2011-3207

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 Merit Systems Protection Board in consolidated case nos. CH0752090925-R-1 and AT0752100184-R-1.

EN BANC BRIEF FOR RESPONDENTS RHONDA K. CONYERS and DEVON HAUGHTON NORTHOVER

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CERTIFICATE OF INTEREST FOR RHONDA K. CONYERS AND DEVON HAUGHTON NORTHOVER

Counsel for respondents Rhonda K. Conyers ("Conyers") and Devon Haughton Northover ("Northover") certifies the following:

1. The full name of every party or amicus represented by me is: Rhonda K. Conyers and Devon Haughton Northover.

2. The name of the real parties in interest (if the party named in the caption is not the real party in interest) represented by me is: None.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the parties or amicus curiae represented by me are: None.

4. The names of all law firms and partners or associates that appeared for the parties or amicus now represented by me in the trial court or are expected to appear before this court are:

   The undersigned principal attorney represented Conyers and Northover before the U.S. Merit Systems Protection Board ("Board") and is the principal attorney for each of them in this Court. American Federation of Government Employees ("AFGE") General Counsel

David A. Borer and AFGE Deputy General Counsel Joseph F. Henderson are on this brief on behalf of Conyers and Northover. Former AFGE General Counsel Mark D. Roth entered an appearance on behalf of respondent Northover before the Board.

Date: March 11, 2013

Respectfully submitted,

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STATEMENT OF RELATED CASES

This Court issued a published panel opinion in this case on August 17, 2012. *Berry v. Conyers*, 692 F.3d 1223 (Fed. Cir. 2012). That opinion was vacated when the Court agreed to rehear this case en banc. *Berry v. Conyers*, Case No. 2011-3207, 2013 WL 262509 (January 24, 2013).

No other case in or arising from the present actions has been before this or any other appellate court. Respondents Conyers and Northover are unaware of any related cases presently pending before this or any other court. However, respondents are aware of the following petitions for review that are pending before the MSPB and that involve the scope of the MSPB's review in similar non-security clearance cases: *Whitney v. Dep't of Defense*, 2011 WL 5901737, No. CH-0752-09-0248-I-5 (July 5, 2011); and *Brown v. Dep't of Defense*, 2011 WL 6393194, No. CH-0752-10-0294-I-2 (August 18, 2011). Respondents further believe that there are other related petitions for review pending before the Board.

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INTRODUCTION

It is undisputed that these are not security clearance cases. It is also undisputed that these cases do not involve access to classified information. This Court therefore correctly granted rehearing en banc to determine the exceptionally

important question of whether the Supreme Court's ruling in *Department of the Navy v. Egan*, 484 U.S. 518 (1988) ("*Egan*"), should be expanded to preclude the full scope of review by the U.S. Merit Systems Protection Board ("MSPB" or "Board") in these cases. Further, the Court should affirm the Board because *Egan* is confined to security clearance cases.

As explained before the panel, the individual respondents, Rhonda K. Conyers and Devon Haughton Northover, are persons who were employed as civilians by the Defense Finance and Accounting Service ("DFAS") and the Defense Commissary Agency ("DECA"), respectively. At no time were either Conyers or Northover required to have access to classified information. JA376.[1] At no time were either Conyers or Northover required to have a confidential, secret or top secret security clearance. *Id.*; *see also* Exec. Order 13,526 § 1.1, 75 Fed. Reg. 707, 707-08 (January 5, 2010) (describing information classification levels).

DFAS, moreover, did not designate the position held by Conyers as sensitive based on national security concerns. JA163-65 ("Position Sensitivity Designation Record"). Specifically, the Position Sensitivity Designation Record created and used by DFAS is a three-page form. The form contains boxes that may be checked off as to the sensitivity designation of the position in question, boxes that may be checked off as to whether the position accesses classified information, and

[1] JA refers to the Joint Appendix filed by the petitioner on February 27, 2012.

categories and boxes that may be checked off as to the reasons for the position's designation at a particular level of sensitivity.

DFAS designated the position held by Conyers as non-critical sensitive with no access to classified information. JA163. Although the form provides areas where national security may be checked as the basis for the position's designation, DFAS did not check those areas with respect to Conyers. Instead, DFAS used "IT-II" as the basis for its designation. JA165. Among the designation reasons specified within the IT-II category is "responsibility for accounting, disbursement, or authorization for disbursement from systems of dollar amounts less than $10 million per year." *Id.* The IT-II category does not reference national security. DFAS also left blank the seven areas on the designation record where it could have relied on national security as a basis for the designation. JA164-65. The position unequivocally did not have access to confidential, secret, top secret or sensitive compartmented information.

DECA originally designated the grocery store position held by Northover as non-sensitive but later changed that designation to non-critical sensitive. *Compare* JA1111, *with* JA944. Immediately prior to the Board's 2010 oral argument in these cases, however, DECA again reversed course. JA1411-12. DECA, at the eleventh hour, changed its eligibility determination and found Northover eligible to occupy his GS-7 Commissary Management Specialist position based, in its own

words, on two factors: 1) the instant pending litigation; and 2) Northover's lack of access to classified material. JA1412; *see also* JA1475 at lines 1-5. In so doing, DECA made the following specific affirmative finding:

> That while the Statement of Reasons (SOR) dated September 11, 2008 raised questions concerning Mr. Northover's potential trustworthiness, reliability and judgment as those concepts relate to the grant of access to classified material, no access to classified material is required or permitted in the position to which he is being reassigned [the position he held prior to his demotion].

JA1412.

Because *Egan* is confined to cases involving security clearance and access to classified information and because the Executive's authority as Commander in Chief does not, of its own accord, entitle the President to re-write an act of Congress, this Court should affirm the decisions of the Board in *Conyers v. Department of Defense*, 115 M.S.P.R. 572 (2010), ("*Conyers*") and *Northover v. Department of Defense*, 115 M.S.P.R. 451 (2010), ("*Northover*").

STATEMENT OF JURISDICTION

This Court granted the petition of the Director of the Office of Personnel Management pursuant to the collateral order doctrine on August 17, 2011. *Berry v. Conyers*, 435 Fed. Appx. 943, 2011 WL 3606639. Conyers and Northover respectfully submit, however, that review pursuant to the collateral order doctrine

was improvidently granted in the first instance and is perpetuated in error. Conyers also respectfully submits that the Director's petition is moot as to her and that this Court therefore lacks jurisdiction over the Director's petition in her MSPB appeal.

A. The Collateral Order Doctrine Does Not Support The Court's Jurisdiction Over This Case

As the individual respondents have previously argued, this case does not support application of the collateral order doctrine because the Director's right to seek review pursuant to 5 U.S.C. § 7703(d) is adequately protected by the Director's ability to petition for judicial review of a final decision in a subsequent appeal raising the same issue before the Board. *U.S. v. Mendoza*, 464 U.S. 154 (1984) ("*Mendoza*").

The court in *Mendoza* was asked to apply the doctrine of non-mutual offensive collateral estoppel to prevent the United States from litigating a constitutional issue that had been decided against the United States in an earlier lawsuit brought by an individual who was not a party to the *Mendoza* litigation. The government had not appealed the trial court's unfavorable decision in the earlier lawsuit. *Mendoza*, 464 U.S. at 155. The Supreme Court declined to apply collateral estoppel under those circumstances because it found that doing so "would thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue." *Id* at 160. Indeed, one of the

court's driving concerns was that applying collateral estoppel would force the government "to appeal every adverse decision in order to avoid foreclosing further review." *Id* at 161.

The high court's reasoning and the prudential considerations that it relied on in *Mendoza* apply with equal force here, as this Court reviews the Board much as the Supreme Court reviews a circuit court of appeals. There are also presently cases pending before the Board that raise the scope of review issue. Put another way, because non-mutual estoppel does not apply to the government, the Board's legal conclusion in *Conyers* and *Northover* would remain effectively reviewable in a subsequent petition involving a different appellant even if this matter were dismissed as interlocutory. *See Bingaman v. Dep't of the Treasury*, 127 F.3d 1431, 1439 (Fed. Cir. 1997) ("Although collateral estoppel can be applied in some instances when the parties to the two proceedings in question differ, it is available against the government only when the parties to the two proceedings are the same.").

The Director would thus not be barred from challenging the Board's holding in another petition before this Court. *Cf. Berry v. Hopper*, Misc. No. 13-145, 2013 WL 499856 (Fed. Cir., docketed February 8, 2013) (Recently filed petition by the Director seeking judicial review of legal question decided by MSPB in earlier, interlocutory order in *Aguzie v. Office of Personnel Management*, 116 M.S.P.R. 64

(2011)). Consequently, review pursuant to the collateral order doctrine was improvidently granted and the Director's petition should therefore be dismissed. *Cf. Lachance v. Joyce*, 232 F.3d 906 (Fed. Cir. 2000) (unpublished) (dismissing OPM petition for review of non-final remand order by MSPB).

The Director's assertion that delayed review would imperil a substantial public interest, moreover, rings more hollow now than it did at the time of his petitions' filing. It also still fails to recognize that agencies routinely disclose the reasons for their national security determinations when defending Board appeals that arise from a negative eligibility determination that does not involve a security clearance. *See* 5 C.F.R. § 1201.25 (2013) (detailing the required contents of an agency response to an employee appeal). In the instant matter and in the related *Whitney* and *Brown* cases pending before the Board, the agencies disclosed the reasons for their negative eligibility determinations to the Board as an initial part of the administrative appeal process. *See,* e.g., JA1065 (DeCA Personnel Suitability and Security Programs, submitted with Northover agency narrative response), JA121 ("*Conyers* Narrative Response"), JA945 ("*Northover* Narrative Response"). Indeed, the entire "DoD Personnel Security Program," DoD Directive 5200.2-R, is available on-line and has been so for years. *See*

http://www.dtic.mil/whs/directives/corres/pdf/520002r.pdf;

http://www.fas.org/irp/doddir/dod/5200_2_r.pdf;

http://www.dod.mil/dodgc/doha/5200.2-R.pdf . This directive includes the specific adjudicative guidelines applied by the Department of Defense for determining eligibility for access to classified information. *See* 5200.2-R, Appendix 8.

Further, in addition to the adjudicative criteria being publically available, DFAS disclosed before the Board the reasons for its decision to deny Conyers eligibility to occupy a sensitive position and its basis for designating her position as non-critical sensitive in the first instance. JA149-52 (denial of eligibility); JA163-65 (Position Sensitivity Designation Record). DECA disclosed much the same. *See* JA995 (denial of eligibility); *see also* JA989 (disclosing DECA's reasons for changing positions other than Northover's from non-critical sensitive to non-sensitive). Neither the Board's governing procedures, nor an agency's required disclosures in a Board appeal have changed as a result of the Board's determination that it may exercise its full scope of review in appeals that do not involve security clearances or access to the classified information. The Board's processes, and the attendant agency disclosures, remain, for all intents and purposes, the same.

Moreover, although they could have, none of the responding agencies moved to seal part or all of the record or for a protective order pertaining to the disclosure of any case-related information. The Director's assertion that delayed review would imperil a substantial public interest is therefore insufficient to justify

departing from the final judgment rule. Considering the extensive amount of information related to eligibility determinations that is readily available to the public, independent of any action by the Board, it is utterly unreasonable to conclude that delayed review, or for that matter Board review, imperils a substantial public interest. None of the processes or determinations in this case was ever cloaked in secrecy, which is unsurprising given that they do not involve classified information. Consequently, and for the reasons explained in respondents' answer to the Director's petition, Conyers and Northover respectfully maintain that the collateral order doctrine does not support the Court's jurisdiction over this matter. The Director's petition should therefore be dismissed.

B. This Case Is Moot As To Respondent Conyers

As suggested by Judge Dyk's panel dissent, this case is moot as to respondent Conyers and should therefore be dismissed as to her. *Berry v. Conyers*, 692 F.3d at 1238, n.1, (Fed Cir. 2012) (vacated). The Board's administrative judge dismissed with prejudice Conyers' appeal of her indefinite suspension on September 29, 2011. 2011 WL 6939837. The administrative judge dismissed the appeal as moot. Neither side petitioned for review. Likewise, neither side before this Court disputes that the resolution of this petition will have no discernible effect upon respondent Conyers. Brief for Petitioner, n. 12 at p. 20. Conyers, who initiated the Board appeal in her case, thus no longer has a legally cognizable

interest in the outcome of this case. *See City News and Novelty, Inc., v. Waukesha*, 531 U.S. 278, 283 (2001) ("*City News*") (matter may be moot when plaintiff no longer has cognizable interest in its outcome).

It is, more specifically, settled law that when "an appealable action is canceled or rescinded by an agency, any appeal from that action becomes moot." *Cooper v. Dep't of the Navy*, 108 F.3d 324, 326 (1997). The Board has thus held that:

> [t]he Board's jurisdiction is determined by the nature of an agency's action against a particular appellant at the time an appeal is filed with the Board, and an agency's unilateral modification of its action after an appeal has been filed cannot divest the Board of jurisdiction unless the appellant consents to such divestiture, or unless the agency completely rescinds the action being appealed. *Vidal v. Department of Justice,* 113 M.S.P.R. 254, ¶ 4 (2010). When an agency cancels or rescinds an action after the action has been appealed, the Board may dismiss the appeal as moot. *Id.* For an appeal to be rendered moot, an appellant must receive all of the relief that he could have received if the matter had been adjudicated and he had prevailed. *Id.*

Green v. Department of the Air Force, 114 M.S.P.R. 340, 342-43 (2010).

Here, DFAS rescinded its indefinite suspension of Conyers, removed all evidence of the indefinite suspension from her personnel file, paid her all of the back pay to which she was entitled, and moved to dismiss her appeal on no less than two occasions. JA378-80 (DFAS Motion to Dismiss); *Conyers v. Dep't of Defense*, 2011 WL 6939837 (2011) (final decision of the administrative judge).

DFAS did this, moreover, over the objection of Conyers. Conyers did not consent to dismissal by the administrative judge and, in fact, contested the amount of back pay that she was owed by DFAS. 2011 WL 6939837. Nevertheless, DFAS provided Conyers with "all of the relief that [s]he could have received if the matter had been adjudicated and [s]he had prevailed." *Green*, 114 M.S.P.R. at 343.

Consequently, and notwithstanding this Court's decision in *Horner v. Merit Sys. Protection Board*, 815 F.2d 668 (Fed. Cir. 1987) ("*Horner*"), this case is moot as to Conyers and should be dismissed.[2] Unlike in *Horner*, a favorable decision by the Court in this case will not render the action against Conyers a nullity. *Horner*, 815 F.2d at 671.

Dismissal is also particularly appropriate in this case because it was not Conyers who sought to moot her appeal, nor is it Conyers who seeks review by this Court. Instead, it was the government that successfully sought to moot her appeal.

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[2] Respondents note also that, in addition to DECA rescinding respondent Northover's demotion and granting him eligibility to occupy a sensitive position, the sole remaining claim in Northover's appeal is a claim of discrimination based on race and gender that he has not waived. This makes his appeal a "mixed case" pursuant to 5 U.S.C. § 7702(a). As such, this Court's review may implicate the Supreme Court's decision in *Kloeckner v. Solis* that judicial review of mixed cases must proceed in district court. 133 S.Ct. 596, 604 (2012). That is, even if *Kloeckner* does not affect this Court's jurisdiction over a petition filed by the Director in a mixed case, it shows, in conjunction with the deficiencies in the Director's collateral order argument, that this case is not an appropriate candidate for the Court to exercise its discretion and review the Director's petition. Regardless of the outcome in this Court, Northover will retain his right to seek judicial review of a final decision of the Board pursuant to 5 U.S.C. § 7703(b)(2).

The government should not be permitted to moot an appeal on the one hand and to simultaneously seek review on the other. *City News*, 531 U.S. at 284 (mootness dismissal appropriate when it does not "reward an arguable manipulation" of the court's jurisdiction).

STATEMENT OF THE ISSUES

Conyers and Northover submitted the following issue to the panel: whether the narrow limiting rule of *Egan* should be expanded to cover the Board's statutory review of adverse action appeals arising from a federal civilian employee's loss of eligibility to occupy a sensitive position that does not require a security clearance or access to classified information.

The Court raised the following issues when it granted rehearing en banc:

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?

STATEMENT OF THE CASE

The Director of the Office of Personnel Management seeks reversal of the decisions of the MSPB in *Conyers v. Department of Defense*, 115 M.S.P.R. 572 (2010), and *Northover v. Department of Defense*, 115 M.S.P.R. 451 (2010).

This Court granted review of the Director's petition in *Berry v. Conyers*, 435 Fed. Appx. 943, 2011 WL 3606639 (2011). A panel of this Court then reversed the MSPB in *Berry v. Conyers*, 692 F.3d 1223 (2012). Respondents petitioned for rehearing en banc, which this Court granted in *Berry v. Conyers*, Case No. 2011-3207, 2013 WL 262509 (January 24, 2013).

STATEMENT OF THE FACTS

A. Conyers and Northover

Conyers and Northover were not newly hired federal employees. Conyers worked for DFAS as a General Schedule ("GS") pay grade 5 Accounting Technician. JA378. Under the present GS grade 5 pay table applicable to Conyers's former work location, a GS 5 earns anywhere from approximately $32,000/yr. to approximately $42,000/yr. *See* OPM 2012 GS pay table for Columbus, OH, locality pay area *available at* http://www.opm.gov/oca/12tables/pdf/COL.pdf.

Conyers had a federal service computation date of September 3, 1985. JA136. In 2007, however, DFAS tentatively determined to deny her eligibility to occupy a sensitive position. JA143. Conyers continued to work for DFAS despite this tentative determination until 2009 when DFAS indefinitely suspended her from service after she was denied eligibility to occupy a non-critical sensitive position based on financial considerations and personal conduct.[3] JA138-39 (Notice of Decision to Indefinitely Suspend). At the time of her indefinite suspension, she had worked for the federal government for more than 20 years.

[3] DFAS later removed Conyers from federal service. That removal action is not before the Court.

Conyers was denied eligibility to occupy her non-critical sensitive position based on financial considerations involving overdue debt in an amount totaling, approximately, $10,000.00. Part of that debt had been previously charged off by her creditors, thereby cancelling it. JA149-51 (Letter of Denial). Certain of her delinquent debts were also for utilities, such as gas. JA150-51. The debts arose, in part, as a result of her separation, and later divorce, from her husband. JA154.

The non-critical sensitive position that Conyers was suspended from was the same accounting technician position that she had occupied for years. Although initially designated as non-sensitive, DFAS re-designated the position as non-critical sensitive based on the position's accounting duties. JA165.

Similarly, Northover worked for DECA as a GS grade 7 Commissary Management Specialist. Under the present GS grade 7 pay table applicable to Northover's work location, a GS 7 earns anywhere from approximately $39,000/yr. to approximately $50,000/yr. *See* OPM 2012 GS pay table for the Rest of U.S. locality pay area *available at* http://www.opm.gov/oca/12tables/pdf/RUS.pdf. Northover has a federal service computation date of September 8, 2002.[4] JA964. As a GS 7 Commissary Management Specialist, Northover worked for DECA at a commissary store where he performed inventory control and stock management

[4] Northover remains employed by DECA, although he is presently earning a higher salary as the result of a final agency decision issued in a discrimination complaint unrelated to this case. JA1765-66.

duties. JA1016-21 (Position Description). Thus, in 2009, DECA demoted Northover to a GS-4 part-time store associate position after he was denied eligibility to occupy a non-critical sensitive position. JA970. He was denied eligibility to occupy his non-critical sensitive GS 7 position after he did not respond to a tentative determination to deny him eligibility and was denied an extension of time to provide a response. JA995. He had sought an extension of time to respond to the tentative decision to deny him eligibility because of his need to care for his terminally ill father and to attend his brother's funeral. *Id.*

B. The Board

The Board began its analysis by looking to its own statutory jurisdiction under the CSRA and found that these cases fall squarely within that statutory jurisdiction. JA46; *see also* 5 U.S.C. §§ 1204, 7512, 7513, 7701 (2006).[5] These cases arise from an indefinite suspension lasting more than 14 days and a demotion in grade, both of which are adverse actions appealable to the Board. 5 U.S.C. §§ 7512(2) (indefinite suspension), 7512(3) (reduction in grade). The Board next reviewed whether the express rule of *Egan* limited the Board's scope of review in these cases. Because these cases do not concern security clearance determinations or potential access to classified information, the Board recognized that they are

[5] The *Conyers* and *Northover* decisions are functionally identical. In the interest of consistency, this brief cites to the *Northover* decision unless otherwise specified.

not, in fact, on all fours with *Egan* and thus found that the holding of *Egan* could not diminish the Board's review of the merits. JA48.

This left the Board to determine whether the underlying reasoning of *Egan*, as separate from its holding, was so broad as to warrant its application to the Board's scope of review in these cases. The Board supported its conclusion that *Egan*'s rationale should not apply by first turning to the plain language of *Egan* itself. JA49 ("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."). The Board then went on to note that "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." JA51 (citing *Jacobs v. Dep't of the Army*, 62 M.S.P.R. 688 (1994) ("*Jacobs*")).

The Board discussed *Jacobs* and a similar case, *Adams v. Dep't of the Army*, at length. JA52-53, (citing *Adams v. Dep't of the Army*, 105 M.S.P.R. 50 (2007), *aff'd*, 273 Fed. Appx. 947 (Fed. Cir. 2008) ("*Adams*")). The appellant in *Jacobs* was an army security guard who had been disqualified from the agency's Chemical Personnel Reliability Program. The appellant in *Adams* was a human resources assistant who the Army had removed for loss of access to a sensitive computer

system. In discussing *Jacobs* and *Adams* (where the agency had argued that *Egan* applied), the Board specifically addressed the agencies' concerns that the Board would be inexpert in analyzing an agency's predictive judgment regarding an employee's future behavior. It reiterated that the Board routinely reviews such predictive judgments as part of its statutory mandate to review agency penalty determinations, and it viewed this fact as further evidence that full Board review here is in no way incompatible with *Egan* or its rationale. JA52.

The Board concluded by identifying, *inter alia*, three additional factors that support applying the Board's usual statutorily mandated scope of review in these cases: 1) the text of the CSRA, in particular the existence of 5 U.S.C. § 7532; 2) the fact that OPM has not interpreted its own Part 732 regulations as affecting the Board's scope of review; and 3) the fact that "[a]pplying 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." JA60.

With regard to section 7532, the Board saw section 7532 as important not because it is directly at issue in these appeals, but because its very presence in the CSRA demonstrates that Congress spoke on the question of removals and suspensions for national security reasons. As the Board put it in reference to the act that was the predecessor of section 7532:

> 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, 108 S.Ct. 668, 98 L.Ed.2d 830 (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.

JA54, n.15. Based on all of the above, the Board held that *Egan* did not restrict its scope of review in adverse action appeals arising from eligibility determinations when the position at issue did not require a security clearance or access to classified information. JA48.

SUMMARY OF ARGUMENT

The Supreme Court's decision in *Egan* is confined to security clearance determinations. *Egan* is a narrow ruling that carved out a specific, limited exception to the scope of the Board's review authority under Chapters 75 and 77 of Title 5 of the United States Code, both of which reside in the Civil Service Reform Act of 1978 ("CSRA"), 5 U.S.C. § 1101, et seq. *Id.* at 527. *Egan*, like its predecessors and its progeny, was premised on the desire to protect classified information. *Id.* at 529 (". . . 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."), *citing CIA v. Sims*, 471 U.S. 159, 170 (1985); *see also Robinson v. Dep't of Homeland Sec.*, 498 F.3d 1361, 1364-65 (Fed. Cir. 2007) ("The opportunity a government employee may have for **access to top secret or other classified information** is not subject to due process procedural protections but rather is subject to the applicable statutes and regulations for issuing and revoking such clearances."). (emphasis added).

Egan did not extend its reach beyond security clearance cases to ordinary adverse action appeals, such as these, where security clearances or access to classified information are lacking. The assertions of the Director and the panel majority to the contrary are incorrect. The Supreme Court repeatedly made it clear in *Egan* that access to classified information was the primary consideration in limiting the Board's power to review the merits of an agency's decision to deny or revoke a security clearance. *Egan* at 527-29. The court was concerned with striking the right balance among the Executive's power as Commander in Chief, Congress's role as the legislative branch of the Government, and the Judiciary's duty to interpret the law. The court recognized a need for the Commander in Chief to wield more authority with regard to the preservation of national secrets, i.e. classified information, and so drew its line there in order to respect the separation of powers, while still maintaining a functional system of checks and balances.

The concerns that drove *Egan*, moreover, are simply not presented here. The rule adopted by the Board, by definition, only applies to cases that do not involve security clearances or access to classified material. The Board's recognition of the limited extent of *Egan*'s holding thus does not provide a basis for this Court to, in essence, legislate a change to the CSRA by further narrowing the scope of the Board's scope of review. This is so even if the Court might view such a narrowing of the Board's review as a preferred or ideal outcome.

Respondents' argument in this regard has not changed. The Supreme Court had to reconcile its decision to limit the Board's scope of review with the plain language of the CSRA that grants the Board the power to hear appeals of adverse actions, with all other exceptions to the Board's review specifically embedded in statutory text. The Court did so by tying its newly crafted exception to the protection of classified information.

The Board therefore correctly read *Egan* and correctly recognized that the President's authority over national security must coexist with the Congressional choice to grant tenured federal employees adverse action appeal rights and to charge the Board with meaningful review of those appeals. *See* 5 U.S.C. §§ 1204(a), 7513(d), and 7701 (2006).

The Executive branch and its agencies should not be allowed to evade the review statutorily-mandated by 5 U.S.C. § 7513, and thereby shield arbitrary or invidious decision-making, through the naked assertion of national security. This is especially true given that 5 U.S.C. § 7532 already gives agencies this power. *Cf. Cole v. Young*, 351 U.S. 536, 547 (1956) ("*Cole*") ("Moreover, if Congress intended the term to have such a broad meaning that all positions in the Government could be said to be affected with the 'national security,' the result would be that the 1950 Act, though in form but an exception to the general personnel laws, could be utilized effectively to supersede those laws."); *see also*

Exec. Order 13,526 § 1.7, 75 Fed. Reg. at 710, (specifying that information may not be classified to prevent embarrassment or to conceal violations of law, inefficiency, or administrative error). Consequently, this Court should affirm the Board. The crux of *Egan* was that deference to the Executive warranted deviating from the text of CSRA when the protection of classified information was at issue. Here, there is no classified information to protect. [6]

Further in this vein, the Executive's power as Commander in Chief is not limitless. As the Board correctly noted, Congress and the Judiciary both play active roles in national security matters – as Congress did here when it gave the Board the power to adjudicate adverse action appeals at the same time that it enacted 5 U.S.C. § 7532. The rule advanced by the Director would grossly expand the Executive's ability to evade, at a word, the merits review of cases with no connection to classified information. It would give the Executive, in other words,

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[6] To be clear, respondents have never argued that sensitive positions necessarily entail access to classified information. Conyers and Northover, in fact, argue quite the opposite. It is because occupancy of sensitive position does not necessarily entail access to classified information that this Court cannot rely on *Egan*'s implied assumption that they did simply because that was the case in *Egan*. As the Board explained, it is because the courts in *Egan* and *Cole* based their holdings, in part, on the presumption that sensitive positions went hand-in-hand with access to classified information (a presumption that unequivocally cannot be made here), the Board could not rely on the "sensitive" label alone when ascertaining its review powers. JA54-55; *see also* JA49 ("Nothing in *Egan* indicates that the Court considered the NCS [i.e. sensitive] designation **alone** as sufficient to preclude Board review of the merits of the determination underlying Mr. Egan's removal.") (emphasis added).

the unreviewable power to essentially rewrite the CSRA in order to constrict the Board's scope of review and diminish the adverse action appeal rights expressly granted to federal civilian employees.

Such a rule is not compatible with a functional system of checks and balances or the plain language and legislative intent of the CSRA. The CSRA is the controlling act of Congress in this case. Congressional action thus demonstrates that the Board interpreted the CSRA correctly. More specifically, the fact that Congress passed and later repealed legislation, the National Security Personnel System ("NSPS"), that would have given the Department of Defense the same broad insulation from review that the government seeks here shows that the Board correctly determined the scope of its review. *See Berry v. Conyers*, 692 F.3d at 1244-45 (2012) (Dyk, J., dissenting) (vacated).

If, as the government contends, *Egan*, which was decided in 1988, limits the Board's review in non-security clearance cases, the decision of Congress to memorialize that same limitation in a subsequent act, in 2003, makes no sense. The more reasonable view is that Congress did not see *Egan* as precluding review and therefore chose to change *Egan*'s reach by an affirmative act. By repealing the NSPS legislation, Congress therefore returned the Board's scope of review to its earlier, post-*Egan* state, which has always required the full scope of Board review in these cases.

Further, Congressional inaction following the Board's decisions in *Jacobs* and *Adams*, in conjunction with the repeal of NSPS, demonstrates that Congress intended to preserve full MSPB review of adverse action appeals that do not involve intelligence agencies or security clearances. If the Board's decision in *Jacobs*, for example, had offended Congress, it could have acted to reverse it. But Congress did not reverse *Jacobs* through legislative action.

This Court, moreover, should not be guided by whether there are differences between the relevant processes and criteria associated 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. Agencies control their own internal processes for granting eligibility to occupy a sensitive position, as well as for making security clearance determinations. These internal processes thus allow agencies to create a self-serving apparatus that does not bear on the Board's scope of review.

Finally, this Court should affirm the MSPB because the MSPB would not encounter problems in adjudicating appeals from employees holding sensitive positions that do not require a security clearance, and because the Board already gives agency determinations a high level of deference. The Board routinely handles cases involving sensitive matters and routinely defers to agency decision-making. The Board is thus well-prepared to adjudicate appeals such as those filed

by Conyers and Northover. Consequently, the Court should affirm the decisions of the Board.

ARGUMENT

I. THIS COURT SHOULD AFFIRM CONYERS AND NORTHOVER BECAUSE THE SUPREME COURT'S RULING IN *DEPARTMENT OF THE NAVY V. EGAN* IS CONFINED TO DETERMINATIONS THAT AN EMPLOYEE IS INELIGIBLE TO HOLD A SECURITY CLEARANCE OR ACCESS CLASSIFIED INFORMATION

A. *Egan's* Holding is Confined to Security Clearance Cases

The Supreme Court's ruling in *Egan* is, on its face, limited to cases that involve determinations on security clearances or access to classified information. Specifically, and as respondents have argued throughout this litigation, the *Egan* court began its opinion by explaining that "[t]he narrow question presented by this case [*Egan*] is whether the Merit Systems Protection Board (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). In other words, from its very inception the Supreme Court's opinion did not reach beyond security clearance cases.

That this is undoubtedly the case is also borne out by the fact that the Supreme Court's holding in *Egan* is simply that the CSRA "by its terms does not confer broad authority on the Board **to review a security-clearance determination**." *Id.* at 531 (emphasis added). The Supreme Court's framing of

the issue and its narrow holding act, in tandem, as bookends upon its entire opinion; they set its outer boundaries. Those boundaries do not reach cases such as these where neither a security clearance nor access to classified information is involved. The government stipulated that neither Conyers nor Northover was required to possess a security clearance or have access to classified information. JA376.

Moreover, that the Supreme Court may not have used the term "security clearance" every time that it could have does not alter the gravamen of the court's opinion. Read as a whole, the court's ruling in *Egan* is confined to determinations that an employee is ineligible to hold a security clearances or access classified information. For example, the underlying dispute in *Egan* began with the Department of the Navy denying Thomas Egan a security clearance. *Egan*, 484 U.S. at 522. Given that the very genesis of the case was rooted in the denial of a security clearance, the argument that the Supreme Court's opinion could somehow grow beyond the parameters of the dispute before it is not tenable.

Similarly, although the court refers to "national security information" during its discussion of the President's power as Commander in Chief, that reference is defined in the text when the court finds that the "grant of **security clearance**" is committed to the Executive, in part because the President's role as Commander in Chief gives him the authority to "**classify** and control access" to

national security information. *Id* at 527(emphasis added). Putting the court's reasoning together, it thus nearly goes without saying that what the court was doing was merely finding another way to express its main proposition the Board could not review the merits of agency determinations involving security clearances and access to classified information. *See Egan*, 484 U.S. at 529 ("Predictive judgment of this kind must be made by those with the necessary expertise in protecting **classified information**.") (emphasis added).

In other words, when the court used the phrase "national security information" in *Egan*, it was using that phrase as a synonym for classified information. Respondents, thus, do not conflate "national security information" with "classified information." Respondents merely read them in the context which they were written. This, in turn, further demonstrates that *Egan* is confined to security clearance matters.

B. *Egan's* Reasoning is Confined to Security Clearance Cases

Egan premised its limitation of the Board's scope of review on the indivisible tie between possession of a security clearance and potential access to classified information. The Supreme Court's decision is indeed filled beyond the brim with evidence of the Court's overriding focus on access to classified information. *See Egan*, 484 U.S. at 529. At every step, *Egan* wrapped itself with concerns over the classification and control of information, the granting and

revoking of security clearances, and the protection of classified information. *See* Exec. Order 13,526, 75 Fed. Reg. at 727 (defining "classification" as the act or process by which information is determined to be classified information). As discussed above, the mere fact that the Court did not use the phrase "classified information" at every turn does not change the import of the Court's decision.

The *Egan* Court's focus on classified information is so prevalent that if the court had meant for its holding to carry the broader impact that the Director seeks, it is reasonable to conclude that the court would have chosen starkly different language. If the court had intended its decision to have a broader application, the court could have, for example, simply said that: the Board may not review any determination by an agency that relates to national security. It did not do so. Instead, the *Egan* Court deliberately limited itself to answering the narrow question of the Board's scope of review in security clearance cases. 484 U.S. at 520.

Regardless of how or where Egan accessed classified information, he accessed it. It was that access combined with his loss of a security clearance that precipitated the *Egan* court's decision. *Egan* should, moreover, not be read in a way that countenances the protection of information already in the public domain as a reason for defying the CSRA. If, for example, certain information (in document form or otherwise) poses an identifiable and serious risk to the national security, that information will more likely than not be classified and therefore

accessible only through possession of a security clearance. This in turn argues in favor of affirming the Board and against expanding *Egan* because it underscores that the distinction between an agency determination that an employee is ineligible to occupy a sensitive position and an agency determination denying or revoking a security clearance is a distinction with a difference.

It lastly bears repeating that the Board's decisions do not prevent the Executive from taking an adverse action against an employee for eligibility reasons. *Conyers* and *Northover* do not prevent an agency from demoting, removing, suspending or reassigning an employee based on his loss of eligibility to occupy a sensitive position. They also do not prevent an agency from removing an employee based on a finding that the employee is unsuitable for federal employment.

Conyers and *Northover* do not, in the end, prevent an agency from taking any legally permissible adverse action against an employee. And this, of course, includes using the summary procedures provided to the Executive by 5 U.S.C. § 7532 for adverse actions necessary in the interest of national security. The Board's decisions are thus not as broad as the Director contends. *Egan's* rationale does not, therefore, support the expansion of its holding to these cases. Consequently, this Court should affirm the Board.

II. THIS COURT SHOULD AFFIRM THE MSPB BECAUSE FULL MSPB REVIEW OF ADVERSE ACTIONS THAT DO NOT INVOLVE SECURITY CLEARANCES OR ACCESS TO CLASSIFIED INFORMATION PRESERVES THE CONSITUTIONAL SYSTEM OF CHECKS AND BALANCES

The balance struck by *Egan* should not be disturbed by this Court. To do so would extend the power of the Executive branch too far into an act of the Legislative branch without any Congressional imprimatur. The Executive's authority as Commander in Chief is not absolute. *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 645-46 (1952) (Jackson, J., concurring) (The President's "command power is not such an absolute as might be implied from that office in a militaristic system but is subject to limitations consistent with a constitutional Republic whose law and policy-making branch is a representative Congress."). This is so even when the Executive is operating at the apex of his military role, such as during a time of armed conflict (something he does not do here). *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) ("We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens. Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.") (internal citation omitted), *citing Youngstown* and *Mistretta v. United States*, 488 U.S. 361 (1989).

Nor does the existence of a connection between national security and an Executive action, including one taken pursuant to an executive order, in and of itself dissipate the force of the constitution's system of checks and balances. *See Boumediene v. Bush*, 553 U.S. 723, 797 (2008) ("Security subsists, too, in fidelity to freedom's first principles."). The force of our system of checks and balances is indeed amplified when, as here, the Executive seeks to assert his power as Commander in Chief over internal government affairs in the face of preexisting Congressional action. *See Youngstown*, 343 U.S. at 644, (Jackson, J., concurring) ("That military powers of the Commander-in-Chief were not to supersede representative government of internal affairs seems obvious from the Constitution and from elementary American history."); *see also* U.S. Const. art. I, § 8 (Giving Congress the power to "provide for the common Defence" and "[t]o make Rules for the Government and Regulation of the land and naval forces[.]").

There is therefore no constitutional infirmity *per se* when one branch acts within what may be construed as the province of another. As applied here, and as the Board acknowledged, it cannot be said that the President may deprive either the Congress or the Judiciary of all freedom of action merely by invoking national security. Thus, where Congress has spoken and the President nevertheless seeks to use his own constitutional power in a manner incompatible with either the express

or implied will of Congress, his power is at its "lowest ebb." *Youngstown*, 343 U.S. at 638.

The Board should also be affirmed because its decisions continue a functional system of checks and balances by acting as a safeguard against the arbitrary exercise of Executive power. *See Youngstown*, 343 U.S. at 629 (Douglas, J., concurring) ("The doctrine of the separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power."). DECA's conduct in *Northover* shows the need for this safeguard to great effect. DECA changed the sensitivity designation of the position held by Northover more than once, without providing a consistent rationale. On top of this, DECA admitted changing Northover's eligibility status based on this litigation. JA1412. Such a truly arbitrary and capricious reason as pending litigation is far removed from the national security calculation that *Egan* saw as deserving of judicial deference. Likewise, DFAS's conduct in designating Conyers's position as sensitive for reasons other than national security again demonstrates why the Board reasoned wisely when it determined that *Egan* did not restrict its scope of review in these cases. JA165.

It would make no sense to preclude the merits review of adverse actions pertaining to an entire agency's worth of employees on national security grounds when that agency itself has designated positions as sensitive for non-national

security reasons. And this is especially so where Congress, as shown below, specifically exempted certain components of that agency from Board review. *See* 5 U.S.C. § 7511(b)(8) (insulating intelligence components of the Department of Defense from Board review). This Court should therefore affirm the Board.

III. CONGRESSIONAL ACTION DEMONSTRATES THAT CONGRESS INTENDED TO PRESERVE MSPB REVIEW OF ADVERSE ACTIONS THAT DO NOT INVOLVE INTELLIGENCE AGENCIES OR SECURITY CLEARANCES

A. The Plain Language and Legislative History of the CSRA Support Full MSPB Review of Adverse Action Appeals that Do Not Involve Intelligence Agencies, Security Clearances or Eligibility for Access to Classified Information

We begin at the outset with the text, structure and purpose of the CSRA. *See Elgin v. Dep't of Transportation*, 132 S.Ct. 2126, 2133 (2012). Congress passed the CSRA to create a comprehensive statutory scheme governing the conditions of federal civilian employment. *See*, e.g., *U.S. v. Fausto*, 484 U.S. 439, 455 (1988); *Karahalios v. National Federation of Federal Employees*, 489 U.S. 527, 531 (1989); *Bush v. Lucas*, 462 U.S. 367 (1983).

Congress did this in order to ensure a merit-based hiring system that protects employees from arbitrary agency action. 692 F.3d 1223 (Dyk, J., dissenting) (vacated), *citing* S. Rep. No. 95-969, *reprinted in* 1978 U.S.C.C.A.N. 2723, 2741; *see also* S. Rep. No. 95-969, *reprinted in* 1978 U.S.C.C.A.N. at 2724-25 ("Both the public and those in government have a right to the most effective possible civil

service; that is, one in which employees are hired and removed on the basis of merit and one which is accountable to the public through its elected leaders.").

To further this purpose, Congress established the Board, made it the guardian of merit systems principles, and granted it the power to hear and adjudicate all matters within its jurisdiction. *See* 5 U.S.C. § 1204(a)(1); S. Rep. No. 95-969, *reprinted in* 1978 U.S.C.C.A.N. at 2746 ("The Merit Systems Protection Board is charged with protecting the merit system. It will act in most respects as a quasi-judicial body, empowered to determine when abuses or violations of law have occurred, and to order corrective action.").

At the same time Congress specifically excluded certain employees from the coverage of the act. *See* 5 U.S.C. § 7511(b) (excluding from CSRA coverage, *inter alia*, employees of the Foreign Service, the CIA, the GAO, the FBI, an intelligence component of the Department of Defense, and an intelligence component of a military department). The excluded employees include intelligence components of the Department of Defense as well as employees of other agencies, all of which have some obvious relationship to national security.

With respect to adverse action appeals like those filed by Conyers and Northover, however, Congress placed them within the Board's jurisdiction. Congress guaranteed employees who file such appeals "a hearing for which a transcript will be kept" that will be "processed in accordance with regulations

prescribed by the Board." 5 U.S.C. §§ 7513(d), 7701(a)(2). This right to a hearing has, without contradiction, been interpreted as the right to a meaningful hearing. *See Frampton v. Dep't of the Interior*, 811 F.2d 1486, 1489 (Fed. Cir. 1987) ("A fair hearing for employees who appeal to the MSPB from agency decisions is the basic cornerstone of employee rights."); *see also Morgan v. United States*, 304 U.S. 1, 18 (1938) ("The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them."); and *Adams*, 105 M.S.P.R. at 54-55.

On top of the Board powers and employee rights established by the CSRA, Congress also established a specific, separate procedure for national security-based suspensions and removals. 5 U.S.C. § 7532. Congress, moreover, made the deliberate policy determination to remove from the Board's jurisdiction actions taken pursuant to that specific, separate procedure for national security-based suspensions and removals. 5 U.S.C. § 7512(A).

So, to summarize, the CSRA: 1) overhauled the federal civil service in order to protect against arbitrary government action; 2) deliberately gave some federal employees, but not others, adverse action appeal rights; 3) created the Board for the express purpose of protecting the merit system; and 4) specifically granted the Board the power to hear and adjudicate appeals filed by those employees with

adverse action appeal rights, subject to a single express exception for suspensions and removals "necessary in the interests of national security." 5 U.S.C. § 7532.

And it is against this backdrop that the Director implores this Court to create a new exception from the full scope of Board review; an exception that Congress did not see fit to include in the CSRA, despite the fact that when Congress passed the CSRA it plainly went to great pains to outline the particular powers, rights and procedures to be used for adverse action appeals before the Board. The Director supports his argument by reliance on *Egan*, even though the Supreme Court created a narrow exception in *Egan* under highly proscribed circumstances that are not present here. The Director's reliance is misplaced and this Court should therefore decline the Director's invitation. The language and intent of Congress in the CSRA do not allow the Executive to create such exceptions from Board review as it deems desirable, any more than *Egan* does in the absence of a security clearance or access to classified information.

Put another way, by including sections 1204, 7511, 7512, 7513, 7532, and 7701 together in a single statute, Congress plainly evidenced its intent to make merits review by the Board the norm, with the narrower provisions of section 7532 being the exception. To read the CSRA otherwise makes no sense. It would be illogical for Congress to create an unreviewable exception (section 7532) to the

rule (sections 1204, 7513 and 7701) if it did not understand the rule itself as providing for the meaningful review of adverse actions by the Board.

By establishing, moreover, a separate procedure for national security-based suspensions and removals, and by expressly exempting that procedure from Board review, Congress spoke directly to the issue of the Board' scope of review in appeals that implicate national security. Congress affirmatively granted an agency head expansive room to act swiftly and without external review whenever he "considers that action necessary in the interests of national security." 5 U.S.C. § 7532(a). It would be illogical for Congress to speak so clearly and comprehensively, but somehow neglect to mention a major exception from Board review – one, no less, that the government argued for in litigation subsequent to the CSRA. *See Jacobs*; *see also Berry v. Conyers*, 692 F.3d at 1242, (Dyk, J., dissenting), *citing United States v. Brockamp*, 519 U.S. 347 (1997) (explicit exceptions show Congressional intent not to allow the creation of unmentioned exceptions by the judiciary).

The Board's conclusion that it saw no evidence of Congressional intent to allow the Executive to unilaterally expand *Egan's* reach is therefore well-supported. JA54-55, n.15. The Board read its own enabling statute correctly when it determined that *Egan* should not apply to these cases. If the Board had expanded *Egan* beyond its narrow holding, the Board would have subverted the

will of Congress by reading section 7532 out of the CSRA, a result eschewed by all canons of statutory construction. *See Marbury v. Madison*, 1 Cranch 137, 174 (1803) (Courts should not read a statute so as to deprive a provision of meaning); *accord Weddel v. Sec'y of Dep't of Health and Human Servs.*, 23 F.3d 388, 393 (Fed. Cir. 1994).

In the end, it is so unlikely as to defy belief that the Supreme Court intended *Egan's* holding to be applied in such a sweeping manner. Congress included section 7532 in the CSRA as a special mechanism for handling national security suspensions or removals. *Egan* recognized this, which is why *Egan* cast its holding narrowly and limited itself to the protection of classified information. The Court found that the Executive should enjoy a higher degree of authority when protecting classified information. But the Executive cannot enjoy the same degree of authority here because there is, by definition, no classified information to protect in cases that do not concern security clearance determinations.

Consequently, the text, structure and purpose of the CSRA all demonstrate that Congress intended to preserve MSPB review of adverse actions that do not involve intelligence agencies or security clearances. This Court should therefore affirm the Board.

B. Post-*Egan* Congressional Action and Inaction Demonstrates that Congress Intended to Preserve MSPB Review of Adverse Actions that Do Not Involve Intelligence Agencies or Security Clearances

The Congressional decision to at first allow the Secretary of Defense discretion to exclude employees in national security positions, i.e. sensitive positions, from Board review via NSPS, and to then repeal that discretion by a subsequent Congressional act, shows: 1) that Congress knows how to craft an exception for sensitive positions or to expressly delegate the authority to do so; and 2) that Congress determined not to do so for sensitive positions without security clearances or access to classified information. The Board's argument to the panel and the discussion by Judge Dyk in his panel dissent is thus well-taken, and Conyers and Northover join it. *Berry v. Conyers*, 692 F.3d at 1243-44 (Dyk, J., dissenting). That Congress granted the Department of Defense the precise power that it seeks here but then took that power away shows, without question, that Congress did not intend to expand *Egan's* narrow rule.

In addition to the proverbial elephant in the room of NSPS, the lack of Congressional action in the wake of the Board's decisions in *Jacobs*, 62 M.S.P.R. 688 (1994), and *Adams v. Dep't of the Army*, 105 M.S.P.R. 50 (2007), *aff'd*, 273 Fed. Appx. 947 (Fed. Cir. 2008) (unpublished), further demonstrates that Congress intended to preserve MSPB review in appeals that do not involve intelligence agencies or security clearances.

In *Jacobs*, for example, the Department of the Army removed Jacobs based on his disqualification from the agency's Chemical Surety Program ("CPRP"), a program designed to ensure the safety and security of American chemical weapons. *Jacobs*, 62 M.S.P.R. at 690-90. The army argued to the Board's administrative judge that, based on *Egan*, the Board's scope of review was limited to determining:

> (1) Whether qualification under the CPRP was required for the appellant to remain in his position; (2) whether the appellant was disqualified from the CPRP; and (3) whether the appellant was afforded minimum due process by the agency's decision to disqualify him from the CPRP.

Id. at 690. The army argued, specifically, that removal for "disqualification from the CPRP was akin to a removal based on the loss of a security clearance and that the Board's authority to review the appeal thus was limited by the Supreme Court's decision in" *Egan*. *Id.*

The Board rejected the army's argument by explaining that:

> The role of protecting the 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 then removed any ambiguity from its decision by concluding that:

> 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 (emphasis added).

It is difficult to conceive, based on the foregoing, of how the Board could have made a clearer pronouncement of *Egan*'s limitation than it did in 1994. Yet, Congress took no action despite the clarity of the Board's published and precedential decision in *Jacobs*.

The Board's published and precedential 2007 decision in *Adams*, affirmed without opinion by this Court, is similarly instructive. Again, the army argued that *Egan* limited the scope of the Board's review over its decision to suspend the appellant's computer access. The Board observed, however, that:

> 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.

105 M.S.P.R. at 55. Consequently, the Board declined to apply *Egan*. It nonetheless upheld the appellant's removal, in part because the army "presented

ample evidence that its computer system contains sensitive information, and that access to this information therefore must be limited to those who have demonstrated integrity and responsibility." *Id.* at 57.

Congress did not respond to *Adams* either. Taken together, *Jacobs* and *Adams* show that the Board very clearly interpreted and applied *Egan* as confined to security clearances. These two cases also demonstrate that the government was well aware of the Board's interpretation and the Board's application of *Egan*. The government argued the point in each case. The cases were also published, making them available in the Board's official reporter.

Despite, however, the long-standing and crystal clarity of the Board's case law, Congress took no action to change the Board's scope of review – other, that is, than its passage of NSPS, which it later repealed. Thus, while Congressional action or inaction may not, at times, be probative, it is here. The logical and most likely conclusions to be drawn from the passage of NSPS and the concomitant existence of *Jacobs* and *Adams* are therefore these: 1) *Egan* is confined to security clearances; 2) the Board recognized this fact and explicitly held so in 1994; 3) Congress knew that *Egan* was confined to security clearances and that the Board applied it as such; 4) Congress, as a result, passed legislation, years later, in the form of NSPS to give the Department of Defense the power to foreclose Board review in non-security clearance cases because it recognized that *Egan* was

confined to security clearances; and 5) Congress repealed NSPS, thereby returning to the full scope of Board review that had existed *status quo ante* with respect to the Department of Defense and that had continued, via *stare decisis*, at other agencies not subject to NSPS.

Put another way, if Congress had wished to curtail what was obviously the law from 1994 until at least 2007, it could have done so. Congress could have, for example, overturned *Jacobs* outright or Congress could have specified a new standard of review to be used by the Board, as Congress did for performance based actions under 5 U.S.C., Chapter 43. Congress did neither of these things. Consequently, and for all of the foregoing reasons, the Court should affirm the Board.

IV. THIS COURT SHOULD NOT BE GUIDED BY WHETHER THERE ARE 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.

This Court should not be guided by whether there are 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. This is so for three reasons.

First, as explained above, the scope of the Board's review in non-security clearance cases is dependent upon the CSRA. It is not, nor should it be dependent upon the internal procedures and criteria used by agencies. For example, that the Department of Defense may use the same criteria or adjudicative guidelines, DoD Instruction 5200.2-R, to determine security clearances as it does to determine eligibility for a sensitive position is not probative of the Board's scope of review. It only demonstrates that the Department may have chosen to act in conformity with its own arguments. This is a completely self-serving internal choice that does not bear on the Board's scope of review. Put another way, it should not affect this Court's legal analysis for the government to unilaterally create procedures or criteria for its own internal use but to then argue that compliance with the CSRA is unwieldy or is contrary to those agency procedures and criteria.

Second, and although the inquiries may be similar, security clearance determinations are governed by separate executive orders from Executive Order 10450, which pertains to designating position sensitivity levels. Executive Order 13526, for example, governs in detail the issue of classified national security information and "prescribes a uniform system for classifying, safeguarding, and declassifying national security information." 77 Fed. Reg. 707 (January 5, 2010).

Whereas, Executive Order 12968 governs access to classified information and states determinations on access to classified information, "are separate from suitability determinations with respect to the hiring or retention of persons for employment by the government or other personnel actions." 60 Fed. Reg. 40245, 40248 (August 7, 1995). Thus regardless of the particular procedure used by an agency internally, security clearance determinations are not the same as determinations as to whether an employee is eligible to hold a sensitive position that does not require a security clearance and that lacks access to classified information.

Finally, to the extent that the Court asks what the specific, relevant processes and criteria are at agencies other than certain agencies within the Department of Defense, the Court's question is predominantly a factual question that is not developed in the record. For example, the Washington Headquarters Service – Consolidated Adjudications Facility that made the determinations disputed in this case does not handle adjudications for agencies such as the Department of Veterans Affairs. *Compare* DoD Instruction 5200.2-R *with* VA Directive 0710, *available at* http://www.va.gov/vapubs/viewPublication.asp?Pub_ID=487&FType=2.

Consequently, and because a survey of all government agencies is unnecessary to determine the legal question of the Board's scope of review, the decisions of the Board should be affirmed.

V. THE MSPB WOULD NOT ENCOUNTER PROBLEMS IN DETERMINING ADVERSE ACTION APPEALS FOR EMPLOYEES HOLDING "SENSITIVE" POSITIONS NOT REQUIRING A SECURITY CLEARANCE.

As a threshold matter, it is likely impossible to speculate as to all of the possible problems, great and small, that the Board might encounter in its adjudication of any future case. Nevertheless, the Director has raised two structural problems that he contends the Board would face in determining adverse action appeals for employees holding sensitive positions that do not require a security clearance: 1) that the Executive's standard for occupancy of a sensitive position is incompatible with the standard of review exercised by the Board in adjudicating adverse action appeals; and 2) that the merits review of adverse action appeals by employees in sensitive positions might lead to the disclosure of sensitive information. The Director's contentions lack merit.

First, the standard of proof that the Board uses in adjudicating adverse action appeals is not incompatible with the Executive's standard for occupancy of a sensitive position. This is because whatever removal authority was enshrined in Executive Order 10450 (containing the language relied on by the Director and the

panel majority) as a result of the Act of 1950 became the summary removal procedures established by 5 U.S.C. § 7532. *Carlucci v. Doe*, 488 U.S. 93, 95 (1988) ("Section 7532 of Title 5 of the United States Code, on which the Court of Appeals relied, was passed in 1950 and reenacted and codified in 1966, as part of Chapter 75 of Title 5, the Chapter that deals with adverse actions against employees of the United States."). Section 6 of Executive Order 10450 makes this abundantly clear:

> Should there develop at any stage of investigation information indicating that the employment of any officer or employee of the Government may not be clearly consistent with the interests of the national security, the head of the department or agency concerned or his representative 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**.

(emphasis added).

Congress, by the same token, explicitly set a different standard for the review of adverse actions taken pursuant to 5 U.S.C. § 7512. Congress mandated that in order for an agency's adverse action under section 7512 to be sustained, that agency must demonstrate by a preponderance of the evidence that the action promotes the efficiency of the service. 5 U.S.C. § 7513(a) (agencies may only take

action for "such cause as will promote the efficiency of the service"); 5 U.S.C. § 7701(c)(1)(B) (agency decision will only be sustained when supported by a preponderance of the evidence).

The alleged problem of possibly conflicting standards of review that the Supreme Court speculated about in *Egan*, in dicta following its holding, and which the Director raises now is thus an illusion. *See Egan*, 484 U.S. at 531 ("These two standards **seem** inconsistent.") (emphasis added). There is no inconsistency because Congress resolved any potential conflict by passing the CSRA's bifurcated system for effecting Chapter 75 removals, thereby preserving Executive Order 10450 within section 7532. As Conyers and Northover argued in their petition for rehearing en banc, this conclusion is, in fact, entirely consistent with how Congress and this Court have treated potentially conflicting standards in the past. Conyers and Northover Pet. for Rehrg., P. 11, citing *Lisiecki v. Merit Systems Protection Bd.*, 769 F.2d 1558, 1567 (Fed. Cir. 1985) (agency may choose to proceed under Chapter 43 or Chapter 75 but is bound by the substantive standards and procedural requirements of its choice). Consequently, this Court should affirm the Board.

The Director's second alleged problem, that the Board's decisions will force federal agencies to reveal their decision-making processes and that they will be wary of doing so for fear of disclosing sensitive information, is easily addressed for two reasons. *Id.* One, as discussed above, agencies typically reveal much of

their analyses to the Board in these types of cases already. *Supra* p. 7-8. Two, it is settled Board law that a party to an appeal who wishes to protect information from disclosure may move to seal all or part of the record. *Hoback v. Dep't of the Treasury*, 86 M.S.P.R. 425, 432-3 (2000) ("If the appellants are seeking an order to protect sensitive or confidential information within documents that they wish to submit to the Board, they may do so by requesting that the administrative judge place certain parts of the record under seal."); *see also* 5 C.F.R. § 1201.14(c) (prohibiting use of the Board's electronic filing system to file pleadings that contain sensitive security information or classified information). This means that the Board already has an effective tool in place for addressing agency concerns over the disclosure of non-classified information that is alleged to be sensitive. Consequently, and for all the reasons above, the Court should affirm the Board in these cases.

VI. THE MSPB WOULD LIKELY GRANT AGENCIES THE SAME HIGH LEVEL OF DEFERENCE THAT THE MSPB ORDINARILY GRANTS TO AGENCY DETERMINATIONS.

To begin with, Conyers and Northover respectfully submit that the question of the MSPB's deference is not fully ripe for review by this Court. Since its 2010 decisions in *Conyers* and *Northover*, the Board has had no opportunity to apply or interpret its decisions because of this case. This issue has also not been fully briefed to the Board. The Board has therefore had no opportunity to hear argument

on the extent to which it should defer to an agency's judgment on issues of national security in the context of an adverse action appeal.

Nor do Conyers and Northover believe that this question aids in resolving whether the CSRA grants the Board the power to exercise its full scope of review in appeals that do not involve security clearance determinations or access to classified information. Put differently, the ultimate, and narrow, question that this Court must answer is whether the Board is precluded by *Egan* from exercising its full scope of review in non-security clearance cases. The question of what level of deference the Board should apply after the antecedent question of the Board's scope of review has been decided is a question better left to development by the Board itself or, in the end, to Congress.

Having said this, however, the Board's existing case law does provide insight into the high level of deference that the Board would likely grant an agency's national security determination when that determination is raised in an adverse action appeal that does not involve a security clearance or access to classified information. The Board's decision in *Adams*, for example, demonstrates that the Board is likely to grant considerable deference to such an agency determination.

One of the underlying concerns that prompted the army to suspend the appellant's computer access in *Adams*, a concern also present in this case, was the

appellant's integrity and responsibility in relation to delinquent debts that he owed. In addressing the army's concerns, the Board found that:

> [t]hese concerns are legitimate. The agency presented ample evidence that its computer system contains sensitive information, and that access to this information must be limited to those who have demonstrated integrity and responsibility.

Adams, 105 M.S.P.R. at 57. The Board then, without intruding into the mechanics of the army's decision-making process, asked only whether the army acted reasonably in denying the appellant access to its computer system. Finding that it had, and that the appellant needed that computer access to perform his duties, the Board sustained the appellant's removal. *Id.* at 58. *Adams* thus shows the Board granting considerable deference to an agency in an adverse action appeal that did not involve a security clearance but did pertain to a personnel security determination made by the agency.

The Board's handling of cases involving certifications necessary for employment as well as penalty determinations also show that the Board would likely grant agency eligibility determinations a high level of deference. In *Thompson v. Dep't of the Air Force*, for example, the Board found it to be:

> ...well settled that, absent evidence of bad faith or patent unfairness, the Board defers to the agency's determination as to the requirements that must be fulfilled in order for an individual to qualify for appointment to a particular position, and to retain that position.

104 M.S.P.R. 529, 532 (2007). The Board has similarly held that it must:

> give deference to an agency's decision regarding a penalty unless that penalty exceeds the range of allowable punishment specified by statute or regulation, or the penalty is "so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion." *Parker v. U.S. Postal Service,* 819 F.2d 1113, 1116 (Fed.Cir.1987); *see Lachance v. Devall,* 178 F.3d 1246, 1258 (Fed.Cir.1999) (the Board may reject those penalties it finds abusive, but may not infringe on the agency's exclusive domain as workforce manager); *Starks v. Department of the Army,* 94 M.S.P.R. 95, ¶ 9 (2003) (same). This is because the agency has the primary discretion in maintaining employee discipline and seeing that the efficiency of the service is served within its organization. *Thomas v. U.S. Postal Service,* 96 M.S.P.R. 179, ¶ 4 (2004). The Board is not here to displace management's responsibility in this regard; our role is to ensure that managerial judgment has been properly exercised. *Lavette v. U.S. Postal Service,* 96 M.S.P.R. 239, ¶ 17 (2004).

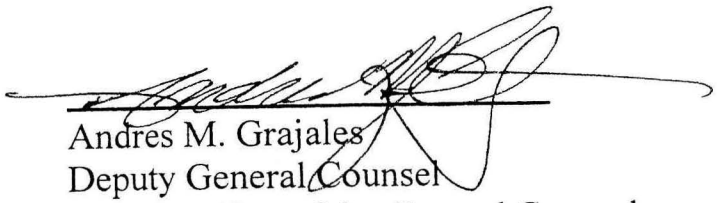
Jones v. Dep't of Justice, 98 M.S.P.R. 86, 94 (2004).

Although the MSPB has not had the chance to establish a standard of deference that it would apply to non-security clearance cases, Conyers and Northover submit that the above cases demonstrate that the Board would likely grant a high level of deference to an agency's judgment on issues of national security in the context of an adverse action appeal that does not involve a security clearance or access to classified information. Consequently, the Court should affirm the Board.

CONCLUSION

For the foregoing reasons, the decisions of the Board should be affirmed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, hereby certify that on this 11th day of March, 2013, I caused one original and thirty copies of the foregoing En Banc Brief for Respondents Rhonda K. Conyers and Devon Haughton Northover to be filed with the Court by hand-delivery and two copies each to be mailed via United States certified mail, postage prepaid, to the following:

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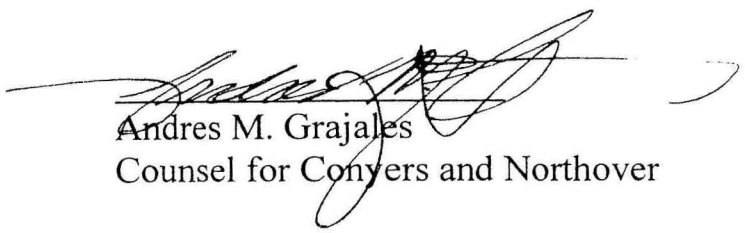
CERTIFICATE OF COMPLIANCE WITH RULE 32(a) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

1. Pursuant to Fed. R. App. P. 32(a)(7), I certify that the attached brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). The brief contains 12,551 words, as counted by Microsoft Word 2010, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Federal Circuit Rule 32(b).
2. I also certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). The brief has been prepared in proportionally-spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.



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