

Enlarging executive power

Federal Circuit ruling puts many federal employees at risk.

BY LOUIS FISHER

On August 17, in *Berry v. Conyers*, the U.S. Court of Appeals for the Federal Circuit substantially broadened presidential power, minimized the judiciary's role in national security, largely ignored congressional policy regarding the civil service and misread the U.S. Supreme Court's decision in *Dep't of the Navy v. Egan* (1988). As a result, hundreds of thousands of federal employees are now more vulnerable to arbitrary dismissals and downgrades, including employees who exercise their whistleblower rights to disclose agency waste and corruption.

The Supreme Court's decision in 1988 concerned Thomas Egan. After being hired for a laborer's job at a nuclear submarine facility, he became ineligible when denied a security clearance required for the position. He sought review by the Merit Systems Protection Board, the quasi-judicial board that hears appeals brought by federal workers. The Supreme Court, divided 5-3, upheld the Navy's action and denied that the board possessed authority to review and reverse the Navy's decision.

In sharp contrast, the two Defense Department employees in *Berry* did not have security clearances or a need to see classified documents. Rhonda Conyers worked as an accounting technician at the level of GS-05. She was indefinitely suspended after being denied eligibility to occupy a "sensitive position" and have access to "sensitive information." She was subsequently removed. The second employee, Devon Haughton Northover, held a GS-07 position at an Air Force commissary. He was downgraded to GS-04 after the department denied him eligibility to occupy a sensitive position. Nothing in the work of Conyers and Northover compares with the duties of Egan on the Trident submarine. A brief by the American Federation of Government Employees observed, "[W]hether the commissary at Gunter Air Force Base has a sufficient number of mustard jars on its shelves is not the type of information that the Court sought to protect in *Egan*."

The opening paragraph of *Egan* underscores its limited reach: "The narrow question presented by this case is whether the Merit Systems Protection Board...has authority by statute to review the

substance of an underlying decision to deny or revoke a security clearance in the course of reviewing an adverse action." The court held that the board had no such authority. At issue was a narrow question guided by statutory policy and the need for a security clearance. Regrettably, Justice Harry Blackmun failed to limit himself to the instructions given to the parties (statutory construction) and veered off to talk about the president's power as commander in chief. See <http://loufisher.org/docs/ep/466.pdf>.

In *Berry*, the Federal Circuit ignored *Egan's* framework and decided that courts must refrain "from second-guessing Executive Branch agencies' national security determinations concerning eligibility of an individual to occupy a sensitive position, which may not necessarily involve access to classified information." Predicting an employee's impact on national security had to be left to the "necessary expertise" of executive officials. The Federal Circuit did not look to Congress for its statutory policy. Instead, it deferred to far-ranging presidential powers over foreign policy and national security. It insisted that "*Egan's* core focus is on 'national security information,' not just 'classified information.'" That interpretation severely distorts the meaning of *Egan*.

Reacting to the breadth of the Federal Circuit's ruling, a dissent by Judge Timothy Dyk objected that it would preclude judicial review of "whistleblower retaliation and a whole host of other constitutional and statutory violations for federal employees subjected to otherwise appealable removals and other adverse actions." He said the majority "completely fails to come to grips" with the policies adopted by Congress in the Civil Service Reform Act. The majority's holding, he concluded, "effectively nullifies the statute." He explained that the primary purpose of the act was to ensure that federal employees are "protected against arbitrary action, personal favoritism, and from partisan political coercion." Those fundamental values are undermined by the Federal Circuit's decision.

The documentary record in the case highlights the danger of moving from *Egan's* focus on security clearances to the far larger population of government employees who occupy "sensitive"

positions. After the terrorist attacks of September 11, 2001, federal agencies greatly increased the number of sensitive classifications. More and more federal employees are exposed to arbitrary removal and downgrading without protections previously available.

The agency of government constitutionally authorized to define the rights of government employees working in positions without security clearances is not the president, executive agencies, the Federal Circuit or other judicial bodies. It is Congress. The decision cannot be made simply by proclaiming the need to protect "national security," a standard far too amorphous and subject to abuse. Dissenting in *Knauff v. Shaughnessy* (1950), Justice Robert Jackson reminded us: "Security is like liberty in that many are the crimes committed in its name." The record since 1950 reinforces his concern. Sections 731.106 and 732.201 of Title 5 of the Code of Federal Regulations refer to such categories as "public trust positions" and the designations of Sensitive, Critical-Sensitive, and Noncritical-Sensitive. This type of vagueness invites arbitrary and capricious actions by agency supervisors. Members of Congress need to review the standards and values that guide the civil service, including whistleblower rights and procedural safeguards for government employees. Only through statutory action can we be assured that agency officials will operate under the rule of law.

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