


TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

In the Matter of:)
)
DEPARTMENT OF THE NAVY,)
)
)
Petitioner,)
)
v.)
)
THOMAS E. EGAN.)

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SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

No. 86-1552

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IN THE SUPREME COURT OF THE UNITED STATES

DEPARTMENT OF THE NAVY,

Petitioner,

V.

THOMAS E. EGAN

No. 86-1552

Washington, D.C.

Wednesday, December 2, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 p.m.

APPEARANCES:

LOUIS R. COHEN, ESQ., Department of Solicitor General, U.S. Department of Justice, Washington, D.C.; on behalf of the Petitioner.

WILLIAM J. NOLD, ESQ., Louisville, Kentucky; on behalf of the Respondent.

C O N T E N T S

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ORAL ARGUMENT OF

PAGE

LOUIS R. COHEN, ESQ.

on behalf of Petitioner

3

WILLIAM J. NOLD, ESQ.

on behalf of Respondent

19

P R O C E E D I N G S

(12:59 p.m.)

1
2
3 CHIEF JUSTICE REHNQUIST: We'll hear argument now on
4 Number 86-1552, Department of the Navy versus Egan. Mr. Cohen,
5 you may proceed whenever you're ready.

ORAL ARGUMENT OF LOUIS R. COHEN

ON BEHALF OF PETITIONER

6
7
8 MR. COHEN: Thank you, Mr. Chief Justice, and may it
9 please the Court.

10 After stating the background of this case, I will
11 argue that the Navy's decision not to grant someone with
12 respondent's history a security clearance to work on repairing
13 nuclear submarines is not and should not be subject to
14 substantive review by the Merit Systems Protection Board.

15 The Board has in certain cases including this one
16 power to review the procedures followed by the employing agency
17 in denying a clearance but there has been no challenge to the
18 procedures followed by the Navy in this case. The Board does
19 not have authority to review the merits of a procedurally
20 proper agency decision to deny a clearance.

21 Respondent had a job at the Trident Refit Facility in
22 Bremerton, Washington, that entailed access to the interiors of
23 nuclear submarines and knowledge of their arrivals and
24 departures. The job was conditioned on his obtaining a
25 security clearance. The security investigation disclosed a

1 history of incidents involving firearms, alcohol and violent
2 behavior. After giving respondent notice and an opportunity to
3 respond, the Naval Systems Personnel Command in Washington,
4 D.C. denied the clearance, and the Trident facility in the
5 State of Washington removed respondent from the job for cause
6 for failure to meet one of the job's requirements.

7 Respondent petitioned the Merit Systems Protection
8 Board for a review. The Board presiding official issued an
9 initial decision reversing the removal on the ground that the
10 Navy failed to show, I'm quoting, "it reached a reasonable and
11 warranted decision concerning the propriety of the revocation
12 of appellant's security clearance."

13 The Board reversed its presiding official and
14 sustained the removal. It ruled that in an appeal from a
15 removal for lack of a required security clearance, the agency
16 must satisfy the Board that the position in question required a
17 clearance, that the clearance was denied or revoked, and that
18 the agency afforded the employee procedural due process in
19 connection with the clearance determination, which it
20 specifically found the agency had done here.

21 But the Board said -- and I'm quoting again -- "it
22 has no authority to review the agency's stated reasons for the
23 clearance determination." We think the Board got it right.

24 Let me begin by disposing I hope of the argument that
25 due process requires a hearing on the merits before the MSPB on

1 the security clearance determination. I want to make two
2 points. The first is that there simply is no due process
3 question in this case. Respondent was given notice of the
4 Navy's intent to deny his clearance, and a full statement of
5 reasons and an opportunity to respond. His response, with the
6 assistance of his union, did not challenge any fact in the
7 Navy's statement, he did not ask to confront or cross examine
8 anyone or to be heard further by the Navy.

9 When he sought review by the MSPB, he did not
10 challenge the adequacy of the Navy's processes, and although
11 the presiding official was willing to hear him on the merits of
12 the clearance determination, he twice failed to respond to the
13 Board's notice that a hearing would be convened at his request.

14 The only thing he has placed in issue in this case is
15 the Navy's judgment, based on the results of the investigation,
16 that a clearance should be denied.

17 Second and more generally, it is the employing agency
18 that must give an employee whatever process is due in
19 connection with the denial of a clearance. Where the employee
20 does contend that the employing agency has not given him an
21 adequate opportunity to be heard, the MSPB's job, in itself
22 said, is to rule on the adequacy of the agency's process. The
23 MSPB's decision is of course subject to review by the Federal
24 Circuit.

25 But the Constitution does not require or authorize

1 the MSPB to take upon itself the process of hearing and
2 deciding the merits of the clearance question. Nor, we think,
3 does the statute. And I want to turn to the question whether 5
4 U.S.C. 7513 gives the MSPB power to review denial of Mr. Egan's
5 clearance on its merits.

6 The first thing I want to say is that the Board's
7 answer that it can review procedures but not substance, seems
8 to us the most plausible reading of the statutory text.
9 Everyone agrees that Mr. Egan had a right to be removed only
10 for cause under section 7513, and the right to appeal his
11 removal to the MSPB.

12 Everyone also agrees that the MSPB has no general
13 jurisdiction to review the denial of a security clearance as
14 such. For example, an employee who loses a promotion or an
15 employee who is simply transferred to a different job, or who
16 doesn't get access to a particular part of the facility because
17 he isn't given a security clearance has no MSPB review because
18 there's nothing for the Board's jurisdiction to attach to.

19 The Board said in essence that if an agency fails to
20 follow the proper procedures so that there has been no valid
21 security clearance determination, then there is no cause for
22 the removal. But if the agency has followed proper procedures,
23 and has reached a determination denying a clearance, then
24 nothing in the statute gives the Board the right to reverse the
25 clearance determination, or disregard it, just because the

1 agency has not persuaded the Board.

2 In addition to thinking that this is the most
3 plausible reading of the statute, we have two --

4 QUESTION: Do you suggest that that reading of the
5 statute should go right across the board to any kind of a
6 removal or just to any adverse action?

7 MR. COHEN: I think it should go to any adverse
8 action.

9 QUESTION: Well, does this construction apply to
10 anything but security clearances?

11 MR. COHEN: I think that the question of the Board's
12 power to review the merits of collateral determinations that
13 lead to adverse actions is a question that the Board is in the
14 process of working out. But in general, if someone is denied a
15 job because, for example, he is found to be medically unfit,
16 found to have a medical condition, I take it that the Board
17 would review whether the existence of that medical condition is
18 cause for removal from that job, but wouldn't review the
19 medical determination itself on the merits.

20 I do think that the question of the extent to which
21 the Board should probe underlying collateral decisions is one
22 that may vary from case to case, depending on what the
23 underlying decision is.

24 QUESTION: Didn't the Board mention its deference to
25 disbarment proceedings and criminal convictions in its opinion?

1 MR. COHEN: Yes, it did. Those are, as our
2 opponents have pointed out, decisions that will have been
3 rendered by someone other than the employing agency. That's
4 only partially true here. Here, two different parts of the
5 Navy made these two different determinations.

6 But, yes, the Board did mention that.

7 QUESTION: How about removal for some kind of
8 wrongdoing or failure to adequately perform in the employing
9 agency?

10 MR. COHEN: Well, in the event of wrongdoing, the
11 agency is required to persuade the Board by a preponderance of
12 the evidence that the wrongdoing occurred because that is the
13 cause for the removal.

14 Here, the cause for the removal is the lack of a
15 security clearance which is a separate determination, and the
16 question is whether that separate determination by a different
17 part of the agency is subject to review by the preponderance
18 standard.

19 QUESTION: What if an agency establishes as a
20 qualification for a particular job, high skill level. And then
21 it makes a separate determination that this individual who has
22 been in the job does not have a high skill level, and another
23 part of the agency makes that determination. Do you have any
24 doubt that the MSPB would determine whether that judgment was
25 true or not?

1 MR. COHEN: No. I think that it probably would.

2 QUESTION: So what is the law? You can't just be
3 relying upon the language of the statute and say you cannot go
4 behind the fact that there was a cause for removal, and that
5 the cause had been determined to exist by the agency, and not
6 look into whether it was properly determined.

7 MR. COHEN: I'm not just relying on the language of
8 the statute. I think that the language of the statute creates
9 problem that exists in a number of cases of how far you look
10 behind the final action of the agency that is subject to MSPB
11 review and look into the merits of collateral decisions.

12 I think the agency drew the right line in this case
13 because of the nature of the decision and because of the
14 history of these kinds of decisions.

15 QUESTION: Well, that's not compelled by statute.
16 You're really just arguing that this language of the statute
17 allows you to draw this line. It certainly doesn't compel it.

18 MR. COHEN: Well, my words were, it is the most
19 plausible application of the statute to this case.

20 QUESTION: Because of the distinctive characteristics
21 of what the determination was in this case.

22 MR. COHEN: All right, yes. It's certainly not
23 compelled by the words of the statute.

24 There are two other closely related reasons for
25 thinking that Congress did not intend to confer the power to

1 review these decisions on the MSPB. One of them is historical.
2 The Civil Service Commission did not review security clearance
3 determinations by employing agencies. The MSPB generally
4 inherited the CSC's review powers, and there's simply no
5 evidence that Congress intended to give the MSPB larger powers
6 in this respect.

7 The other, which I think explains why the Civil
8 Service Commission did not review clearance determinations is
9 that outside review of the merits of clearance determinations
10 by a defense agency is functionally inappropriate. The Navy
11 should, after affording an employee an adequate chance to be
12 heard, have the final say about whether it trusts him on board
13 one of its submarines.

14 And I want to make three points about the nature of
15 that decision.

16 QUESTION: Before you get into that, as to the first
17 point which you just went off of, you said prior to the new
18 legislation, the Civil Service Commission hadn't reviewed it.
19 But there are a lot of things that the Civil Service Commission
20 didn't review, aren't there, that used to be reviewed by Courts
21 that have been given to the MSPB. You certainly can't say that
22 everything that the MSPB now has was matter that the Civil
23 Service Commission used to have. Some of it would never go
24 through the Civil Service Commission, but would go directly to
25 the Courts. Isn't that right?

1 MR. COHEN: I think that's right. But I also think
2 that where that is the case, it is explicit or at least
3 affirmatively indicated in the legislative history and that
4 there is legislative history suggesting a presumption of
5 continuation of the Civil Service Commission's jurisdiction
6 without expansion except where there's other evidence.

7 QUESTION: There were court decisions that had made
8 this kind of an inquiry before the Civil Service Reform Act was
9 passed, weren't there? Hadn't the D.C. Circuit looked into
10 denial of security clearances?

11 MR. COHEN: Actually, the D.C. Circuit case, the
12 Hoska case came up after the Civil Service Reform Act was
13 passed, and in that case, after an MSPB presiding official
14 affirmed the agency's determination and there was no petition
15 to the full Board, the D.C. Circuit in the Hoska case reviewed
16 that determination and reversed it on the merits. We think
17 that decision is wrong. And the MSPB concluded in this case
18 that that decision is wrong.

19 We've said that right along.

20 QUESTION: You're aware of no pre-CSRA court
21 decisions that did effectively what the MSPB was doing here?

22 MR. COHEN: That's right, not in the context of a
23 government employee.

24 The overriding objective of a security clearance
25 determination is to protect information and not individuals.

1 The President's instructions to the Navy and to other defense
2 agencies that no one is to have a job entailing access to
3 classified information unless there has been a determination
4 that it is clearly consistent with the interests of the
5 national security are controlling.

6 The final substantive judgment should be made by the
7 agency whose mission is the defense of the nation, and not the
8 agency whose mission is protecting civil servants. Because in
9 the final analysis, we would rather exclude from our nuclear
10 submarines some individuals who will never compromise sensitive
11 information than admit one individual who does.

12 In particular, denial of a security clearance may
13 well be warranted when predicate facts are less than probable.
14 If an investigation leaves the Navy with an irreducible
15 suspicion that an employee has committed acts whose repetition
16 would endanger security, common sense as well as Presidential
17 command may require denying him a clearance. The MSPB
18 presiding officer's statement in this case that if the
19 underlying facts are in doubt, the Navy will be required to
20 prove them by a preponderance of the evidence is quite wrong
21 and very illuminating.

22 The statutory preponderance standard is the right
23 standard for testing a removal based on an employee's alleged
24 misconduct. But it is not the right standard for judging
25 whether there is enough confidence in an individual to allow

1 him on board a nuclear submarine. Congress did not give the
2 MSPB any other standard, because it did not think reviewing
3 security clearance determinations on their merits is what the
4 MSPB would be doing.

5 QUESTION: Mr. Cohen, can I just ask one kind of
6 general question.

7 Does your argument apply equally to a removal from a
8 position to a person who previously obtained a security
9 clearance but had his security clearance revoked? Is there any
10 difference, do you think?

11 MR. COHEN: I don't think so.

12 QUESTION: Okay.

13 MR. COHEN: The security clearance process is not an
14 attempt to judge an individual's past conduct, but to predict
15 his future behavior. The question in this case is not whether
16 Mr. Egan has done something to deserve being barred from
17 working at Bremerton, but whether there is an unacceptable risk
18 that he would compromise sensitive information either
19 deliberately or inadvertently or under compulsion for some
20 reason.

21 That is a judgment that can only be made by people
22 who are expert in the aspects of human behavior that render
23 individuals vulnerable to espionage.

24 Finally, the security clearance determination can
25 only be made by people who themselves have thorough going

1 access at least in some cases can only be made by people who
2 themselves have thorough going access to classified
3 information. To decide whether a particular individual should
4 be cleared for access to work at a particular place, he may
5 have to know something about the information to which that job
6 would give him access. The degree of sensitivity of particular
7 information, the nature of its usefulness to hostile entities,
8 the identities of the hostile entities to which it may be
9 useful may have a bearing on a particular clearance
10 determination.

11 QUESTION: Of course, construing 1712 and 1713 as the
12 Court of Appeals said wouldn't really keep the agency from
13 insulating security cancellations from judicial review. They
14 could proceed another way, couldn't they?

15 MR. COHEN: They could proceed under 5 U.S.C. 7532.

16 QUESTION: Right.

17 MR. COHEN: And the Court of Appeals based its
18 decision here in part on the existence of that section.

19 QUESTION: But my question is, you'll admit the
20 agency's interests could be protected if they proceeded under
21 that section?

22 MR. COHEN: If they did proceed under that section.
23 That section, which I do want to talk about, gives the
24 Secretary of the Navy and other agency heads the power to
25 summarily suspend without pay any employee when necessary in

1 the interests of national security. And then after giving the
2 employee the reasons, "as specifically as security
3 considerations permit," giving him some kind of an intra agency
4 hearing after which he may be removed and the removal is
5 expressly excluded from any MSPB review even of process.

6 I think we want to say two things about that. We
7 think it has little or no bearing on the present issue first
8 because it's clear that an employee who does not obtain a
9 security clearance that is a valid requirement of his job can
10 be removed for cause, like an employee who fails to meet any
11 other requirement without invoking 7532. Essentially, everyone
12 involved in this case agrees on that, although our papers note
13 that the District of Columbia Circuit later disagreed in a
14 different case.

15 But the existence of 7532 has nothing to do, we
16 think, with whether Congress has authorized MSBP review of the
17 merits of security clearance determinations in cases where that
18 emergency section is not invoked. 7532 does expressly provide
19 for some kind of a hearing by the employing agency, and in non-
20 7532 cases where the adequacy of the agency process is put at
21 issue, I suppose 7532 might have some bearing by way of analogy
22 on that question of employing agency process.

23 But it does not, it seems to me, suggest that the
24 MSPB should in such a case take it on itself to review the
25 merits of the agency's clearance organization.

1 QUESTION: Why did the agency proceed under 1712 and
2 13 rather than 1732 in this case, or why would it in other
3 cases like this?

4 MR. COHEN: Well, they could have been invoked. This
5 was a new hire, an employee who was put through the agency's
6 routine security clearance process for somebody who is going to
7 have a laborer's job on board a submarine. And when the result
8 of that clearance process was negative, there was a removal,
9 and the agency notified Mr. Egan that he was entitled to MSPB
10 review. Which we think is an important right on his part.

11 It would have been possible, I think, but not the use
12 for which 7532 was intended, for Mr. Egan to have been
13 suspended without pay at the first sign that there might be a
14 security question here, and then --

15 QUESTION: Or later, when there was.

16 MR. COHEN: Yes. And that the head of the agency,
17 the Secretary of the Navy, would then have had to rule
18 personally on this case. And if he had done so, there would
19 have been no MSPB review whatever.

20 This is not a case in which the Navy had anything in
21 particular that it wished to conceal, or it could have invoked
22 7532 and escaped MSPB review entirely. But it had no reason to
23 invoke that procedure here.

24 QUESTION: What does the employee lose if the
25 government chooses to move under 7532 rather than 7513 or

1 whatever?

2 MR. COHEN: He loses his job effectively. He loses
3 his pay immediately. And he loses the right to MSPB review of
4 his ultimate removal, and he may lose the right to the full
5 statement of the reasons for the denial of his security
6 clearance that Mr. Egan got here, and the full statement of the
7 reasons for his removal that Mr. Egan got here, and the
8 opportunity to make a written response in two stages.

9 He loses that whole process. He is given after
10 suspension and before removal in what is really quite a
11 different process under 7532, a statement of reasons which as I
12 said the statute says is to be as detailed as security
13 considerations permit. And then a hearing before an agency
14 board and then a final determination by the head of the agency.

15 QUESTION: But apart from that, apart from its affect
16 on the employee, it would preserve the government's concerns,
17 entirely? The government could protect itself as well under
18 7532 as it could under 7513.

19 MR. COHEN: It would. 7532 would certainly protect
20 the government's concerns for secrecy in a case where it
21 doesn't want to tell the employee or the MSPB all of the
22 reasons for its concerns. It would not protect the
23 government's concern to give the employee the kind of
24 opportunity to respond and the kind of opportunity for an MSPB
25 check on its procedures that respondent had here.

1 It also would involve the Secretary of the Navy in
2 making personnel decisions about whether a laborer who is going
3 to work in a facility where the only reason for not letting him
4 work was because of the information with which he would come
5 into contact --

6 QUESTION: Isn't there another difference, too.
7 Isn't under 7513 at the end of the line, there's judicial
8 review, is there not, whereas under 7532, there's not? Or am I
9 wrong on that?

10 MR. COHEN: I think the Court assumed in Coal v.
11 Young that there is no judicial review and I think that would
12 be our position. I suspect we would get some debate.

13 QUESTION: On 7532.

14 MR. COHEN: On 7532. But that is our position.

15 QUESTION: So your position is there's no judicial
16 review of the merits of the security removal under 1713?

17 MR. COHEN: That's right.

18 But the Navy's judgment that particular evidence
19 warrants denial of a clearance is and ought to be final.

20 Thank you, Mr. Chief Justice. I'd like to reserve
21 the balance of my time.

22 CHIEF JUSTICE REHNQUIST: Very well, Mr. Cohen.
23 We'll hear now from you, Mr. Nold.

24

25

1 ORAL ARGUMENT OF WILLIAM J. NOLD

2 ON BEHALF OF RESPONDENT

3 MR. NOLD: Mr. Chief Justice, may it please the
4 Court.

5 In listening to the arguments presented by the Navy
6 in this case, I've tried to come up with a way that I could
7 possibly describe them. And I think that we start out with the
8 same premise. We start out with the premise that this is a
9 case that involves statutory interpretation. It's at that
10 point that the government seems to walk away from that
11 question.

12 What they seem to do in my view is to start building
13 a cloud around the statute. They start building this cloud and
14 they call it national security, and as their argument
15 progresses down through their argument in their brief, the
16 cloud gets darker and darker and darker, so that by the time we
17 get to the end, we can't see the statute anymore. What we see
18 is this cloud called national security.

19 I am not here to argue that national security is not
20 important. I am not here to take a position in this case that
21 would limit agencies' ability to maintain and protect national
22 security. That's obviously something that they've been told to
23 do by the President, and we want them to do it.

24 But what I want to do is to look at this statute
25 aside and apart from this cloud for just a moment, and see what

1 it says. Not only what the particular statute says that talks
2 about removal for cause -- 7513 -- but also the statute that
3 says you can remove somebody on the basis of national security.
4 I may even take a look at the statute that says that you can
5 remove someone because of poor performance.

6 Because the Civil Service Reform Act created a lot of
7 new things that the Civil Service Commission under the old
8 system didn't have. It created an independent board, the Merit
9 Systems Protection Board, that was to hear these cases separate
10 and apart from agencies.

11 Now, when they did that, I believe that Congress was
12 the proper body to take a look at this cloud that's there or
13 take a look at this problem of national security, take a look
14 at this situation where the President has told agencies to make
15 sure you don't compromise security, and come up with a
16 statutory scheme that would not only protect the interest of
17 the employee, but also protect the interest of agencies in a
18 situation such as we have here. And I believe that they did
19 that. And I would like to talk about these particular statutes
20 for just a moment.

21 7513 is the statute that contains the language that
22 we've heard for years: you can't remove an employee unless it's
23 for cause that would promote the efficiency of the service.

24 There is another statute, Chapter 43 of the Act --
25 4303, I believe, that says now under the new law that you can

1 remove an employee for performance reasons. You don't have to
2 show cause. You just have to show that he hasn't performed up
3 to the level that he's expected to perform.

4 Now, taking those two statutes for a minute, the
5 courts have held that an agency can terminate an employee on
6 performance-based reasons under Chapter 7513, that is, for
7 cause, because there might be situations where performance and
8 cause kind of go together. But the cases have said that if you
9 do that, you are bound by the procedures, you are bound by the
10 burdens of proof, you are bound by all of the other rights that
11 the employee has under 7513.

12 You're not bound under the precise procedural
13 problems that are presented under performance based types of
14 claims.

15 Now, let me throw into the statutory scheme, 7532.
16 It wasn't created by the Civil Service Reform Act. It's been
17 around for years. And what that says is, and what that
18 recognizes is that under some circumstances, there may be
19 situations when agencies ought to be able to terminate somebody
20 and not have somebody else essentially looking over their
21 shoulder and second guessing that move.

22 QUESTION: It isn't just that. If the only
23 difference between 7532 and 7513 were the absence of MSBP
24 review, then you'd have a very strong case. But 7532 does much
25 more than that. It allows that person to be taken out of the

1 job and off of the payroll immediately without any prior
2 procedures, and that can be the explanation of it, rather than
3 what you suggest.

4 MR. NOLD: Justice Scalia, another explanation of it
5 could mean that the Congress in the legislative history under
6 7532 recognized that there might be situations where an
7 employee would have to be removed and taken out of the
8 government, not because of any fault of his own whatsoever.
9 Maybe a Russian agent moved in next door to him. Certainly,
10 that's not his fault. But it may be in the interests of
11 national security that he not live next door to a Russian
12 agent. So they have the ability to remove him, even though
13 there's no cause whatsoever from the standpoint of misconduct
14 on his part.

15 QUESTION: Denial of a security clearance is no more
16 misconduct than what you just described. What you just
17 described would be adequate grounds for denial of a security
18 clearance too, wouldn't it?

19 MR. NOLD: That's right. And in some cases, security
20 clearances like you say are revoked or denied because of
21 misconduct types of reasons, and sometimes not.

22 You asked earlier a question about what the employee
23 loses when 7532 is invoked. There is something of a very real
24 importance that the employee gains. Because what he gains is
25 the right to a hearing. Under the procedures that the MSBP

1 felt that were appropriate to review these kinds of cases, the
2 situation could be that the person never gets the opportunity
3 to sit down and cross examine and confront the people that say
4 that he's done x, y and z. He's totally denied that right.

5 At least under 7532, he would have the opportunity to
6 have some form of hearing, even though that hearing would be in
7 front of the agency.

8 QUESTION: Well, he is given it by the agency as the
9 agency's regulations now exist. It's not in the CSRA, but the
10 agency does give him a hearing. So in point of fact, there's
11 no difference right now between what happens under 7513 and
12 7532.

13 MR. NOLD: Well, the wording's the same.

14 QUESTION: You're saying the agency isn't compelled
15 to give him a hearing, it's a matter of agency grace?

16 MR. NOLD: No. What I'm saying is that under 7532,
17 the statute says that he has the right to a hearing. Under
18 7513, the statute also says that he has a right to be heard
19 before the Merit Systems Protection Board. And this Board is
20 directed by the statutes to hear and adjudicate the matters
21 that come before it.

22 Now, under the scheme that has been adopted by the
23 Merit Systems Protection Board and found offensive by the
24 Federal Circuit, there would be no hearing at all, in my view,
25 in front of the Merit Systems Protection Board. And the reason

1 is because there wouldn't be anything to hear.

2 QUESTION: Yes, but there is a hearing before the
3 Department of the Navy.

4 MR. NOLD: Not under 7513.

5 QUESTION: It doesn't require it, but didn't they
6 offer your client a hearing?

7 MR. NOLD: They did.

8 QUESTION: Well, and it was before the Agency which
9 is exactly what 7532 would have given you a right to have.

10 MR. NOLD: No, they didn't offer him a hearing in the
11 revocation or the denial process of the security clearance.

12 QUESTION: Didn't they give him a statement of
13 reasons?

14 MR. NOLD: Statement of reasons.

15 QUESTION: An opportunity to question any of the
16 facts that they set forth?

17 MR. NOLD: You get a written statement of reasons.
18 You get an opportunity to provide a written response, and you
19 get a decision. And you get the right to appeal one higher
20 level within the agency. That's it. You don't get the right
21 to be heard.

22 QUESTION: Even if you question the facts?

23 MR. NOLD: Even -- there is no provision that I'm
24 aware of that he could command a hearing. Whether the Agency
25 would give him one, I guess there would be some discretion on

1 their part.

2 QUESTION: And here he didn't ask for one. Is that
3 right?

4 MR. NOLD: He did not ask for one.

5 QUESTION: Under 7532 after suspension, he can get a
6 hearing?

7 MR. NOLD: After suspension and prior to removal.

8 QUESTION: Right, he can get a hearing.

9 MR. NOLD: A pre-termination hearing.

10 The Merit Systems Protection Board again, as I've
11 mentioned, has the mandate to hear and adjudicate the matters
12 that come before it. And there's no question that this matter
13 was properly before it.

14 Now, in addition to having the Merit Systems
15 Protection Board hear the matter, he's entitled to judicial
16 review to the Federal Circuit upon a decision by the Merit
17 Systems Protection Board. And the scope of review was defined
18 specifically in the Civil Service Reform Act. And it's very
19 similar, I believe, to the kind of review that you would get
20 under the Administrative Procedures Act.

21 It's an arbitrary and capricious standard and the
22 courts look to see whether or not the law was followed and
23 whether or not there was substantial evidence to support the
24 decision.

25 Now, I'm trying to imagine what the court would be

1 looking at in a case where the only questions were: does he or
2 does he not have a clearance, was the clearance required as a
3 part of his job, and were minimal due process standards
4 granted. That could all be put on one page.

5 QUESTION: How about a case where the only
6 requirement is that he be admitted to the bar, and they show
7 that he's been disbarred. Do you think the Board has a right
8 to inquire into the propriety of his disbarment?

9 MR. NOLD: Absolutely not. And the reason that they
10 don't is that the Supreme Courts of our States have very
11 elaborate rules that have considerable due process rights built
12 into them, and there would be no way that the Merit Systems
13 Protection Board would have any control whatsoever over that.

14 QUESTION: Well, when why should you treat the Navy
15 Department's security clearance system as so totally different
16 from the State requirements for admission and remaining in the
17 Bar? I mean, it's a separate organization, and you don't have
18 any claim here that your client was denied due process in the
19 security denial, do you?

20 MR. NOLD: Well, I think --

21 QUESTION: He didn't ask for a hearing.

22 MR. NOLD: Let me answer the first question, first.
23 I think the distinction that has to be drawn between a
24 disbarment proceeding or in the military context, the questions
25 come up when a person doesn't get a promotion in the military.

1 The distinction there is it's a collateral source. The person
2 that is taking away the right to practice law is totally
3 different from the Navy in this case who's firing somebody.

4 QUESTION: But supposing that a particular job in the
5 Navy calls for someone of field grade say of Lieutenant
6 Commander, and this fellow was a Lieutenant Commander but he's
7 reduced in rank to a lieutenant, and therefore the civilian
8 side of the Navy says, well, you no longer have the
9 qualification to fill this job.

10 Now, do you think the Merit System Protection Board
11 can review whether or not he was properly demoted?

12 MR. NOLD: No, I absolutely do not.

13 QUESTION: Well, there are some kinds of decisions,
14 then -- collateral, as you call them -- that the Merit System
15 Protection Board shouldn't review?

16 MR. NOLD: That's true.

17 QUESTION: And why should the denial of a security
18 clearance be one of them?

19 MR. NOLD: Because it's one and the same person
20 that's doing the removal. It's the civilian side of the Navy
21 that's taking away the security clearance. It's the civilian
22 side of the Navy that's terminating him.

23 QUESTION: Why is that different from the fellow
24 who's demoted from Lieutenant Commander to Lieutenant? It's
25 the Navy doing it.

1 MR. NOLD: Well, because the Navy does have military
2 on one side and civilian on the other. This security clearance
3 --

4 QUESTION: The Secretary of the Navy is head of them
5 both.

6 MR. NOLD: -- the security clearance is revoked by
7 the naval civilian personnel command. There are certainly
8 important things to be said for the military not having
9 restraint on it.

10 QUESTION: All they have to do is put this security
11 clearance call in another division of the Navy and everything
12 would be fine. You'd have no complaints, right?

13 MR. NOLD: Well, it is in another division at this
14 time. But the agency --

15 QUESTION: Well, why isn't that enough. It has to be
16 in the military half of the Navy? Is there a military half and
17 a civilian half?

18 MR. NOLD: Well, the interest that's being protected
19 when you're talking about a military decision is the same
20 interest that you want to protect to make sure that everybody
21 in the platoon is marching in the same direction. And that's
22 not what we have in this national security question matter.

23 You've got to have absolute control in the military.

24 QUESTION: Let me ask you something about the
25 statutory structure here. The test for security clearance

1 under the executive order is whether the employment of the
2 individual in the job would be clearly consistent -- clearly
3 consistent with the interests of the national security. Now,
4 that's a fairly strict test.

5 There are two basic sections of the CSRA 43, which
6 you mentioned earlier, which permits removal for poor job
7 performance. And the MSPB reviews those determinations on the
8 basis of substantial evidence?

9 MR. NOLD: Substantial evidence, right.

10 QUESTION: Right. And Congress did it that way
11 because Congress, as I recall the legislative history, knew
12 that it's hard to prove.

13 MR. NOLD: Well, the Congress wanted to give the
14 ability to fire people.

15 QUESTION: That's right, and it's hard to prove
16 inadequate performance, so they said substantial evidence will
17 do there.

18 Then it has Section 75 which has a different review
19 standard for the MSPB. There, it's preponderance of the
20 evidence, more likely than not.

21 Now, if Congress did want to have these things
22 reviewed, I find it incredible that it would want them reviewed
23 under 75, under a preponderance standard. It is more likely
24 than not that this was clearly consistent, clearly consistent
25 with the interests of the national security.

1 That's a very strange test. If I were going to have
2 that reviewed, I would have had it reviewed under Title 43,
3 Chapter 43 which would be there is substantial evidence that
4 this would not be clearly consistent with the interests of the
5 national security.

6 MR. NOLD: I think it should be removed even a step
7 further, and under Chapter 7532, because that's the same test.
8 That talks about things where continued employment is clearly
9 consistent with the interest of national security. It's the
10 same test as you have with the revocation of the clearance
11 itself. That is my point.

12 What the Navy has done in this case is that they've
13 really changed the standard under 7513. They've changed the
14 standard from one of being clearly consistent with the interest
15 of national security to replace the standard that says you
16 can't fire somebody unless it's for such cause as would promote
17 the efficiency of the Service.

18 So by a two-step process, they have changed the
19 standard under 7513. Because that is precisely the same
20 standard as you have in the revocation of the security
21 clearance.

22 QUESTION: Yes, but that assumes the security
23 decision is subject to review.

24 MR. NOLD: Well, Justice Scalia, when he was a Judge,
25 I believe, wrote an opinion about that in the D.C. Circuit.

1 QUESTION: He's still a Judge.

2 QUESTION: We think he still is a Judge.

3 QUESTION: Thanks, fellas.

4 MR. NOLD: They tell us we're supposed to call you
5 justices.

6 And you examined that whether or not a due process
7 interest attached to a security clearance, and I believe -- or
8 a liberty interest attached to a security clearance -- and the
9 holding was that it did not attach when you didn't get the
10 clearance because of some unspecified reason.

11 But in this case, Mr. Egan is having his clearance
12 taken away for very specified reasons that have been set out
13 and that appear to me to constitute misconduct, which then is
14 bootstrapped, if you will, over into a removal action which
15 this Court has consistently held an employee of his status has
16 a property right in his job, under Arnett v. Kennedy and those
17 other cases that talk about that.

18 So I believe that what the decision does in the MSPB
19 is to convert that standard from 7532 and cause it to be
20 enforced under 7513. Clearly, Congress did not intend to do
21 that. I think what they intended when they talked about as
22 such cause as would promote the efficiency of the service, was
23 to give the employee who was told that he was going to be fired
24 and specific reasons for his termination, to give the employee
25 the opportunity to cross examine the person or the witnesses

1 that would testify against him, and possibly correct a
2 situation that might be wrong.

3 He can't do that under the system that is advanced by
4 the Navy in this case. And I believe that that was what was
5 found objectionable by the Federal Circuit.

6 QUESTION: Mr. Nold, I'm trying to think if what
7 Congress would have done to be sure that the MSPB would handle
8 this thing the way that you're saying they expected it to. And
9 the analogy that comes to my mind is that when this Court was
10 in the same position that the MSPB is in, that is to say,
11 before the 1976 Amendments to the Freedom of Information Act
12 were adopted, we were asked to review, among other things, one
13 of the exemptions to the Act is whether the information was
14 classified in the interests of national security.

15 And we decided that that was not an invitation for us
16 to go into whether the classification was correct or not. We
17 just looked into whether it was classified or not. Now,
18 Congress didn't like that and they therefore provided that we
19 would look into whether it was properly classified. But
20 without saying that, we just didn't go behind the determination
21 that it was classified.

22 It seems to me that this is exactly the same kind of
23 thing that the MSPB is confronted with.

24 MR. NOLD: Well, certainly under the FOIA, the courts
25 even now give a great deal of due deference to --

1 QUESTION: That's because the statute was changed.
2 But what I'm saying is that under the old statute, which reads
3 for purposes of classification the way this legislation reads
4 for purposes of security clearance, we thought it appropriate
5 as a Court to say, well, it means we look to see whether it's
6 classified, not whether the classification is proper.

7 You want the MSPB to look into not merely whether the
8 fellow doesn't have a security clearance, but whether it was
9 proper to deny him a security clearance. It's certainly not
10 what we would have done.

11 MR. NOLD: I want the MSPB to look into the reasons
12 that were advanced for the revocation of that clearance. If
13 misconduct was involved. That's what I want. And I want him
14 to have the ability to create a record about that. And I want
15 him to have the ability to have judicial review of that record
16 so that some court can later look back and say whether or not
17 he was denied something arbitrarily or capriciously.

18 QUESTION: I suppose then you would rather have the
19 Navy proceed under 1713, if it's construed as you would have
20 it, than under 1732, because you would have no judicial review
21 under 1732 but you would have an agency hearing.

22 MR. NOLD: The Navy takes the position that no
23 judicial review would be available. I don't know that that's
24 ever been really tested or not one way or the other.
25 Certainly, the statute does not preclude judicial review.

1 QUESTION: In your mind, why do you think the Navy
2 proceeded under 1713 rather than 1732, to avoid an agency
3 hearing of the kind that he would get in 1732?

4 MR. NOLD: Well, I think the agency was thinking,
5 well, the guy doesn't have a clearance. That's one of the
6 qualifications for his position, and therefore that constitutes
7 cause for removal. I don't think they did it to avoid the
8 process.

9 QUESTION: You don't think they made a mistake about
10 what 1713 means?

11 MR. NOLD: Well, maybe they did. But they do have
12 the option, certainly, and they chose which way to go. Egan
13 had no ability to make that choice. They chose to go the route
14 7532, which entitles him to all those procedures and the
15 hearing that he gets.

16 I believe that with the questions we've covered, it
17 pretty much covers what I wanted to say.

18 Thank you.

19 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Nold.

20 Mr. Cohen, you have four minutes remaining.

21 MR. COHEN: Unless the Court has further questions, I
22 have nothing further.

23 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Cohen.

24 The case is submitted.

25 (Whereupon, at 1:48 p.m., the case in the above

1 entitled matter was submitted.)

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3 DOCKET NUMBER: 86-1552
4 CASE TITLE: Department of the Navy v. Thomas E. Egan
5 HEARING DATE: December 2, 1987
6 LOCATION: Washington, D.C.

7
8 I hereby certify that the proceedings and evidence
9 are contained fully and accurately on the tapes and notes
10 reported by me at the hearing in the above case before the
11 United States Supreme Court
12 and that this is a true and accurate transcript of the case.

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