

UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD  
WASHINGTON REGIONAL OFFICE

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RHONDA K. CONYERS, :  
 :  
 Appellant, : Docket No.  
 v. : CH-0752-09-0925-I-1  
 :  
 DEPARTMENT OF DEFENSE, :  
 :  
 Appellee. :  
 :

-----x  
DEVON H. NORTHOVER, :  
 :  
 Appellant, : Docket No.  
 v. : AT-0752-10-0184-I-1  
 :  
 DEPARTMENT OF DEFENSE, :  
 :  
 Appellee. :  
 :

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Howard T. Markey National  
Courts Building  
717 Madison Place, N.W.  
Washington, D.C. 20005

Tuesday, September 21, 2010

THE HEARING in the above-entitled matter commenced  
at 10:05 a.m., pursuant to notice.

BEFORE: SUSAN SUI GRUNDMANN, Chairman  
ANNE WAGNER, Vice Chairman

Diversified Reporting Services, Inc.  
(202) 467-9200

APPEARANCES:

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## 1 P R O C E E D I N G S

2 CHAIRMAN GRUNDMANN: Good morning. We're on  
3 the record. Last night the agency counsel in the  
4 Northover Case filed a motion to dismiss this morning  
5 and received a response from appellant's counsel. We  
6 are taking the motion under advisement and in the  
7 interim will proceed with oral argument.

8 The U.S. Merit Systems Protection Board will  
9 now hear oral argument in the cases of Conyers and  
10 Northover v. Department of Defense, MSPB Docket No. CH  
11 0752-09-0925-I-1, and AT 0752-10-0184-I-1. Here today  
12 is the full MSPB, Vice Chairman Anne Wagner, member  
13 Mary Rose, and myself, Susan Sui Grundmann, Chairman,  
14 presiding.

15 Prior to this hearing the parties stipulated  
16 to the following. The parties agree that the positions  
17 held by appellants Conyers and Northover did not  
18 require the incumbents to have a confidential secret or  
19 top secret clearance. The parties also agreed that the  
20 positions held by appellants Conyers and Northover did  
21 not require the incumbents to have access to classified  
22 information.

1           The parties are represented by counsel. We  
2 understand, however, that the Office of Personnel  
3 Management has declined to participate in these  
4 arguments. The board will hear first from Mr.  
5 Grajales, counsel for appellant Conyers. Mr. Grajales  
6 is representing both Mr. Conyers and Mr. Northover, and  
7 will be allotted 15 minutes each for each appellant.

8           Good morning, Mr. Grajales.

9           MR. GRAJALES: Good morning. May I approach?

10          CHAIRMAN GRUNDMANN: Yes.

11          MR. GRAJALES: Good morning. On behalf of  
12 Rhonda Conyers and Devon Northover, I am Andy Grajales.  
13 And I would like to thank the board for offering Ms.  
14 Conyers and Mr. Northover the opportunity to present  
15 the oral argument in this matter. They wish, however,  
16 to express that they regret they were not able to be  
17 here in person today.

18          May it please the board, full review of the  
19 merits underlying an agency's decision to take an  
20 adverse action against a tenured federal employee is  
21 the default position of this court's authority. And  
22 when that adverse action is based on the loss of a

1 qualification to hold the position, this review  
2 authority extends to a review of the merits of that  
3 loss of qualification. This is as the board is aware  
4 the adverse case.

5 This is also the mandate of the board's  
6 enabling statute that directs that this board shall  
7 hear all matters committed to its jurisdiction under  
8 Title 5 of the United States Code and under Chapter 43  
9 of Title 38. Because the board's jurisdiction is set  
10 by statute, the board has no power to diminish its own  
11 review, authority or jurisdiction. This is a task,  
12 appellants believe, that is reserved to congress. And  
13 in this regard, the board's powers with respect to this  
14 matter may best be understood as a very simple pie  
15 chart.

16 The board's jurisdiction or review authority  
17 is like a large circle or a pie, and the Supreme Court  
18 and the Department of the Navy v. Egan took a very  
19 fine-edged carving knife and took out in its own words  
20 a narrow slice of that pie, that slice being security  
21 clearance determinations involving access to classified  
22 information.

1           In a sense, the Supreme Court reversed the  
2 inquiry I just spoke about, by finding that when  
3 classified information was at issue, congress would  
4 have had to expressly -- added rather than subtracted -  
5 - but that is not what the board must do itself, and it  
6 does not extend outside of appeals involving access to  
7 classified information.

8           CHAIRMAN GRUNDMANN: Mr. Grajales, let me ask  
9 you just a question. You say that our jurisdiction is  
10 established by statute. DoD in their response to their  
11 reply brief to the Amici and the appellants mention  
12 that revocation of security clearances, along with  
13 revocation of eligibility to hold a non-critical,  
14 sensitive position, are not in our regulations.  
15 They're not specifically mentioned by our jurisdiction.

16           MR. GRAJALES: Yes, that is absolutely true.  
17 However, when looking at what this board's jurisdiction  
18 is, you must look to Egan. And so the default position  
19 is that an adverse action on the merits falls within  
20 the jurisdiction unless it is carved out; and, Egan  
21 reversed that by finding with respect to classified  
22 information only with respect expressly to security

1 clearances that is carved out based on separation of  
2 powers.

3 MS. WAGNER: But, Mr. Grahales, you're talking  
4 about a default position with regard to jurisdiction,  
5 but the word "jurisdiction" isn't plenary. It isn't  
6 broad. It's defined by statute, and the Supreme Court  
7 in Egan indicated that the statute precluded us from  
8 reviewing security clearance revocations. The issue I  
9 think that we had is that the rationale that the court  
10 employed in Egan could arguably extend beyond simply  
11 security revocations to include other national security  
12 types of determinations at issue here, arguably.

13 MR. GRAJALES: Appellants respectfully suggest  
14 that actually what the court in Egan found was not that  
15 the statute required or that the statute 1204 deprived  
16 the board of jurisdiction. It was based on something  
17 other than statutes. It was based on something other  
18 than the statute. It was based on the absence of  
19 anything in the statute, any express statement by  
20 Congress. And what the court found was that in order  
21 to include security clearance or classified information  
22 matters, Congress would have had to have spoken

1 explicitly. And it's absolutely true that the board's  
2 jurisdiction is not plenary; however, there is nothing  
3 else, as I would speak to in a moment, that deprives  
4 the board of jurisdiction over eligibility to occupy a  
5 sensitive position when there is no classified  
6 information at issue.

7 MS. WAGNER: Well, what about the argument  
8 that the President's constitutional powers actually  
9 deprive the board of exercising that type of review.

10 MR. GRAJALES: That argument is weak when it  
11 is applied to cases involving eligibility to occupy a  
12 sensitive position in the absence of any security  
13 clearance and in the absence of any access to  
14 classified information, because if we go back and we  
15 look at Egan, what Egan teaches is that the court was  
16 completely concerned with the exposure of classified  
17 information, and that is where they found the  
18 President's power to be strong enough to override the  
19 silence in this board's enabling statute. And so  
20 because, as we have undisputed here where there is no  
21 classified information, there is no security clearance  
22 at issue.



1           That rationale that drove the court in Egan to  
2 carve out a piece of the board's jurisdiction simply  
3 does not apply; nor, is there any other statute or  
4 regulation that would deprive this board of  
5 jurisdiction over a sensitive position eligibility  
6 matter. Simply put, because the loss of eligibility to  
7 occupy a sensitive position not requiring a security  
8 clearance and without access to classified information  
9 does not fall within the narrow slice of pie taken out  
10 by Egan.

11           Hence, the rule of Egan cannot apply. As I  
12 said, there is nothing. There is no other authority,  
13 no other power, that removes eligibility matters from  
14 this board's jurisdiction. And, if you look, as vice  
15 chair Wagner just said, the board's jurisdiction  
16 certainly is not plenary; but, in any instance where  
17 the board's jurisdiction has been removed from review  
18 of the merits of an adverse action, it has done so by  
19 statute.

20           If you look at non-appropriated fund  
21 employees, if you look at National Guard Technicians,  
22 Veterans Canteen Service, Title 38 nurses, all of these

1 groups of employees are removed by statute. They are  
2 removed by an act of Congress. There is nothing.  
3 There is no act of Congress. There is no regulation,  
4 indeed, as OPM conceded in its advisory opinion saying  
5 Part 732 of 5 C.F.R. does not answer the board's  
6 question, because it does not go to the board's  
7 jurisdiction.

8 MS. WAGNER: What about Executive Order 14050?

9 MR. GRAJALES: 10450 applies to the  
10 designation of positions. It doesn't speak to  
11 jurisdiction. And if you look at that order, it deals  
12 with an entirely separate matter. It is removed from  
13 access to classified information and that leads to  
14 something that is critical to understand about Egan,  
15 that in Egan what the court presupposed, because it was  
16 true in that case, is that there was access to  
17 classified information.

18 They assumed wrongly that occupation of a  
19 sensitive position necessarily entails access to  
20 classified information. But we know that this is  
21 untrue and we know that without doubt that in this we  
22 have two non-critical sensitive employees who neither

1 were required to hold a security clearance, nor were  
2 they required to have access to classified information.

3 MS. WAGNER: But isn't it true that -- you're  
4 correct -- it's Executive Order 10450. But that was  
5 issued pursuant to 5 U.S.C. 7532 -- isn't that  
6 correct -- among other authorities that the President  
7 cited?

8 MR. GRAJALES: I believe that to be accurate,  
9 however, there's nothing in 7532 that speaks to this  
10 board's jurisdiction over an action initiated pursuant  
11 to 7513. 7532 provides an alternative method, and that  
12 actually acts as a rebuttal to some of the arguments  
13 made by the agencies here. Undoubtedly the agencies  
14 argued that occupancy of a sensitive position is  
15 sufficiently analogous to possession of a security  
16 clearance that the rule of Egan should apply.

17 CHAIRMAN GRUNDMANN: Okay. So let's say we  
18 agree with you. Let's say that we agree that Egan does  
19 not apply here. What kind of remedy would come out of  
20 this?

21 MR. GRAJALES: The remedy that the board would  
22 order would be dependent, obviously, on the top of

1 case, but it would be reversal of the agency's action,  
2 and appellants believe that could include an order of  
3 reinstatement, possibly an order of remand to the  
4 agency to reconsider its decision; and, possibly, as I  
5 said, an order or reinstating the appellant to the  
6 position.

7           And that is because as we see in this case,  
8 actually, if you look at some of the filings by the  
9 Defense Commissary Service, the argument that the  
10 employing agency will be without power to reinstate the  
11 employee as plainly false, because in Mr. Northrop's  
12 case, it's clear that the agency had overturned a  
13 decision by the consolidated adjudications facility,  
14 which denied Mr. North over eligibility to occupy  
15 sensitive position.

16           MS. WAGNER: Excuse me. Are you saying that  
17 the board has the authority to order the agency to  
18 restore eligibility for occupying a sensitive position?

19           MR. GRAJALES: Yes, I think the board would  
20 have the authority to restore, to order that  
21 eligibility restored, and to reinstate the employee.

22           CHAIRMAN GRUNDMANN: Well what standards would

1 we use?

2 MR. GRAJALES: I believe where appellants  
3 would argue that the board would use the same standards  
4 that it uses in any other adverse actions, whether the  
5 action serves the efficiency of a service, whether the  
6 agency has proved its case by a preponderance of the  
7 evidence. And if you look how the board has addressed  
8 similar cases, such as the recent DOE case where the  
9 board was looking at the nexus of off-duty conduct to  
10 the efficiency of the service, this is an entirely  
11 analogous inquiry that the board could turn to that log  
12 to use to find the standard that the board should use  
13 when adjudicating cases involving eligibility to occupy  
14 a sensitive position.

15 MS. WAGNER: How would that standard work  
16 given the directive that agency heads only issue  
17 security clearances or grant access to classified  
18 information, or deem people eligible to occupy  
19 sensitive positions, if it's clearly consistent with  
20 the national security. How do you reconcile those  
21 statistics?

22 MR. GRAJALES: You reconcile it, I believe,

1 one, based on the distinction between access to  
2 classified information and eligibility to occupy a  
3 sensitive position that does not include that. I think  
4 you also reconcile it by looking to the board's grant  
5 of jurisdiction that if Egan does not apply, there is  
6 nothing that prevents the board. There is nothing that  
7 takes away the board's authority to look at that action  
8 and determine whether the agency's action supported the  
9 efficiency of the service, and that calculation that  
10 vice chair Wagner has just mentioned, would fall within  
11 the analysis of that standard.

12 MS. WAGNER: So it's contingent. I'm  
13 essentially distinguishing the eligibility to occupy  
14 sensitive position determination from the security  
15 clearance determination. Is that correct? Does your  
16 argument contend that?

17 MR. GRAJALES: Yes.

18 MS. WAGNER: Okay. And so, specifically, how  
19 would you distinguish those two determinations?

20 MR. GRAJALES: Egan replied in cases involving  
21 security clearances the board would be limited to the  
22 procedural inquiries that it is limited to now in those

1 cases. In eligibility cases to occupy a sensitive  
2 position the board would look to see simply whether or  
3 not the agency has proven its case, has it proven by a  
4 preponderance of the evidence that there is a nexus  
5 between the agency's determination and its action, and  
6 that would include, I believe, the review of whether  
7 the agency has proven its case, and as part of its case  
8 it has to show some nexus, and that's going to be part  
9 of that inquiry.

10           The distinction between a security clearance  
11 and eligibility to occupy a sensitive position also  
12 makes sense when we consider that it is the possession  
13 of a security clearance and only the possession of a  
14 security clearance that allows for the access of the  
15 classified national security information or material  
16 that Egan was concerned with. That is the bright line  
17 when you look at cases such as this where you may have  
18 a sensitive position, but you have no access.

19           Mr. Northover, a commissary store manager, has  
20 no access to the type of information for example that  
21 Mr. Egan had. Mr. Egan had a security clearance,  
22 because he was aware and he had access to the insider

1 nuclear submarines, the arrivals and departures of  
2 nuclear submarines prior to the fall of the Berlin  
3 Wall.

4 Mr. Northover does inventory control in a  
5 store and hangs signs and labels the aisles with  
6 whatever the specialist may be. There is no risk  
7 because he has no access to classified information.

8 MS. WAGNER: Mr. Grajales, I think that's the  
9 question. Isn't it? I mean whose call is that to  
10 make? Do we through our statutory jurisdiction have  
11 the ability to second guess the agency's assessment  
12 that is improbable as it might seem that Mr. Northover  
13 could compromise national security, that that's the  
14 agency's call to make.

15 CHAIRMAN GRUNDMANN: And do we have the  
16 expertise to make that judgment?

17 MR. GRAJALES: In the absence of access to  
18 classified national security information appellants  
19 argue that it is the mandate of this board, that it  
20 makes exactly that inquiry into whether or not the  
21 agency has proven that nexus. And the expertise, this  
22 board has the expertise in determining making nexus



1 inquiries, making determinations whether or not a case  
2 has been proven by a preponderance of the evidence.

3           If you look at Adams as a sterling example of  
4 a case where the board clearly had the expertise to  
5 determine whether or not the agency's revocation of  
6 Adam's access to a sensitive computer system was  
7 "proven" and served the efficiency of the service. The  
8 board clearly had the expertise to make that nexus  
9 decision, and thus the board has that expertise here in  
10 these appeals.

11           CHAIRMAN GRUNDMANN: I want to go back just  
12 very quickly to our discussion of remedy and what we  
13 can give the employee in response to a positive answer.  
14 The case Skees v. Navy is informative to us in the  
15 sense that although it's talking about a security  
16 clearance, they do look -- our reviewing court looks at  
17 the underlying questioning of whether somebody is  
18 properly classified.

19           Is there an analogy, one? Two, even though  
20 it's a security clearance, doesn't the logic also  
21 follow in this particular case?

22           MR. GRAJALES: I would begin by first pointing

1 out that Skees and the companion case -- there's also  
2 often cited, and I believe it's cited in this case by  
3 both agencies -- Brady, for the proposition the board  
4 may not review a designation. Those two cases do not  
5 stand for the proposition that the board may not  
6 review, but they don't extend, rather, to cases that do  
7 not involve access to classified information.

8 Both Skees and Brady had a security clearance,  
9 and so appellants submit, one, those cases are not  
10 precedential. Two, the law on that point is unsettled;  
11 and, three, although they may be analogous to some  
12 extent that is the wrong inquiry, because again we go  
13 back to whether or not Egan should be applied. And so  
14 while it may be perhaps a similar determination, the  
15 dividing line is when Egan applies it is a  
16 determination that the board may not make versus when  
17 Egan does not apply, because there is no access to  
18 classified information, nor is there a security  
19 clearance. It is a determination that the board might  
20 be able to reach an appropriate case.

21 MS. WAGNER: Why do you say that the law is  
22 unsettled on that question?

1           MR. GRAJALES: Because Skees and Brady do not  
2 reach beyond the arena of a security clearance; and,  
3 so, there is no precedental decision. Oh, I'm sorry --  
4 that speaks as clearly as Skees and Brady do to the  
5 board's authority to review the designation of a  
6 position when a security clearance is present, or when  
7 access to classified information is present. However,  
8 appellants believe that the board does not actually  
9 need to reach this issue in order to decide this case.

10           The appeals here do not extend, do not reach  
11 the designation. In other words, the appeals here are  
12 concerned instead with the denial or revocation, which  
13 is a very separate action than the agency's decision to  
14 designate the position. Now, while the board might be  
15 able, we believe, to reach the decision, to designate a  
16 position, for example, in the presence of a prohibited  
17 personnel practice, it would certainly seem that once  
18 Egan does not apply, that is, a personnel action; and,  
19 if it were taken for her inhibited purpose that it  
20 would qualify as a prohibitive personnel

21           CHAIRMAN GRUNDMANN: I take it that you would  
22 agree that this is not a national security position.

1     Could this be a public trust position that the  
2     appellants held, one of them still holds?

3             MR. GRAJALES:    Could it be?   Yes.   Public  
4     trust but not national security, and that is one of the  
5     critical points, to go back.   Whatever Congress may  
6     have intended, they certainly did not intend that  
7     entire civilian workforces of federal agency be  
8     deprived of the full scope of board review in the  
9     absence of any access to classified information.   This  
10    is the rights of -- these types of employees was a  
11    critical factor in the NSPS litigation that concluded  
12    and has since dissolved.

13            Congress could not have intended that 100% of  
14    DFAS employees, for example -- and we know that 100% of  
15    DFAS employees are in fact now designated as  
16    sensitive -- they could not have intended that all of  
17    those employees be deprived of the full scope of board  
18    review sub silentio.   That would make no sense to  
19    impute that intent to Congress.

20            MS. WAGNER:    I have a question about that.  
21    How do you, again, going back to the language in 5  
22    U.S.C. 7532, which does delineate, which provides for

1 summary dismissal of employees for national security  
2 reasons. Congress delineates agencies for which it was  
3 giving that authority, but also gives to the President  
4 the ability to identify other agencies, and that seems  
5 pretty open-ended to me in terms of a delegation of  
6 authority. And just for purposes of exploring this  
7 point a little bit, how do we read into that language a  
8 limitation on the President's ability then to further  
9 identify employees who would fall within the summary  
10 dismissal authority under 7532.

11 MR. GRAJALES: The summary dismissal procedure  
12 on 7532 may extend to a broader group of employees, and  
13 I think that we don't need to read a limitation there  
14 for purposes of dismissal under 7532, because it  
15 remains an altered method of dismissal; and, so, for  
16 example, if it's some unlikely scenario that is not  
17 presented here, we have an employee who lacks access to  
18 classified information but for one reason or another,  
19 because a present national security risk. 7532 is  
20 there to allow the agency head to take swift action to  
21 remove or suspend that employee. It exists as a  
22 separate procedure.

1 I see that my time is running down and I'd  
2 like to reserve unless the board has any further  
3 questions for me for rebuttal, if I may.

4 CHAIRMAN GRUNDMANN: Sure. Thank you, Mr.  
5 Grajales.

6 MS. WAGNER: Thank you.

7 CHAIRMAN GRUNDMANN: Next, we have Mr. Yount  
8 from DOD FAS. Welcome.

9 MR. YOUNT: Good morning, Chairman Grundmann,  
10 Vice Chairman Wagner, and member Rose. May it please  
11 the honorable board, I am Frank Yount from the Defense  
12 Finance and Accounting Service with the permission now  
13 than the request of the counsel I am presenting  
14 argument in this case. The board members have already  
15 discussed in some depth the extent of their authority.  
16 It's not plenary as they pointed out and is not all  
17 encompassing.

18 One of the things that we wanted to examine  
19 today is a number of issues that can address or impact  
20 directly on that. Now, the case before the board,  
21 unfortunately, has a very limited record, and it  
22 doesn't address any of the aspects the Federal

1 Government or Department of Defense looks at in  
2 determining a position to be non-critical sensitive or  
3 any of the procedures that are required, the appellate  
4 review and so on, of granting of a security clearance.

5 MS. WAGNER: But, Mr. Yount, I'd point out that  
6 the limited record is a result of, I believe, the  
7 agency Federal Request for Interrogatory review here?

8 MR. YOUNT: No. That was done sua sponte by  
9 the administrative judge. The agency did not request  
10 interlocutory deal.

11 CHAIRMAN GRUNDMANN: I believe in Conyers the  
12 agency filed.

13 MR. YOUNT: No. The agency did not.

14 CHAIRMAN GRUNDMANN: Because that would not  
15 reflect the interlocutory order that came from the  
16 judge's proceeding.

17 MR. YOUNT: I recognized that. Also not  
18 present in the record are the day-to-day functions of  
19 Ms. Conyers and her job performance. The request for  
20 oral argument raises the core issue of the jurisdiction  
21 that will work. The three areas that the board has  
22 requested that we specifically address today, the crux

1 of those goes to the authority of the board and the  
2 jurisdiction of the board to respond. The appellant,  
3 in essence, has the burden of proving by preponderance  
4 of the evidence that the board does have jurisdiction  
5 going from Carly v. Department of the Army, 413 F.3d  
6 1354.

7 Now, one of the examples that the appellants  
8 have relied heavily on is Adams, and that addresses a  
9 relatively narrow issue of access to a specific  
10 computer system, and was addressed as such. The  
11 question here is Egan, if, arguendo, is not applied, do  
12 we throw out the analysis that Egan used to arrive at  
13 its conclusions.

14 MS. WAGNER: But in Adams the government  
15 strenuously argued, I believe, that Egan applied in  
16 that case.

17 MR. YOUNT: Yes.

18 MS. WAGNER: So why -- you're saying that the  
19 court's decisions were not apparent or relevant to that  
20 case?

21 MR. YOUNT: Well, the court issue here was  
22 access to a specific computer system and the argument



1 was that Egan did apply in order to address in general  
2 qualifications for the job; and, this particular  
3 qualification involved access to a computer system.  
4 Now, in this particular case, we wanted to look at the  
5 argument here turning to the authority of the President  
6 in national security matters.

7 CHAIRMAN GRUNDMANN: Let me ask you another  
8 question to follow on.

9 MR. YOUNT: Yes, certainly.

10 CHAIRMAN GRUNDMANN: Was the basis of the  
11 designation of this position -- "non-critical  
12 sensitive" -- was it for national security or for  
13 public trust reasons?

14 MR. YOUNT: National security reasons; and, of  
15 course, once again it's not an issue in evidence in the  
16 record. But, if I could present an example.

17 CHAIRMAN GRUNDMANN: Let me just ask you.  
18 Walk me through this. Can the agency lump together  
19 national security and public trust into uber sensitive  
20 positions, or are they treated separately?

21 MR. YOUNT: They are largely distinct and  
22 separate, but there are, of course, occasions when both

1 would apply to a given situation.

2 CHAIRMAN GRUNDMANN: I have to tell you  
3 something. I pulled something out of the record, and  
4 I'll give a copy of it now while I'm with the other  
5 board members. This came out of the record, the one  
6 that came up on interlocutory, and it talks about  
7 position sensitivity designation. And this one is, I  
8 think, Mrs. Conyers.

9 If you go to the second page and the third  
10 pages, neither the national security nor the public  
11 trust positions are designated. In fact, what it looks  
12 like based on this document is that the designation for  
13 "sensitive" was for an IT reason, which would make  
14 sense because of Conyers' position that she held. So  
15 this doesn't tell me that this is a national security  
16 position.

17 MR. YOUNT: Okay.

18 CHAIRMAN GRUNDMANN: In order to change, you  
19 made the assertion that this is a national security  
20 position. If you were to change a position from public  
21 trust or IT, do you have to notify the appellant?

22 MR. YOUNT: Yes, we would.

1           CHAIRMAN GRUNDMANN:  And is there a process  
2   that the appellant faces in switching over to a  
3   different position?  I guess, classification?

4           MR. YOUNT:  Well, it would determine on the  
5   circumstances of an individual position, but in a case  
6   such as Conyers where the designation is changed to  
7   non-critical sensitive position, that would then  
8   require a security investigation.  The individual would  
9   be afforded the opportunity to respond to an  
10  investigation.

11           There is a review process as to qualifying and  
12  disqualifying factors with respect to a given position.  
13  The individual employee can then respond in general.

14           CHAIRMAN GRUNDMANN:  This is for national  
15  security.  Right?

16           MR. YOUNT:  Yes.

17           CHAIRMAN GRUNDMANN:  And this is what Ms.  
18  Conyers faced?

19           MR. YOUNT:  Yes.

20           CHAIRMAN GRUNDMANN:  What's interesting is the  
21  OPM supplemental response indicated that there were two  
22  types of forms that employees would fill out -- the

1 SF86 for national security and the 85P for public trust  
2 or other.

3 You look like you have an answer.

4 MR. YOUNT: I actually have a form in my hand.

5 CHAIRMAN GRUNDMANN: Great. Okay.

6 MR. YOUNT: And the response was somewhat  
7 inaccurate with respect to the caption and purpose of  
8 their own form, and that says here at the top, which  
9 under the purpose of the form, the United States  
10 Government conducts background investigations and  
11 investigations to establish that applicants or  
12 incumbents either employed by the government or working  
13 for the government or under contract are suitable for  
14 the job and are eligible for public trust or sensitive  
15 positions. So it specifically references in the form  
16 sensitive positions.

17 CHAIRMAN GRUNDMANN: So is this SF86 or 85?

18 MR. YOUNT: This is the 85P.

19 CHAIRMAN GRUNDMANN: This is the 85. Okay.

20 MR. YOUNT: And we could offer into evidence  
21 were the record open to receive it the rationale for  
22 creating the 85P as opposed to just the 85, and

1     concessions to the privacy of the individual employees,  
2     rather than the more intrusive 86 when sensitive  
3     positions versus clearance issues.

4             CHAIRMAN GRUNDMANN:  So national security  
5     sensitive positions can also fill out an SF85?

6             MR. YOUNT:  Yes.

7             CHAIRMAN GRUNDMANN:  Okay.

8             MR. YOUNT:  And specifically stating the  
9     purpose of the form.

10            MS. WAGNER:  Mr. Yount, I believe that OPM did  
11     indicate in its response to our inquiry that that was  
12     not an accurate characterization of the use of the  
13     forms.  Do you disagree with OPM on that?

14            MR. YOUNT:  Well, I would have to -- based  
15     upon the instructions that they have literally on the  
16     face of the form itself.

17            MS. WAGNER:  And just to clarify, what, from  
18     the agency's perspective, is the significance of the  
19     form here, as between the SF86, SF85 and SF85P for  
20     purposes of this case?

21            MR. YOUNT:  For purposes of this case, largely  
22     the differences would be the amount of intrusions the

1 information that the applicant would have to complete.

2 MS. WAGNER: No, but I mean in terms of what  
3 it indicates about the agency's assessment of the  
4 position. Are you saying that if the agency uses an  
5 SF86 form it is evidence of its determination that it  
6 is a national security position?

7 MR. YOUNT: No, that it entails classified  
8 information.

9 MS. WAGNER: Okay. But you've stipulated that  
10 there's no classified information fault in this case.

11 MR. YOUNT: Which is why an 86 is not a part  
12 of this particular determination.

13 MS. WAGNER: Okay. Okay.

14 MR. YOUNT: One of the issues that seems to be  
15 focused upon here is, as we go through this, the  
16 equation of unclassified with not being national  
17 security sensitive information; and, even in Egan, as  
18 we go through, the court made a separate determination  
19 before it started speaking with respect to the  
20 classified information issue that non-classified,  
21 sensitive information is within that presidential  
22 authority that is addressed in 10450.

1           Going directly to the language of the court as  
2 it comes into this, we have pursuant to these  
3 directives, department and agencies of the government  
4 classify jobs in three categories: Critical sensitive,  
5 non-critical sensitive, and non-sensitive. Then it  
6 goes on to discuss separately clearances. It goes on  
7 to say that different levels of clearance are required,  
8 depending upon the position sought. A government  
9 appointment is expressly made subject to a background  
10 investigation that varies according to the degree of  
11 adverse effect the appellant could have on national  
12 security.

13           Now, one of the points that counsel made of  
14 this is that Congress has not spoken, and the fact that  
15 Congress has not spoken with respect to sensitive  
16 information, that therefore it is by fiat separate and  
17 distinct. That's not true. Congress has spoken with  
18 respect to sensitive information. When it goes in and  
19 discusses the security clearances and the requirements  
20 for a security clearance, it examines what the  
21 Secretary of Defense needs to do and or a process.  
22 But, in discussing that, it speaks specifically to

1 unclassified positions.

2           Now, in the statute that addresses the scope  
3 of the security investigations, which is 10 U.S.C.  
4 1564, down at the bottom it references specifically  
5 sensitive information. And, it says, for the purpose  
6 of this section it is not necessary for the performance  
7 of duties to involve classified activities or  
8 classified matters in order for the duties to be  
9 considered sensitive and critical to national security,  
10 specifically citing to 10 U.S.C. 1564(e).

11           Now, I realize I haven't addressed  
12 specifically the three questions you've asked. I have  
13 just a couple minutes remaining. I'd be very happy to  
14 answer whatever questions you have; or, if you'd like  
15 me to address the three questions you presented, I can  
16 do that briefly.

17           MS. WAGNER: Let's try that. Then we'll come  
18 back.

19           MR. YOUNT: Okay. Thank you. Okay. The  
20 first question is the issues the board requests that  
21 the party address first: Does the board have authority  
22 to review an agency's reasons for determining positions



1 is non-critical sensitive, if the positions do not  
2 require eligibility for access to classified  
3 information.

4 The answer, based upon what we just saw from  
5 Congress, is no, because that is still sensitive,  
6 defense-related information. And it goes directly to  
7 the expertise for address with respect to the agencies  
8 to examine these positions and to determine whether or  
9 not there's classified information -- excuse me --  
10 whether or not there's sensitive information. We go to  
11 the examine of a number of separate things that the  
12 contracting specialist could see.

13 First, there is a contract where meals are  
14 ready to eat. There's a contract or transfer of  
15 troops. There's a contract for transfer of household  
16 goods and equipment. There are also actually issues  
17 with respect to the contracts as to whether or not  
18 they're being satisfied. All of these, taken as a  
19 whole and presented, that does contain sensitive,  
20 national defense information.

21 And as the board pointed out earlier, there is  
22 a degree of expertise in looking at these individual

1 positions to determine the impact of these are national  
2 security, that trying to link the latter two  
3 questions -- I'll answer those. There's kind of a lump  
4 in their meeting, 19 seconds. The regulations require  
5 that in order to designate a position as sensitive,  
6 they must be based upon considerations of national  
7 security interest. So the determination --

8 CHAIRMAN GRUNDMANN: Or the public trust, or  
9 IT, AT LEAST THAT FORM TELLS ME.

10 MR. YOUNT: I don't have a time, but I can  
11 respond.

12 MS. WAGNER: I have a couple of questions.

13 MR. YOUNT: Certainly.

14 MS. WAGNER: So is it your position that there  
15 is no determination of national security that the  
16 executive branch can make that is reviewable by any  
17 other entity?

18 MR. YOUNT: I wouldn't say it's not reviewable  
19 by any other entity, and would also say that Congress  
20 does have the authority to extend review into these  
21 areas that at this juncture the issue of determination  
22 of whether or not the position entails national

1 security sensitive information, and whether or not an  
2 individual is eligible to occupy such a position is  
3 within the realm of executive program -- or not  
4 Executive programs, but executive authority.

5 CHAIRMAN GRUNDMANN: Well, let me just follow-  
6 up then. A number of years ago, 20 years ago, there  
7 was dry testing litigation that involved once where  
8 challenges to the government's widespread designation  
9 or positions subject to random drug testing, because  
10 they implicated national security concerns, and Supreme  
11 Court had no problem, I think although if I reached  
12 that court, the record wasn't fully developed with  
13 regard to particular positions that was before it in  
14 terms of any national security implications.

15 But the court certainly expressed a lot of  
16 skepticism as to a number of positions that had been  
17 designated on national security grounds for random drug  
18 testing, and just like you did, to speak to this  
19 question of isn't it within the purview of certainly,  
20 you know, the courts. And I would say by extension  
21 Congress, and Congress has delegated to us to review  
22 these sort of broad scale, broad-based delegations of

1 positions as implicating national security.

2 MR. YOUNT: I would think that in these  
3 situations you would have to look to the underlying  
4 authority, which an individual court would rest its  
5 opinion. Here we have potential issues involving  
6 individual, personal liberties, whereas there's no  
7 property. You know, there's a property interest in an  
8 individual's body. The individual obviously has that  
9 authority.

10 There's no such property interest in security  
11 clearance, and by extension there's no indication.  
12 There's no case law to support that that extends to the  
13 right to access national security information or to  
14 occupy a position that involves access to National  
15 Security Act.

16 CHAIRMAN GRUNDMANN: Well, what about Koll? I  
17 mean Koll specifically says that national security  
18 should be narrowly interpreted and goes to great  
19 lengths to emphasize that you can't be everywhere.

20 MR. YOUNT: Well, the issue here isn't the  
21 fact that it can be everywhere.

22 CHAIRMAN GRUNDMANN: Well, I'm asking you the

1 question.

2 MR. YOUNT: Okay.

3 CHAIRMAN GRUNDMANN: I mean how does Koll?  
4 Does Koll not apply? Is it not informative here?

5 MR. YOUNT: I think that it is informative. I  
6 don't believe that it is more so than Egan when it  
7 examines specifically the characterization as positions  
8 as sensitive or non-sensitive.

9 CHAIRMAN GRUNDMANN: But Egan relies on Koll  
10 to some extent.

11 MR. YOUNT: Yes, just on the grade, but the  
12 board or the court specifically addressed separately  
13 and distinctly from the security clearance aspect the  
14 designation of positions before he went on to examine  
15 security. So I think that Egan provides an  
16 instruction, but I think here in Egan very specifically  
17 looked at that very specific issue of designation and  
18 sensitivity positions. I addressed those very  
19 specifically.

20 MS. WAGNER: I just have one more question. I  
21 mean is there any doubt that the agency could have  
22 taken a disciplinary action against Ms. Conyers under

1 7513?

2 MR. YOUNT: I quite frankly am not certain  
3 based upon the facts and circumstances.

4 MS. WAGNER: Well, I mean in theory, in the  
5 sense that --

6 MR. YOUNT: If there were such an egregious  
7 violation that she had cold-cocked her supervisor.

8 CHAIRMAN GRUNDMANN: No. I think this is a  
9 good question. I mean the question is she lost her  
10 eligibility to hold this position. The agency could  
11 have just fired her rather than said you lost your  
12 eligibility here.

13 MS. WAGNER: The question is if the agency  
14 couldn't proceed under 7513. And so what you're really  
15 asking us to determine and to uphold is that the  
16 appellant's rights as a tentative employee to third-  
17 party review is contingent on the agency's  
18 characterization or decision to pursue a certain  
19 process rather than another process.

20 MR. YOUNT: Well, as the court addressed in  
21 Egan, these are referral processes and they are not  
22 exclusive one to the other, the recollection or the

1 agencies proceed under nation's security requirements  
2 and authorities is permissible.

3 CHAIRMAN GRUNDMANN: Thank you, Mr. Yount.

4 MR. YOUNT: Thank you for your attention.

5 CHAIRMAN GRUNDMANN: Because we've gone way  
6 over with Mr. Yount, if the deputy clerk wants to add  
7 two more minutes onto Mr. Grajales's time, in the event  
8 you need it.

9 Next up, Ms. Caldwell for DOD Defense  
10 Commissary Agency in the Northover case.

11 Good day to you.

12 MS. CALDWELL: Good morning. May it please  
13 the board, I am Stacey Turner Caldwell, and without  
14 waiving the Defense Commissary Agency's objections  
15 pursuant to our motion to dismiss, I am here to  
16 represent the Defense Commissary Agency in oral  
17 argument in the case of Northover.

18 Here, pursuant to the authority granted to the  
19 Defense Commissary Agency by virtue of Executive Order  
20 10450 as amended, and further under 5 C.F.R. Part 732  
21 and Department of Defense Regulation 5200.2-R, the  
22 agency designated the position of Commissary Management

1 Specialist as a moderate risk, national security  
2 position, with the sensitivity level of non-critical,  
3 sensitive.

4 When Mr. Northover occupied that position,  
5 that meant that he did have to go through a background  
6 investigation and that he had to maintain eligibility  
7 to occupy a sensitive position. When that eligibility  
8 was denied, the agency took action to remove Mr.  
9 Northover solely based on the denial of that  
10 eligibility.

11 The agency submits that the precedent in Egan  
12 limiting the scope of the board's review clearly  
13 applies to this case also, because the authority that  
14 was exercised by the agency comes by virtue of the same  
15 executive order as the authority that was exercised by  
16 the agency in the Egan case to designate security  
17 positions and security requirements.

18 MS. WAGNER: Well, just to clarify, the  
19 Executive Order is 10450. Is that it?

20 MS. CALDWELL: Yes, ma'am. Now in designating  
21 the levels of security clearance required and just to  
22 be clear, security clearance formally is often used to



1 refer just to confidential secret and top secret  
2 clearances; however, that term is also used in the  
3 vernacular to refer to all the background checks that  
4 have to be run and passed in order to hold the  
5 position.

6 CHAIRMAN GRUNDMANN: So are you arguing that  
7 Egan, even though it specifically addresses security  
8 clearances, should actually mean if it covers any type  
9 of investigatory element in an employee's career?

10 MS. CALDWELL: Yes, Your Honor. I am arguing  
11 that Egan applies equally, because this is the same  
12 type of security determination with the authority for  
13 making that security determination in the interest of  
14 protecting national security as exercised by the agency  
15 in the same authority.

16 CHAIRMAN GRUNDMANN: But the authority in --  
17 is 12698 -- talks about an affirmative action that the  
18 granting official takes when they issue a security  
19 clearance. It's not the same thing that occurs here.

20 MS. CALDWELL: And there are two different  
21 ways that security clearances are referenced. Yes, it  
22 formally applies to those particular clearances covered

1 under there. However, it also is utilized to reference  
2 the entire realm of background investigations that  
3 apply to positions. And within the Department of  
4 Defense in terms of talking about security  
5 designations, we refer to all of the security  
6 designation determinations that are made as clearance  
7 decisions.

8 CHAIRMAN GRUNDMANN: So that is the vernacular  
9 the DOD uses?

10 MS. CALDWELL: Yes. More importantly --

11 MS. WAGNER: Excuse me, counsel. And I  
12 understand that this was representation that was made  
13 in the Conyers case, but in the brief in that matter  
14 that was submitted to the board, the government argued  
15 that the determination as to whether, I should say was  
16 up for argument, but the determination as to whether  
17 two grant the security clearance and whether an  
18 individual is eligible to occupy a sensitive position  
19 were separate inquiries. How does that comport with  
20 what you're indicating now, which is that it's just one  
21 amorphous review?

22 MS. CALDWELL: Well, Your Honor, I can't

1 really speak to what was intended by that footnote.

2 I'm not saying they're the same level.

3 CHAIRMAN GRUNDMANN: Wasn't that your  
4 footnote?

5 MS. WAGNER: No. It was there.

6 CHAIRMAN GRUNDMANN: Okay.

7 MS. CALDWELL: I'm not saying that they are  
8 the same level. What I'm saying is that they are both  
9 determinations made in the interest of National  
10 Security by virtue of the same authority, and that  
11 authority rests with the President of the United States  
12 as Commander in Chief and is delegated to the agency  
13 head to make those determinations and to ensure that  
14 they're effective in protecting national security.

15 It's a difference in degree of protection that  
16 the agency head has made a decision is needed not in  
17 terms of the kind of protection that's needed and the  
18 kind of designation. They're all security  
19 designations.

20 MS. WAGNER: I'm interested just to explore  
21 for a minute the arguments that both the government  
22 agencies made in these cases, which is that the

1 authority of the President in this regard rests in the  
2 Commander-in-Chief authority. And it seems that you  
3 would both have that authority be construed extremely  
4 broadly, and exclusively. Is that essentially your  
5 contention that when the President exercises his  
6 authority it is not an available, exclusive authority?

7 MS. CALDWELL: Our contention is that the  
8 President has delegated that authority to the agency  
9 head and no one else; and what goes along with that is  
10 that the agency head, in addition to having the  
11 authority for making the decision, the agency head has  
12 the responsibility for ensuring that that decision is a  
13 good one. And so if you get into other entities  
14 interfering and the agency's had ability to make these  
15 very close judgment calls, then there's a problem,  
16 because the agency spends a considerable amount of time  
17 consulting with experts who have specialized knowledge  
18 in this area.

19 MS. WAGNER: Right. But what I'm asking you  
20 is the President's authority isn't exclusive in this  
21 regard. I mean, if you look at the Constitution,  
22 Article 1, Section 8, Congress has authority to

1 regulate the armed and naval forces and to govern them.  
2 Congress has the authority to appropriate for the  
3 military. Congress has the authority to determine, you  
4 know, to establish the Uniform Code of Military  
5 Justice. I mean there's a lot of play there in terms  
6 of the respective authorities of the legislative branch  
7 and the executive branch.

8 MS. CALDWELL: Yes, Your Honor. And Congress  
9 certainly would have the authority to take action to  
10 modify the current state of things if that was their  
11 decision to do so. Our contention here is that as  
12 things stand now, pursuant to Executive Order 10450,  
13 the agency head has both the authority and the  
14 considerable amount of responsibility and  
15 accountability for making these decisions, and Congress  
16 has not delegated to anyone the authority to intervene  
17 in that exercise at this point.

18 CHAIRMAN GRUNDMANN: Let's talk about that  
19 authority in this particular case.

20 MS. CALDWELL: Yes, ma'am.

21 CHAIRMAN GRUNDMANN: In your motion to dismiss  
22 you indicate that whereas in 2009 Mr. Northover was

1 deemed ineligible for whatever reason. But as recently  
2 as a few days ago, a week ago, he is now deemed  
3 eligible. What changed?

4 MS. CALDWELL: Well, for one thing,  
5 litigation, Your Honor. That changed, but I will tell  
6 you the important distinction, the important point is  
7 that the person who changed the decision is the head of  
8 the agency.

9 CHAIRMAN GRUNDMANN: That's not the question.

10 MS. CALDWELL: Their person who is responsible  
11 for making that decision.

12 CHAIRMAN GRUNDMANN: Understood. Here's the  
13 question. What changed from 2009 to a week ago?

14 MS. CALDWELL: The head of the agency  
15 determined to grant a waiver of the factors that were  
16 represented as risk factors in this particular case,  
17 and that responsibility is his because that discretion  
18 solely rests with him. Hence, before in 2009 he  
19 deferred to the expertise of Washington Headquarters  
20 Services, which is the agency that is delegated to  
21 conduct the background investigations and make those  
22 decisions.

1           CHAIRMAN GRUNDMANN:  What if two weeks from  
2   now the agency head determines that Mr. Northover is no  
3   longer eligible?

4           MS. CALDWELL:  Well, that's certainly within  
5   his authority too, Your Honor, and I don't always  
6   understand decisions that are made that are outside the  
7   realm of my authority and expertise, but our point is  
8   that respectfully the Merit System Protection Board  
9   does not have the authority nor the expertise to  
10  intervene in the President's exercise of his authority  
11  to make decisions on national security matters and  
12  national security designations by virtue of the  
13  delegation to the agency head.

14           And I especially want to point out in terms of  
15  the expertise that's involved, because, again, someone  
16  on the outside reviewing the situation may not  
17  understand why the commissary employee is deemed to be  
18  in a non-critical sensitive position.  But I think one  
19  of the important things to look at is that --

20           MS. WAGNER:  Well, I have a question of point,  
21  too.

22           CHAIRMAN GRUNDMANN:  I want an answer to that,

1 where you were going, but go ahead.

2 MS. WAGNER: Okay. I'm sorry.

3 You talk about this discretion and this  
4 expertise, and from your briefs I gather that part of  
5 that kind of calculation about the expertise was in the  
6 predictive assessment of the behavior of the employee  
7 in terms of future contact and what not, that the  
8 agency had some particular expertise in that regard.  
9 But that's not the case in any removal that there is  
10 always an assessment of predictive behavior and I mean  
11 there's nothing inherently unique about an agency has  
12 ability to assess that that renders it unreviewable by  
13 the board.

14 I mean the board reviews those assessments all  
15 the time in the context of Douglas Factor analysis.  
16 You know, is the rehabilitation a reasonable  
17 possibility. Will this misconduct occur again? I mean  
18 those are types of considerations that are fully within  
19 the board's purview.

20 MS. CALDWELL: Yes, Your Honor, normally they  
21 are, however, in this case versus other cases you have  
22 Egan, and it is our contention that Egan directly



1 applies to this situation, actually.

2 CHAIRMAN GRUNDMANN: We don't have to expand  
3 Egan at all in order to apply it to this case.

4 MS. CALDWELL: Let me remind you that it's not  
5 an expansion of Egan in this instance, because the same  
6 rationale that prompted the court in Egan to make the  
7 limit, to place the limit on the scope of review  
8 applies here also, because it's the same type of  
9 security determination pursuant to Executive Order  
10 10450 as this may have been. And I think importantly  
11 one thing that we need to look at is in talking about  
12 classified information there is a distinction.

13 You're looking at classified information,  
14 which is by virtue of the nature of the information  
15 itself deemed classified. In these instances where a  
16 position is sensitive, but does not involve access to  
17 classified information -- excuse me. Can I get some  
18 water, please? You're talking about the position being  
19 designated as sensitive because of the nature of the  
20 position.

21 CHAIRMAN GRUNDMANN: Not the material  
22 information.

1 MS. CALDWELL: Not the material.

2 CHAIRMAN GRUNDMANN: Okay.

3 MS. CALDWELL: And there are many instances --  
4 thank you very much. Excuse me. There are instances  
5 where experts, who spend an extensive amount of time  
6 studying issues with regard to military operations, and  
7 the information that someone can gain, know that  
8 someone can take a particular bit of information that's  
9 not classified about troop movements, troop base  
10 populations, and they can apply that information in a  
11 way that can bring about materially adverse affect on  
12 national security.

13 And so what I'm trying to point out is that  
14 it's the same type of decision that involves a lot of  
15 expertise that maybe we wouldn't understand just  
16 looking at it, but someone has spent an awful amount of  
17 time making these decisions. They're very difficult  
18 judgment calls and it's the agency head that's  
19 ultimately responsible for ensuring that the system is  
20 effective; and, for the same reason that the court in  
21 Egan determined that that particular judgment call  
22 shouldn't be interfered with. It shouldn't be

1 interfered with here.

2 CHAIRMAN GRUNDMANN: Yeah. You wanted to talk  
3 about national security as it pertained to this  
4 position, and I'd love to hear it.

5 MS. CALDWELL: With regard to the commissary  
6 management specialist?

7 CHAIRMAN GRUNDMANN: Correct.

8 MS. CALDWELL: Yes, Your Honor. With regard  
9 to the commissary management specialist, Mr. Northover  
10 was involved in entering special orders into the  
11 system. Commissary management specialists are able to  
12 gain information about troop movements at times, about  
13 populations on the base, about the presence of  
14 dignitaries on the base, the food supply going to  
15 different military units.

16 That information could be used by someone to  
17 interfere with military operations. It is by virtue of  
18 what we do within the Department of Defense that  
19 supplies the reason that you find so many sensitive  
20 positions in the Department of Defense. The same  
21 position at the Department of Labor may be classified  
22 differently.

1           Your Honor, I'm out of time, but I'll be glad  
2 to continue to answer questions.

3           CHAIRMAN GRUNDMANN: Thank you very much.

4           MS. CALDWELL: Thank you for the time.

5           CHAIRMAN GRUNDMANN: Joining us today are also  
6 two amici who will split their time, Mr. Devine and Ms.  
7 Wilson. Let's go in that order. Mr. Devine?

8           MR. DEVINE: May it please the board, my name  
9 is Tom Define. I'm legal director of the Government  
10 Accountability Project and representing GAP as an  
11 amicus.

12           The board is to be commended for seeking  
13 argument on this issue because the stakes could not be  
14 higher, but the ruling is an opportunity to restore a  
15 consistent set of rules throughout the civil service  
16 for access to the merit system; secondly, to maintain  
17 the role of civil service law over a potentially all  
18 encompassing national security loophole; and, third, to  
19 clarify the boundaries for Egan v. Department of the  
20 Navy that reflect the Supreme Court's mandate, rather  
21 replacing the preview force activism to expand Egan.

22           By expanding Egan the board ironically created

1 an outcome where judgment calls with the least national  
2 security significance with the largest exception from  
3 the merit system, somehow on grounds of national  
4 security. There's something very wrong with that  
5 picture. The premises for our argument are, first of  
6 all, that Egan was a decision on security clearances  
7 and security clearances alone, while there was much  
8 commentary about the context for it.

9           That was the ratio decided in that it was  
10 grounded in the search for statutory authority to  
11 support board authority. It simply found none. But  
12 unlike the context in Egan, however, with respect to  
13 prohibited personnel practices, Congress has  
14 established the boundaries of the board's authority in  
15 5 U.S.C. 2302(a)(2)(B) and (C). Those established the  
16 scenarios where the board is barred from intruding on  
17 national security decisions, either for individual jobs  
18 or for particular categories of jobs.

19           There is no other authority in the statute  
20 which limits the board's power to police the merit  
21 system and guard against prohibitive personnel  
22 practices. It ultimately qualified such as the

1 definition in Executive Order 10, Executive Order that  
2 is controlling here, I cannot even cast Constitutional  
3 muster. The definition in the Executive Order covers  
4 jobs that could bring about material adverse effect on  
5 national security, as I think the amicus was amply  
6 demonstrated.

7 That could potentially affect any job that  
8 exists in the Federal Government. Anyone who wants to  
9 engage in mischief has the capacity to get an impact  
10 that is not an adequate boundary though for limiting  
11 the court's authority to place the merit system. There  
12 was an analogous circumstance in American Foreign  
13 Service Association v. Garfinkel in the 1980s where the  
14 court disallowed free speech restrictions based on the  
15 concept of classifiable instead of classified, because  
16 the former category could apply to all communications.

17 We are in the due process equivalent of that  
18 scenario here, and there is no constitutional basis for  
19 such an amorphous concept to be the bright line  
20 boundary of legal rights.

21 MS. WAGNER: Mr. Devine, has Executive Order  
22 10450 ever been challenged to your knowledge?

1 MR. DEVINE: I'm sorry?

2 MS. WAGNER: Has it ever been challenged? Has  
3 the Executive Order 10450 ever been challenged?

4 MR. DEVINE: I couldn't give a researched  
5 response to that. Your Honor, we don't think that  
6 there's a problem with having that broad standard as a  
7 promise and a principal for making decisions. It's just  
8 like the efficiency of the service. But within those  
9 broad contexts, you had particular, tangible boundaries  
10 for the exercise of rights that open that possibility  
11 that you won't be covered by the merit system.

12 MS. WAGNER: I'm interested in getting your  
13 response to the question that I posed to Mr. Grajales  
14 earlier, which is that that Executive Order is based in  
15 part on the statutory authority, 5 U.S.C. 7532, which  
16 contemplates on the face of it, anyway, that the  
17 President could delegate or could designate positions  
18 with no statutory standard to limit that designation.  
19 So where would we get such a limitation?

20 MR. DEVINE: First, let's say there are  
21 broader categories that require less review of agency  
22 action. And if an agency wants to exercise its

1 authority and avoid review, it should go to those  
2 particular categories, rather than try to neutralize.  
3 I've noted the adverse action procedures and due  
4 process rights.

5 MS. WAGNER: I thought that's what you were  
6 accusing the government of doing here, which is to  
7 essentially resorting to non-statutory approaches to  
8 dismissing employees in order to avoid the appellate  
9 process that's provided in the statute.

10 MR. DEVINE: Absolutely. And I think the  
11 government is trying to avoid review. I think they  
12 probably took the wrong basis in their attempt to avoid  
13 review. But even in Section 7532 there's nothing which  
14 says the board is deprived of authority to enforce the  
15 congressional ends against prohibited personnel  
16 practices. It would streamline the process for a  
17 merits decision, but it doesn't accept those decisions  
18 from the merit system itself.

19 With respect to the arguments that we covered  
20 quite thoroughly, so I don't mind being repetitive, and  
21 it is worth pointing out that counsel has rebutted  
22 himself by referencing the context for the discussion



1 in Egan and the fact that Congress has created  
2 different charter boards of jobs. In none of those  
3 circumstances were any restrictions placed on the  
4 board.

5 He was illustrating the background nature of  
6 what the government is attempting to make his  
7 changeable walls or a board of fearing to board review.  
8 But suddenly the amicus stated that everything  
9 connected with a security clearance decision was partly  
10 a security clearance decision. That simply doesn't  
11 reflect current law. But in other decisions initially  
12 decided by the court, the Jacobs decision in 1994, the  
13 Army tried to avoid review that was filed by an  
14 employee under the Chemical Personnel For Liability  
15 Program.

16 CHAIRMAN GRUNDMANN: But Jacobs had a security  
17 clearance.

18 MR. DEVINE: I'm sorry?

19 CHAIRMAN GRUNDMANN: Mr. Jacobs had a security  
20 clearance in that case.

21 MR. DEVINE: That's another unreviewable way  
22 to remove him from employment, and the board said it

1 wanted to avoid review, but the clearance had to be  
2 removed. It couldn't be done through that vehicle.  
3 Executive Order 12968 has separate categories for  
4 security clearance in preliminary determinations.  
5 Section 1.2(a), I believe it is, regards security  
6 clearances directly.

7           Section 1.2(c) involves those preliminary  
8 steps, such as background investigations or signing a  
9 non-disclosure form. And the board has authority to  
10 review non-disclosure forms to make sure they're hands  
11 off for the personnel factors rights in the  
12 whistleblower protection. And amicus also stated that  
13 the board doesn't have the expertise for anything  
14 connected with a security trans pacific.

15           The board exercises that expertise routinely  
16 in areas involving national security, reassigning them  
17 from a job with one national security duty to lots, a  
18 failure to provide training necessary for national  
19 security positions. These are all covered by  
20 prohibited personnel practices. Finally, Your Honors,  
21 I'd like to point out that the Crown Port Doctrine that  
22 we are considering cannot coax us with the merit

1 system.

2 Controls are necessary to deal with a rapidly  
3 proliferating phenomenon to exploit this loophole. The  
4 Department of Justice and three-quarters of the U.S.  
5 Attorney positions had sensitive positions. It was  
6 applying to all civilian employees of military bases is  
7 this case, most IRS employees. All law enforcement are  
8 inspector general agents. All TSA baggage screeners  
9 will not be guaranteed of merit system. It's the one  
10 that's establishing the bright line defending its  
11 authority in this area.

12 The alternative will be a fugal hatch putsch  
13 of inconsistent rules. For example, the Navy, these  
14 preliminary determinations have the same due process as  
15 security clearance actions. The Department of  
16 Justice -- they get none. Your Honor, this is a very  
17 significant opportunity to restore coherence to the  
18 stages that are preceding the decision which  
19 practically is reserved for the President.

20 CHAIRMAN GRUNDMANN: Thank you, Mr. Devine.

21 Ms. Wilson?

22 MS. WILSON: Good morning, or are we in

1 afternoon? May it please the board, my name is Julie  
2 Wilson and I'm here today representing the National  
3 Treasury Employees Union as amicus.

4           The issue before you is far simpler than  
5 agency counsel suggests. Plainly put, does the board  
6 have the authority to review the underlying merits of  
7 an adverse action involving an employee who does not  
8 have access to classified information. As my  
9 colleagues from AFGE and GAP have just explained, the  
10 answer to that question is unmistakably, "yes."

11           I think it would be helpful to summarize just  
12 some of the main points here today. It's undisputed  
13 that as a general matter the board has jurisdiction  
14 over the adverse actions present in this case, a  
15 removal and an indefinite suspension. The board's  
16 jurisdiction to review the merits of an adverse action,  
17 such as it is at present here, has illuminated only the  
18 most narrow of cases. There's a strong statutory  
19 presumption in 1205 and Chapter 77 that the board will  
20 review any underlying decision leading up to that  
21 adverse action.

22           The agency attempts to avoid board review, but

1 here by citing to Egan, which is admittedly one of  
2 those narrow exceptions, but in doing so the agency  
3 mistakenly glosses over the critical fact; that is that  
4 neither Conyers nor Northover were required to access  
5 classified information or to hold a security clearance,  
6 the dispositive fact in Egan.

7           The agency thus erred when it tries to extend  
8 Egan to a situation that simply was not present there.  
9 In fact, as we talked about, as my colleagues have  
10 talked about, the Egan court made very, very clear that  
11 it was addressing the most narrow question of whether  
12 the board could review the merits of irrevocation of a  
13 secured clearance. In ruling that it did not, the  
14 court took great care to stress its concerns about the  
15 President's ability to protect the nation's most  
16 critical secrets.

17           I want to address two of the points made by  
18 agency counsel today. One, counsel alleges that the  
19 Egan court made two separate inquiries that the court  
20 looked to the present, reported the broad power to  
21 dictate what would be in the interest of national  
22 security and then looked to see whether that applied in

1 a security clearance context. And I respectfully  
2 suggest that that's not really what happened in Egan.

3 Egan adds at its very outset acknowledged that  
4 it was only looking at a very narrow question. The  
5 question of whether the board could review the security  
6 clearance. It concluded that it did not, but then went  
7 through to support that conclusion, looking at what the  
8 statute provided, looking at what Congress intended by  
9 issuing the statute. And that is to agency counsel's  
10 second point: congressional attendance.

11 When the Egan court looked at the question of  
12 the review of the security clearance it was doing so in  
13 an environment where very few employees have a security  
14 clearance. It was looking at what Congress would have  
15 intended for a small group of employees, whether  
16 Congress would have potentially have a vow for that  
17 small group of employees to be denied full board  
18 review. Here, it is the polar opposite situation.

19 As we've all talked about in our briefs, this  
20 decision has the potential to affect tens of thousands,  
21 even hundreds of thousands of garden variety federal  
22 employees. And I respectfully suggest that Congress

1 could not have intended to deprive that significant  
2 number of federal employees to avoid review over  
3 adverse actions.

4 MS. WAGNER: I have a question, counsel. It  
5 seems to me that that argument can kind of cut both  
6 ways, which is that at the time Egan was decided I  
7 think the same concerns about the possibility of  
8 agencies resorting to a security clearance  
9 determinations or in order to circumvent the statutory  
10 rights of federal employees with regard to removals and  
11 what not, that agencies with wholesale start out in  
12 issuing security clearances just in order to  
13 circumvent.

14 And that actually hasn't happened, I think, to  
15 the extent, or at least we haven't heard any of the  
16 parties indicating that that has actually happened. So  
17 the idea that by wondering this eligibility  
18 determination review we are going to be opening up the  
19 floodgates to wholesale deprivation of employee rights.  
20 Is that a concern that is reasonable to anticipate  
21 given the history of how Egan was in charge of an  
22 agency?

1           MS. WILSON: I think so. I think so, Your  
2 Honor, because there's a process for the designation of  
3 a security clearance. An agency must show that the  
4 employee will have access to classified information in  
5 order to even seek the permission to give the person a  
6 security clearance.

7           So there's certainly a process and a procedure  
8 that the agency has to go through in order to get a  
9 security clearance. And that could be one of the  
10 reasons why we haven't seen this wholesale requirement  
11 that all employees go through the security clearance  
12 process, because it's expensive and it's time  
13 consuming, as it talked about in the background  
14 investigation for the SF86.

15           On the other side, there doesn't appear to be  
16 any process, and I'd like to take agency counsel's  
17 assertions that face down you have people with great  
18 expertise are making these decisions about the  
19 designations of these positions as national security  
20 positions. There's nothing in the record to suggest  
21 how these designations are made, by whom they're  
22 reviewed, whether it's the most rated H.R. employee or



1 the head of the Department of Defense who was deciding  
2 whether these positions are national security  
3 positions.

4 And, in fact, I think that OPM somewhat  
5 concedes that there isn't really an established process  
6 for reviewing the designations. So in the absence of  
7 any regulatory or executive branch review over national  
8 security designations, I think that there is a strong  
9 and a real concern that the agencies would have their  
10 unfair discretion to reclassify all positions, and thus  
11 overwrite any type of review.

12 MS. WAGNER: Well, I mean I had to take a look  
13 at the executive board, but I believe that the  
14 Executive Order itself contemplates that OPM should be  
15 undertaking a consistent review of agency designations  
16 to ensure that they were being done consistent with  
17 national security concerns, and what not.

18 MS. WILSON: There's nothing in the record  
19 that speaks to that, and OPM did not address it in its  
20 letters, in its March letter or April letter.

21 MS. WAGNER: But you would concede that the  
22 agency does have the authority to do that?

1 MS. WILSON: That OPM would have the  
2 authority?

3 MS. WAGNER: Yes. Certainly to look at the  
4 interpretation and application of its own regulations.  
5 What I would suggest is it doesn't appear that that is  
6 happening to date.

7 MS. WILSON: Well, and I also want to ask you,  
8 because under 7532 in addition to extending the  
9 designation authority to the present, you know, after  
10 delineating the specific agencies that in Congress's  
11 view apparently implicated national security concerns.  
12 It says that the designation should be submitted to the  
13 committee for armed services for review, if those  
14 designations are made.

15 Do you know if those designations had been  
16 submitted to a congressional --

17 MS. WILSON: I can't speak to that  
18 specifically.

19 MS. WAGNER: Okay.

20 MS. WILSON: I don't know. Now that does  
21 raise an important point that I wish to address, based  
22 on your earlier questions to both Mr. Define and agency

1 counsel about the application of 7532. I think it's  
2 significant here, and important that the agency didn't  
3 proceed under 7532. We're dealing with a chapter 75  
4 removal.

5           If they had wanted to assuming that they could  
6 show the imminent risk to national security, they could  
7 have attempted to remove these employees that are 7532.  
8 So the analysis of that section of 7532 and its  
9 potential limitations and how the agency need apply it  
10 is somewhat irrelevant to the resolution of the issue  
11 here.

12           Here, the agency made a decision to proceed  
13 under Chapter 75. It proposed the removal and the  
14 indefinite suspension of these two employees. In doing  
15 so, that means that the board has under Chapter 77  
16 review of those adverse actions. Once the agency  
17 proceeded under Chapter 75, the consequences of that  
18 flow from their decision, the board has very clear  
19 statutory review over Chapter 75 removals and  
20 indefinite suspensions.

21           And, in fact, you know, I want to also speak  
22 just to expand on a little bit of what we talked about

1 earlier about the concerns should the rationale in Egan  
2 be applied to this vast majority of federal employees.  
3 There certainly appears to be a significant trend  
4 towards reclassifying a number of federal positions as  
5 sensitive. As I pointed out earlier, there's no  
6 information, either in the record or even anecdotally  
7 that NTEU is aware of, about how these decisions are  
8 made, and there doesn't appear to be any oversight  
9 currently in place for these designations.

10 Our concern is that agencies in the absence of  
11 such oversight are going to have this unfettered  
12 discretion to strip federal employees of their  
13 statutory rights to full board review, and NTEU is  
14 actually aware of a situation that we referenced in our  
15 brief where this very situation is happening. We have  
16 an employee whom we represent, who the removal was  
17 proposed went to an arbitrator.

18 The arbitrator struck down the reasons that  
19 the agency presented for the removal. It required and  
20 ordered the employee to be reinstated in his job and by  
21 coincidence, very shortly after reinstatement, this  
22 employee was subject to a reinvestigation because his

1 physician is sensitive.

2 Now, the fact that that's currently before the  
3 adjudicator as to whether the employee is eligible, but  
4 it is strongly expected that the employee will in fact  
5 be ineligible to occupy his sensitive position. And if  
6 Egan were to apply, that would mean that the agency  
7 would have had a second bite at the average used, the  
8 very same reasons that were struck down by the  
9 arbitrator for removing the employee from his position.

10 That doesn't seem consistent with what  
11 Congress intended when it set up the CSRA. It doesn't  
12 seem consistent with what the Merit Systems Protection  
13 Board jurisdiction requires, that to have agencies have  
14 the opportunity to strip employees of review rights.  
15 Justify designating a position as a sensitive position  
16 is inconsistent. It's inconsistent, as the board  
17 itself points out in Jacobs, given its role of the  
18 protector of the Merit Systems Protection board.

19 MS. WAGNER: I have a question and I'm not  
20 sure if the case you were describing involved the  
21 access to that internal, arguably independent review  
22 that I guess DOD employees are entitled to with regard

1 to eligibility as well as security clearance  
2 provocations.

3 MS. WILSON: Yes. That type of internal  
4 review is pretty consistent. This happened to be a DHS  
5 employee, but the review procedure for eligibility, the  
6 determinations seems pretty consistent across the  
7 government that there is an additional decision about  
8 eligibility. The employee is given an opportunity to  
9 respond, those very basic due process rights.

10 CHAIRMAN GRUNDMANN: So why isn't that  
11 sufficient in this particular case?

12 MS. WILSON: Because in this case, as in  
13 Conyers and Northover, there is serious concern that  
14 the employee did not have the opportunity to -- let me  
15 address this a different way. That type of review is  
16 not sufficient to guarantee the employees' full  
17 statutory rights under board review, that it is simply  
18 a matter of turning in a piece of paper that says, "I  
19 disagree with the agency," and then the agency has  
20 complete discretion to either read it or throw it out,  
21 or disregard it altogether. I mean, because there is  
22 no review process, we have no idea what the agency

1 does.

2 CHAIRMAN GRUNDMANN: But I think he was in one  
3 of the agency's briefs that this is a six-tier review  
4 in this particular case. It's not just handing a paper  
5 and seal it off. It seems to be some sort of a  
6 calculated process before eligibility is denied.

7 MS. WILSON: And it could be six. It could be  
8 12, but if it's all cloaked in this mystery about what  
9 happens behind the scenes, I don't think it really  
10 matters, because what the end result is is that the  
11 agency has complete discretion to decide whether the  
12 employee is eligible to occupy the sensitive position.  
13 And they can do so, presuming that their position  
14 stands. They can do so knowing that there's no review  
15 of that.

16 So how do we protect an employee from  
17 discrimination, from personnel practice, from  
18 retaliation, from constitutional violations, from all  
19 of the assertions and claims that have been repeatedly  
20 struck down in the Egan context? I mean, you know, when  
21 security clearances require it, the court has  
22 repeatedly said, if Egan applies, our ability to look

1 at even discrimination is very, very limited.

2 Our ability to look to see whether the  
3 employees are retaliated is very, very limited, if not  
4 non-existent. So I acknowledge that there might be  
5 some type of internal review process.

6 I respectfully suggest that that's not enough,  
7 and there's nothing in the statute to suggest that that  
8 is enough. The board has clear statutory jurisdiction  
9 to review these types of diverse actions, absent some  
10 type of congressional act or a court decision that  
11 narrows the board's jurisdiction. We suggest that it  
12 is not for the board to go in there and to apply Egan  
13 to limit jurisdiction.

14 CHAIRMAN GRUNDMANN: Thank you very much.

15 MS. WILSON: Thank you.

16 CHAIRMAN GRUNDMANN: I believe we are back  
17 with Mr. Grajales, 12 minutes. How much time? I gave  
18 you two extra minutes.

19 MR. GRAJALES: Thank you to the board again  
20 for this opportunity to piggyback off of what was just  
21 discussed. Appellants suggest that even if an agency's  
22 internal review were sufficient, that still would not



1 allow the board to advocate its responsibility under  
2 the statute to adjudicate the merits of an adverse  
3 action appeal.

4 Not only that; internal review is not  
5 sufficient for the simple reason that there is no third  
6 party neutral review. This is an exclusively internal  
7 review process, whether it be within the Department of  
8 Defense, or one of the military departments, or any  
9 other department or agency within the Federal  
10 Government. And appellants would suggest that in fact  
11 the internal review applied by the various departments  
12 and agencies is not entirely consistent.

13 There are some significant differences, for  
14 example, in the way that the Department of Defense  
15 Central Adjudication facility applies its regulations  
16 or its policies. First is, for example, the Department  
17 of the Navy's Central Adjudications Facility. There  
18 are differences.

19 There may be, although appellants regretfully  
20 are unable to speak with certainty. There may be  
21 significant differences in the level of review that is  
22 allowed given the distinction between a security

1 clearance versus eligibility to occupy a sensitive  
2 position.

3 Appellants also wish to point out that if  
4 something as ephemeral as litigation can change a  
5 national security designation, then what else? So to  
6 completely arbitrate process does not square with the  
7 board's authority under 1204, 7512 or 7701 of Title 5  
8 of the United States Code, and it cannot be what Egan  
9 or Congress intended to protect. And, indeed, as came  
10 up, I think, when the board questioned agency counsel  
11 as well as mediating with respect to expertise, and  
12 this is in the record, in 2003 DFAS had approximately  
13 35% of its employees designated as sensitive.

14 Two years later, virtually overnight, they had  
15 100% designated as sensitive with a broad brush. That  
16 is not expertise. That is arbitrary, and in the same  
17 vein, for example, the board's review when Vice Chair  
18 Wagner was asking what would be the standard,

19 Well, I direct the board to look at the cases  
20 and appeals it has adjudicated, involving, for example,  
21 law enforcement personnel. The board certainly has the  
22 authority to review the full scope of merits, but in

1 recognition of some of the particular facets of law  
2 enforcement personnel, the board also routinely holds  
3 them to a higher standard.

4           There's nothing inconsistent about that, nor  
5 is there anything that would prevent the board from  
6 doing likewise, should it choose in these cases. And  
7 let us dispense, immediately, with the fallacy, if I  
8 haven't said it before, that the term security  
9 clearance is not a term of art. It most certainly is  
10 as shown, if you look at Executive Order 13526, which  
11 replaces its predecessor, 12968, which was cited by  
12 amicus AFGE, I believe, on page 9 of the amicus brief.

13           This Executive Order provides a detailed  
14 scheme for the identification and protection of  
15 classified, national security information, and it  
16 explicitly describes the types and the only types of  
17 security clearances as a confidential secret and top  
18 secret, all of the addition in short of a term of art,  
19 and, again, lack clarity regarding whether it should be  
20 a form 85 or a form 86 to be used.

21           That clearly to appellants argues in favor of  
22 establishing the security clearance as the bright line

1 to balance the national security concerns present in  
2 Egan for the rights of federal tenured employees and  
3 the powers of this board. And appellants wish to  
4 express their disagreement, I believe, with agency  
5 counsel.

6 Egan relied heavily on Koll v. Young, as well  
7 as CIA v. Sims, to inform its decision in Egan. It  
8 relied and quoted the portions of those two decisions,  
9 Koll and CIA v. Sims, regarding classified information.  
10 It is ever present in Egan.

11 That case is replete with references to the  
12 need to protect the national security information, and  
13 that is why appellants respectfully suggest that the  
14 board should not extend Egan to cover appeals of  
15 adverse actions arising from an employee's loss of  
16 eligibility to occupy a sensitive position, when there  
17 is no security clearance, nor access to classified  
18 information.

19 With that, I'd be perfectly willing and happy  
20 to take any questions that the board may have.

21 MS. WAGNER: I've got a couple of questions.  
22 And I think I stated before that it seems to me that

1 the argument was primarily on the contention that  
2 security clearance is distinct from the determination  
3 with regard to eligibility. Is that correct?

4 MR. GRAJALES: Yes.

5 MS. WAGNER: With the Executive Order 13467,  
6 are you familiar with that?

7 MR. GRAJALES: I've read it, but I am not --

8 MS. WAGNER: June of 2008, the Executive Order  
9 was issued, and that seems to conflate, actually, all  
10 of those, those concepts: eligibility for sensitive  
11 position, security clearance. In terms of the purpose  
12 of the Executive Order is at least from reading it on  
13 its face is to align all of the processes for making  
14 those assessments and to make them consistent.

15 What significance should we attribute to that  
16 in terms of determining whether and in fact security  
17 clearances should be considered, or eligibility  
18 determination should be considered in the same light as  
19 security clearance revocations.

20 MR. GRAJALES: I regret that I'm not fully  
21 familiar with that Executive Order, however, appellants  
22 would argue that it should not control the board's

1 decision, because, again, we look to Egan and it is  
2 Egan itself that carved out the jurisdiction of the  
3 board; and, so, Egan created the limited carve out  
4 based on classified information. That is that anyway  
5 that is not present.

6 Egan simply doesn't apply, although there may  
7 be the subsequent Executive Order conflating that. The  
8 argument remains the same, that the concerns that drove  
9 Egan are not present.

10 MS. WAGNER: Just one final question. Is  
11 there anything to be made of congressional action or  
12 action in this context? I mean, you know, we have  
13 Congress having authorized and then let subside an SPS  
14 system which would, you know, suggest that Congress did  
15 contemplate the possibility of bringing whole groups of  
16 employees outside the scope of statute. I mean do you  
17 have any comment about that, and what we should make of  
18 congressional action or inaction, either way.

19 MR. GRAJALES: Certainly, congressional  
20 inaction or action may not be the clearest indicator of  
21 congressional intent; however, appellants would argue  
22 that here congressional inaction does speak to what the

1 board's scope of review should be, because if Congress  
2 sought to restrict it further, it could have done so  
3 and has not done so. And given that when you read Egan  
4 you must read it as tied to national security  
5 classified, national security information, of how it's  
6 believed the conclusion to be drawn from that is that  
7 Congress allowed Egan to proceed to continue, but it  
8 did not act to extend it. Nor, did it act to restrict  
9 the board's otherwise full scope of review.

10 MS. WAGNER: Thank you.

11 CHAIRMAN GRUNDMANN: Thank you, Mr. Grajales.

12 MR. GRAJALES: Thank you.

13 CHAIRMAN GRUNDMANN: This concludes the oral  
14 argument in the appeals of Conyers and Northover v.  
15 Department of Defense. The parties have been given an  
16 additional two weeks to brief on the three questions  
17 that the board posed to them on September 16th.  
18 Briefing will be simultaneous. These briefs will be  
19 filed no later than close of business, Tuesday, October  
20 5th, and the record will close on October 5th. The  
21 order will issue from the board later this afternoon.

22 On behalf of the board, the board does thank

1 the parties, their counsel, amici, for the time and the  
2 deal they put into their arguments and their briefs in  
3 an effort to educate us to better inform our decision.

4 Thank you. This hearing is adjourned.

5 (Whereupon, at 11:45 a.m., the hearing was  
6 adjourned.)

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