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JUDICIAL INTERPRETATIONS OF *EGAN*

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Executive Summary

Executive officials and scholars often cite the Supreme Court’s decision in Department of the Navy v. Egan, 484 U.S. 518 (1988), to claim broad and even unchecked constitutional powers by the President over foreign policy, national security, and access to classified documents. However, the case was originally one of statutory construction: what was the intent of Congress when the executive branch grants and revokes security clearances? The Court’s decision strayed from that core issue and discussed presidential powers under Article II, creating misconceptions in the lower courts. Often missing in those rulings is Egan’s policy that whatever scope exists for presidential authority, that range depends on what Congress has enacted into law (“unless Congress specifically has provided otherwise”).

The Supreme Court’s decision in *Department of the Navy v. Egan*, 484 U.S. 518 (1988). *Egan* is often cited by those who argue that the President has broad and exclusive powers under Article II of the Constitution to control access to national security information, especially classified documents.¹ Executive officials have cited *Egan* to prohibit Members of Congress and their staff from gaining access to classified national security information held by the executive branch.² However, the issue presented to the

¹ E.g., James A. Baker, *Intelligence Oversight*, 45 HARV. J. ON LEGIS. 199, 202-03 (2008); James E. Baker, IN THE COMMON DEFENSE: NATIONAL SECURITY LAW FOR PERILOUS TIMES 146 (2007). *But see* Louis Fisher, *Congressional Access to National Security Information*, 45 HARV. J. ON LEGIS. 219, 230-32 (2008).

² E.g., letter from Attorney General Michael B. Mukasey to Speaker Nancy Pelosi, Dec. 17, 2007, at 2 (national security information “is subject to the President’s constitutional control. *See Dep’t of Navy v. Egan . . .*”); letter from Richard A. Hertling, Acting Assistant Attorney General, Office of Legislative Affairs, U.S. Department of Justice, to Rep. Henry A. Waxman, chairman of the House Committee on Oversight and Government Reform, Mar. 13, 2007, at 2 (“Under the Constitution, the authority to control the circumstances under which others receive classified and national security information resides with the President. *See Egan . . .*”); letter from William E. Moschella, Assistant Attorney General, Office of Legislative Affairs, U.S. Department of Justice, to Senator Susan M. Collins, chairman of the Senate

Court in *Egan* did not address constitutional issues or independent presidential power. The question was purely statutory: what did *Congress* intend through its legislative policy? Various passages in *Egan* strayed from this central issue and created confusion and misconceptions in the lower courts and in subsequent Supreme Court rulings. Congress can clarify national policy by passing new legislation.

In the years since 1988 there have been over 180 reported decisions that refer to *Egan*. Some of those citations properly understand the core holding of *Egan*: the intent of Congress as expressed through existing statutory policy. Others focus on digressions in the Court's decision that ignored the issue originally identified by the Court and briefed by the parties. The first section of this memorandum reviews the legal dispute taken to the Court. The second section summarizes how federal courts have interpreted *Egan*. The concluding section explains the options available to Congress.

I. The *Egan* Litigation

The issue in *Egan* was fundamentally one of statutory construction. The dispute began when the Navy on February 16, 1983, issued a notice of intent to “deny/revoke” a security clearance to Thomas Egan, who worked on the Trident submarine. On May 27, 1983, after Egan had been given an opportunity in writing to explain, mitigate, or refute charges of unreliability, the Navy issued its final determination to revoke his security clearance. Because his federal position required a clearance, on June 17, 1983 the Navy issued a notice of proposed removal. Egan did not respond orally or in writing to the notice of proposed removal. On July 15, 1983, the Navy issued its final decision to remove him.³

A. MSPB's Ruling

Acting under the appeals process of 5 U.S.C. §§ 7512-7513, Egan turned to the Merit Systems Protection Board (MSPB) to review his discharge. Under those sections of the law, an agency may remove an employee “only for such cause as will promote the efficiency of the service.” Initially, a presiding official of the Board reversed the Navy's action, in part because the criteria established by the agency made it “impossible” to determine whether it had acted reasonably and with sufficient cause. The Navy petitioned for full Board review by a three-member panel, which decided on August 8, 1985 that the presiding official had erred in reviewing the merits of the agency's action, lacked authority to order reinstatement of a security clearance, and it sustained Egan's removal.⁴ He appealed to the Federal Circuit.

Committee on Homeland Security and Governmental Affairs, Apr. 12, 2005, at 3 (the President's authority to control access to national security information in the executive branch flows from constitutional powers, “as both this Department and the courts have long recognized. *See Dep't of the Navy v. Egan . . .*”); statement of Peter Keisler, Assistant Attorney General, Civil Division, U.S. Department of Justice, before the Senate Committee on Governmental Affairs, concerning S. 1358, The Federal Employee Protection of Disclosures Act, Nov. 12, 2003, at 9 (claiming, pursuant to *Egan*, that “the President's exclusive power to make security clearance determinations is based on his constitutional role as Commander-in-Chief”).

³ *Egan v. Department of Navy*, 802 F.2d 1563, 1564-65 (Fed. Cir. 1986).

⁴ *Id.* at 1565-67.

B. Federal Circuit

On October 1, 1986, the Federal Circuit vacated the Board's decision and returned the case with instructions that required review of the process for making security clearance determinations. The Federal Circuit dealt entirely with statutory — not constitutional — questions, particularly sections 7512, 7513, 7531, 7532, and 7701 of Title 5.⁵ The court searched for what “Congress intended.”⁶ It faulted the Board in part for failing to fully comply with congressional policy regarding due process for federal employees subject to removal and security clearance denials. The Board is “responsible for conducting, not abdicating, its other statutory responsibilities.”⁷ In upholding Egan's removal, the Board had concluded that “the underlying national security considerations inherent in a security clearance determination involve such a degree of sensitivity that we should not infer jurisdiction over that determination, particularly in light of Executive Order 10450, which commits such actions to agency discretion.”⁸ Part of the dispute was between a President's order and statutory policy. According to the Federal Circuit, the order did not address appellate review of an agency's grant or denial of security clearance, “although it discusses the factors to be weighed to determine whether a person's employment is consistent with the interests of national security.”⁹ It further observed: “It is a truism that the Executive can not by Order vacate an Act of Congress.”¹⁰

The three-member Board's decision spoke of judicial deference to military expertise and sensitive matters of national security.¹¹ However, the Federal Circuit agreed that Egan was not a member of the military forces and that security clearances are not limited to employees in the military departments.¹² Moreover, the MSPB and federal courts possess both authority and competence to review cases involving national security considerations and sensitive agency materials.¹³ It would be “incongruous,” said the Federal Circuit, to assert that the Board “is incapable of reviewing an agency's decision based on loyalty, trustworthiness, or veracity, and therefore that the intent of Congress in enacting both § 7512 and § 7532 must be ignored.”¹⁴

The Federal Circuit explained that the right to a hearing “is particularly cogent in the security clearance context” because charges of “disloyalty” would make it “difficult,

⁵ *Id.* at 1567-69.

⁶ *Id.* at 1568.

⁷ *Id.* at 1569.

⁸ *Id.*

⁹ *Id.* at 1570.

¹⁰ *Id.* n.4.

¹¹ *Egan v. Dept. of Navy*, 28 M.S.P.R. 509, 516-17, 518, 520-21 (1985).

¹² *Egan v. Department of Navy*, 802 F.2d at 1570-71.

¹³ *Id.* at 1571-72.

¹⁴ *Id.* at 1572.

perhaps impossible, for Mr. Egan to obtain future government employment.”¹⁵ The Board, by refusing to review the Navy’s reasons for refusing to grant a security clearance, denied to federal employees “the minimal opportunity to correct agency error, or to be protected from specious, arbitrary, or discriminatory actions,” and thus “violates the congressional mandate that it ‘protects the rights of employees, recognized by the Supreme Court in *Arnett v. Kennedy*, 416 U.S. 134 . . . (1974), to a full and fair consideration of their case’. S.Rep. No. 969, 85th Cong., 2d Sess. 51, *reprinted* in 1978 U.S.Code Cong. 2723, 2773.”¹⁶

In vacating the decision of the Board, the Federal Circuit insisted that the Board exercise “the authority it now seeks to abdicate. . . . To the extent that Congress has authorized such review, it must continue to be implemented.”¹⁷ The focus was on statutory policy. The Federal Circuit concluded that “the heavy weight of law and precedent, congressional intent, and fundamental rights, require that the agency action taken in *Egan* receive the same appellate review as other adverse actions taken under 5 U.S.C. § 7512.”¹⁸ The decision expressly rejected the notion that a statutory framework could be altered or diluted in any way by a presidential Executive Order.

Dissenting in this case, Chief Judge Markey insisted that the “authority to grant or deny a security clearance is committed to the sound discretion of executive agency heads. See Exec. Order 10450 . . .”¹⁹ He objected that the majority’s decision “will dilute the responsibility the President placed on” the armed services and executive agencies and ran “clearly contrary to well-established principles of deference owed national security determinations of executive agencies.”²⁰ To him, the protection of classified information “is an executive responsibility flowing from the President’s constitutional mandate to provide for the national defense. U.S. Const., Art. II, § 2.”²¹ Section 2 of Article II does not vest all of national defense in the President. Important powers and duties are expressly reserved to Congress under Article I. One problem with a national security case like *Egan* is that the Justice Department is always present to defend and promote executive power but the attorney representing the private party is in no position, either through capacity or incentive, to defend and promote congressional power.

C. Briefs to the Supreme Court

Although the Markey dissent spoke of independent constitutional powers of the President in the field of national security, the Supreme Court accepted the case only to review statutory questions. It directed the parties to respond to this question:

Whether, in the course of reviewing the removal of an employee for failure to maintain a required security clearance, the Merit Systems

¹⁵ *Id.* at 1573.

¹⁶ *Id.*

¹⁷ *Id.* at 1575.

¹⁸ *Id.*

¹⁹ *Id.* at 1578.

²⁰ *Id.*

²¹ *Id.* at 1580.

Protection Board is authorized by statute to review the substance of the underlying decision to deny or revoke the security clearance.²²

The briefs submitted by the parties analyzed statutory, not constitutional, issues. As the Justice Department stated in its brief: “The issue in this case is one of statutory construction and ‘at bottom . . . turns on congressional intent.’”²³ The specific statutory questions concerned 5 U.S.C. §§ 7512, 7513, 7532, and 7701.²⁴ The Justice Department, after analyzing the relevant statutes and their legislative history, could find no basis to conclude that Congress intended the MSPB to review the merits of security clearance determinations.²⁵ Egan’s brief found “nothing in the legislative history of the Civil Service Reform Act that would indicate Congress’s intent to limit the MSPB’s scope of review. To the contrary, the legislative history clearly indicates Congress’s concern that employees be given a hearing and full consideration of their appeals.”²⁶

The Justice Department did state that the President “has the constitutional power and responsibility to determine whether an individual is sufficiently trustworthy to occupy a position in the executive branch that will give him access to sensitive national security information” and had delegated that responsibility to agency heads by Executive Order.²⁷ However, it acknowledged that statutory policy can limit the President by vesting authority on courts and agency boards: “In the absence of affirmative evidence of an intent [by Congress] to make such a dramatic change, the presumption (expressly suggested in the legislative history) is that the statute codified without change the federal employee appeal rights that had previously existed only by Executive Order.”²⁸ The attention here is on congressional policy expressed in statutes.

The Justice Department explored the potential conflict between presidential authority and statutory policy. It argued that the President’s authority over access to classified information in executive agencies “exists quite apart from any explicit congressional grant. It flows directly from the constitutional vesting of the ‘executive Power’ in the President and the President’s powers as ‘Commander in Chief of the Army and Navy.’”²⁹ The existence of constitutional duties for the President does not mean exclusive and plenary power. It means that presidential authority may exist in the absence of statutory authority but can be narrowed and redirected by congressional policy. Later in this brief the Justice Department says precisely that: “Absent an

²² U.S. Department of Justice, “Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit,” U.S. Supreme Court, Department of the Navy v. Thomas E. Egan, October Term, 1986, at (I) (hereafter “Petition for a Writ of Certiorari”); U.S. Department of Justice, “Brief for the Petitioner,” U.S. Supreme Court, Department of the Navy v. Thomas E. Egan, October Term, 1987, at (I) (hereafter “Brief for the Petitioner”).

²³ “Brief for the Petitioner,” *supra* note 22, at 22, citing *Clarke v. Securities Industry Ass’n*, No. 85-971 (Jan. 14, 1987), reported at 479 U.S. 388, 400 (1987).

²⁴ Petition for a Writ of Certiorari,” *supra* note 22, at 2.

²⁵ *Id.* at 3-5, 13, 15-18.

²⁶ “Brief for the Respondent,” U.S. Supreme Court, Department of the Navy v. Thomas M. Egan, October Term 1987, at 5.

²⁷ “Petition for a Writ of Certiorari,” *supra* note 22, at 9.

²⁸ *Id.* at 15.

²⁹ “Brief for the Petitioner,” *supra* note 22, at 15.

unambiguous grant of jurisdiction by Congress, courts have traditionally been reluctant to intrude upon the authority of the executive in military and national security affairs.”³⁰ Debate about presidential “constitutional powers” therefore turns on what Congress provides in its statutes.

D. Oral Argument

The Supreme Court heard oral argument on December 2, 1987. Louis R. Cohen presented the case for the Justice Department; William J. Nold provided legal counsel for Egan. Most of the argument concentrated on statutory policy and congressional intent, but at times the discussion drifted into presidential duties over national security. Cohen conceded that the MSPB “has in certain cases including this one power to review the procedures followed by the employing agency in denying a clearance but there has been no challenge to the procedures followed by the Navy in this case.” The Board does not, he said, “have authority to review the merits of a procedurally proper agency decision to deny a clearance.”³¹ Nothing in that position argues for independent and plenary presidential power over national security information, including classified information. To Cohen, the Board’s authority to “review procedures but not substance” seemed to him “the most plausible reading of the statutory text.”³² In short, the President through Executive Orders could not direct agencies to revoke security clearances by following procedurally deficient methods, such as denying a hearing or the employee’s opportunity to challenge a revocation. “Everyone agrees,” Cohen said, “that Mr. Egan had a right to be removed only for cause under section 7513, and the right to appeal his removal to the MSPB.”³³ To that extent, the dispute was statutory.

In representing Egan, Nold told the Court that after comparing his legal position with that of the Justice Department, “[w]e start out with the premise that this is a case that involves statutory construction.” Yet after initially sharing that area of agreement, “the government seems to walk away from that question.”³⁴ What the Justice Department did, he said, was “to start building a cloud around the statute. They start building this cloud and they call it national security, and as their argument progresses down through their argument in their brief, the cloud gets darker and darker and darker, so that by the time we get to the end, we can’t see the statute anymore. What we see is this cloud called national security.”³⁵ Although Nold highlighted the national security issue, the questions from the Justices focused primarily on the procedural safeguards under Sections 7513 and 7532 available to an agency employee.³⁶

³⁰ *Id.* at 21.

³¹ Transcript of Oral Argument, Department of the Navy v. Thomas E. Egan, U.S. Supreme Court, No. 86-1552, Dec. 2, 1987, at 3.

³² *Id.* at 6.

³³ *Id.*

³⁴ *Id.* at 19.

³⁵ *Id.*

³⁶ *Id.* at 20-34.

E. The Court Decides

On February 23, 1988, the Court held 5 to 3 that under Section 7513 the MSPB did not have authority to review the substance of an underlying Navy decision on a security clearance determination. Under Section 7513, an employee has certain procedural rights, including a hearing. The MSPB reviews employee removals under a preponderance of the evidence standard.³⁷ On those issues and others, the Court confined itself to statutory interpretation and congressional intent.

Writing for the majority, Justice Blackmun began by focusing on statutory concerns: “The narrow question presented by this case is whether the Merit Systems Protection Board (Board) has authority by statute to review the substance of an underlying decision to deny or revoke a security clearance in the course of reviewing an adverse action.” He explained that the Court granted certiorari “because of the importance of this issue in its relation to national security concerns.”³⁸

F. Statutory vs. Constitutional Authority

After reviewing the rulings of the MSPB and the Federal Circuit, Justice Blackman “turn[ed] first to the statutory structure”³⁹ and identified the different procedural rights provided by Sections 7513 and 7532. At that point he emphasized the “concerns of national security, as in this case, where the grant of security clearance to a particular employee, a sensitive and inherently discretionary judgment call, is committed by law to the appropriate agency of the Executive Branch.”⁴⁰ In using the phrase “committed by law,” did he mean authority granted by statute or by the Constitution? Initially he seemed to emphasize the latter:

The President, after all, is the “Commander in Chief of the Army and Navy of the United States.” U.S. Const., Art. II, § 2. 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. . . .⁴¹

This passage borrows heavily from the Justice Department’s brief, which said that the President’s authority over access to classified information in executive agencies “exists quite apart from any explicit congressional grant. It flows directly from the constitutional vesting of the ‘executive Power’ in the President and the President’s

³⁷ Department of Navy v. Egan, 484 U.S. 518 (1988).

³⁸ *Id.* at 520.

³⁹ *Id.* at 525.

⁴⁰ *Id.* at 527.

⁴¹ *Id.*

powers as ‘Commander in Chief of the Army and Navy.’”⁴² Both Justice Blackmun and the Justice Department stated that the President’s authority “exists quite apart from any explicit congressional grant,” but that language only affirms that the President may act in the absence of statutory authority, not against statutory authority. Also, the Department spoke of power flowing “directly” from Article II, where Justice Blackmun referred to authority flowing “primarily” from Article II. In either case, the door was open for Congress to pass legislation that limited and directed presidential power. Justice Blackmun added other language that seemed to support exclusive, independent presidential power:

This Court has recognized the Government’s “compelling interest” in withholding national security information from unauthorized persons in the course of executive business. *Snepp v. United States*, 444 U.S. 507, 509, n. 3 (1980). See also *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). The authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief.⁴³

Moreover, Justice Blackmun emphasized that decisions about granting someone access to sensitive material “must be made by those with the necessary expertise in protecting classified information. . . . [T]he protection of classified information 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.” It was not “reasonably possible for an outside non-expert body to review the substance of such a judgment . . .” Nor could such a body “determine what constitutes an unacceptable margin of error in assessing the potential risk.”⁴⁴ There was a reasonable basis, Justice Blackmun said, to conclude that an agency head “must bear the responsibility for the protection of classified information committed to his custody” and that individual “should have the final say in deciding whether to repose his trust in an employee who has access to this information.”⁴⁵ Justice Blackmun referred to the Court’s decision in *Haig v. Agee* (1981) that recognized “the generally accepted view that foreign policy was the province and responsibility of the Executive.”⁴⁶ From *United States v. Nixon* (1974): “As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities.”⁴⁷ The words “generally accepted” and “utmost deference” fall short of endorsing plenary presidential power.

Having swung toward presidential power, Justice Blackmun returned to a statutory framework. The scope of presidential power depended on what Congress has enacted into law: “unless Congress specifically has provided otherwise, courts

⁴² “Brief for the Petitioner,” *supra* note 22, at 15.

⁴³ *Department of Navy v. Egan*, 484 U.S. at 527.

⁴⁴ *Id.* at 529.

⁴⁵ *Id.* (quoting from *Cole v. Young*, 351 U.S. 536, 546 (1956)).

⁴⁶ *Id.* (quoting from *Haig v. Agee*, 453 U.S. 280, 293-94 (1981)).

⁴⁷ *Id.* at 529-530 (quoting from *United States v. Nixon*, 418 U.S. 683, 710 (1974)).

traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.”⁴⁸ This sentence picks up language in the Justice Department’s brief: “Absent an unambiguous grant of jurisdiction by Congress, courts have traditionally been reluctant to intrude upon the authority of the executive in military and national security affairs.”⁴⁹

In the end, after recognizing various powers and duties of the President in military and national security affairs, Justice Blackmun settled on statutory interpretation to resolve the case. He looked to what Congress had said in law respecting the relative responsibilities of the Navy and the MSPB over security clearances. In the last four pages of his opinion, Justice Blackmun concluded there was inadequate evidence in statutes and legislative history to indicate that Congress intended to authorize the MSPB to review an agency’s security clearance determination.⁵⁰ Through this statutory analysis he reversed the Federal Circuit. Justice Kennedy took no part in the consideration or decision of the case.

G. Blackmun’s Papers

The Blackmun Papers at the Library of Congress contain two folders on the *Egan* case. After the Court issued its decision, Justice Blackmun wrote a one-page synopsis explaining how *Egan* came to the Court from the Federal Circuit, the majority’s decision, and the dissent. In four lines he captured the majority’s focus on statutory, not constitutional, issues: “In an opinion filed today we reverse that judgment. We hold that the Board under the statute utilized does not have the authority to review the substance of an underlying security clearance determination.”⁵¹

H. The Dissenting Opinion

Justice White, joined by Justices Brennan and Marshall, dissented. They agreed that the government has a “compelling interest” in safeguarding national security secrets, but objected that there was “no necessity for this Court to rewrite the civil service statutes in the name of national security.” Those statutes “already provide a procedure that protects sensitive information without depriving federal employees such as respondent of a hearing into the underlying reasons for their discharge.”⁵² The dissenters found “nothing in these statutory provisions to suggest that the Board is to scrutinize discharges on national security grounds any less comprehensively than other discharges for ‘cause.’” Nothing in the legislative history of those statutes “suggest[ed] that the Board is foreclosed from examining the reasons underlying the discharges of employees who are alleged to be security risks.”⁵³

⁴⁸ *Id.* at 530.

⁴⁹ “Brief for the Petitioner,” *supra* note 22, at 21.

⁵⁰ Department of Navy, 484 U.S. at 530-534.

⁵¹ “No. 86-1552, Department of the Navy v. Egan,” initialed H.A.B., dated 2/23/88. Papers of Harry A. Blackmun, 86-1552, Department of the Navy v. Egan, Box 499, Folder 4, Manuscript Room, Library of Congress.

⁵² Department of Navy, 484 U.S. at 534.

⁵³ *Id.*

The dissenters said that if Congress “had remained silent on the subject of national security discharges throughout the Civil Service Reform Act,” they might recognize some restrictions on how the Board could review discharges. But Congress provided for an alternative procedure when the executive branch determines that an employee’s removal “is necessary or advisable in the interests of national security,” citing 5 U.S.C. § 7532(b).⁵⁴ The Navy could have proceeded against Egan under Section 7532 but chose not to.⁵⁵ As a result, the dissenters pointed out, “the majority’s decision frustrates this congressional intent by denying any meaningful hearing to employees such as respondent who are discharged on national security grounds under provisions other than § 7532.”⁵⁶ As to the Board’s competence and authority to review agency decisions to discharge employees and deny security clearances, the dissenters said the Board “routinely evaluates such factors as loyalty, trustworthiness, and judgment in determining whether an employee’s discharge will ‘promote the efficiency of the service.’”⁵⁷ The dissent rejected the majority’s position “absent any indication that Congress or the President intended to deny federal employees discharged on national security grounds a full hearing before either the Board or their employing agency into the merits of their removal.”⁵⁸

I. The Core Holding

In *Egan*, the Supreme Court decided this fundamental issue: “In an appeal pursuant to § 7513, the Board does not have authority to review the substance of an underlying security-clearance determination in the course of reviewing an adverse action.”⁵⁹ The dispute was entirely within the executive branch: MSPB versus Navy. The case was argued and decided on statutory grounds, even if parts of the majority decision commented on the President’s powers under Article II. The majority, however, did not find in the President any plenary or unchecked power over classified information. The majority clearly wrote: “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.”⁶⁰ Resolution of disputes over classified information depends on judgments by both of the elected branches, Congress and the President. Moreover, judicial deference to executive judgments does not require congressional deference. Members of Congress have both the authority and the duty to exercise their own powers under Article I.

II. How Courts Interpret *Egan*

Egan began with statutory issues identified by the Court to the parties but later branched into constitutional issues discussed in the majority opinion. Because of a lack of

⁵⁴ *Id.* at 535.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 537 n.1.

⁵⁸ *Id.* at 538.

⁵⁹ *Id.* at 518.

⁶⁰ *Id.* at 530.

doctrinal coherence, judicial decisions that cite *Egan* do so on different grounds, some statutory, some constitutional. Courts differ on how much deference to extend to executive judgments, and even whether the judiciary has jurisdiction to hear cases about security clearances. Some of the decisions focus on the disclosure of classified information, either to the courts or to the plaintiffs. The *Al-Haramain* litigation (discussed in Section II.F) offers an unusually close and reasoned analysis of *Egan*.

A. Analyzing Statutory Grounds

A number of federal courts correctly understood *Egan* as a search for statutory grounds and congressional intent. On March 30, 1988, a month after the Court decided *Egan*, the Tenth Circuit recognized that the Court addressed only the “narrow question” whether the MSPB had statutory authority to review the Navy’s decision.⁶¹ It ruled that a district court had “improperly based its jurisdiction upon constitutional grounds.”⁶² Although the Tenth Circuit referred to the “constitutional responsibility” of the executive branch to classify and control access to information bearing in national security, it also repeated the Court’s caution in *Egan*: “unless Congress specifically has provided otherwise.”⁶³ A similar ruling was issued by the Federal Circuit on April 19, 1988, stating that judicial deference “must be ‘at its apogee’ in matters pertaining to the military and national defense,” but at the same time drawing attention to the unless-Congress qualification.⁶⁴ On June 10, 1988, a district court referred to the “narrow question” decided in *Egan* that decisions on security clearances “are not reviewable by MSPB.”⁶⁵ On December 6, 1988, in *Carlucci v. Doe*, the Supreme Court discussed *Egan* solely in terms of the role of Congress by statute to determine the removal of federal employees on national security grounds and the revocation of clearances to see classified materials.⁶⁶

On September 30, 1988, the Fourth Circuit corrected a misconception by one of the parties about *Egan*. The party maintained that the district court had failed to practice judicial deference, but the Fourth Circuit stated that the district court acted appropriately because *Egan* “deals with the procedural rights granted federal employees by a specific statute.”⁶⁷ On January 11, 1989, the Federal Circuit held that the claim of an employee that he was denied due process in security revocation could not be heard by the MSPB, citing *Egan* and existing statutes as authority.⁶⁸ Even so, the court acknowledged that the case would have been different had there been, under 5 U.S.C. § 7703(c), agency action that was arbitrary, capricious, or an abuse of discretion, contrary to law, or unsupported

⁶¹ Hill v. Department of the Air Force, 844 F.2d 1407, 1409 (10th Cir. 1988).

⁶² *Id.* at 1413.

⁶³ *Id.* at 1410, 1411.

⁶⁴ Voge v. United States, 844 F.2d 776, 779 (Fed. Cir. 1988). *See also* Becerra v. Dalton, 94 F.3d 145, 148 (4th Cir. 1996) for the unless-Congress condition.

⁶⁵ Peterson v. Department of Navy, 687 F.Supp. 713, 714 (D.N.H. 1988). Other courts interpret *Egan* in the same manner: Read v. United States, 254 F.3d 1064, 1065 (Fed. Cir. 2001).

⁶⁶ Carlucci v. Doe, 488 U.S. 93, 103-04 (1988).

⁶⁷ Artist v. Virginia Intern. Terminals, Inc., 857 F.2d 977, 978 n.3 (4th Cir. 1988).

⁶⁸ Lyles v. Department of Navy, 864 F.2d 1581, 1583-84 (Fed. Cir. 1989).

by substantial evidence.⁶⁹ A similar decision was handed down by the Federal Circuit the same day in two other cases, again relying on *Egan* and statutory authority.⁷⁰

On March 21, 1989, in *Treasury Employees v. Von Raab*, the Supreme Court decided a case involving classified material. Although the Court cited *Egan*, it did not speak of exclusive presidential powers or deny the authority of Congress to legislate restrictions.⁷¹ Two months later a district court cited *Egan* to describe the government's "compelling interest" to protect sensitive information, but did so on statutory — not constitutional — grounds.⁷² A decision by the D.C. Circuit in 1989 on national security information made comparable use of *Egan*.⁷³ The same can be said about a district court decision that year. *Egan* was cited but not for constitutional sources of authority for the President.⁷⁴ The D.C. Circuit applied similar reasoning in 1989.⁷⁵

In 1989, the D.C. Circuit interpreted *Egan* as a statutory matter.⁷⁶ The next year a district court cited *Egan* for the government's "compelling interest" to protect sensitive information.⁷⁷ In that same year, the D.C. Circuit reviewed the termination of a federal employee on the ground of being a security risk. The ruling concentrated on statutory procedures and authorities, citing *Egan* at various points for guidance on statutory interpretation.⁷⁸ In 1992, Judge Michael Luttig of the Fourth Circuit agreed that "the only question" before the Supreme Court in *Egan* was whether Section 7513 authorized the MSPB to review the Navy's decision to withhold a security clearance.⁷⁹ Yet he nevertheless decided to discuss constitutional sources for the President before acknowledging the unless-Congress qualification.⁸⁰

Other courts began their decisions by analyzing statutes and legislative history, only to speak about broad presidential authority in foreign affairs and "judicial reticence, in the absence of a clear legal mandate," citing *Egan*.⁸¹ Some courts started with

⁶⁹ *Id.* at 1584.

⁷⁰ *Griffin v. Defense Mapping Agency*, 864 F.2d 1579 (Fed. Cir. 1989); *Skees v. Department of Navy*, 864 F.2d 1576 (Fed. Cir. 1989).

⁷¹ *Treasury Employees v. Von Raab*, 489 U.S. 656, 677-78 (1989); cited in a dissent by Chief Justice Rehnquist in *Chandler v. Miller*, 520 U.S. 305, 327 (1997).

⁷² *Hartness v. Bush*, 712 F.Supp. 986, 991 (D.D.C. 1989).

⁷³ *Harmon v. Thornburgh*, 878 F.2d 484, 492 (D.C. Cir. 1989).

⁷⁴ *American Federation of Government Emp. v. Cavazos*, 721 F.Supp. 1361, 1370-71 (D.D.C. 1989).

⁷⁵ *American Federation of Gov. Employees v. Skinner*, 885 F.2d 884, 893 (D.C. Cir. 1989).

⁷⁶ *Doe v. Cheney*, 885 F.2d 898, 906 (D.C. Cir. 1989).

⁷⁷ *National Treasury Employees Union v. Yeutter*, 733 F.Supp. 403, 411 (D.D.C. 1990).

⁷⁸ *U.S. Information Agency v. Krc*, 905 F.2d 389, 393, 395-400 (D.C. Cir. 1990).

⁷⁹ *Guillot v. Garrett*, 970 F.2d 1320, 1325 (4th Cir. 1992).

⁸⁰ *Id.* at 1324.

⁸¹ *Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1350, 1380 (2nd Cir. 1992). *See also* *Mitchell v. Crowell*, 966 F.Supp. 1071, 1079 (N.D. Ala. 1996), citing *Egan* to limit agency decisions on security clearances to statutory policy; *McCoy v. Pennsylvania Power and Light Co.*, 933 F.Supp. 438, 441 (M.D. Pa. 1996), recognizing that *Egan* held that the security clearance process "is committed by law" to federal agency discretion; *King v. Alston*, 75 F.3d 657, 662 (Fed. Cir. 1996), agreeing that *Egan* presented the "narrow question" whether the MSPB had statutory authority to review the Navy's decision, but treated the subject matter as outside the jurisdiction of federal courts; *Drumheller v. Department of Army*, 49 F.3d

statutory analysis but later concluded that decisions of security clearances are exclusively an executive function and are not reviewable by the judiciary. In 2005, the D.C. Circuit summarized an earlier ruling that held that revocation of a security clearance was not actionable under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, relying on *Egan*'s decision that the MSPB "lacked [statutory] authority" to review the Navy's decision to deny or revoke a security clearance, because that "sensitive and inherently discretionary judgment call . . . is committed by law to the appropriate agency of the Executive Branch."⁸² "Committed by law" is a statutory concept, but the D.C. Circuit concluded that issuing and revoking security clearances are discretionary functions of the executive branch, involving "the complex area of foreign relations and national security" and "are not subject to judicial review."⁸³

B. Levels of Judicial Deference

In 1990, the Ninth Circuit cited *Egan* for the proposition that courts must give "special deference" to the executive branch when adjudicating matters involving classified information.⁸⁴ Federal judges have cited the "utmost deference" standard in *Egan* for deferring to executive judgments in foreign relations and national security.⁸⁵ Other courts find in *Egan* the standard of "considerable deference" to executive judgments regarding foreign policy and national defense.⁸⁶ Federal judges look to *Egan* to avoid intruding on the President's authority in military and national security affairs.⁸⁷ However, judicial deference does not mean total deference. Some courts properly understand *Egan* in terms of its qualifier: "unless Congress specifically has provided otherwise."⁸⁸ A court ruling in 2004, guided by *Egan*, stated that when Congress has

1566, 1569-70, 1571 (Fed. Cir. 1995), stating that the MSPB lacked statutory authority and jurisdiction to review the Navy's decision but then said, without elaboration, "neither do we."

⁸² *Bennett v. Chertoff*, 425 F.3d 999, 1000 (D.C. Cir. 2005), citing Department of Navy, 484 U.S. at 527.

⁸³ *Bennett v. Chertoff*, 425 F.3d at 1001.

⁸⁴ *High Tech Gays v. Defense Ind. Sec. Clearance Off.*, 895 F.2d 563, 577 (9th Cir. 1990). *See also* *Veitch v. Danzig*, 135 F.Supp.2d 32, 36 (D.D.C. 2001) and *Claybrook v. Slater*, 111 F.3d 904, 908 (D.C. Cir. 1997) for *Egan*'s language that the judiciary should defer to executive judgments in the area of national security.

⁸⁵ *Oryszak v. Sullivan*, 565 F.Supp.2d 14, 18-20 (D.D.C. 2008); *Leu v. International Boundary Com'n*, 523 F.Supp.2d 1199, 1209 (W.D.Wash. 2007); *Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 360 (D.C. Cir. 2007) (Kavanaugh, J., dissenting).

⁸⁶ *Natural Resources Defense Council, Inc. v. Winter*, 502 F.3d 859, 862 (9th Cir. 2007). Circuit Judge Milan D. Smith, Jr., dissenting in part and concurring in part, distinguished *Egan* from the facts of this case; *id.* at 866. Four dissenting Supreme Court Justices in 2008 cited *Egan* to "accord great deference even when the President acts alone" in the area of foreign and military affairs; *Boumediene v. Bush*, 128 S.Ct. 2229, 2297 (2009) (Scalia, J., joined by Roberts, C.J., Thomas, J., and Alito, J.).

⁸⁷ *John Doe, Inc. v. Mukasey*, 549 F.3d 861, 871 (2nd Cir. 2008); *El Badrawi v. Department of Homeland Sec.*, 579 F.Supp.2d 249, 263 (D.Conn. 2008); *In re Guantanamo Bay Detainee Litigation*, 570 F.Supp.2d 13, 19 (D.D.C. 2008); *Arar v. Ashcroft*, 532 F.3d 157, 181 (2nd Cir. 2008); *Munaf v. Geren*, 128 S.Ct. 2207, 2218 (2008); *Bismullah v. Gates*, 514 F.3d 1291, 1301 (D.C. Cir. 2008) (Circuit Judges Henderson, Sentelle, Randolph, and Kavanaugh, dissenting from the denial of rehearing en banc); *Brooks v. United States*, 65 Fed.Cl. 135, 145 (2005); *Miller v. United States*, 29 Fed.Cl. 107, 106 (1993); *Adkins v. United States*, 30 Fed.Cl. 158, 162 (1993).

⁸⁸ *Roig v. Puerto Rico Nat. Guard*, 47 F.Supp.2d 216, 218 (D.Puerto Rico 1999); *Nishitani v. United States*, 42 Fed.Cl. 733, 737 (1999); *Jones v. New York State Div. of Military*, 166 F.3d 45, 51 (2nd Cir.

provided specific statutory guidance, [c]onsiderations of deference are not relevant.”⁸⁹ Judicial deference, whatever its scope, does not interfere with congressional authority to make independent legislative judgments regarding access to classified information.

That position was developed by a district court in 1990. The CIA, citing *Egan*, maintained that federal courts “ought to be extremely deferential to decisions affecting national security.”⁹⁰ The court regarded the agency’s reliance on *Egan* “to be partially misplaced.” Equal protection claims brought by agency employees “are reviewable despite the inquiry into the affairs of the CIA compelled by participation in the discovery process.”⁹¹ Although the court accepted “as a general matter” the language in *Egan* that courts “ought to be extremely deferential” in these cases of security clearances, “such deference to Executive Branch decisions does not require the Judiciary to abdicate its authority under Article III to decide whether or not an individual’s right to equal protection under the Federal Constitution has been violated.”⁹² Such cases are reviewable by the courts “because Congress has not clearly precluded constitutionally-based claims from judicial review.”⁹³

Other courts in their interpretations of *Egan* warned that judicial deference to executive judgments should not produce judicial abdication.⁹⁴ Relying on *Egan*, some courts have held that they “should not intrude upon the authority of the executive in military and national security affairs, unless Congress has specifically expressed a contrary intention.”⁹⁵ *Egan* is frequently cited for the general principle of “judicial deference that pervades the area of national security.”⁹⁶ In 1992, a district court interpreted *Egan* to require “utmost deference” by the courts.⁹⁷ It ignored the very next line in *Egan*: “unless Congress specifically has provided otherwise . . .”⁹⁸ The Third Circuit in 2002 invoked *Egan* to support a judicial reluctance to intrude upon the Executive’s authority in military and national security affairs, without acknowledging the

1999); *Able v. United States*, 88 F.3d 1280, 1293 (2d Cir. 1996); *Perez v. United States*, 850 F.Supp. 1354, 1360 (N.D.Ill. 1994); *United States v. Santiago*, 846 F.Supp. 1486, 1493 (D.Wyo. 1994).

⁸⁹ *Strickland v. United States*, 61 Fed.Cl. 443, 448 (2004).

⁹⁰ *Dubbs v. C.I.A.*, 769 F.Supp. 1113, 1116 (N.D.Cal. 1990).

⁹¹ *Id.*

⁹² *Id.* n.3.

⁹³ *Id.*

⁹⁴ *Buttino v. F.B.I.*, 801 F.Supp. 298, 301 (N.D.Cal. 1992).

⁹⁵ *Northrop Grumman Corp. v. United States*, 75 Fed.Cl. 761, 766-67 (2007); *O.K. v. Bush*, 377 F.Supp.2d 102, 117 (D.D.C. 2005); *Doe v. United States*, 66 Fed.Cl. 165, 166 (2005); *United States v. Green*, 293 F.3d 855, 862 n.39 (5th Cir. 2002); *United States v. Hawkins*, 249 F.3d 867, 873 n.2 (9th Cir. 2001); *United States v. Mandel*, 914 F.2d 1215, 1221 n.10 (9th Cir. 1990). Similar statements, citing *Egan*, are found in *Briley v. National Archives & Records Admin.*, 236 F.3d 1373, 1379 (Fed. Cir. 2001); *Hesse v. Department of State*, 217 F.3d 1372, 1374-77, 1380 (Fed. Cir. 2000); *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1161 (D.C. Cir. 1999).

⁹⁶ *Los Angeles Times Commun’s. v. Department of Army*, 442 F.Supp.2d 880, 899 (C.D.Cal. 2006); *Franklin v. Massachusetts*, 505 U.S. 788, 818 (1992) (concurrency by Justice Stevens, joined by Justices Blackmun, Kennedy, and Souter).

⁹⁷ *Lovelace v. Stone*, 814 F.Supp. 558, 559 (E.D.Ky. 1992), citing *United States v. Nixon*, 418 U.S. 683, 710 (1974). See also *Cobb v. Danzig*, 190 F.R.D. 564, 566 (S.D.Cal. 1999) for finding in *Egan* an utmost-deference standard.

⁹⁸ *Department of Navy v. Egan*, 484 U.S. at 530.

unless-Congress condition.⁹⁹ The Fourth Circuit in 1996 pointed to *Egan* as controlling authority that the President is empowered as Commander in Chief to classify and control access to national security information.¹⁰⁰

A district judge in 1991 remarked that it was proper for courts to defer to military judgments, citing *Egan* for support.¹⁰¹ Other courts have adopted the same attitude, including the need to protect classified information and broader issues of warmaking.¹⁰² In 2002 the Supreme Court referred to dicta in *Egan* that foreign policy is “the province and responsibility of the Executive.”¹⁰³ To the extent that judges decide to defer to military and foreign policy decisions of the executive branch, Congress need not do so. If Congress acts through its statutory authority to challenge a military judgment, courts must then interpret and apply legislative policy. For example, in *Goldman v. Weinberger* (1986) the Supreme Court deferred to a military judgment that prohibited the wearing of yarmulkes indoors, on duty, by military personnel.¹⁰⁴ Within a year Congress overrode that military judgment.¹⁰⁵ Almost a decade later, in 1996, the Fourth Circuit cited *Goldman* as reason for courts to defer to the military’s experience over troop morale, apparently unaware that *Goldman* had been reversed by statutory policy.¹⁰⁶

In 1996, a district court cited both *Egan* and *Goldman* for this principle: “In the context of the military, it is well settled that courts are particularly reluctant to interfere ‘upon the authority of the Executive in military and national security affairs.’”¹⁰⁷ Whatever the scope of “judicial reluctance,” federal courts have decided many cases involving military and national security affairs, beginning with Supreme Court cases in

⁹⁹ *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 219 (3rd Cir. 2002). The Ninth Circuit in 2003 referred to *Egan* and the President’s constitutional authority to protect national security information without acknowledging the unless-Congress condition; *Doe v. Tenet*, 329 F.3d 1135, 1156-57 (9th Cir. 2003). Also in 2003, the D.C. Cir. omitted reference to *Egan*’s unless-Congress language while expressing judicial reluctance to intrude upon the Executive’s authority in national security affairs; *Center for Nat. Sec. Studies v. Dept. of Justice*, 331 F.3d 918, 927 (D.C. Cir. 2003).

¹⁰⁰ *Thomasson v. Perry*, 80 F.3d 915, 925 (4th Cir. 1996).

¹⁰¹ *Steffan v. Cheney*, 780 F.Supp. 1, 14 (D.D.C. 1991).

¹⁰² *Hamdi v. Rumsfeld*, 542 U.S. 507, 531 (2004); *Bennett v. Ridge*, 321 F.Supp.2d 49, 55-56 (D.D.C. 2004); *Jones v. Ashcroft*, 321 F.Supp.2d 1, 8 (D.D.C. 2004); *Padilla v. Rumsfeld*, 352 F.3d 695, 712 (2nd Cir. 2003); *Reeves v. United States*, 49 Fed.Cl. 560, 569 n.22 (2001).

¹⁰³ *Christopher v. Harbury*, 536 U.S. 403, 417 (2002), citing *Department of Navy v. Egan*, 484 U.S. at 529.

¹⁰⁴ 475 U.S. 503 (1986).

¹⁰⁵ 101 Stat. 1086-97, § 508 (1987).

¹⁰⁶ *Thomasson v. Perry*, 80 F.3d 915, 926 (4th Cir. 1996). A year later, the Federal Circuit cited *Goldman v. Weinberger* as a possible ground for “special deference” to agency decisions without mentioning the 1987 statute; *Holley v. United States*, 124 F.3d 1462, 1467 (Fed. Cir. 1997). This case cites *Egan* to require minimum due process when discharging a military officer in a security context; *id.* at 1469-60.

¹⁰⁷ *Oram v. Dalton*, 927 F.Supp. 180, 184 (E.D.Va. 1996). See also *Strickland v. United States*, 36 Fed.Cl. 651, 655 (1996) for judicial “reluctance” in this area of the law, but recognizing that the Constitution “grants power over the military to the Executive and Legislative Branches.” *Goldman* and *Egan* were cited by the Second Circuit in 1997 to support judicial deference to military judgments with the understanding that Congress may provide otherwise by law; *General Media Communications, Inc. v. Cohen*, 131 F.3d 273, 283 (2nd Cir. 1997).

1800, 1801, and 1804.¹⁰⁸ As the Court noted in *Baker v. Carr* (1962): “it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.”¹⁰⁹

Some courts have read *Egan* to say that security clearance decisions are “a matter within the purview of the executive and not to be second-guessed by the judiciary unless Congress has specifically provided otherwise.”¹¹⁰ Others insist on a measure of judicial independence even in cases involving the military. After discussing *Egan* in a ruling in 2008, a district court said that deference to military judgments “must be tempered, however, by ‘[t]he established principle of every free people . . . that the law shall alone govern; and to it the military must always yield.’” *Dow v. Johnson*, 100 U.S. 158, 169, 25 L.Ed. 632 (1880) (Field, J.). Deference therefore does not mean a court must abjure judicial review whenever a party raises the specter of national security.”¹¹¹

C. Lack of Jurisdiction

Other judicial rulings went beyond judicial deference, citing *Egan* to hold that courts should have no role at all. In 1990, a district court said it was asked by the plaintiff “to second-guess the discretionary judgment of the Department of Defense” regarding the revocation of a security clearance.¹¹² It concluded that it had “no authority to engage in this type of review.” It looked to *Egan* to decide that the MSPB “did not have the statutory authority” to review the Navy’s decision to revoke a security clearance, but then moved from this statutory issue to language in *Egan* about constitutional sources for the President while at the same time recognizing the phrase “unless Congress specifically has provided otherwise.”¹¹³ The court added: “*Egan* makes clear that this Court has neither the authority nor the expertise to review this decision.”¹¹⁴ However, *Egan* did not deprive courts of jurisdiction to hear and decide national security cases. Courts are expected to interpret and apply the statutory policy of Congress.

In 1990, the Fourth Circuit read *Egan* to largely rule out judicial involvement in cases of security clearances. It claimed that the Supreme Court “indicated that the determination by an agency whether or not to grant an individual access to secret information lies inherently within the discretion of that agency and that therefore it is virtually impossible for the MSPRB [Merit Systems Protection Review Board] or a court to review the exercise of such discretion by application of objective criteria.”¹¹⁵ The use of “inherently” appears to exclude both judicial and congressional checks. The Fourth Circuit underscored the President’s constitutional powers before returning to the capacity of Congress to control this area through statutory policy: “The discretionary nature of the

¹⁰⁸ *Bas v. Tingy*, 4 U.S. 37 (1800); *Talbot v. Seeman*, 5 U.S. 1 (1801); *Little v. Barreme*, 6 U.S. (2 Cr.) 169 (1804).

¹⁰⁹ 369 U.S. 186, 211 (1962).

¹¹⁰ *Hill v. White*, 321 F.3d 1334, 1336 (11th Cir. 2003).

¹¹¹ *Natural Resources Defense Council v. Winter*, 527 F.Supp.2d 1216, 1237 (C.D.Cal. 2008).

¹¹² *Williams v. Reilly*, 743 F.Supp. 168, 171 (S.D.N.Y. 1990).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Jamil v. Secretary, Dept. of Defense*, 910 F.2d 1203, 1205-06 (4th Cir. 1990).

decision to withhold a security clearance combined with the constitutional delegation of the obligation to protect national security to the Executive Branch is such that neither the MSPRB nor a court of appeals, in review of the MSPRB, can be permitted ‘to intrude upon the authority of the Executive in military and national security affairs’ absent specific authorization from Congress.”¹¹⁶ The court held “we need not and do not reach the question of whether *Egan* precludes courts from reviewing security clearance decisions for pretext in the context of the third stage of a Title VII claim of discrimination.”¹¹⁷

In another case decided in 1990, the Ninth Circuit held that a district court lacked jurisdiction to review the merits of a decision by the Defense Department to revoke the security clearance of an employee of a defense contractor. The court relied on the “logic” of *Egan* to decide in that manner.¹¹⁸ The following year a district court interpreted *Egan* to preclude judicial review for cases involving the government’s decision to revoke a security clearance.¹¹⁹ The court quoted language in *Egan* about the President’s powers flowing from constitutional sources without recognizing either the statutory nature of the case or the unless-Congress qualification.¹²⁰ In 1993, a district court looked to *Egan* for guidance, agreeing “that it has no authority to review the merits of a decision to revoke or deny a security clearance.”¹²¹ Other courts have ruled that the decision not to issue a security clearance is unreviewable under *Egan*.¹²²

In 1993, a district court said that “the presumption of reviewability is entirely inapplicable in matters concerning national security. *See Egan*, 484 U.S. at 527 . . .”¹²³ Here the area excluded to the judiciary appeared to be not only security clearances but the whole of national security. *Egan* does not support that interpretation. Page 527 of *Egan* is filled with language about the President as Commander in Chief, authority flowing from Article II, and so forth, but the Supreme Court understood that the field of national security can be defined and limited by statute. This same district court decision recognized that the exclusion of the courts must be stated expressly in a statute: “where Congress intended to preclude judicial review of constitutional claims, its intent must be

¹¹⁶ *Id.* at 1206.

¹¹⁷ *Id.* at 1207. *See also id.* at 1209.

¹¹⁸ *Dorfmont v. Brown*, 913 F.2 1399, 1401 (9th Cir. 1990). *See also id.* at 1405. Five years later the Ninth Circuit reiterated its lack of jurisdiction in cases involving security clearance decisions; *Brazil v. U.S. Dept. of Navy*, 66 F.3d 193, 196 (9th Cir. 1995). In 2002 the Tenth Circuit read *Egan* to say that security clearance decisions are not subject to any external review, including judicial review; *Duane v. U.S. Dept. of Defense*, 275 F.3d 988, 993 (10th Cir. 2002).

¹¹⁹ *Beattie v. United States*, 759 F.Supp. 753, 758 (D.Kan. 1991).

¹²⁰ *Id.* at 759.

¹²¹ *Mangino v. Department of Army*, 818 F.Supp. 1432, 1434 (D.Kan. 1993). For a similar interpretation of *Egan* by the Tenth Circuit, leading to unreviewability of national security clearance decisions, *see Beattie v. Boeing Co.*, 43 F.3d 559, 564-66 (10th Cir. 1994).

¹²² *Robinson v. Department of Homeland Sec.*, 498 F.3d 1361, 1366-67 (Fed. Cir. 2007) (concurrency by Circuit Judge Rader; a separate concurrence by Senior Circuit Judge Plager at 1367 looked to *Egan* and other cases to find “some limited scope for judicial review of the procedure by which a security clearance is revoked”); *Stanley v. Gonzales*, 476 F.3d 653, 658 (9th Cir. 2007); *Stanley v. Department of Justice*, 423 F.3d 1271, 1273 (Fed. Cir. 2005); *Greene v. United States*, 65 Fed.Cl. 375, 382 (2005); *Weber v. United States*, 209 F.3d 756, 759-60 (D.C. Cir. 2000); *Ryan v. Reno*, 168 F.3d 520, 522, 523 (D.C. Cir. 1999).

¹²³ *Chesna v. U.S. Dept. of Defense*, 822 F.Supp. 90, 94 (D.Conn. 1993).

clear.”¹²⁴ In 1995, the Fifth Circuit claimed that the Supreme Court in *Egan* and several circuit courts have held that judicial scrutiny of the merits of a revocation decision involving security clearances “is an impermissible intrusion by the Judicial Branch into the authority of the Executive Branch over matters of national security.”¹²⁵ A court in 2004 cited *Egan* as one of several grounds for refusing to adjudicate a tort claim arising from the destruction of a pharmaceutical company in Sudan.¹²⁶

Other courts spoke more cautiously about *Egan*’s application to judicial authority. In 1990, a district court stated that the Supreme Court in *Egan* held that the issuance of security clearances under Executive Order 12,356 “is an exercise of the Executive’s authority in national security affairs with respect to which the judiciary normally has no jurisdiction.”¹²⁷ “It may well be that *Egan* allows for exceptions where the need for judicial involvement is great . . .”¹²⁸ The following year, the Eleventh Circuit acknowledged the discretionary authority of agencies to issue and revoke security clearances but stated that “even in a context as sensitive as the one which existed in *Egan*, the discretion of the agency, and the unreviewability of the agency’s exercise of discretion by a court, may not be absolute.”¹²⁹

In 1992, a district court rejected the argument of the Defense Department that the court lacked authority to review the downsizing of a military base. The court denied that the case fell under the political question doctrine.¹³⁰ Pointing to the “unless Congress” language in *Egan*, it stated that “certainly not every matter concerning the military or touching on politics requires the judiciary to stay its hand.”¹³¹ A year later the D.C. Circuit relied on *Egan* (and also *Webster v. Doe*) to reject the government’s argument that security-clearance judgments are “judicially unreviewable.”¹³² “To stretch *Egan* to cover this case would be to endorse untenable, and far-reaching, restrictions on judicial review of governmental actions.”¹³³

The U.S. Court of Federal Claims in 1993 cited *Egan* to describe judicial review over security clearance matters as “severely limited” but not totally excluded from the courts, listing several areas appropriate for judicial inquiry.¹³⁴ In 1995, the claims court said that decisions of the military deserve “a great deal of deference” but not total

¹²⁴ *Id.* at 96.

¹²⁵ *Perez v. F.B.I.*, 71 F.3d 513, 514-15 (5th Cir. 1995). See also *Mitchell v. Crowell*, 975 F.Supp. 1440, 1444 n.4 (N.D.Ala. 1997) for a case citing *Egan* in agreeing that a court has no jurisdiction to review the government’s decision to deny an individual a security clearance.

¹²⁶ *El-Shifa Pharmaceutical Industries Co. v. United States*, 378 F.3d 1346, 1366 (Fed. Cir. 2004).

¹²⁷ *American Federation of Gov. Emp. v. Sullivan*, 744 F.Supp. 294, 306 (D.D.C. 1990).

¹²⁸ *Id.*

¹²⁹ *Horton Homes, Inc. v. United States*, 936 F.2d 548, 553 (11th Cir. 1991).

¹³⁰ *County of Seneca v. Cheney*, 806 F.Supp. 387, 394 (W.D.N.Y. 1992).

¹³¹ *Id.* at 395.

¹³² *National Fed’n of Fed. Employees v. Greenberg*, 983 F.2d 286, 289 (D.C. Cir. 1993).

¹³³ *Id.* at 290.

¹³⁴ *Carpenter v. United States*, 28 Fed.Cl. 195, 201 (1993). See also *Brockmann v. Department of Air Force*, 27 F.3d 544 (Fed. Cir. 1994) for general application of *Egan* to the withdrawal of a security clearance.

deference, citing *Egan*.¹³⁵ In the same year, a district court relied on *Egan* and other Supreme Court decisions to conclude that it lacked jurisdiction to decide cases that involve polygraph examinations and security clearances. Treating the area of foreign policy and national security as essentially executive in nature, it backed off from that position by saying the President has “a large degree of unshared power” in those fields.¹³⁶ The Third Circuit affirmed, looking to *Egan* partly for statutory analysis but also to discuss presidential authority under Article II and the political question doctrine.¹³⁷

A district court in 2002 read presidential power under *Egan* broadly but refused to accept the government’s argument that a case involving classified information represented a political question beyond the jurisdiction of the federal judiciary: “*Egan* did not once mention political question doctrine.”¹³⁸ The constitutional text “does not expressly commit control over information that bears on national security to the Executive Branch.”¹³⁹ Contrary to the government’s position, judicial review of the decision to deny a plaintiff’s counsel access to “allegedly classified information does not contravene the holding” of *Egan*.¹⁴⁰ Even if the President possesses great discretion under Article II to determine who has access to classified information, “*Egan* says nothing about what happens when an exercise of that discretion conflicts with another provision of the Constitution.”¹⁴¹

In 2007, the Federal Circuit used *Egan* as a framework to decide whether agency decisions on security clearances are reviewable by the courts.¹⁴² After agreeing that neither the MSPB nor a court may review “the underlying merits of an agency’s decision to suspend a security clearance,” it held that courts have an obligation to assure that the procedures set forth in 5 U.S.C. § 7513 were followed by an executive agency. In this case, it held that “the procedural requirements of section 7513 were not met.”¹⁴³ The petitioner in this case “was entitled to more information about the allegations against him than he received.”¹⁴⁴ Other courts, in brief citations, continue to cite *Egan* to claim that an agency’s decision to revoke a security clearance “is not subject to judicial review.”¹⁴⁵

D. Interpreting Article II Powers

On May 27, 1988, District Judge Gasch cited *Egan* to support the proposition that the President, “pursuant to his Article II powers, undertook to defend national security by

¹³⁵ Lee v. United States, 32 Fed.Cl. 530, 537-38 (1995).

¹³⁶ Stehney v. Perry, 907 F.Supp. 806, 816-17, 818-19 (D.N.J. 1995).

¹³⁷ Stehney v. Perry, 101 F.3d 925, 931, 936 (3rd Cir. 1996). For further discussion of *Stehney* and *Egan*, see Makky v. Chertoff, 541 F.3d 205, 212-13 (3rd Cir. 2008).

¹³⁸ Stillman v. Department of Defense, 209 F.Supp.2d 185, 202 (D.D.C. 2002).

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 207.

¹⁴¹ *Id.* at 208.

¹⁴² Cheney v. Department of Justice, 479 F.3d 1343, 1348-51 (Fed. Cir. 2007).

¹⁴³ *Id.* at 1352.

¹⁴⁴ *Id.* at 1353.

¹⁴⁵ Nickelson v. United States, 284 F.Supp.2d 387, 390 n.3 (E.D.Va. 2003). According to a court in 2004, *Egan* held that suspension of a security clearance “does not rise to a legal or equitable claim.” Bernard v. United States, 59 Fed.Cl. 497, 502 (2004).

limiting access to and disclosure of sensitive information.”¹⁴⁶ He did not discuss the statutory nature of *Egan* or the authority of Congress to legislate limitations on presidential power. Two months later, Judge Gasch again read *Egan* broadly to reach constitutional principles. Citing *Egan*, he said that executive employees “unquestionably have an obligation to preserve the secrecy of national security information.”¹⁴⁷ Referring to *Egan*, he said “the President has broad discretion to ensure that his employees are faithful to this obligation.”¹⁴⁸ Broad discretion need not mean exclusive authority. Judge Gasch did not discuss the capacity of Congress by statute to narrow and direct presidential discretion.

The Supreme Court on June 15, 1988 decided *Webster v. Doe*, involving the CIA’s removal of an employee because he was homosexual. Although the majority made no mention of *Egan*, Justice O’Connor in a concurrence and partial dissent referred to a 1936 Supreme Court decision that spoke of “the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations.”¹⁴⁹ She did not acknowledge that this language from the 1936 case was dictum nor did she recognize that the assertion about plenary and exclusive presidential powers was based on Justice Sutherland’s misrepresentation of a speech by John Marshall when he served with the U.S. House of Representatives in 1800.¹⁵⁰ She then cited *Egan* for this position: “The authority of the Director of Central Intelligence to control access to sensitive national security information by discharging employees deemed to be untrustworthy flows primarily from this constitutional power of the President, and Congress may surely provide that the inferior federal courts are not used to infringe on the President’s constitutional authority.”¹⁵¹

First, the authority flows *primarily* — not exclusively — from presidential power. Second, if Congress by statute can reinforce the President’s authority in this area it can by statute limit it. Dissenting in this case, Justice Scalia looked to language in *Egan* about agency decisions involving “a sensitive and inherently discretionary judgment call.”¹⁵² The use of “inherently” may imply that the executive branch has some type of plenary authority under Article II concerning national security information, subject to no statutory restraints, but that is not the holding of *Egan*.

A footnote in a district court decision in 1988 regarded questions of national security and foreign policy as “generally viewed as being within the ‘province and responsibility of the Executive,’” citing *Haig v. Agee*, 453 U.S. 280, 293-94 (1981).¹⁵³ The footnote stated that in this area of Article II the courts “have traditionally shown the

¹⁴⁶ National Federation of Federal Employees v. United States, 688 F.Supp. 671, 675-76 (D.D.C. 1988).

¹⁴⁷ National Federation of Federal Employees v. United States, 695 F.Supp. 1196, 1199 (D.D.C. 1988).

¹⁴⁸ *Id.*

¹⁴⁹ *Webster v. Doe*, 486 U.S. 592, 605-06 (1988), citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

¹⁵⁰ Louis Fisher, *The “Sole Organ” Doctrine*, LAW LIBRARY OF CONGRESS, August 2006, available at <http://www.loc.gov/law/help/usconlaw/pdf/SoleOrgan-Aug06.pdf>

¹⁵¹ *Id.* at 606.

¹⁵² *Id.* at 609, citing *Department of Navy v. Egan*, 484 U.S. at 527.

¹⁵³ *United States v. Mandel*, 696 F.Supp. 505, 517 n.22 (E.D.Cal. 1988).

utmost deference to Presidential responsibilities,” referring both to *United States v. Nixon*, 418 U.S. 683, 710 (1974) and *Egan*.¹⁵⁴ In *Nixon*, the Court specifically stated that whatever deference the courts might grant to executive decisions in those areas, the Court’s holding had no application to congressional access to executive branch information.¹⁵⁵ With regard to *Egan*, judicial deference depended in part on what Congress did by statute.

In 1989, a district court decided a case involving the exportation of controlled commodities. A footnote cited *Egan* for the existence of broad discretion by the executive branch over matters of national security, but specifically recognized that Congress could alter that discretion by statute.¹⁵⁶ However, later in that decision the court referred to “the President’s position as Commander and [sic] Chief of the Armed Forces” and cited language in *Egan* about presidential authority to classify and control access to national security information as “flow[ing] primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant.”¹⁵⁷

The Fourth Circuit in 1989 cited *Egan* when it spoke of “the Attorney General’s constitutionally-based power to protect information important to national security.”¹⁵⁸ It did not acknowledge, as the Court did in *Egan*, the authority of Congress to legislate restrictions and limits. A district court in 1992 mixed statutory and constitutional arguments, stating correctly that *Egan* “held that the decision to grant or revoke a security clearance is committed to the discretion of the President by law,” but then in a footnote on the same page referring to the President’s authority “as head of the Executive Branch and as Commander in Chief.”¹⁵⁹

Another mixture of statutory and constitutional analysis appears in a 1993 Fifth Circuit decision. To the court, the government’s argument “that a clear congressional statement is especially appropriate in this instance because the Executive Branch has exclusive authority over foreign affairs — borders on frivolity.”¹⁶⁰ The court said the government “overlooks or conveniently ignores the well recognized distinction between foreign affairs and foreign commerce,” citing *Egan*, even though *Egan* was not a case

¹⁵⁴ Also citing *Egan* and *Haig* for a broad reading of executive power over foreign policy and national security: *Merida Delgado v. Gonzales*, 428 F.3d 916, 920 (10th Cir. 2005); *In re Assicurazioni Generali S.P.A. Holocaust*, 340 F.Supp.2d 494, 502 (S.D.N.Y. 2004); *Tachiona v. United States*, 386 F.3d 205, 213 (2nd Cir. 2004). A district court in 2007 cited both *Egan* and *Haig* but also the “unless Congress” qualification; *Arias v. Dyncorp*, 517 F.Supp.2d 221, 225 (D.D.C. 2007). The Federal Circuit, discussing both *Egan* and *Haig* in a 2008 ruling, declined to interpret them as precluding judicial review over revocation of a security clearance; *Romero v. Department of Defense*, 527 F.3d 1324, 1329 (Fed. Cir. 2008).

¹⁵⁵ *United States v. Nixon*, 418 U.S. 683, 712 n.19 (1974) (the Court was not concerned with the balance “between the confidentiality interest and congressional demands for information”).

¹⁵⁶ *United States v. Helmy*, 712 F.Supp. 1423, 1429 n.8 (E.D.Cal. 1989).

¹⁵⁷ *Id.* at 1434.

¹⁵⁸ *Appeal of U.S. by Atty. Gen.*, 887 F.2d 465, 470 (4th Cir. 1989).

¹⁵⁹ *Doe v. Schachter*, 804 F.Supp. 53, 62 n.7 (N.D.Cal. 1992).

¹⁶⁰ *Mississippi Poultry Ass’n, Inc. v. Madigan*, 992 F.2d 1359, 1367 (5th Cir. 1993).

about foreign commerce and never used the words “foreign commerce.”¹⁶¹ The authority over foreign commerce is assigned expressly to Congress in Article I.¹⁶² The Fifth Circuit claimed that “the Executive Branch does have exclusive jurisdiction over foreign affairs,” but no such exclusivity exists. In addition to its powers over foreign commerce, Congress authorizes and appropriates funds for foreign assistance and other international programs and the Senate shares with the President the power to make treaties. A decision in 2005 cited *Egan* for the correct understanding that military decisions are committed “to the political branches of our government,” both Congress and the President.¹⁶³ In that same year, another court looked solely to the Executive when citing *Egan* and the field of military and national security matters.¹⁶⁴ In 2007, the Tenth Circuit relied on language in *Egan* about constitutional authority vested in the Executive Branch while recognizing, but giving less emphasis to, the constitutional authority vested in Congress.¹⁶⁵

A district court in 1995 discussed the plaintiff’s assertion that *Egan* “actually rejected the notion that an explicit grant of congressional authority to the President was necessary before the President could issue regulations governing the military that had the force and effect of law.”¹⁶⁶ Whatever independent authority the President might have under Article II, *Egan* recognized that Congress operating under its Article I authority had provided statutory policy to protect classified information and could, by law, further refine its policy. According to another district court decision in 1995, the Court in *Egan* granted the President independent constitutional authority to protect national security information; the district court did not analyze the statutory issues at play or refer to the unless-Congress qualification.¹⁶⁷ Similarly, the First Circuit in 1997 cited *Egan* as authority for “the primacy of presidential power to protect national security interests.”¹⁶⁸

In 1998, a district court interpreted *Egan* to find “exclusive authority that the Executive Branch has over matters concerning national security” and the “inherent authority of the Executive Branch to control matters regarding national security” but also cited the “unless Congress” language.¹⁶⁹ The Second Circuit that year cited *Egan* when referring to the President’s “authority as Commander in Chief ‘to control access to information bearing on national security.’”¹⁷⁰ The following year, a district court quoted language in *Egan* that “foreign policy was the province and responsibility of the Executive” but also pointed to the enumerated powers of Congress in the realm of foreign

¹⁶¹ *Id.* n.47.

¹⁶² “To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. const., art. II, § 8, cl. 3.

¹⁶³ Arch Chemicals, Inc. v. United States, 64 Fed.Cl. 380, 395 (2005).

¹⁶⁴ Almurbati v. Bush, 366 F.Supp.2d 72, 75, 81 (D.D.C. 2005).

¹⁶⁵ Hall v. U.S. Dept. of Labor, Admin. Review Bd., 476 F.3d 847, 852-53 (10th Cir. 2007).

¹⁶⁶ In re Cincinnati Radiation Litigation, 874 F.Supp. 796, 826 (S.D. Ohio 1995).

¹⁶⁷ McDaniel v. AlliedSignal, Inc., 896 F.Supp. 1482, 1490 (W.D. Mo. 1995).

¹⁶⁸ United States v. McKeeve, 131 F.3d 1, 14 (1st Cir. 1997).

¹⁶⁹ Edwards v. Widnall, 17 F.Supp.2d 1038, 1041 (D. Minn. 1998). A similar ruling appears in Reinbold v. Evers, 187 F.3d 348, 357 (4th Cir. 1999), discussing broad presidential powers but also the unless-Congress language.

¹⁷⁰ Able v. United States, 155 F.3d 628, 633 (2nd Cir. 1998). The same use of *Egan* appears in Barlow v. United States, 51 Fed.Cl. 380, 394 (2002).

affairs.¹⁷¹ The Eleventh Circuit in 2001, after comparing the enumerated powers of Congress and the President in foreign affairs, cited *Egan* for “the generally accepted view that foreign policy [i]s the province and responsibility of the Executive.”¹⁷² Looking to *Egan*, a district court in 2001 thought it prudent for courts to largely defer to the judgments of the elected branches (President and Congress) in foreign relations.¹⁷³ Other courts understand *Egan* to mean that the President’s control over national security information flows primarily from Article II.¹⁷⁴ The D.C. Circuit in 2003 cited language in *Egan* that the executive branch has a “compelling interest” in withholding national security information from unauthorized persons.¹⁷⁵

E. Disclosing Classified Information

Some decisions refer to *Egan* for the general need to protect classified information. One district judge stated that a court “must seriously consider the national security implications of releasing any of the confidential information to the plaintiff for confrontation purposes,” citing *Egan*.¹⁷⁶ Withholding information from a party in court does not mean lack of access by judges to sensitive documents (to be read *in camera*) or lack of access by Congress. In 1988, a district court cited *Egan* as a class of cases that has been “traditionally exempt from judicial review.”¹⁷⁷ In fact, *Egan* was not exempt from judicial review. It was adjudicated and decided by courts at every level. The district court acknowledged that procurement decisions based on military considerations can be subject to judicial review in cases of “gross impropriety, fraud, or bad faith.”¹⁷⁸

A district court in 2007 included this language from *Egan*: “This Court has recognized the Government’s ‘compelling interest’ in withholding national security information from unauthorized persons in the course of executive business.”¹⁷⁹ No one would argue that unauthorized persons should have access to national security information, but that broad principle does not block access by federal judges, Members of Congress and legislative staff cleared to see classified documents, and parties in court who may have a legal need to see national security information.¹⁸⁰

In 1990, the D.C. Circuit cited *Egan* in discussing whether disclosure of classified material by a congressional committee binds the executive branch and forces the Executive to confirm or deny the existence of the material. The court declined to reach

¹⁷¹ *Made in the USA Foundation v. United States*, 56 F.Supp.2d 1226, 1255-56 (N.D.Ala. 1999).

¹⁷² *Made in the USA Foundation v. United States*, 242 F.3d 1300, 1313 (11th Cir. 2001).

¹⁷³ *Greenberg v. Bush*, 150 F.Supp.2d 447, 453 (E.D.N.Y. 2001).

¹⁷⁴ *United States v. Anvari-Hamedani*, 378 F.Supp.2d 821, 829 n.5 (N.D. Ohio 2005); *Stillman v. Department of Defense*, 209 F.Supp.2d 185, 193-94 (D.D.C. 2002).

¹⁷⁵ *People’s Mojahedin Org. v. Department of State*, 327 F.3d 1238, 1242 (D.C. Cir. 2003), citing language from *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980).

¹⁷⁶ *Rafeedie v. I.N.S.*, 688 F.Supp. 729, 750 (D.D.C. 1988).

¹⁷⁷ *Topgallant Group, Inc. v. United States*, 704 F.Supp. 265, 266 (D.D.C. 1988).

¹⁷⁸ *Id.*

¹⁷⁹ *Stillman v. C.I.A.*, 517 F.Supp.2d 32, 38 (D.D.C. 2007), citing *Department of Navy v. Egan*, 484 U.S. 527.

¹⁸⁰ These issues are explored in *State Secret Protection Act of 2009: Hearing Before the H. Comm. on the Judiciary*, 111th Cong., 1st Sess. (2009).

the constitutional grounds offered by the CIA for that argument.¹⁸¹ The next year a district court cited *Egan* for this understanding of classified information: “By definition, disclosure of any classified information would cause damage to the national security, the only distinction between the two categories [top secret versus secret or confidential] is the amount of damage caused. The fact that certain information may be classified as confidential does not mean that it is not sensitive.”¹⁸²

Egan made no sweeping observations about potential damage that might come by disclosing classified information. It is not true that disclosure of classified information “by definition” causes damage to the national security. Solicitor General Erwin Griswold advised the Supreme Court in 1971 that publication of the “Pentagon Papers” would pose a “grave and immediate danger to the security of the United States.” He later admitted that no damage had been done by the publication and that the principal concern of executive officials who classify documents “is not with national security, but rather with governmental embarrassment of one sort or another.”¹⁸³ In 2007, a district court declined to accept *Egan* as authority that grants the executive branch a “compelling and overriding” privilege to withhold classified information.¹⁸⁴ The court held in this case that the executive branch “must make a specific showing of harm to national security in specific cases to carry its burden in this regard. The government’s *ipse dixit* that information is damaging to national interest is not sufficient to close the courtroom doors nor to obtain the functional equivalent, namely trial by code.”¹⁸⁵

F. Al-Haramain Litigation

Al-Haramain Islamic Foundation and two of its attorneys brought an action alleging that the Bush Administration violated the Foreign Intelligence Surveillance Act (FISA) by conducting warrantless electronic surveillance of their communications. On July 2, 2008, District Judge Vaughn Walker held that FISA preempted the state secrets privilege that the government had invoked in an effort to have the case dismissed.¹⁸⁶ The government relied in part on *United States v. Nixon* (1974), which rejected the President’s “undifferentiated claim of public interest in the confidentiality of [White House] conversations” between the President and his advisors.¹⁸⁷ The Court in *Nixon* contrasted the need for confidentiality to protect those conversations with “a claim of need to protect military, diplomatic or sensitive national security secrets.”¹⁸⁸

To Judge Walker, even an effort by a court to conduct a “comparative weighing of the imperatives of confidentiality for ‘undifferentiated’ presidential discussions and

¹⁸¹ *Fitzgibbon v. C.I.A.*, 911 F.2d 755, 765-66 (D.C. Cir. 1990).

¹⁸² *National Treasury Employees Union v. Hallett*, 756 F.Supp. 947, 952 (E.D.La. 1991). *Egan* was cited in 2006 by a district court to protect classified information from public disclosure; *United States v. Abu Marzook*, 412 F.Supp.2d 913, 925-26 (N.D.Ill. 2006).

¹⁸³ Erwin N. Griswold, *Secrets Not Worth Keeping*, WASH. POST, February 15, 1989, at A25.

¹⁸⁴ *United States v. Rosen*, 487 F.Supp.2d 703, 716 n.21 (E.D.Va. 2007).

¹⁸⁵ *Id.* at 716-17.

¹⁸⁶ *In re National Sec. Agency Telecommunications Rec.*, 564 F.Supp. 1109 (N.D. Cal. 2008).

¹⁸⁷ *Id.* at 1120 (citing *United States v. Nixon*, 418 U.S. 683, 706 (1974)).

¹⁸⁸ *Id.* (citing *United States v. Nixon*, 418 U.S. at 706).

‘military, diplomatic or sensitive national security secrets’ affords defendants little help in this case.”¹⁸⁹ *Egan*, on which the government relied, “confirms that power over national security information does not rest solely with the president.”¹⁹⁰ After recognizing the President’s constitutional power to control access to national security information, the Court in *Egan* “also discussed the other side of the coin, stating 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.’”¹⁹¹ For Judge Walker, the argument for judicial reluctance disappears once Congress legislates: “*Egan* recognizes that the authority to protect national security information is neither exclusive nor absolute in the executive branch. When Congress acts to contravene the president’s authority, federal courts must give effect to what Congress has required.”¹⁹² In a separate decision, issued six months later, Judge Walker reiterated his rejection of the government’s interpretation of *Egan*.¹⁹³

This position of judicial independence in matters of classified information is reflected in a decision on August 26, 2009 by District Judge Royce C. Lamberth. According to the Justice Department, a federal court could not order the executive branch to grant a security clearance to a particular individual because that decision, quoting *Egan*, “is committed by law to the appropriate agency of the Executive Branch.”¹⁹⁴ Judge Lamberth observed that the D.C. Circuit’s most recent case on granting or denying a clearance stated that the rule expressed in *Egan* applies “at least in the absence of litigation.”¹⁹⁵ He said allowing a court “to play a role in the handling of classified information, at least in the context of litigation, is beyond dispute.”¹⁹⁶ To assert otherwise, “the Executive Branch could immediately ensure that the ‘state secrets privilege’ was successfully invoked simply by classifying information, and the Executive’s actions would be beyond the purview of the judicial branch. This would of course usurp the judicial branch’s obligation ‘to say what the law is.’ *Marbury v. Madison*, 1 Cranch 137, 177 (1803).”¹⁹⁷

G. Brief Points Explored

In 1989, the D.C. Circuit called attention to *Egan*’s unexceptional remark that “[i]t should be obvious that no one has a ‘right’ to a security clearance.”¹⁹⁸ Other courts cite *Egan* for that observation, a position no one disputes.¹⁹⁹ One court, referring to

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 1120-21.

¹⁹¹ *Id.* at 1121 (citing *Department of Navy v. Egan*, 484 U.S. at 530 (emphasis in original)).

¹⁹² *Id.* at 1121.

¹⁹³ *In re National Sec. Agency Telecommunications*, 595 F.Supp.2d 1077,1088 (N.D.Cal. 2009).

¹⁹⁴ *Horn v. Huddle*, Civil Action No. 94-1756 (RLC) (D.D.C. 2009), memo. op. at 12, citing *Department of Navy v. Egan*, 484 U.S. at 527.

¹⁹⁵ *Horn v. Huddle*, memo. op. at 12.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 12-13.

¹⁹⁸ *Doe v. Cheney*, 885 F.2d 898, 909 (D.C. Cir. 1989).

¹⁹⁹ *Oryszak v. Sullivan*, 565 F.Supp.2d 14, 19 n.1 (D.D.C. 2008); *Cheney v. Department of Justice*, 479 F.3d 1343, 1355 (Fed. Cir. 2007) (McKinney, C.J., dissenting); *Barlow v. United States*, 51 Fed.Cl. 380, 393 (2002); *Hesse v. Department of State*, 217 F.3d 1372, 1376 (Fed. Cir. 2000); *Stehney v. Perry*, 101

Egan, observed that “national security clearances themselves are not a form of property protected by [the] Due Process Clause.”²⁰⁰ Another court, relying on *Egan*, stated that “no employee has a property ‘right’ to a security clearance or access to classified information.”²⁰¹ The Ninth Circuit in 1994, in referring to *Egan*, made the obvious point “that the very safety of this country and its citizens can be seriously compromised by a drug-afflicted person with access to top secret materials.”²⁰² A district court in 2002 cited *Egan* while recognizing that the safeguarding of classified information “outweighs an individual’s right to access to it, even when that access is critical to the individual’s employment.”²⁰³ *Egan* was briefly cited by the Fourth Circuit in 2007 in describing “the Executive’s constitutional mandate [that] encompasses the authority to protect national security information.”²⁰⁴ In several cases, federal courts referred to *Egan* without discussing it or applying its holding.²⁰⁵

In 2007, a district court looked to a number of factors, including *Egan*, in deciding against a *Bivens* remedy brought by private plaintiffs seeking money damages against I. Lewis Libby, former Chief of Staff to Vice President Cheney, Cheney, and others. Elements in the case, relating to covert CIA operations, gave the court “reason to pause before extending *Bivens* to this context,” for “unless Congress specifically has provided otherwise” courts are reluctant to intrude upon executive authorities in military and national security affairs.²⁰⁶ When one of the plaintiffs and her publisher brought action against the CIA for declaratory and injunctive relief, a district court relied in part on *Egan* to conclude that a congressional publication of classified CIA information “cannot bind the CIA.”²⁰⁷

In 1990, a district court referred to *Egan* generally when discussing the possibility that a President might assert executive privilege with respect to national security interests.²⁰⁸ In a footnote, the Federal Circuit said that *Egan* “is generally instructive on the inhibitions that prevail when the Board [MSPB] reviews agency decisions.”²⁰⁹ The

F.3d 925, 936 (3d Cir. 1996); *King v. Alston*, 75 F.3d 657, 661 (Fed. Cir. 1996); *Stehney v. Perry*, 907 F.Supp. 806, 820, 821 (D.N.J. 1995); *Chesna v. U.S. Dept. of Defense*, 850 F.Supp. 110, 118 (D.Conn. 1994); *Wright v. Park*, 811 F.Supp. 726, 731 (D.Me. 1993); *Jones v. Department of Navy*, 978 F.2d 1223, 1225 (Fed. Cir. 1992); *Doe v. Schachter*, 804 F.Supp. 53, 58 (N.D.Cal. 1992); *Lovelace v. Stone*, 814 F.Supp. 558, 559 (E.D.Ky. 1992); *Williams v. Reilly*, 743 F.Supp. 168, 171 (S.D.N.Y. 1990).

²⁰⁰ *Hodge v. Carroll County Dept. of Social Services*, 812 F.Supp. 593, 602 (D.Md. 1992). For the same observation: *Pindell v. Wilson-McKee*, 60 F.Supp.2d 1244, 1257 (D.Wyo. 1999).

²⁰¹ *Jones v. Department of Navy*, 978 F.2d 1223, 1225 (Fed. Cir. 1992).

²⁰² *Acton v. Vernonia Sch. Dist.* 47J, 23 F.3d 1514, 1524 (9th Cir. 1994).

²⁰³ *Wiedenhoef v. United States*, 189 F.Supp.2d 295, 297 (D.Md. 2002).

²⁰⁴ *El-Masri v. United States*, 479 F.3d 296, 304 (4th Cir. 2007).

²⁰⁵ *Kiyemba v. Obama*, 561 F.3d 509, 522 (D.C. Cir. 2009)(Kavanaugh, Circuit Judge, concurring); *Schroer v. Billington*, 577 F.Supp.2d 293, 301 n.4 (D.D.C. 2008); *McMellon v. United States*, 387 F.3d 329, 373 (4th Cir. 2004) (dissent by Circuit Judge Luttig); *Doe v. Ashcroft*, 334 F.Supp.2d 471, 513-14 n.202 (S.D.N.Y. 2004); *James v. Hale*, 355 F.3d 1375, 1378 (Fed. Cir. 2004); *Public Service Elec. & Gas Co. v. Local 94 Intern.*, 140 F.Supp.2d 384, 393 (D.N.J. 2001); *Marozsan v. United States*, 852 F.2d 1469, 1494 (7th Cir. 1988); *Lee v. Kemp*, 731 F.Supp. 1101, 1109 (D.D.C. 1989).

²⁰⁶ *Wilson v. Libby*, 498 F.Supp.2d 74, 96 (D.D.C. 2007). See also *id.* at 93.

²⁰⁷ *Wilson v. McConnell*, 501 F.Supp.2d 545, 559 (S.D.N.Y. 2007).

²⁰⁸ *United States v. Poindexter*, 732 F.Supp. 142, 157 (D.D.C. 1990).

²⁰⁹ *Henry v. Department of Navy*, 902 F.2d 949, 954 n.4 (Fed. Cir. 1990).

D.C. Circuit, after discussing the government's need to protect classified information, added: "See *Department of Navy v. Egan*, 484 U.S. 518, 528 . . ." ²¹⁰ Page 528 of *Egan* merely discusses executive orders on classified information and observes that no one has a "right" to a security clearance. Lower courts refer to what other Justices have understood to be the significance of *Egan*. ²¹¹ *Egan* is cited for the general issue of workers who handle sensitive information and are denied security clearances. ²¹² It is also a source when discussing the minimal due process that is followed when employees are removed for security reasons. ²¹³

A district court in 1991 cited this language from *Egan*: "A clearance does not equate with passing judgment upon an individual's character." ²¹⁴ Deciding to grant or not grant a clearance does not pass judgment on someone's character; deciding to revoke a clearance does. The Tenth Circuit agreed with the district court that denying someone access to classified information is not defamatory, relying on this same sentence from *Egan*. ²¹⁵

III. Conclusions

However one might define the scope of presidential authority over classified information in the absence of legislation and litigation, that scope is altered by judicial rulings and congressional legislation. If Congress were to pass legislation giving the MSPB or any other federal court greater authority in deciding matters involving the revocation of security clearances, courts would respect and apply the new congressional policy. Similarly, the level of either judicial or legislative deference to executive judgments, including in the areas of national security and foreign affairs, will change in accordance with the decision by courts and Congress to exert their own independent authorities under Article III and Article I. Nothing in *Egan* recognizes a plenary or exclusive power on the part of the President over classified information.

²¹⁰ *Hartness v. Bush*, 919 F.2d 170, 173 (D.C. Cir. 1990). See also *Romaguera v. Gegenheimer*, 798 F.Supp. 1249, 1255 (E.D.La. 1992).

²¹¹ *Frasier v. U.S. Dept. of Health and Human Services*, 779 F.Supp. 213, 219 n.4 (N.D.N.Y. 1991).

²¹² *Perez v. F.B.I.*, 71 F.3d 513, 514 n.6 (5th Cir. 1995); *Abella v. United States*, 34 Fed.Cl. 452, 455 (1995); *IBEW, Local 1245 v. US. NRC*, 966 F.2d 521, 528 n.10 (9th Cir. 1992); *American Fed. of Gov. Employees v. Barr*, 794 F.Supp. 1466, 1474 (N.D.Cal. 1992); *Hartness v. Bush*, 794 F.Supp. 15, 16 (D.D.C. 1992).

²¹³ *Romero v. Department of Defense*, 527 F.3d 1324, 1328 (Fed. Cir. 2008); *Golding v. United States*, 48 Fed.Cl. 697, 725 (2001).

²¹⁴ *Beattie v. United States*, 759 F.Supp. 753, 761 (D.Kan. 1991), citing *Department of Navy v. Egan*, 484 U.S. at 528.

²¹⁵ *Beattie v. United States*, 949 F.2d 1092, 1095 (10th Cir. 1991).