NO. 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

BRIEF FOR AMICUS CURIAE THE UNITED STATES OFFICE OF SPECIAL COUNSEL IN SUPPORT OF RESPONDENTS AND IN FAVOR OF AFFIRMING THE MERIT SYSTEMS PROTECTION BOARD'S DECISION

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BRIEF FOR AMICUS CURIAE THE UNITED STATES OFFICE OF SPECIAL COUNSEL IN SUPPORT OF RESPONDENTS AND IN FAVOR OF AFFIRMING THE MERIT SYSTEMS PROTECTION BOARD'S DECISION

IDENTITY OF THE AMICUS

Amicus, the United States Office of Special Counsel (OSC), is an independent federal agency charged with, *inter alia*, protecting federal employees from "prohibited personnel practices," as defined in 5 U.S.C. § 2302(b). In particular, OSC is responsible for protecting federal employees against retaliation when they disclose "any information" they reasonably believe evidences a violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety, unless such disclosure is specifically prohibited by law. *See* 5 U.S.C. § 2302(b)(8). In addition to responding to the Court's invitation for the views of *amici curiae*, the Special Counsel is "authorized to appear as *amicus curiae* in any action brought in a court of the United States related to section 2302(b)(8) . . . [and is] authorized to present the views of the Special Counsel with respect to compliance with section 2302(b)(8) . . . and the impact court decisions would have on the enforcement of such provisions of law." 5 U.S.C. § 1212(h). The Special Counsel respectfully submits this Brief to address concerns that upholding the

panel's decision will impede OSC's ability to effectively enforce section 2302(b)(8).

STATEMENT OF THE ISSUES

a. Does the Supreme Court's ruling in *Department of the Navy v. Egan*, 484 U.S. 518 (1988), foreclose review by the Merit Systems Protection Board (MSPB or Board) 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 clearance, 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?

INTRODUCTION AND SUMMARY OF ARGUMENT

For the reasons summarized below, OSC submits that the Federal Circuit should not extend the Supreme Court's decision in *Department of the Navy v. Egan*, 484 U.S. 518 (1988), to preclude MSPB review of the merits of an adverse action under title 5, chapter 75 that is based on an agency determination that an employee is ineligible to hold a position designated as sensitive pursuant to Executive Order 10,450 and 5 C.F.R. § 732 *et seq.*

1. As explained in Section I, the panel's extension of *Egan* to eligibility determinations in *Berry v. Conyers*, 692 F.3d 1223 (Fed. Cir. 2012), is potentially sweeping in scope and would undermine OSC's ability to perform its statutory duty to protect whistleblowers for a substantial number of employees. *Egan* represented a narrow exception to the Civil Service Reform Act (CSRA), a carefully crafted statutory framework that provides civil servants with due process rights in the face of adverse actions. This exception was predicated on the absence of explicit Congressional direction to permit the Board to review the merits of a security clearance determination. *Egan*, 484 U.S. at 530. The Supreme Court acknowledged that Congress's failure to preclude security clearance denials from review created a "strong presumption in favor of appellate review," but nonetheless ignored this presumption in deference to the President's unique power to limit access to classified information. *Id.* at 527. In *Hesse v. Department of*

State, 217 F.3d 1372, 1377-80 (Fed. Cir. 2000), *cert. denied*, 531 U.S. 1154 (2001), the Federal Circuit extended the *Egan* exception to cases involving allegations that an agency revoked a security clearance in retaliation for whistleblowing. The impact of *Egan* and *Hesse*, however, was mitigated in that they only exempted from the CSRA personnel actions involving positions that require access to classified information—a concretely-defined and well-understood limitation.

A sweeping extension of this narrow exception to all sensitive positions, even those that do not require access to classified information, would endanger the rights of federal employees. Essentially, such a decision would carve out an exception from the CSRA and Whistleblower Protection Act (WPA) for over 25% of the existing federal work force when an agency bases an adverse action on an eligibility determination.[1] This would run counter to the usual presumption in favor of appellate review and instead infer Congressional intent from its silence. But such an inference of intent is unwarranted because, unlike with security clearances, there is no identifiable limit to the number of positions that could be

[1] According to OPM only 300,000 of the approximately 800,000 Department of Defense civil service employees occupy non-sensitive positions. Appendix to OPM Petition for Review of the Merit Systems Protection Board in Consolidated Case Nos. CH0752090925-R-1 and AT0752100184-R-1, filed May 6, 2011, at 76. Thus, 500,000 occupy positions designated as sensitive, representing approximately 25% of the approximately two million federal employees (subject to specified exclusions for, *inter alia*, the intelligence agencies, the postal service, and the Tennessee Valley Authority). *See www.fedscope.opm.gov/employment.asp*.

excluded from Board review, as federal agencies have broad and subjective discretion to designate sensitive positions. Indeed, as the cases at hand demonstrate, such a subjective standard can reach a GS-7 commissary management specialist and a GS-5 accounting technician, neither of whom require a security clearance to perform his or her job.

Such an expansion potentially would undermine OSC's and the Board's statutory jurisdiction over departments and agencies, including but not limited to the Department of Defense (DOD), the Department of Homeland Security (DHS), and the Department of Energy (DOE), because these and other agencies could easily avoid OSC and Board scrutiny by designating positions as sensitive to insulate adverse actions from review.

2. As explained in Section II, the panel's extension of *Egan* is contrary to Congressional intent as evidenced by Congress's actions over the years to increase protections for whistleblowers. Since passing the CSRA, Congress has expanded the rights and protections for federal whistleblowers several times. In so doing, Congress has emphasized the critical role that whistleblowers play in national security. An expansion of *Egan* to eligibility determinations, however, would undermine Congress's efforts to create a safe environment for those whistleblowers who are best-positioned to make disclosures that are in the interest

of national security, by exposing them to reprisal without any substantive review rights.

Furthermore, over the years, Congress has engaged in multiple efforts to mitigate the scope of *Egan*, by attempting to amend the WPA to include appeal procedures for whistleblowers who face retaliatory security clearance revocations. Although these efforts failed, the total absence of any Congressional concern over eligibility determinations in these attempts suggests that Congress did not contemplate that eligibility determinations were exempt from Board review.

Finally, when Congress has sought to exclude specific employees from the protections of the CSRA, WPA or WPEA, it has done so expressly. Such specificity suggests that Congress did not implicitly intend to exclude over 25% of the federal work force from these protections.

3. As discussed in Section III, procedural differences between security clearance and eligibility determinations underscore the common sense understanding that *Egan* was a narrow decision aimed at the objectively identifiable class of positions that require access to classified information. Specifically, the President has acted twice to provide procedural protections for security clearance revocations, with no corresponding effort for employees challenging eligibility determinations. The logical inference from this omission is that the President assumed, as did Congress, that adverse actions based on

eligibility determinations are entitled to full consideration by the Board and require no additional protection.

4. As discussed in Section IV, OSC is well-positioned to investigate and prosecute claims involving retaliatory eligibility determinations. OSC's mission and expertise are to investigate claims of retaliatory personnel actions. OSC has decades of experience in dealing with complaints from employees occupying sensitive positions. The extension of *Egan* contemplated in the panel's decision would mark a significant narrowing of OSC's jurisdiction.

ARGUMENT

I. EXTENSION OF *EGAN* TO ELIGIBILITY DETERMINATIONS LACKS A LIMITING PRINCIPLE AND DISREGARDS *COLE*'S WARNING AGAINST SWEEPING EXCLUSIONS OF EMPLOYEES FROM STATUTORY PROTECTIONS

OSC supports the MSPB's position as stated in its principal brief that the *Egan* decision is narrowly confined to security clearance determinations.

In *Egan*, the Supreme Court insulated security clearance determinations from the procedural protections of the CSRA. The Court predicated the *Egan* exclusion on a Congressional silence and the President's discretion, in the absence of explicit direction from Congress, to protect classified national security information. 484 U.S. at 530. The Court explained that "the grant of security clearance to a particular employee, a sensitive and inherently discretionary judgment call, is committed by law to the appropriate agency of the Executive

Branch." *Id.* at 527. The *Egan* decision relied on a history, dating to World War I, of the Executive Branch protecting the nation's secrets through a classification system. *Id.* at 527-28.

Consequently, even though the CSRA plainly extended procedural protections to *all* employees facing adverse actions except those whom Congress specifically excluded from the statute's coverage (5 U.S.C. § 7511(b)), *Egan* carved out an additional, but limited exception, for adverse actions based on security clearance determinations. The Court made this exception in deference to the President's unique and long-standing role in protecting the nation's secrets. This exclusion is limited in scope, however, because it can only affect those persons who occupy positions for which access to classified information is a requirement of the job.

A judicially-created extension of this narrow exception to all adverse actions based on eligibility determinations threatens to swallow the whole. Such an extension would assume that Congress, by its silence, intended to insulate much of the federal workforce from the due process protections of the CSRA for adverse actions that are based on eligibility determinations.[2] This reads too much into Congressional silence.

[2] *See supra* note 1.

Indeed, there is no clear limit on how many employees an agency could exclude under this exception. Under Executive Order 10,450, the head of any executive agency or department has broad discretion to designate a position as sensitive, if by nature of the position the occupant could bring about "a material adverse effect on the national security." Exec. Order 10,450 § 3(b), 18 Fed. Reg. 2489 (Apr. 27, 1953). The heads of all agencies have unreviewable discretion to designate a position as sensitive. Exec. Order 10,450 § 3(b); 5 C.F.R. § 732.201. Thus, the only limiting standard is subjective—that the agency head determine that the nature of the position is such that the occupant could bring about "a material adverse effect on the national security." *Id.*

While requiring a "material" effect on national security would seem to be a limiting principle, the cases at hand demonstrate that materiality is an elastic concept. The example of Devon Northover is instructive. Mr. Northover was a GS-7 commissary management specialist at the Defense Commissary Agency (DCA), a noncritical-sensitive (NCS) position that did not require access to classified information. *Berry v. Conyers*, 692 F.3d 1223, 1226-27 (Fed. Cir. 2012). After the DOD Central Adjudication Facility determined that he was ineligible to hold a NCS position, the DCA demoted Northover to a GS-4 store associate non-sensitive position. *Id.* at 1227. Northover appealed the demotion to the Board. *Id.*

The connection between the commissary, whose mission is to deliver reasonably priced groceries and household items to service members and their families, and the protection of the homeland from foreign aggression is debatable. The Federal Circuit panel accepted, however, OPM's assertion that Northover's sensitivity designation was justified. The panel concluded that the ability of Northover to observe the stock levels at a military base grocery store for hydration products and sunglasses justified a sensitive designation because such purchases could hint at future deployments and adversely affect national security in a material way. *Id.* at 1234, n.18.

This, of course, is an argument that could be made about most federal employees, by virtue of their access to federal facilities and their ability to observe their surroundings. At a minimum, such logic could be extended to virtually any employee of DOD, DHS, and DOE. The combined workforces for these three departments alone account for nearly 50% of the approximately two million federal employees who are covered by the CSRA. *See www.fedscope.opm.gov/employment.asp*.

Such an extension would be so sweeping that it should not rest on a supposition that Congress, by not explicitly addressing adverse actions based on eligibility determinations, implicitly intended to insulate such decisions from the due process protections in the CSRA. Indeed, in *Cole v. Young*, 351 U.S. 536

(1956), the Supreme Court cautioned against allowing expansive definitions of national security to undermine the clear intention of Congress to extend protections to employees.[3] The Court explained that "'national security' . . . was intended to comprehend only those activities of the Government that are *directly* concerned with the protection of the Nation from internal subversion or foreign aggression, and not those which contribute to the strength of the Nation only through their impact on the general welfare." *Id.* at 544 (emphasis added). The Court rejected an overbroad extension of national security-based removal procedures as contrary to Congressional intent: "The 1950 [National Security] Act itself reflects Congress' concern for the procedural rights of employees and its desire to limit the unreviewable dismissal power to the *minimum scope necessary* to the purpose of protecting activities affected with the 'national security.'" *Id.* at 547 (emphasis added). In so doing, the Court used access to classified information as the reasonable proxy for determining whether a position poses a genuine security risk. The Court explained that when Congress passed the National Security Act of 1950, upon which 5 U.S.C. § 7532 is based, Congress equated security risks with employees who had "access to classified materials; they were security risks

[3] The employee in *Cole* was a food and drug inspector for the Food and Drug Administration (FDA). *Id.* at 539. The FDA removed him on national security grounds because he closely associated with Communists. *Id.* at 540.

because of the risk they posed of intentional or inadvertent disclosure of confidential information." *Id.* at 550.

If the panel's extension of *Egan* to adverse actions based on eligibility determinations were permitted, under the logic of *Hesse*, the decision would prevent OSC and the MSPB from investigating and correcting allegations of reprisal for whistleblowing for thousands of federal employees for whom protections have been presumed under the CSRA and WPA. Such an exemption would have a detrimental effect on OSC's ability to fulfill its mission to protect federal employee whistleblowers and, as discussed *infra* in Section II, would run counter to clear Congressional intent to protect whistleblowers in positions vital to the nation's national security.

A survey of OSC's recent efforts on behalf of whistleblowers illustrates the potential impact of such an extension. OSC has requested stays, both formal from the MSPB and informal from the agency, of personnel actions in 54 matters over the past three years. OSC requests such stays only in cases where, at the outset, there appear to be reasonable grounds to believe that an agency has committed a prohibited personnel practice. 5 U.S.C. § 1214(b)(1).[4] Ordinarily, OSC's stay requests involve cases in which complainants allege that an agency retaliated

[4] OSC requests stays in such cases not only to obtain prompt relief for complainants but also to mitigate the chilling effect that reprisal can have to prevent other whistleblowers from coming forward.

against them because of a protected whistleblower disclosure or for engaging in protected activities such as cooperating with an Inspector General investigation or exercising a lawful appeal right. 5 U.S.C. § 2302(b)(8), (9). In 23 of these 54 stay matters, the complainants worked for component agencies of DOD, DHS, or DOE. Several of these complainants certainly occupied positions that were sensitive (i.e., a nuclear weapons courier, an Interdiction Agent for the Customs and Border Patrol agency), and all of them occupied positions that could arguably be deemed sensitive under the loose standard that the panel found sufficient for the commissary employee. In several of these cases, OSC was able to obtain meaningful corrective action for the complainants, including back pay and reinstatement. OSC's ability to fulfill its mission on behalf of complainants, however, would be hamstrung if agencies could assert that an adverse action based on a negative eligibility determination was exempt from OSC investigation and Board review.

II. CONGRESSIONAL EFFORTS TO PROTECT WHISTLEBLOWERS CONFIRM A BROADER INTENT FOR THE MSPB TO RETAIN JURISDICTION OVER ADVERSE ACTIONS INVOLVING EMPLOYEES IN SENSITIVE POSITIONS

Extending *Egan* without a clear limiting principle on the number of employees whose appeal rights could be affected by an agency's unfettered discretion to designate positions as sensitive would be contrary to Congress's intent.

Indeed, in the CSRA itself, Congress was clear that it intended to prevent agencies from exercising discretion to undermine whistleblower protection. Namely, Congress protected disclosures of information, except those disclosures that are "specifically prohibited by law" or disclosures of classified information unless the whistleblower made the legally prohibited disclosure through specified channels. 5 U.S.C. § 2302(b)(8)(A) and (B). This enacted language presented a narrower exception than the original proposal in the House and Senate, which additionally excepted disclosures of information prohibited by "rule or regulation." *See* H.R. 11280, 95th Cong., (2d Sess. 1978); S. 2640, 95th Cong., (2d Sess. 1978). Congress made the change because of concerns that the original language would encourage agencies to adopt regulations to prohibit disclosures. *See* S. Rep. No. 95-969, at 23 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2743. As explained in the Conference Report, "the reference to disclosures specifically prohibited by law is meant to refer to *statutory law* and court interpretations of those statutes. *It does not refer to agency rules and regulations.*" H.R. Conf. Rep. No. 95-1717, at 130, *reprinted in* 1978 U.S.C.C.A.N. 2860, 2864 (emphasis added). In the cases at hand, affirming the panel's *Berry* decision would enable agencies to do exactly what Congress sought to prevent—agencies could exempt themselves from whistleblower protections by designating positions as "sensitive."

Since the passage of the CSRA, Congress has acted several times, in a bipartisan fashion, to strengthen the protections for whistleblowers, recognizing the critical role that whistleblowers play in the nation's welfare generally and national security specifically. These efforts by Congress to strengthen protections for whistleblowers, particularly in the national security realm, would be futile if agencies could simply evade a substantive review by punishing whistleblowers through eligibility determinations.

For example, in 1989, Congress added an Individual Right of Action for aggrieved whistleblowers, granting them the right to seek Board review of allegations of retaliatory personnel actions. Furthermore, in reaction to Federal Circuit case law that undermined Congress's original intent to broadly protect whistleblower disclosures (i.e., *Fiorello v. Department of Justice*, 795 F.2d 1544 (Fed. Cir. 1986) (finding an employee's disclosure was not protected because his primary motivation was personal and not for the public good)), Congress clarified that "a disclosure" meant "any disclosure." In explaining this amendment, the Senate Report cautioned the courts against unduly narrow interpretations of the Whistleblower Protection Act:

> The Committee intends that disclosures be encouraged. The OSC, the Board and the courts should not erect barriers to disclosures which will limit the necessary flow of information from employees who have knowledge of government wrongdoing. For example, it is inappropriate for disclosures to be protected only if they are made for

> certain purposes or to certain employees or only if the employee is the first to raise the issue. S.508 emphasizes this point by changing the phrase "a disclosure" to "any disclosure" in the statutory definition. This is simply to stress that *any* disclosure is protected (if it meets the reasonable belief test and is not required to be kept confidential.)

S. Rep. No. 100-413, at 13 (1988).

Despite this amendment, narrow interpretations of the protections for whistleblowers persisted, prompting Congress in 1994 to again step in and clarify its intention that "any disclosure" truly means "any." The House Report echoed the earlier frustration, evident in the 1988 Senate report, with undue bureaucratic and court-created barriers to whistleblower protections:

> Perhaps the most troubling precedents involve the Board's inability to understand that "any" means "any." The WPA protects "any" disclosure evidencing a reasonable belief of specified misconduct, a cornerstone to which the MSPB remains blind. The only restrictions are for classified information or material the release of which is specifically prohibited by statute.

H.R. Rep. No. 103-769, at 18 (1994). Furthermore, in the 1994 amendments to the WPA, Congress again expanded and strengthened the Act by adding two new classes of personnel actions to the covered actions: a decision to order psychiatric testing or examinations and any other significant change in working conditions. Act of Oct. 29, 1994, Pub. L. No. 103-424, § 5(a)(2), 108 Stat. 4361, 4363.

Most recently, in 2012, Congress enacted the Whistleblower Protection Enhancement Act (WPEA). As explored below, this latest amendment further

strengthens whistleblower protections and contradicts any inference of Congressional intent to exclude from protection employees occupying sensitive positions.

A. Expansion of Rights to TSA Employees Exemplifies Congressional Efforts for Board to Exercise Jurisdiction Over Employees in Sensitive Positions

In the committee report accompanying the WPEA, Congress emphasized the critical role that whistleblowers play in protecting the national security:

> Moreover, in a post–9/11 world, we must do our utmost to ensure that those with knowledge of problems at our nation's airports, borders, law enforcement agencies, and nuclear facilities are able to reveal those problems without fear of retaliation or harassment. Unfortunately, federal whistleblowers have seen their protections diminish in recent years, largely as a result of a series of decisions by the United States Court of Appeals for the Federal Circuit, which has exclusive jurisdiction over many cases brought under the Whistleblower Protection Act (WPA). Specifically, the Federal Circuit has wrongly accorded a narrow definition to the type of disclosure that qualifies for whistleblower protection.

S. Rep. No. 112-155, at 2 (2012). This intention to protect whistleblowers in the national security field is best exemplified by Congress's extension of the full panoply of whistleblower protections to the employees of the Transportation Security Agency (TSA), including the right to pursue an Individual Right of Action with the MSPB. Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, § 109, 126 Stat. 1465, 1470 (2012). Before the enactment of the WPEA, TSA employees did not have statutory whistleblower rights under the WPA. S. Rep. No. 112-155, at 19 (2012); *see also Schott v. Dep't of Homeland Sec.*, 97

M.S.P.R. 35, ¶¶ 10-28 (2004) (discussing history of excluding screeners from whistleblower protection laws). Rather, the Administrator of the TSA had "final authority" over TSA personnel actions and employees lacked any appeal rights to the Board for reprisal for whistleblowing. S. Rep. No. 112-155, at 18 (2012). The WPEA extended to TSA employees the protections of 5 U.S.C. § 2302(b)(1), (8), and (9), along with any right or remedy available to employees in the civil service by laws that implement those sections.

Congress extended these protections to TSA employees notwithstanding the sensitivity of their positions. By virtue of TSA's mission to protect the nation's transportation system, employees submit to a background investigation using Standard Form 86, Questionnaire for National Security Positions (SF86). *See* Self-Assessment for Applicants for the Transportation Security Agency (June 2011), https://hraccess-assessment.tsa.dhs.gov/TSOFAQs/BackgroundRequirements.pdf (accessed on Feb. 26, 2013). Such background investigations are reserved for sensitive National Security positions. Position Designation Tool at 15-16, http://archive.opm.gov/investigate/resources/position/Introduction.aspx. In extending the protections to TSA employees, the Senate noted that there was no basis for the exclusion given that "all other components of the Department of Homeland Security" enjoyed the full protections of the WPA. S. Rep. No. 112-155, at 19 (2012).

This expansion of protections to employees who occupy sensitive positions would be meaningless if Congress did not intend for the MSPB to retain jurisdiction over adverse actions involving these same employees. In short, Congress evidenced a strong intent that whistleblower protections extend to federal employees who occupy sensitive positions. Such intent would be undermined if the court created a loophole by exempting from Board review personnel actions that are based on eligibility determinations.

B. Attempts by Congress to Mitigate the Scope of *Egan* by Extending Protections to Security Clearance Determinations Confirm that Congress did not Intend to Exclude Eligibility Determinations

Over the years, Congressional efforts to mitigate the impact of *Egan* on federal employee whistleblowers demonstrate that it was not within Congress's comprehension that *Egan* was so broad as to eliminate meaningful due process for adverse actions based on eligibility determinations. Since 2000, when the Federal Circuit held in *Hesse* that *Egan* prevented the MSPB from exercising jurisdiction in whistleblower cases alleging retaliatory security clearance revocations, Congress has undertaken multiple attempts to mitigate the effect of that decision. Although these attempts were all unsuccessful, the narrow focus on security clearance revocations suggests that Congress did not conceive that *Egan* applied to eligibility determinations.

The most recent effort to mitigate *Egan* and *Hesse* is found in the Senate version of the WPEA bill, S. 743. This version included provisions to establish policies and procedures to allow appeals of adverse security clearances and access determinations. S. 743, 112th Cong. § 202(a) (as passed by Senate, May 8, 2012). Specifically, employees could appeal allegedly retaliatory security clearance revocations to an appellate review board within the Office of the Director of National Intelligence (ODNI). Furthermore, section 202(b) would have prohibited any personnel action against an employee's security clearance or access to classified information because of a protected disclosure and protected activity. S. Rep. No. 112-155, at 48-49 (2012).

The Senate Report confirms that the intent of these draft provisions was to fill a gap in the law for employees in a position to affect national security:

> [T]he lack of remedies under current law for . . . whistleblowers who face retaliation in the form of withdrawal of the employee's security clearance leaves unprotected those who are in a position to disclose wrongdoing that directly affects our national security. S. 743 would address these problems by . . . creating . . . new protections for employees whose security clearance is withdrawn in retaliation for having made legitimate whistleblower disclosures. More specifically, S. 743 would, among other things . . . provide federal employees with a way to challenge security clearance determinations made in retaliation against protected whistleblower disclosures.

S. Rep. No. 112-155, at 2 (2012).

These sections of S. 743 were removed by the House. S. 743, 112th Cong. (as passed by House, Sept. 28, 2012). The Senate agreed to the House's amendment of S. 743 and the provisions relating to security clearances and access determinations were not presented to the President for signature. S. 743, 112th Cong. (as agreed to by Senate, Nov. 13, 2012).

Although the final version of the WPEA did not contain an appeal mechanism for security clearance and access determinations, the proposed version is nonetheless significant. Most strikingly, for purposes of the Court's contemplated extension of *Egan*, the Senate did not foresee eligibility determinations as a new category of actions against which whistleblowers needed protection. Rather, it confirms that the Senate understood that there was a gap in protections for those employees who faced adverse security clearance determinations in retaliation for whistleblowing, created when the Federal Circuit extended *Egan* to the Whistleblower Protection Act in *Hesse*. The Senate's proposed provision sought to rectify the gap by creating an appeal mechanism, balancing national security concerns (by vesting the appellate review with ODNI) with the need to provide some recourse for whistleblowers.

Had the Senate version passed with the appeal process intact, then a court decision to extend *Egan* to eligibility determinations would have two outcomes.[5] First, it would effectively nullify the procedural protections for retaliatory security clearance revocations by creating an alternate route to remove an employee: Instead of pursuing an adverse security clearance determination, the agency could opt to pursue an adverse eligibility determination and be free from any review process. Second, it would create an inexplicable exclusion of any review procedures for employees, such as Northover and Conyers, who occupy sensitive positions that do not require a security clearance. Such employees would be afforded *zero* protections, even though they arguably pose a lesser threat to national security than those employees with security clearances. Closing such court-manufactured loopholes that divine Congressional intent where there is none was a primary impetus behind the WPEA in the first place. S. Rep. No. 112-155, at 5 (2012) ("It is critical that employees know that the protection for disclosing wrongdoing is extremely broad and will not be narrowed retroactively by future MSPB or court opinions. Without that assurance, whistleblowers will hesitate to come forward."). In light of the comprehensive actions by Congress to protect whistleblowers, a common sense approach rejects an interpretation that the Senate

[5] One need not contemplate this hypothetical scenario because the President, through a policy directive, effectively extended the Senate's procedural protections to security clearance determinations (*see infra* at Section III).

would endeavor to protect those with security clearances, while leaving those in sensitive positions without any recourse. Instead, the more logical explanation is that the Senate did not conceive that *Egan* could or should be extended in this manner, and therefore saw no reason to include eligibility determinations in its procedural protections.

Furthermore, prior to the WPEA, Congress attempted to include provisions relating to review procedures for security clearance determinations several times, without any concern expressed for eligibility determinations. During the 103rd, 107th, 108th, 109th, 110th and 111th sessions of Congress, several bills proposed that either the Board or an alternative panel have authority to review whether security clearance determinations were retaliatory.[6] Although these provisions never became law or were amended before enactment, the numerous attempts show that Congress recognized a gap in protection for employees facing retaliatory security clearance determinations, but no corresponding gap in protections for

[6] H.R. 2970, 103rd Cong. § 4 (as passed by House, Oct. 3, 1994); S. 3070, 107th Cong. (as reported by S. Comm. on Governmental Affairs, Nov. 19, 2002); H.R. 3281, 108th Cong. § 5 (introduced in House, Oct. 8, 2003); S. 1229, 108th Cong. (as introduced in Senate, June 10, 2003); S. 1358, 108th Cong. (as introduced in Senate, Nov. 11, 2003); S. 2628, 108th Cong. (as reported by S. Comm. on Governmental Affairs, Oct. 8, 2004); S. 494, 109th Cong. (as reported by S. Comm. on Homeland Sec. and Governmental Affairs, May 25, 2005); John Warner National Defense Authorization Act for Fiscal Year 2007, S. 2766, 109th Cong. § 1089 (as passed by Senate, June 22, 2006); H.R. 985, 110th Cong. § 10 (passed by House, Mar. 14, 2007); S. 372, 111th Cong. (as introduced in Senate, Feb. 3, 2009).

employees facing retaliatory determinations regarding their eligibility to hold a sensitive position.

C. Congress's Specific Agency Exclusions from the WPEA Evidence a Focus on Access to Classified Information

Congress's understanding that classified information and, consequently, security clearance determinations represent a special category beyond the reach of OSC and Board jurisdiction is exemplified by the express exclusion in the WPA of intelligence agencies from the definition of "agency" for purposes of OSC's jurisdiction. Congress reiterated this exclusion in the WPEA by amending it to add two additional intelligence agencies – the ODNI and the National Reconnaissance Office. Pub. L. No. 112-199, § 105, 126 Stat. 1465, 1468 (2012). Furthermore, under this section, Congress gives the President the right to exclude other Executive agencies, or units thereof, if "the principal function . . . is the conduct of foreign intelligence or counterintelligence activities." 5 U.S.C. § 2302(a)(2)(C). Thus, Congress made a determination that employees whose work focuses on collecting and analyzing intelligence and counterintelligence information are not authorized to bring whistleblower retaliation claims to OSC or have the Board adjudicate such claims. This evidences a narrow focus on those agencies and employees who, due to the classified nature of their work, are not entitled to the same protections afforded to other employees.

III. THE EXECUTIVE'S CREATION OF UNIQUE APPEAL PROCEDURES FOR SECURITY CLEARANCE REVOCATIONS CONFIRMS THAT ORDINARY BOARD REVIEW APPLIES TO ELIGIBILITY DETERMINATIONS

The key procedural difference between security clearances and eligibility determinations relates to the front-end designation for a position. Namely, with security clearance designations, the potential number of affected positions is limited by an objective standard—whether an occupant of the position will require access to the nation's secrets in order to perform the job, such that the risk of intentional or inadvertent disclosure of that information poses a national security risk. By contrast, a sensitivity designation is committed to the subjective discretion of the agency head with a potentially limitless standard that the position be one that could have a material adverse effect on national security.

The risk of over-designation is compounded by several factors. First, with security clearances, there is a stated policy to limit the designation of such positions to the "minimum required for the conduct of agency functions." Exec. Order 12,968, 60 Fed. Reg. 40245 (Aug. 2, 1995). There is no corresponding government-wide policy statement to limit sensitivity designations. Second, the incentive to over-designate security clearances is limited by the sheer cost of the required background investigation. The cost for an OPM investigation for critical sensitive and special sensitive employees exceeds $2,000 per person. *See* OPM 2012 Investigation Billing Rates, http://www.opm.gov/investigations/background-

investigations/federal-investigations-notices/2011/fin11-05.pdf. The cost for an OPM investigation for a non-critical sensitive position, however, is only $100 more than the basic background investigation for non-sensitive positions. *Id.* Thus, there is little cost incentive to avoid over-designating positions as non-critical sensitive. This is particularly true if such designations are used to insulate broad categories of positions and personnel actions from Board review.

Another key procedural difference between security clearances and sensitivity designations is a clear appeals procedure for security clearance revocations. Executive Order 12,968 lays out a defined procedure for employees to appeal the merits of denied or revoked security clearances. The process includes a written explanation for the denial, an opportunity to review documents relating to the decision, an opportunity to seek counsel and respond, notice of the results of a review, an opportunity to appeal to a three-member panel appointed by the agency head, a written decision, and an opportunity to appear personally and present evidence. Exec. Order 12,968, § 5.2. Under the terms of the Executive Order, the decision of the panel is final and, therefore, not subject to external review by the Board. By contrast, eligibility determinations are not covered by Executive Order 12,968. Although individual departments and agencies may voluntarily adopt similar review procedures for eligibility determinations, there is no corresponding Executive Order that requires it. Thus, perversely, an adverse action based on an

eligibility determination where an employee is not required to hold a security clearance is entitled to less review on the merits than an employee whose security clearance is threatened.

Finally, a clear procedural distinction between eligibility determinations and security clearance is found in Presidential Policy Directive 19 (Oct. 10, 2012). On October 10, 2012, less than two weeks after the House struck the Senate's WPEA protections for security clearance revocations, President Obama issued PPD 19. In PPD 19, the President prohibits executive agencies from taking any action affecting an employee's eligibility for access to classified information in reprisal for whistleblowing. The Directive requires establishment of a review procedure for employees who assert that an agency denied or revoked their security clearance or access to classified information in retaliation for protected whistleblowing. Namely, such employees will be entitled to an internal appeal followed by an External Inspector General review. If they prevail, they are entitled to similar status quo ante relief that a prevailing whistleblower would be entitled to under 5 U.S.C. §§ 1214 and 1221.

Executive Order 12,968 and PPD 19 exemplify action by the Executive to balance national security concerns with whistleblower protections in the absence of express Congressional direction on the appropriate appeal mechanism for denials and revocations of security clearances. Both Executive Order 12,968 and PPD 19,

however, are entirely silent on a similar appeals procedure for eligibility determinations. A logical inference from such an omission is that the President did not contemplate the sweeping result that the panel's decision would require. Rather, Executive Order 12,968 and PPD 19 reflect the considered judgment of the Executive to grant some appeals right to employees in the most sensitive national security positions in the government – those for which access to the nation's secrets is a requirement. While these appeals processes fall short of the Board review that most employees are entitled to under chapter 75, at least they offer some protections. If, however, the court extends *Egan* to employees in sensitive positions who do not require a security clearance, then these employees, who pose less of a national security threat than those who require a clearance, will be deprived of any review for adverse actions based on eligibility determinations. Furthermore, such a decision could effectively nullify the review provided to those employees with clearances under PPD 19 and Executive Order 12,968, if agencies can simply base an adverse action against their employees on eligibility determinations and forego even the limited review that a security clearance determination would permit.

IV. OSC IS EQUIPPED TO DEAL WITH ALLEGATIONS CONCERNING ELIGIBILITY DETERMINATIONS

OSC addresses the final issue posed by the court from its perspective—if the court does not extend *Egan* to eligibility determinations, what problems would

OSC encounter in investigating and prosecuting claims of retaliation for whistleblowing brought by employees occupying sensitive positions, and what deference does OSC give to an agency's judgment on national security issues.

The answer is that OSC would not encounter any problems in handling cases involving allegations of retaliatory eligibility determinations. OSC is well-equipped to handle sensitive matters. For example, OSC is authorized by statute to accept disclosures that include classified information or other information that an employee is otherwise prohibited from publicly disclosing. 5 U.S.C. §§ 1214(a)(3), 2302(b)(8)(B). OSC has procedures in place to handle such information appropriately and has adopted internal controls to safeguard classified information and ensure that only OSC employees with the appropriate clearance can access such information.

OSC's expertise in whistleblower retaliation claims uniquely positions it to investigate claims of retaliation, including from employees occupying sensitive positions. Indeed, as discussed *supra* in Section I, a substantial number of OSC cases involve employees who work for agencies that operate in the national security realm. As noted, almost 50% of the cases in which OSC has sought stays over the past three years involved DOD, DHS, and DOE.

While the standards that OSC applies in analyzing retaliation cases are defined by statute, those standards are readily adaptable to cases involving

eligibility determinations. In determining whether a *prima facie* case of whistleblower reprisal has been established, OSC ascertains whether: (1) a protected disclosure of information was made; (2) the accused official(s) (e.g., the proposing or deciding official) had knowledge of the disclosure and the identity of the employee making the disclosure; and (3) the protected disclosure was a contributing factor in the personnel action or threat of a personnel action. *Gergick v. General Servs. Admin.*, 43 M.S.P.R. 651 (1990).

Once a *prima face* case is established, OSC assesses whether the agency has a valid defense. Namely, the burden of persuasion shifts to the agency to show, by clear and convincing evidence, that it would have taken the same personnel action in the absence of the disclosure. *Redschlag v. Dep't of the Army*, 89 M.S.P.R. 589, 627 (2001). OSC analyzes the so-called "*Carr* factors" in making this determination: (1) the strength of the agency's evidence in support of its personnel action; (2) the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and, (3) any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated. *Carr v. Social Sec. Admin.*, 185 F.3d 1318, 1323 (Fed. Cir. 1999).

The *Carr* factors provide adequate protection to an agency to justify an action against a whistleblower who poses a national security threat to the agency.

If a removal is genuinely based on national security grounds, i.e., an ineligibility to occupy a sensitive position, then the strength of the agency's evidence to support that action and the agency's evidence that it is not singling the whistleblower out for disparate treatment should overcome the existence and strength of any motive to retaliate against that employee. Furthermore, agencies have the option, in cases where a national security threat is deemed imminent, to proceed with a removal through 5 U.S.C. §7532. While section 7532 only applies to those departments and agencies designated in 5 U.S.C. § 7531, the President is empowered to designate other agencies as deemed in the best interests of national security. 5 U.S.C. § 7531(9). Thus, in the unlikely event that an agency is unable to convince OSC and the Board of what it believes to be a genuine national security threat posed by an employee who does not require a security clearance, then OSC and the Board cannot prevent the most sensitive agencies from removing such an employee through section 7532.

CONCLUSION

For the foregoing reasons, OSC supports the Board's position that the court should not extend *Egan* to eligibility determinations and that the Board's decisions 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) should be affirmed.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type volume limitation of Fed. R. App. P. 32(a)(7)(B). The brief contains 6,990 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Fed. Cir. R. 32(b).

2. 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 a proportionally-spaced typeface using Microsoft Word 2010 in a 14 point Times New Roman font.

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Elisabeth R. Brown
Attorney

DATE: March 14, 2013

UNSWORN DECLARATION OF AUTHORITY

I, Jason Zuckerman, declare under penalty of perjury that I have actual authority to sign the BRIEF FOR AMICUS CURIAE THE UNITED STATES OFFICE OF SPECIAL COUNSEL IN SUPPORT OF RESPONDENTS AND IN FAVOR OF AFFIRMING THE MERIT SYSTEMS PROTECTION BOARD'S DECISION and the accompanying Certificate of Compliance on Elisabeth R. Brown's behalf. I certify that the foregoing is true and correct.

Executed on March 14, 2013

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Jason Zuckerman, Esq.

CERTIFICATE OF SERVICE

I, Jason Zuckerman, an employee with the U.S. Office of Special Counsel, hereby certify that on this 14th day of March 2013, I caused the Brief for Amicus Curiae the United States Office of Special Counsel in Support of Respondents and in Favor of Affirming the Merit Systems Protection Board's Decision to be served to the following individuals by mailing two true and correct copies thereof by first class mail, postage prepaid:

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