THIRTY YEARS AFTER *EGAN*: DEFINING EXECUTIVE BRANCH AUTHORITY IN CIVILIAN PERSONNEL DECISIONS MOTIVATED BY NATIONAL SECURITY CONCERNS

MICHAEL J. CARLSON*

I. Introduction

In April 2015, the Army's Blue Grass Army Depot (BGAD) failed an annual safety inspection by the Joint Munitions Command (JMC).[1] The JMC concluded that BGAD neglected to properly maintain its Intrusion Detection System (IDS) in compliance with the Army regulations governing its Arms, Ammunition, and Explosives (AA&E) program. The IDS is a key component of the security system designed to guard some of the Army's most dangerous conventional weapons from theft or sabotage. The weapons systems at BGAD included Stinger missiles in ready-to-fire status and other weapons that would pose an immediate threat of mass casualties if they were stolen by a terrorist organization, a criminal enterprise, or a disgruntled employee intent on perpetrating a mass homicide.

A subsequent internal inspection revealed that two electronics mechanics charged with maintaining the IDS, both Federal civilian employees, violated Army regulations by installing unauthorized devices that would prevent the IDS from alarming in the event an intruder accessed buildings in which weapons were stored.

The BGAD commander acted promptly, suspending the employees' employment and their certifications under the AA&E program, pending the results of an internal investigation. The certification is a condition of

* Litigation Attorney, United States Army Litigation Division, Fort Belvoir, Virginia. Previously assigned as Student, 68th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, Charlottesville, Virginia. LL.M., 2020, The Judge Advocate General's School; J.D., 1996, University of Maryland, School of Law; M.P.M., 1992, University of Maryland, School of Public Policy; B.A., 1987, Randolph-Macon College. Member of the Bars of Maryland, the United States Court of Appeals for the First Circuit, the United States Court of Appeals for the Fourth Circuit, and the Supreme Court of the United States. This article was submitted in partial completion of the Master of Laws requirements of the 68th Judge Advocate Officer Graduate Course.

[1] The facts recited in this section are based on those underlying *Bilski v. McCarthy*, Civil Action No. 5: 16-322-DCR, 2017 WL 3484686 (E.D. Ky. Aug. 14, 2017). Some facts have been altered for ease of presenting the issues considered in this article. To avoid confusion with the actual facts at issue in *Bilski*, this article simply references the case as the "BGAD case" or the "situation at BGAD."

employment for personnel working with sensitive AA&E; it includes a requirement that employees go through screening beyond that required to receive their security clearances. When the investigation was completed, the commander revoked the employees' certifications and terminated their employment. The commander neither suspended nor sought revocation of the employees' security clearances.

If the Army had revoked the electronics mechanics' security clearances, the revocations and the commander's removal of the employees would have been dismissed in any related court action pursuant to the Supreme Court's decision in *Department of the Navy v. Egan*.[2] In *Egan*, the Court held that notwithstanding a legislative scheme permitting review of Federal employment decisions by the Merit Systems Protection Board (MSPB), security clearance determinations involving a delegation of the President's power as Commander in Chief under Article II of the Constitution are not subject to judicial review.[3]

While the central holding of *Egan* is unambiguous, the lower courts do not always extend deference to Executive Branch security-related decisions beyond security clearance determinations.[4] Disagreements among the appellate courts as to whether national security-related employment actions, including the decisions involving AA&E certifications at BGAD, will be afforded deference, create challenges for Federal court litigators in developing litigation strategies. The uncertainty also places potential burdens on agency decision makers who may become immersed in litigation for years.[5]

These challenges unexpectedly presented themselves in the BGAD case. After their suspensions and removals, the electronics mechanics initiated a complaint for retaliation based on the commander's actions. Once the employees exhausted the administrative process, they filed a lawsuit against the Army in the U.S. District Court for the Eastern District of Kentucky. In response to the employees' complaint, the Army filed a motion to dismiss the plaintiffs' claims, arguing that *Egan* precluded review of the

[2] Dep't of the Navy v. Egan, 484 U.S. 518 (1988).
[3] *Id.* at 527, 529.
[4] *See, e.g.*, Toy v. Holder, 714 F.3d 881 (5th Cir. 2013).
[5] During the course of fully litigated employment case, an agency decision maker may expect to make four or five statements during the investigation and litigation processes, in addition to spending time preparing to testify, assisting in discovery, and potentially serving as the agency representative at trial, which typically lasts several days. This assertion is based on the author's recent professional experiences as a Litigation Attorney with the Army's Litigation Division from 30 March 2010 to present [hereinafter Professional Experiences].

Army's AA&E certification decisions and the resulting employment actions.

Before the plaintiffs responded to the motion, the Sixth Circuit Court of Appeals[6] ruled in another case that the Tennessee Valley Authority's revocation of a security guard's medical certification, a precondition to working at a nuclear power plant, was not exempt from review under *Egan*.[7] The Sixth Circuit's decision effectively undercut the Army's motion to dismiss and left the BGAD commander's decisions at issue in litigation that would continue for more than four-and-a-half years.[8]

This article focuses on the practice of agency lawyers in Federal courts with the goal of determining the most logical and effective means of protecting agency discretion on national security-related decisions. The approach aims to minimize the litigation burden on agency decision makers and to provide predictability for leaders charged with crafting agency policies.

Part II provides an overview of the civilian personnel system and describes the prevailing law at the time in which *Egan* was decided, giving context to the Supreme Court's decision. Part III reviews the Supreme Court's decision in *Egan*, explaining how it arrived at the conclusion that security clearance determinations are protected from scrutiny by the MSPB and the courts. Part IV is a look forward from *Egan*, examining four appellate decisions that represent divergent views of *Egan.* The examination of these cases defines the common problems confronted by the Federal court litigators charged with handling *Egan*-related issues in civilian employment cases. Part V argues for a logical application of *Egan*, with an interpretation based on consistent adherence to the Supreme Court's guidance and consideration of the authorities on which the Court relied in making its ruling. Finally, Parts VI and VII explore potential exceptions to *Egan*, with Part VI examining potential exceptions for constitutional claims and Part VII considering exceptions that may apply to certain aspects of cases that

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[6] The Sixth Circuit Court of Appeals has appellate jurisdiction over Federal cases originating in U.S. District Courts in Kentucky. *Geographic Boundaries of United States Courts of Appeals and United States District Courts*, U.S. COURTS, https://www.uscourts.gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf (last visited Nov. 28, 2020).

[7] Hale v. Johnson, 845 F.3d 224 (6th Cir. 2016).

[8] Bilski v. McCarthy, 790 F. App'x 756 (6th Cir. 2019) (affirming, in relevant part, the award of summary judgment to the Army on plaintiffs' retaliation claims related to the commander's disciplinary actions).

may be examined even when *Egan* prevents review of a national security-based employment action.

II. Background

Egan arose in a constitutionally complex setting involving the balancing of constitutional powers of the President and Congress with the constitutionally protected interests of Federal employees. The President and Congress both have significant constitutional powers on matters affecting national security, foreign affairs, and civilian employment.[9] The assertion of these constitutional powers by the political branches may conflict with notions of due process that accompany property interests to which civilian employees are normally entitled in their positions.[10] Such assertions of constitutional powers can also encroach on other constitutionally protected liberties.[11]

Subsection A of this background briefly describes the Federal personnel system established by the Civil Service Reform Act of 1978 (CSRA),[12] with a focus on the key provisions considered by the Supreme Court in *Egan*. The CSRA dictates the due process owed to Federal employees in the making of employment decisions and establishes workplace protections for them. Subsection B provides the legal backdrop to *Egan* through a brief examination of two prior Supreme Court cases involving the tension between the Government's exercise of its national security powers and the rights of its employees.

A. An Overview of the Federal Civilian Personnel System[13]

The current iteration of the personnel system governing Federal civilian employment was established by the CSRA and is found in Title V of the

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[9] *See* U.S. CONST. art. I, § 8; *id.* art. II, § 2.

[10] A property interest in a Government position arises when a person has a "reasonable expectation" of continued employment deriving from the applicable of laws or regulations. Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972).

[11] *See, e.g.*, Webster v. Doe, 486 U.S. 592, 596 (1988) (considering alleged violations of an employee's rights under the First, Fourth, Fifth, and Ninth Amendments of the Constitution).

[12] Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of 5, 10, 15, 28, 31, 39, and 42 U.S.C.).

[13] The system covering Federal personnel practices is detailed and often difficult to understand. *See* Professional Experiences, *supra* note 5; *see also* Transcript of Oral Argument at 43, Perry v. Merit Sys. Prot. Bd., 137 S. Ct. 1975 (2017) (No. 16-399) ("[W]ho wrote this statute? Somebody who . . . takes pleasure out of pulling the wings off flies?")

U.S. Code. The CSRA governs a broad array of Federal personnel actions,[14] which must be made in accordance with certain merit system principles[15] and free from illegal discrimination or other motivations contrary to the CSRA's purpose.[16] These principles include the obligation on the part of Government decision-makers to refrain from encroaching on an individual's constitutionally protected rights in making personnel decisions.[17] The CSRA provides for due process[18] and the opportunity to appeal the most significant adverse actions, such as removals, directly to the MSPB.[19] The CSRA affords employees an appeals process, which starts with an appeal to the MSPB[20] and culminates at the U.S. Court of Appeals for the Federal Circuit.[21]

Beyond the process described above, Chapter 75 of Title V establishes an alternative procedure for suspensions and removals of a Federal employee "in the interests of national security."[22] The employee is entitled to a statement of charges, an opportunity to respond, and a hearing before an agency authority.[23] This process ends with an unappealable written decision by the head of the agency.[24]

The CSRA allows for provides alternate methods of review for claims under the various statutes prohibiting discrimination, such as Title VII of the Civil Rights Act of 1964,[25] which have their own administrative processes that generally culminate in the right to file an action in a U.S. district court.[26]

(Alito, J.). This overview provides a description of the principles, decision-making process, and review mechanisms most relevant to this article.

[14] 5 U.S.C. § 2302(a)(2)(A).

[15] *Id.* § 2301(b).

[16] *Id.* § 2302(b).

[17] The CSRA expressly requires that "[a]ll employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management . . . [including] proper regard for their privacy and constitutional rights." *Id.* § 2301(b).

[18] *Id.* § 7543(b).

[19] *Id.* § 7543(d).

[20] *Id.* § 7701; *id.* § 1204.

[21] *Id.* § 1204; *id.* § 7703.

[22] *Id.* § 7532(a)–(b).

[23] *Id.* § 7532(c)(3).

[24] *Id.*

[25] 42 U.S.C. § 2000e-16(a) (prohibiting discrimination based on race, color, religion, sex, or national origin).

[26] *See, e.g.*, *id.* § 2000e-16(c).

B. Prelude to *Egan*: Supreme Court Cases Considering Presidential Authority

Almost twenty years before *Egan*, the Supreme Court decided two cases—*Greene v. McElroy*[27] and *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy* (*Cafeteria Workers*)[28]—that laid the foundation for the Court's decision in *Egan*. Both cases involved claims by Government contractors' employees who lost their positions for security-related reasons without being afforded the opportunity to hear and respond to the evidence supporting the Government's position.

In *Greene*, the employee's loss of his security clearance not only cost him his job but also made it impossible to gain other employment within his field.[29] The Court found the employee had no ability to pursue "his chosen profession free from unreasonable governmental interference," a protected interest under the Fifth Amendment.[30] Based on this "immutable" principle, the Court observed that where the Government contemplates an action that will seriously affect an individual's ability to pursue their occupation, the Government's evidence "must be disclosed to the individual so he has an opportunity to show that it is untrue."[31]

The Court acknowledged that both the President and Congress had the right to limit the procedural rights of an individual based on assertions of their national security powers.[32] The Court found, however, that neither the Executive Orders mandating classification and protection of sensitive information nor Congress' enactment of legislation to support the agency's classification program constituted an authorization for the agency to rescind a security clearance without due process.[33] The Court reasoned that the right to due process is so fundamental to any governmental decision-making process that authorization for a program lacking such provisions is invalid unless it is "clear that the President or Congress, within their respective constitutional powers, specifically decided that the imposed procedures are necessary and warranted and has authorized their use."[34]

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[27] Greene v. McElroy, 360 U.S. 474 (1959).
[28] Cafeteria & Rest. Workers Union, Local 473 v. McElroy (*Cafeteria Workers*), 367 U.S. 886 (1961).
[29] *Greene*, 360 U.S. at 492.
[30] *Id.*
[31] *Id.* at 496.
[32] *Id.*
[33] *Id.* at 499–507.
[34] *Id.* at 507.

The Supreme Court's subsequent decision in *Cafeteria Workers* addressed similar issues, but reached a different conclusion.[35] The employee, who worked as a cook, lost her job after the Navy commander summarily barred her from the installation based on security concerns without providing an explanation.[36] The commander's action was in accordance with the Navy's regulations.[37] The Court rejected the employee's claim that she was entitled to notice and an opportunity to respond to the allegations based on the facts of the case.[38] The Court found that Congress' enactment of legislation authorizing the Secretary of the Navy to promulgate necessary regulations, coupled with the statute's requirement that the President approve any such regulations, was a specific delegation of constitutional power required under *Greene*.[39] The President had "endowed" the regulations "with the sanction of the law."[40]

The Court further observed that while due process is generally required for any Government action, the "Fifth Amendment does not require a trial-type hearing in every conceivable case of government impairment of private interest."[41] The Court further found that the employee lacked a protected interest because the Navy's action did not affect her "right to follow a chosen trade or profession," but merely prevented her from working in a position at one location.[42]

III. *Egan* in Sum

In *Egan*, the Supreme Court considered the justiciability of the Navy's decision to revoke the security clearance of a civilian employee, Thomas Egan, and to remove him from Federal employment.[43] Egan was hired for a civilian laborer leader position at the Navy's Trident Naval Refit Facility to work on the maintenance and repair of nuclear-powered Trident

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[35] Cafeteria & Rest. Workers Union, Local 473 v. McElroy (*Cafeteria Workers*), 367 U.S. 886, 891 (1961).
[36] *Id.* at 887–88.
[37] *Id.* at 888.
[38] *Id.* at 898.
[39] *Id.* at 891.
[40] *Id.* (citing United States v. Maurice, 26 F. Cas. 1211 (C.C.D. Va. 1823) (No. 15,747)).
[41] *Id.* at 894.
[42] *Id.* at 896–97.
[43] Dep't of the Navy v. Egan, 484 U.S. 518, 525–26 (1988).

submarines.[44] Egan's position required a security clearance as a condition of employment.[45]

When Egan began work, he performed non-sensitive duties pending completion of his security investigation.[46] Following completion of the investigation, the Navy denied him a clearance based on the discovery of four criminal convictions and a prior drinking problem.[47] The Navy then removed Egan from his position using the procedure established under 5 U.S.C. § 7513, which governs most significant Federal employment actions, rather than § 7532. The § 7513 process allows for review by the MSPB and the Court of Federal Claims,[48] whereas § 7532, which allows national security-related removals, culminates in an unreviewable decision by the head of the agency.[49] Yet, in *Egan*, the Supreme Court held that the security clearance determination was unreviewable notwithstanding the Navy's use of § 7513.[50] The Court found that the presumption of reviewability "runs aground when it encounters concerns of national security" where a security clearance determination is "committed by law" to the Executive Branch.[51]

Justice Blackmon explained the Court's constitutional basis for reversal:

> The President, after all, is the "Commander in Chief of the Army and Navy of the United States." His authority to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to such information flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant.[52]

As the Court expounded, Presidents have exercised their authority over the protection of sensitive information through a series of Executive Orders, which delegate the President's authority to Federal agencies and

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[44] *Id.* at 520.
[45] *Id.*
[46] *Id.* at 521.
[47] *Id.*
[48] 5 U.S.C. § 7532.
[49] *Egan*, 484 U.S. at 521–22.
[50] *Id.* at 526.
[51] *Id.* at 526–27.
[52] *Id.* at 527 (quoting U.S. CONST. art. II, § 2).

dictate the manner in which information is classified and protected.[53] The requirement that a security clearance be granted only when "clearly consistent with the interests of the national security" requires the type of expertise and "predictive judgment" found only at the agency.[54] The agency must therefore have "broad discretion to determine who may have access to" sensitive information.[55]

At the heart of the Supreme Court's decision is its holding that courts have no role in reviewing security clearance determinations:

> Certainly, it is not reasonably possible for an outside nonexpert body to review the substance of such a judgment and to decide whether the agency should have been able to make the necessary affirmative prediction with confidence. Nor can such a body determine what constitutes an acceptable margin of error in assessing the potential risk.[56]

In reaching this determination, the Court rejected the application of due process jurisprudence holding that an employee's rights may be implicated when Government action would deprive him or her of future employment prospects.[57] The Court posited that "[i]t should be obvious that no one has a 'right' to a security clearance."[58]

Rejecting Egan's argument that the Navy subjected its removal decision to review by using § 7513, the Supreme Court found that the existence of the two administrative procedures under the CSRA—§§ 7513 and 7532—merely provided alternative structures for handling removals related to security clearance decisions.[59] The Court explained that such decisions are not reviewable by the MSPB regardless of the process elected by the agency.[60]

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[53] *Id.*
[54] *Id.* at 528.
[55] *Id.* at 529.
[56] *Id.*
[57] *Id.* at 528–29.
[58] *Id.* at 528.
[59] *Id.* at 530–34.
[60] *Id.* at 533–34.

IV. Courts' Divergent Interpretations of *Egan*

In the wake of *Egan*, Federal courts of appeals have consistently applied the Supreme Court's central holding—that the merits of an agency's security clearance determination are protected from judicial review—and have done so in a variety of cases.[61] However, there are significant disagreements among the courts of appeals as to the scope of *Egan*'s application.[62] These disagreements center primarily on two general questions. First, to what extent are an agency's actions related to a security clearance determination protected from judicial scrutiny?[63] This includes decisions to report security issues and to initiate a security investigation.[64] There is also a related question about whether the actions of every person involved in the security clearance process are protected under *Egan*.[65] The second question is to what extent *Egan* extends to agency actions other than security clearance determinations that bear on national security.[66] Such actions include certifications under personnel reliability programs like those used in the AA&E program at BGAD, and other conditions of employment imposed to protect national security.[67]

The appellate courts' divergent interpretations of *Egan* on these issues is well illustrated by four courts of appeals opinions from the Fourth, Sixth, and D.C. Circuits, discussed in pairs below. Each pair of decisions represents application of *Egan* in strikingly similar factual scenarios, but with different conclusions as to the requirement for judicial abstention.

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[61] *E.g.*, Becerra v. Dalton, 94 F.3d 145, 149 (4th Cir. 1996) (barring claim under Title VII); Guillot v. Garrett, 970 F.2d 1320, 1325 (4th Cir. 1992) (barring claim under the Rehabilitation Act of 1973); Perez v. FBI, 71 F.3d 513 (5th Cir. 1995) (barring claim under Title VII); Brazil v. U.S. Dep't of the Navy, 66 F.3d 193, 195 (9th Cir. 1995) (barring claim under Title VII); Hill v. Dep't of Air Force, 844 F.2d 1407, 1413 (10th Cir. 1988) (barring claim under the Fifth Amendment and the Administrative Procedures Act); Ryan v. Reno, 168 F.3d 520, 523 (D.C. Cir. 1999) (barring claim under Title VII).

[62] *Compare, e.g.*, *Becerra*, 94 F.3d 145 (extending *Egan*'s bar on judicial review to complaints about the instigation of a security investigation), *with* Rattigan v. Holder, 643 F.3d 975 (D.C. Cir. 2011) (rejecting the application of *Egan* to a complaint about the instigation of a security investigation).

[63] *Becerra*, 94 F.3d 145; *Rattigan*, 643 F.3d 975.

[64] *Rattigan*, 643 F.3d 975.

[65] *Id.*

[66] *Compare, e.g.*, Hale v. Johnson, 845 F.3d 224 (6th Cir. 2016) (declining to extend *Egan* to a security-related medical certification decision), *with* Foote v. Moniz, 751 F.3d 656, 657 (D.C. Cir. 2014) (extending *Egan* to a security-related certification program).

[67] *See, e.g.*, *Foote*, 751 F.3d at 657 (applying *Egan* to the Department of Energy's Human Reliability Program).

First, in *Becerra v. Dalton*[68] and *Rattigan v. Holder*,[69] the Fourth and D.C. Circuits considered whether an agency's instigation of a security investigation for purposes of making a clearance determination is protected from judicial review. Second, the question of whether *Egan* extends to employment actions other than security clearance determinations is exemplified by the differing approaches of the Sixth Circuit in *Hale v. Johnson*[70] and the D.C. Circuit in *Foote v. Moniz*.[71]

A. Does *Egan* Extend to the Entire Security Clearance Process?

In *Becerra* and *Rattigan*, the Fourth and D.C. Circuits considered claims in which plaintiffs sought to circumvent *Egan* by challenging the initiation of the security clearance process rather than the final security determination.[72] In both cases, the plaintiffs alleged that they were wrongfully targeted by coworkers who provided false information to security officials for retaliatory reasons.[73] In *Becerra*, the plaintiff's security clearance was revoked, resulting in the loss of his clearance.[74] In *Rattigan*, the Federal Bureau of Investigation's (FBI) Security Division found that the concerns raised by Rattigan's coworker did not necessitate action on his security clearance.[75]

The courts applied different standards and arrived at different results as to whether these referrals of concerning information were protected from court review. The Fourth Circuit rejected Becerra's attempt to distinguish between instigation of a security clearance investigation and the decision ultimately resulting from that investigation, explaining:

> We find that the distinction between the initiation of a security investigation and the denial of a security clearance is a distinction without a difference. The question of whether the Navy had sufficient reasons to investigate the plaintiff as a potential security risk goes to the very heart

[68] *Becerra*, 94 F.3d 145.
[69] *Rattigan*, 643 F.3d 975.
[70] *Hale*, 845 F.3d 224.
[71] *Foote*, 751 F.3d at 657.
[72] *Becerra*, 94 F.3d at 149 (challenging only the instigation of the security investigation based on false information). In *Rattigan*, the FBI's Security Division found that the concerns raised by Rattigan's coworker did not necessitate action on his security clearance. *Rattigan*, 643 F.3d at 984–86.
[73] *Becerra*, 94 F.3d at 149.
[74] *Id.*
[75] *Rattigan*, 643 F.3d at 979.

> of the "protection of classified information [that] must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it." The reasons why a security investigation is initiated may very well be the same reasons why the final security clearance decision is made. Thus, if permitted to review the initial stage of a security clearance determination to ascertain whether it was a retaliatory act, the court would be required to review the very issues that the Supreme Court has held are non-reviewable.[76]

In contrast, the D.C. Circuit found that *Egan* did not apply because "Rattigan's claim implicates neither the denial nor revocation of his security clearance nor the loss of employment resulting from such action."[77] The court further held "that *Egan* shields from review only those security decisions made by the FBI's Security Division, not the actions of thousands of other FBI employees who, like Rattigan's . . . supervisors, may from time to time refer matters to the Division."[78] The court explained, "decisions about whether to grant or deny security clearance require '[p]redictive judgment . . . by those with the *necessary expertise* in protecting classified information.'"[79] The court observed that "such expert predictive judgments are made by 'appropriately trained adjudicative personnel.'"[80] Since Rattigan did not challenge the decision of those trained personnel, *Egan* did not apply.[81]

Significant to the differing opinions is the Fourth Circuit's focus on the extent to which the agency's decision-making implicates a constitutionally delegated authority to the agency as a whole.[82] By contrast, the D.C. Circuit limits protection from judicial scrutiny to the actions of trained security experts who protect the same type of sensitive information.[83]

These divergent applications of *Egan* have significant implications for Federal court litigators, depending on the jurisdiction in which they

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[76] *Becerra*, 94 F.3d at 149 (alteration in original) (quoting Dep't of the Navy v. Egan, 484 U.S. 518, 529 (1988)).
[77] *Rattigan*, 643 F.3d at 981.
[78] *Id.* at 983.
[79] *Id.* (alteration in original) (quoting *Egan*, 484 U.S. at 529).
[80] *Id.* (quoting Exec. Order No. 12968, 60 Fed. Reg. 40,250 (Aug. 7, 1995)).
[81] *Id.*
[82] Becerra v. Dalton, 94 F.3d 145, 149 (4th Cir. 1996).
[83] *Rattigan*, 643 F.3d at 983.

practice. *Rattigan* subjects the security referral decisions by non-experts to court review; it also creates questions about whether an employee involved in the security clearance process may be subjected to a claim in court in other situations. For example, if the BGAD commander had decided to suspend the security clearances of the electronics mechanics pending a final determination, would he be considered sufficiently expert in the exercise of the "predictive judgment" such that his decision would be insulated from judicial review? This is an open question, which, at least in the D.C. Circuit, necessitates litigation on a case-by-case basis to determine the level of expertise of all personnel involved in the security clearance process.

B. Does *Egan* Apply to Security-Related Decisions Other than Security Clearances?

Whether and to what extent *Egan* applies to decisions other than security clearances is a question of significant debate. In *Foote v. Moniz*, the D.C. Circuit extended the application of *Egan* to a reliability program similar to the AA&E program at BGAD.[84] Employing a different analysis, the Sixth Circuit declined to apply *Egan* outside of the security clearance context in *Hale v. Johnson*.[85]

Both *Foote* and *Hale* considered an agency's removal decisions after an employee lost security-related certifications that were a condition of employment at a nuclear facility.[86] In *Foote*, the D.C. Circuit considered the reviewability of the Department of Energy's refusal to certify the plaintiff under its Human Reliability Program, which is used to "carefully evaluate[] employment applicants for certain positions, such as those where the employees would have access to nuclear devices, materials, or facilities."[87] The court's analysis closely followed the analysis in *Egan*, recognizing that the program was established pursuant to an Executive Order to protect a "substantial national security interest in denying unreliable or unstable individuals access to nuclear . . . facilities."[88] The court concluded that the certification decision was insulated from review because, "like the decision whether to grant a regular security clearance,

[84] Foote v. Moniz, 751 F.3d 656 (D.C. Cir. 2014).
[85] Hale v. Johnson, 845 F.3d 224 (6th Cir. 2016).
[86] *Id.*; *Foote*, 751 F.3d at 656.
[87] *Foote*, 751 F.3d at 657.
[88] *Id.* at 658.

[it was] 'an attempt to predict' an applicant's 'future behavior and to assess whether . . . he might compromise sensitive information.'"[89]

The Sixth Circuit took a contrary approach. In *Hale v. Johnson*, the court rejected the application of *Egan* to the Tennessee Valley Authority's revocation of a security guard's medical certification. The certification was a condition of the guard's employment at a Tennessee Valley Authority nuclear power plant.[90]

The Sixth Circuit noted that *Egan* involved protection of "national-security *information*, not general national-security concerns such as those applicable in determining whether an individual has the physical capacity to guard a nuclear plant."[91] The court observed that Hale's case was markedly different than Egan's in that it did not involve revocation of a security clearance.[92] The court further explained that, while clearance determinations are made by an agency based on its "expertise" in making the "predictive judgment,"[93] no such expertise was needed in "the determination of an individual's physical capability to perform a job," which is the type of decision that "has historically been reviewed by courts."[94] Accordingly, the *Hale* court declined to "extend *Egan* to preclude judicial review of an agency's determination regarding an employee's physical capability to perform the duties of his or her position" or to put itself in a position in which it is deprived of jurisdiction to review employment decisions merely because they are made "in the name of national security."[95]

Significant to the analyses of the D.C. Circuit and the Sixth Circuit in these cases is the different application of *Egan*'s reference to the agency expertise in exercising predictive judgment on national security issues. *Foote* applies this principle broadly as an explanation for why the agency is vested with the power to deny employment to someone who might "compromise sensitive information."[96] By contrast, in *Hale*, the court used this language as a basis to deny the application of *Egan* in scenarios where expertise is not needed.[97] Additionally, while the D.C. Circuit recognized

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[89] *Id.* (quoting Dep't of the Navy v. Egan, 484 U.S. 518, 528 (1988)).
[90] *Hale*, 845 F.3d at 226.
[91] *Id.* at 230 (citation omitted).
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.* at 231.
[96] Foote v. Moniz, 751 F.3d 656, 658–59 (D.C. Cir. 2014) (quoting Dep't of the Navy v. Egan, 484 U.S. 518, 528 (1988)).
[97] *Hale*, 845 F.3d at 230.

that protecting a nuclear facility was a sufficient national security interest, the Sixth Circuit viewed such an interest as outside the scope of *Egan* because it did not involve protection of the type of "national security *information*" referenced in *Egan*.[98]

The uncertainty that such disparate analytical approaches creates for agency decision-makers and attorneys litigating on their behalf is considerable. The Sixth Circuit's opinion, including its reluctance to apply *Egan* beyond decisions involving security clearances, creates substantial uncertainty as to whether *Egan* would apply even in a situation such as the BGAD case, which involved undeniable national security interests.[99]

V. The Logical Application of *Egan*

A logical and consistent application of *Egan* necessitates a thorough consideration of each legal principle applied by the Court and the legal underpinnings of the decision. A focused approach provides for a straightforward application of the President's powers as Commander in Chief to protect national security interests. Such an approach will allow litigators to effectively advance arguments that create consistency in the law and an appropriate level of protection for agency decision-making in national security matters.

Egan's consideration of the constitutional issues is relatively direct, spanning only four pages.[100] In that distilled analysis, the Court draws on numerous legal authorities to define the scope of the President's authority over national security matters. This jurisprudence provides ample information from which a litigator can draw the proper application of the *Egan* doctrine.

Egan's analytical framework defines the President's constitutional powers on national security matters, Congress' ability to check those powers, and the extent to which a Federal employee's due process rights may affect the decision-making process.[101] *Egan* also provides guidance as to when the President will be deemed to have asserted his or her powers

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[98] *Id.* at 231.

[99] Given the uncertainty associated with the applicability of *Egan* to reliability programs, counsel advising agency decision-makers should recommend that personnel actions premised on national security concerns be addressed by the security clearance process, if that process is appropriate under the circumstances.

[100] *Egan*, 484 U.S. at 526–30.

[101] *Id.*

over national security issues, a necessary predicate to any defense that an agency decision is unreviewable by the courts.[102] As discussed below, full consideration of the principles recognized in *Egan* resolves most of the questions—certainly, the most prominent questions—raised by the courts of appeals' decisions discussed in the previous section.

A. Has the President Exerted His or Her Powers Under the Constitution?

Central to any analysis under *Egan* is the question of whether a plaintiff in Federal court is challenging the President's authority as Commander in Chief under Article II of the Constitution. The Supreme Court explained that "[t]he authority to protect [national security] information falls on the President as head of the Executive Branch and Commander in Chief."[103] *Egan* principles may also be implicated if a plaintiff challenges a constitutional delegation of power to an agency by Congress: "It cannot be doubted that both the legislative and executive branches are wholly legitimate potential sources of such explicit authority" to make national security-related decisions.[104]

The question of delegation of power is critical because, where neither the President nor Congress have delegated power to an agency, an agency decision is presumed to be subject to judicial review.[105] Similarly, where the President or Congress makes a general delegation of power to an agency, its decisions will likely be subject to judicial review absent a specific expression of the intent and necessity of removing an employee's due process rights.[106] Yet, where the President asserts his or her national security powers, any presumption of reviewability by the courts disappears.[107]

The President can delegate his or her constitutional authority by different mechanisms.[108] In *Egan*, the Court found that the issuance of

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[102] *Id.* at 527–30.
[103] *Id.* at 527.
[104] Cafeteria & Rest. Workers Union, Local 473 v. McElroy (*Cafeteria Workers*), 367 U.S. 886, 890 (1961) (referring to a base commander's power to bar a civilian from a military installation).
[105] Webster v. Doe, 486 U.S. 592, 603 (1988) ("[W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear.").
[106] Greene v. McElroy, 360 U.S. 474, 507 (1959). *See also Cafeteria Workers*, 367 U.S. at 890 ("We proceed on the premise that the explicit authorization found wanting in *Greene* must be shown in the present case."); *Webster*, 486 U.S. at 603 ("[W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear.").
[107] *Egan*, 484 U.S. at 527.
[108] *Greene*, 360 U.S. at 507.

numerous Executive Orders governing the classification of information and the issuance of security clearances constituted clear exertions of the President's power as Commander in Chief.[109] In *Cafeteria Workers*, the Court held that a President may also delegate his or her constitutional powers by his or her review and approval of regulations governing national security matters.[110]

Consistent with these holdings, litigators considering the application of *Egan* must initially determine not only whether a matter is within the sphere of the President's constitutional powers, but whether he or she delegated that power. While there is not extensive authority on the topic, presumably any mechanism by which the President or Congress explicitly state their intention to delegate authority to an agency will suffice.

B. General Principles Affecting the Scope of the President's Power

The considerable breadth of the President's authority over national security matters is the central issue defining the application of *Egan* in matters affecting civilian employees of the Federal Government.[111] Congress' powers to address national security issues are also wide ranging. Such powers derive from constitutional provisions affording Congress the authority to declare war, appropriate funds "for the common Defence [sic] and general Welfare of the United States," and raise and support an Army and a Navy.[112]

As the Supreme Court has observed, the division of interrelated powers between the President and Congress creates a range of situations that may affect the deference given to the President on defense and foreign policy issues.[113] When "the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."[114] Where both branches have authority over a subject but Congress has not acted, "'congressional inertia, indifference or quiescence may' invite the exercise of executive power."[115] Finally, at the other end

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[109] *Egan*, 484 U.S. at 527–30.
[110] *Cafeteria Workers*, 367 U.S. at 891 ("Navy Regulations approved by the President are, in the words of Chief Justice Marshall, endowed with 'the sanction of the law.'" (quoting United States v. Maurice, 26 F. Cas. 1211, 1215 (D. Va. 1823) (No. 15,747))).
[111] *Egan*, 484 U.S. at 527–30.
[112] U.S. CONST. art I, § 8.
[113] Zivotofsky *ex rel.* Zivotofsky v. Kerry, 576 U.S. 1, 10–12 (2015).
[114] *Id.* at 10 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U. S. 579, 635 (1952)).
[115] *Id.* (quoting *Youngstown Sheet & Tube Co.*, 343 U.S. at 637).

of the spectrum, where "'the President takes measures incompatible with the expressed or implied will of Congress . . . he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.' To succeed in this [scenario], the President's asserted power must be both 'exclusive' and 'conclusive' on the issue."[116]

Egan refines this analysis by recognizing that the President's "authority to classify and control access to information bearing on national security" is central to his or her powers as Commander in Chief and "exists quite apart from any explicit congressional grant."[117] *Egan* further informs that the President's authority to control sensitive information is so strong that courts must defer to the President unless "Congress *specifically* has provided otherwise."[118] The fact that Congress enacted provisions for administrative and judicial review of Federal employment decisions in Chapter 75 of Title V of the U.S. Code was not enough to deprive the agency of its protection from judicial scrutiny in making a security clearance determination.[119]

While these general principles are necessary considerations in *Egan* cases, the lower court decisions discussed in Part III highlight the more specific and commonly recurring questions bearing on the scope of the President's national security powers.[120] Resolution of those questions will go a long way toward establishing the consistency needed in applying *Egan*.

C. Is Deference to Agency National Security Employment Actions Limited to Security Clearances or to the Protection of National Security Information?

The Sixth Circuit's decision in *Hale v. Johnson* raises two important questions. First, to what extent does *Egan* extend protection from judicial review to decisions other than security clearance determinations.[121] In other words, does *Egan* apply to any agency decision "so long as it is made in the

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[116] *Id.* (quoting *Youngstown Sheet & Tube Co.*, 343 U.S. at 637–38).
[117] Dep't of the Navy v. Egan, 484 U.S. 518, 527 (1988) (citing Cafeteria & Rest. Workers Union, Local 473 v. McElroy (*Cafeteria Workers*), 367 U.S. 886, 890 (1961)).
[118] *Id.* at 530 (emphasis added).
[119] *Id.* at 527–30.
[120] *Id.* at 526–30.
[121] Hale v. Johnson, 845 F.3d 224, 230 (6th Cir. 2016) ("The [*Egan*] Court explicitly narrowed its holding to address the review of decisions to revoke or deny security clearances."). *See also* Toy v. Holder, 714 F.3d 881, 885 (5th Cir. 2013) ("No court has extended *Egan* beyond security clearances, and we decline to do so.").

name of national security?"[122] Second, is deference to presidential powers limited to "national-security *information*, not general national-security concerns?"[123] These are important questions for any litigator to consider when raising *Egan* as a bar to a plaintiff's claim.

1. Egan *Applies Beyond Security Clearances*

Based on a review of *Egan* and other Supreme Court decisions, the answer to the first question is simple: *Egan* principles apply to a range of national security-related employment decisions. The boundaries of that power, however, are less certain.

A review of the *Egan* decision does not support a restrictive application of its principles. Although the Court necessarily speaks to the facts of Egan's claim and the specific legal issues related to security clearances, the Court's holding is made in the context of broader principles, which the Court forcefully explains in its opinion.[124]

The *Egan* ruling is rooted in the principle of separation of powers, which compels judicial abstention from areas constitutionally reserved to the President.[125] Based on *Egan*'s explicit language, it is beyond cavil that the President's powers include a "compelling interest in withholding national security information from unauthorized persons in the course of executive business."[126]

The President's constitutional interest in protecting national security information by various means is well established. The President's authority in this area derives from his role as Commander in Chief[127] and his or her authority to conduct foreign policy.[128] In 1788, Founding Father John Jay explained that the President was assigned the authority to conclude treaties under Article II, Section 2 of the proposed Constitution.[129] The drafters of

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[122] *Hale*, 845 F.3d at 231.
[123] *Id.*
[124] *Egan*, 484 U.S. at 527–29.
[125] *Id.* at 527.
[126] *Id.*
[127] U.S. CONST. art II, § 2.
[128] *Egan*, 484 U.S. at 529 ("[F]oreign policy was the province and responsibility of the Executive." (quoting Haig v. Agee, 453 U.S. 280, 293–94 (1981))).
[129] THE FEDERALIST NO. 64 (John Jay). The Federalist Papers are considered a reliable source of the framers' intent for the Constitution, having been cited by the Supreme Court in hundreds of opinions. *See* Melvyn R. Durchslag, *The Supreme Court and the Federalist Papers: Is There Less Here than Meets the Eye?*, 14 WM. & MARY BILL OF RTS. J. 243 (2005).

the Constitution decided the President was in the best position "to receive secret information" needed for negotiations with foreign powers.[130] Although the President is bound to "act by the advice and consent of the Senate" on the substance of any treaty, "he will be able to manage the business of intelligence in such a manner as prudence may suggest."[131]

While cases considering judicial deference to presidential prerogatives may speak of the question in terms of "extending *Egan*"[132] beyond security clearances, the application of such deference to the security measures other than security clearances was not new at the time *Egan* was decided. This is apparent from the cases upon which *Egan* relied.

In *Totten v. United States*,[133] the Supreme Court rejected a breach of contract claim filed by the estate of a former spy based on the secret nature of the contract.[134] The Court reasoned that "a disclosure of the service might compromise or embarrass our government in its public duties, or endanger the person or injure the character of the agent."[135] In *Snepp v. United States*, the Court similarly recognized the Government's "compelling interest" in shielding national security information by way of a non-disclosure agreement with an employee of the Central Intelligence Agency (CIA).[136]

The Court's decision in *Cafeteria Workers* goes further than *Totten* or *Snepp*. It applies deference to a commander's summary removal of an employee from a shipyard where the Navy was developing new weapons systems.[137] The Court rejected the reviewability of the commander's decision based solely on the Navy's assertion that the employee failed to meet the "security requirements" of the installation.[138] The Court held that the employee was not entitled to be informed of the "specific grounds for her exclusion" or "accorded a hearing."[139]

These Supreme Court decisions make it pellucidly clear that the President's authority to protect sensitive information extends beyond

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[130] THE FEDERALIST NO. 64 (John Jay).
[131] *Id.*
[132] *See, e.g.*, Hale v. Johnson, 845 F.3d 224, 231 (6th Cir. 2016).
[133] Totten v. United States, 92 U.S. 105, 106 (1876).
[134] *Id.*
[135] *Totten*, 92 U.S. at 106.
[136] Snepp v. United States, 444 U.S. 507, 509 n.3 (1980).
[137] Cafeteria & Rest. Workers Union, Local 473 v. McElroy (*Cafeteria Workers*), 367 U.S. 886 (1961).
[138] *Id.* at 887.
[139] *Id.* at 894.

security clearance determinations. The D.C. Circuit found *Egan* is properly extended to reliability programs and other situations in which the President delegates authority to an agency within his national security powers.[140]

2. Egan *Extends Beyond the Protection of National Security Information*

The President's authority over national security matters necessarily extends beyond the protection of sensitive information. *Egan* directly supports this conclusion. The majority's opinion opens and concludes the discussion of the constitutional issues before the Court with broad statements concerning the President's powers.[141] The Court initially acknowledges the general presumption in favor of reviewability of Government administrative actions, but explains that this presumption "runs aground when it encounters concerns of *national security*."[142] Likewise, the Court bolsters its holding at the end of the analysis while explaining that "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*."[143] The Court's opinion speaks of the President's interest in protecting sensitive information, but in no way limits his or her authority to protect such information.[144] Indeed, since *Egan*, the Court has reiterated the broad powers of the President over national security matters in a variety of contexts.[145]

The *Hale* court did not explain its conclusion that *Egan* only extends to the protection of national security information. *Egan* and the BGAD case both demonstrate the implausibility of the limitation suggested in *Hale*. Egan was required to maintain a security clearance because his position involved maintaining the Navy's Trident submarines, which are nuclear-powered and carry nuclear weapons.[146] In the BGAD case, the

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[140] Foote v. Moniz, 751 F.3d 656, 658 (D.C. Cir. 2014) (discussing cases in which *Egan* was extended beyond security clearance determinations).
[141] Dep't of the Navy v. Egan, 484 U.S. 518, 526–30 (1988).
[142] *Id.* at 527 (emphasis added).
[143] *Id.* at 530 (emphasis added).
[144] *Id.* at 526–30.
[145] *See, e.g.*, Ziglar v. Abbasi, 137 S. Ct. 1843, 1849 (2017) ("National-security policy, however, is the prerogative of Congress and the President, and courts are 'reluctant to intrude upon' that authority absent congressional authorization." (quoting *Egan*, 484 U.S. at 530)); Hamdi v. Rumsfeld, 542 U.S. 507, 531 (2004) ("Without doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them." (citing *Egan*, 484 U.S. at 530)).
[146] *Egan*, 484 U.S. at 520.

electronics engineers maintained a system designed to protect highly sensitive conventional weapons. While there was undoubtedly sensitive information at both sites, the obvious concern in each case was the protection of the weapons themselves. It would be illogical to conclude that "sensitive information" concerning weapons would be subject to *Egan*, but not the weapons themselves. As the court properly found in *Foote*, *Egan* is not limited to the protection of sensitive information; it was properly applied to the Department of Energy's reliability program because the "Government has a substantial national security interest in denying unreliable or unstable individuals access to nuclear devices, materials, and facilities."[147]

Given the extensive jurisprudence recognizing the President's authority over national security information, Federal Government litigators will have an advantage in advancing an *Egan* argument if they highlight security concerns based on a potential compromise of sensitive information. They should also be prepared to explain any broader security concerns. Importantly, litigators should also be aware that "information" in some contexts may be a defined term that may not be limited to information as a layperson understands that term. For example, pursuant to Executive Order 12356, referenced in *Egan*,[148] "'information' means any information *or material*, regardless of its physical form or characteristics, that is owned by, produced by or for, or is under the control of the United States Government."[149] Depending on the nature and date of a claim, litigation attorneys should consider the existence of other Executive Orders or statutes that may define "information" in a relevant context.

Understandably, courts try to identify limitations on the scope of presidential power in the Federal workplace. Faced with a paucity of case law involving application of *Egan* to national security issues beyond the protection of sensitive information, attorneys should look for persuasive or direct authority deriving from Congress to support their contention that *Egan* applies in a given case.[150] In terms of providing a workable definition of national security, the Supreme Court's interpretation of 5 U.S.C. § 7532 provides some guidance. Interpreting "national security" under that section, the Court explained that it "comprehend[s] only those activities of

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[147] Foote v. Moniz, 751 F.3d 656, 658 (D.C. Cir. 2014).
[148] *Egan*, 484 U.S. at 528.
[149] Exec. Order No. 12356, 3 C.F.R. 174 (1983) (emphasis added).
[150] Cafeteria & Rest. Workers Union, Local 473 v. McElroy (*Cafeteria Workers*), 367 U.S. 886, 890 (1961).

the Government that are directly concerned with the protection of the Nation from internal subversion or foreign aggression, and not those which contribute to the strength of the Nation only through their impact on the general welfare."[151] That is a reasonable definition and one that arguably could assuage concerns, such as those expressed in *Hale*, that courts not slip "into an untenable position wherein [they] are precluded from reviewing any federal agency's employment decision so long as it is made in the name of national security."[152]

D. Is an Agency's Expertise a Factor in Determining the Application of *Egan*?

In *Hale* and *Rattigan*, the courts of appeals rejected the application of *Egan* to security-related decisions based in part on *Egan*'s finding that "it is not reasonably possible for an outside nonexpert body [i.e., a court] to review the substance" of a security clearance determination and to "decide whether the agency should have been able to make the necessary affirmative prediction" concerning an employee's suitability.[153] Looking to the purported requirement for expertise, *Rattigan* used this language as a basis for denying protection of agency decisions made by *individuals* lacking expertise in security matters.[154] The *Hale* court applied the purported requirement for expertise to deny the application of *Egan* in a *situation* in which the court deemed that security expertise was not required.[155] Determining whether these courts applied the proper analysis to conclude when a court should abstain from reviewing an agency's employment decision requires a close examination of *Egan*.

Section III of the *Egan* opinion contains the Court's substantive analysis of the constitutional basis for its decision.[156] Consideration of the jurisprudence underlying the *Egan* decision leaves no doubt that the President's national security powers, including his or her interest in protecting sensitive information and materials, derives from his or her authority as Commander in Chief. Of the sixteen cases the majority cites in Section III of the *Egan* opinion, none support the proposition that a

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[151] Cole v. Young, 351 U.S. 536, 544 (1956).
[152] Hale v. Johnson, 845 F.3d 224, 231 (6th Cir. 2016).
[153] *Egan*, 484 U.S. at 529.
[154] Rattigan v. Holder, 643 F.3d 975, 983 (D.C. Cir. 2011) (finding the reporting of security concerns by non-experts to be reviewable).
[155] *Hale*, 845 F.3d at 230 (finding reviewable an agency determination that a security guard failed a medical examination required as part of a security certification).
[156] *Egan*, 484 U.S. at 526–30.

court's ability to review a national security-related decision turns on the expertise of a particular person or on the need for expertise in a particular situation.[157] *Egan* itself makes no suggestion that deference to an agency would turn on whether expertise was required in order to make a determination.[158]

While some agencies undoubtedly have expertise over matters involving national security and good public policy supports affording those agencies discretion over such matters, there is no logical basis for affording that discretion on a case-by-case basis on matters that undeniably involve the President's constitutional powers.

Through their attempts to qualify presidential power, the *Rattigan* and *Hale* decisions expose agencies to litigation where expertise in predictive judgment arguably is not demonstrated or not needed. The discovery needed for a court to make the necessary determination is, by itself, contrary to *Egan*'s dictate that presidentially-endorsed national security decisions are unreviewable.[159] *Rattigan*'s and *Hale*'s attempts to qualify *Egan* also run counter to *Egan*'s dictate that the courts should not intrude on the President's decisions in national security affairs except when "Congress *specifically*" authorizes them to do so.[160] *Egan* does not support the imposition of an expertise prerequisite for judicial deference.[161]

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[157] Cafeteria & Rest. Workers Union, Local 473 v. McElroy (*Cafeteria Workers*), 367 U.S. 886, 890 (1961); Snepp v. United States, 444 U.S. 507, 509 n.3 (1980); United States v. Robel, 389 U.S. 258, 267 (1967); United States v. Reynolds, 345 U.S. 1, 10 (1953); Totten v. United States, 92 U.S. 105, 106 (1876); Molerio v. FBI, 749 F.2d 815, 824 (D.C. Cir. 1984); Adams v. Laird, 420 F.2d 230, 239 (D.C. Cir. 1969); CIA v. Sims, 471 U.S. 159, 170 (1985); Cole v. Young, 351 U.S. 536, 546 (1956); Haig v. Agee, 453 U.S. 280, 293–94 (1981); United States v. Nixon, 418 U.S. 683, 710 (1974); Orloff v. Willoughby, 345 U.S. 83, 93–94 (1953); Burns v. Wilson, 346 U.S. 137, 142, 144 (1953); Gilligan v. Morgan, 413 U.S. 1, 10 (1973); Schlesinger v. Councilman, 420 U.S. 738, 757–58 (1975); Chappell v. Wallace, 462 U.S. 296 (1983).

[158] *Egan*, 484 U.S. at 529.

[159] *Id.* at 520.

[160] *Id.* at 530.

[161] *Rattigan* and *Hale* also ignore the reality that security clearance determinations do not always involve the exercise of predictive judgment as was the case in *Egan*. Such judgment is needed "to predict [an employee's] possible future behavior and to assess whether, under compulsion of circumstances or for other reasons, he might compromise sensitive information." *Id.* at 528. Some security clearance decisions, however, are made based on actual acts known to have jeopardized national security, including sabotage and espionage. Such was the situation in the BGAD case.

VI. Are Constitutional Claims an Exception to *Egan*?

Only four months after the Supreme Court decided *Egan*, the Court issued an opinion raising questions about the breadth of its application. In *Webster v. Doe*,[162] the Court recognized the potential viability of a constitutional claim where an employee of the CIA was summarily removed from his position on national security grounds. The employee sought injunctive and other equitable relief to stop his removal based on statutory and constitutional grounds.

The *Webster* decision presented questions as to the precise circumstances in which an employee can challenge an agency's national security-related employment decision by way of a constitutional claim. Decisions at the courts of appeals are divided on whether *Egan* is subject to an exception on constitutional grounds.[163] Constitutional claims can come in a variety of forms. They can challenge the constitutionality of a statute or the application of a statute to a particular circumstance.[164] Claims can also implicate either substantive or procedural rights of the Constitution.[165] Such claims may target the agency or be filed against an agency official in his or her individual capacity (known as a *Bivens* claim).[166] Claimants may seek monetary damages or be limited to equitable relief.[167] While *Webster* opened the door to constitutional challenges seeking equitable relief, the implications of *Webster* for national security-related employment decisions are narrower than they may appear on the face of the decision itself.

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[162] Webster v. Doe, 486 U.S. 592, 601 (1988).

[163] *Compare* Brazil v. U.S. Dep't of the Navy, 66 F.3d 193, 197–98 (9th Cir. 1995) (holding that Title VII precluded a constitutional challenge to a security clearance decision), *and* Perez v. FBI, 71 F.3d 513, 515 (5th Cir. 1995) (per curiam), *with* Stehney v. Perry, 101 F.3d 925, 932 (3d Cir. 1996) (allowing constitutional claims to proceed and declaring that "not all claims arising from security clearance revocations violate separation of powers"), *and* Dubbs v. CIA, 866 F.2d 1114, 1120 (9th Cir. 1989) (holding that security clearance decisions are reviewable on constitutional grounds and explaining that *Webster* "is dispositive on this question").

[164] *Webster*, 486 U.S. at 586 (alleging the unequal application of the National Security Act); Elgin v. Dep't of the Treasury, 567 U.S. 1, 6–7 (2012) (alleging Military Selective Service Act violated equal protection rights by discriminating on the basis of sex).

[165] *Webster*, 486 U.S. at 596 (alleging procedural and substantive constitutional violations).

[166] *Id.* (presenting a claim against the Director of the CIA in his official capacity); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (presenting a claim against six Federal agents in their individual capacities).

[167] *Webster*, 486 U.S. 592 (seeking equitable relief); *Bivens*, 403 U.S. 388 (seeking compensatory damages).

A. The *Doe v. Webster* Decision

In *Webster*, the Court considered the reviewability of a decision by the Director of Central Intelligence to remove a CIA analyst under a provision of the National Security Act. The National Security Act includes a broad delegation of power to the Director to, "in [his or her discretion], terminate the employment of any officer or employee of the [CIA] whenever the Director deems the termination of employment necessary or advisable in the interests of the United States."[168] Doe alleged that the Director failed to follow agency procedures and acted "arbitrarily and capriciously," thus violating the Administrative Procedures Act (APA) and denying him his constitutionally protected rights "in violation of the First, Fourth, Fifth, and Ninth Amendments."[169] Doe sought equitable relief, including reinstatement or an order compelling the Director to reevaluate the removal.[170] Doe sought no monetary damages.[171]

Noting that the National Security Act specifically permitted the Director to carry out removals outside of the "standard discharge procedures," the Court rejected the reviewability of the Director's actions under the APA.[172] The National Security Act, the Court ruled, provides no standard for legal review and "exhibits . . . extraordinary deference to the Director in his decision to terminate individual employees."[173] Thus, the "language and structure of [the Act] indicate that Congress meant . . . [to] preclude[] judicial review of these decisions under the APA."[174]

Turning to the employee's constitutional claims, the Court rejected the Government's argument that "employment termination decisions, even those based on policies normally repugnant to the Constitution" are unreviewable by the courts.[175] The Court reasoned that "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear."[176] In reaching this conclusion, the Court emphasized that "this heightened showing [is required] in part to avoid the 'serious constitutional question' that would arise if a federal statute were construed

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[168] 50 U.S.C. § 3036(e)(1).
[169] *Webster*, 486 U.S. at 596.
[170] *Id.* at 596–97.
[171] *Id.* at 597.
[172] *Id.* at 598.
[173] *Id.* at 601.
[174] *Id.*
[175] *Id.* at 603.
[176] *Id.* (citing Johnson v. Robison, 415 U.S. 361, 373–74 (1974)).

to deny any judicial forum for a colorable constitutional claim."[177] Applying that standard, the Court found that the language of the National Security Act did not evince a congressional intent to foreclose district court review of a constitutional challenge to a decision under the Act.[178]

B. Reading *Webster* and *Egan* Together

Read in isolation, *Webster* may represent a significant change of direction by the Court on the reviewability of employment decisions bearing on national security grounds. Given that *Webster* was decided by the same justices during the same term as *Egan*, it is unlikely that *Webster* reflected a desire by the Court to undermine its recently issued decision in *Egan*. This is particularly true because the *Webster* opinion was written by Justice Rehnquist, who joined the majority in *Egan*. Complicating the analysis is the fact that *Webster* did not analyze or even reference *Egan* in reaching its holding.[179] While recognizing the potential viability of Doe's constitutional claims, the Court offered no guidance as to the legal boundaries of any such claims.

While the Court's failure to harmonize *Webster* and *Egan* creates some uncertainty, a closer examination of these decisions, as well as other jurisprudence, clarifies that the ability of an employee to challenge a national security-based employment decision on a constitutional basis is relatively narrow in scope. Reading *Webster* and *Egan* together, it is evident that the Court holds diverging views when congressional versus presidential delegations of power over national security matters will be subjected to review. Significantly, the holding in *Webster* was based purely on case law involving executive application of, or compliance with, a legislative enactment.[180] *Webster* did not involve a challenge to the delegation of presidential powers such as those involved in *Egan* (Executive Orders) or *Cafeteria Workers* (presidentially-approved regulations).

Where there is a question about the constitutionality of an agency's compliance with a congressional delegation of power, the Court found that there is a presumption of reviewability.[181] This presumption is rebutted

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[177] *Id.* (citing Bowen v. Mich. Acad. of Fam. Physicians, 476 U.S. 667, 681 n.12 (1986)).
[178] *Id.*
[179] *Egan* is only referenced in the two dissenting opinions in *Webster*. In those opinions, Justices O'Connor, *id.* at 605–06 (O'Connor, J., dissenting) and Scalia, *id.* at 606–21 (Scalia, J., dissenting), found the *Doe* decision inconsistent with *Egan*.
[180] *Id.* at 603.
[181] *Id.*

only where it is "clear" that Congress intended to preclude review by the courts.[182] By contrast, *Egan* counsels that any presumption of reviewability "runs aground" when it involves presidential action in national security matters.[183] Given the judiciary's historic reluctance "to intrude upon the authority of the Executive in military and national security affairs," *Egan* extends this more deferential standard to the President unless Congress "specifically" states otherwise.[184] *Egan*'s recognition of presidential authority is consistent with the Court's ruling in *Cafeteria Workers*. In *Cafeteria Workers*, the Court "acknowledge[d] that there exist constitutional restraints upon state and federal governments in dealing with their employees," but held that not "all such employees have a constitutional right to notice and a hearing before they can be removed."[185]

C. Are Decisions Covered by *Egan* Ever Reviewable?

While *Webster* subjected Government employment actions premised on summary dismissal statutes to review on constitutional grounds, there is a question as to if and when Federal actions premised on presidentially-delegated national security powers are subject to review. Likewise, there is a parallel question as to when a law allowing summary dismissal of an employee would be reviewable if Congress, in accordance with *Webster*, provided that such a law was not subject to review on constitutional grounds. Case law suggests that, notwithstanding the announced limits on review in such circumstances, these decisions could be challenged in limited circumstances.

1. Equal Protection Claims May Be an Exception to Egan

A review of Supreme Court case law suggests that some equal protection claims present a likely exception to *Egan*. By the 1970s, it was an "established practice for th[e Supreme] Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution and to restrain individual state officers from doing what the 14th Amendment forbids the State to do."[186] Equal protection is "essentially

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[182] *Id.*
[183] Dep't of the Navy v. Egan, 484 U.S. 518, 526 (1988).
[184] *Id.* at 530.
[185] Cafeteria & Rest. Workers Union, Local 473 v. McElroy (*Cafeteria Workers*), 367 U.S. 886, 898 (1961).
[186] Davis v. Passman, 442 U.S. 228, 242 (1979) (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)). *See also* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 400 (1971) (Harlan, J., concurring).

a direction that all persons similarly situated should be treated alike."[187] Where there is Government action based on characteristics of a person, including such things as race, sex, or religion, equal protection analysis requires a balancing of Government interests with the rights of the individual.[188]

Courts have held open the possibility of review on equal protection grounds in cases seeking injunctive relief against a Federal agency even where national security concerns are involved. As explained above, *Webster* left open the possibility of review of the CIA's application of the National Security Act on Fifth Amendment grounds. While the D.C. Circuit subsequently ruled in the Government's favor on Doe's equal protection claim, the decision was made on a factual basis.[189] The court stated explicitly that "the equal protection argument [is] properly before us."[190]

More importantly, considering the President's delegation of power in *Cafeteria Workers*, the Court found that the Navy's security-related decision was unreviewable while acknowledging cases expressly forbidding facially discriminatory regulation.[191] The Court also posited that the employee "could not constitutionally have been excluded from the Gun Factory if the *announced* grounds for her exclusion had been patently arbitrary or discriminatory—that she could not have been kept out because she was a Democrat or a Methodist."[192] *Cafeteria Workers*' distinction between facially discriminatory policies or decisions and facially

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[187] Plyler v. Doe, 457 U.S. 202, 216 (1982).

[188] Depending on the category of people affected by Government action, the level of scrutiny applied by a court varies. *E.g.*, City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432 (1985).

[189] Doe v. Gates, 981 F.2d 1316, 1322–24 (D.C. Cir. 1993).

[190] *Id.* at 1322. There are at least three other national security cases involving sexual orientation in which a court of appeals ruled for the Government, but failed to categorically rule out the possibility of challenging agency decision on equal protection grounds. *See* U.S. Info. Agency v. Krc, 989 F.2d 1211, 1214 (D.C. Cir. 1993); High Tech Gays v. Def. Indus. Sec. Clearance Off., 895 F.2d 563 (9th Cir. 1990); Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987).

[191] Cafeteria & Rest. Workers Union, Local 473 v. McElroy (*Cafeteria Workers*), 367 U.S. 886, 897 (1961) ("'[N]one would deny' that 'Congress may not "enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work."'" (quoting United Pub. Workers v. Mitchell, 330 U.S. 75, 100 (1947))); Wieman v. Updegraff, 344 U.S. 183, 192 (1952) ("It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.").

[192] *Cafeteria Workers*, 367 U.S. at 898 (emphasis added).

legitimate actions is consistent with more recent case law. Commenting on *Korematsu v. United States*,[193] the World War II era case in which the Supreme Court upheld orders forcing citizens of Japanese heritage into concentration camps, the Court recently stated that

> [t]he forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority. But it is wholly inapt to liken that morally repugnant order to a facially neutral policy denying certain foreign nationals the privilege of admission.[194]

Thus, while *Egan* provides great deference to the President's national security powers, even national security-related decisions are likely subject to judicial review when Government action is taken for overtly discriminatory reasons.

2. Due Process Claims Are an Unlikely Exception to Egan

In contrast to equal protection claims, due process claims are unlikely to succeed in the face of either presidential or congressional delegation of authority on national security matters. When an employee's protected liberty or property interests are encroached upon by the Government, the employee is normally entitled to advanced notice and "the right to some kind of prior hearing."[195] Given this general rule, due process claims are a likely avenue for any claim being advanced by a Government employee summarily removed from a position based on national security grounds. Such claims, however, are unlikely to be successful in the face of prevailing case law.

Due process claims typically fall into two potential categories: cases involving infringements on an individual's liberty and those implicating the loss of a property interest.[196] An employee may be deemed to have a protected liberty interest where Government action would "seriously damage his standing and associations in his community [by], for example,

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[193] Korematsu v. United States, 323 U. S. 214 (1944).
[194] Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018); *see also* Hegab v. Long, 716 F.3d 790, 798 (4th Cir. 2013) (Motz, J., concurring) ("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*.").
[195] Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 569–70, 573 (1972).
[196] *Id.* at 569–70.

[stating] that he had been guilty of dishonesty, or immorality."[197] The liberty interests protected by the Constitution are broad and encompass "the right of the individual to contract, to engage in any of the common occupations of life . . . and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men."[198] A person may suffer an actionable loss of liberty where the government "imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities."[199] This would occur, for example, in circumstances where the Government "regulat[es] eligibility for a type of professional employment."[200]

A person may also raise a claim that he or she has a protected property interest in their Government position, which cannot be taken away without due process.[201] A property interest protected by the Constitution requires that a person "have more than an abstract need or desire for it" and "more than a unilateral expectation of it."[202] A person "must, instead, have a legitimate claim of entitlement to [his or her Government position]."[203] Such "[p]roperty interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . that support claims of entitlement to those benefits."[204]

Despite the surface appeal of potential due process claims, courts of appeals have rejected due process claims in the face of statutes authorizing summary removal of employees. In the aftermath of the Supreme Court's

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[197] *Id.* at 573; *see* Wieman v. Updegraff, 344 U.S. 183, 191 (1952); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951); United States v. Lovett, 328 U.S. 303, 316–17 (1946); Peters v. Hobby, 349 U.S. 331, 352 (1955) (Douglas, J., concurring); *Cafeteria Workers*, 367 U.S. at 898. Where an otherwise defamatory comment has not been publicized, however, there is no infringement on an employee's liberty interests. Hodge v. Jones, 31 F.3d 157, 165 (4th Cir. 1994) ("[G]iven the extensive confidentiality provisions protecting the Hodge investigation report, we see no avenue by which a stigma or defamation labeling the Hodges as child abusers could attach."); Bollow v. Fed. Rsrv. Bank, 650 F.2d 1093, 1101 (9th Cir. 1981) ("Unpublicized accusations do not infringe constitutional liberty interests because, by definition, they cannot harm 'good name, reputation, honor, or integrity.'" (quoting Bishop v. Wood, 426 U.S. 341, 348 (1975))).
[198] *Bd. of Regents of State Colls.*, 408 U.S. at 572 (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).
[199] *Id.* at 573.
[200] *Id.* at 573–74.
[201] *Id.* at 576–79.
[202] *Id.* at 577.
[203] *Id.*
[204] *Id.*

decision in *Webster*, the case eventually returned to the D.C. Circuit.[205] The D.C. Circuit Court of Appeals rejected Doe's claim that he had an expectation of continued employment based on the CIA employee handbook and comments made by CIA employees at the beginning of his employment.[206] Observing that "the National Security Act of 1947 'exhibits . . . extraordinary deference to the Director in his decision to terminate individual employees,'" [207] the court found that statements made by employees and in agency documents "[can]not create a property interest for purposes of due process when they are contrary to the express provisions of regulations and statutes." [208] The D.C. Circuit's holding that no expectation of continued employment in the face of a summary dismissal statute comports with the great weight of authority on this issue.[209]

These cases, along with *Egan*'s finding that "no one has a 'right' to a security clearance,"[210] effectively foreclose the possibility of a due process claim in the national security context.

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[205] Doe v. Gates, 981 F.2d 1316 (D.C. Cir. 1993), *aff'g in part, rev'ing in part* Doe v. Webster, 769 F.Supp. 1 (D.D.C. 1993).
[206] *Id.* at 1320–21.
[207] *Id.* at 1320 (quoting Webster v. Doe, 486 U.S. 592, 601 (1986)).
[208] *Id.* at 1321 (alteration in original) (quoting Baden v. Koch, 638 F.2d 486, 492 (2d Cir. 1980)).
[209] *Baden*, 638 F.2d at 492; Malkan v. Mutua, 699 F. App'x 81, 82–83 (2d Cir. 2017); Batterton v. Tex. Gen. Land Off., 783 F.2d 1220, 1224 (5th Cir. 1986) ("To say that customs entirely contrary to a statute's meaning may stem from that statute would defy reason; only if consistent with official law may such practices create a property interest in one's job."); Puckett v. Lexington-Fayette Urb. Cnty. Gov't, 566 F. App'x 462, 468 (6th Cir. 2014) (holding in a non-employment case that understandings cannot create a due process interest contrary to the law); Heck v. City of Freeport, 985 F.2d 305, 311 (7th Cir. 1993) (same); Bollow v. Fed. Rsrv. Bank, 650 F.2d 1093, 1099 (9th Cir. 1981) ("[T]he United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to do what the law does not sanction or permit." (quoting Utah Power & Light Co. v. United States, 243 U.S. 389, 409 (1917)); Driggins v. City of Okla. City, Okla., 954 F.2d 1511, 1514–15 (10th Cir. 1992) (holding that representations or mutual understandings contrary to an explicit city charter provision cannot lead to a property interest where those officials making the representations did not have the authority to deviate from the express city charter provisions); Brett v. Jefferson Cnty., Ga., 123 F.3d 1429, 1434 (11th Cir. 1997) ("While protected property interests in continued employment can arise from the policies and practices of an institution, a property interest contrary to state law cannot arise by informal custom." (citations omitted)).
[210] Dep't of the Navy v. Egan, 484 U.S. 518, 528 (1988).

D. Limitations on Constitutional Claims

Constitutional claims arising out of the Federal workplace face numerous obstacles, some of which have developed after the Court's decision in *Webster*. It is important for agency attorneys to be aware of these threshold issues in defending national security cases. These limitations preclude constitutional tort claims seeking money damages and typically limit review of constitutional claims to the system and remedies established by the CSRA.

1. The United States Has Not Waived Sovereign Immunity for Constitutional Torts

As the Supreme Court has explained, "[i]t is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for [subject matter] jurisdiction."[211] A "waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text."[212] That waiver "will be strictly construed, in terms of its scope, in favor of the sovereign."[213] And "the *terms* of [the United States'] consent to be sued in any court define that court's jurisdiction to entertain the suit."[214]

In *FDIC v. Meyer*, the Supreme Court found that Congress did not waive sovereign immunity for constitutional claims for money damages against the United States under the Federal Torts Claims Act (FTCA).[215] It explained that for a claim to be actionable under the FTCA,

> a claim must allege, *inter alia*, that the United States "would be liable to the claimant" as "a private person" "in accordance with the law of the place where the act or omission occurred." A constitutional tort claim such as Meyer's could not contain such an allegation. Indeed, we have consistently held that § 1346(b)'s reference to the

[211] United States v. Mitchell, 463 U.S. 206, 212 (1983); *see* FDIC v. Meyer, 510 U.S. 471, 475 (1994).
[212] Gomez-Perez v. Potter, 553 U.S. 474, 491 (2008) (quoting Lane v. Peña, 518 U.S. 187, 192 (1996)).
[213] *Id.* (quoting *Lane*, 518 U.S. at 192).
[214] Lehman v. Nakshian, 453 U.S. 156, 160 (1981) (quoting United States v. Testan, 424 U.S. 584, 586 (1976)).
[215] *Meyer*, 510 U.S. at 475.

> "law of the place" means law of the State—the source of substantive liability under the FTCA.[216]

At the same time, the Court rejected Meyer's request to recognize a Federal common law tort against the United States based on an agency's violation of the Constitution. Observing the potential fiscal impact on the Federal Government of recognizing such a claim, the Court declined to extend such liability.[217]

2. Constitutional Claims Are Preempted by the Civil Service Reform Act

The CSRA "established a comprehensive system for reviewing personnel actions taken against federal employees."[218] The Supreme Court has repeatedly recognized that the CSRA precludes challenges arising out of the Federal workplace except through the administrative and judicial review expressly authorized by the statute.[219]

The Supreme Court explained that "[a] leading purpose of the CSRA was to replace the haphazard arrangements for administrative and judicial review of personnel action, part of the 'outdated patchwork of statutes and rules built up over almost a century' that was the civil service system."[220] Congress enacted the CSRA to replace this patchwork system "with an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration."[221]

Employees covered by the CSRA can seek review of an employment decision if they are subjected to personnel actions "'for such cause as will promote the efficiency of the service.'"[222] "[T]he route prescribed is by appeal to the MSPB and, if dissatisfied with the result, appeal to the Federal

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[216] *Id.* at 477–78 (quoting 28 U.S.C. § 1346(b)). *See, e.g.*, Miree v. DeKalb Cnty., Ga., 433 U.S. 25, 29 n.4 (1977); United States v. Muniz, 374 U.S. 150, 153 (1963); Rayonier Inc. v. United States, 352 U.S. 315, 318 (1957).
[217] *Meyer*, 510 U.S. at 486 ("We leave it to Congress to weigh the implications of such a significant expansion of Government liability.").
[218] Elgin v. Dep't of the Treasury, 567 U.S. 1, 5 (2012) (quoting United States v. Fausto, 484 U.S. 439, 455 (1988)).
[219] *Id.*; *Fausto*, 484 U.S. 439; Bush v. Lucas, 462 U.S. 367 (1983).
[220] *Fausto*, 484 U.S. at 444 (citing S. REP. NO. 95-969, at 3 (1978)).
[221] *Id.* at 445.
[222] *Elgin*, 567 U.S. at 5 (citing 5 U.S.C. §§ 7513(a), 7503(a)).

Circuit, whose decisions in turn are reviewable by the Supreme Court."[223] In other words, "the remedy [offered by the CSRA] displaces the plenary district court action entirely, just as a statute channeling agency review to a circuit court displaces a direct review action in the district court."[224] Even where the CSRA provides no remedy to a covered employee, claims pursued through statutes not explicitly excepted under the CSRA are precluded.[225]

a. Challenges to the Constitutionality of a Statute Are Preempted

There is no implied exception to permit constitutional claims arising out of the Federal workplace.[226] In *Elgin*, the Supreme Court held that a facial challenge to the constitutionality of a statute was preempted by the CSRA. The claim was advanced by a Department of Treasury employee who had been removed from his position pursuant 5 U.S.C. § 3328 based on his failure to register with the Selective Service as required by the Military Selective Service Act.[227]

After unsuccessfully appealing to the MSPB, Elgin challenged the constitutional validity of the statutes in U.S. District Court rather than completing the review process established by the CSRA.[228] Elgin argued that the Court's decision in *Webster* authorized suit in Federal court "to

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[223] Elgin v. U.S. Dep't of the Treasury, 641 F.3d 6, 8 (1st Cir. 2011), *aff'd*, 567 U.S. 1. *See* 5 U.S.C §§ 7513(d), 7701(a)(1)–(2), 7703(b).

[224] *Elgin*, 641 F.3d at 9 (citing Whitman v. Dep't of Transp., 547 U.S. 512, 513–14 (2006) (per curiam)). The precise path of a case can vary, however, depending on the nature of the claims. Where there is a "mixed" case involving claims of discrimination, the district court will have jurisdiction after review by the MSPB. *See* 5 U.S.C. § 7702(a)(1)(B); 29 C.F.R. § 1614.310(b) (2019).

[225] *Fausto*, 484 U.S. at 455 (stating that the CSRA's "deliberate exclusion of employees in respondent's service category from the provisions establishing administrative and judicial review for personnel action of the sort at issue here prevents respondent from seeking review in the Claims Court under the Back Pay Act."). Pursuant to the CSRA, the only additional statutory remedies available to Federal employees are those provided by various anti-discrimination laws. *See* 5 U.S.C. § 2302(d). The statutory schemes established under these laws also preempt other remedies. *See, e.g.*, Brown v. Gen. Servs. Admin., 425 U.S. 820 (1976) (holding that Title VII provides the exclusive remedy for race discrimination for Federal employees).

[226] *Elgin*, 567 U.S. at 13 ("The purpose of the CSRA . . . supports our conclusion that the statutory review scheme is exclusive, even for employees who bring constitutional challenges to federal statutes.").

[227] *Id.* at 6–7. Elgin alleged that "Section 3328 [was] an unconstitutional bill of attainder and unconstitutionally discriminate[d] on the basis of sex when combined with the registration requirement of the Military Selective Service Act." *Id.* at 7.

[228] *Id.* at 6–7.

avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim."[229] The Court rejected the application of *Webster*, explaining that the heightened presumption of reviewability only applies when no other forum is available.[230] In Elgin's case, the CSRA allowed for review of the claim by the CSRA because "*Webster*'s standard does not apply where Congress simply channels judicial review of a constitutional claim to a particular court."[231]

b. Bivens *Claims Are Preempted by the CSRA*

The Supreme Court has explicitly ruled that *Bivens*-style constitutional claims[232] against individual supervisors are preempted by the CSRA.[233] In *Bush v. Lucas*, the Court considered the *Bivens* claim of a National Aeronautics and Space Administration employee who alleged that he was demoted in violation of his First Amendment rights.[234]

The court action was filed during the pendency of Bush's administrative claim. Although Bush secured reinstatement and back pay through the administrative process, he asserted that the limited remedies were inadequate and asked the Court to recognize a *Bivens* claim to recover full damages.[235] The Court rejected the employee's argument, stating:

> The question is not what remedy the court should provide for a wrong that would otherwise go unredressed. It is whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue. That question obviously cannot be

[229] *Id.* at 9 (quoting Webster v. Doe, 486 U.S. 592, 603 (1988)).
[230] *Id.* at 9–10.
[231] *Id.* at 10.
[232] *Bivens* actions are now disfavored by the Supreme Court, which limits future claims to facts very closely tracking the three such claims previously approved by the Court. *E.g.*, Ziglar v. Abbasi, 137 S. Ct. 1843, 1856 (2017) (declining to recognize a *Bivens* claim for putative violations of the Fourth and Fifth Amendments arising out of the plaintiffs' detention after the September 11, 2001 attacks and articulating the particular inappropriateness of doing so in response to presidential action on a matter affecting national security).
[233] Bush v. Lucas, 462 U.S. 367 (1983).
[234] *Id.* at 368–70.
[235] *Id.* at 369–71.

> answered simply by noting that existing remedies do not provide complete relief for the plaintiff.[236]

The Court concluded that the CSRA's detailed review process demonstrated Congress' intent to create a system that preempts other potential remedies.[237] As the Court observed, "Congress is in a far better position than a court to evaluate the impact of a new species of litigation between federal employees on the efficiency of the civil service."[238]

VII. Matters Potentially Subject to Review Notwithstanding the Application of *Egan*

Even when *Egan* bars judicial review of an agency's personnel action for national security reasons, there may be aspects of the case that a court may properly consider. First, under limited circumstances, a court can consider whether an employee who has lost or been denied a security clearance may be entitled to transfer to a non-sensitive position. Second, a court may consider whether an agency has complied with its own regulations in executing an employment action. While neither situation is common, it is important for agency counsel to be aware of these situations as they prepare for an *Egan* defense.

A. Did *Egan* Establish Transfer to a New Position as a Substantive Right?

At the conclusion of its opinion, the *Egan* Court held that when the denial of a clearance is the basis for denying an employee a position, the MSPB—and by extension, the courts—may review the corresponding employment decision to determine whether the clearance was a requirement of the position and whether it was denied.[239] The Court explained that the reviewing body can then consider "whether transfer to a non-sensitive position [is] feasible."[240] This raises the question of whether *Egan* established an affirmative obligation on the part of an agency to transfer employees who have been denied clearances. The answer to this question is "no."

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[236] *Id.* at 388.
[237] *Id.* at 388–90.
[238] *Id.* at 389.
[239] Dep't of the Navy v. Egan, 484 U.S. 518, 530 (1988).
[240] *Id.*

At first glance, *Egan*'s observation about considering the feasibility of a transfer appears to be directive in that it is listed along with other issues that are reviewable by the MSPB.[241] Relevant to the point, the Court makes a factual finding that the Navy considered transferring Egan to another position but had no options at the Trident Naval Refit Facility.[242]

The Supreme Court provided no statute or case law to support a conclusion that an employer is obligated to consider transferring an employee who fails to maintain a security clearance. After summarizing the MSPB's limited power of review, the Court cited four cases in support of its finding. Each of those cases stands for the proposition that a civilian who fails to maintain a condition of employment is properly removed by an agency.[243] None of those cases suggests an obligation on the part of an agency to transfer an employee.[244] As a matter of longstanding law, there is generally no statutory requirement that an employee who fails to meet a condition of employment is entitled to consideration for another position.[245]

Shortly after *Egan*, the Federal Circuit considered the case of a Defense Mapping Agency employee who claimed that *Egan* created an agency obligation to transfer employees to non-sensitive positions after loss of a security clearance.[246] Rejecting that argument, the court opined:

> we are not inclined to the view that the [Supreme] Court so casually created a new substantive requirement never thought to exist before. We see this passage as recognition of a Board role in reviewing the feasibility of transfer to a nonsensitive position if that substantive right is available from some other source, such as a statute or regulation.[247]

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[241] *Id.*
[242] *Id.* at 522.
[243] *See id.* at 530–31 (first citing Zimmerman v. Dep't of the Army, 755 F.2d 156 (Fed. Cir. 1985); then citing Buriani v. Dep't of the Air Force, 777 F.2d 674, 677 (Fed. Cir. 1985); then citing Bacon v. Dep't of Hous. & Urb. Dev., 757 F.2d 265, 269–70 (Fed. Cir. 1985); and then citing Madsen v. Veterans Admin., 754 F.2d 343 (Fed. Cir. 1985)).
[244] *Zimmerman*, 755 F.2d 156; *Buriani*, 777 F.2d at 677; *Bacon*, 757 F.2d at 269–70; *Madsen*, 754 F.2d 343.
[245] Griffin v. Def. Mapping Agency, 864 F.2d 1579, 1580 (Fed. Cir. 1989) ("The case law is clear that, if . . . [an] employee cannot do his job, he can be fired, and the employer is not required to assign him to alternative employment." (alteration in original) (quoting Carter v. Tisch, 822 F.2d 465, 467 (4th Cir. 1987))).
[246] *Id.*
[247] *Id.*

Only "if Defense Mapping Agency had an 'existing policy,' manifested by regulation, to transfer applicants who unsuccessfully seek a security clearance to nonsensitive positions if available [could it] be held to that policy and the Board could review its efforts."[248]

Counsel should be aware of other potential situations when there may be an obligation to consider transferring an employee. For example, the Ninth Circuit held that *Egan* did not bar review of the Department of Energy's decision to remove a disabled employee without considering the possibility of first transferring him to a new position.[249] The employee, whose job required that he maintain a reliability program certification, had a reading disorder that rendered him unable to perform tasks central to his job.[250] The Court acknowledged that "[b]ecause his job required him to provide transportation information to nuclear convoys, his reading disorder presented a potential threat to national safety."[251] During the decertification process, the employee conceded that he could not perform the required functions of his position and instead requested a transfer as a reasonable accommodation under the Rehabilitation Act; he did not challenge the decertification decision in any way.[252] The Court found that while the Department of Energy's "'investigation, suspension, and recommended revocation of' Sanchez's [reliability program] clearance are all shielded by *Egan*, the later decisions not to engage with him when he requested a non-[reliability program] job or to reassign him to a non-sensitive, non-[reliability program] job are not."[253]

The Court explained that judicial review of the reasonable accommodation claim was not barred by *Egan* because it did not have "'to examine the legitimacy of the [Department's] proffered reasons and the

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[248] *Id.* at 1580–81. *See* Campbell v. McCarthy, 952 F.3d 193, 206–07 (4th Cir. 2020), *cert. denied*, No. 20-435, 2020 WL 6829153 (U.S. Nov. 23, 2020) ("We do not see how, in these circumstances, the [Army's] past practice [in transferring employees whose clearances had been suspended] provides an 'independent source for a right to a transfer' as contemplated by *Egan* and our precedents." (citing Jamil v. Sec'y, Dep't of Def., 910 F.2d 1203, 1208–09 (4th Cir. 1990))); *see also* Lyles v. Dep't of the Army, 864 F.2d 1581 (Fed. Cir. 1989) (finding that the Army had an obligation to search for a non-sensitive position because its own regulations created such an obligation).

[249] Sanchez v. U.S. Dep't of Energy, 870 F.3d 1185 (10th Cir. 2017).

[250] *Id.*

[251] *Id.* at 1188. When attempting to relay critical information, Sanchez "mixed up the order of words and numbers, skipped over sections, and gave briefing points out of order." *Id.*

[252] *Id.* at 1191.

[253] *Id.* at 1195–96 (quoting Hall v. U.S. Dep't of Labor, Admin. Rev. Bd., 476 F.3d 847, 852 (10th Cir. 2007)).

merits of the revocation decision' or 'the circumstances under which the [Department] recommended revocation.'"[254]

The *Griffin* and *Sanchez* cases illustrate a logical caveat to non-reviewability of national security cases—one which was implicitly recognized in *Egan* itself. Litigators should therefore consider whether by regulation or statute an employee has a substantive right to be considered for a transfer to another position after losing or failing to obtain a security clearance or security-related certification.[255] At the same time, absent a right established by statute or regulation, an employee's claim that he or she should have been transferred instead of removed encroaches on the basis for agency's security determination, even where there is an alleged history of such decisions.[256] In the absence of an affirmative obligation to consider a transfer, reviewing an agency decision against transferring an employee involves second-guessing the agency's determination of the degree of risk associated with retaining an employee and is therefore inconsistent with *Egan*.[257]

B. Courts May Review Agency Compliance with a Regulation or a Statute

When carrying out a removal or other employment action, an agency must generally follow the procedures established by its own regulations or by the applicable statute. While courts cannot examine the merits of a security clearance determination, this does not preclude a court from reviewing the agency's compliance with the proper procedures.[258] This principle is entirely consistent with the court decisions finding that an

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[254] *Id.* (alterations in original) (quoting *Hall*, 476 F.3d at 852–53). The obligation of the agency to consider transferring an employee cannot be based solely on the existence of a physical or mental inability to maintain a required security-related certification but comes into play only if the employee can show "(1) he [or she] is disabled; (2) he [or she] is 'otherwise qualified'; and (3) he [or she] requested a plausibly reasonable accommodation." *Id.* at 1195 (citing Sanchez v. Vilsack, 695 F.3d 1174, 1177 (10th Cir. 2012)).

[255] Griffin v. Def. Mapping Agency, 864 F.2d 1579, 1580–81 (Fed. Cir. 1989); Sanchez v. U.S. Dep't of Energy, 870 F.3d 1185 (10th Cir. 2017).

[256] Campbell v. McCarthy, 952 F.3d 193, 206–07 (4th Cir. 2020), *cert. denied*, No. 20-435, 2020 WL 6829153 (U.S. Nov. 23, 2020).

[257] *Id.*

[258] Service v. Dulles, 354 U.S. 363 (1957) (recognizing the right of Federal courts to review an agency's actions to ensure that its own regulations have been followed); Sampson v. Murray, 415 U.S. 61, 71 (1974) ("[F]ederal courts do have authority to review the claim of a discharged governmental employee that the agency effectuating the discharge has not followed administrative regulations."); *see* Cole v. Young, 351 U.S. 536 (1956) (reviewing both a removal under § 7532 and the terms of an Executive Order).

agency must consider transferring an employee if the agency's regulations require such consideration.[259]

While being cognizant of the obligation to adhere to mandatory procedures, counsel should be mindful of the possibility of alternate procedures available for a given personnel action.[260] Agency attorneys should also be aware of the likelihood that any challenge to the procedures used by the agency should be considered in the process set forth in the CSRA.[261]

VIII. Conclusion

There is substantial disagreement among the Federal Circuit Courts as to the extent to which *Egan* precludes judicial consideration of agency national security-related personnel actions. The reasons for such divergence of opinion is attributable to the selective application of *Egan*'s central principles. A comprehensive approach to *Egan,* including careful consideration of each of the principles discussed in the case and its jurisprudential underpinnings, provides a reliable strategy to promote a more consistent application of the law.

A Federal litigation attorney should consider several questions when contemplating whether to raise an *Egan* defense in a particular case. Does the employment decision at issue raise a national security concern? And, if so, is it a generalized concern or one that involves an immediate potential risk if the decision had not been made? Is it possible to characterize the concern as one about national security information? Has either the President or Congress taken action, through an Executive Order, legislation, or otherwise, that potentially constitutes a delegation of authority to the Executive Branch? Does any delegation of authority have provisions that would specifically and necessarily limit an employee's right to a review of the employment decision at issue? What due process provisions does such delegation include and to what extent has the agency

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[259] *See Campbell*, 952 F.3d at 206–07; Jamil v. Sec'y, Dep't of Def., 910 F.2d 1203, 1208–09 (4th Cir. 1990); *Griffin*, 864 F.2d 1579, 1580–81; Lyles v. Dep't of the Army, 864 F.2d 1581 (Fed. Cir. 1989).

[260] Dep't of the Navy v. Egan, 484 U.S. 518, 530–34 (1988) (discussing alternate remedies under §§ 7513 and 7532 of Title V).

[261] Elgin v. Dep't of the Treasury, 567 U.S. 1, 6–7 (2012) (the CSRA preempts claims not provided by the CSRA).

complied with them? Is there a potential conflict in actions taken by the President or Congress?[262]

Even when *Egan* is directly applicable to an agency action, Government attorneys should consider whether there is a potential constitutional issue or other matters that may be reviewable by a court. Such matters would include the possibility that the agency must consider transferring an employee who loses his or her security clearance and whether the agency has complied with the procedures established by its own regulations or the applicable statute under which it made its employment decision.

While not all factors are equally important, these questions frame the issues that employment litigators should consider in Federal court. Consideration of these points will not only help in legal analysis but will also assist in collecting the appropriate information to present to a court considering an *Egan* defense. Such a comprehensive approach will benefit the clients and bring clarity to national security-related employment jurisprudence.

[262] For example, do the employment review schemes established by the CSRA run contrary to a presidential action? If so, did Congress state a specific intention to create a review process?