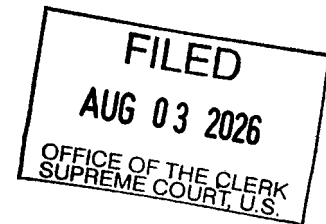


26-5277
No. _____



IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL G. THOROGOOD,

Petitioner,

v.

DEPARTMENT OF THE NAVY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Department of the Navy v. Egan limits judicial review of the merits of a security-clearance determination. But even in clearance-related adverse actions, the Merit Systems Protection Board and the Federal Circuit retain authority to review whether the agency complied with the statutory adverse-action requirements of 5 U.S.C. § 7513.

Petitioner did not ask the Federal Circuit to review the merits of the Navy's security-clearance determination. Petitioner argued that the agency and the Board failed to comply with 5 U.S.C. § 7513(a), § 7513(b), and § 7513(e), including by acting on an incomplete adverse-action record, failing to include and consider the final written Personnel Security Appeals Board decision, conflating eligibility for access with actual access to classified information, and failing to address procedural prejudice.

The Federal Circuit affirmed in a nonprecedential opinion after recasting Petitioner's argument as a challenge to whether his position required a security clearance, and without addressing Petitioner's preserved § 7513(a) and § 7513(e) arguments.

The question presented is:

Whether, in a security-clearance-based adverse action, a reviewing court may affirm without addressing preserved statutory challenges under 5 U.S.C. § 7513(a) and § 7513(e), where the petitioner does not challenge the merits of the clearance determination but argues that the agency acted on an incomplete record and failed to comply with mandatory adverse-action procedures.

LIST OF PARTIES

The parties to the proceeding below were:

Michael G. Thorogood, Petitioner.

Department of the Navy, Respondent.

RELATED PROCEEDINGS

Thorogood v. Department of the Navy, No. 2026-1219, United States Court of Appeals for the Federal Circuit. Judgment entered June 3, 2026. Panel rehearing and rehearing en banc denied July 14, 2026.

Thorogood v. Department of the Navy, MSPB Docket No. DC-0752-24-0319-I-1, Merit Systems Protection Board. Final order entered November 25, 2025.

Thorogood v. Department of the Navy, MSPB Docket No. DC-0752-24-0319-I-1, Initial Decision entered October 3, 2024.

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TABLE OF AUTHORITIES

Cases

Department of the Navy v. Egan, 484 U.S. 518 (1988)

Gargiulo v. Department of Homeland Security, 727 F.3d 1181 (Fed. Cir. 2013)

Hesse v. Department of State, 217 F.3d 1372 (Fed. Cir. 2000)

Hornseth v. Department of the Navy, 916 F.3d 1369 (Fed. Cir. 2019)

Schnedar v. Department of the Air Force, 2013 MSPB 16

Schnedar v. Department of the Air Force, 2014 MSPB 5

Statutes and Regulations

5 U.S.C. § 7513

5 U.S.C. § 7701

5 U.S.C. § 7703

28 U.S.C. § 1254

DoD Regulation 5200.2-R, Chapter 8

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit is nonprecedential and appears at Appendix A.

The Federal Circuit's order denying panel rehearing and rehearing en banc appears at Appendix B.

The final order of the Merit Systems Protection Board appears at Appendix C.

The initial decision of the Merit Systems Protection Board administrative judge appears at Appendix D.

JURISDICTION

The United States Court of Appeals for the Federal Circuit entered judgment on June 3, 2026. Petitioner timely filed a combined petition for panel rehearing and rehearing en banc. The Federal Circuit denied rehearing on July 14, 2026.

This petition is filed within 90 days of the denial of rehearing.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

This case involves 5 U.S.C. § 7513(a), which provides that an agency may take an adverse action against an employee "only for such cause as will promote the efficiency of the service."

This case involves 5 U.S.C. § 7513(b), which provides that an employee against whom an adverse action is proposed is entitled to advance written notice, a reasonable time to answer

orally and in writing, representation by an attorney or other representative, and a written decision.

This case involves 5 U.S.C. § 7513(e), which requires an agency to maintain and furnish the notice of proposed action, the employee's written answer, a summary of any oral answer, the notice of decision, the reasons therefor, and any order effecting the action.

This case involves 5 U.S.C. § 7701(c)(2)(A), under which an agency action may not be sustained if the employee shows harmful error in the application of the agency's procedures.

This case also involves DoD Regulation 5200.2-R, Chapter 8, including § C8.2.2.5, concerning the final written decision of the Personnel Security Appeals Board.

STATEMENT OF THE CASE

1. This case concerns a clearance-related indefinite suspension, not a challenge to the merits of a clearance determination.

Petitioner Michael G. Thorogood was a federal civilian employee of the Department of the Navy at Norfolk Naval Shipyard. The agency indefinitely suspended him after his eligibility for access to classified information was revoked.

Petitioner did not ask the Merit Systems Protection Board or the Federal Circuit to review the merits of the security-clearance determination. Petitioner challenged the adverse-action process and argued that the agency failed to comply with 5 U.S.C. § 7513 and applicable Department of Defense procedures before imposing and sustaining the indefinite suspension.

2. Petitioner distinguished eligibility for access from actual access to classified information.

The agency's adverse-action documents asserted that Petitioner's "access to classified information" had been revoked and that his position required access to classified information. Petitioner argued that the agency conflated eligibility for access with actual access.

Petitioner's argument was not that the position lacked any security-related eligibility requirement. Petitioner argued that the agency's stated basis for the adverse action went further and incorrectly asserted that actual access to classified information was required, possessed, or used in the position.

Petitioner argued that the position description required eligibility, not actual access; that his duties were performed on unclassified systems; that he did not access classified information in the position; and that agency witnesses gave inconsistent testimony regarding access.

The Federal Circuit did not address that argument as presented. Instead, the panel characterized Petitioner's argument as a challenge to whether his position required a security clearance and affirmed on that basis.

3. Petitioner raised statutory arguments under 5 U.S.C. § 7513(a).

Section 7513(a) allows an adverse action only for such cause as will promote the efficiency of the service.

Petitioner argued that the agency did not properly establish that the indefinite suspension promoted the efficiency of the service because the agency acted on an incomplete and inaccurate record. Petitioner argued that the final written PSAB decision was material because it reflected that reinstatement or re-eligibility remained available. Petitioner further argued that the agency failed to meaningfully consider his actual duties, the unclassified nature of his work, telework feasibility, reassignment, or other alternatives before keeping him in non-duty, non-pay status.

The Federal Circuit did not address Petitioner's § 7513(a) argument.

4. Petitioner raised statutory arguments under 5 U.S.C. § 7513(e).

Section 7513(e) requires the agency to maintain and furnish the employee and the Board the notice of proposed action, the employee's answer, a summary of any oral answer, the notice of decision, the reasons for the decision, and any order effecting the action.

Petitioner argued that the agency violated § 7513(e) by failing to include required materials in the adverse-action file, including the final PSAB determination and the required oral-reply summary.

The PSAB decision was material because it bore directly on the security-appeal process, the timing of the adverse action, the agency's justification for the suspension, and the Board's ability to determine whether the agency complied with required procedures.

Petitioner argued that the deciding official did not review the PSAB report before imposing the suspension and that the agency file did not include the PSAB final determination.

The Federal Circuit did not address Petitioner's § 7513(e) argument.

5. The Federal Circuit affirmed in a nonprecedential opinion and denied rehearing.

The Federal Circuit affirmed the Board's decision in a short nonprecedential opinion. The opinion stated that review of clearance-related adverse actions is limited to determining whether the clearance was denied or revoked, whether the clearance was required for the position, and whether the procedures set forth in § 7513 were followed.

However, the court did not address the § 7513(a) and § 7513(e) issues Petitioner raised. The court instead treated the case as though Petitioner disputed only whether the position required a security clearance and whether he received basic notice and an opportunity to respond.

The opinion also misstated material facts. It stated that Petitioner was represented by an attorney at the MSPB hearing. Petitioner was pro se at the MSPB hearing and personally questioned witnesses. This error mattered because Petitioner raised prejudice from denial of union representation and other procedural restrictions affecting a pro se litigant.

Petitioner filed a combined petition for panel rehearing and rehearing en banc. Petitioner identified the mischaracterization of his argument, the attorney-status error, the PSAB-role issue, and the failure to address preserved statutory arguments under § 7513(a), § 7513(b), and § 7513(e). The Federal Circuit denied rehearing without explanation.

After the panel decision, Petitioner also submitted supplemental authority identifying the MSPB's precedential decisions in *Schnedar v. Department of the Air Force*, 2013 MSPB 16, and *Schnedar v. Department of the Air Force*, 2014 MSPB 5. Those decisions interpret DoD 5200.2-R and confirm that the final written PSAB decision is material to the procedural validity of a clearance-based adverse action.

REASONS FOR GRANTING THE PETITION

I. The decision below effectively eliminates meaningful § 7513 review in clearance-based adverse actions.

This Court's decision in *Department of the Navy v. Egan* limits review of the merits of security-clearance determinations. Petitioner does not ask this Court to revisit *Egan* or to review the merits of a clearance determination.

The problem here is different. The Federal Circuit's decision allowed the agency's invocation of a clearance-related reason to substitute for meaningful review of the statutory adverse-action requirements that remain reviewable.

The Federal Circuit's own precedent recognizes that, in clearance-related adverse actions, the Board and the reviewing court may determine whether the agency complied with 5 U.S.C. § 7513. The panel acknowledged that general principle, but it did not apply that principle to the statutory issues Petitioner actually raised.

Section 7513(a) requires an adverse action to promote the efficiency of the service. Petitioner argued that the agency's access-versus-eligibility conflation, the PSAB report, the unclassified nature of the work, the feasibility of alternatives, and the incomplete record were material to that analysis. The Federal Circuit did not address that issue.

Section 7513(e) requires a complete adverse-action record. Petitioner argued that the agency omitted required materials, including the final PSAB determination and the oral-reply summary. The Federal Circuit did not address that issue.

The result is a decision that says § 7513 review remains available while refusing to review the § 7513 issues actually presented. That approach risks turning Egan into a shield against statutory adverse-action review even when the employee does not challenge the clearance merits.

II. The Federal Circuit recast Petitioner's argument and answered a different question.

Petitioner did not argue that his position had no security-related eligibility requirement.

Petitioner argued that the agency's own documents went further and asserted that his position required actual access to classified information. Petitioner argued that the record did not support that assertion.

That distinction matters. If the position required eligibility but not actual access, then the agency's repeated access language was not harmless. It affected the stated basis for the adverse action, the efficiency-of-the-service analysis, the consideration of alternatives, and the Board's review of the agency's justification.

The Federal Circuit recast Petitioner's argument as a challenge to whether the position required a security clearance. The court then held that the record supported the finding that the position required eligibility for access. That did not answer Petitioner's separate argument that the agency conflated eligibility with actual access and relied on unsupported access language in its proposed suspension and statement of facts.

III. The failure to address § 7513(e) is especially important because the omitted PSAB decision was material to the procedural validity of the adverse action.

Petitioner's § 7513(e) argument was not a technical recordkeeping objection. The final written PSAB decision was material to whether the agency acted on a complete record, whether the deciding official considered the relevant facts, whether the Board could conduct meaningful review, and whether the adverse action could be sustained under Department of Defense procedure.

The MSPB's precedential decisions in *Schnedar v. Department of the Air Force*, 2013 MSPB 16, and *Schnedar v. Department of the Air Force*, 2014 MSPB 5, confirm the importance of the final written PSAB decision in clearance-based adverse actions under DoD 5200.2-R.

Petitioner submitted *Schnedar* as supplemental authority after the Federal Circuit's decision. That authority confirms that the PSAB written decision was not collateral. It was material to the

agency's procedural burden and to the Board's ability to review the complete adverse-action record.

Here, the agency issued multiple proposed suspensions and a suspension decision before the PSAB issued its final written decision. The agency file did not include the PSAB report, and the deciding official did not review it before imposing the suspension. Petitioner preserved the § 7513(e) issue, but the Federal Circuit did not address it.

If agencies may omit material security-appeal documents from the adverse-action record and still obtain affirmance without meaningful review, § 7513(e) loses force in the very cases where record completeness is most important.

IV. The decision below rests on material factual errors that confirm the need for review.

The Federal Circuit's opinion stated that Petitioner was represented by an attorney at the MSPB hearing. The record showed that Petitioner proceeded pro se and personally questioned witnesses. That error matters because Petitioner argued procedural prejudice from denial of union representation and other limitations affecting his ability to present his case.

The panel also stated that PSAB upheld the suspension decision. PSAB did not decide whether an indefinite suspension promoted the efficiency of the service under § 7513(a). PSAB reviewed the security determination. The agency and the Board still had separate obligations to determine whether the adverse action was procedurally valid, supported by a complete record, and justified under the civil-service adverse-action statute.

These errors are not isolated. They reflect the larger problem: the court affirmed on a simplified view of the record that did not address Petitioner's actual statutory arguments.

V. This case presents an important recurring federal question.

Federal employees whose jobs involve security-clearance eligibility remain entitled to the statutory adverse-action protections Congress enacted.

The question is not whether courts may review the merits of a clearance determination. The question is whether courts may refuse to address statutory adverse-action arguments simply because the adverse action is clearance-related.

The issue affects federal employees across agencies whose employment may be suspended or terminated after security-related determinations. If the decision below stands, agencies may argue that Egan bars meaningful review of § 7513(a), § 7513(e), and agency procedural compliance whenever a clearance determination is in the background.

That result is inconsistent with the statutory scheme and with the limited-review framework the Federal Circuit itself purported to apply.

The Court should grant the petition, vacate the judgment, and remand so that the Federal Circuit may address Petitioner's preserved statutory arguments under 5 U.S.C. § 7513(a), § 7513(b), and § 7513(e), including the agency's failure to include and consider the final PSAB written decision and related procedural materials.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. In the alternative, the Court should grant the petition, vacate the judgment below, and remand for further consideration of Petitioner's preserved statutory and procedural arguments under 5 U.S.C. § 7513 and DoD 5200.2-R.

Respectfully submitted,

/s/Michael G. Thorogood

Michael G. Thorogood

Petitioner, pro se

Date: July 31, 2026