APPEALS COURT TREATS COMMISSARY GATORADE SUPPLIES AS A "CLEAR AND PRESENT DANGER"

Navy v. Egan—the SCOTUS case Executive Branch officials always point to to claim unlimited powers over classification authority—just got bigger.

Berry v. Conyers extends the national security employment veto over commissary jobs

The original 1988 case pertained to Thomas Egan, who lost his job as a laborer at a naval base when he was denied a security clearance. He appealed his dismissal to the Merit Systems Protection Board, which then had to determine whether it had authority to review the decision to fire him based on the security clearance denial. Ultimately, SCOTUS held that MSPB could not review the decision of the officer who first fired Egan.

> The grant or denial of security clearance to a particular employee is a sensitive and inherently discretionary judgment call that is committed by law to the appropriate Executive Branch agency having the necessary expertise in protecting classified information. It is not reasonably possible for an outside, nonexpert body to review the substance of such a judgment, and such review cannot be presumed merely because the statute does not expressly preclude it.

Unlike Egan, the plaintiffs in this case did not have jobs that required they have access to classified information. Nevertheless, plaintiffs Rhonda Conyers (who was an accounting clerk whose "security threat" pertained to personal

debt) and Devon Haughton Northover (who worked in a commissary and also charged discrimination) were suspended and demoted, respectively, when the government deemed them a security risk.

In a decision written by Evan Wallach and joined by Alan Lourie, the Federal Circuit held that the Egan precedent,

> require[s] that courts 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.

That is, the Federal government can fire you in the name of national security if you have a "sensitive" job, whether or not you actually have access to classified information.

As Timothy Dyk's dissent notes, the effect of this ruling is to dramatically limit civil service protections for any position the government deems sensitive, both within DOD—where both Conyers and Northover work—and outside it.

> Under the majority's expansive holding, where an employee's position is designated as a national security position, see 5 C.F.R. § 732.201(a), the Board lacks jurisdiction to review the underlying merits of any removal, suspension, demotion, or other adverse employment action covered by 5 U.S.C. § 7512.
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> [snip]
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> As OPM recognizes, under the rule adopted by the majority, "[t]he Board's review . . . is limited to determining whether [the agency] followed necessary procedures . . . [and] the merits of the national security determinations are not

> subject to review."

In doing so, the dissent continues, it would gut protection against whistleblower retaliation and discrimination.

> As the Board points out, the principle adopted by the majority not only precludes review of the merits of adverse actions, it would also "preclude Board and 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." Board Br. at 35. This effect is explicitly conceded by OPM, which agrees that the agency's "liability for damages for alleged discrimination or retaliation" would not be subject to review. OPM Br. at 25. OPM's concession is grounded in existing law since the majority expands Egan to cover all "national security" positions, and Egan has been held to foreclose whistleblower, discrimination, and other constitutional claims.

Tracking Gatorade supplies can now represent a "clear and present danger"

There are a couple of particularly troubling details about how Wallach came to his decision. In a footnote trying to sustain the claim that a commissary employee might be a national security threat, Wallach argues that Northover could represent a threat in the commissary by observing how much rehydration products and sunglasses service members were buying.

> The Board goes too far by comparing a government position at a military base commissary to one in a "Seven Eleven across the street."
>
> [snip]

> Commissary employees do not merely observe "[g]rocery store stock levels" or other-wise publicly observable information. Resp'ts' Br. 20. In fact, commissary stock levels of a particular unclassified item – sunglasses, for example, with shatterproof lenses, or rehydration products – might well hint at deployment orders to a particular region for an identifiable unit. Such troop movements are inherently secret. Cf. Near v. State of Minnesota ex rel. Olson, 283 U.S. 697, 716 (1931) ("When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right . . . . No one would question but that a government might prevent actual obstruction to its recruiting service or the *publication of the sailing dates of transports or the number and location of troops*.") (citing Schenck v. United States, 294 U.S. 47, 52 (1919)) (emphasis added). This is not mere speculation, because, as OPM contends, numbers and locations could very well be derived by a skilled intelligence analyst from military commissary stock levels.

I love how every time these judges uphold the principle that the Executive is uniquely qualified to make these decisions, they always engage in this kind of (their argument would hold, completely incompetent) hypothetical explanation to prove the Executive's claims aren't totally bogus. (The government appears to have cued up the concept of commissary intelligence mapping—but not the Gatorade spying itself—in oral argument.)

And this one is a particularly lovely example, relying as it does not just on the proposition

that how much Gatorade (or more advanced rehydration products) service members purchase is a national security issue, but also citing Near v. Minnesota (a key First Amendment case that established prior restraint) to get to Schenck v US (the regrettable decision upholding the Espionage Act that introduced the concept of "clear and present danger"). That is, ultimately Wallach invokes "clear and present danger" to describe how a commissary employee could hurt our country.

Then Wallach goes on to invoke the due process standard from Hamdi—the same one Eric Holder says was used to kill Anwar al-Awlaki.

> The Board and Respondents must recognize that those instances are the result of balancing competing interests as was the case in Egan and as is the case here. See Hamdi v. Rumsfeld, 542 U.S. 507, 529 (2004) ("[T]he process due in any given instance is determined by weighing the 'private interest that will be affected by the official action' against the Government's asserted interest, 'including the function involved' and the burdens the Government would face in providing greater process.") (quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

Effectively Wallach argues that federal employees must be subject to the kind of justice socialists were—until the Red Scare showed how unreasonable that was—and enemy combatants are, all in the name of national security.

Accounting clerks can now be treated to the same kind of justice as Khalid Sheikh Mohammed.

This decision extends the Executive's arbitrary secrecy regime over more Federal employees

In addition to the whistleblower concerns Dyk laid out in his dissent—which the Government Accountability Project addresses here—this decision exposes large numbers of federal

employees to the arbitrary system that has been expanding—and Congress wants to expand still further—among those with security clearances. The clearance process is already an arbitrary one, which exposes people to the asymmetric authority of the Executive Branch to decide who can work and who can't. But here there's not even a formal review process: once a supervisor deems someone a threat to national security, that decision is largely unreviewable. Thus—as the language of clear and present danger was used before to sow fear and paranoia among government employees—this could be used for political persecution and petty retaliation.

Given past use of Navy v. Egan this decision might expand claims to Executive secrecy, too

I said above that Navy v. Egan is the SCOTUS case Executive Branch officials point to when making vast claims about the Executive's unlimited power over classification issues. David Addington pointed to it to justify insta-declassifying the NIE (and presumably Valerie Plame's covert identity). DOJ lawyers pointed to it to argue that they could prevent al-Haramain from litigating its FISA claim by denying its lawyers had the "need to know" information pertaining to the case. As Steven Aftergood notes, these claims are suspect, but no Court has judged them so yet.

I fear this decision extends this (mis)application of Navy v. Egan, too.

To be clear, this decision only expands the original meaning Navy v. Egan; it doesn't affirm the more expansive readings of it, as pertains to classification, from recent years. Formally, it just means "sensitive" government employees are now subject to the same kind of national security veto that employees with security clearances have been.

Furthermore, this is just a Circuit decision, not a SCOTUS one.

That said, it relies on the language that the expansive readings of Egan also rely on. such as

this passage:

> Affording such discretion to agencies, according to Egan, is based on the President's "authority to classify and control access to information bearing on national security and to determine" who gets access, which "flows primarily from [the Commander in Chief Clause] and exists quite apart from any explicit congressional grant."

Moreover, it does something with national security information that the government has already been trying to do, most notably in Espionage cases like Thomas Drake's, where they tried to prosecute him for retaining information that wasn't even classified, or shouldn't have been.

This kind of language from Wallach's opinion is precisely the kind of argument the government has been trying to make of late.

> In fact, Egan's core focus is on "national security information," not just "classified information." 484 U.S. at 527 (recognizing the government's "compelling interest in withholding national security information") (emphasis added).
>
> [snip]
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> Egan therefore is predicated on broad national security concerns, which may or may not include issues of access to classified information.

Read expansively (as Egan already has been), this is the kind of language the government might use to justify prosecuting someone for talking about critical infrastructure—problems with bridges or PEPCO's pathetic electrical grid or the Keystone pipeline. Applied the way Navy v. Egan already is, it would extend the Executive Branch's authority to police any

information it wants to call national security related.

The government has been trying to assert its control over information that is not even classified in recent years. While this decision could only be used to supplement these efforts, I wouldn’t be surprised if it were.

When managing Gatorade supplies can make a guy a “clear and present danger,” such an eventuality no longer seems a stretch.