Catholic University Law Review

Volume 67
Issue 1 *Winter 2018*

Article 10

3-20-2018

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Frank Russo

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Cover Page Footnote

J.D., The Catholic University of America, Columbus School of Law, 2018; B.A., The University of Georgia, 2015. I would like to thank Professor David Hodgkinson for his guidance throughout the writing of this Comment. I also extend my gratitude to *the Catholic University Law Review* for their assistance in editing and publishing this Comment. Particularly, I am grateful to Thomas Gentry, Richard Smith, Esperanza Sanchez, Ruth Ann Mueller, Kate Sullivan and the entire Executive Board for their hard work, which all too often goes without proper recognition. Finally, I am beyond thankful to my family, friends and mentors both here in Washington, DC and at home in Georgia for their support.

CLEARING THE AIR: DOES CHOOSING AGENCY DEFERENCE IN SECURITY CLEARANCE RULINGS DILUTE CONSTITUTIONAL CHALLENGES?

By: Frank Russo[+]

The ability to obtain a security clearance has a wide-ranging impact from job placement to questions of fitness in a presidential election. Sustaining a functional career in intelligence, national security, and many other federal fields within the United States is nearly impossible without proper security clearance.[1] In 2016, the importance of proper clearance evolved into a national debate as each presidential candidate staked claims that their opposition should be excluded from receiving sensitive material.[2] Democratic presidential nominee and former Secretary of State Hillary Clinton was accused of mishandling classified information while serving as Secretary of State, leading Congress to introduce a bill removing the nominee's clearance.[3] Her opponent, Republican nominee and current U.S. President Donald J. Trump, faced mounting criticism over his ability to keep sensitive information secret, leading to calls for the nominee to be denied customary national security briefings.[4] As the election process brought security clearance procedures into the public eye, the mundane bureaucratic chatter surrounding the subject turned to polarizing debates within a national election. Following the election, the discussions surrounding security clearances did not subside as White House officials were accused of violating

[+] J.D., The Catholic University of America, Columbus School of Law, 2018; B.A., The University of Georgia, 2015. I would like to thank Professor David Hodgkinson for his guidance throughout the writing of this Comment. I also extend my gratitude to the *Catholic University Law Review* for their assistance in editing and publishing this Comment. Particularly, I am grateful to Thomas Gentry, Richard Smith, Esperanza Sanchez, Ruth Ann Mueller, Kate Sullivan and the entire Executive Board for their hard work, which all too often goes without proper recognition. Finally, I am beyond thankful to my family, friends and mentors both here in Washington, DC and at home in Georgia for their support.

1. *See All About Security Clearances*, DEP'T STATE, http://www.state.gov/m/ds/clearances/c10978.htm (last visited Feb. 6, 2018).

2. *See, e.g.*, Ivan Levingston, *Intelligence Briefings Become Flashpoint for Trump and Clinton Campaigns*, CNBC (Aug. 5, 2016, 3:17 PM), http://www.cnbc.com/2016/08/05/intelligence-briefings-become-flashpoint-for-trump-and-clinton-campaigns.html ("'I don't think it's safe to have Hillary Clinton be briefed on national security because the word will get out' Trump said.").

3. Katie Bo Williams, *House Bill Would Revoke Clinton's Security Clearance*, THE HILL (July 7, 2016, 2:34 PM), http://thehill.com/policy/national-security/287247-house-bill-would-revoke-clintons-security-clearance.

4. Leigh Ann Caldwell & Robert Windrem, *Could Candidate Donald Trump Be Denied National Security Briefings?*, NBC NEWS (July 29, 2016, 4:01 PM), http://www.nbcnews.com/politics/2016-election/could-candidate-donald-trump-be-denied-national-security-briefings-n619156.

standard clearance procedures.[5] Political opponents of President Trump introduced legislation to revoke the clearance of senior White House advisers.[6] Despite growing attention from politicians and national media, little scholarship has been produced examining the federal judiciary's role in handling national security clearance disputes.

Federal government agencies dictate the terms of security clearance procedures including application review, denial, and acceptance.[7] Similarly, agency heads are responsible for establishing revocation procedures.[8] A loss of a security clearance at an agency is almost always followed by loss of employment.[9] An employee is able to appeal a revocation to the Merit Systems Protection Board (MSPB or the Board).[10] The Supreme Court first addressed this process in *Department of Navy v. Egan*,[11] deciding that the MSPB was correct in refusing to review the substance and evidentiary conclusions of an agency's security clearance revocation decision.[12] Additionally, the Supreme Court refused to conduct its own substantive review of the revocation.[13]

The decision in *Egan* has defined security clearance jurisprudence over the past three decades.[14] Two competing camps have materialized since the *Egan* precedent took hold of security clearance jurisprudence. The first advocates for the federal judiciary to strictly follow the administrative decisions and deny substantive reviews of security clearance decisions and procedures.[15] Supporters of the *Egan* decision reason that national security concerns outweigh the constitutional considerations of a security clearance decision and, therefore, should not be questioned by the federal judiciary.[16] Whereas, critics of the *Egan*

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5. *See, e.g.*, Katie Bo Williams & Jordan Fabian, *Questions Grow Over Kushner's Security Clearances*, THE HILL (July 17, 2017, 6:00 AM), http://thehill.com/homenews/administration/342120-questions-grow-over-kushners-security-clearances ("Calls for [Jared] Kushner to lose his security clearance have mounted . . . .").

6. Igor Bobic, *Republicans Block Effort to Revoke Jared Kushner's Security Clearance*, HUFFINGTON POST (July 13, 2017, 1:04 PM), http://www.huffingtonpost.com/entry/jared-kushner-security-clearance_us_596783aae4b0a0c6f1e67433 (describing a proposed amendment revoking security clearances for Kushner and White House Staff who "deliberately fail to disclose meetings with foreign nationals." (internal quotation marks omitted)).

7. Exec. Order No. 12,968, 3 C.F.R. 391, 392, 397 (1995).

8. *Id.* at 397, 399–400.

9. Katrina J. Church, *Loss or Denial of Security Clearance: An Employee's Rights*, 4 SANTA CLARA COMPUTER & HIGH TECH. L.J. 197, 198 (1988).

10. 5 U.S.C. § 7513(d) (2006) ("An employee against whom an action is taken under this section is entitled to appeal to the Merit System Protection Board . . . .").

11. 484 U.S. 518 (1988).

12. *See id.* at 529–32.

13. *Id.* at 529–34.

14. *See* Charles Pollack, Comment, *A Delicate Balance: Federal Employees, Security Clearances, and the Role of the Federal Circuit*, 23 FED. CIR. B.J. 133, 147 (2013) ("The Supreme Court has not clarified how *Egan* should limit Federal Circuit review since the late 1980s.").

15. *See, e.g.*, *id.* at 135 (arguing for a limited judicial review of security clearance denials).

16. *See id.* Mr. Pollack notes:

decision argue that legislative changes are needed to expand the federal judiciary's role in reviewing security clearance revocation procedures.[17] These critics claim federal employees in the security field deserve a thorough process that includes a substantive review of both the procedures and explanations behind a clearance revocation or denial.[18]

Each approach exhibits the friction that exists between constitutional rights and national security concerns when reviewing security clearance disputes.[19] However, both camps overvalue one aspect of the divide that would lead the respective approaches to damage the federal judiciary's role in security clearance jurisprudence. This Comment advocates for a third approach, first explored in the concurring opinion of *Hegab v. Long*,[20] where the federal judiciary should only conduct substantive reviews of the *policies* underlying a security clearance revocation when there is a constitutional challenge against a specific procedure or rule.[21] Precedent established in *Webster v. Doe*,[22] decided in the same year as *Egan*, allows courts to review constitutional challenges to national security employment policies, while not encroaching the boundaries of national security power vested in the other branches of government.[23]

This Comment begins with a detailed history of modern security clearance procedures and MSPB reviews of clearance revocations. Part I focuses on those who need security clearances and how these clearances can be obtained, denied, or revoked. Part I then concludes with a review of the statutorily defined MSPB rules and procedures. In Part II, the conflict between due process rights and national security concerns is explored. Part II finishes with an overview of the two modern arguments, one side advocating for due process versus the other advocating for national security. Part III centers on a detailed explanation of the third approach addressed in *Hegab* by offering a new way forward for judicial review of security clearances that shows how the limited expansion of the federal

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> Supreme Court precedents make substantive review on national security issues unnecessary because the federal government ultimately has the responsibility to "provide for the common defense, [and] promote the general Welfare of all citizens." These responsibilities require that the President and Congress make national security decisions, and the Supreme Court has consequently affirmed that such determinations are not suited for the judiciary.

Id. at 134 (footnotes omitted).

17. *See, e.g.*, Nadia A. Patel, *You're Fired!* Egan *and MSPB Review of Security Clearance Decisions*, 21 FED. CIR. B.J. 93, 94 (2011) (arguing for an amendment to the Civil Service Reform Act "to expressly authorize the MSPB to review the merits of security clearance denials that are the basis of adverse employment actions").

18. *See id.* at 101.

19. *See* Pollack, *supra* note 14, at 134; *see also* Patel, *supra* note 17, at 94.

20. 716 F.3d 790 (4th Cir. 2013) (holding that an employee at the National Geospatial Intelligence Agency was not entitled to a review after his clearance was revoked upon discovery of his marriage to a woman identified as a foreign national).

21. *Id.* at 797–98 (Motz, J., concurring).

22. 486 U.S. 592 (1988).

23. *See id.* at 603–05.

judiciary's role in security clearance revocation protects both constitutional due process and national security interests. Part IV concludes by reinforcing the need for greater attention in security clearance jurisprudence throughout academia.

I. AMERICAN HISTORY SHAPES THE PROCESSES FOR SECURITY CLEARANCE IN MODERN TIMES

A. The Value of a Clearance

The United States has placed significant emphasis on protecting vital national security information through legislation and executive orders beginning with the passage of the Civil Service Act of 1883, which required individuals seeking federal employment to be of "good" character, reputation, and fitness.[24] In modern times, federal agencies rely on security clearances to ensure their employees meet the standards required to handle and protect sensitive information.[25] Essentially, the need for clearances is driven by two principles: protection and secrecy.[26] Protecting sensitive information is vital to the federal government's ability to handle diplomatic negotiations and military actions.[27] Secrecy, in theory, also incentivizes bureaucrats to debate policy without fear of public retribution when discussing sensitive material with fellow decision-makers.[28]

Security clearances are also of significant importance to individuals seeking employment in the federal government. Employees holding clearances earn, on average, twenty-two percent more than individuals who do not.[29] In addition to the financial benefit, individuals who are able to earn a clearance have greater employment prospects because the pool of cleared agency and intelligence community (IC) workers is shrinking.[30] Security clearances are an integral part

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24. William Henderson, *A Brief History of the U.S. Personnel Security Program*, CLEARANCEJOBS (June 29, 2009), https://news.clearancejobs.com/2009/06/29/a-brief-history-of-the-u-s-personnel-security-program/; *see also* Civil Service Act of 1883, Jan. 16, 1883, ch. 27, 22 Stat. 403.

25. MICHELLE D. CHRISTENSEN, CONG. RESEARCH SERV., SECURITY CLEARANCE PROCESS: ANSWERS TO FREQUENTLY ASKED QUESTIONS 1 (2016), https://fas.org/sgp/crs/secrecy/R43216.pdf.

26. *See* Patel, *supra* note 17, at 95.

27. Harvard Law Review Association, *Information Security: Classification of Government Documents*, 85 HARV. L. REV. 1189, 1191 (1972) [hereinafter *Information Security*].

28. *Id.* at 1191–92 ("If an official knows that his recommendations will shortly be made public, there is a danger that he might hedge his advice in order to avoid embarrassing his superiors or to attract favorable public attention to himself, thus injuring the governmental interest in exposing decisionmakers to a broad range of viewpoints.").

29. Katherine Walsh, *Security Clearances Worth an Extra $19k Per Year?*, CSO (Apr. 11, 2008, 8:00 AM), http://www.csoonline.com/article/2122323/it-careers/numbers—-security-clearances-worth-an-extra—19k-per-year-.html.

30. *See* NAT'L COUNTERINTELLIGENCE & SEC. CTR., 2015 ANNUAL REPORT ON SECURITY CLEARANCE DETERMINATIONS 1, 5, 7, 12–13 (2015), https://www.dni.gov/files/documents/News

of federal employment and the work bureaucrats do on a daily basis, which begs the question: how did clearances come to play such a significant role in our government, and how has the process for obtaining clearance changed over time?

B. The History of Security Clearances

Safe guarding sensitive information came to the forefront of the American legislative focus following the outbreak of World War I (WWI).[31] The first system of classification was borne from the American Expeditionary Force procedures established for handling classified information during WWI.[32] Sensitive documents were separated into groups labeled "Secret," "Confidential," or "For Official Circulation Only."[33] Following WWI, Congress expanded the Executive's authority to control sensitive national security information within the military, and established criminal punishments for the dissemination of information without executive permission.[34] President Dwight D. Eisenhower further extended such authority to include civilian agencies in 1951, effectively giving the Executive Branch exclusive control over regulating the procedures for the handling of sensitive information.[35]

Through the last century, executive orders have regularly modified security clearance standards and procedures.[36] Under the current system, sensitive information and clearances are separated into three levels: "Top secret," "Secret," and "Confidential."[37] Additionally, each agency head classifies

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room/Reports%20and%20Pubs/2015-Annual_Report_on_Security_Clearance_Determinations.pdf.

31. *See Information Security*, *supra* note 27, at 1193 ("The outbreak of World War I prompted the passage of the Espionage Act of 1917, which spelled out the offenses [of national security violations] in greater detail, increased the severity of the penalties, and added new provisions dealing with acts of espionage in time of war."); *see also* Espionage Act of 1917, ch. 30, 40 Stat. 217.

32. *Information Security*, *supra* note 27, at 1193.

33. *Id.*

34. *See* Espionage Act of 1938, ch. 2, § 1, 52 Stat. 3.

35. *See* Exec. Order No. 10,450, 3 C.F.R. 73 (1953).

36. *See, e.g.*, Exec. Order No. 12,968, 3 C.F.R. 391 (1995) (establishing a uniform, federal program to gain access to classified information); Exec. Order No. 12,356, 47 Fed. Reg. 14,874 (Apr. 2, 1982) (establishing a uniform system to classify and declassify national security information); Exec. Order No. 12,065, 3 C.F.R. 190 (1978) (establishing a system to classify information as Top Secret, Secret, and Confidential); Exec. Order No. 11,652, 37 Fed. Reg. 5209 (Mar. 10, 1972) (establishing a monitoring system to classify and declassify information).

37. Exec. Order No. 11,652, 37 Fed. Reg. 5209, 5209–10 (Mar. 10, 1972). Executive Order 11,652 provides: (1) "Top Secret" shall be applied to information if its "unauthorized disclosure could reasonably be expected to cause exceptionally grave damage to the national security"; (2) "Secret" shall be applied to information if its "unauthorized disclosure could reasonably be expected to cause serious damage to the national security"; and (3) "Confidential" shall be applied to information if its "unauthorized disclosure could reasonably be expected to cause damage to the national security." *Id.*

employment positions within their department as either "Special-Sensitive," "Critical-Sensitive," or "Noncritical-Sensitive."[38] Previously, the Federal Investigative Services (FIS) handled ninety-five percent of federal background checks[39] with the Defense Industrial Security Clearance Office (DISCO) handling Department of Defense (DOD) related security clearances.[40] In 2016, the Office of Personnel Management (OPM) and the Office of Management and Budget (OMB) established a new department, the National Background Investigations Bureau (NBIB), to handle security clearance procedures and background checks.[41] According to the White House, the NBIB will be led by a presidential appointee who is responsible for overseeing the newly established agency and engaging in collaborative efforts with the DOD to ensure a smooth transition to the new system.[42] The NBIB works directly with existing DOD databases to conduct background checks as well as implement new security procedures for safeguarding the information collected during the check.[43]

C. Security Clearance Procedures

Individuals seeking employment that requires access to classified information must gain a proper security clearance prior to beginning the occupation.[44]

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38. *See* 5 C.F.R. § 732.201(a) (2017) (explaining that the head of each agency classifies "any position within the department or agency the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security as a sensitive position at one of three sensitivity levels"); *see also* Marko Hakamaa, *Position Designation and the Type of Investigation Required*, CLEARANCEJOBS (Aug. 4, 2014), https://news.clearancejobs.com/2014/08/04/position-designation-type-investigation-required/ (explaining that the classification is based on (1) the level of risk the position poses to the agency or government and (2) what and how much sensitive classified material will the employee be handling).

39. Nicole Ogrysko, *OPM, OMB to Stand Up New Agency, Director to Own Security Clearance Process*, FEDERAL NEWS RADIO (Jan. 22, 2016, 11:50 AM), http://federalnewsradio.com/opm-cyber-breach/2016/01/opm-announces-major-update-to-security-clearance-policy/.

40. William H. Henderson, *Security Clearance Frequently Asked Questions*, CLEARANCEJOBS, https://www.clearancejobs.com/security_clearance_faq.pdf (last visited Sept. 7, 2017).

41. Jamal Brown, *Modernizing & Strengthening the Security & Effectiveness of Federal Background Investigations*, WHITE HOUSE BLOG (Jan. 22, 2016, 11:00 AM), https://www.whitehouse.gov/blog/2016/01/22/modernizing-strengthening-security-effectiveness-federal-background-investigations. Additional changes include:

> 1. [e]stablishing a five-year reinvestigation requirement for all individuals with a security clearance, regardless of the level of access;
> 2. [r]educing the number of individuals with active security clearances by 17 percent;
> 3. [l]aunching programs to continuously evaluate personnel with security clearances to determine whether that individual continues to meet the requirements for eligibility; and
> 4. [d]eveloping recommendations to enhance information sharing between State, local, and Federal Law Enforcement entities when conducting background investigations.

Id.

42. *Id.*

43. *Id.*

44. *See All About Security Clearances*, *supra* note 1.

President Eisenhower established the procedures for receiving a clearance in 1960.[45] The structural layout in Executive Order 10,865 (the Order) allowed for the DOD and other government agencies to conduct background checks prior to employing an individual who would handle sensitive information.[46] Obtaining the required level of clearance entails going through a background check conducted by the appropriate agency.[47] Individuals cannot obtain a security clearance on their own, instead sponsorship is required from a contractor or federal agency.[48] Once a prospective employee receives sponsorship or a "conditional offer of employment," the individual must fill out a "Standard Form 86" security questionnaire, which is reviewed by the sponsoring agency's human resources department for inconsistencies.[49] Under the current structure, DOD clearances are handled by DISCO, and agencies that do not require a DOD clearance must file the applicant information with the NBIB to continue the investigation.[50] If approved, the agency and NBIB then require the individual to meet with an investigator at least once, and may require additional meetings or polygraphs depending on the level of clearance required.[51] The final decision to grant or deny the clearance falls on the agency or department in consultation with the NBIB.[52]

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45. Exec. Order No. 10,865, 3 C.F.R. 62 (1960), *amended by* Exec. Order No. 10,909, 3 C.F.R. 75 (1961).

46. *Id.*; *see also* Church, *supra* note 9, at 200–01 ("[Executive Order 10,865] sets the framework for the 'Industrial Personnel Security Clearance Review Program,' which is administered by the Department of Defense, and equivalent programs administered by other Government agencies.").

47. *All About Security Clearances*, *supra* note 1; *see also* Brown, *supra* note 41 (explaining that a majority of background checks are conducted by the newly formed NBIB agency).

48. Henderson, *supra* note 40.

49. *All About Security Clearances*, *supra* note 1. The stated purpose of the Standard Form 86 is as follows:

> This [Standard Form 86] will be used by the United States (U.S.) Government in conducting background investigations, reinvestigations, and continuous evaluations of persons under consideration for, or retention of, national security positions as defined in 5 CFR 732, and for individuals requiring eligibility for access to classified information under Executive Order 12968. This form may also be used by agencies in determining whether a subject performing work for, or on behalf of, the Government under a contract should be deemed eligible for logical or physical access when the nature of the work to be performed is sensitive and could bring about an adverse effect on the national security.

U.S. OFFICE OF PERS. MGMT., OMB No. 3206-0005, QUESTIONNAIRE FOR NATIONAL SECURITY POSITIONS 1 (2010).

50. *See* Henderson, *supra* note 40; Brown, *supra* note 41.

51. *See All About Security Clearances*, *supra* note 1; *see also Passing the Polygraph*, MILITARY.COM, http://www.military.com/veteran-jobs/security-clearance-jobs/passing-polygraph.html (last visited Feb. 6, 2018).

52. *See* 32 C.F.R. § 147.2(b) (2016); *see also* Brown, *supra* note 41.

The second section of the Order addresses the process required when revoking or denying a security clearance.[53] The Order specifies the minimum Due Process requirements for the removal of a clearance:

> 1. [A] written statement of reasons why access to classified information may be denied or revoked ("Statement of Reasons");
> 2. [A]n opportunity to reply in writing;
> 3. [A]n opportunity for a hearing after filing a written reply to the Statement of Reasons;
> 4. [R]easonable time to prepare for the hearing;
> 5. [T]he opportunity to be represented by counsel;
> 6. [T]he opportunity to cross-examine persons on any matters (with a limitation on the disclosure of classified information) raised in the Statement of Reasons, other than the characterization of any organization or individual other than the applicant; and
> 7. [W]ritten notice of the final decision concerning the allegations contained in the Statement of Reasons.[54]

Initially, the Order specified the Secretary of Defense as the individual in charge of handling the revocation process or delegating revocation procedures.[55] However, under the current format, each federal agency handles its own processes and adjudications consistent with the minimum requirements set out in the Order.[56]

Although not all processes are the same, each agency follows a basic format. Once a security clearance is denied or revoked, the agency will issue a "Statement of Reason" (SOR) or a similar letter of intent to the individual, which contains factual explanations for the denial or revocation.[57] Agencies may explain within the SOR why granting the clearance would be inconsistent with national security concerns.[58] If the individual is pursuing an appeal, they are then required to respond to the SOR and agency decision in writing.[59] All applicants appealing a revocation or denial are "entitled to an oral hearing, which they must request in their written response to the SOR. Hearings are trial-like

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53. Exec. Order No. 10,865, 3 C.F.R. 62 (1960), *amended by* Exec. Order No. 10,909, 3 C.F.R. 75 (1961); *see also* Church, *supra* note 9, at 201 (discussing the Order's minimum standards).

54. Church, *supra* note 9, at 201 (citing Exec. Order No. 10,865 § 3).

55. *See id*.

56. *See* John V. Berry, *I'm a Lawyer Specializing in Security Clearance Cases. Hillary Clinton Got Off Easy*, WASH. POST (July 7, 2016), https://www.washingtonpost.com/opinions/im-a-lawyer-specializing-in-security-clearance-cases-hillary-clinton-got-off-easy/2016/07/07/3810f3c-4480-11e6-bc99-7d269f8719b1_story.html?utm_term=.f5d6b5ec9578.

57. *A Summary of the Security Clearance Appeals Process*, BERRY & BERRY PLLC (Nov. 8, 2013), http://www.berrylegal.com/resources/A_Summary_of_the_Security_Clearance_Appeals_Process/ [hereinafter BERRY & BERRY PLLC].

58. *See* Patel, *supra* note 17, at 99.

59. BERRY & BERRY PLLC, *supra* note 57.

proceedings conducted before administrative law judges."[60] Following the written response and, if requested, oral hearing, the agency's adjudicator will re-review the individual's application and decide whether to overturn the denial, uphold the agency's decision, or request further information.[61] If the employment position in question requires access to sensitive information, the revocation or denial of a clearance will cost the individual his or her job.[62]

D. U.S. Merit Systems Protection Board Review

Federal government employees who lose clearance following the agency adjudication process are left with limited options for appeal.[63] The Civil Service Reform Act (CSRA) permits government personnel to appeal security clearance revocation or adverse employment decisions to the MSPB for judicial review.[64] The MSPB serves as the independent agency responsible for addressing questions regarding the federal merit systems.[65] However, it does not provide hearings for government employees on issues such as discrimination complaints, unfair labor complaints, adverse employment decisions unrelated to clearance revocation, or activities prohibited by civil service regulations.[66] Government employees facing adverse employment effects from a clearance revocation may petition the regional MSPB Board within thirty days of the agency's decision.[67] The appellant has the option of receiving representation before the MSPB appoints an administrative law judge (ALJ) to review the petition.[68]

Once an appeal is filed, the ALJ alerts both petitioner-appellant and the agency of the impending review.[69] The ALJ is responsible for holding pre-

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60. *See* Patel, *supra* note 17, at 99 (footnote omitted).

61. BERRY & BERRY PLLC, *supra* note 57.

62. Church, *supra* note 9, at 198.

63. *Id.* at 214.

64. *See* Patel, *supra* note 17, at 94; *see also* Civil Service Reform Act of 1978, Pub. L. No. 94-454, § 204(a), 92 Stat. 1111, 1137–38.

65. *See About MSPB*, U.S. MERIT SYS. PROTECTION BOARD, http://www.mspb.gov/about/about.htm (last visited Feb. 6, 2018).

> The Merit Systems Protection Board is an independent, quasi-judicial agency in the Executive branch that serves as the guardian of Federal merit systems. The Board was established by Reorganization Plan No. 2 of 1978, which was codified by the Civil Service Reform Act of 1978 (CSRA), Public Law No. 95-454. . . .
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> . . . .
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> . . . MSPB carries out its statutory responsibilities and authorities primarily by adjudicating individual employee appeals and by conducting merit systems studies. In addition, MSPB reviews the significant actions of the Office of Personnel Management (OPM) to assess the degree to which those actions may affect merit.

Id.

66. *Id.*

67. *See How to File an Appeal*, U.S. MERIT SYS. PROTECTION BOARD, http://www.mspb.gov/appeals/appeals.htm (last visited Feb. 6, 2018).

68. *Id.*

69. *Id.*

hearing conferences and a full hearing on matters of both fact and law.[70] Once the hearing is complete, the ALJ will issue an initial decision that can be appealed to the MSPB or directly to the U.S. Court of Appeals for the Federal Circuit.[71] If the petitioner-appellant appeals to the MSPB, a three Board member panel reviews the case and issues a final decision.[72] Finally, the employee's options are only exhausted once an appeal of the MPSB decision is made to the Federal Circuit.[73] The federal judiciary has been forced to grapple with competing precedent when defining its role in addressing security clearance denials and revocations that involve alleged constitutional violations.

II. DEBATE WAGES OVER THE JUDICIARY'S ROLE IN SECURITY CLEARANCE JURISPRUDENCE

A. The Egan *Decision: Defining National Security Jurisprudence*

In 1981, Thomas Egan lost his job as a civilian employee for the Navy when his security clearance application was denied because he failed to disclose prior convictions for federal gun charges.[74] Egan responded by appealing the denial—first through the Department of the Navy, and then through the MSPB.[75] The Board accepted Egan's appeal as a result of the disparate employment decision that resulted from the failure to acquire a security clearance.[76] During the hearing, the government stated the MSPB had limited ability to review the case because "the Board did not have the authority to judge the merits of the underlying security-clearance determination."[77] Initially, a MSPB official reversed the Navy's decision, requiring the department to explain the specific reasons for denying the clearance and prove that those reasons were reasonably related to national security concerns.[78] However, the Navy was granted a review of that decision by the full Board in which the Board unanimously held that the statutory language and legislative history of the enabling statute did not require

70. *Id.*

71. *Id.*

72. *Id.*

73. *See id*.

74. *See* Dep't of Navy v. Egan, 484 U.S. 518, 521 (1988) ("[T]he Director of the Naval Civilian Personnel Command issued a letter of intent to deny respondent a security clearance. This was based upon California and Washington state criminal records reflecting respondent's convictions for assault and for being a felon in possession of a gun, and further based upon his failure to disclose on his application for federal employment two earlier convictions for carrying a loaded firearm. The Navy also referred to respondent's own statements that he had had drinking problems in the past and had served the final 28 days of a sentence in an alcohol rehabilitation program.").

75. *Id.* at 522.

76. *Id.* at 522–23.

77. *Id.* at 523.

78. *Id.*

or authorize a review of clearance decisions.[79] Egan petitioned to the Court of Appeals for the Federal Circuit, which reversed the MSPB's final decision.[80]

When elevated to the Supreme Court, the Court granted cert and reversed the Federal Circuit's decision following a review of the statutory language and national security concerns that clearly attach to security clearance procedures and policies.[81] In examining Egan's claim, the Court's explanation for the decision was two-fold. Reviewing the language of § 7513, Justice Blackmun stated a clearance denial or revocation did not amount to an "adverse action" as defined in the statute.[82] The Court concluded there was no "right" to a clearance, and therefore, the decision to grant or revoke such a clearance "requires an affirmative act of discretion on the part of the granting official."[83] In explaining the Court's deference, Justice Blackmun posited:

> A clearance does not equate with passing judgment upon an individual's character. Instead, it is only an attempt to predict his possible future behavior and to assess whether, under compulsion of circumstances or for other reasons, he might compromise sensitive information. It may be based, to be sure, upon past or present conduct, but it also may be based upon concerns completely unrelated to conduct, such as having close relatives residing in a country hostile to the United States. "[T]o be denied [clearance] on unspecified grounds in no way implies disloyalty or any other repugnant characteristic."[84]

The broad discretion standard adopted by the Court was also rooted in national security concerns within the power of the Executive.[85] When handling national

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79. *Id.* at 524 (citing 5 U.S.C. § 7512 (1978)).

80. *Id.* at 525.

81. *Id.* at 525–30.

> Presidents, in a series of Executive Orders, have sought to protect sensitive information and to ensure its proper classification throughout the Executive Branch by delegating this responsibility to the heads of agencies. . . .
>
> It should be obvious that no one has a "right" to a security clearance. The grant of a clearance requires an affirmative act of discretion on the part of the granting official. The general standard is that a clearance may be granted only when "clearly consistent with the interests of the national security."

Id. at 528.

82. *Id.* at 530. Noting this, one commentator explained:

> [T]he Court explained that a denial of a security clearance is not an "adverse action" and, thus, is not subject to Board review. The statute specifically entitles employees terminated for cause under § 7513 to procedural protections only, including determination of (1) whether such cause existed, (2) whether in fact clearance was denied, and (3) whether transfer to a non-sensitive position was feasible. Therefore, according to the Court, the Board is not authorized to conduct further review into a decision to deny or revoke a security clearance.

Patel, *supra* note 17, at 105 (footnotes omitted).

83. *Egan*, 484 U.S. at 528.

84. *Id.* at 528–29 (quoting Molerio v. FBI, 749 F.2d 815, 824 (1984)).

85. *Id.* at 527.

security issues, "courts have traditionally shown the utmost deference to Presidential responsibilities."[86] Relying on this principle and the statutory language, the *Egan* Court set the tone for deference to agency decisions involving security clearance decisions.[87]

B. Constitutional Claims in Security Clearance Jurisprudence

Following the holding in *Egan*, courts have refused to conduct substantive reviews of security clearance decisions.[88] Employees who lose employment as a direct result of a denial or revocation of a security clearance are only able to obtain a "surface" level review of the procedure, with no protection afforded regarding the reasons or policies behind the decision.[89] As a result of the *Egan* decision, federal appellate courts have consistently ruled in favor of agencies when clearance decisions are brought before them.[90] This reluctance to question agency judgment when reviewing the reasoning behind a clearance decision has been apparent throughout modern clearance jurisprudence.

The Supreme Court failed to address how the appellate courts should handle the constitutional questions and due process concerns in *Egan*. Following their decision, the Supreme Court offered insight into these concerns in *Webster v. Doe*.[91] The Central Intelligence Agency (CIA) revoked the clearance and employment of an employee upon discovering that the individual was a homosexual.[92] The individual challenged the Agency's decision on separate

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86. United States v. Nixon, 418 U.S. 683, 710 (1974).

87. *Egan*, 484 U.S. at 527.

88. Patel, *supra* note 17, at 105–07.

89. *Id.* at 106.

90. *See, e.g.*, Carlucci v. Doe, 488 U.S. 93, 97–98 (1988) (involving a National Security Agency employee who was fired under § 7532 when he disclosed homosexual relationships that had occurred within the scope of his employment); Berry v. Conyers, 692 F.3d 1223, 1225, 1228–29 (Fed. Cir. 2012) (involving two Department of Defense employees who were demoted and eventually lost their jobs as a result of a failure to receive a security clearance); Skees v. Dep't of Navy, 864 F.2d 1576, 1577–79 (Fed. Cir. 1989) (involving an employee was terminated following the denial of security clearance and an inability of the Navy to find an alternative position with the department); Hegab v. Long, 716 F.3d 790, 791, 797 (4th Cir. 2013).

91. 486 U.S. 592, 594 (1988). As one commentator explained:

> The Supreme Court has not clarified how *Egan* should limit Federal Circuit review since the late 1980s. The most significant attempt appeared in *Webster v. Doe*, where a distinction was made between security clearance issues and constitutional claims. . . . The Court ruled that APA review was precluded because the employee's security clearance was terminated through CIA power granted under the National Security Act. It determined that lower courts could hear other constitutional claims, however, not otherwise prohibited by statute.

Pollack, *supra* note 14, at 147.

92. *Webster*, 486 U.S. at 595. The Court explained that Webster failed to allege an unconstitutional policy had existed at the CIA:

> We share the confusion of the Court of Appeals as to the precise nature of respondent's constitutional claims. It is difficult, if not impossible, to ascertain from the amended complaint whether respondent contends that his termination, based on his homosexuality,

grounds: that the decision violated the Administrative Procedure Act (APA) and that it deprived him of his Fifth Amendment Due Process and Equal Protection rights.[93] The Supreme Court refused to review the Agency's decision under the APA because the Agency satisfied the required "arbitrary and capricious standard" in its decision-making.[94]

Again, relying on the statutory language and legislative intent, the Supreme Court explained that the National Security Act, which granted the CIA the authority to handle clearance and employment decisions, was clear in restricting judicial review of agency decisions.[95] However, the Supreme Court left the door open for substantive review of constitutional claims.[96]

In the wake of the *Egan* and *Doe* decisions, the federal judiciary has struggled to balance the broad discretion standard with the requirement to allow review of constitutional claims.[97] Security clearance questions pertaining to Fifth

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> is constitutionally impermissible, or whether he asserts that a more pervasive discrimination policy exists in the CIA's employment practices regarding all homosexuals. This ambiguity in the amended complaint is no doubt attributable in part to the inconsistent explanations respondent received from the Agency itself regarding his termination. Prior to his discharge, respondent had been told by two CIA security officers that his homosexual activities themselves violated CIA regulations. In contrast, the Deputy General Counsel of the CIA later informed respondent that homosexuality was merely a security concern that did not inevitably result in termination, but instead was evaluated on a case-by-case basis.

Id. at 602.

93. *Id.* at 596.

94. *See id.* at 603–05.

95. *Id.* at 603.

96. *Id.* at 604–05 ("Petitioner also contends that even if respondent has raised a colorable constitutional claim arising out of his discharge, Congress in the interest of national security may deny the courts the authority to decide the claim and to order respondent's reinstatement if the claim is upheld . . . . [W]e do not think Congress meant to impose such restrictions when it enacted § 102(c) of the NSA. Even without such prohibitory legislation from Congress, of course, traditional equitable principles requiring the balancing of public and private interests control the grant of declaratory or injunctive relief in the federal courts.").

97. Victor R. Donovan, *Administrative and Judicial Review of Security Clearance Actions: Post* Egan, 35 A.F.L. REV. 323, 333–34 (1991) (explaining that although most courts err on the side of heavy discretion in the agency's favor, the federal judiciary has been unable to consistently apply the Webster decision while affording significant weight to the agency's final decision). Additionally, federal courts have struggled to handle Title VII and other constitutional claims involving security clearance procedures. *Id.* at 331–34. The article points specifically to the case of *Jamil v. Defense Mapping Agency*, 910 F.2d 1203 (4th Cir. 1990), as an example of this issue, stating:

> It is questionable whether the Federal courts will allow Title VII attacks upon security clearance actions. . . .
>
> . . . In *Jamil v. Defense Mapping Agency*, the plaintiff appealed the revocation of his security clearance and subsequent removal from employment for financial irresponsibility. . . . Although Jamil conceded that *Egan* prevented the MSPP and the Federal courts from hearing the merits of his security revocation, he argued he could still challenge his revocation on the grounds that it violated other substantive laws [such as Title VII], and that the agency failed to follow its own procedures. . . .

Amendment Due Process and Equal Protection claims have been particularly difficult for the courts to handle.[98] The federal judiciary has been inconsistent on handling Fifth Amendment claims in the context of security clearance revocations and denials.[99] The only consistency with constitutional claims is the skepticism through which the court views alleged violations of Fifth Amendment Due Process following a clearance removal.[100] The judiciary's struggle to balance constitutional claims with the broad discretion standard has led the courts to continue to favor deference to the agency.[101] As agency deference grows, criticism of the current standard as it pertains to employee rights has risen in tandem.[102]

C. The Pitfalls of Judicial Deference

Skeptics of the Supreme Court's holding in *Egan* take particular issue with the lack of effective relief for an employee who faces an adverse employment decision resulting from a security clearance denial.[103] Further, without protections, critics of the broad discretion standard worry agencies can abuse clearance denials to effectively remove employees without scrutiny.[104] Under the current format, procedural failures by the agency are the only protection an employee is afforded.[105] The minimum requirements set by the court when

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> . . . The court specifically refused to reach the question of whether *Egan* would prevent it from reviewing the revocation of a security clearance if Jamil had raised a genuine issue of fact as to the existence of pretext. Although it refused to reach this question, the court's unwillingness to reiterate that this decision is beyond court review may indicate it believes it could consider the merits of a revocation to determine whether it was pretextual.

Id. at 331–32 (footnotes omitted).

98. *Id.* at 332–34.

99. *Id.*

100. *Id.* at 332 ("To date several federal circuits have considered whether constitutional challenges to security clearance actions have survived *Egan*. Although the law in this area is still being developed, the courts that have considered the issue have agreed that the merits of the decision are not reviewable by a court or board. These courts have also agreed that substantive due process attacks upon security clearance revocations are not well founded. What is less clear is whether *Egan* allows courts to consider attacks upon security clearance actions based upon alleged violations of equal protection guarantees.").

101. *See* Patel, *supra* note 17, at 106–08.

102. *Id.* at 94 ("*Egan* is becoming increasingly relevant today. In 2010, the Board decided two cases addressing whether *Egan*'s limitations should extend to adverse actions involving employees in 'non-critical sensitive' positions. The Board has exhibited a willingness to broaden *Egan*'s narrow jurisdictional limitation beyond review of security clearance denials or revocations to also bar review of whether an employee can hold other sensitive positions. These cases highlight the Boards tendency to allow the executive branch unchecked discretion regarding national security decisions.").

103. *Id.* at 105–07.

104. *Id.* at 106–08.

105. *Id.* at 107 ("[The current judicial review] is limited to procedural review of: (1) whether a clearance was actually denied, (2) whether the position required the security clearance, and (3)

reviewing the agency's effectiveness in following the appropriate processes can be easily met if the agency allowed the employee to (1) receive notice of the revocation and subsequent termination, (2) have an opportunity to respond, and (3) obtain notice of the reasoning behind the decision—so long as the agency does not invoke the national security exemption.[106]

Agencies are able to rely on the current standard to ensure the proper procedures are followed in order to revoke or deny a clearance without providing any significant insight into the reasoning.[107] The current model could reasonably incentivize agencies to make arbitrary or malicious employment decisions with security clearances as the vehicle for such action. Additionally, those in academia who are critical of the modern clearance jurisprudence point to the lack of substantive evaluations as a restriction on alternative claims against a revocation or denial.[108] Without the ability to review a clearance revocation on its merits, an employee is unable to bring forth additional statutory claims, such as a violation of Title VII of the Civil Rights Act of 1964.[109] As a result of these restrictions, statutory alternatives have been proposed to remedy the broad agency discretion.[110]

Critics of the modern clearance jurisprudence have offered amendments that would alter the CSRA and the statutory scheme that currently precludes review of MSPB clearance reviews.[111] The most substantial change would allow merit-

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whether the statutory procedures in § 7513 were followed. . . . The Court's three-pronged review is superficial. The first two elements are questions of fact that the Board can answer simply by looking at the record. These questions only provide protection from dishonest terminations, i.e., if the agency terminates an employee when a security clearance was not actually required for the position or if the security clearance was not actually denied. In most cases, though, this is not what the employee disputes. An employee could claim that his position should not have required a security clearance, but the Board cannot review that designation either. As a result, these two questions provide little to no protection.").

106. *Id.*

107. *Id.*

108. *See id.* at 107–12.

109. *Id.* at 108–09 (stating that without the ability to review the merits of a security clearance decision, a court is unable to find a Title VII violation, and "[t]herefore, employees in protected classes are unable to seek review of the underlying security clearance decisions that lead to their terminations.").

110. *Id.* at 114.

111. *Id.* (outlining a legislative change the CSRA to include merit based reviews and a two-part statutory scheme). The article proposes the following:

> First, it should amend § 7512 to include adverse security clearance decisions in the list of actions covered by the subchapter. Specifically, it should add "(6) a denial, suspension, or revocation of a security clearance" after § 7512(5).
>
> Second, Congress should amend § 7513 by adding a provision after § 7513(d) as follows: (e) An employee whose termination under this section arises from the employee's security clearance being denied, suspended, or revoked is entitled to appeal to the Merit Systems Protection Board under § 7701 of this title. The Merit Systems Protection Board shall have the authority to review the merits of the decision denying, suspending, or revoking the employee's security clearance.

based reviews of all security clearance decisions.[112] Further, the offered change in statutory language would allow the federal judiciary to have an expanded role in reviewing MSPB decisions.[113] The legislative change would explicitly overrule the Supreme Court's current view of post-*Egan* security clearance jurisprudence.[114]

If Congress were to undertake such a legislative initiative, the new standard would allow for all employees who face adverse employment decisions as a result of a clearance denial or revocation to receive a full merit based review of the agency's decision.[115] Moreover, the new approach would have the implied effect of requiring judges to begin questioning agency decisions that involve national security questions.[116] Such a change would be a significant departure from the judiciary's modern position of deferring to the Executive Branch on matters involving national security. However, skeptics of full merit based review and increased judicial oversight have concerns that are rooted in the belief that national security decisions are solely the prerogative of the Executive.[117]

D. Justifying Agency Discretion

The Court's deference to agency judgment is not without legitimate purpose or reason. Although the current standard restricts an employee's ability to obtain review, courts are faced with the difficult challenge of balancing national security interests. When reviewing security clearance jurisprudence, legal scholars have noted that the current model respects the separation of powers by following Congressional statutory language and preserving Executive control of national security matters.[118] Specifically, supporters of agency discretion

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Id. (footnotes omitted).

112. *Id.*

113. *Id.* at 114–15.

114. *See id.* at 114.

115. *Id.*

116. *See id.* at 115.

117. *Id.*

118. Pollack, *supra* note 14, at 151–52; *see also* United States v. Curtiss-Wright Export, 299 U.S. 304, 318–19 (1936) (explaining that executive branch is the sole organ of national security). In *Curtiss-Wright Export*, the Supreme Court explained:

> The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality. . . .
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> . . . .
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> . . . In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.

Curtis-Wright Export, 299 U.S. at 318–19.

believe that *Egan* and its progeny are consistent with the long standing Political Question and State Action doctrines, as the court does not usurp its constitutionally mandated authority.[119] The argument by those in favor of full agency deference, including on those issues involving constitutional claims, is rooted in the belief that any expansion of judicial review would be in conflict with separation of powers, which assigns national security powers to the Executive Branch.[120]

Denying merit based reviews is not seen as a ploy to restrict employee rights by supporters of the Court, but rather an attempt to uphold and protect "constitutional principles."[121] Additionally, a concern exists that the judiciary would be unable to handle sensitive national security questions involved in the merits of a clearance, an area that courts do not have extensive expertise.[122] The Supreme Court admitted in *Egan* that it often does not possess the expertise to handle those national security questions reserved for the Executive.[123]

Most controversially, supporters of modern clearance jurisprudence explain that a distinction between *Webster* and *Egan* exists, allowing for courts to avoid constitutional reviews of clearance denials or revocations.[124] These scholars claim that the *Webster* decision "merely concedes that the courts can hear constitutional claims associated with an employee's termination not otherwise prohibited by statute" while still deferring to the agency's discretion when revoking a clearance.[125] Therefore, courts can avoid answering constitutional questions when security clearances are challenged.

The diverse viewpoints on both sides of the modern *Egan* debate demonstrate the difficult issues courts face when deciding whether to review a security clearance decision.[126] Scholars who advocate for legislative change overlook

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119. Pollack, *supra* note 14, at 151–52 ("The *Egan* decision plainly states that no person has a 'right' to a security clearance, and the grant of such a privilege must come from an official with authority. Furthermore, such an order can only be granted when it is 'clearly consistent with the interests of the national security.' National security interests and determinations are reserved for executive and legislative branch resolution. . . . This ruling conforms to both the Political Question and State Action Doctrines by keeping courts removed from national security determinations reserved for the Executive.").

120. *Id.* at 151–52.

121. *Id.* at 154.

122. *Id.*

123. Dep't of Navy v. Egan, 484 U.S. 518, 529–30 (1988) ("Thus, unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.").

124. Pollack, *supra* note 14, at 151–53.

125. *Id.* at 153.

126. *Compare* Patel, *supra* note 17, at 117 ("As it stands, an employee terminated based on a security clearance denial or revocation is precluded from seeking substantive review of her termination, whereas an employee terminated for any other reason can seek full review with the MSPB. The Supreme Court's decision in *Egan* is a roadblock to the rights of government employees. Only congressional action amending the CSRA will effectively eliminate this roadblock and guarantee a terminated employee MSPB review of the underlying security clearance

the need to protect national security information.[127] Furthermore, their approach avoids addressing the separation of powers question that arises from each clearance review. Those who support the *Egan* decision's broad holding rely on such shortcomings to defend their position.[128] However, these supporters seem to ignore that the decision in *Webster* allowed merit based reviews of constitutional questions involving any adverse employment action, even if the decision involves national security implications.[129] The question remains: Can the judiciary find a viable middle ground in modern security clearance law?

III. CURRENT SECURITY CLEARANCE JURISPRUDENCE OPENS THE DOOR FOR A NEW APPROACH

A. The Hegab *Background*

The case of *Hegab v. Long*[130] represents an opportunity for clarity in the security clearance arena. After obtaining a top secret clearance in January of 2010, Mahmoud Hegab began orientation for his employment at the National

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decisions that resulted in her termination."), *with* Pollack, *supra* note 14, at 157 ("There is a delicate balance between the interests of federal employees and national security. The interests of the former must be protected, but such protection should not come at the expense of the latter. There are alternative procedures that exist to protect federal employees without requiring judicial inquiry into a sensitive security clearance issue. As a result, the Federal Circuit should separate itself from security clearance questions."), *and* Donovan, *supra* note 97, at 336 ("Assuming the Supreme Court eventually holds security clearance determinations to be nonjusticiable . . . it will demonstrate the Supreme Court's recognition that the routine keeping of the nation's secrets must, as a practical matter, be entrusted to the executive branch.").

127. *See* Patel, *supra* note 17, at 115.

128. *See* Pollack, *supra* note 14, at 152–53.

129. *Id.*; Webster v. Doe, 486 U.S. 592, 604–05 (1988); *see also* Pollack, *supra* note 14, at 152–53.

130. 716 F.3d 790, 791 (4th Cir. 2013). In writing for the majority, Circuit Judge Niemeyer explained the facts and history of the case as follows:

> Hegab commenced this action under the Administrative Procedure Act against the NGA and its Director to reverse the NGA's decision, to reinstate his security clearance, and to award him back pay, benefits, and attorneys' fees. In his complaint, he alleged that he presented "overwhelming evidence" to refute the NGA's conclusions and that the NGA staff "did not take the time or effort to review" the facts or "assumed that anything with the name 'Islam' associated with it is a subversive terrorist organization." He alleged that "[i]f the latter is true . . . [his] constitutionally protected rights of freedom of religion, freedom of expression, and freedom of association" were violated. The district court dismissed Hegab's complaint under Federal Rule of Civil Procedure 12(b)(1), concluding that it did not have subject-matter jurisdiction to review a security clearance determination.
>
> We conclude that Hegab's speculative and conclusory allegations of constitutional violations were essentially recharacterizations of his challenge to the merits of the NGA's security clearance determination and that we do not have jurisdiction to review such a determination.

Id. (alteration in original).

Geospatial Intelligence Agency (NGA).[131] During the orientation, Hegab disclosed to a security officer that he had married Bushra Nusairat following his clearance investigation.[132] The disclosure of new information prompted the NGA to re-investigate Hegab's clearance, and by November of the same year, the agency issued a ruling revoking the clearance.[133] The statement of reasons released by the agency stated that Hegab and his wife's association with foreign governments and organizations "present[ed] an elevated foreign influence risk that [wa]s problematic and unacceptable to the national security of the United States."[134] Hegab appealed his revocation to the NGA and, after receiving a final rejection in 2011, filed suit against the agency.[135] Although Hegab conceded that "courts are generally without subject-matter jurisdiction to review an agency's security clearance decision,"[136] his suit alleged the revocation violated his "constitutionally protected rights of freedom of religion, freedom of expression, and freedom of association."[137]

The district court dismissed Hegab's claim, stating it did not have subject matter jurisdiction.[138] Hegab appealed that decision to the Fourth Circuit, which concluded that the district court did not err in dismissing the former NGA

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131. *Id.* at 791–92.

132. *Id.* at 792.

133. *Id.*

134. The complete list of reasons provided by NGA for the clearance re-investigation and revocation were:

> (1) that Hegab, his parents, and his siblings held dual citizenship with the United States and Egypt; (2) that Hegab still possessed an Egyptian passport and that it would require contact with foreign national government officials for Hegab to renounce his Egyptian citizenship and turn in his passport, which would increase the potential that he would be monitored by foreign intelligence services; (3) that Hegab stated that he was 80% certain that his wife held dual citizenship with Jordan; (4) that Hegab reported "continuing contact with multiple foreign nationals (including relatives), some of whom reside outside of the Continental United States"; (5) that Hegab had reported residing in Egypt from May 2004 to November 2007; (6) that Hegab's spouse had attended and graduated "from the Islamic Saudi Academy, whose curriculum, syllabus, and materials are influenced, funded, and controlled by the Saudi government"; and (7) that "[i]nformation available through open sources identifies [Hegab's] spouse as being or having been actively involved with one or more organizations which consist of groups who are organized largely around their non-United States origin and/or their advocacy of or involvement in foreign political issues."

Id. (alteration in original).

135. *Id.* at 793.

136. *Id.* at 794. The court stated:

> Both Hegab and the NGA appear to agree with the proposition that no one has a right to a security clearance and that the grant of a security clearance is a highly discretionary act of the Executive Branch. They also recognize that the Fourth Circuit has concluded that security clearance determinations are generally not subject to judicial review.

Id. at 793.

137. *Id.* at 791.

138. *Id.* at 793.

employee's claim.[139] Writing for the majority, Judge Niemeyer concluded, "Hegab's constitutional allegations are conclusory only, resting on his disagreement with the NGA's decision on the merits."[140] Therefore, under the *Egan* standard, the Fourth Circuit concluded that Hegab's claim must be dismissed because the judiciary does not have the authority to review the merits or evidentiary conclusions of a security clearance decision.[141]

B. Finding a Middle Ground: The Hegab *Approach*

Although the Fourth Circuit's holding was standard in security clearance appeals, the concurring opinion written by Judge Motz proposed a solution on how courts could "reconcile" the *Egan* and *Webster* decisions.[142] Specifically, she suggested that constitutional claims resulting from a clearance revocation or denial could be subject to judicial review.[143] In her concurring opinion, Judge Motz opined:

> If *Egan* stood alone, clearly it would require dismissal here too. But in *Webster v. Doe*, decided the same term as *Egan*, the Supreme Court appeared to hold, over vigorous dissents, that federal courts have jurisdiction to review constitutional challenges to security-related employment decisions. . . .
>
> . . . .
>
> . . . In light of the holding in *Egan*, at most *Webster* permits judicial review of a security clearance denial only when that denial results from the application of an allegedly unconstitutional *policy*.[144]

Through her concurrence, Judge Motz offers an approach that will afford constitutional protections to employees without significantly impeding upon the Executive's control of national security matters.[145] By allowing reviews only of unconstitutional policies, the court would be restricted to review only the merits of the policy, rather than the specific factors that played a role in the denial or

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139. *See id.* at 791.

140. *Id.* at 796.

141. *Id.* ("In its security clearance determination, the NGA concluded that Hegab had failed to mitigate its concern of 'an elevated foreign influence risk that is problematic and unacceptable to the national security of the United States,' and this conclusion is one in which the NGA 'should have the final say,' and in which courts should not intrude." (internal citation omitted) (quoting Dep't of Navy v. Egan, 484 U.S. 518, 529 (1988))).

142. *Id.* at 798 (Motz, J., concurring).

143. *Id.* at 797–98 (Motz, J., concurring).

144. *Id.* at 798 (Motz, J., concurring) (internal citations omitted). Although Judge Motz claims unconstitutional policies should be subject to review, in that case, "Hegab allege[d] no unconstitutional policy but only an assertedly unconstitutional individualized adverse determination, [and therefore] his claim fail[ed]." *Id.* (Motz, J., concurring).

145. *Id.* (stating that "nothing in *Webster* indicates that it overruled *Egan*," and that courts could still assess the constitutionality of a policy claim "without delving into the merits of an individualized security clearance determination").

revocation of an individual's clearance.[146] Such a limited review would keep the judiciary from impinging on clear boundaries, which would otherwise risk exposing national security secrets. In other words, specific decisions made during an *individual* clearance review process would remain shielded from scrutiny.

The concern within intelligence and security communities that reviewing clearance revocations may expose sensitive materials can be assuaged by judicial review that only focuses on internal policies.[147] During these reviews, the judiciary would have no need to request classified materials as the proceeding would have no bearing on the individual's conduct. Rather, the court's focus would be on the institutional policy that is alleged to have violated the employee's constitutional right. Thus, the court could provide protection for an employee and render a decision that has no bearing on the sensitive material involved in the agency's revocation decision of an individual.

Additionally, agencies would be unable to promulgate arbitrary revocation policies that restrict the constitutional rights of its employees. Judge Motz's opinion presents an opportunity for the federal courts to ensure that agencies are not engaging in unlawful discrimination when establishing revocation policies. Agencies would be required to ensure security clearance policies are in line with federal law as a safeguard for individuals facing revocation.

Moreover, a change in posture from the federal judiciary would have the added benefit of encouraging agency transparency when outlining security clearance procedures. However, under this standard the courts would still be able to afford deference to the agency by refusing to delve into the intricate details of an individual's revocation. Unlike other reformers, *The Hegab Approach* sufficiently considers the national security concerns implicated in a security clearance decision.[148] The current clearance procedures have left many

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146. *Id.*

147. Presumptively, prohibiting the judicial review of individual security clearance determinations will limit the chances that sensitive material is exposed in the process. *See id.*

148. *See* Jason Rathod, Note, *Not Peace, But a Sword:* Navy v. Egan *and the Case Against Judicial Abdication in Foreign Affairs*, 59 DUKE L.J. 595, 597–98 (2009). In that Note, the author argued that,

> lower courts [should] change course by reopening judicial review of the merits of security clearance determinations, making injured plaintiffs whole, deterring future racial discrimination, and avoiding a chilling effect on agency adjudicators.
>
> In short, to reclaim its role in the United States' system of separation of powers, the judiciary should not use the Constitution to make peace with the political branches of government, but rather, should wield it as a sword.

Id. at 635. However, the author fails to recognize the national security implications of a complete and detailed review of the merits of a clearance revocation, as a "substantive review of a security clearance revocation . . . creates a separation of powers issue by requiring an inquiry into a sensitive area in which [the court] lacks expertise. This creates a risk that the security clearance system was developed to prevent." Pollack, *supra* note 14, at 155 (footnotes omitted).

federal employees clouded by uncertainty following a revocation decision.[149] Through a middle ground approach, the Supreme Court would establish a consistent review policy that would effectively balance constitutional and national security concerns.

IV. CONCLUSION

As security clearances come to the forefront of public debate for the first time, the Supreme Court has the opportunity to grant clarity in clearance jurisprudence. Through reconciling the decisions in *Egan* and *Webster*, the Court can afford protection to employees while respecting the tenants of Executive power. Refusing to apply *Webster* in the context of security clearance decisions would continue to restrict the constitutional rights of employees facing an adverse employment decision as the result of a denial or revocation.

The call to modernize security clearance jurisprudence post-*Egan* is long overdue as the issue comes to light on the national stage for the first time. Now is the time for the judiciary to shift course with the common sense *Hegab* approach. Courts remaining on the current course in security clearance jurisprudence will only lend more confusion to the issue and inadequate support for the constitutional rights of employees requiring a clearance.

Although a noble idea, a complete overhaul of clearance reviews post-*Egan*, would require the de-classification of sensitive materials and have the unintended effect of harming national security. The new middle ground approach established in the *Hegab* concurrence accomplishes the incredibly difficult task of safeguarding national security, while also ensuring that the constitutional rights of employees are protected. The Supreme Court would be wise to adopt the approach taken by Judge Motz in *Hegab* and provide a comprehensive solution to the problems that arise from a security clearance dispute.

149. *See* Susan McGuire Smith, *No Security Clearance, No Job*, FEDSMITH (Aug. 13, 2015), http://www.fedsmith.com/2015/08/13/no-security-clearance-no-job/.