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 H[illegible]THOVER,
Respondents,

and

MERIT SYSTEMS PR[illegible]BOARD,

Petition for Review of the [illegible]rits Syst[illegible]tion Board in
Consolidated Case N[illegible]0925-R-[illegible]nd AT0752100184-R-1

**RESP[illegible]F P[illegible]IONER JOHN BERRY TO
PE[illegible]IONS FOR [illegible]EHEARING *EN BANC***

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INTRODUCTION

Pursuant to this Court's October 2, 2012 order, petitioner John Berry, Director of the Office of Personnel Management, respectfully submits this response to the petitions for rehearing *en banc* filed by respondents Conyers and Northover and the Merit Systems Protection Board (MSPB). Those petitions should be denied because the panel majority in this case correctly held that *Dep't of the Navy v. Egan*, 484 U.S. 518 (1988), prohibits the MSPB from overruling an agency's expert determination that an employee is ineligible to occupy a position designated as national security sensitive under Executive Order 10,450. As the majority recognized, no basis exists for carving out an exception to *Egan* simply because a position affecting national security does not require access to classified information. On the contrary, the same separation-of-powers principles that caused the *Egan* Court to hold that the MSPB may not review "predictive judgments" by the Executive Branch that individuals are ineligible for access to classified information apply with equal force to agency determinations that individuals are ineligible to hold positions that "could bring about, by virtue of the nature of the position, a material adverse effect on the national security." Exec. Order No. 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; 5 C.F.R. § 732.201.

In arguing that rehearing *en banc* is warranted, respondents and their amici do not identify any meaningful conflict between the majority's decision and any decision by the Supreme Court, this Court, or any other court of appeals. Instead, they argue

primarily that the decision is contrary to the Civil Service Reform Act (CSRA), which in their view allows the MSPB (and courts) to review the substance of Executive Branch determinations regarding individuals' eligibility to occupy positions designated as national security sensitive under Executive Order 10,450. But the Supreme Court rejected virtually identical arguments in *Egan*, holding that the general presumption of reviewability "runs aground when it encounters concerns of national security." *Egan*, 484 U.S. at 527. Moreover, the *Egan* Court specifically rejected the argument (made by respondents here) that 5 U.S.C. § 7532 – a provision pre-dating the CSRA, which allows for the summary suspension and removal of employees for national security reasons – demonstrates Congress's intent to allow review of national security decisions made under other provisions of law. *Id.* at 532-33. In short, respondents' quarrel is with *Egan* itself, not with the panel majority's interpretation of the CSRA.

Respondents' attempt to circumvent *Egan* ultimately fails because they cannot explain why the national security decisions challenged here should be treated any differently than the national security decisions held unreviewable in *Egan*. Nor is there any basis to do so. For purposes of *Egan*, "predictive judgments" by the Executive Branch regarding an individual's eligibility to hold a security sensitive position are in all material respects identical to "predictive judgments" regarding an individual's eligibility to hold a position requiring access to classified information.

In the end, respondents ask this Court to disregard the Supreme Court's reasoning in *Egan*, insisting that the Court only addressed the "narrow question" of

whether the MSPB could review the merits of decisions about access to classified information. But nothing in *Egan* suggests that courts should ignore its rationale in other contexts. On the contrary, courts applying *Egan* over the last two decades have consistently recognized that it precludes review in contexts beyond the precise facts of that case. As explained more fully below, courts have held that *Egan* bars judicial review, not merely MSPB review; that *Egan* precludes review of claims beyond the CSRA, including claims under the APA, Title VII, and the Constitution; and that *Egan* bars review of security-related actions beyond the denial or revocation of security clearances, including the designation of a position as one requiring a security clearance and the decision to open a security investigation. Accordingly, the panel majority properly held that *Egan* precludes the MSPB from overruling the "predictive judgment" of experts in the Executive Branch that an individual is ineligible to hold a position designated as sensitive under Executive Order 10,450. For these reasons, the petitions for rehearing *en banc* should be denied.

BACKGROUND

1. Respondents Rhonda K. Conyers and Devon Haughton Northover were indefinitely suspended and demoted, respectively, after they were found ineligible to occupy "noncritical sensitive" positions with the Department of Defense. Their positions had previously been designated as "sensitive" pursuant to Executive Order 10,450 – a designation that respondents concede is not subject to review by the MSPB or any court. See *Skees v. Dep't of the Navy*, 864 F.2d 1576 (Fed. Cir. 1999).

Respondents challenged DoD's actions in two separate proceedings, and the government argued in both cases that *Egan* precluded review of the merits of the agency's eligibility determinations. After administrative judges issued conflicting decisions on this issue, the full MSPB held that *Egan* only limits review of the merits of a security-based eligibility determination in cases involving access to classified information. Because respondents did not occupy positions that required access to classified information, the MSPB concluded that *Egan* did not preclude it from reviewing the merits of the agency's determinations that respondents posed security risks rendering them ineligible to occupy positions designated as sensitive.

2. This Court granted the government's petition for review of the MSPB's decision, and reversed. 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." 8/17/12 Op. at 3. Rejecting respondents' argument that *Egan* is limited solely to cases involving access to classified information, the panel stated that "*Egan* cannot be so confined." *Id.* at 9. The panel held that principles set forth in *Egan* "instead require that courts refrain from second-guessing Executive Branch determinations concerning the eligibility of an individual to occupy a sensitive position, which may not necessarily involve access to classified information." *Id.* at 9-10.

While stating that Congress "has the power to guide and limit the Executive's application of its powers," the panel majority explained that the CSRA did not impose

such limits or make security-related judgments by the Executive Branch reviewable. *Id.* at 11. On the contrary, the panel stated, 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, demonstrates that applying *Egan* where the agency took action pursuant to other provisions would render Section 7532 a nullity. *Id.* at 13. As the majority explained, 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." *Id.* at 14 (citing *Egan*, 484 U.S. at 532).[1]

The panel further explained that "*Egan*'s core focus is on 'national security information,' not just 'classified information.'" Op. at 16. Emphasizing that Executive Order 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," the panel described respondents' focus on eligibility for access to classified information as "misplaced" because "Government positions may require different types and levels of clearance, depending upon the sensitivity of

[1] The panel also cited *Carlucci v. Doe*, 488 U.S. 93 (1988), for the proposition that Congress enacted § 7532 to "supplement, not narrow, ordinary agency removal procedures." Op. at 15 (quoting *Carlucci*, 488 U.S. at 102). As a result, the panel stated that it was "unconvinced" that Congress intended Section 7532 to be the exclusive means of removing employees for national security reasons. *Id.* at 15-16.

the position sought." *Id.* at 19 & n.16. Indeed, the panel noted, "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." *Id.* at 20. And, because Executive Order 10,450 requires agencies to make a determination that an individual's eligibility to hold a sensitive position is "clearly consistent with the interest of national security," the panel explained that "*Egan's* concerns regarding [this standard] conflicting with the Board's preponderance of the evidence standard apply equally here." *Id.* at 20.

Finally, the panel declared that it was "naive to assume that employees without direct access to already classified information cannot affect national security." *Id.* at 21. Stressing that many government employees could have an adverse impact on national security that might not be readily apparent to non-experts, *id.* at 22 n.18. the panel stated 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," *id.* at 23. The panel noted that "the President, as Commander-in-Chief, has the right and the obligation, within the law, to protect the government against potential threats," and thus concluded that the MSPB "cannot review the merits of Executive Branch agencies' determinations concerning eligibility of an employee to occupy a sensitive position that implicates national security." *Id.* at 26-27.

Judge Dyk dissented, arguing primarily that the majority's decision "nullifies" the CSRA. Diss. Op. at 7. In his view, Congress made clear in the CSRA that it

intended to allow the MSPB to review the merits of agency security determinations, *id.* at 9-18, and *Egan's* contrary holding was limited to the "narrow" question whether the MSPB had authority to review security clearance decisions, *id.* at 22-23.

ARGUMENT

I. THE PANEL'S DECISION IS FULLY CONSISTENT WITH *EGAN* AND DECISIONS BY THIS COURT AND OTHER COURTS APPLYING *EGAN*.

In *Egan*, the Supreme Court held that separation-of-powers principles precluded the MSPB from reviewing the merits of Executive Branch determinations that an individual is ineligible for access to classified information. Emphasizing that the general presumption of reviewability "runs aground when it encounters concerns of national security," *Egan*, 484 U.S. at 527, the Court stated that:

> 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.

Id. at 529. The Court "fortified" this conclusion by noting that the "clearly consistent with the national security" standard in Executive Order 10,450 is inconsistent with the preponderance of the evidence standard ordinarily applicable to MSPB review of employee appeals under the CSRA. *Id.* at 530-31. Noting that review under a preponderance standard "would involve the Board in second-guessing the agency's national security determinations," the Court found "it extremely unlikely that Congress intended such a result." *Id.* at 531-32. Finally, the Court rejected an

argument that the existence of a pre-CSRA provision allowing for the suspension and removal of employees for national security reasons, 5 U.S.C. § 7532, "is a 'compelling' factor in favor of Board review of a security-clearance denial" in cases where the agency suspends or removes an employee pursuant to the CSRA. *Id.* at 533.

The panel majority in this case properly held that *Egan* precludes the MSPB from reviewing Executive Branch determinations that an employee's continued employment in a position designated as national security sensitive is not "clearly consistent with the national security" under Executive Order 10,450. As the panel recognized, all the same separation-of-powers concerns that caused the *Egan* Court to hold that the MSPB may not review "predictive judgments" by an agency regarding an individual's eligibility for access to classified information apply with equal force to "predictive judgments" about whether an employee should be allowed to hold a position that "could bring about, by virtue of the nature of the position, a material adverse effect on the national security." Exec. Order No. 10,450, § 3. In both cases the Executive Branch must make a "judgment call" about acceptable levels of risk that "it is not reasonably possible for an outside nonexpert body to review," *Egan*, 484 U.S. at 529, and in both cases it would be impossible for the MSPB to review the merits of the agency's judgment regarding security risks "without departing from the 'clearly consistent with the national security' test," *id.* at 531. Thus, the panel correctly concluded that principles established in *Egan* "require that courts refrain from second-guessing Executive Branch determinations concerning the eligibility of an individual

to occupy a sensitive position, which may not necessarily involve access to classified information." *Id.* at 9-10.

Nowhere do respondents provide any principled basis for carving out an exception to *Egan* that would allow the MSPB (or courts) to review the merits of Executive Branch determinations that an individual is ineligible to occupy a sensitive position under Executive Order 10,450. Nor could they, because such decisions are made pursuant to precisely the same delegation of Executive Branch authority (*i.e.*, Executive Order 10,450) that was at issue in *Egan*.[2] Furthermore, such decisions involve "predictive judgments" about whether a person can be relied upon in a post where the Executive Branch has determined he or she could have a material adverse impact on the national security – judgments that an "outside nonexpert body" such as the MSPB cannot evaluate. *Egan*, 484 U.S. at 528-29 (describing "inexact science" involved in predicting a person's future behavior in the national security context). For these reasons alone, respondents' petitions for rehearing *en banc* must be denied.

Nor do respondents identify any conflict between the panel majority's decision and any decision by the Supreme Court, this Court, or any other court of appeals. In its "Statement of Counsel," the MSPB asserts that the majority's decision is contrary to *Egan*, *Cole v. Young*, 351 U.S. 536 (1956), and four decisions by this Court applying

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[2] After *Egan* was decided, the President issued Executive Order 12,968, *reprinted as amended in* 5 U.S.C. § 435, to guide eligibility decisions for access to classified information. Like E.O. 10,450, Section 3.1(b) of E.O. 12,968 requires such decisions to be "clearly consistent with the national security interests of the United States."

Egan in various circumstances. MSPB Pet. at 1. These arguments fail because the MSPB nowhere explains how these decisions conflict with the majority's holding.[3]

As explained above, the panel properly applied *Egan's* core holding – that "outside nonexpert bodies" may not second-guess predictive judgments by the Executive Branch regarding security risks – to eligibility determinations made under Executive Order 10,450. Respondents insist that *Egan's* holding is limited solely to "security clearance" decisions, but the *Egan* Court recognized that "[d]ifferent types and levels of clearance are required depending upon the position sought," 484 U.S. at 528, and drew no distinction for reviewability purposes among different kinds of security-related judgments that outside bodies like the MSPB lack authority to review. Indeed, the Court plainly recognized that the same considerations that resulted in Mr. Egan being denied access to classified information also prohibited him from holding a sensitive position. See *Id.* at 530 (observing that MSPB review was limited to determining "whether transfer to a nonsensitive position was feasible"). No court to our knowledge has ever carved out an exception from *Egan* for security-related predictive judgments regarding eligibility to hold sensitive positions as opposed to positions requiring access to classified information. On the contrary, numerous

[3] The MSPB's argument that *Egan* is limited by a much earlier decision, *Cole v. Young*, 351 U.S. 536 (1956), MSPB Pet. 12-14, is especially puzzling. In *Cole*, the Supreme Court stressed that the positions at issue were not "affected with the 'national security,'" *id.* at 543, and construed provisions of the 1950 Security Act concerning the statutory power of removal now embodied in 5 U.S.C. § 7532, which the government did not rely upon in this case. *Cole* is thus wholly inapposite.

courts, including this one, have held that *Egan* bars review of claims and security-related actions well beyond the facts at issue in *Egan* itself.

For example, this Court long ago held that *Egan* did not merely bar claims challenging decisions regarding specific individuals' access to classified information but also precluded a plaintiff's challenge to "the Navy's classification of his position as one requiring a security clearance" because allowing such a challenge would permit the plaintiff "to do indirectly what he cannot do directly," that is, have "an outside nonexpert body second-guess the Navy's judgment on protection of classified information in its charge." *Skees*, 864 F.2d at 1578. Similarly, the D.C. Circuit has rejected attempts by plaintiffs to circumvent *Egan* by focusing their claims on something other than a security clearance decision itself. *Ryan v. Reno*, 168 F.3d 520, 524 (D.C. Cir. 1999) (holding that *Egan* barred Title VII claims because agency's refusals to waive background checks for foreign nationals "were tantamount to clearance denials").[4] See also *Becerra v. Dalton*, 94 F.3d 145, 148-49 (4th Cir. 1996) (holding that "the distinction between the initiation of a security investigation and the denial of a security clearance is a distinction without a difference"). In short, *Egan's*

[4] The D.C. Circuit's recent decision in *Rattigan v. Holder*, 689 F.3d 764 (D.C. Cir. 2012), *reh'g en banc denied* (Nov. 1, 2012), is not to the contrary. Although the government disagrees with that decision, 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. Because the security-related decisions that employees are ineligible to occupy sensitive positions under Executive Order 10,450 are made by officials with the requisite training and expertise to make predictive judgments regarding security risks, they are shielded from judicial review even under the majority's analysis in *Rattigan.*

rationale extends well beyond the facts of that case, and respondents' attempts to limit *Egan* to its facts are contrary to decades of jurisprudence holding that *Egan* precludes claims that would require outside, non-expert bodies to second-guess security-related judgments by the Executive Branch. See *e.g.*, *El-Ganayni v. U.S. Dep't of Energy*, 591 F.3d 176 (3d Cir. 2010) (holding that *Egan* bars First Amendment retaliation claim).

Despite this wealth of authority applying *Egan*, the MSPB argues that the majority's decision conflicts with dicta in other decisions referring to the "narrow question" decided in *Egan*. MSPB Pet. at 10.[5] But such passing statements do not establish a "conflict" with the majority's decision in this case, much less a conflict of sufficient magnitude to warrant rehearing *en banc*. Far from limiting *Egan*, these decisions confirm that *Egan* bars claims challenging agency actions beyond the decision to revoke a person's access to classified information, such as the designation of a position as one requiring a security clearance. See *Skees*, 864 F.2d at 1578. In sum, the majority's decision is fully consistent with *Egan* and its progeny.

II. RESPONDENTS' OTHER ARGUMENTS PROVIDE NO BASIS FOR REHEARING EN BANC.

Unable to show that the panel majority's decision conflicts in any way with *Egan* or any decision by this Court or any other court of appeals, respondents resort

[5] Unlike the MSPB, the employee respondents argue solely that this Court should not "expand the narrow rule" in *Egan*. Employees' Pet. at vii. They do not claim the majority's decision is "contrary" to *Egan* or any other decision. Similarly, respondents' amici argue only that *Egan* is a narrow decision limited to access to classified information and should not be expanded beyond that context. NTEU Br. at 3-5. They do not claim the majority's decision conflicts with any other decision.

to (1) arguments regarding the CSRA that the Supreme Court considered and rejected in *Egan*, and (2) policy arguments that wildly exaggerate the practical impact of the majority's decision. Both sets of arguments lack merit.

A. Respondents argue at great length that the panel's decision is contrary to the CSRA because it precludes MSPB review of decisions they believe Congress intended to make reviewable by statute. See MSPB Pet. 3-9; Employees' Pet. 5-8. The short answer to these arguments is that the Supreme Court rejected them in *Egan*. While recognizing that the CSRA generally provides for MSPB review of the merits of adverse actions, the Court held that the presumption of reviewability "runs aground when it encounters concerns of national security." *Egan*, 484 U.S. at 527.

Moreover, the Court specifically rejected a variant of the argument now advanced by respondents: that Congress provided a mechanism, 5 U.S.C. § 7532, to suspend or remove employees for national security reasons that would be nullified if national security eligibility determinations made by agencies pursuant to other provisions of law are unreviewable. See MSPB Pet. at 5 (arguing that "Congress has spoken on this very issue"). In *Egan*, the Court explained that the availability of removal under Section 7532 did not counsel in favor of MSPB review of decisions regarding access to classified information under applicable CSRA provisions (*e.g.*, 5 U.S.C. § 7513). See *Egan*, 484 U.S. at 533. Likewise, this Court has recognized that the potential applicability of Section 7532 does not limit the parameters of *Egan*. See *King v. Alston*, 75 F.3d 657, 659 n.2 (Fed. Cir. 1996) (holding that *Egan* precludes

MSPB review of substantive reasons for denial of access to classified information, while noting that the agency could also have acted pursuant to Section 7532). In short, the panel's decision is no more "contrary" to the CSRA than *Egan* itself was.

B. In the end, respondents and their amici resort to criticizing the panel's decision on policy grounds, arguing that large numbers of employees will lose their right to third-party review of adverse personnel actions because agencies will be able to unilaterally designate positions as "sensitive" and then make adverse eligibility determinations that the MSPB cannot review. MSPB Pet. at 14. See also NTEU Amicus Br. at 5 (arguing that the "sensitivity designation process is ripe for abuse"). These arguments rest on the false premise that agencies will violate Executive Order 10,450 and regulations requiring that positions have the requisite nexus to national security in order to be designated "sensitive." See 5 C.F.R. § 732.201. While many positions may meet the criteria to be designated "sensitive," this simply reflects the reality that there are many positions where employees – including some employees without access to classified information – could do grave harm to the national security. These include Department of Homeland Security employees who block entry into the United States of materials that could be used for terrorism and DoD employees who work in nuclear or chemical areas or transport jet fuel or other dangerous materials. Respondents concede that the designation of such positions is not reviewable under *Skees*, and this concession is fatal to their arguments that *Egan* only applies to decisions regarding eligibility for access to classified information. For

all the same reasons that the designation of certain positions as "sensitive" under Executive Order 10,450 is not reviewable, an agency's determination that a specific individual is ineligible to occupy such a position is also not reviewable.

Finally, respondents' policy arguments also rest on the false premise that the panel's decision precludes all MSPB review of adverse personnel actions rather than merely limiting the *scope* of review where such actions are tied to the person's ineligibility to occupy a position based on national security concerns. To be sure, under *Egan* and the panel's decision, the merits of an agency's predictive judgment that an employee presents a security risk are shielded from review. Nevertheless, the MSPB can still review routine personnel actions involving employees who occupy sensitive positions. And, as the *Egan* Court explained, where an employee is removed "for cause" under 5 U.S.C. § 7513 after being found ineligible to hold a particular position, the MSPB may still "determine whether such cause existed, whether in fact [a] clearance was denied, and whether transfer to a nonsensitive position was feasible." *Egan*, 484 U.S. at 530. See also *Romero v. Dep't of Defense*, 658 F.3d 1372 (Fed. Cir. 2011) (holding that *Egan* does not preclude review of compliance with procedures related to security clearance decisions). Thus, respondents exaggerate the extent to which the panel's decision precludes MSPB review.

CONCLUSION

For the foregoing reasons, the petitions for rehearing *en banc* should be denied.

Respectfully submitted,

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NOVEMBER 2012

CERTIFICATE OF SERVICE

I certify that on this 14th day of November 2012, I caused copies of the foregoing to be served on the following counsel by first class United States mail:

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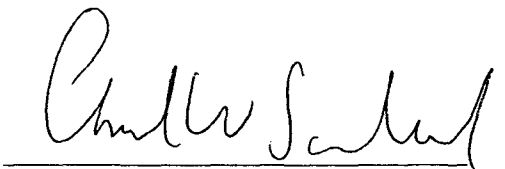

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