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PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: FRANK C. CARLUCCI, SECRETARY OF DEFENSE, ET AL
Petitioners V. JOHN DOE

CASE NO: 87-751

PLACE: WASHINGTON, D.C.

DATE: October 11, 1988

PAGES: 1 thru 51

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----X

3 FRANK C. CARLUCCI, SECRETARY OF :

4 DEFENSE, ET AL., :

5 Petitioners :

6 v. : No. 87-751

7 JOHN DOE :

8 -----X

9 Washington, D.C.

10 Tuesday, October 11, 1988

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 1:59 o'clock p.m.

14 APPEARANCES:

15 MICHAEL K. KELLOGG, ESQ., Assistant to the Solicitor

16 General, Department of Justice, Washington, D.C.; on
17 behalf of the Petitioner.

18 JOHN G. GILL, JR., ESQ., Rockville, Maryland; on behalf
19 of the Respondent.

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P R O C E E D I N G S

(1:59 p.m.)

1
2
3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 87-751, Frank C. Carlucci v. John Doe.

5 Mr. Kellogg, you may proceed whenever you're
6 ready.

7 ORAL ARGUMENT OF MICHAEL K. KELLOGG

8 ON BEHALF OF THE PETITIONER

9 MR. KELLOGG: Thank you, Mr. Chief Justice,
10 and may it please the Court.

11 Every employee of the National Security Agency
12 has to have a high level security clearance. That is a
13 statutory requirement for employment at NSA.

14 The question at issue in this case is not what
15 happens to an employee who loses his clearance, for it
16 is clear that he has to be removed. Nor is the question
17 whether the clearance decision itself is subject to
18 judicial review. The application of this Court's
19 decisions in Egan and Webster v. Doe will remain open on
20 remand.

21 The question at issue today is simply what
22 procedures are to be followed by the agency in removing
23 an employee who loses his clearance.

24 After briefly stating the background of this
25 case, I will argue that there are three different ways

1 to remove the employee, and the agency is charged with
2 choosing the appropriate procedure in light of the
3 individual circumstances.

4 First, the employee can be removed for cause
5 for failure to maintain a required clearance after
6 following all the ordinary procedures afforded to
7 Federal employees dismissed for cause, including MSPB
8 review if the employee is a preference eligible veteran.

9 Second, the employee can be suspended and then
10 removed under the summary procedures of 5 U.S.C. 7532
11 following notice in a hearing if the Secretary of
12 Defense determines that the suspension and the removal
13 are in the interests of national security.

14 Finally, the employee can be removed without
15 any procedures whatsoever under 50 U.S.C. 833 if the
16 Secretary of Defense determines that that action is in
17 the interest of the United States and that none of the
18 other procedures can be invoked consistently with
19 national security.

20 Well, Respondent was employed at the National
21 Security Agency from 1968 until 1984. In 1982 he
22 disclosed to NSA security officials that while on
23 vacation in foreign countries, he had engaged in
24 homosexual relations with foreign nationals. He
25 subsequently received a notice of proposed removal on

1 the grounds that his continued access to classified
2 information was no longer clearly consistent with the
3 national security.

4 Pursuant to NSA regulations governing
5 for-cause removals, he was advised that he had a right
6 to respond, to obtain counsel. He was kept on paid
7 status pending the outcome of his case, but was denied
8 access to classified information.

9 Respondent requested and received a
10 psychiatric evaluation in an effort to demonstrate that
11 he did not pose a security risk. A board of appraisal
12 was convened to consider his case. Based on the
13 psychiatric report and Respondent's own statements, the
14 board concluded that Respondent had shown poor judgment,
15 that he was emotionally unstable and that he was living
16 beyond his means. Accordingly, the board concluded that
17 he was a poor security risk and recommended that his
18 clearance be revoked.

19 QUESTION: What authority was the Secretary --
20 or the agency acting under at this stage?

21 MR. KELLOGG: They were acting under dual
22 authority. The board of appraisal is provided for by
23 statute.

24 QUESTION: Yes, but when the -- when the
25 agency first took action against him and started this

1 procedure, what did it purport to act under?

2 MR. KELLOGG: It was acting under its
3 statutory authority to hire employees without regard to
4 the Civil Service laws. That authority puts NSA
5 employees in the excepted service for purposes of the
6 Civil Service Reform Act. Now --

7 QUESTION: And you say that that gave the
8 agency the power to fire too.

9 MR. KELLOGG: That's correct. And because
10 Respondent was not --

11 QUESTION: And the agency had issued
12 regulations?

13 MR. KELLOGG: Yes. The agency has issued
14 regulations instituting that authority and, in fact,
15 circumscribing its otherwise uncircumscribed authority --

16 QUESTION: And that is what they were acting
17 under? Their own regulations?

18 MR. KELLOGG: That's correct. NSA has
19 provided by regulation that NSA employees can only be
20 removed for cause, and it has provided procedural
21 protections to be used for for-cause removals including
22 notice and opportunity to respond and be represented by
23 counsel. It is those procedures that were invoked in
24 this case.

25 QUESTION: Mr. Kellogg, would you tell me what

1 is the NSA regulation that required that the removal be
2 for cause?

3 MR. KELLOGG: Chapter 370 --

4 QUESTION: It's 370.

5 MR. KELLOGG: -- of the NSA regulations says
6 that removals are to be for such cause as will promote
7 the efficiency of the service.

8 QUESTION: And is that -- is 370 in the
9 appendix of the cert petition?

10 MR. KELLOGG: Yes, it is.

11 QUESTION: Mr. Kellogg, doesn't Chapter 371 of
12 the regulations say that it applies to actions to limit
13 access to classified information and to suspend or
14 terminate personnel for reasons of national security?

15 MR. KELLOGG: That's correct, Justice O'Connor.

16 QUESTION: It looked to me reading through it,
17 frankly, like this was a 371 proceeding or should have
18 been. Maybe they proceeded under 370, but were they
19 violating their own regulations in doing that?

20 MR. KELLOGG: No, they were not, Justice
21 O'Connor. Chapter 371 implements procedures for
22 clearing access of employees to classified information.
23 And it's correct that the clearance portion of what
24 happened to Respondent took place pursuant to Chapter
25 371. But once the clearance is revoked, the question is

1 how is the employee to be removed.

2 QUESTION: Then it becomes cause.

3 MR. KELLOGG: And then it becomes cause
4 because possession of a clearance is a statutory
5 requirement of employment at NSA. Chapter 371 provides
6 an alternative mechanism for removing the employee. It
7 implements 5 U.S.C. 7532, which permits the employee to
8 be summarily suspended without pay and then subsequently
9 removed if the director or if the head of the agency
10 determines that it's in the interest of national
11 security.

12 QUESTION: I was a little troubled because
13 reading the regulations, it did seem to me that they
14 just didn't follow their own regulations.

15 MR. KELLOGG: Well, I think that's not
16 correct. They were, in fact, very careful to state
17 precisely which portion of the regulations they were
18 following. There are different paths here and which
19 path you take depends upon the language you use in
20 notifying the employee. If they had said we propose to
21 suspend and remove you in the interest of national
22 security pursuant to 5 U.S.C. 7532, then they would have
23 had to follow 371.

24 QUESTION: So, you say this is not a national
25 security case as defined in the preamble to the

1 regulations.

2 MR. KELLOGG: That's correct. It's certainly
3 true that national security is implicated. The reason
4 he lost his clearance is that it was no longer clearly
5 consistent with the national security for him to have a
6 clearance. But the reason he was removed was for cause
7 for failure to satisfy his statutory condition of his
8 employment.

9 Now, the Court of Appeals held that the
10 authority of the Director of NSA to remove employees for
11 cause is circumscribed by 5 U.S.C. 7532 which the court
12 says expressly controls terminations in the interest of
13 national security. And we think the Court of Appeals
14 reversed the proper relation between 7532 and ordinary
15 for-cause procedures.

16 Seventy-five thirty-two by its own terms is an
17 optional, not a mandatory, procedure. It states that
18 the Secretary may suspend and remove an employee
19 pursuant to its procedures, but it does purport to lay
20 down a mandatory procedure for every case.

21 It also says that 7532 can be used
22 notwithstanding other statutes, but nothing precludes
23 actions taken pursuant to other statutes. And this
24 reference to other statutes only makes sense -- is
25 referring to provisions like the CSRA that provide

1 protections in ordinary for-cause removals that are not
2 available under the summary procedures of 7532.

3 QUESTION: Mr. Kellogg, may I ask you another
4 question? Seventy-five thirty-two says you may suspend
5 without pay.

6 MR. KELLOGG: That's correct.

7 QUESTION: Does it -- is every 7532 suspension
8 one without pay?

9 MR. KELLOGG: Well, I don't think it would
10 have to be.

11 QUESTION: Because this one was not.

12 MR. KELLOGG: The statute seems to contemplate
13 that. For example, in part B, it says you remove -- you
14 can only suspended an employee. And that would seem to
15 indicate that the suspension is what starts the whole
16 process going.

17 But if the agency were to choose to suspend
18 him with pay or merely to suspend access to classified
19 information, I don't think anybody would object.

20 QUESTION: They might not object, but they
21 wouldn't be following the statute if they did that.

22 It seems to me that this is something -- and
23 doesn't the agency head himself have to do the -- invoke
24 this procedure?

25 MR. KELLOGG: That's correct. The head of the

1 agency has to make the decision himself.

2 QUESTION: Well, okay.

3 MR. KELLOGG: The point is that Section 7532
4 is not an employee protection statute. It sets minimum
5 standards to be used in suspending and removing
6 employees. Whether the agency could go beyond those in
7 using 7532 is an open question, but not particularly
8 germane to the question at issue.

9 QUESTION: Under 7532, isn't the ultimate
10 decision the Secretary rather than the agency?

11 MR. KELLOGG: Yes. The head of the agency has
12 to make the ultimate decision.

13 Now, subsequent to the Court of Appeals'
14 decision in this case --

15 QUESTION: But the Secretary doesn't get into
16 the act under the for-cause --

17 MR. KELLOGG: No, that's correct. The
18 Secretary does not.

19 Subsequent to the Court of Appeals' decision
20 in this case, the Director of NSA was designated by
21 executive order as the head of an agency for purposes of
22 7532. So, in any subsequent cases, the Director himself
23 would be making the decision, not the Secretary of
24 Defense.

25 QUESTION: In any subsequent cases brought

1 under 7532.

2 MR. KELLOGG: That's correct.

3 QUESTION: Of course, he did that because
4 under the Court of Appeals' holding, that's all he could
5 do --

6 MR. KELLOGG: That's correct.

7 QUESTION: -- because they eliminated the
8 avenue of discharge that you rely on.

9 MR. KELLOGG: That's correct.

10 QUESTION: Yes.

11 MR. KELLOGG: And so, it would have to go back
12 and he would have to do it again under 7532 or under
13 833. That's an option as well.

14 QUESTION: But 833 has got that condition on
15 its use that none of the other procedures would be
16 adequate.

17 MR. KELLOGG: That's correct. It states --
18 it's sort of the most extreme, the most restrictive
19 provision.

20 QUESTION: But what has happened here already
21 would seem to indicate you never could satisfy that
22 condition.

23 MR. KELLOGG: Not that you could never satisfy
24 it.

25 QUESTION: Yes.

1 MR. KELLOGG: There could certainly be cases
2 in which 833 would be appropriate. For example --

3 QUESTION: Well, I agree with that, but in
4 this case, I don't see how you could ever use 833.

5 MR. KELLOGG: Oh, I don't think 833 would be
6 appropriate in this case. I don't really think 7532
7 would be appropriate either unless --

8 QUESTION: Well, 833 is really an emergency
9 dismissal provision.

10 MR. KELLOGG: That's correct, as is --

11 QUESTION: And we don't -- that's why it's not
12 applicable here.

13 MR. KELLOGG: No, we do not have an emergency.

14 Section 7532 is an emergency provision as
15 well. The legislative history of 7532 focused on the
16 Lloyd-La Follette Act and the Veteran's Preference Act
17 and the procedures provided to Federal employees
18 dismissed for cause under that statute. It said this
19 procedure is necessary in certain extreme and emergency
20 circumstances to cut through --

21 QUESTION: You are speaking now of 7532.

22 MR. KELLOGG: That's correct.

23 QUESTION: And your position is that it also
24 is only an emergency provision that's not applicable
25 here.

1 MR. KELLOGG: Well, I'm not saying that it
2 couldn't have been used here. Certainly NSA's mission
3 is so sensitive that any employee for whom it is not
4 clearly consistent with the national security for him to
5 have a clearance, it is probably also in the interest of
6 national security to remove that employee.

7 But I think the three provisions --

8 QUESTION: What were you suggesting when you
9 answered Justice White earlier? That there might have
10 to be a remand for reconsideration under 7532?

11 MR. KELLOGG: If the Court of Appeals were
12 upheld. That's what they said. You have to go back and
13 do it again under 7532.

14 QUESTION: But really there's a different
15 standard under 7532 than there is under the National
16 Security Agency. In order to invoke that emergency --
17 not the super emergency, 833, but the regular emergency
18 -- it has to be necessary in the interest of national
19 security.

20 MR. KELLOGG: That's correct.

21 QUESTION: But you can deny a security
22 clearance without meeting that standard. All you have
23 to find is it's not clearly consistent with national
24 security that this man have access to NSA materials.

25 MR. KELLOGG: That's correct.

1 QUESTION: But they're different standards.

2 MR. KELLOGG: And once that you find that it's
3 not clearly consistent, the statute --

4 QUESTION: Then you have cause.

5 MR. KELLOGG: -- requires the employee be
6 removed. But that doesn't necessarily mean that you
7 have to invoke Section --

8 QUESTION: Mr. Kellogg, you know you're going
9 to be arguing in another case that it's not consistent
10 with national security to give access to classified
11 information to someone as to whom it is not clearly
12 consistent that he can have that information. I mean,
13 the two really boil down to the same.

14 MR. KELLOGG: Well, no, I don't think they do.
15 For example, in a number of agencies, you don't even
16 have to have a clearance necessarily to work in that
17 agency. Every employee at NSA has to have a security
18 clearance.

19 QUESTION: Yes, but where you have a security
20 clearance, I'm sure you would say that unless someone
21 clearly can be trusted with access to the classified
22 information, it's not -- it's necessary in the interest
23 of national security not to let him have that classified
24 information.

25 MR. KELLOGG: Well, I think that might well

1 follow, Justice Scalia.

2 The three statutory procedures for removing
3 employees in these circumstances form sort of a pyramid
4 where the for-cause procedures are the base and cover
5 the broadest ground. Then comes Section 7532, and
6 finally the smallest compass and the most extreme case,
7 Section 833.

8 The lines of demarcation between those
9 procedures are not clear-cut, and much is left to the
10 discretion of the agency to choose which one is
11 appropriate in an individual case, but as a general
12 principle, the for-cause procedures are to be used
13 unless there's some reason why they shouldn't be used
14 such as, for example, the employee can't be told the
15 precise reasons why he's being removed. Perhaps it
16 would reveal a source of information that must remain
17 secret.

18 In those circumstances, Section 7532 would be
19 appropriate because it provides for a statement of
20 reasons only to the extent that national security
21 permits; whereas, under the for-cause procedures you
22 have to give him a complete statement of reasons.

23 The premise of the Court of Appeals' decision
24 and of Respondent's argument appears to be that he would
25 have received more procedures under 7532 than he

1 received under the for-cause procedures.

2 QUESTION: (Inaudible) Secretary's decision.

3 MR. KELLOGG: That's correct. The Secretary
4 of Defense, under the prior procedures would have been
5 involved if 7532 had been invoked, but he would also
6 have been suspended without pay for 16 months. He would
7 have received notice only to the extent consistent with
8 the national security. He would have had no right to
9 counsel. He would have had a single hearing of
10 unspecified scope. And if a decision were made to
11 remove him, he would have been ineligible for any other
12 position in the Department of Defense and for any other
13 job elsewhere in government without OPM specifically
14 saying that he's eligible.

15 Now, that contrasts sharply with what he
16 actually received, which was 16 months of pay, notice
17 and opportunity to respond, counsel, several layers of
18 intra-agency review, including a personal meeting with
19 the Director of NSA and a recommendation that the agency
20 try to find his employment elsewhere where a clearance
21 was not required.

22 QUESTION: When did his pay stop?

23 MR. KELLOGG: His pay stopped on the date of
24 his removal when the final decision was made by the
25 Director of NSA.

1 The only person who would be better off if
2 Section 7532 became the standard means for removing
3 people who lose their security clearance is Respondent
4 because he got all the other procedures. Everybody else
5 would be worse off.

6 There are any number of reasons why the agency
7 might determine that someone's access to classified
8 information is no longer clearly consistent with the
9 national security. It could depend on a number of
10 mundane factors such as financial problems, alcohol
11 abuse, mental health concerns, carelessness in the
12 handling of classified material, or simply that a family
13 member has close ties with a hostile country.

14 Now, in all of those circumstances, the
15 employee may lose his clearance and his job at NSA
16 because NSA cannot tolerate any unnecessary risk. Its
17 mission is too sensitive. But we're still dealing in
18 those cases with a fairly run-of-the-mine clearance
19 determination, not an emergency such that the procedures
20 of 7532 have to be invoked.

21 There will, unfortunately, be more dangerous
22 cases from time to time in which an employee has to be
23 excluded from access to classified information and
24 removed immediately and in which perhaps he can't be
25 given a full statement of the reasons. In those cases,

1 Section 7532 or even Section 833 would be appropriate.

2 But it's important to note that it's in the
3 agency's own interest to provide its employees with as
4 much protection as possible to avoid any arbitrary or
5 unnecessary removals and to give the employee himself a
6 sense that he's being treated fairly because a
7 disgruntled ex-employee with classified information
8 poses a grave security risk.

9 The ultimate irony of the Court of Appeals'
10 decision is that it seems to mandate a more severe
11 procedure than the agency itself would want to use.

12 Unless there are any further questions, I'll
13 reserve the remainder of my time.

14 QUESTION: Thank you, Mr. Kellogg.

15 We'll hear now from you, Mr. Gill.

16 ORAL ARGUMENT OF JOHN G. GILL, JR.

17 ON BEHALF OF THE RESPONDENT

18 MR. GILL: Mr. Chief Justice, may it please
19 the Court.

20 We respectfully submit that the decision by
21 the District of Columbia Circuit be affirmed because of
22 the plain language of the statute, its legislative
23 history, a pertinent executive order, the pertinent
24 Department of Defense directive, NSA's own regulations,
25 and the clear mandate of this Court's trilogy of

1 security cases in the 1950's, Cole v. Young, Vitarelli
2 v. Seaton, and Service v. Dulles, which we submit
3 mandate calling a security case a security case.

4 First of all, I need to emphasize that the
5 mandatory procedures that are at issue in this case are
6 keyed to removal or termination. Much is made in the
7 government's papers about suspension, and that, indeed,
8 is discretionary when you're dealing with security
9 risks, tactical decisions as to whether to suspend now
10 or perhaps watch a person and see what's happening are
11 proper.

12 But -- and I think this is the answer to
13 Justice Stevens' question about was he suspended without
14 pay and is that a mandatory procedure to trigger these
15 rights.

16 The suspension is discretionary, but once you
17 get to removal, these procedures are mandatory. And the
18 mere fact that the government paid him for some more
19 months should not, we submit, obviate his
20 congressionally mandated head-of-agency review rights.

21 And as is conceded, this was a termination
22 case from the very beginning. And in the words of
23 7532(3), an employee is entitled to the following
24 procedures before removal. And as the D.C. Circuit
25 held, we were entitled, we complain, about not receiving

1 a hearing at the agency authority duly constituted for
2 this purpose, a review of the case by the head of the
3 agency or his designee, and a written statement of the
4 decision by the agency head.

5 QUESTION: But before that carries the day for
6 you, you've got to show that 7532 is the exclusive
7 provision for removal.

8 MR. GILL: Yes, Your Honor. We contend that
9 when you terminate in the interest of national security,
10 which I'll get to the record and why this case is such a
11 case, these rights are mandated. We disagree with the
12 mere option argument of the government. When you have a
13 security case, as this is, a termination in the interest
14 of national security, these rights are mandated by
15 Congress.

16 QUESTION: And you'll tell us why I suppose.

17 MR. GILL: Yes, Your Honor.

18 QUESTION: Certainly the plain language of
19 7532 doesn't say that. It says: "Notwithstanding any
20 other statutes, the following procedures may be
21 employed." But you say --

22 MR. GILL: Then it starts with suspension,
23 Your Honor.

24 QUESTION: Suspension without pay.

25 MR. GILL: And suspension is discretionary.

1 QUESTION: Right.

2 MR. GILL: But then it gets to but when
3 there's removal, the employee is entitled.

4 QUESTION: But that's an employee suspended
5 under Subsection (a) of this section, so forth and so
6 on, is entitled.

7 MR. GILL: Well --

8 QUESTION: That's the only mandatory language
9 I see.

10 MR. GILL: Well, we respectfully say that this
11 -- if it is in the interest of national security, this
12 is the only option if it's truly an interest of national
13 security case.

14 QUESTION: I understand that's your position.
15 All I'm saying is the plain language of the statute
16 doesn't say that. That's all.

17 MR. GILL: Well, we point out in the -- most
18 of our record references are to the Court of Appeals'
19 appendix, which we understand has been filed with the
20 Clerk and circulated to the Justices.

21 The initial notice at Court of Appeals 82
22 started out: "This is a notice to remove you from your
23 critical, sensitive position." Our point is that it was
24 a removal on national security grounds from the very
25 beginning.

1 The government's entire for-cause argument
2 depends on Chapter 370, which is their inherent
3 authority for-cause procedures. And, of course, the
4 simplest answer to this, as Justice O'Connor has already
5 pointed out, is it -- they didn't use the 370
6 standards. Three seventy point three, which is found at
7 Court of Appeals' Appendix 67, Subsection 3-2 reads:
8 "This section does not apply to a suspension or removal
9 taken in the interest of national security."

10 The government's position is anomalous in the
11 light of Chapter 371.1. That's at Court of Appeals'
12 Appendix 228. "This chapter prescribes policies and
13 procedures governing actions to limit access to" --

14 QUESTION: Excuse me. You wouldn't have the
15 references to the -- to the petition rather than the
16 Court of Appeals --

17 MR. GILL: This is not in the petition. I
18 think this may be found in our brief in opposition to
19 certiorari. We set out 371 -- and I think that's at
20 12(b). No, I'm sorry. That's at 10(b) of our
21 opposition to certiorari.

22 And the very first, 1.1 says: "This chapter
23 prescribes policies and procedures governing actions to
24 limit access to classified information, suspend or
25 terminate civilian personnel of NSA for reasons of

1 national security."

2 Now, this is very important language because
3 the government's argument seems to intertwine cause with
4 the taking away of a security clearance, the taking away
5 of access to classified information. This preamble to
6 371 says 371 applies when you either terminate or
7 circumscribe someone's access to classified information.
8 So, by NSA's own regulation, this is the procedure
9 that's to be used, and this procedure later on mandates
10 the 7532 procedures: appeal to the agency head, hearing
11 by a duly constituted board, and a decision by the
12 Secretary of Defense.

13 So, by its own regulation, 370 which they rely
14 on is not applicable. Three seventy-one, whether you
15 consider it a mere taking away of a security clearance
16 -- they have to use 371 before they get to cause.

17 QUESTION: But is there any contest about the
18 revocation of his security clearance? That has been
19 revoked, hasn't it?

20 MR. GILL: Yes, Your Honor. We --

21 QUESTION: So, this isn't -- this isn't a
22 proceeding in which it was sought to take away his
23 security clearance.

24 MR. GILL: Well, it's unclear. It was always
25 sought to remove him, but he was being removed because

1 you can't work there with a -- without a security
2 clearance. And the government says this is cause. We
3 say you take away his security clearance in the interest
4 of national security, which I think Justice Scalia said
5 is the same standard as the 7532 --

6 QUESTION: Well, did he argue in these
7 proceedings that his security clearance shouldn't have
8 been revoked?

9 MR. GILL: Yes, Your Honor. Yes.

10 QUESTION: And was this the proper forum in
11 which he should argue that?

12 MR. GILL: Well, we contend that there should
13 have been 371 rights that gave us these rights plus
14 appeal to the Secretary of Defense.

15 QUESTION: That's under --

16 MR. GILL: He was cut off. Basically I think
17 the proceedings would have been the same up through the
18 Director of NSA, but then we would have had another
19 hearing, a review by the designee of the Secretary of
20 Defense and then a written --

21 QUESTION: You would have had on top of this
22 -- if the agency said your security clearance is
23 revoked, then you're going to have a 7532 hearing.

24 MR. GILL: Yes, Your Honor.

25 QUESTION: And in which that decision to

1 revoke will be relitigated, wouldn't it?

2 MR. GILL: "Reviewed and readjudicated" in the
3 words of the executive order.

4 Now, there are certain standards set up in
5 these regulations. Three seventy sets up the familiar
6 standard for such cause as will promote the efficiency
7 of the service. And that's in Section 3-4. That was
8 never utilized. We never heard that term until we got
9 to this Court.

10 QUESTION: What? The for-cause?

11 MR. GILL: For-cause as it would promote the
12 efficiency of the service.

13 There was a talismanic incantation of 370 a
14 few times at the administrative level, but it was always
15 whether his continued access to SCI's, classified
16 information --

17 QUESTION: But there was no doubt that the
18 proceeding before the agency was under 370.

19 MR. GILL: They said that. There is a doubt.
20 This is my point, Your Honor.

21 QUESTION: Well, anyway --

22 QUESTION: Talismanic incantation for the good
23 of the service instead of a talismanic incantation of
24 370.

25 MR. GILL: No. I asked this Court to follow

1 the mandate of Cole v. Young, Vitarelli v. Seaton. Is
2 it really a security case? What test was used? The
3 test was the 371 test. Is his access clearly consistent
4 with the interest of national security, which we
5 respectfully submit, is the test in 7532. Never did
6 they use the 370 test even though they said that term,
7 that number. They never said for such cause as would
8 promote the efficiency of the service.

9 QUESTION: But 371 covers not only policies
10 and procedures to terminate civilian personnel for
11 reasons of national security, it also prescribes
12 policies and procedures governing access -- governing
13 actions to limit access to classified information. And
14 what the government says it was using 371 for, as I
15 understand it, is to say that this person is not
16 entitled to classified information. Since he is not
17 entitled to classified information, it is in the good of
18 the service that he not hold his job. Why isn't that an
19 adequate explanation of the use of 371?

20 MR. GILL: Because, Your Honor, I heard that
21 for the first time in this Court. And I'm very familiar
22 with the record. You will not find in the record any
23 mention of 371. That was never utilized. I mean, the
24 standard was utilized, but they never acknowledged they
25 were utilizing it.

1 If you use 371 --

2 QUESTION: So, for that, they did the wrong
3 talisman. That one they did use the standard and didn't
4 use the number. The other one you were complaining
5 about, they did use the number, but didn't use the
6 standard.

7 MR. GILL: Well, Your Honor, yes, they used
8 the 371 standard. My point is that when you use 371,
9 you get your 7532 procedures. That's in that
10 regulation, and it mandates review at the Secretary of
11 Defense level, which is why we're here.

12 So, the fact that they used the 371 standard
13 is very important. That gives us these rights that we
14 think Congress gave us.

15 If I could refer to the initial letter. It
16 had the standard of -- it's not your -- your continued
17 employment is not clearly consistent with the national
18 security.

19 They then convened a board of appraisal.
20 Under the 1964 legislation, a purely security procedure,
21 which deals with or impanels people who are -- have
22 expertise in the area of security and advises on
23 national security matters. And that body found that his
24 access to classified information was clearly -- clearly
25 not consistent with national security.

1 Most significant is the Director of NSA's own
2 decision. It's at 192 of the Court of Appeals' record,
3 and I quote paragraph C. "Doe's record on the job
4 evidences proper security awareness, but his lifestyle
5 away from work is not similarly acceptable." We feel
6 that under the for-cause standard promoting the
7 efficiency of the service, this is almost a finding that
8 it does not impair the efficiency of the service because
9 his on-the-job performance is acceptable.

10 He then goes on. "I find much attractive
11 about Doe and his work record and performance. I also
12 find him significantly flawed in his off-duty behavior
13 and a potential security risk." This was a security
14 case. This was not a for-cause case. And when you --
15 when it is a case in the interest of national security,
16 the government has to contend with Executive Order
17 10450. President Eisenhower, 1953.

18 We have cited in our papers and the government
19 in its reply brief has quoted Section 6. Now, this is
20 at 250 of the Court of Appeals' appendix. Section 6
21 deals with the discretionary nature of suspensions. And
22 Executive Order 10450 is by its terms more broad than
23 7532. Section 5, which is unrebutted in the reply
24 brief, is mandatory in nature and mandates the 7532
25 procedures for any and all terminations in the interest

1 of national security.

2 "Whenever there is developed information
3 indicating the retention of employment may not be
4 clearly consistent with the interest of national
5 security, such information shall be forwarded to the
6 head of the employing department or agency who shall
7 review or cause to be reviewed and, where necessary,
8 readjudicate in accordance with the Act of August 26,
9 1950." That is 5 U.S.C. 7532, which the Court of
10 Appeals held we were entitled to.

11 Why does the NSA regulations and the executive
12 order seem to indicate that 7532 rights were mandated?
13 We feel that back in the early 1950's, when the
14 executive order came into being, when this legislation
15 was passed, there was great concern -- the Korean War,
16 the cold war -- about security risks. There was also a
17 great concern about witch hunts in government
18 employment. People wrongfully, frivolously being
19 ferreted out as national security risks without basis.

20 We've set out at length the legislative
21 history at pages 23 to 34 of our brief, both of the 1950
22 Act and the 1964 Act. We have done that in footnote
23 fashion.

24 On the whole, it clearly shows that the
25 District of Columbia Circuit was right in this case.

1 There was a legislative compromise. A part, a
2 significant portion of Congress, wanted civil service
3 review for the protection of employees.

4 Another part of Congress wanted additional
5 power, not emergency power. This is not an emergency
6 act, although I can see it does away with outside the
7 agency review, but greater power to the Secretary to
8 terminate in the interests of national security. A
9 compromise was reached.

10 The politically responsible, often
11 Cabinet-level officer, accountable to the President,
12 accountable to Congress who could be called down to
13 legislative hearings to say, what's happening in your
14 agency, why are there so many employees being
15 terminated, why do you have security leaks there. a high
16 level that would show an impartial tribunal, not the
17 people who were trying to get rid of the employee
18 anyway, but someone removed but, again, consistent with
19 the values preserved in this Court's decision in Egan
20 where there will not be outside the agency substantive
21 review for a security clearance.

22 QUESTION: And you think Congress intended as
23 a regular matter, whenever there's a security problem,
24 including a clearance problem like this for security
25 information, that the head of the agency is going to be

1 spending his time case by case determining these
2 matters? I think that --

3 MR. GILL: Your Honor --

4 QUESTION: As a routine matter, not an
5 emergency provision.

6 MR. GILL: Your Honor, the statute clearly
7 gives the authority to the head of the agency to
8 delegate it to a duly constituted authority for a
9 hearing and a designee for review. He does have to sign
10 off on the eventual order.

11 QUESTION: Don't you think that means he has
12 to personally understand the order?

13 MR. GILL: Oh, yes.

14 QUESTION: He has to give his personal
15 attention to it.

16 MR. GILL: And he can take the advice of his
17 subordinates, his designees. I think the intent of
18 Congress was that the office, insulated from direct
19 connection with the people making the initial employment
20 decision --

21 QUESTION: Right.

22 MR. GILL: -- would have a review like an
23 appellate court.

24 QUESTION: Like an appellate court.

25 And you think that that was the routine way in

1 which Congress intended security problems to be handled
2 in these agencies, personal attention of the head of the
3 agency.

4 MR. GILL: If you read the legislative history

5 --

6 QUESTION: Not an emergency. That's the
7 routine way.

8 MR. GILL: Yes, Your Honor.

9 QUESTION: Well, that would be extraordinary
10 if that were the case.

11 MR. GILL: If you look at 2330, which was
12 quoted by the Court of Appeals, the -- it said right now
13 there is no appeal to the head of an agency when you're
14 terminated in the interest of national security. And it
15 said this new legislation extends that right to
16 employees.

17 QUESTION: The agency here is the Defense
18 Department, and you're talking about the Secretary of
19 Defense who has a few other things to do --

20 MR. GILL: Yes, Your Honor.

21 QUESTION: -- overseeing all security problems
22 and clearances in the entire Defense Department.

23 MR. GILL: Yes, Your Honor.

24 QUESTION: Personally.

25 MR. GILL: However, I'd point out, as the

1 government has in their reply brief, the President has
2 now designated the head of NSA as the head of an agency
3 for this purpose.

4 QUESTION: Good thing, but even that person I
5 assume has other responsibilities that might better
6 occupy his time.

7 MR. GILL: Well --

8 QUESTION: As a routine matter, I mean, I
9 could understand as an emergency. If you want to get
10 rid of somebody quickly, which is how I understand this
11 provision, you might make him, if you want to do it
12 quickly -- make him do it personally, but not as a
13 routine matter. Isn't it -- it's such an implausible
14 intent on the part of Congress.

15 MR. GILL: I think if you read the legislative
16 history, Your Honor, you'll -- so it was intended,
17 specific reference, and we have set it out in our brief.

18 QUESTION: Counsel, Section 832 and 833 both
19 say that notwithstanding the section, Section 7512 and
20 7532, there may be terminations.

21 MR. GILL: Or any other legislation --

22 QUESTION: Doesn't -- doesn't that envisage
23 that Section 7512 could on some occasions be used for
24 national security cases?

25 MR. GILL: No, Your Honor. I --

1 QUESTION: I mean, why else would Congress
2 have mentioned 7512?

3 MR. GILL: For the same reason they said nor
4 any other legislation, which they --

5 QUESTION: Well, they specifically said 7512.

6 MR. GILL: And they specifically said 7532. I
7 think that at best is a mandate of Congress or an intent
8 of Congress to say we want to make it clear. There is
9 no review of the extraordinary emergency power in 833.
10 No other statutes will get in the way of it.

11 I don't think you can read what the government
12 read in that there exists an option. In fact, the D.C.
13 Court of Appeals took just -- I mean, the D.C. Circuit
14 took just the converse. They said the mere mention of
15 7532 shows that they had to remove that to demonstrate
16 that 833 -- that 7532 was not mandated.

17 QUESTION: Well, and as I recall, the D.C.
18 Circuit didn't even cite 7512. It did an ellipse of the
19 statute.

20 MR. GILL: But my point is I don't think it
21 means an option. And if you look at the legislative
22 history of that Act, the 1964 Act, you see Congressmen
23 saying as long as this new legislation doesn't get in
24 the way of the ordinary appeal rights. And we've set
25 that out by way of footnote in our brief.

1 To analyze the competing contentions in this
2 case, the government argues that you have a general
3 power to terminate which is inherent from the power to
4 hire. And they can use it if they rely on it.

5 We argue that Congress has given a specific
6 focus to national security cases of termination in the
7 interests of national security, and in those cases there
8 shall be these procedural reviews.

9 QUESTION: Seventy-five thirty-two starts out
10 not by talking about removal at all. It talks about
11 suspension.

12 MR. GILL: Yes, Your Honor.

13 QUESTION: And it only gets to removal in the
14 second subsection. That sounds to me like it is more
15 designed to deal with an emergency where your first
16 reaction is to suspend the guy and separate him, and
17 then maybe later you'll think about removal, rather than
18 the comprehensive statute governing all removals.

19 MR. GILL: These are only removals in the
20 interests of national security.

21 We have kind of an unusual situation here,
22 Your Honor, because everyone has to be cleared at NSA to
23 work there. This is the 1964 legislation. I don't
24 think we necessarily had this situation in 1950 when
25 Congress acted. But --

1 QUESTION: What about the period between 1959
2 and 1964? They hired people -- began hiring people in
3 1959.

4 MR. GILL: Yes, Your Honor.

5 QUESTION: And your interpretation means that
6 during that period, the '59 Act, in effect, said you can
7 appoint these people, but you cannot fire them without
8 following the 7532 procedures.

9 MR. GILL: You can suspend, but you can't --

10 QUESTION: It's kind of a strange way to read
11 the '59 statute. It surely doesn't say that. They're
12 not necessarily in the Civil Service or anything else.

13 MR. GILL: The '59 statute says nothing about
14 termination.

15 QUESTION: It just gives them the power to
16 appoint, and presumably they could appoint and say
17 you're hired at will or you're hired on a one-year
18 contract. I don't see how you read into the '59
19 statute the limitations that you find in the earlier
20 1950 statute.

21 MR. GILL: Respectfully, Your Honor, I don't
22 do it; the Department of Defense does it. And I'd like
23 to quote 5100.23. That's the Department of Defense
24 directive which gave --

25 QUESTION: Where do we find that?

1 MR. GILL: It's at the Court of Appeals'
2 record 62.

3 QUESTION: Well, we don't have -- is it

4 QUESTION: I think we have --

5 QUESTION: -- the Court of Appeals' record up
6 here.

7 MR. GILL: Well, I was assured. It was the
8 Solicitor General's idea, and I was assured it was
9 distributed. I'm sorry. But in most brief -- both
10 briefs, most of the references are to that.

11 But that is the delegation of authority under
12 the '59 Act from the Secretary of Defense to the
13 Director of NSA. And if I can quote paragraph 10 where
14 these are the different -- "authorize the suspension,
15 but not to terminate the services of an employee in the
16 interest of national security in positions within the
17 NSA, in accordance with the provisions of" and it goes
18 on and it cites statutory authority, including 7532.

19 Now, the government argues that --

20 QUESTION: Before you leave that, would you
21 tell me again what the citation is to that, what you
22 just read?

23 MR. GILL: This is the Department of Defense
24 directive 5100.23, and it's at page 62 of the Court of
25 Appeals' appendix.

1 QUESTION: Thank you.

2 MR. GILL: And this is the delegation of
3 authority in this regard from the Secretary of Defense
4 to the Director of NSA pursuant to this Act. And
5 clearly, if we use principles of the English grammar,
6 when something set off by commas, he withheld to himself
7 the power to terminate the services of an employee in
8 the interests of national security for positions at
9 NSA.

10 And this defeats totally the government's
11 argument on inherent authority because of In re Hennen
12 and all of those cases say the power is inherent unless
13 circumscribed by regulatory -- we think it's also a
14 recognition of the congressional mandate.

15 The principle we espouse here is not a
16 startling one, we respectfully submit. And that is when
17 there's a specific focus on legislation that overcomes
18 and overrules general inherent powers, then you have to
19 follow those procedures.

20 QUESTION: Was this the ground the Court of
21 Appeals used?

22 MR. GILL: They did not focus on the
23 Department of Defense directive. They did say what I
24 just quoted: the specific focus of legislation would
25 control --

1 QUESTION: They said 7532 was the exclusive.

2 MR. GILL: It's mandated when there's a
3 termination in the interest of national security.

4 QUESTION: But they didn't specifically rely
5 on the argument you've just been making?

6 MR. GILL: The Department of Defense
7 directive? No, they didn't mention it. We argued it.
8 They did not mention it.

9 QUESTION: And the presidential -- did you say
10 a presidential proclamation?

11 MR. GILL: Yes, Your Honor.

12 QUESTION: Did they rely on that?

13 MR. GILL: No, I don't think they did.

14 However, that's repeatedly mentioned. *Vitarelli v.*
15 *Seaton* -- this Court relied on it to mandate compliance
16 with States' regulations for security cases.

17 QUESTION: So, you would think you -- even if
18 the 7532 argument wasn't good, you would win under the
19 President's proclamation?

20 MR. GILL: Your Honor, we win under the
21 statute, the presidential order, the Department of
22 Defense directive, and NSA's own regulations.

23 QUESTION: Well, but you're defending the
24 ground that the Court of Appeals used.

25 MR. GILL: Absolutely, in addition to the

1 others, yes.

2 QUESTION: Well, in addition, you usually
3 start with that, and then you say even if the Court of
4 Appeals was wrong, you win on these other grounds.

5 MR. GILL: Yes, Your Honor.

6 QUESTION: But we don't have to deal with
7 those other grounds if we don't want to. We could leave
8 that to -- for the Court of Appeals, couldn't we? We
9 don't have to entertain these respondents' claims to
10 defend the judgment on some other ground.

11 MR. GILL: I suppose not, but I think it would
12 be wise to do so if there's clear regulatory authority.

13 QUESTION: Well, it isn't -- it might help if
14 the Court of Appeals gave us some aid on this other
15 regulatory authority.

16 MR. GILL: Well, I also submit, Your Honor,
17 this regulatory authority and the presidential orders
18 are manifestations of what Congress intended and what
19 the government itself thought Congress intended.

20 To get through the logical steps that the
21 government makes in its for-cause argument, you have to
22 say a security clearance is required at NSA. We're
23 taking away a person's security clearance. So, he's
24 terminated for cause because he doesn't fulfill a
25 qualification of employment. They come right up against

1 the procedural wall that we've been discussing here when
2 they take away the security clearance in the interest of
3 national security, and it triggers these procedural
4 rights.

5 I see I don't have time to --

6 QUESTION: Why is that? When they take away
7 the security clearance in the interest of national
8 security, what is triggered?

9 MR. GILL: Termination in the interest of
10 national security, 7532 --

11 QUESTION: No. We weren't talking
12 termination; we're talking about taking away a security
13 clearance.

14 MR. GILL: That's the equivalent of
15 termination in this case. That's the equivalent of
16 termination at NSA. And they said that.

17 QUESTION: Now, what says that?

18 MR. GILL: The 1964 Act, 831. You have to
19 have a security clearance to work at NSA.

20 QUESTION: Well, I know, but --

21 MR. GILL: And this was recognized
22 administratively, Your Honor, when they gave them the
23 notice.

24 QUESTION: What is crucial to your case is
25 that taking away a security clearance is ipso facto

1 treated by these statutes as the equivalent of
2 termination.

3 MR. GILL: In these circumstances. There
4 might be other agencies where it wouldn't amount to
5 termination. So, it wouldn't -- it wouldn't amount to
6 removal if they could put them somewhere else, but they
7 can't at NSA.

8 QUESTION: I don't see that that's
9 self-evident to me that the two under the statutory
10 scheme are to be treated the same. Security clearance
11 is one thing; termination is another.

12 MR. GILL: Except that the notice says we are
13 terminating -- we're removing you because we're
14 revoking your security clearance. That's the facts of
15 this case.

16 QUESTION: Well, I understand, but what we're
17 doing is revoking your security clearance, and since you
18 don't have a security clearance, you can't hold this job.

19 MR. GILL: And that is, I think, to subvert
20 the intent of Congress and the intent of these other
21 regulations.

22 QUESTION: You have a regulation that says
23 that, that revoking a security clearance is the same as
24 termination?

25 MR. GILL: No. We have the statutory

1 requirement and we have 371 which triggers the 7532
2 procedures, NSA's own regulation.

3 QUESTION: Mr. Gill, section 7531 that
4 precedes 7532 in the Code says what agency shall include
5 when 7532 says the head of an agency. And it lists
6 State, Commerce, et cetera. And then at the very end,
7 it says: "such other agency of the Government of the
8 United States as the President designates in the best
9 interest of national security."

10 Now, that doesn't sound like an employee's
11 bill of rights really if the President can bring other
12 agencies into it or not as he chooses depending on
13 national security considerations.

14 MR. GILL: Well, two responses. This Court
15 did limit the President's authority in *Cole v. Young*
16 where they said that they could not -- kind of the
17 converse of this situation -- they could not obviate a
18 person's veteran's preference rights by making HEW one
19 of these agencies.

20 And also the Court in *Vitarelli*, I believe,
21 said that an employee is entitled to these procedures.
22 The Secretary of State in that case could not change the
23 reasons for his removal by saying I now act in my
24 absolute discretion. You're not going to get your
25 rights under regulations 7532 type rights.

1 In further answer, Your Honor --

2 QUESTION: But I'm curious. If it was thought
3 to be something where an employee's right are to be
4 protected, it was left to the President for national
5 security consideration to expand it beyond the reach of
6 the agencies that Congress had designated.

7 MR. GILL: Absolutely true.

8 QUESTION: I know it's true, but it doesn't
9 seem --

10 MR. GILL: And I think -- I think --

11 QUESTION: -- it's consistent with your
12 argument.

13 MR. GILL: I think the initial motive for the
14 legislation was to expand terminations of security
15 risks, but Congress mandated a compromise: appeal in
16 the agency for substantive review at the Secretary of
17 Defense level.

18 QUESTION: May I ask one question to be sure I
19 have your position? Is it your position that in order
20 to revoke a security clearance in the National Security
21 Agency, they must follow the 7532 procedures?

22 MR. GILL: When it equates with termination.

23 QUESTION: Well, no.

24 MR. GILL: Yes, yes.

25 QUESTION: They must do it every time, okay.

1 MR. GILL: And that's their own regulations,
2 Your Honor. Three seventy-one says that.

3 QUESTION: Well, I understand that's your
4 position.

5 QUESTION: Thank you. Thank you, Mr. Gill.

6 Mr. Kellogg, you have 11 minutes remaining.

7 REBUTTAL ARGUMENT OF MICHAEL K. KELLOGG

8 MR. KELLOGG: In the Court's decision in Cole
9 v. Young, the Court compared 7532 -- situations in which
10 use of that statute was appropriate with ordinary
11 removal procedures. And the Court stated quite
12 clearly: "In the absence of an immediate threat of harm
13 to the national security, the normal dismissal
14 procedures seem fully adequate and the justification for
15 summary powers disappears."

16 Now, the MSPB and the Federal Circuit, which
17 have wide responsibility for Federal personnel matters,
18 also stated in the Egan case that the existence of
19 Section 7532 does not affect the availability of
20 for-cause removal procedures whenever the cause might
21 implicate national security.

22 In lieu --

23 QUESTION: Part of Mr. Gill's argument, Mr.
24 Kellogg, is that even if you could have proceeded under
25 one of these other provisions, you didn't. And I must

1 say he does seem to make a point that you were
2 proceeding under 371 which is not the for-cause removal
3 procedure. Is that correct?

4 MR. KELLOGG: I think actually the agency was
5 very careful in choosing the procedures that it followed
6 here. The notice of proposed removal to Respondent
7 stated: your -- "it appears that your continued access
8 to classified information is no longer consistent with
9 the national security. Therefore, you no longer meet a
10 requirement of employment at NSA. Therefore, you will
11 be removed under Chapter 370."

12 Now, it's true that the notice didn't say
13 under the for-cause standard of Chapter 370, but Chapter
14 370 only allows removals for a cause. The agency was
15 quite careful to follow the 370 procedures.

16 Now, there are separate procedures under 371
17 for implementing Section 7532, but the agency did not
18 follow the 7532 procedures for removals and dismissals
19 in the interests of national security.

20 QUESTION: But it's also true that Section 371
21 in its introductory sentence says: "It purports to
22 prescribe policies and procedures governing actions to
23 limit access to classified information." That seems to
24 support your opponent's view that that section governs
25 the procedure for taking away a security clearance.

1 MR. KELLOGG: It would only support the
2 proponent's -- the opponent's view if it followed that
3 once you revoke a clearance, you have to continue and
4 can only use Section 7532.

5 Now, it's true that Chapter 371 implements the
6 statutory authorization for using boards of appraisals
7 to assess whether a person should have access to
8 classified information. And a board of appraisal was
9 used in this case and determined that Respondent's
10 access was no longer clearly consistent with the
11 national security. Therefore, his clearance was revoked.

12 QUESTION: So, are you saying that insofar as
13 they went through the revocation of access procedure,
14 they did follow 371? They didn't violate it. But then
15 when they removed him, they were following 370?

16 MR. KELLOGG: That's correct. And there's
17 nothing in the regulations that precludes that. In
18 fact, it would be quite extraordinary if NSA in its own
19 regulations were to bind its hands and give itself only
20 the option of using the emergency procedure whenever a
21 clearance is revoked.

22 QUESTION: You maintain that you carefully
23 tailored it for 371, but you never mention 371.

24 MR. KELLOGG: We carefully tailored it for 370.

25 QUESTION: Well, did you carefully not mention

1 371?

2 MR. KELLOGG: I don't recall if 371 is
3 specifically mentioned. A board of appraisal was
4 convened.

5 QUESTION: He said it wasn't mentioned.

6 MR. KELLOGG: That's true. Respondent said
7 that. I'm frankly not sure if anywhere in the record
8 there is or is not a mention of Chapter 371.

9 A board of appraisal was convened, and a board
10 of appraisal is permitted under the procedures of
11 Chapter 371, but the removal took place under Chapter
12 370. And the fact that a procedure exists under 371 for
13 removing an employee summarily, when it's necessary in
14 the interest of national security, does not affect
15 whether loss of a clearance is cause for removal.

16 QUESTION: Yes, but unfortunately this
17 combination of 370 and 371 is contradicted by the very
18 first section of 371 which reads: "Scope. This chapter
19 prescribes policies and procedures governing actions to
20 limit access to classified information, suspend and/or
21 terminate civilian personnel of the NSA, Central
22 Security Service, for reasons of national security.
23 Such actions for reasons other than national" -- other
24 than national -- "security are processed in accordance
25 with Chapter 370." And yet, you purport to be going

1 under 371 and 370. I mean --

2 MR. KELLOGG: That's correct.

3 QUESTION: -- this thing says it's a
4 dichotomy. If it's for national security, it's under
5 371; if it's other than national security, it's under
6 370.

7 MR. KELLOGG: No. If it's implementing
8 Chapter 75 -- or Section 7532, then you have to follow
9 the procedures in Chapter 371.

10 Counsel is quite correct that the delegation
11 of authority to the Director of NSA specifically
12 withheld the power to suspend and terminate employees in
13 the interest of national security pursuant to 7532. As
14 a consequence, NSA had to develop separate procedures
15 for suspensions and removals in the interest of national
16 security.

17 But a removal for cause is something quite
18 different, and nothing in Chapter 371 says that loss of
19 a clearance cannot be cause for removal.

20 But also a note to follow up on Justice
21 White's point. The District Court was faced with the
22 question of whether NSA followed its procedures in this
23 case. It found that it did, that the removal comported
24 with NSA regulations. The Court of Appeals, in light of
25 its statutory holding, did not reach that question.

1 If the Court is troubled by the regulatory
2 question but wishes to reverse on the statutory
3 question, the Court could remand to the Court of Appeals
4 for -- to address the question of whether NSA followed
5 its own regulations. But the NSA regulations have been
6 in place since the inception of NSA, and removals time
7 and again take place for cause after revocation of a
8 clearance. The agency's own interpretation of its
9 regulations is surely entitled to some deference.

10 Unless there are any further questions --

11 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
12 Kellogg.

13 The case is submitted.

14 (Whereupon, at 2:56 o'clock p.m., the case in
15 the above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#87-751 - FRANK C. CARLUCCI, SECRETARY OF DEFENSE, ET AL., Petitioners

V. JOHN DOE

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

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