# Comments

# *Kaplan v. Conyers*: Preventing the Grocery Store Clerk from Disclosing National Security Secrets

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**ABSTRACT**

The Civil Service Reform Act of 1978 ("CSRA") established procedures by which federal agencies handle personnel actions. Federal employees who believe they were terminated or demoted without merit may appeal the agency's action to an independent board for review. The U.S. Supreme Court articulated, however, that when review of an action could cause national security secrets to be divulged, a less comprehensive review is required.

For decades, this exception to a full independent review was limited to adverse actions that would require the reviewing board to adjudicate the merits of a security clearance denial or revocation. Then, in August 2013, the U.S. Court of Appeals for the Federal Circuit extended the exception to adverse actions stemming from an agency's determination that an employee is no longer eligible to occupy a national security "sensitive" position. Reasoning that both security clearances and sensitive positions pose the same national security concerns, the Federal

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Circuit prohibited independent review over the Department of Defense's termination of two civilian employees in non-critical sensitive positions.

This Comment first discusses the purpose and procedures of the CSRA and details the recent Federal Circuit decision. This Comment then explores how expanding the U.S. Supreme Court's national security exception to the CSRA disrupts congressional intent, precedent, and the rights of millions of federal employees. Finally, this Comment concludes that the Congress should pass legislation that effectively reverses the Federal Circuit's decision.

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## I. INTRODUCTION

The nightmare of a foreign terrorist attack on U.S. soil became a tragic reality on September 11, 2001. Since then, the government has become justifiably concerned with protecting national security.[1] Now, more than ever, many federal government positions require security clearances and are designated as "national security sensitive."[2] Although the government's dramatic reaction to terrorism is beneficial for the purpose of protecting national secrets, the crackdown has curtailed the legal rights and freedoms of many Americans.[3] Specifically, in the realm of federal employment, federal courts seeking to preserve national security have eviscerated certain congressional directives set forth in the Civil Service Reform Act of 1978[4] ("CSRA").[5]

Congress enacted the CSRA to replace the former personnel management system,[6] which was ineffective because a culture of favoritism and retaliation had become endemic to the federal hiring and firing process.[7] Consequently, the CSRA, in part, provides federal civilian employees the right to independent review by the Merit Systems

1. *See, e.g.*, *Safeguarding Our Nation's Secrets: Examining the National Security Workforce: Hearings Before the Subcomm. on the Efficiency and Effectiveness of Fed. Programs and the Fed. Workforce*, 113th Cong. at 56:23 (2013) [hereinafter *Hearings*] (statement of Brian Prioletti, Office of the Dir. of Nat'l Intelligence), *available at* http://1.usa.gov/1pi5ypM.

2. *Id.*

3. *See, e.g.*, Kaplan v. Conyers, 733 F.3d 1148, 1166 (Fed. Cir. 2013), *cert. denied*, 134 S. Ct. 1759 (2014).

4. Civil Service Reform Act (CSRA) of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (2012) (codified as amended in scattered sections of 5 U.S.C.).

5. *See Conyers*, 733 F.3d at 1166.

6. The Pendleton Act of 1883 established the former personnel management system. S. REP. NO. 95-969, at 2–4 (1978).

7. *Id.*

Protection Board ("MSPB") for certain personnel actions, such as terminations and demotions.[8]

However, federal courts interpreting the CSRA have found that federal employees are not guaranteed the CSRA's procedural protections under all circumstances.[9] In 1988, the U.S. Supreme Court established a narrow "national security" exception whereby an employee who is terminated on the basis of an agency's decision to revoke his security clearance is denied the statutorily granted right to MSPB review on the merits.[10] For more than two decades, the MSPB and U.S. Courts of Appeals applied this exception narrowly, only allowing federal agencies to preempt MSPB merit review of adverse employment actions related to security clearance denials or revocations.[11]

In August 2013, the U.S. Court of Appeals for the Federal Circuit dramatically changed the scope of the national security exception by extending it to the denial or revocation of an employee's eligibility to occupy noncritical sensitive positions.[12] Federal agencies designate a position as "noncritical sensitive" when the nature of the position exposes the employee to material that may potentially affect national security.[13] In the case of *Kaplan v. Conyers*,[14] the Federal Circuit found that a Department of Defense ("DoD") employee, in a position similar to that of to a store clerk at a "Seven Eleven,"[15] could be demoted without independent review because his job stocking shelves with sunglasses and rehydration backpacks could lead him to infer that U.S. troops were being deployed to a sunny region.[16]

Effectively, *Conyers* denies hundreds of thousands of federal civilian employees in national security positions[17] the same protections

8. *See* 5 U.S.C. §§ 7513(d), 7701 (2012).

9. *See, e.g.*, Dep't of the Navy v. Egan, 484 U.S. 518, 530 (1988).

10. *See id.* at 529–30; *see also infra* Part II.C.1. (describing the Court's decision in *Egan*).

11. *See, e.g.*, Toy v. Holder, 714 F.3d 881, 885 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 650 (2013) (stating that "[n]o court has extended *Egan* beyond security clearances, and we decline to do so").

12. Kaplan v. Conyers, 733 F.3d 1148, 1166 (Fed. Cir. 2013), *cert. denied*, 134 S. Ct. 1759 (2014).

13. Exec. Order No. 10,450, § 3, 3 C.F.R. 936 (1949-1953 Comp.); 5 C.F.R. §§ 732.102–732.201 (2013). For a more detailed explanation of sensitive positions, see *infra* Part II.A.

14. Kaplan v. Conyers, 733 F.3d 1148 (Fed. Cir. 2013), *cert. denied*, 134 S. Ct. 1759 (2014).

15. Oral Argument at 28:10, Berry v. Conyers, 692 F.3d 1223 (2012) (No. 2011-3207) (statement by counsel for MSPB), *available at* http://1.usa.gov/1uOVkf5.

16. *Conyers*, 733 F.3d at 1163 n.15.

17. *See infra* text accompanying note 23.

afforded to the rest of the federal workforce.[18] The outcome is directly at odds with Congress's purpose in enacting the CSRA—eliminating personnel decisions based on factors other than merit.[19]

Because *Conyers* poses a real and unwarranted threat to the integrity of the CSRA, this Comment recommends that Congress amend the CSRA to protect federal employees who occupy noncritical sensitive positions from unfair personnel actions—the same actions that led to the enactment of the CSRA. Part II of this Comment will introduce the administrative procedures for personnel actions in the federal government and describe how the Federal Circuit's opinion in *Conyers* impacts those procedures.[20] Part III will argue that *Conyers* is contrary to congressional intent and diverges from established precedent.[21] Finally, Part IV contends that Congress should amend the CSRA to provide MSPB review over eligibility determinations for noncritical sensitive positions.[22]

## II. BACKGROUND OF THE CIVIL SERVICE REFORM ACT AND THE FEDERAL CIRCUIT'S DECISION

### *A. Defining "Sensitive" Positions*

*Conyers* has astounding effects for federal government employees occupying sensitive positions. Pursuant to an executive order, agencies must first classify jobs as "national security" positions when the positions either relate to protecting the United States from foreign aggressors and defending its military power or require "regular use of, or access to, classified information."[23] Next, agencies must classify each national security position as one of three sensitivity levels: (1) critical sensitive, (2) noncritical sensitive, or (3) nonsensitive.[24] "Sensitive" jobs are civilian positions in which the employee has the potential to cause a "material adverse effect" on national security due to the nature of the

18. *Conyers*, 733 F.3d at 1166.
19. *See* S. REP. NO. 95-969, at 2–4 (1978).
20. S*ee infra* Part II.
21. *See infra* Part III.
22. *See infra* Part IV.
23. Exec. Order No. 10,450, § 3, 3 C.F.R. 936 (1949-1953 Comp.); 5 C.F.R. § 732.102 (2013).
24. Exec. Order No. 10,450, § 3, 3 C.F.R. 936 (1949-1953 Comp.); 5 C.F.R. §§ 732.102–732.201 (noting that the positions vary in degrees of potential harm to national security, with "critical sensitive" being the most severe). The designation determines a position's investigative requirements. 5 C.F.R. § 732.201(b).

job.[25] Pursuant to DoD guidelines, "noncritical sensitive" positions comprise any position with one or more of the following attributes:

> [1] Access to Secret or Confidential information.
>
> [2] Security police/provost marshal-type duties involving the enforcement of law and security duties involving the protection and safeguarding of DoD personnel and property.
>
> [3]Category II automated data processing positions.
>
> [4] Duties involving education and orientation of DoD personnel.
>
> [5] Duties involving the design, operation, or maintenance of intrusion detection systems deployed to safeguard DoD personnel and property.
>
> [6] Any other position so designated by the Head of the DoD Component or designee.[26]

"Security clearance," by contrast, refers to an employee's access to classified information.[27] Relevant to *Conyers*, employees in noncritical sensitive positions, therefore, do not always need or have access to confidential information.[28]

### *B. The Civil Service Reform Act of 1978*

Congress enacted the Civil Service Reform Act of 1978 to streamline personnel actions[29] of civil service employees and achieve efficiency and accountability in federal government employment.[30] The CSRA codifies the merit system principles,[31] provides impartial review

25. 5 C.F.R. § 732.201(a).

26. DoD Reg. 5200.2-R § C3.1.2.1.2 (1987) (citations omitted).

27. *See* Exec. Order No. 12,968, 60 Fed. Reg. 40,245, 40,246 (Aug. 7, 1995) (stating that an agency head will grant an employee a security clearance only if the employee needs to know classified information to perform her lawful government function and meets certain conditions).

28. *See* 5 C.F.R. § 732.201(a); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-800, SECURITY CLEARANCES: AGENCIES NEED CLEARLY DEFINED POLICY FOR DETERMINING CIVILIAN POSITION REQUIREMENTS 5 (2012) [hereinafter U.S. GOV'T ACCOUNTABILITY OFFICE] (stating that noncritical sensitive positions are also defined as "positions that do not have a national security element, but still require a designation of risk for suitability purposes").

29. 5 U.S.C. § 2302(a) (2012) (defining "personnel action[s]" as any practice concerning employment status, such as hiring, firing, transferring, duties, performance evaluations, modifying pay, benefits, or education).

30. S. REP. NO. 95-969, at 1–3 (1978).

31. 5 U.S.C. § 2301(b). The merit system principles include maintaining efficiency; a qualified workforce; merit-based employment; "high standards of integrity, conduct, and concern for the public interest;" and providing equal pay, opportunities, and adequate

over violations of the principles, prescribes procedures for personnel actions, protects employees from arbitrary actions, and encourages whistleblowing.[32] The CSRA covers civil service employees[33] in all federal agencies except the Government Accountability Office ("GAO") and certain intelligence agencies.[34]

Congress created two agencies to implement the goals of the CSRA.[35] First, the Office of Personnel Management ("OPM") manages and advises federal agencies on personnel practices.[36] Second, the MSPB enforces merit system principles and adjudicates personnel actions.[37] Within the MSPB, the Office of the Special Counsel ("OSC") investigates claims of prohibited personnel practices and reports possible violations of the merit system principles.[38] A closer look at these agencies will reveal how civil service employees are protected, both procedurally and substantively.

1. Office of Personnel Management

The OPM is an independent agency within the executive branch that manages federal personnel practices by issuing regulations, offering guidance, and monitoring the efficacy of agencies' personnel procedures.[39] The Director of the OPM is responsible for aiding the President in fashioning procedures for federal employment, researching personnel management techniques, and prescribing recommendations to

training free from arbitrary actions and personal or political preference and free from whistleblower retaliation. *Id.*

32. S. REP. NO. 95-969, at 1–2.

33. *See* 5 U.S.C. § 2302(a)(2)(B), (C). The CSRA applies to "any position in the competitive service, a career appointee position in the Senior Executive Service or a position in the excepted service" and employees of executive agencies with the exclusion of government contractors and enumerated agencies. *Id.* For definitions of these terms, see *id.* § 3132(a).

34. *Id.* § 2302(a)(2)(C)(ii) (exempting, for example, the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, the Office of the Director of National Intelligence, and "as determined by the President, any executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities, provided that the determination be made prior to a personnel action").

35. *See id.* §§ 1101–1105 (relating to the Office of Personnel Management); *id.* §§ 1201–1209 (relating to the MSPB).

36. *See id.* §§ 1101–1105.

37. *See id.* § 1204(a).

38. 5 U.S.C. § 1212(a).

39. *See id.* §§ 1101, 1104.

the President.[40] The OPM is the "government's principal representative in Federal labor relations matters."[41]

Additionally, the OPM promulgates and enforces regulations relating to civil service statutes.[42] The Director of the OPM has the authority to investigate the suitability of job applicants to ensure compliance with civil service laws and relevant regulations.[43] If the OPM believes the MSPB erred in a decision, it may appeal the decision to the U.S. Court of Appeals for the Federal Circuit.[44]

2. Merit Systems Protection Board

The second agency responsible for carrying out the CSRA is the MSPB.[45] The MSPB is an independent and impartial three-member, bipartisan panel[46] whose purpose is to protect the public from inefficient and unlawful personnel practices within the government.[47] The MSPB adjudicates actions that violate the merit system principles and reviews OPM rules and regulations.[48] Moreover, the MSPB has the power to issue binding orders to federal agencies and employees.[49]

Employees in CSRA-protected positions have the right to MSPB review of adverse personnel actions taken against them.[50] The CSRA makes it unlawful for an agency to remove an employee absent "such cause as will promote the efficiency of the service."[51] The MSPB generally will uphold the agency's personnel decision as long as the decision is supported by a preponderance of the evidence.[52] If parties are

40. *Id.* §1103(a). The current Director is Katherine Archuleta, who began her four-year term in November 2013. *Our People & Organization*, OPM.GOV, http://www.opm.gov/about-us/our-director/ (last visited Sept. 7, 2014).

41. 5 U.S.C. § 1101 note (Message of the President).

42. *Id.* §§ 1103(b)(1), 1104(b)(1).

43. *Id.* § 1103(b)(1).

44. *See id.* § 7703(d)(1).

45. *See id.* § 1204(a).

46. 5 U.S.C. § 1201.

47. *See id.* § 1204(a); S. REP. NO. 95-969, at 6 (1978).

48. 5 U.S.C. § 1204.

49. *Id.* § 1204(a)(2). The MSPB's subject matter jurisdiction is limited to that which is prescribed by law, rule, or regulation. *See* Bennett v. Merit Sys. Prot. Bd., 635 F.3d 1215, 1218 (Fed. Cir. 2011).

50. *See* 5 U.S.C. § 7513(d); *see also id.* § 7701 (providing employees with procedural safeguards). Section 7532 provides an optional, alternative process comprising of solely internal review for employees who have claims of adverse actions but occupy a national security position. *Id.* § 7532.

51. *Id.* § 7513(a).

52. *See id.* § 7701(c)(1)(B).

dissatisfied with the MSPB's judgment, they may appeal to the Federal Circuit, which has exclusive authority to bind the MSPB.[53]

a. Office of Special Counsel

Within the MSPB, the OSC serves as the investigatory branch of the MSPB and protects civil service employees from adverse personnel actions, particularly whistleblower retaliation.[54] The OSC "investigate[s] and prosecute[s] political abuses and merit system violations."[55] The Special Counsel, head of the OSC, has adjudicative authority similar to the MSPB.[56]

Due to the sensitive nature of information surrounding whistleblower allegations, the OSC is generally prohibited from disclosing information connected to allegations of whistleblowing.[57] However, an agency may be required to have access to all relevant employee information to determine whether the employee should be privy to information that, if leaked, "could be expected to cause exceptionally grave damage to the national security."[58] In such a case, the OSC can disclose the information surrounding the employee's allegations of whistleblowing.[59]

The CSRA affords federal civilian employees procedural protections against adverse personnel actions to promote an efficient and accountable federal workforce.[60] In *Kaplan v. Conyers*, the Federal Circuit narrowed the scope of the CSRA's protections in the context of national security.[61]

53. *Id.* § 7703(b).

54. *Id.* § 1212(a); *see* S. REP. NO. 95-969, at 24 (1978) ("The Special Counsel will also have a particular mandate to investigate and take action to prevent reprisals against government 'whistle blowers.'"). The OSC initiates investigations and responds to individuals' non-frivolous requests to investigate prohibited personnel practices. S. REP. NO. 95-969, at 32.

55. 5 U.S.C. § 1101 note (Message of the President).

56. *See id.* § 1212(b)(1)–(2) (granting the OSC the authority to "administer oaths, examine witnesses, take depositions, and receive evidence," and "issue subpoenas . . . order the taking of depositions and order responses to written interrogatories").

57. *See id.* § 1212(g)(1) ("[E]xcept in accordance with the provisions of section 552a of title 5, United States Code, or as required by any other applicable Federal law.").

58. *Id.* § 1212(g)(2)(B).

59. *See id.*

60. *See* S. REP. NO. 95-969, at 1–3 (1978).

61. Kaplan v. Conyers, 733 F.3d 1148, 1160 (Fed. Cir. 2013), *cert. denied*, 134 S. Ct. 1759 (2014).

### C. *The Federal Circuit's Unwarranted Extension of the National Security Exemption:* Kaplan v. Conyers

#### 1. Precursor to *Conyers*: *Department of the Navy v. Egan*[62]

In deciding *Conyers*, the Federal Circuit faced the essential question of whether the U.S. Supreme Court's holding in *Department of the Navy v. Egan* applied.[63] In *Egan*, the U.S. Supreme Court denied MSPB review over the merits of security clearance denials or revocations.[64] The DoD thus argued in *Conyers* that the Federal Circuit should extend *Egan* to bar MSPB review over the merits of ineligibility determinations for "sensitive" positions.[65]

*Egan* involved Thomas M. Egan, a federal employee, who was a laborer leader in the Navy—a civilian position within the CSRA's protection.[66] Egan's position required "[a]ccess to [s]ecret or [c]onfidential information" and therefore Egan required a security clearance.[67] Because Egan was denied a security clearance, he was fired.[68] The "narrow question" before the U.S. Supreme Court was whether the MSPB had the authority to review the merits of the Navy's decision to revoke Egan's security clearance.[69] The answer depended on whether the MSPB had to have the authority to review an agency's security clearance decision to afford due process to an employee in a national security position.[70] Answering in the negative, the Court held that the MSPB was precluded from reviewing the merits of a security clearance revocation under 5 U.S.C. §§ 7512,[71] 7513(d).[72] The Court reasoned that review of such a determination—whether an employee may access classified information—is reserved solely for the employing agency.[73]

62. Dep't of the Navy v. Egan, 484 U.S. 518 (1988).
63. *See Conyers*, 733 F.3d at 1150–51.
64. *Egan*, 484 U.S. at 533.
65. *Conyers*, 733 at 1152.
66. *See Egan*, 484 U.S. at 520.
67. *Id.* at 520–21 n.1 (quoting Chief of Naval Operations Instructions (OPNAVINST) 5510.1F, para. 16-101-2.b (June 15, 1981)).
68. *Id.* at 520–21 (noting that Egan was denied a security clearance based on felony convictions, failure to disclose criminal record, and drinking problems).
69. *Id.* at 519–20.
70. *Id.* at 526. The question quickly becomes a policy issue as to whether and to what degree an employee should be treated differently because of her ability to cause damage to the country by the nature of her position.
71. 5 U.S.C. § 7512 (2012).
72. *Id.* § 7513(d).
73. *Egan*, 484 U.S. at 533.

The Court based its reasoning in part on the constitutional separation of powers.[74] Examining the inherent authority of the President to control and manage access to classified information, the Court found that the "predictive judgments"[75] associated with denying or granting access to classified information were within the Executive's exclusive purview.[76]

The Court also looked at the statutory framework for removal of a civil service employee.[77] Both parties agreed that MSPB review was proper, but disagreed over "the subject matter of th[e] hearing and the extent to which the [MSPB] may exercise reviewing authority."[78] The Court determined that the President's "inherent authority" in areas of national security eclipsed the MSPB's subject matter jurisdiction over removal for "cause."[79] Therefore, the MSPB was precluded from reviewing the merits of a security clearance denial and instead could only determine: (1) whether "cause" existed; (2) whether the security clearance was actually denied; and (3) whether "transfer to a nonsensitive position was feasible."[80] The Court explained that the review provided sufficient procedural process under the circumstances of national security concerns.[81] In *Conyers*, the question was whether the limited review over security clearances that the Court prescribed in *Egan* should be extended to also limit review over an employee's suitability to occupy a noncritical sensitive position.[82]

2. Background of *Conyers*

In *Kaplan v. Conyers*, the U.S. Court of Appeals for the Federal Circuit addressed two consolidated cases involving employees' appeals from adverse personnel actions.[83] In the first case, the employer, the

74. *See id.* at 527, 530–33.

75. By "predictive judgments," the Court is referring to the granting authority's "attempt to predict [an individual's] possible future behavior and to assess whether, under compulsion of circumstances or for other reasons, he might compromise sensitive information." *Id.* at 529.

76. *Id.* at 528–31.

77. *Id.* at 526, 532.

78. *Egan*, 484 U.S. at 526.

79. *Id.* at 529–30 (noting that executive orders have delegated such authority to agencies).

80. *Id.* at 530.

81. *Id.* at 533.

82. Kaplan v. Conyers, 733 F.3d 1148, 1151 (Fed. Cir. 2013), *cert. denied*, 134 S. Ct. 1759 (2014).

83. *Id.* at 1151; *see* 5 U.S.C. § 7513(d) (2012) (providing employees the right to MSPB review of adverse employment actions); *id.* § 7512(3) (stating that covered actions include suspensions and demotions).

DoD, indefinitely suspended Rhonda K. Conyers ("Conyers") after she lost her eligibility to occupy noncritical sensitive positions.[84] The DoD employed Conyers as an Accounting Technician—a secretarial position—at the Defense Finance and Accounting Service.[85]

Similarly, in the second case, the DoD demoted Devon Haughton Northover ("Northover") because he was ineligible to occupy noncritical sensitive positions.[86] Prior to his demotion, Northover was a Commissary Management Specialist (a store clerk position) at the Defense Commissary Agency.[87] Northover's demotion brought him to a GS-4 grade level[88] as a part-time Store Associate.[89] Both Conyers and Northover were found ineligible to occupy noncritical sensitive positions because they held debt due to death or divorce.[90]

The DoD classified both Conyers's and Northover's positions as noncritical sensitive.[91] While the DoD did not disclose why the grocery clerk and accounting secretary jobs were noncritical sensitive, the DoD did state that individuals who raise security concerns are not permitted to occupy noncritical sensitive positions because such employees *may* come into contact with classified information.[92] The DoD maintained this policy even if the positions do not require access to classified information or a security clearance, as was the case here.[93]

84. *Conyers*, 733 F.3d at 1151–52. The Washington Headquarters Services Consolidated Adjudications Facility ("WHS/CAF"), on behalf of the DoD, performed the security check and rendered Conyers ineligible to hold a noncritical sensitive job. *Id.* at 1152.

85. *See* Conyers v. Dep't of Def., 115 M.S.P.R. 572, 573 (M.S.P.B. 2010).

86. *Conyers*, 733 F.3d at 1152. WHS/CAF similarly performed the security check and rendered Northover ineligible. *Id.*

87. *Id.*

88. The administration of federal pay is organized in a ladder that consists of 15 levels classified in the "General Schedule" ("GS"). *Pay & Leave*, OPM.GOV, http://1.usa.gov/1eXc9iK (last visited Sept. 28, 2013). The OPM issues guidelines that agencies must follow when classifying positions. *Id.* The "level of difficulty, responsibility, and required qualifications" determines a position's classification. *Id.*

89. *See Conyers*, 733 F.3d at 1152. The court noted that Northover maintained a cognizable interest in the claim, even though the DoD reinstated him, because he raised discrimination as an affirmative defense. *Id.* at 1153.

90. *See* Joe Davidson, *Senate Panel Raises Questions About 'National Security Sensitive' Designation for Workers*, WASH. POST, Nov. 20, 2013, *available at* http://wapo.st/1x23S64.

91. *See Conyers*, 733 F.3d at 1151.

92. *Id.* at 1152.

93. *See* Stipulation Between the Parties in Conyers v. Dep't of Def., No. CH-752-09-O925-I-1 and Northover v. Dep't of Def., No. AT-0752-10-0184-I-1, (Sept. 1, 2010), *available at* http://1.usa.gov/1ybOrWk [hereinafter Stipulation]; Conyers v. Dep't of Def., 115 M.S.P.R. 572, 578–79 (M.S.P.B. 2010), *rev'd and remanded sub nom.* Berry v. Conyers, 692 F.3d 1223 (Fed. Cir. 2012), *and reh'g en banc granted*, *opinion vacated*, 497 F. App'x 64 (Fed. Cir. 2013) (acknowledging stipulation).

Both Conyers and Northover appealed the adverse actions to the MSPB for independent review.[94] The Federal Circuit ultimately dismissed Conyers's claims as moot because she received back pay and other remedies; however, her case is still relevant for purposes of this Comment because the decision affects similarly situated employees, including Northover.[95]

3. Procedural History: MSPB Review of Conyers's and Northover's Claims

At the MSPB hearing,[96] the DoD argued that because the U.S. Supreme Court prohibited MSPB review of the merits of a security clearance denial, the Court intended to deny MSPB review of an employee's ineligibility to hold a sensitive position.[97] The MSPB rejected the DoD's argument and held that: (1) *Egan* was strictly limited to prohibiting MSPB review when the "denial, revocation, or suspension of a 'security clearance'" is at issue; and (2) an agency's classification of a position as sensitive does not necessarily preclude MSPB review.[98]

The MSPB reasoned first that reviewing a demotion and suspension fell squarely within its jurisdiction.[99] Second, the MSPB reasoned that the U.S. Supreme Court intended *Egan* to be narrowly construed.[100] The MSPB clarified that a "security clearance" and "sensitive position" are vastly different because the former denotes access to classified

94. *Conyers*, 733 F.3d at 1151; *see* 5 U.S.C. § 7513(d) (2012).

95. *Conyers*, 733 F.3d at 1153; Supplemental Brief for the Acting Director, OPM, on Rehearing *En Banc*, at 20 n.11, Kaplan v. Conyers, 733 F.3d 1148 (Fed. Cir. 2013).

96. *Conyers*, 115 M.S.P.R. at 574; Northover v. Dep't of Def., 115 M.S.P.R. 451, 453 (M.S.P.B. 2010), *rev'd and remanded sub nom.* Berry v. Conyers, 692 F.3d 1223 (Fed. Cir. 2012), *reh'g en banc granted*, *opinion vacated*, 497 F. App'x 64 (Fed. Cir. 2013), *and rev'd and remanded sub nom*. Kaplan v. Conyers, 733 F.3d 1148 (Fed. Cir. 2013), *cert. denied*, 134 S. Ct. 1759 (2014). Initially, Conyers and Northover individually appealed the adverse personnel actions to the MSPB who passed the case along to an administrative judge. *See* Petition for Writ of Certiorari at 4, *Kaplan v. Conyers*, 733 F.3d 1148 (Fed. Cir. 2013), *petition for cert. filed sub nom.* Northover v. Archuleta, No. 13-607 (U.S. Nov. 15, 2013). The administrative judge in both cases granted the DoD's motion for interlocutory appeal and stayed proceedings pending determination of the certified issue. *See* Conyers, 115 M.S.P.R. at 573 (noting that the administrative judge refused to extend *Egan* to limit review and certifying for interlocutory review); *Northover*, 115 M.S.P.R. at 453 (noting that the administrative judge applied *Egan* to limit MSPB review and certified for interlocutory review). The cases were consolidated and heard before the full, three-member MSPB. *Conyers*, 115 M.S.P.R. at 574; *Northover*, 115 M.S.P.R. at 453.

97. *See Conyers*, 115 M.S.P.R. at 574; *Northover*, 115 M.S.P.R. at 458.

98. *Conyers*, 115 M.S.P.R. at 583–85, 587–88; *Northover*, 115 M.S.P.R. at 458–59.

99. *Conyers*, 115 M.S.P.R. at 577–78; *Northover*, 115 M.S.P.R. 451, 456–58.

100. *Conyers*, 115 M.S.P.R. at 583–85; *Northover*, 115 M.S.P.R. at 451.

information and the latter refers broadly to national security information.[101] Third, the MSPB noted that unlike *Egan*, where there was a threat of classified national security information being leaked to the MSPB, the employees in *Conyers* lacked access to classified information.[102] The cases were remanded to administrative judges to review the merits of the DoD's eligibility determinations of the employees.[103]

Following the MSPB's decision, the Federal Circuit granted the OPM's petition to review[104] on August 17, 2011.[105] In a divided panel, the Federal Circuit reversed the MSPB.[106] Upon rehearing en banc, the court vacated its previous decision but again reversed the MSPB, holding that *Egan* barred MSPB review of the employee's ineligibility for a "sensitive" job.[107]

4. The Federal Circuit's En Banc Analysis

The majority opinion stressed three main points in support of the conclusion that the MSPB lacked authority to review the DoD's ineligibility determination.[108] First, the court reasoned that the executive branch has broad authority in the context of national security concerns.[109] The majority interpreted this authority to extend to "*all* prediction of risk regarding national security."[110] Therefore, the absence of an employee's access to classified information was immaterial because effective protection of national security interests requires that agencies exercise their own judgment when determining who may hold national security positions.[111] The majority reasoned further that such "predictive judgments" could not reasonably be reviewed because they were

101. *Conyers*, 115 M.S.P.R. at 580.
102. *See id.* at 579; *see also* Dep't of the Navy v. Egan, 484 U.S. 518, 527–30 (1988).
103. *Conyers*, 115 M.S.P.R. at 579, 590.
104. *See supra* text accompanying note 44.
105. Berry v. Conyers, et al., 435 F. App'x 943, 944–45 (Fed. Cir. 2011).
106. Berry v. Conyers, 692 F.3d 1223, 1237 (Fed. Cir. 2012), *reh'g en banc granted*, *opinion vacated*, 497 F. App'x 64 (Fed. Cir. 2013), *and rev'd and remanded sub nom*. Kaplan v. Conyers, 733 F.3d 1148 (Fed. Cir. 2013), *cert. denied*, 134 S. Ct. 1759 (2014).
107. Kaplan v. Conyers, 733 F.3d 1148, 1153 (Fed. Cir. 2013), *cert. denied*, 134 S. Ct. 1759 (2014).
108. *Id.* at 1156–64.
109. *Id.* at 1155–56 (citing Boumediene v. Bush, 553 U.S. 723, 797 (2008); United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936)).
110. *Id.* at 1156.
111. *Id.* at 1156–57.

subjective and involved information that could threaten national security if revealed.[112]

Second, the court reasoned that because Congress chose not to enlarge the MSPB's authority in national security contexts, the executive branch had exclusive authority.[113] Third, although Northover did not have access to classified information, the court maintained that *Egan* still applied because he could nonetheless have an adverse impact on national security.[114] The court explained that Northover could conceivably infer classified information from the nature of his work, based on the "compilation theory."[115]

The compilation theory asserts that individual bits of unclassified information, when arranged together like puzzle pieces, may lead to the disclosure of classified information.[116] For example, Northover could have possibly deduced that troops would be deployed in a desert region because he was given orders to stock desert-specific supplies on the shelves.[117] The court discussed how the modern geopolitical landscape required national security information to be kept strictly confidential, even if the connection to national security was merely derivative.[118] In light of these considerations, the court held that an agency's internal review procedures were sufficient to satisfy the CSRA and employees' due process rights.[119]

The dissent, representing three members of the court, criticized the majority for improperly extending *Egan* to prohibit review over suitability determinations.[120] The dissent identified two fatal flaws in the majority's reasoning: (1) the DoD lacks the authority to unilaterally control access to national security information absent congressional or presidential order;[121] and (2) the MSPB has jurisdiction to review the DoD's adverse personnel actions pursuant to the CSRA.[122] The dissent

112. *Conyers*, 733 F.3d at 1156–58, 1164 ("[D]efining the impact an individual may have on national security is the type of predictive judgment that must be made by those with necessary expertise.").

113. *Id.* at 1160, 1163 (citing Dames & Moore v. Regan, 453 U.S. 654, 678 (1981)).

114. *Id.* ("[T]here is no meaningful difference in substance between a designation that a position is 'sensitive' and a designation that a position requires 'access to classified information.'").

115. *Id.* at 1163 n.15.

116. *Id.* at 1158.

117. *Conyers*, 733 F.3d at 1158.

118. *Id.* at 1164–65 (discussing the need to classify many positions as sensitive due to the widened access to national security information through computers and the possibility of intelligence gathering through blackmail and coercion).

119. *Id.* at 1166.

120. *Id.* at 1167 (Dyk, J., dissenting).

121. *Id.* at 1168.

122. *Conyers*, 733 F.3d at 1172, 1177.

also raised policy concerns by pointing out that the majority's decision is detrimental to hundreds of thousands of federal employees and whistleblowers.[123] Without the authority to review the merits of an eligibility decision, the MSPB is unable to review a sensitive employee's allegation of whistleblower retaliation or any other affirmative defense.[124]

The dissent's distinction between *Egan* and the issues in *Conyers* properly reflects both the congressional intent to broadly protect civil service employees and the precedent to apply *Egan* narrowly.[125]

## III. AMENDING THE CSRA TO SOLVE THE PROBLEM OF LIMITED PROTECTIONS THAT FEDERAL CIVILIAN EMPLOYEES RECEIVE

Congress should amend the CSRA to reverse *Conyers*. *Conyers* denies federal employees in sensitive positions the right to appeal an adverse employment action even when the employee had no access to, or need to access, classified information.[126] Congress should not allow *Conyers* to restrict due process rights of employees in sensitive positions that require neither security clearances nor access to classified information.[127] To effect this recommendation, Congress should amend the CSRA to allow the MSPB to review underlying suitability determinations that result in adverse personnel actions to such above-described employees.[128]

Notably, Congress recognizes the problematic decision in *Conyers*, and bipartisan efforts have already arisen to amend the CSRA to include the following text:

> (k)(1) The [MSPB] has authority to review on the merits an appeal by an employee or applicant for employment of an action arising from a determination that the employee or applicant for employment is ineligible for a sensitive position if—
>
> (A) the sensitive position does not require a security clearance or access to classified information; and

123. *Id.* at 1178–80.

124. *See id.* at 1180 n.17 (noting that when the action is based on security clearances, courts will not hear employees' affirmative defenses of whistleblower retaliation, retaliation for constitutionally protected speech, retaliation for religious beliefs, or Title VII discrimination claims).

125. *See id.* at 1167.

126. *See id.* at 1151 (majority opinion).

127. *See Conyers*, 733 F.3d at 1151.

128. *See, e.g.*, H.R. 3278, 113th Cong. (as introduced Nov. 8, 2013); S. 1809, 113th Cong. (as introduced Dec. 12, 2013).

(B) such action is otherwise appealable.[129]

Congress should pass this legislation for several reasons. First, Congress intended to grant civil service employees the right to independent review of adverse personnel actions, and thus, *Conyers*'s creation of an exception to MSPB review frustrates the CSRA's purpose.[130] Second, the Federal Circuit ignored important precedent in deciding *Conyers*.[131] Its interpretation that *Egan* covers not only security clearances but also sensitive positions is overbroad because the two designations are not synonymous.[132] Moreover, courts have refused to extend *Egan* beyond security clearance denials.[133] Finally, the consequences of *Conyers* would be detrimental to hundreds of thousands of federal employees, specifically whistleblowers, who are most in need of legislative protection.[134]

### *A.* Conyers *Creates an Exception to the CSRA That Congress Did Not Intend.*

The Federal Circuit's decision to prohibit MSPB review over an agency's determination that an employee is ineligible for a sensitive position violates congressional intent. Through the CSRA, Congress pledged to protect civil service employees from arbitrary personnel actions and to "insure that employees are hired and fired solely on the basis of their ability."[135] The CSRA passed with an overwhelming majority in both the House and Senate, with only one senator and eight members of the House voting against its passage.[136] The following reasons highlight why the outcome in *Conyers* directly contravenes congressional intent.

129. S. 1809, 113th Cong. Proposed Subsection (k) would be added to 5 U.S.C. § 7701 (2012).

130. *See infra* Part III.A.

131. *See, e.g.*, Dep't of the Navy v. Egan, 484 U.S. 518, 529–30 (1988).

132. *See infra* Part III.B.1.

133. *See, e.g.*, Toy v. Holder, 714 F.3d 881, 885 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 650 (2013).

134. *See infra* Part III.C.

135. S. REP. NO. 95-969, at 4 (1978).

136. *Bill Summary & Status: 95th Congress (1977-1978), S.2640*, THE LIBRARY OF CONGRESS, http://1.usa.gov/1iWT8fw (last visited Jan. 8, 2014) (stating that the CSRA passed in the House by a vote of 365-8, and in the Senate by 87-1).

1. Congress Has Not Created a Sensitive Positions Exception to the CSRA.

Congress has created specific exceptions to CSRA procedures but has shown an unwillingness to impose a broad national security exception, which indicates that Congress intended those employees to remain covered.[137] In drafting the CSRA, Congress considered national security and specifically excluded several agencies from MSPB review but chose not to include the DoD or noncritical sensitive positions.[138] Moreover, in 1994, Congress amended the National Security Act of 1947[139] to authorize the President to:

> establish uniform minimum standards to ensure that employees in the executive branch of Government whose access to *classified information* is being denied or terminated . . . are appropriately advised of the reasons for such denial or termination and are provided an adequate opportunity to respond to all adverse information which forms the basis for such denial or termination before final action by the department or agency concerned.[140]

The purpose of the amendment was to provide employees "minimal procedural protections" in relation to security clearance procedures and thus comply with the holding in *Egan*, which limited MSPB review of security clearances.[141] Agencies are therefore able to bypass the MSPB procedures and implement their own internal review procedures. The amendment, however, only mentions minimum procedures for the termination of classified-status employees.[142] Congress likely intended that non-classified employees were still afforded the full protections guaranteed by CSRA.[143]

Congress has also repealed a national security exception in the past as overbroad, further demonstrating the congressional intent to provide

137. *See, e.g.*, 5 U.S.C. § 2302(a)(2) (2012) (stating that the CSRA applies to "any position in the competitive service, a career appointee position in the Senior Executive Service or a position in the excepted service," and employees of executive agencies with the exclusion of government contractors and enumerated agencies).

138. *See supra* note 34 and accompanying text.

139. National Security Act of 1947, Pub. L. 80-253, 61 Stat. 495 (2012) (codified as amended in scattered sections of 50 U.S.C.).

140. 50 U.S.C. § 3161(a)(5) (2012) (emphasis added).

141. Kaplan v. Conyers, 733 F.3d 1148, 1173 (Fed. Cir. 2013), *cert. denied*, 134 S. Ct. 1759 (2014) (Dyk J., dissenting) (citing H.R. REP. NO. 103-753, at 54 (1994) (Conf. Rep.)).

142. *Id.*; *see* H.R. REP. NO. 103-753, at 53–54 (noting that the amendment was consistent with *Egan*).

143. *See* H.R. REP. NO. 103-753, at 53–54.

broad protection through the CSRA.[144] In 1996, Congress created a specific exception to the CSRA by granting the Secretary of Defense the power to remove "any employee in a defense intelligence position" when doing so was in the interest of national security.[145] The employees' positions in *Conyers*, however, were not defense intelligence positions, and thus, the exception does not apply.[146] Then, in 2005, Congress authorized the creation of a National Security Personnel System ("NSPS") to house a personnel management system separate from the CSRA.[147] Pursuant to the NSPS, the Secretary of Defense promulgated regulations to limit MSPB review over *any* employee in national security cases, not just those in defense intelligence positions.[148]

Shortly thereafter, in response to concerns regarding unfairness,[149] Congress invalidated the regulations and repealed the authorizing statute, dissolving the NSPS and the separate appeals process.[150] Specifically, widespread criticism from DoD employees that the NSPS stripped them of CSRA-granted protections induced Congress to invalidate the statute.[151]

The limited and carefully articulated amendments to the CRSA demonstrate a determined congressional purpose to preserve the CRSA's broad reach. Thus, the Federal Circuit's holding should be viewed as creating an unwarranted exception outside the scope of the legislation.

2. Congress Intended to Foreclose Opportunities for Abuse.

In passing the CSRA, Congress sought to extend protection to all individuals who serve their country in civil service jobs.[152] Specifically, the former personnel management system had become so corrupt with personnel decisions based on favoritism, retaliation, and self-dealing,

144. *See* National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 108-136, § 1101, 117 Stat. 1392, 1621–33 (2003) (repealed 2009).

145. 10 U.S.C. § 1609(a) (2012); *see Conyers*, 733 F.3d at 1173–75 (arguing that the presence of specific exceptions is evidence that Congress did not intend, or create, a general national security exception to the CSRA).

146. *See* 10 U.S.C. § 1614.

147. *See* 117 Stat. at 1621–33 (repealed 2009).

148. 5 C.F.R. § 9901.107(a)(2) (repealed 2011).

149. *See* H.R. REP. NO. 111-166, at 327–28 (2009) (noting "concerns remain regarding the system and its overall impact on DoD employees").

150. *See* National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 1113(b)–(c), 123 Stat. 2190, 2498 (2009) (repealing the NSPS).

151. *See* H.R. REP. NO. 111-166, at 327–28.

152. 124 CONG. REC. 159, 1727 (1978) (stating the goal of the CSRA was to "serve the American public while offering necessary protections to the millions of men and women who dedicate their careers to public service").

that Congress replaced it with a merit-based system—the CSRA.[153] In enacting the CSRA, Congress conferred broad authority on the MSPB to achieve an efficient personnel system, which required a "strong policing mechanism[] to assure that the greater flexibility [of agency heads] is not abused or misused."[154] The decision in *Conyers*, however, severely limits the MSPB's authority by empowering agencies with the ability to dispose of employees for any reason, as long as the dismissal is under the guise of national security. Thus, the decision effectively turns back the clock back to pre-CSRA troubles.

3. *Conyers* Exacerbates Problems That Congress Has Taken Steps to Ameliorate.

Congress recognized that agencies were over-classifying information and in 2010,[155] sought to decrease classifications and thus increase transparency through the Reducing Over-Classification Act.[156] Further, in 2014, congressional members introduced the Clearance and Over-Classification Reform and Reduction Act ("CORRECT Act") to clarify procedures related to security clearances and sensitive positions.[157] The CORRECT Act proposes to help solve the problem of "over-designations" of sensitive positions.[158] One motivation for addressing the problem of over-designation is to aid the OPM in its investigatory processes.[159]

However, under *Conyers*, by simply designating positions as noncritical sensitive, agencies can avoid independent MSPB review.[160] Thus, *Conyers* hinders Congress's goal of increasing government transparency by incentivizing agencies to over-designate positions as noncritical sensitive.[161]

153. *See* S. REP. NO. 95-969, at 2–4 (1978) (discussing the need to reform the prior personnel management system—the Pendleton Act of 1883).
154. *Id.* at 128.
155. *See* S. REP. NO. 111-200, at 1–2 (2010).
156. Reducing Over-Classification Act, Pub. L. No. 111-258, 124 Stat. 2648 (2010) (codified as amended in scattered sections of 6 U.S.C. and 50 U.S.C.).
157. *See* H.R. 5240, 113th Cong. (2014); S. 2683, 113th Cong. (2014).
158. 160 CONG. REC. 1262 (2014).
159. *Id.*
160. *See infra* notes 206–212 and accompanying text.
161. *See supra* notes 157–158 and accompanying text.

4. The Federal Circuit's Decision Conflicts with the U.S. Supreme Court's Interpretation of Congressional Intent.

The U.S. Supreme Court has cautioned courts to construe national security exceptions to employee procedural protections narrowly.[162] The Court determined that Congress sought to protect employees' procedural rights by limiting agencies' unreviewable dismissal power to the "*minimum* scope necessary to [achieve] the purpose of protecting activities affected with the 'national security.'"[163] Accordingly, Congress should amend the CSRA and reverse the Federal Circuit's decision because the court's broad reading of the DoD's authority unnecessarily limits essential procedural protections for civil service employees that Congress intended to preserve.

*B. The Federal Circuit Improperly Extended Supreme Court Precedent by Conflating Sensitive Positions with Those That Require Security Clearances.*

1. *Egan* Only Applies to Security Clearances, Which Are Distinct from a Position's Status as Sensitive.

The Federal Circuit expanded the scope of *Egan* by improperly equating sensitive positions and positions in which the occupant has access to classified information.[164] In *Egan*, the U.S. Supreme Court limited MSPB review in a case involving a security clearance because executive agencies have broad discretion in the "protection of *classified information*."[165] The Court never indicated that this broad discretion would extend to employees who did not have access to classified information.

"Security clearance" is a term of art historically used to refer to an employee's access to classified information.[166] In fact, the DoD's Personnel Security Program defines "security clearance" as "a determination that a person is eligible under the standards of this

162. *See, e.g.*, Cole v. Young, 351 U.S. 536, 546–47 (1956).

163. *Id.* at 547 (emphasis added).

164. *See Hearings*, *supra* note 1, 113th Cong. at 56:23 (statement of Brian Prioletti, Office of the Director of National Intelligence) ("There is a difference between the sensitive position and having a clearance, as we know.").

165. Dep't of the Navy v. Egan, 484 U.S. 518, 529 (1988) (emphasis added).

166. *See* Conyers v. Dep't of Def., 115 M.S.P.R. 572, 580 (M.S.P.B. 2010), *rev'd and remanded sub nom.* Berry v. Conyers, 692 F.3d 1223 (Fed. Cir. 2012), *and reh'g en banc granted, opinion vacated*, 733 F.3 1148 (Fed. Cir. 2013) (citing Jones v. Dep't of the Navy, 978 F.2d 1223, 1225 (Fed. Cir. 1992); Hill v. Dep't of the Air Force, 844 F.2d 1407, 1411 (10th Cir. 1988)).

Regulation for access to *classified information*."[167] By contrast, a 1953 executive order governs the designation of sensitive positions and instructs agency heads to designate positions as "sensitive" if the occupant "could bring about, by virtue of the nature of the position, a material adverse effect on the national security."[168] In the DoD, noncritical sensitive positions are classified based on the presence of one of several characteristics—most of which do not require access to classified information.[169] Accordingly, the terms "noncritical sensitive" and "classified information" are not synonymous and should not be treated as such for purposes of MSPB review.[170]

2. Other Courts Narrowly Apply *Egan.*

Courts have applied *Egan*'s national security exception only to security clearance determinations.[171] As the U.S. Supreme Court determined in *Egan*, offering fewer procedural protections to civil service employees who have access to classified information is justified by "reasons . . . too obvious to call for enlarged discussion."[172] The national security justification wanes, however, when an adverse employment action does not involve the denial or revocation of a security clearance or access to classified information.[173] Specifically, when the adverse action arises from the denial or revocation of an employee's access to an agency certification or "approval of the

167. DoD Reg. 5200.2-R § DL1.1.21 (1987) (emphasis added).

168. Exec. Order No. 10,450, § 3, 3 C.F.R. 936 (1949-1953 Comp.); 5 C.F.R. § 732.101 (2013).

169. *See supra* note 26 and accompanying text.

170. *See* DoD Reg. 5200.2-R § C3.1.1.

171. *See, e.g.*, Toy v. Holder, 714 F.3d 881, 885 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 650 (2013).

172. Dep't of the Navy. v. Egan, 484 U.S. 518, 529 (1988) (quoting CIA v. Sims, 471 U.S. 159, 170 (1985)). The U.S. Supreme Court in *Egan* intended its decision to be narrowly applied to an agency's "underlying decision to deny or revoke a *security clearance* in the course of reviewing an adverse action." *Id.* at 520 (Blackman, J.) (emphasis added) (commencing the opinion by so describing the "narrow question" before the Court).

173. *Compare id.* at 529–30 (reasoning that the government has a "'compelling interest' in withholding national security information for unauthorized persons" and thus agencies have broad discretion to control access to classified information, which justified decreased due process in determinations on security clearances), *with* Adams v. Dep't of the Army, 105 M.S.P.R. 50, 55–56 (M.S.P.B. 2007), *aff'd*, 273 Fed. Appx. 947 (Fed. Cir. 2008) (holding that revocation of computer access, which contained sensitive information, was reviewable), *and* Jacobs v. Dep't of the Army, 62 M.S.P.R. 688, 694–95 (M.S.P.B. 1994) (holding that revocation of an employee's eligibility to access chemical weapons was reviewable, even when the employee held a security clearance).

employee's fitness or other qualifications to hold his position,"[174] the MSPB has generally held that *Egan* does not apply to bar merit review of the underlying determination.[175] In *Adams v. Department of the Army*,[176] the MSPB held that, despite *Egan*, it had authority to review the Army's decision to revoke an employee's computer access, which provided the employee access to sensitive information.[177] The MSPB reasoned that the purpose of *Egan* was to afford the executive branch the deference needed to protect the nation from unauthorized individuals gaining access to classified information.[178] The MSPB explained that reviewing the merits of a security clearance revocation presented national security concerns that were not present in *Adams* because the employee did not have access to classified information or access to information that would require a security clearance.[179]

Similarly, other U.S. Courts of Appeals have limited *Egan* to the domain of classified information.[180] Courts have held, for example, that *Egan* does not apply to prohibit review of the revocation of agency certifications.[181] Despite other circuits' limiting of *Egan* to security

174. *Adams*, 105 M.S.P.R. at 55.

175. *See, e.g.*, *id.* (revocation of human resource assistant's computer access); Laycock v. Dep't of the Army, 97 M.S.P.R. 597, 597 (M.S.P.B. 2004) (withdrawal of attorney-advisor's qualifications approval), *aff'd*, 139 F. App'x 270 (Fed. Cir. 2005); *Jacobs*, 62 M.S.P.R. 688, 695 (disqualification of security guard from Chemical Personnel Reliability Program); Boulineau v. Dep't of the Army, 57 M.S.P.R. 244, 248 n.6, 249 (M.S.P.B. 1993) (disqualification of helicopter flight instructor from position based on medical fitness exam); Graham v. Dep't of the Air Force, 46 M.S.P.R. 227, 230 (M.S.P.B. 1990) (termination of medical officer's clinical credentials).

176. Adams v. Dep't of the Army, 105 M.S.P.R. 50, 55–56 (M.S.P.B. 2007), *aff'd*, 273 Fed. Appx. 947 (Fed. Cir. 2008).

177. *Id.* at 54–55.

178. *Id.* at 55 (citing *Egan*, 484 U.S. at 529).

179. *Id.* at 55; *accord Jacobs*, 62 M.S.P.R. at 695 (reasoning that "[a]s the protector of the government's merit systems, the [MSPB] is not eager to expand the scope of the rationale in *Egan* to divest federal employees whose positions do not require a security clearance of basic protections against non-meritorious agency actions").

180. *See* Kaplan v. Conyers, 733 F.3d 1148, 1167–68 (Fed. Cir. 2013), *cert. denied*, 134 S. Ct. 1759 (2014) (Dyk, J., dissenting); Toy v. Holder, 714 F.3d 881, 885 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 650 (2013) ("No court has extended *Egan* beyond security clearances, and we decline to do so.").

181. *See, e.g.*, *Toy*, 714 F.3d at 884–86 (stating that revocation of Federal Bureau of Investigation (FBI) contract employee's building access is not within the purview of *Egan*'s exception to MSPB review); Rattigan v. Holder, 689 F.3d 764, 770 (D.C. Cir. 2012) (stating that FBI officials' decision to report employee as security concern is not within *Egan*'s exception to MSPB review). An "agency certification" is an agency's approval that an employee is authorized or qualified to hold a specific position or perform certain tasks. *See, e.g.*, *Adams*, 105 M.S.P.R. at 55.

clearances, the Federal Circuit has the final say because it holds exclusive power to bind the MSPB.[182]

Congress should amend the CSRA to effectively overrule the Federal Circuit because courts have consistently applied *Egan* only to security clearance revocations or denials.[183] Without Congressional action, the Federal Circuit's decision will be final even though other circuits have refused to extend *Egan*.[184] Further, because sensitive positions and security clearances are not synonymous, the Federal Circuit should not have extended *Egan* beyond its limited reach.[185]

3. The Federal Circuit Misapplied the Compilation Theory.

The Federal Circuit in *Conyers* contended that Northover and Conyers could be terminated without MSPB review even though their positions did not require security clearances because the employees could potentially ascertain classified security information.[186] In reaching this conclusion, the court relied on the "compilation theory," which supposes that pieces of otherwise unclassified information, taken together, can become classifiable when they have the potential to reveal classified information.[187] The compilation theory is borne out of an executive order that provides authority and guidance to agency heads in classifying national security information.[188]

The Federal Circuit's reliance on the compilation theory is flawed for three reasons. First, the compilation theory serves to justify an agency's decision to classify certain information.[189] The employees in *Conyers* had *no* access to classified information, and offering theories of how information relating to their position may be classified is immaterial.[190] The theory does not, as the court suggests, provide a post hoc justification for limiting removal procedures.

182. *See* Petition for Writ of Certiorari at 24–25, *Kaplan v. Conyers*, No. 2011-3207, 2013 WL 4417583 (Fed. Cir. Aug. 20, 2013), *petition for cert. filed sub nom.* Northover v. Archuleta, No. 13-607 (U.S. Nov. 15, 2013) (citing 5 U.S.C. § 7703(b) (2012)).

183. *See, e.g.*, *Toy*, 714 F.3d at 884–86.

184. *See supra* note 53 and accompanying text.

185. *See supra* notes 165–169 and accompanying text.

186. Kaplan v. Conyers, 733 F.3d 1148, 1160 (Fed. Cir. 2013), *cert. denied*, 134 S. Ct. 1759 (2014).

187. *See id.* at 1158–60 (citing Exec. Order No. 13,526, § 1.7(e), 3 C.F.R. 298, 1.7(e) (2009), *reprinted in* 50 U.S.C. § 435 (Supp. V 2012)).

188. *See* Exec. Order No. 13,526, § 1.7(e), 3 C.F.R. 298, 1.7(e) (2009), *reprinted in* 50 U.S.C. § 435 (Supp. V 2012).

189. *See, e.g.*, Kiareldeen v. Ashcroft, 273 F.3d 542, 551 n.2 (3d Cir. 2001).

190. *See Conyers*, 733 F.3d at 1153; *see also* Stipulation, *supra* note 93.

Second, in support of its point, the Federal Circuit cited two cases in which courts refused to grant the adverse parties' litigation requests that the government release information classified per the compilation theory.[191] In stark contrast, the employees in *Conyers* are not seeking disclosure of any information that is potentially classifiable under the compilation theory.[192] Rather, the employees were seeking to discuss, through MSPB review, their demotion and termination from stocking and secretarial positions due to debt they held.[193] While several courts have invoked the compilation theory to deprive parties of the ability to discover information,[194] no other court has invoked it to prohibit an employee from divulging to a court *any* information related to his job, such as what type of shampoo he placed on the shelves.[195] To the contrary, courts have routinely reviewed the merits of denials based on agency-held certifications or other suitability determinations when they do not involve security clearance denials.[196]

Third, as a policy consideration, the compilation theory has potential for abuse, and courts only rarely reject the Government's compilation defense.[197] Although the figure is unknown, some scholars estimate that 75 percent of government-held information is classified pursuant to the compilation theory.[198] Here, no such information is sought. Because the compilation theory does not apply in the context of *Conyers*, and because it would strip all sensitive employees of CSRA protections, the Federal Circuit should not have applied the theory as a basis for precluding MSPB review.

191. *Kiareldeen*, 273 F.3d at 551 n.2 (holding that in a deportation appeal, the Immigration and Naturalization Service's production of unclassified summaries, rather than the documents themselves, was justified by the compilation theory); Kasza v. Browner, 133 F.3d 1159, 1170 (9th Cir. 1998) (holding that the Air Force properly asserted the compilation theory to withhold documents requested in discovery).

192. *See* Stipulation, *supra* note 93.

193. Initial Brief of Appellant-Petitioner at 11, Berry v. Conyers, 692 F.3d 1223 (Fed. Cir. 2012) (No. 2011-3207), 2011 U.S. Fed. Cir. Briefs 3207.

194. *See, e.g.*, *Kiareldeen*, 273 F.3d at 551 n.2.

195. *See Conyers*, 733 F.3d at 1163 n.15.

196. *See supra* Part III.B.2.

197. *See, e.g.*, David E. Pozen, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L.J. 628, 665, 679 (2005) (explaining that courts are overly deferential to compilation theory claims and uphold highly speculative claims that lack "any legitimate analytic basis").

198. *Id.* at 648.

4. The Supreme Court Has Weighed In and Determined That National Security Concerns Arise from Those with Access to Classified Information.

In *Cole v. Young*,[199] the U.S. Supreme Court supported a narrow definition of "national security" when used to bypass employees' procedural protections, analogous to the ones prescribed in the CSRA.[200] In *Cole*, the Court held that only in positions that provide a risk of "immediate threat of harm" to national security should an employee's procedural protections be limited through the use of an agency's unreviewable dismissal power.[201] The Court explained that national security concerns are only directly implicated when an employee in a sensitive position posed a "security risk"—a risk caused by "employees having access to classified materials."[202] The Court thus equated sensitive positions with positions that had access to classified information and, accordingly, limited agencies' unreviewable removal power to only those instances when an employee has access to classified or top-secret material.[203]

Because the U.S. Supreme Court has articulated that national security risks arise from those with access to classified information[204] and that unreviewable dismissal power is narrowly permitted, the Federal Circuit's decision allowing summary dismissal of a grocery store clerk should be reversed.

199. Cole v. Young, 351 U.S. 536 (1956).

200. *See id.* at 543 (defining the scope of agencies' unreviewable dismissal powers under the Act of August 26, 1950 ("Act") when "deemed necessary 'in the interest of the national security'"). *Cole* defined "national security" within the meaning of the Act, which was a precursor to 5 U.S.C. § 7532 (2012). *See Conyers*, 733 F.3d at 1158 n.10. *Cole*, which preceded the passage of the CSRA, interpreted the Act's application to the Veterans' Preference Act of 1944 that similarly gave civil service employees the right to appeal adverse employment actions. *See id.*

201. *Cole*, 351 U.S. at 543, 46.

202. *Id.* at 550.

203. *Id.* at 550–51. Further, the Court found that the position was improperly classified as sensitive because the employee lacked access to classified information and "was not in a position to influence policy against the interests of the Government." *Id.* at 556–57 n.19.

204. *See* Dep't of the Navy v. Egan, 484 U.S. 518, 529 (1988) (citing *Cole* for the proposition that the agency head, who is responsible for safeguarding *classified information*, should have final discretion in determining who has access to such information, and the decision, therefore, should bypass independent review).

### C. *The Extension of* Egan *Adversely Affects Numerous Individuals.*

#### 1. *Conyers* Creates a "Sensitive Jobs" Loophole.

Within the DoD alone, at least 200,000 employees occupy noncritical sensitive positions.[205] Agencies also have complete discretion in classifying positions as sensitive.[206] In fact, there is currently no public guidance on an agency's designation process.[207] Moreover, bases for finding an employee ineligible are vast and include any scenario in which the employee may "compromise sensitive information."[208] In *Conyers*, for example, the employees were denied eligibility to hold noncritical sensitive positions because they held debt due to death or divorce.[209]

Herein arises the fear of a "sensitive jobs" loophole through which agencies can easily engage in arbitrary adverse personnel actions upon routine background checks.[210] Agencies can easily and without oversight classify positions as sensitive.[211] The loophole thus allows agencies to designate employees as occupying sensitive jobs to avoid congressionally mandated CSRA personnel procedures.[212] Agency heads

205. Conyers, 733 F.3d at 1178.

206. *See* Exec. Order No. 10,450, § 3, 3 C.F.R. 936 (1949-1953 Comp.); 5 C.F.R. § 732.201(a) (2013); Skees v. Dep't of the Navy, 864 F.2d 1576, 1587 (Fed. Cir. 1989).

207. *See Hearing*s, *supra* note 1, at 113th Cong. 3 (2013) (statement of Timothy F. Curry, Deputy Assoc. Dir. for Partnership & Labor Relations at the OPM). A proposed regulation to "facilitate more uniform and consistent designations which are more closely aligned with the actual national security implications and sensitivities attending the position" indicates that the lack of guidance is a problem for agencies. *Id.* at 113th Cong. 4 (2013) (statement of Brian Prioletti, Office of the Director of National Intelligence); *see* Designation of National Security Positions in the Competitive Service, and Related Matters, 78 Fed. Reg. 31847 (proposed May 28, 2013) (to be codified at 5 C.F.R. pt. 732).

208. *Egan*, 484 U.S. at 528 (discussing an agency's decision to grant a security clearance); *see Conyers*, 733 F.3d at 1164–65 ("Occasionally, those means of obtention [of intelligence] are coercive and/or subversive. For example, the intelligence community may view certain disparaging information concerning an employee as a vulnerability which can be used to blackmail or coerce information out of the individual.").

209. *See* Davidson, *supra* note 90.

210. *See, e.g.*, Corrected Brief for Amicus Curiae Government Accountability Project in Support of Respondents in Favor of Affirming the Board's Decision, Kaplan v. Conyers, 733 F.3d 1148 (Fed. Cir. 2013) (No. 2011-3207), 2013 WL 1637206; 159 CONG. REC. E1457 (daily ed. Oct. 8, 2013) (statement of Rep. Eleanor Holmes Norton) (stating that "[m]y bill would stop the use of 'national security' to repeal a vital component of civil service protection and of due process" in reference to H.R. 3278, 113th Cong. (as introduced Nov. 8, 2013)).

211. *See* Skees v. Dep't of the Navy, 864 F.2d 1576, 1587 (Fed. Cir. 1989).

212. *See, e.g.*, *Conyers*, 733 F.3d at 1178–80 (Dyk, J., dissenting) (stating that the majority's decision will have "profound consequences" affecting as many as 200,000

are incentivized to classify positions as sensitive because it serves their interest to have more control over employment decisions.[213] Personnel decisions based on criteria other than merit, however, are exactly what the CSRA was intended to curb.[214] And although it is hard to imagine that agencies would abuse this power, such abuse was the impetus for the CSRA in 1978.[215] Many critics, therefore, predict a surge in sensitive designations due to the *Conyers* decision, leaving employees with no recourse from adverse personnel actions.[216] Accordingly, the loophole should be closed because it threatens to undermine the accountability policy objectives of the CSRA.[217]

2. The Sensitive Jobs Loophole Removes Whistleblower Protections.

A primary purpose of the CSRA is to protect employees who report actions of "mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety"—or blow the whistle.[218] However, in response to insufficient protections in the CSRA, Congress enacted the Whistleblower Protection Enhancement Act of 2012[219] ("WPEA") to encourage more employees to blow the whistle.[220] Specifically, Congress granted the MSPB more authority to adjudicate claims of whistleblower retaliation.[221] Congress has fought for whistleblower protections because it has recognized that

noncritical sensitive civilians employed in the DoD who do not have, or require, access to classified information); 159 CONG. REC. E1457 (daily ed. Oct. 8, 2013) (statement of Rep. Eleanor Holmes Norton) (warning that the decision will create "avenues for unreviewable, arbitrary action or retaliation by an agency head and, in addition, makes a mockery of whistleblower protections" and will result in stripping employees of due process under the pretext of national security).

213. *See Conyers*, 733 F.3d at 1178–79 (citing dozens of cases pending on appeal until *Conyers* is decided).

214. *See supra* Part III.A.3.

215. *See supra* Part III.A.3.

216. *See, e.g.*, Jack Moore, *Court Ruling Gives Agencies 'Weapon' Against Employees, Union Says*, FEDERAL NEWS RADIO (Aug. 28, 2013, 11:58 AM), http://bit.ly/1eXkjaU; Press Release, Angela Canterbury, Dir. of Pub. Policy of the Project on Gov't Oversight, Activist Court Decision Strips Civil Service Rights and Whistleblower Protections From National Security Positions (Aug. 21, 2013), *available at* http://bit.ly/1y0Q6xb.

217. *See* Press Release, Angela Canterbury, *supra* note 216.

218. 5 U.S.C. § 2302 (2012); *see also* Wren v. Merit Sys. Prot. Bd., 681 F.2d 867, 872 (D.C. Cir. 1982).

219. Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, 126 Stat. 1465 (2012) (codified as amended in scattered sections of 5 U.S.C.).

220. *See* S. REP. NO. 112-155, at 3 (2012).

221. *See id.* at 4.

encouraging whistleblowing helps achieve an efficient workforce and increased government accountability.[222] However, whistleblowers are in need of strong protection because employers often retaliate against the disclosing employees with adverse personnel actions.[223] In this sense, whistleblowers act as an added enforcement mechanism of the merit system principles.[224]

The sensitive jobs loophole is damaging to whistleblowers because it prevents the MSPB from adjudicating a sensitive employee's claim of retaliatory firing for blowing the whistle on a supervisor.[225] Courts have held that when an employee asserts that her removal based on her security clearance revocation was pretextual, the MSPB cannot adjudicate the employee's claim because it would need to review the merits of the security clearance denial, which *Egan* prohibits.[226] Assimilating *Conyers*, the same logic would bar MSPB review over employees in sensitive jobs who allege whistleblower retaliation.[227] The loophole aggravates whistleblowers' already shaky protection by the Federal Circuit and the MSPB, which have reputations for lackluster enforcement of whistleblower protection laws.[228]

Congress sought to promote whistleblowing even in the realm of national security to curtail unproductive and dangerous activities.[229] However, under *Conyers*, employees cannot rely on the WPEA to protect themselves from lawful disclosures of waste or mismanagement because they can be summarily fired under the guise of eligibility determinations.[230] The fear of retaliation discourages whistleblowers

222. *See* S. REP. NO. 95-969, at 1–2 (1978).
223. *See id.*
224. *Id.*
225. *See* Kaplan v. Conyers, 733 F.3d 1148, 1180, *cert. denied*, 134 S. Ct. 1759 (2014) (Dyk, J., dissenting).
226. *See id.* (citing Bennet v. Chertoff, 425 F.3d 999, 1003 (D.C. Cir. 2005); Hesse v. Dep't of State, 217 F.3d 1372, 1377–80 (Fed. Cir. 2000)).
227. *Id.*
228. *See* S. REP. NO. 112-155, at 4, 18 (2012) (blaming the Federal Circuit and the MSPB for substantially limiting whistleblower protections and doing so inconsistently with congressional intent); Lilyanne Ohanesian, *Protecting Uncle Sam's Whistleblowers: All-Circuit Review of WPA Appeals*, 22 FED. CIR. B.J. 615, 616–17 (2012) (stating that since the Whistleblower Protection Act ("WPA") was amended in 1994, the MSPB had dismissed half of all WPA claims, and the Federal Circuit decided for the whistleblower in only three out of 229 WPA appeals). The WPEA strengthened protections offered under the WPA, which offers a procedural framework through which whistleblowers can appeal adverse personnel actions. *See* Whistleblower Protection Act of 1994, Pub. L. 103-424, 108 Stat. 4361 (1994) (codified as amended in scattered sections of 5 U.S.C.); S. REP. NO. 112-155, at 4.
229. *See* S. REP. NO. 112-155, at 22, 24–25; S. REP. NO. 95-969, at 6.
230. *See, e.g.*, *Conyers*, 733 F.3d at 1180 (Dyk, J. dissenting).

from reporting fraud, abuse, and waste, thereby fostering an inefficient personnel management system contrary to Congress's clear intent to encourage whistleblowing.[231] Because the MSPB protects against disclosure of classified information,[232] Congress should foreclose the unnecessary sensitive jobs loophole.

## IV. CONCLUSION

The events of September 11, 2001 sparked a surge in aggressive security measures within the United States government. Today, considerably more governmental positions require security clearances.[233] In 2012, the Office of the Director of National Intelligence reported that more than 4.9 million government employees held a security clearance.[234] Under *Egan*, all 4.9 million employees are denied review by an independent, bipartisan board of the merits of any adverse personal actions based on a determination of their security clearance.[235] In *Conyers*, the Federal Circuit added hundreds of thousands more federal employees to the list of those deprived of access to the MSPB.[236] In addition, agencies often haphazardly designate positions that are nonsensitive as sensitive.[237]

When the U.S. Supreme Court rightfully established a national security exception to the CSRA's procedures for aggrieved employees, the Court limited this exception to those with access to classified information.[238] The Federal Circuit encroached on the CSRA and other courts when it concluded that the national security exception should be expanded to include employees who occupy positions classified as noncritical sensitive, regardless of the positions' actual effect on national security.[239]

Consequently, Congress should amend the CSRA to reverse *Conyers* and refuse to inflate the *Egan* national security exception beyond security clearances. Enabling the MSPB to adjudicate the merits of an adverse action based on an eligibility determination regarding sensitive positions will preserve the merit system principles set forth in

231. *See* S. REP. NO. 112-155, at 3.
232. *See supra* notes 57–59 and accompanying text.
233. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 28, at 8.
234. OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, 2012 REPORT ON SECURITY CLEARANCE DETERMINATIONS 3 (2013), *available at* http://bit.ly/1cFDv7m.
235. *See* Dep't of the Navy v. Egan, 484 U.S. 518, 530 (1988).
236. *See* Kaplan v. Conyers, 733 F.3d 1148, 1160 (Fed Cir. 2013), *cert. denied*, 134 S. Ct. 1759 (2014).
237. *See supra* notes 206, 210–212 and accompanying text.
238. *See Egan*, 484 U.S. at 530.
239. *See Conyers*, 733 F.3d at 1160.

the CSRA.[240] Furthermore, foreclosing the exception will rescue hundreds of thousands of employees from the sensitive jobs loophole and will foster an efficient workforce by encouraging whistleblowing.[241]

240. *See supra* Part III.A.
241. *See supra* Part III.C.