Facility (CAF) had denied her continued "eligibility to occupy a sensitive position." Specifically, the agency stated that the appellant's position required her to have access to sensitive information, that the WHS/CAF had denied her such access, and that as a result she did not meet a qualification requirement of

her position. The suspension was imposed pending her appeal to the Defense Office of Hearings and Appeals. IAF, Tab 5, Subtabs 4G, 4I.

¶3 The appellant filed this appeal. IAF, Tab 1. In response, the agency argued that the Board lacks authority to review the reasons underlying its determination that the appellant is no longer eligible to occupy a sensitive position or have access to sensitive information. IAF, Tab 5, Subtab 1 at 1-2, 5-6. The administrative judge dismissed the appeal without prejudice pending the outcome of related litigation at Board headquarters, IAF, Tab 13, and the appeal was later refiled, IAF (I-2), Tab 1. Subsequently, the administrative judge ruled that the Board is not restricted in its authority to review the reasons underlying the agency's determination to disqualify the appellant from a sensitive position. The administrative judge certified her ruling for interlocutory review by the full Board. IAF (I-2), Tab 4. In the ensuing proceeding at headquarters, the parties and amici filed numerous briefs, and the Board held oral argument on the legal issues presented.

DISCUSSION

¶4 Executive Order No. 10,450, 18 Fed. Reg. 2489 (1953), provides in relevant part as follows:

> NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States . . ., and as President of the United States, and deeming such action necessary in the best interests of the national security, it is hereby ordered as follows:
>
> * * *
>
> Sec. 2. The head of each department and agency of the Government shall be responsible for establishing and maintaining within his department or agency an effective program to insure that the employment and retention in employment of any civilian officer or employee within the department or agency is clearly consistent with the interests of the national security.
>
> Sec. 3. (a) The appointment of each civilian officer or employee in any department or agency of the Government shall be made subject to investigation. The scope of the investigation shall be determined

> in the first instance according to the degree of adverse effect the occupant of the position sought to be filled could bring about, by virtue of the nature of the position, on the national security . . . .
>
> (b) The head of any department or agency shall designate, or cause to be designated, any position within his department or agency the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security as a sensitive position. Any position so designated shall be filled or occupied only by a person with respect to whom a full field investigation has been conducted.

¶5 Based on Executive Order No. 10,450, 5 U.S.C. § 3301, and other authorities, the Office of Personnel Management (OPM) has issued regulations at 5 C.F.R. Part 732 governing "National Security Positions." The regulations provide, at 5 C.F.R. § 732.101, as follows:

> This part sets forth certain requirements and procedures which each agency shall observe for determining national security positions pursuant to Executive Order 10450 . . . .

The regulations further provide, at 5 C.F.R. § 732.102:

> (a) For purposes of this part, the term "national security position" includes:
>
> (1) Those positions that involve activities of the Government that are concerned with the protection of the nation from foreign aggression or espionage, including development of defense plans or policies, intelligence or counterintelligence activities, and related activities concerned with the preservation of the military strength of the United States; and
>
> (2) Positions that require regular use of, or access to, classified information. Procedures and guidance provided in OPM issuances apply.

Additionally, the regulations provide at 5 C.F.R. § 732.201:

> (a) For purposes of this part, the head of each agency shall designate, or cause to be designated, any position within the department or agency the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security as a sensitive position at one of three sensitivity levels: Special-Sensitive, Critical-Sensitive, or Noncritical-Sensitive.

¶6 The majority holds that although the Board lacks authority to review the reasons underlying an agency's decision to deny an employee access to classified information, the Board is authorized to review the reasons underlying an agency's determination that an employee is no longer eligible to occupy a sensitive position where classified information is not involved. I disagree.

I. Supreme Court precedent precludes the Board from reviewing the reasons underlying an agency's determination that an employee is no longer eligible to occupy a sensitive position.

¶7 In *Department of the Navy v. Egan*, 484 U.S. 518, 520-21 (1988), the Supreme Court considered the appeal of an individual appointed to a non-critical sensitive position on a military base, with his duties limited pending "satisfactory completion of security and medical reports." The agency discovered unfavorable information about Mr. Egan during its background investigation that it believed made him a security risk, and notified him of his right to respond. In the meantime, however, Mr. Egan completed his probationary period, thereby gaining appeal rights under 5 U.S.C. §§ 7511-7513. *Id*. at 521-22. Ultimately the agency found Mr. Egan ineligible for his position and removed him. *Id*. at 522. On appeal, the Board held that it lacks authority to review the reasons underlying an agency's determination that an individual poses an unacceptable threat to national security if allowed to remain in his position. *Id*. at 524; *see Egan v. Department of the Navy*, 28 M.S.P.R. 509 (1985).

¶8 In a later phase of the appeal, the Supreme Court agreed with the Board. The Court framed the issue before it to be whether the Board "has authority by statute to review the substance of an underlying decision to deny or revoke a security clearance in the course of reviewing an adverse action." 484 U.S. at 520. I do not agree with the majority that the Court was using the term "security clearance" as a term of art to mean a grant of access to classified information or eligibility for such access. The *Egan* decision, when read as a whole, makes clear that the Court was concerned with the Board intruding on discretionary national

security judgments committed to agency heads, regardless of whether the employee affected needed access to classified information as part of his job. One clear indication of the meaning of *Egan* is the Court's statement that once Mr. Egan was denied a "security clearance," his only possibility for continued employment was in a "nonsensitive position." *Id*. at 522. In other words, the Court considered a "security clearance" to be a requirement for any sensitive position.

¶9 In fact, the centerpiece of *Egan*'s discussion of the limits on Board review, Executive Order No. 10,450, makes no mention of classified information whatsoever. The Court discussed the requirements of Executive Order No. 10,450 in depth while using the terms "security clearance" and "clearance" in reference to "national security" positions generally, and did not confine its discussion to positions involving access to classified information. *Id*. at 528-29, 531. "National security position" refers not just to positions that require access to classified information, 5 C.F.R. § 732.102(a)(2), but also to positions not requiring such access but that "involve activities of the Government that are concerned with the protection of the nation from foreign aggression or espionage, including development of defense plans or policies, intelligence or counterintelligence activities, and related activities concerned with the preservation of the military strength of the United States," 5 C.F.R. § 732.102(a)(1). Accordingly, I interpret *Egan* as holding that the Board lacks authority to review the reasons underlying an agency's determination that an employee is not eligible for a sensitive position, *i.e.*, a "national security position" within the meaning of Executive Order No. 10,450 and 5 C.F.R. Part 732, regardless of whether the employee worked with classified information. 484 U.S. at 529-30. As the Court explained, national security matters are traditionally the province of the President and, by delegation, the heads of the relevant agencies. *Id*. at 530. A non-expert outside body such as the Board is poorly-suited to making the necessary "predictive judgments" about the risk that

an individual poses to national security. *Id*. at 529. Congress simply did not intend to "involve the Board in second-guessing [an] agency's national security determinations." *Id*. at 531-32.[1]

¶10 The case of *Cole v. Young*, 351 U.S. 536 (1956), discussed by the majority, does not alter my conclusion. *Cole* was decided 22 years before the passage of the Civil Service Reform Act, which created the Board and contained the version of 5 U.S.C. § 7513 addressed in *Egan*. As a consequence, *Cole* does not provide guidance on the scope of the Board's review authority under section 7513. Moreover, *Cole* is distinguishable. In *Cole*, the Court held that an agency could not invoke a 1950 law authorizing summary removal of an employee who posed a threat to "national security" unless it had first made the "subsidiary determination" that the employee's position actually implicated "national security." 351 U.S. at 556. The Court found that Mr. Cole's termination was not authorized by the 1950 law because his employing agency had never made the requisite "subsidiary determination." *Id*. at 557. By contrast, in the present appeal, it is undisputed that the agency has formally determined, in accordance with Executive Order No. 10,450 and 5 C.F.R. Part 732, that the appellant's Accounting Technician position is a "national security" position. IAF, Tab 5, Subtab 4A.

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[1] Title 10 U.S.C. § 1564, "Security Clearance Investigations," provides further support for my view that the term "security clearance" does not have the fixed, limited meaning ascribed to it by the majority. Subsection (a), "Expedited Process," charges the Secretary of Defense with improving the timeliness of completion of "background investigations necessary for granting security clearances." Subsection (e), "Sensitive Duties," provides that "[f]or the purpose of this section, it is not necessary for the performance of duties to involve classified activities or classified matters in order for the duties to be considered sensitive and critical to the national security." I therefore disagree with footnote 20 of the majority opinion, which states that under section 1564 the term "security clearance" relates only to employees who need access to classified information as part of their jobs.

¶11 Additional cases cited by the majority also do not provide guidance on the issue at hand. In *Adams v. Department of the Army*, 105 M.S.P.R. 50 (2007), *aff'd*, 273 F. App'x 947 (Fed. Cir. 2008), the Board held that it had authority to review the reasons underlying the agency's decision to suspend the appellant's access to certain computer systems that he needed to use as part of his job. In *Jacobs v. Department of the Army*, 62 M.S.P.R. 688 (1994), the Board held that it had authority to review a security guard's disqualification from the Army's Chemical Personnel Reliability Program based on his alleged misconduct. In *Siegert v. Department of the Army*, 38 M.S.P.R. 684, 687-91 (1988), the Board held that it had authority to review the agency's reasons for revoking a Clinical Psychologist's privileges, and in *Cosby v. Federal Aviation Administration*, 30 M.S.P.R. 16, 18-19 (1986), the Board held that it had authority to review the agency's determination that an Air Traffic Controller was medically disqualified from his position. *Adams*, *Jacobs*, *Siegert*, and *Cosby* stand for the proposition that agencies cannot evade Board review of the reasons for an adverse action merely by creating their own credentialing or fitness standards and then finding those standards unmet. *Adams*, *Jacobs*, *Siegert*, and *Cosby* do not discuss or even cite Executive Order No. 10,450 or 5 C.F.R. Part 732; as a result, they do not support a finding that the Board has authority to review an agency's national security judgments made under delegation from the President.

¶12 Finally, in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), the Court ruled that the Customs Service could institute a drug testing program for employees involved in drug interdiction and who carried firearms, notwithstanding the employees' objection that such testing violated their constitutional right to be free from unreasonable searches; the Court remanded the cases for findings on the validity of the drug testing program as it related to employees who handled classified material. *Van Raab* said nothing about Executive Order No. 10,450 or Board review of adverse actions.

II. Alternatively, even if Supreme Court precedent does not directly address the issue, the Board cannot review an agency's determination that an employee is no longer eligible to occupy a sensitive position because doing so would involve the Board in sensitive national security judgments that are beyond its expertise and that it is not authorized to make.

¶13 The majority reads *Egan* as leaving open the question of the scope of Board review in adverse action appeals involving employees who occupied sensitive positions but did not need access to classified information as part of their jobs. I do not read *Egan* this narrowly. If I did, however, I nevertheless would hold that the Board cannot review the reasons underlying an agency's decision that an employee is no longer eligible for a sensitive position, even when the employee did not work with classified information, because doing so would involve the Board in delicate national security judgments that are beyond its expertise and that it is not authorized to make.

¶14 Regardless of whether an employee in a sensitive position handles classified information, for the Board to review the reasons underlying the agency's decision that an individual's continued employment poses a threat to national security requires the Board to make the "predictive judgments" that the Court said in *Egan* the Board is ill-equipped to make. 484 U.S. at 529. The majority likens these "predictive judgments" to matters that the Board routinely considers under *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981). It is true that when reviewing an agency-imposed penalty for misconduct the Board may consider an employee's rehabilitation potential, *id.* at 305, which is akin to predicting future behavior. Nevertheless, any such prediction within the *Douglas* framework is fundamentally different from determining "what constitutes an acceptable margin of error in assessing the potential risk" that an employee poses to national security. *Egan*, 484 U.S. at 529. The latter judgment is an inherently military one where, as in this appeal, the employee worked for a component of the Department of Defense. In *Egan*, the Court explicitly found that the Board is not an expert in the methods for protecting classified information in the military's

custody, 484 U.S. at 529, and nothing in the structure or staffing of the Board makes it sufficiently expert in military affairs to review other military judgments not involving classified information. As agency counsel observed at oral argument, although an employee with access to classified information might pose a more obvious threat to national security than an employee in a sensitive position who does not work with classified information, the difference between the two employees is one of degree, not kind.

¶15 Apart from the Board's lack of expertise in national security matters, the Board is not authorized to decide whether an employee is eligible for retention in a sensitive position. When the Board reviews an adverse action, the standard the Board applies is whether the action "promote[s] the efficiency of the service." 5 U.S.C. § 7513(a). When an agency determines whether an individual may continue to occupy a sensitive position, the standard the agency applies is whether "retention in employment" is "clearly consistent with the interests of national security." Executive Order No. 10,450, § 2. The Board does not apply the latter standard in adverse action appeals, nor is it permitted to do so under statute, Executive Order No. 10,450, or any other authority. Therefore, the distinction between an agency's determination to deny an employee access to classified information, which the majority says the Board cannot review, and an agency's determination to deny continued employment in a sensitive position where classified information is not involved, which the majority says the Board may review, is an artificial one.

¶16 It bears emphasizing that Executive Order No. 10,450 was issued 25 years before Congress created the Board in the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111. As stated in the Preamble to Executive Order No. 10,450, the position sensitivity system is based on the President's authority under the Constitution and related statutes which, as *Egan* explains, make the President the head of the Executive branch and the steward of national security. The President has delegated certain national security and management functions

to agency heads in Executive Order No. 10,450. Assuming that Congress has the power to limit the authority of the President and agency heads over national security matters,[2] it did not do so when it authorized the Board to adjudicate adverse action appeals. If in 1978 Congress meant to alter longstanding arrangements and delegations by giving the Board the power to overrule an agency head's judgment about the threat a particular employee poses to national security, one would expect a clear indication of such an intention. I find no such indication. In fact, given that Congress instructed the Board to review adverse actions under the "efficiency of the service" standard and not any standard related to national security, *see* 5 U.S.C. § 7513(a), it is reasonable to infer that Congress did not intend to allow the Board to review an agency head's judgment on national security matters.

III. The Board should not review the reasons underlying an agency's determination that an employee is ineligible to occupy a sensitive position because doing so creates the possibility of an irreconcilable conflict between a Board order and an agency head's authority under Executive Order No. 10,450.

¶17 In addition to the explanation above, there is a separate reason why the Board should not review the reasons underlying an agency's determination that an employee is no longer eligible for a sensitive position. Executive Order No. 10,450, § 7, provides that --

> Any person whose employment is suspended or terminated under the authority granted to heads of departments and agencies by or in

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[2] The majority observes that under the Constitution, Congress has the power "to declare war," "to raise and support Armies," "to provide and maintain a Navy," and "to make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. Art. I, § 8, cl. 11-14. It does not appear that these broad powers pertain to the classic Executive functions of managing the civilian workforce at military installations and providing for the security of such installations. In any event, despite my doubts, I assume for purposes of this dissent that Congress could create an agency in the Executive branch to review an agency head's determination that retaining a particular employee in a sensitive position would pose a risk to national security. I simply would find that Congress did not intend to do so.

> accordance with the said act of August 26, 1950, or pursuant to the said Executive Order No. 9835 or any other security or loyalty program relating to officers or employees of the Government, shall not be reinstated or restored to duty or reemployed in the same department or agency and shall not be reemployed in any other department or agency, unless the head of the department or agency concerned finds that such reinstatement, restoration, or reemployment is clearly consistent with the interests of the national security[.]

This restriction on reinstatement also appears in Department of Defense regulations. *See* 32 C.F.R. § 154.57(a).

¶18 If the Board reviewed the reasons underlying an agency's determination that an employee is no longer eligible for a sensitive position, and if it found those reasons unproven, ostensibly it would order cancellation of the employee's removal. As explained in Part II above, however, the Board's decision would be based on application of the "efficiency of the service" standard and not on the relevant "interests of national security" standard under Executive Order No. 10,450. Thus, even after the Board's decision, there would remain the undisturbed judgment of the agency that the individual's continued employment would not be consistent with the interests of national security. Under such circumstances, the agency head would be derelict in his responsibility under Executive Order No. 10,450 if he allowed the individual's reinstatement, yet he would be in violation of a Board order if he denied reinstatement.

¶19 I see no way to resolve this conflict. If the Board undertakes a review of the reasons underlying an agency's determination that an employee is no longer eligible for a sensitive position, it may be conducting empty process resulting in an unenforceable Board order.

CONCLUSION

¶20 For the reasons given above, I would hold that the Board cannot review the reasons underlying an agency's determination that an employee is no longer

eligible to occupy a position that the agency has designated "sensitive" under Executive Order No. 10,450 and its implementing regulations at 5 C.F.R. § 732.201(a). Before today those reasons have never been subject to third-party review, and I am unwilling to make this the first such case. Assuming for the sake of discussion that Congress could, consistent with the Constitution, empower the Board to review the reasons underlying an agency's determination that an employee is no longer eligible to occupy a sensitive national security position, there is no indication that it gave the Board such authority.

_____
Mary M. Rose
Member

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 248

Docket No. AT-0752-10-0184-I-1

Devon Haughton Northover,

Appellant,

v.

Department of Defense,

Agency.

December 22, 2010

Andres M. Grajales, Esquire, Washington, D.C., for the appellant.

Stacey Turner Caldwell, Esquire, Fort Lee, Virginia, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member
Member Rose issues a dissenting opinion.

OPINION AND ORDER

¶1 This appeal is before the Board on interlocutory appeal from the April 2, 2010 order of the chief administrative judge (CAJ) of the Board's Atlanta Regional Office. The CAJ stayed the proceedings and certified for Board review his ruling that he would apply the limited scope of Board review set forth in *Department of the Navy v. Egan*, 484 U.S. 518, 530-31 (1988), in adjudicating the appellant's reduction in grade. For the reasons discussed below, we REVERSE the CAJ's ruling, VACATE the stay order, and RETURN the appeal to the CAJ for further adjudication consistent with this Opinion and Order.

BACKGROUND[1]

¶2 Effective December 6, 2009, the agency reduced the appellant in grade from the competitive service position of GS-1144-07 Commissary Management Specialist (CAO) to part-time GS-1101-04 Store Associate at the Defense Commissary Agency (DCA).[2] Interlocutory Appeal File (IAF), Tab 4, Subtabs 4b, 4d, 4e. The agency took the action "due to revocation/denial of your Department of Defense eligibility to occupy a sensitive position." *Id.*, Subtab 4e at 1. In its notice of proposed demotion, the agency stated that the appellant was in a position which was "designated as a sensitive position," and that its Washington Headquarters Services (WHS), Consolidated Adjudications Facility (CAF) had denied him "eligibility for access to classified information and/or occupancy of a sensitive position." *Id.*, Subtab 4h at 1.

¶3 The appellant filed a Board appeal of his reduction in grade. IAF, Tab 1. In responding to the appeal, the agency asserted that: (1) Pursuant to Executive Order No. 10,450, as amended, and 5 C.F.R. Part 732, it had designated the Commissary Management Specialist (CAO) position a "moderate risk" national security position with a sensitivity level of "non-critical sensitive" (NCS); (2) under *Egan*, the Board is barred from reviewing the merits of an agency's "security-clearance/eligibility determination;" and (3) the *Egan* limited scope of Board review applies to the decision to deny an individual eligibility to occupy a national security position. *Id.*, Tab 4, Subtab 1 at 1, 4-5.

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[1] In deciding this interlocutory appeal, we have relied on the current evidentiary record, the undisputed allegations of the parties, and the parties' stipulations. Because the record is not fully developed, the CAJ should reopen the record when deciding the appeal. Except for the parties' stipulations, he may reexamine any factual matter mentioned in this Opinion and Order. *See, e.g., Olson v. Department of Veterans Affairs*, 92 M.S.P.R. 169, ¶ 2 n.1 (2002).

[2] The appellant was a permanent employee with a service computation date of September 8, 2002. Interlocutory Appeal File, Tab 4, Subtab 4b.

¶4 On April 2, 2010, the CAJ issued a Ruling on Motions for Clarification of Burdens of Proof and Certification for Interlocutory. IAF, Tab 16. He noted that the agency contended the limited scope of Board review set forth in *Egan* applied to this appeal and that the appellant urged the Board not to apply or expand *Egan*. *Id.* at 1-2. The CAJ ruled that he was bound by the *Egan* limitations and certified his ruling to the Board on his own motion after finding that the regulatory requirement for certifying his ruling had been satisfied. He stayed the proceeding pending the Board's resolution of the certified issue. *Id.* at 3.

¶5 The Board found that this interlocutory appeal presented the same legal issue as that presented by the interlocutory appeal in *Conyers v. Department of Defense*, MSPB Docket Nos. CH-0752-09-0925-I-1 and CH-0752-09-0925–I-2. The Board determined that, before deciding these appeals, it was appropriate to permit the Office of Personnel Management (OPM) and interested amici to express their views on the issue. The Board therefore asked OPM to provide an advisory opinion interpreting its regulations in 5 C.F.R. Part 732, National Security Positions. IAF, Tab 6. In doing so, the Board stated that the appellant occupied a position that the agency had designated NCS pursuant to 5 C.F.R. § 732.201(a), *id.* at 1,[3] and that the appeal "raise[d] the question of whether, pursuant to 5 C.F.R. Part 732, National Security Positions, the rule in *Egan* also applies to an adverse action concerning a [NCS] position due to the employee having been denied continued eligibility for employment in a sensitive position," *id.* at 2. The Board also issued a notice of opportunity to file amicus briefs in these appeals. 75 Fed. Reg. 6728 (Feb. 10, 2010). OPM submitted an advisory

[3] The CAJ found that the agency had classified the Commissary Management Specialist (CAO) position as NCS, IAF, Tab 16 at 2, and the Board repeated this in its request to OPM, *id.*, Tab 6. The appellant asserted, however, that his position was not classified as NCS. *See, e.g.*, IAF, Tab 14 at 1 n.1, Tab 22, Comments at 6 n.1. Because of the interlocutory appeal, the parties were not given an adequate opportunity to address this factual matter below. Therefore, if necessary, the CAJ should address the issue on return of this appeal.

opinion and a supplementary letter, five amici submitted briefs,[4] and the parties submitted additional argument. IAF, Tabs 8-11, 13-15, 21-22.

¶6 On September 21, 2010, the Board held oral argument in *Conyers* and *Northover*.[5] The Board heard argument from the appellants' representative, the agency's representatives, and representatives for the amici from the Government Accountability Project and the National Treasury Employees Union.[6] The Board allowed the parties and amici to submit written closing arguments by October 5, 2010. Tr. at 79; IAF, Tab 44. The parties, the National Treasury Employees Union, and the Government Accountability Project submitted closing arguments. IAF, Tabs 45-46, 48-49. In addition, on October 5, 2010, the Office of the Director of National Intelligence (ODNI), Office of General Counsel requested an opportunity to file an "advisory opinion," *id.*, Tab 47, and the Board granted ODNI an opportunity to submit a statement presenting its position, *id.*, Tab 50. The Board also provided the parties and amici with an opportunity to reply to ODNI's filing. *Id.* ODNI filed a statement and the appellant filed a response to the statement. *Id.*, Tabs 51, 52. The record closed on October 25, 2010. *Id.*, Tab 50. The Board has considered the entire record in ruling on this interlocutory appeal.

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[4] The five amici are the American Federation of Government Employees, which also represents the appellant; the National Treasury Employees Union; the National Employment Lawyers Association/Metropolitan Washington Employment Lawyers Association; the Equal Employment Opportunity Commission; and the Government Accountability Project. IAF, Tab 8-11, 13.

[5] The agency submitted several motions to dismiss the appeal as moot, which were opposed by the appellant. The Board denied these motions on the basis that the agency failed to meet the criteria for finding the appeal moot. IAF, Tabs 28-29, 35-36, 42-44. While continuing to so argue, *id.*, Tab 46, Br. at 1 n.1, the agency has nevertheless failed to demonstrate that this appeal is moot for the reasons the Board explained in its previous orders. If necessary, the CAJ should address the mootness issue on return of this appeal.

[6] OPM declined the Board's invitation to present oral argument. IAF, Tab 31, Transcript (Tr.) at 4.

ANALYSIS

The CAJ properly certified his ruling for review on interlocutory appeal.

¶7 An interlocutory appeal is an appeal to the Board of a ruling made by an administrative judge during a proceeding. An administrative judge may certify an interlocutory appeal if he determines that the issue presented is of such importance to the proceeding that it requires the Board's immediate attention. Either party may make a motion for certification of an interlocutory appeal, or the administrative judge may certify an interlocutory appeal on his own motion. If the appeal is certified, the Board will decide the issue and the administrative judge will act in accordance with the Board's decision. *See* 5 C.F.R. § 1201.91.

¶8 An administrative judge will certify a ruling for review if the record shows that the ruling involves an important question of law or policy about which there is substantial ground for difference of opinion; and an immediate ruling will materially advance the completion of the proceeding, or the denial of an immediate ruling will cause undue harm to a party or the public. *See* 5 C.F.R. § 1201.92. An administrative judge has the authority to stay the hearing while an interlocutory appeal is pending with the Board. 5 C.F.R. § 1201.93(c).

¶9 We find that the requirements for certifying a ruling on interlocutory appeal have been satisfied in this appeal. Previously, in *Crumpler v. Department of Defense*, 113 M.S.P.R. 94 (2009),[7] the Board recognized that the legal issue presented here would have potentially far-reaching implications across the federal civil service. *Id.*, ¶ 6. Thus, the CAJ's ruling involves an important question of law or policy. Moreover, we find that there is substantial ground for difference of opinion concerning the question of whether the limited scope of Board review set forth in *Egan* applies here and that an immediate ruling will materially advance the completion of the proceeding. Therefore, the CAJ properly certified

[7] A settlement agreement was reached in *Crumpler* before the Board had the occasion to address the issue.

his ruling for review on interlocutory appeal. *See, e.g.*, *Fitzgerald v. Department of the Air Force*, 108 M.S.P.R. 620, ¶ 6 (2008).

This appeal does not warrant application of the limited Board review prescribed in *Egan*.

¶10 In creating the Merit Systems Protection Board, Congress expressly mandated that the Board adjudicate all matters within its jurisdiction. 5 U.S.C. § 1204. Congress further provided that an employee, as defined in 5 U.S.C. § 7511, against whom certain adverse actions are taken, has the right to invoke the Board's jurisdiction under 5 U.S.C. § 7701. 5 U.S.C. § 7513(d). Such appealable adverse actions include reductions in grade. 5 U.S.C. § 7512(3). Congress also clearly delineated the scope of our review in non-performance adverse action appeals by requiring that the Board determine whether the agency's decision is supported by preponderant evidence and promotes the efficiency of the service, and whether the agency-imposed penalty is reasonable. *See* 5 U.S.C. §§ 7513(a); 7701(b)(3) and (c)(1);[8] *Gregory v. Department of Education*, 16 M.S.P.R. 144, 146 (1983). More specifically, in appeals such as this, when the charge involves an agency's withdrawal of its certification or approval of an employee's fitness or other qualification for the position, the Board has consistently recognized that its adjudicatory authority extends to a review of the merits of that withdrawal. *See Adams v. Department of the Army*, 105 M.S.P.R. 50, ¶ 10 (2007), *aff'd*, 273 F. App'x 947 (Fed. Cir. 2008).

¶11 The instant appeal falls squarely within our statutory jurisdiction. Specifically, at the time of the action giving rise to this matter, the appellant had been a permanent employee in the competitive service with a service computation date of September 8, 2002. IAF, Tab 4, Subtab 4b. He therefore comes within

[8] The Board's review may also include assessing whether, when taking the adverse action, an agency has engaged in a prohibited personnel practice such as, e.g., race discrimination, disability discrimination, or reprisal for protected whistleblowing. 5 U.S.C. §§ 7701(c)(2)(B), 2302(b).

the definition of "employee" in 5 U.S.C. §§ 7511(a)(1)(A)(ii), which the agency does not dispute. On December 6, 2009, DCA reduced him in grade from his position of GS-1144-07 Commissary Management Specialist (CAO) to part-time GS-1101-04 Store Associate. *Id.*, Subtabs 4b, 4d, 4e. That reduction in grade constitutes an appealable action under 5 U.S.C. §§ 7512(3), 7513(b).

¶12 The agency contends, however, that because this appeal involves the denial of eligibility to occupy an NCS position, it is subject only to the limited review prescribed by the Supreme Court in *Egan*. IAF, Tab 4, Subtab 1 at 4-5, Tab 5, Resp. at 1-2, Tab 46, Br. at 1-4, 7-10. In *Egan*, the Court limited the scope of Board review in an appeal of an adverse action based on the revocation or denial of a "security clearance." There, the Court held that the Board lacks the authority to review the substance of the security clearance determination, or to require the agency to support the revocation or denial of the security clearance by preponderant evidence, as it would be required to do in other adverse action appeals. Rather, the Court found that the Board has authority to review only whether the employee's position required a security clearance, whether the clearance was denied or revoked, whether the employee was provided with the procedural protections specified in 5 U.S.C. § 7513, and whether transfer to a nonsensitive position was feasible. 484 U.S. at 530-31; *see also Hesse v. Department of State*, 217 F.3d 1372, 1376 (Fed. Cir. 2000).

¶13 During the course of this interlocutory appeal, the parties stipulated[9] as follows concerning security clearances and access to classified information:

> The parties agree that the positions held by appellants Conyers and Northover did not require the incumbents to have a confidential, secret or top secret clearance. The parties also agree that the positions held by appellants Conyers and Northover did not require the incumbents to have access to classified information.

[9] Parties may stipulate to any matter of fact, and the stipulation will satisfy a party's burden of proving the fact alleged. *See* 5 C.F.R. § 1201.63.

IAF, Tab 27. In other words, the appellant is not required to have a security clearance and he is not required to have access to classified information. Therefore, we conclude that *Egan* does not limit the Board's statutory authority to review the appellant's reduction in grade appeal. We further conclude that *Egan* limits the Board's review of an otherwise appealable adverse action only if that action is based upon a denial, revocation, or suspension of a "security clearance," i.e., involves a denial of access to classified information or eligibility for such access, as we more fully explain below.

¶14 We therefore direct the CAJ, on return of this appeal, to conduct a hearing consistent with the Board's statutory duty to determine whether the appellant's reduction in grade is supported by a preponderance of the evidence, promotes the efficiency of the service and constitutes a reasonable penalty. *See* 5 U.S.C. §§ 7513(a), 7701(b)(3) and (c)(1). As contemplated by the Board's statutory mandate and our precedent, this adjudicatory authority extends to a review of the merits of the agency's denial of the appellant's eligibility to occupy an NCS position. *See Adams*, 105 M.S.P.R. 50, ¶ 10.

¶15 In *Egan*, the Court characterized its decision as addressing the "*narrow question* presented by this case [namely] whether the [Board] has authority by statute to review the substance of an underlying decision to deny or revoke a security clearance in the course of reviewing an adverse action." 484 U.S. at 520 (emphasis added). In holding that it did not, the Court relied primarily on the premise that the President, as Commander in Chief under the Constitution, had authority to classify and control access to information bearing on national security and that such authority exists apart from any explicit Congressional grant. It concluded therefore that "the grant of security clearance to a particular employee . . . is committed by law to the appropriate agency of the Executive Branch." *Id.* at 527. The Court thus found that "'an agency head who must bear the responsibility for the protection of classified information committed to his custody should have the final say in deciding whether to repose his trust in an

employee who has access to such information.'" *Id.* (quoting *Cole v. Young*, 351 U.S. 536, 546 (1956)).

¶16 We believe that the *Egan* Court's limitation of the Board's statutory review authority must be viewed narrowly, most obviously because the Court itself so characterized its holding in that case. Moreover, the Court's rationale rested first and foremost on the President's constitutional authority to "classify and control access to information bearing on national security" and does not, on its face, support the agency's effort here to expand the restriction on the Board's statutory review to any matter in which the government asserts a national security interest. *Egan*, 484 U.S. at 527-528. In fact, although Mr. Egan held a position that was designated as NCS, *Egan*, 484 U.S. at 521, the Court's limitation of Board review was based on the requirement that he hold a security clearance and on the government's need to protect the classified information to which he had access. *Id.* at 527-30. Nothing in *Egan* indicates that the Court considered the NCS designation alone as sufficient to preclude Board review of the merits of the determination underlying Mr. Egan's removal.[10]

¶17 Nor is there any basis upon which to assume that the Court in *Egan* used the term "security clearance" to mean anything other than eligibility for access to, or access to, classified information. In that regard, we note that the words "security clearance" historically have been used as a term of art referring to access to classified information, and they are not synonymous with eligibility to occupy a sensitive position. *See, e.g., Jones v. Department of the Navy*, 978 F.2d

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[10] In *Egan*, the Department of the Navy's designation of a position as "noncritical-sensitive" was defined by the applicable Chief of Naval Operations Instruction to include "[a]ccess to Secret or Confidential information." 484 U.S. at 521 n.1. By contrast, here, the agency's designation of the appellant's position as NCS pursuant to OPM regulations includes no such requirement for access to, or eligibility for access to, any classified information. Indeed, the parties stipulated that the appellant is not required to have a security clearance and he has no need for access to any classified information.

1223, 1225 (Fed. Cir. 1992) (quoting *Hill v. Department of the Air Force*, 844 F.2d 1407, 1411 (10th Cir. 1988) and describing a "security clearance [as] merely temporary permission by the Executive for access to national secrets"). The agency's use of the term "security clearance" "in the vernacular" to refer to all background investigations, Tr. at 40-42, and its assertion that "security clearance decisions are but one variety of agency national security determinations," IAF, Tab 46, Br. at 2, does not change the meaning of "security clearance" as determined by the Court in *Egan*.

¶18 Executive Order No. 12,968 (Aug. 2, 1995) ("Access to Classified Information"), although failing to provide an explicit definition of "security clearance," pertinently provides that "[n]o employee shall be granted access to classified information unless that employee has been determined to be eligible in accordance with this order and to possess a need-to-know." *Id.*, Section 1.2 (a). Executive Order No. 12,968 further provides that employees shall not be granted access to classified information unless they have: (1) Been determined "eligible" for access by "agency heads or designated officials" under Section 3.1 "based on a favorable adjudication of an appropriate investigation of the employee's background;" (2) a demonstrated need-to-know; and (3) signed a nondisclosure agreement. *Id.*, Section 1.2(c)(1)-(3). The Department of Defense Personnel Security Program Regulation, consistent with the above, defines "security clearance" as "[a] determination that a person is eligible under the standards of [32 C.F.R. Part 154] for access to classified information." 32 C.F.R. § 154.3(t). We thus conclude that *Egan* limits the Board's statutory review of an appealable adverse action only when such review would require the Board to review the substance of the "sensitive and inherently discretionary judgment call . . . committed by law to the . . . Executive Branch" when an agency has made a determination regarding an employee's access to classified information, i.e., a decision to deny, revoke or suspend access, or eligibility for access to classified

information. *Egan*, 484 U.S. at 527. Our use of the term "security clearance" in this Opinion and Order includes this specific understanding.[11]

¶19 Furthermore, prior to the Board's now vacated decision in *Crumpler v. Department of Defense*, 112 M.S.P.R. 636 (2009), *vacated*, 113 M.S.P.R. 94 (2009), the Board had long considered *Egan*'s restriction on its statutory review as confined to adverse actions based on security clearance revocation and refused to extend the restriction to non-security clearance appeals where the actions arguably implicated national security. *See, e.g.*, *Jacobs v. Department of the Army*, 62 M.S.P.R. 688 (1994); *Adams*, 105 M.S.P.R. 50. In *Jacobs*, the Board held that it had the authority to review a security guard's disqualification from the Chemical Personnel Reliability Program based on his alleged verbal assault of a security officer. 62 M.S.P.R. at 689-90, 694. The Board stated:

> The role of protecting that national chemical weapons program is, without doubt, a very important role. The importance of that role, however, should not divest civilian employees who work in that program of the basic employment protections guaranteed them under law. Neither should the 'military' nature of such employment, nor should the program's requirements for the ability to react to changing situations with dependability, emotional stability, proper social adjustment, sound judgment, and a positive attitude toward program objectives and duly constituted authority.

Id. at 694. The Board explicitly found as follows:

> The Supreme Court's decision in *Egan* was narrow in scope and specifically applied only to security clearance revocations. As the

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[11] Member Rose suggests in dissent that when the *Egan* Court used the term "security clearance," it did not use it as a term of art limited to the grant of access to, or eligibility for access to, classified information. Rather, she suggests that *Egan*, "when read as a whole," shows that the Court was more generally concerned with any "discretionary national security judgments committed to agency heads, regardless of whether the employee … needed access to classified information as part of his job." As we thoroughly explain in our opinion today, such an expansive reading of *Egan* ignores the facts and much of the analysis in *Egan*, numerous decisions of the Federal Circuit and Board interpreting *Egan* over the last 20 years, as well as the definition of security clearance found in the Department of Defense's own regulations.

> protector of the government's merit systems, the Board is not eager to expand the scope of the rationale in *Egan* to divest federal employees whose positions do not require a security clearance of basic protections against non-meritorious agency actions.

Id. at 695.

¶20 In *Jacobs*, the Board further addressed the agency's concern, expressed also in this appeal, IAF, Tab 46, Br. at 3-4, 7, that, as an outside non-expert body, the Board should not second-guess its attempts to predict the appellant's future behavior. The Board found that most of the removal actions taken by agencies are based at least in part on an attempt to predict an employee's future behavior. It noted that, in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981), the Board set forth a range of factors that an agency should consider in making a penalty determination, which included an estimate of the employee's rehabilitation potential. The Board found that the basis of progressive discipline is that an employee who has engaged in repeated misconduct will be likely to do so again in the future. Thus, when an agency acts based on such predictive judgments in imposing a penalty, the Board is required by its statutory mandate to evaluate the propriety of those agency judgments.[12] *Douglas* and *Jacobs* are not isolated cases, as the Board's case law is replete with decisions in which the Board has reviewed an agency's predictions regarding an employee's future conduct and potential for rehabilitation. *Jacob*s, 62 M.S.P.R. at 695.

¶21 Similarly, in *Adams*, the Board found that *Egan* did not preclude its review of the propriety of the agency's denial of access to sensitive personnel information in an appeal of a human resources assistant's removal for "failure to maintain access to the Command computer system." 105 M.S.P.R. 50, ¶¶ 6, 9-12. The Board acknowledged the agency's argument, similar to that made in this appeal, IAF, Tab 46, Br. at 1-4, 7-10, that the suspension of computer access was

[12] The record before us lacks evidence of any "delicate national security judgments that are beyond [the Board's] expertise" as suggested by the dissent.

not an appealable adverse action, that the federal government had not waived its sovereign immunity from challenges to such actions, and that the Board's authority to review those actions was barred under *Egan*. *Adams*, 105 M.S.P.R. 50, ¶ 9. But the Board found no merit to those arguments. It noted that the agency did not deny that, in 5 U.S.C. § 7513, Congress has authorized the Board to adjudicate removals. As previously noted, it found that adjudication of such an appeal requires the Board to determine whether the agency has proven the charge or charges on which the removal is based; and, when the charge consists of the employing agency's withdrawal or revocation of its certification or other approval of the employee's fitness or other qualifications to hold his position, the Board's authority generally extends to a review of the merits of that withdrawal or revocation. *Id.*, ¶ 10.

¶22 In *Adams*, the Board acknowledged "narrow exceptions" to the Board's authority to review the merits of agency determinations underlying adverse actions, and found that one such exception was addressed in *Egan*. It distinguished *Egan*, however, as follows:

> The present appeal does not involve the national security considerations presented in *Egan*. While the agency's computer system provides employees with access to sensitive information, the agency has acknowledged that the information is not classified and has indicated that it does not consider access to that information to be equivalent to possession of a security clearance. . . . The decision to suspend the appellant's computer access is similar instead to determinations the Board has found it has the authority to review.

Adams, 105 M.S.P.R. 50, ¶ 12.[13]

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[13] In addition to *Jacobs* and *Adams*, the Board has held that, despite *Egan*, it has the authority to review the decision of an agency credentials committee to revoke an employee's clinical privileges, when that revocation was the basis for the employee's removal, *Siegert v. Department of the Army*, 38 M.S.P.R. 684, 687-91 (1988); and to review the validity of a medical determination underlying the removal of an air traffic control specialist, *Cosby v. Federal Aviation Administration*, 30 M.S.P.R. 16, 18-19 (1986).

¶23 In addition to our longstanding precedent, however, we are guided by the Supreme Court's opinion in *Cole v. Young*, 351 U.S. 536 (1956),[14] cited with approval in *Egan*, 484 U.S. at 529, which provides persuasive and considerable support for viewing *Egan* as narrowly limited to appeals involving security clearances. There, the Court addressed whether the removal of a preference-eligible veteran employee of the Department of Health, Education, and Welfare was authorized under the Act of August 26, 1950 (the Act).[15] In ruling that

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[14] Member Rose sees little value in the Supreme Court's *Cole* decision, in part because it was decided in 1956, "22 years before the Civil Service Reform Act." As we note in our decision, though, *Cole* specifically addressed the "Act of August 26, 1950," the predecessor to 5 U.S.C. § 7532. Further, Executive Order No. 10,450, significantly relied on by the dissent, was promulgated in 1953 to implement the 1950 Act. In addition, the relevant regulations issued by OPM, and relied on by Member Rose to find that the Board lacks authority to review the adverse action at issue, are based on Executive Order No. 10,450, and OPM has advised the Board that the regulations do not create or diminish any employee appeal rights.

[15] The Act was the precursor to 5 U.S.C. § 7532 and gave to the heads of certain government departments and agencies summary suspension and unreviewable dismissal powers over civilian employees when deemed necessary "in the interest of the national security of the United States." This express provision within the Civil Service Reform Act (CSRA) for accommodating national security concerns further undermines the agency's claim that the President's constitutional authority as Commander in Chief preempts our statutory review. The argument is tenuous, at best, insofar as it rests upon the misguided premise that the President alone possesses power in the area of national security. Instead, the Constitution gives Congress the power "to declare war" (Art. 1, sec. 8, cl. 11), "to raise and support Armies" (Art. 1, sec. 8, cl. 12), "to provide and maintain a Navy" (Art. 1, sec. 8, cl. 13), and "to make Rules for the Government and Regulation of the land and naval Forces" (Art. 1, sec. 8, cl. 14), and, thus, plainly establishes that Congress also has authority with regard to ensuring national security. *Cf. U.S. v. North*, 708 F. Supp. 380, 382 (D.D.C. 1988) (in rejecting the plaintiff's constitutional argument that "the asserted primacy of the White House in foreign affairs" precludes prosecution for false Congressional testimony, the court looked to various constitutional provisions in recognizing that "Congress surely has a role to play in aspects of foreign affairs….")

The CSRA is the comprehensive scheme created by Congress governing federal employment. *See U.S. v. Fausto*, 484 U.S. 439, 443 (1988). In 5 U.S.C. § 7532, Congress expressly delineated those areas where Board review is circumscribed due to national security concerns. There is no evidence that Congress intended that the President could unilaterally and broadly expand these exceptions so as to effectively

Executive Order No. 10,450[16] did not trump the employee's statutory veterans' preference rights, the *Cole* Court interpreted "national security" as used in the Act.[17] *Cole*, 351 U.S. at 538. Significantly, in so doing, the *Cole* Court did not avoid review of the removal or identify any rule of limited review merely because the Executive Branch of the government alleged that matters of "national security" were at issue.[18] Moreover, although the Court determined that an employee may be dismissed using the summary procedures and unreviewable dismissal power authorized by the 1950 statute only if he occupied a "sensitive" position, the Court plainly equated having a "sensitive" position with having access to classified information. *Id.* at 551, 557 n.19. The *Cole* decision thus clearly supports the Board's determination that its statutory jurisdiction over an

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eliminate Board and judicial review of the reasons underlying adverse actions taken against federal employees, such as the appellant, whose positions do not require access, or eligibility for access, to classified information. Absent any indication that Congress contemplated and ordained such a result, we believe that *Egan's* exception to the Board's statutory jurisdiction must be read narrowly.

[16] Executive Order No. 10,450 was promulgated in April 1953 to provide uniform standards and procedures for agency heads in exercising the suspension and dismissal powers under the 1950 Act. *Cole*, 351 U.S. at 551. It also extended the Act to other agencies. *See id.* at 542.

[17] The Supreme Court's *Cole* decision and its decision in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), plainly contradict the dissent's bold claim that an agency's decision "that retaining an employee would be inconsistent with the interests of national security has never been subject to third-party review before today." In both cases, the Court subjected agency claims regarding national security to judicial scrutiny. *See also* note 19 *supra.*

[18] The *Cole* Court notably stated that it would not lightly assume that Congress intended to take away the normal dismissal procedures of employees "in the absence of some overriding necessity, such as exists in the case of employees handling defense secrets." 351 U.S. at 546-47.

otherwise appealable action cannot be preempted by an agency's generalized claim of "national security."[19]

¶24 In this regard, we agree with the appellants that the potential impact of the agency's argument that *Egan* precludes the Board from reviewing the merits of an agency's adverse action, even when security clearances are not involved, is far-reaching. Accepting the agency's view could, without any Congressional mandate or imprimatur, preclude Board and judicial review of alleged unlawful discrimination, whistleblower retaliation, and a whole host of other constitutional and statutory violations for multitudes of federal employees subjected to otherwise appealable removals and other adverse actions. *See El-Ganayni v. Department of Energy*, 591 F.3d 176, 184-186 (3d Cir. 2010) (First Amendment claim and Fifth Amendment Equal Protection claim must be dismissed because legal framework would require consideration of the reasons a security clearance was revoked); *Bennett v. Chertoff*, 425 F.3d 999, 1003-04 (D.C. Cir. 2005) (adverse action based on denial or revocation of a security clearance not actionable under Title VII of the Civil Rights Act of 1964); *Hesse*, 217 F.3d at 1377 (*Egan* precludes Board review of Whistleblower Protection Act whistleblower claims in indefinite suspension appeal); *Ryan v. Reno*, 168 F.3d 520, 524 (D.C. Cir. 1999) (adverse action based on denial of a security clearance not actionable under Title VII of the Civil Rights Act of 1964); *Jones*, 978 F.2d at 1225-26 (no employee has a "property" or "liberty" interest in a security

[19] In fact, even in cases where the Executive Branch has sought to defend its action on the grounds of protecting classified information, the Court has not abstained from subjecting such assertions to searching judicial scrutiny. *See e.g., National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989). There, employees challenged the Customs Service decision to subject whole categories of employees to random drug-testing on the basis of their presumed access to classified information. Deeming the record insufficient to determine whether the agency overreached, the Court remanded to the Fifth Circuit with instructions to "examine the criteria used by the [Customs] Service in determining what materials are classified and in deciding whom to test under this rubric." *Id*. at 678.

clearance or access to classified information and thus no basis for a constitutional right); *Pangarova v. Department of the Army*, 42 M.S.P.R. 319, 322-24 (1989) (*Egan* precludes the Board from reviewing discrimination or reprisal allegations intertwined with the agency's denial of a security clearance).

¶25 Therefore, we find that the Supreme Court's decision in *Egan* does not support the conclusion that the Board lacks the authority to review the determination underlying the agency's reduction in grade here.[20] The Board may exercise its full statutory review authority and review the agency's determination that the appellant is no longer eligible to hold a "sensitive" position, because this appeal does not involve a discretionary agency decision regarding a security clearance.[21]

The agency's decision to characterize the appellant's position as a national security position and to designate it NCS is insufficient to limit the Board's scope of review to that set forth in *Egan*.

¶26 In 5 C.F.R. Part 732, OPM set forth "certain requirements and procedures which each agency shall observe for determining national security positions pursuant to Executive Order No. 10450 – Security Requirements for Government Employment (April 27, 1953), 18 FR 2489, 3 CFR 1949-1953 Comp., p. 936, as

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[20] We are not finding that the Board has the authority to determine whether the agency has properly designated the appellant's position as NCS. *See Skees v. Department of the Navy*, 864 F.2d 1576, 1578 (Fed. Cir. 1989) (Board lacks the authority to review an agency's determination that a position requires a security clearance); *Brady v. Department of the Navy*, 50 M.S.P.R. 133, 138 (1991) (Board lacks the authority to review an agency's determination to designate a position as NCS). We are simply finding that the agency's decision to designate a position as a "national security" position or as a "sensitive" one, standing alone, does not limit the Board's statutory review authority over an appealable adverse action.

[21] We recognize that Congress has specifically excluded groups of employees from having Board appeal rights or from having protection against prohibited personnel practices, such as employees of the Central Intelligence Agency, the Federal Bureau of Investigation, and intelligence components of the Department of Defense. *See* 5 U.S.C. §§ 2303(a)(2)(C), 7511(b)(7), (8). Congress has not similarly excluded the agency in the current appeal.

amended." 5 C.F.R. § 732.101. OPM's regulations state that the term "national security position" includes:

> (1) Those positions that involve activities of the Government that are concerned with the protection of the nation from foreign aggression or espionage, including development of defense plans or policies, intelligence or counterintelligence activities, and related activities concerned with the preservation of the military strength of the United States; and
>
> (2) Positions that require regular use of, or access to, classified information.

5 C.F.R. § 732.102(a). The regulations further provide:

> For purposes of this part, the head of each agency shall designate, or cause to be designated, any position within the department or agency the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security as a sensitive position at one of three sensitivity levels: Special-Sensitive, Critical-Sensitive, or Noncritical-Sensitive.

5 C.F.R. § 732.201(a). The agency argues that, although the appellant's position did not require a security clearance, the Board is nevertheless precluded under *Egan* from reviewing whether he was improperly reduced in grade based upon the agency's determination that he was ineligible to occupy a national security position. IAF, Tab 4, Subtab 1 at 4-5, Tab 5, Resp. at 1-2, Tab 46, Br. at 1-4, 7-10. We disagree.

¶27 OPM's interpretation of its own regulations at 5 C.F.R. Part 732 supports the conclusion that our review of an adverse action is not limited by *Egan* solely based on the agency's designation of the position as a national security position or as "sensitive." In that regard, OPM has not interpreted its regulations to preclude the usual scope of Board review for adverse actions taken against employees based on ineligibility to occupy NCS positions. Rather, OPM concluded that the Board cannot determine the scope of its review by referring to 5 C.F.R. Part 732. IAF, Tab 15, Advisory Op. at 3. OPM stated:

> OPM's regulations in 5 C.F.R. Part 732 are silent on the scope of an employee's rights to Board review when an agency deems the

> employee ineligible to occupy a sensitive position. The regulations do not independently confer any appeal right or affect any appeal right under law.

Id. at 2. It similarly stated concerning its regulations:

> [T]hey do not address the scope of the Board's review when an agency takes an adverse action against an employee under 5 U.S.C. § 7513(a) following an unfavorable security determination. Likewise, OPM's adverse action regulations in 5 C.F.R. Part 752 do not address any specific appellate procedure to be followed when an adverse action follows an agency's determination that an employee is ineligible to occupy a sensitive position.

Id. at 3. Thus, OPM has not interpreted its own regulations as precluding the Board's usual scope of review in these appeals.

¶28 In its October 18, 2010 statement, ODNI refers to Executive Order No. 13,467 (June 30, 2008), in arguing that the limited scope of Board review set forth in *Egan* should apply in this appeal. IAF, Tab 51, Statement at 1. ODNI notes that Executive Order No. 13,467, which is entitled "Reforming Processes Related to Suitability for Government Employment, Fitness for Contractor Employees, and Eligibility for Access to Classified National Security Information," designated the Director of National Intelligence (DNI) as the Security Executive Agent (SEA) for the federal government. *Id.* at 1. It further notes that, in setting forth the SEA's responsibilities relating to overseeing investigations, developing policies and procedures, issuing guidelines and instructions, serving as a final authority, and ensuring reciprocal recognition among agencies, the Executive Order consistently referred to that authority as relating to both determinations of eligibility for access to classified information or eligibility to hold a sensitive position. *Id.* at 1-2. It thus argues that the President has given the DNI "oversight authority over eligibility determinations, whether they entail access to classified information or eligibility to occupy a sensitive position, regardless of sensitivity level." *Id.* at 2.

¶29 ODNI appears to be arguing, as does the agency, that because executive orders refer to both eligibility for access to classified information and eligibility

to occupy a sensitive position -- or because the agency decided to adjudicate determinations involving access to classified information and eligibility to occupy a sensitive position through the same WHS/CAF process -- the same Board review authority must necessarily apply. Neither ODNI nor the agency has shown that such a circular argument provides a basis for limiting the statutory scope of our review in adverse action appeals.

¶30 We therefore find that the Board has the authority to review the merits of the agency's decision to find the appellant ineligible to occupy an NCS position, and that the Board's authority to exercise its statutory review of the appellant's reduction in grade is not limited by *Egan*. Applying the full scope of Board review in appeals such as this will not prevent agencies from taking conduct-based adverse actions or suitability actions in appropriate cases. Likewise, agencies may respond to urgent national security issues, even for employees who do not have eligibility for access to, or access to, classified information, by exercising their statutory authority to impose indefinite suspensions and removals through the national security provisions in 5 U.S.C. § 7532. *See, e.g., King v. Alston*, 75 F.3d 657, 659 n.2 (Fed. Cir. 1996). Here, however, the agency did not choose to act under 5 U.S.C. § 7532, an option the dissent fails to mention. If the agency believed that a Board appeal would involve delicate national security matters beyond the Board's expertise, or that a Board order might create a conflict with its national security obligations pursuant to Executive Order No. 10,450, it could exercise its statutory authority pursuant to 5 U.S.C. § 7532. *See id*.

¶31 Any agency argument that a Board decision to reverse its action would place it in an impossible position, because it must either violate an agency head's decision and allow an employee who presents a national security risk to occupy a sensitive position or violate the Board's order, does not warrant a different outcome. In its motions to dismiss, the agency indicated that it had reinstated the appellant to the Commissary Management Specialist (CAO) position retroactive

to December 6, 2009. IAF, Tabs 28-29, 39, 42. When asked at oral argument why the agency now deemed the appellant eligible to occupy the NCS position, the agency representative stated, "[w]ell, for one thing, litigation." Tr. at 46. The agency representative proceeded to state that the important point was that the head of the agency "determined to grant a waiver of the factors that were represented as risk factors," and that that discretion and responsibility rested solely with him. *Id.*

¶32 However, the record indicates that, in notifying the WHS/CAF Director of his decision overriding its unfavorable security determination and returning the appellant to his position, Acting Director Thomas Milks directed it to act "without delay" "[b]ecause of pending litigation." IAF, Tab 28, Att. 1 at 1. In addition, his determination stated as its first finding that the questions raised concerning the appellant "relate to the grant of access to classified material," and that "no access to classified material is required or permitted in the position to which he is being reassigned." *Id.* at 2. In his second finding, Milks simply summarily stated that "it is unlikely that [the appellant's] assignment to the subject position would result in a material adverse effect on national security." *Id.* Therefore, the agency's own actions do not support any fear of being put in an impossible position by the possibility that the Board might disagree with its decision and order reinstatement.

The interlocutory appeal must be returned to the CAJ for further proceedings.

¶33 Because *Egan*'s limited scope of Board review does not apply in this appeal, Board review of the challenged reduction in grade includes consideration of the underlying merits of the agency's reasons to deny the appellant eligibility to occupy an NCS position. The CAJ should thus adjudicate this appeal under the generally applicable standards the Board applies in adverse action appeals, including the legal principles governing off-duty or on-duty conduct as applicable.

ORDER

¶34 Accordingly, we vacate the stay order issued in this proceeding and return the appeal to the CAJ for further processing and adjudication consistent with this Opinion and Order.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board
Washington, D.C.

DISSENTING OPINION OF MARY M. ROSE

in

Devon Haughton Northover v. Department of Defense

MSPB Docket No. AT-0752-10-0184-I-1

¶1 For the reasons fully set forth in my dissenting opinion in *Conyers v. Department of Defense*, MSPB Docket Nos. CH-0752-09-0925-I-1 & CH-0752-09-0925-I-2 (December 22, 2010), I would hold that the Board lacks authority to review the reasons underlying the agency's determination that the appellant is no longer eligible to hold his GS-1144-07 Commissary Management Specialist position, which the agency designated "sensitive" under Executive Order No. 10,450 and 5 C.F.R. § 732.201(a).

_____

Mary M. Rose
Member

CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,815 words excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii) and Federal Circuit Rule 32(b), according to the count of Microsoft Word.

s/ *Abby C. Wright*
Abby C. Wright
Counsel for Acting Director, OPM

CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2013, I filed and served the foregoing by CM/ECF and by thereafter causing thirty copies and an original to be delivered to the Clerk of the Court by hand delivery, as requested by the Clerk. I also caused two copies to be mailed by overnight Federal Express or delivered by hand delivery to the following:

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