

# TITLE VII CHALLENGES TO SECURITY CLEARANCE REFERRALS: *RATTIGAN* POINTS THE WAY

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*In a nearly unbroken line of cases since the Supreme Court's ruling in Department of the Navy v. Egan, courts have dismissed as nonjusticiable lawsuits challenging any aspect of the security clearance process, including claims brought under Title VII of the Civil Rights Act. However, in a 2012 D.C. Circuit case, Rattigan v. Holder, plaintiff Wilfred Rattigan won a narrow decision that altered the legal landscape surrounding security clearance referrals. Judge David Tatel's opinion for the majority on re-hearing preserved a Title VII challenge to a discriminatory security clearance referral, albeit on a knowingly false standard. This Note provides a careful reading of that opinion, situating it in the wider legal context of Title VII and the Egan doctrine. It argues that Rattigan gives the strongest indication to date of a limit on the broad reading of Egan that has developed over the last twenty-five years, a prediction that has been borne out by the first few cases to apply Rattigan. It further argues that the chilling argument pressed by government lawyers in Rattigan may actually support allowing plaintiffs like Rattigan to litigate their claims, instead of dismissing them as nonjusticiable. The D.C. Circuit's approach points the way towards an appropriate judicial role in supervising security clearance referrals.*

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## I. INTRODUCTION

On July 10, 2012, after a hard-fought legal battle that began in the D.C. District Court and was heard and re-heard by the D.C. Circuit, plaintiff Wilfred Samuel Rattigan won a narrow decision that altered the legal landscape surrounding security clearance referrals.<sup>1</sup> On rehearing, the D.C. Circuit held that courts can hear Title VII claims based on knowingly false statements that are made in referring a co-worker for security clearance review. While this is undoubtedly a high standard, the decision nevertheless rebuked the government attorneys' argument that the Supreme Court's ruling in *Department of the Navy v. Egan*<sup>2</sup> precluded review entirely.<sup>3</sup> Indeed, *Rattigan* gives the strongest indication to date of a limit on the broad reading of *Egan* that has developed in the twenty-five years since the Court's original ruling.

Mr. Rattigan is an African-American attorney who converted to Islam while working for the FBI as a Legal Attaché in Saudi Arabia, where he coordinated intelligence cooperation with Saudi officials.<sup>4</sup> In order to carry out his duties, Mr. Rattigan applied for and was granted a security clearance,

<sup>1</sup> *Rattigan v. Holder*, 689 F.3d 764, 770 (D.C. Cir. 2012) [hereinafter *Rattigan II*].

<sup>2</sup> *Dep't of the Navy v. Egan*, 484 U.S. 518 (1988).

<sup>3</sup> *Rattigan II*, 689 F.3d at 770.

<sup>4</sup> *Rattigan v. Holder*, 643 F.3d 975, 977–78 (D.C. Cir. 2011), *aff'd on reh'g as modified*, *Rattigan v. Holder*, 689 F.3d 764 (D.C. Cir. 2012) [hereinafter *Rattigan I*].

presumably through a process similar to the FBI's current procedure.<sup>5</sup> After a series of incidents, which are recounted more fully below, several of Rattigan's co-workers reported a list of sensational accusations to the FBI's D.C. Office of International Operations ("OIO"). Among other things, Rattigan's co-workers alleged that he wore "full Saudi Arabian costume," that he attended parties with prostitutes he referred to as "nurses," and that he was "inappropriately under the influence of his Saudi counterparts."<sup>6</sup> As was shown at trial before the D.C. District Court, the Security Division (to which the OIO referred the investigation)<sup>7</sup> found these allegations to be baseless and closed the investigation.<sup>8</sup> Additionally, the trial court held that the security clearance investigation was an unlawful retaliation under Title VII.<sup>9</sup> It is this ruling the government appealed, ultimately resulting in the July 10, 2012, decision of the D.C. Circuit.

The *Rattigan* decision is important in part because security clearance law is a significant and ever-growing area of law. A 2013 report by the Office of the Director of National Intelligence estimated that 4,917,751 people held security clearances as of October 2012; this staggering number (which includes government employees and private contractors) included 54,199 new clearances issued since October 2011.<sup>10</sup> If even a very small fraction of these employees face some form of adverse employment action or security referral in their careers, there are tens of thousands of potential Rattigans in the federal bureaucracy. Perhaps it is surprising then that so little has been written on the subject. Apart from an exceptionally well-reasoned critique of the *Egan* doctrine by constitutional law expert Louis Fisher,<sup>11</sup> and a small handful of student works,<sup>12</sup> there is scant literature in the area. Unlike previous writings that

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<sup>5</sup> According to the FBI's website, "The [Bureau's current security clearance] investigation includes a polygraph examination; a test for illegal drugs; credit and records checks; and extensive interviews with former and current colleagues, neighbors, friends, professors, etc." *Background Investigation*, FED. BUREAU OF INVESTIGATION CAREERS, <https://www.fbijobs.gov/5.asp> (last visited Apr. 4, 2014). Once an employee has been granted her security clearance, she is still subject to various disclosure obligations and other post-adjudication monitoring, which can include investigation of security clearance referrals. *See infra* note 7.

<sup>6</sup> *Rattigan I*, 643 F.3d at 978.

<sup>7</sup> Founded in December 2001, the FBI Security Division is responsible for implementing a variety of programs designed to monitor employees who already have been granted security clearances, including conducting security clearance investigations after information is referred to it by another FBI division. *Just the Facts: Security*, FED. BUREAU OF INVESTIGATION (Aug. 2011), <http://www.fbi.gov/about-us/ten-years-after-the-fbi-since-9-11/just-the-facts-1/security>.

<sup>8</sup> *Rattigan I*, 643 F.3d at 979.

<sup>9</sup> *Id.* at 979–80.

<sup>10</sup> OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, 2012 REPORT ON SECURITY CLEARANCE DETERMINATIONS 3 (2013). This increase was significantly smaller than the increase of 155,311 recorded between 2010 and 2011, perhaps due to a slowdown in government hiring during 2013. OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, 2011 REPORT ON SECURITY CLEARANCE DETERMINATIONS 3 (2012).

<sup>11</sup> LOUIS FISHER, JUDICIAL INTERPRETATIONS OF EGAN (2009), available at [http://loc.gov/law/help/usconlaw/pdf/egan\\_public\\_2009.pdf](http://loc.gov/law/help/usconlaw/pdf/egan_public_2009.pdf). Mr. Fisher argues that the doctrine of deference surrounding security clearances has been misapplied. Specifically, Fisher claims that courts have interpreted *Egan* to stand for a plenary power on the part of the President over classified information. He convincingly argues that *Egan* turned on the narrow question of whether Congress intended the MSPB to review the substance of security clearance determinations under 5 U.S.C. § 7513. *Id.* This Note will refer to Mr. Fisher's argument and his understanding of *Egan* as the "narrow" *Egan* doctrine.

<sup>12</sup> Nadia A. Patel, Note, *You're Fired! Egan and MSPB Review of Security Clearance Decisions*, 21 FED. CIR. B.J. 93 (2011) (arguing that Congress should amend the Civil Service Reform Act to give MSPB authority to review security clearance decisions); Jason Rathod, Note, *Not Peace, But a Sword: Navy v. Egan and the Case Against Judicial Abdication in Foreign Affairs*, 59 DUKE L.J. 595, 599–600 (2009) (arguing that courts should first find that equal protection claims are not preempted by Title VII and then use the reasoning of *Webster v. Doe* to allow courts to review the merits of security clearance decisions); David C. Mayer, Note, *Reviewing National Security Clearance Decisions: The Clash Between Title VII and Bivens Claims*, 85 CORNELL L. REV. 786, 792 (2000) (arguing for an amendment to Title VII that would address the fact

discuss judicial review of security clearance determinations generally, this Note takes up the narrower issue of security clearance referrals. Also unlike the student works that precede it, this Note will not focus on normative prescriptions for the future of the law. Instead, it seeks to highlight the importance of the D.C. Circuit's opinion in *Rattigan* and explain its potential impact on the law.

This Note will analyze the D.C. Circuit's holding and situate it in the broader legal context of Title VII and the *Egan* doctrine. Part II will briefly summarize the origins of the *Egan* doctrine and the current legal framework. It will discuss two views on the Court's ruling in *Egan*: the narrower view pressed by Louis Fisher and the more expansive view that has been adopted by several circuit courts and embraced by executive branch officials. This Note will argue that one reason *Rattigan* is significant is that it represents a significant step towards the narrow view of *Egan* with respect to security clearance referrals.<sup>13</sup>

Part III will give a careful reading of both the original D.C. Circuit opinion and its recent ruling on re-hearing in the *Rattigan* matter. Part IV will propose several reasons why *Rattigan* is a significant decision, provide a first glimpse of how district courts are implementing it, and discuss counterarguments to the claim that *Rattigan* is a significant decision. It will also consider the government's argument that allowing judicial review of security clearance referrals will chill essential candor. This Note is not a comprehensive treatment of the law around security clearance referrals. Instead, it argues that the D.C. Circuit's recent decision in *Rattigan* is a tentative, though legally-significant, break with past precedent. Hopefully, this Note will serve as a foundation for future works and suggest potentially fruitful lines of future inquiry.

## II. THE LEGAL LANDSCAPE

This Part describes the broad contours of the doctrinal framework within which *Rattigan* was decided. It will begin with a discussion of the Supreme Court's decision in *Egan*, the foundational case for modern security clearance review law. It will discuss two possible readings of the case and weigh arguments for and against adopting each. Then, it will describe how the *Egan* doctrine has been applied in the Title VII context. Finally, it will discuss limited exceptions to deference under *Egan*, including due process and more general constitutional challenges that arise under security clearance law.

### A. The Majority View: *Department of the Navy v. Egan* Should Be Read Broadly

When Thomas Egan, a laborer at a Trident nuclear submarine facility in Washington, was denied a security clearance (required for employment) apparently due to prior felony convictions and an admitted history of alcohol abuse, his employment was terminated and he sought review by the Merit Systems Protection Board ("MSPB").<sup>14</sup> Prior to reversal by the Supreme Court in *Egan*, the Federal

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that general constitutional challenges can proceed under *Webster v. Doe* while statutory challenges are barred under *Brown v. General Services Administration*).

<sup>13</sup> The Note will not take a stance on which reading of *Egan* is truer to the text of the opinion. It will also avoid the normative question of which reading of *Egan* represents sounder policy. However, Part III will look critically at arguments that are predicated on the broad reading and consider if they would be tenable under the narrow reading of the case. This Part will also discuss if, contrary to intuition, the Executive branch's underlying objectives might be met more fully by a narrow *Egan* doctrine. See *infra* Part III.D.

<sup>14</sup> *Dep't of the Navy v. Egan*, 484 U.S. 518, 521–22 (1988). The Merit Systems Protection Board, an executive agency created by the Civil Service Reform Act of 1978 (CSRA), Public Law No. 95-454, hears employment dispute-related appeals for federal employees, among other quasi-judicial duties. For more on the MSPB, see U.S. MERIT SYS. PROT. BD., AN INTRODUCTION TO THE MERIT SYS. PROT. BD., available at <http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=243962&version=244230&application=ACROBAT> (last visited Jan. 20, 2014).

Circuit had ruled that the denial of a security clearance was an “adverse action” reviewable by the MSPB under 5 U.S.C. §7513, the general statutory scheme for review of adverse actions against certain government employees.<sup>15</sup> On certiorari from that case, the Court reversed, holding that §7513 was not intended to extend to the merits of security clearance determinations.<sup>16</sup> The sentence preceding the holding gives the key reasoning: “. . . 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.”<sup>17</sup>

It is outside the scope of this paper to give a fine-grained reading of the opinion,<sup>18</sup> but a few portions have been significant in shaping the broad *Egan* doctrine. The Court’s analysis begins with the “strong presumption in favor of appellate review,”<sup>19</sup> before explaining that “it runs aground when it encounters concerns of national security, as in this case.”<sup>20</sup> Then, in what may arguably be described as dicta (given the statutorily-grounded narrow holding), Justice Blackmun examines the constitutional grounding for the security clearance power. He explains that the President’s “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 [the Art. II, §2 Commander-in-Chief power] and exists quite apart from any explicit congressional grant.”<sup>21</sup> However, this section concludes as follows: “Thus, *unless Congress specifically has provided otherwise*, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.”<sup>22</sup> Later courts would use language from Justice Blackmun’s constitutional discussion (ignoring the “unless Congress has specifically provided otherwise” caveat) and *Egan*’s subsequent citation to *United States v. Nixon* to support “utmost deference” to the decisions of Executive branch officials regarding security clearances.<sup>23</sup> This is what this Note refers to as the broad reading of *Egan*.

The MSPB implemented *Egan* immediately. The MSPB found for the government in two cases that were pending before the board as the *Egan* decision was handed down, concluding that review was precluded.<sup>24</sup> The MSPB has cited *Egan* in at least eighty-seven of its published opinions since 1988,

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<sup>15</sup> *Egan v. Dep’t of the Navy*, 802 F.2d 1563, 1567–69 (Fed. Cir. 1986), *rev’d*, 484 U.S. 518 (1988) (reversing the MSPB’s full-board ruling that the MSPB lacked the authority to reinstate a security clearance). The Federal Circuit relied on the lack of any statutory provision precluding review of security clearance determinations and the strong presumption of judicial review in administrative law announced in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). *Egan*, 802 F.2d at 1569.

<sup>16</sup> *Egan*, 484 U.S. at 530.

<sup>17</sup> *Id.*

<sup>18</sup> For a fascinating analysis of *Egan*, including prior history of the case, summaries of the briefs, and excerpts from the papers of Justice Blackmun, author of the majority opinion, see FISHER, *supra* note 11.

<sup>19</sup> *Egan*, 484 U.S. at 526 (citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967)).

<sup>20</sup> *Id.* at 527.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 530 (emphasis added).

<sup>23</sup> *Id.* at 527, 529–30 (quoting *United States v. Nixon*, 418 U.S. 683, 710 (1974)).

<sup>24</sup> The first case involved a disparate treatment challenge brought by a Navy pipefitter with a drug offense-related denial of security clearance; the MSPB concluded it had no authority to hear the challenge. *Woroneski v. Dep’t of Navy*, 39 M.S.P.R. 366 (1988). The second case, involving a challenge to a security clearance revocation based on a psychological evaluation and refusal to undergo counseling or therapy, included a lengthier discussion of *Egan*. *Weissberger v. U.S. Info. Agency*, 39 M.S.P.R. 370 (1988). Citing the court’s decision and the agency petition for writ of certiorari in *Egan*, the MSPB interpreted their post-*Egan* discretion as “review of the legal sufficiency of the procedural aspects of the revocation action . . . limited to determining whether the agency afforded minimal due process protection to the employee in revoking his security clearance.” *Id.* at 373–74.

rejecting for lack of jurisdiction challenges to security clearance decisions based on claims of gender discrimination,<sup>25</sup> disability discrimination,<sup>26</sup> and whistleblower retaliation.<sup>27</sup>

The dominant view on *Egan* today is that it calls for courts to defer to all security clearance determinations made by the Executive, rendering most claims nonjusticiable.<sup>28</sup> A 2005 D.C. Circuit case (discussed more fully below) shows typical language: “Because the authority to issue a security clearance is a discretionary function of the Executive Branch and involves the complex area of foreign relations and national security, employment actions based on denial of security clearance are not subject to judicial review, including under Title VII.”<sup>29</sup> Justice Blackmun’s description of the power to control access to information as existing “quite apart from any explicit congressional grant”<sup>30</sup> provides the textual hook to ground this deference in the Constitution, precluding statutory causes of action. The effect of this reading of *Egan* on Title VII is discussed below.

Executive branch officials have eagerly adopted this reading of *Egan*.<sup>31</sup> In a letter to Congress about government leaks, then-Attorney General John Ashcroft explained:

The President has the power under the Constitution to protect national security secrets from unauthorized disclosure. This extends to defining what information constitutes a national security secret and to determining who may have access to that secret. . . .

. . . The authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief.<sup>32</sup>

According to Ashcroft, it was *Egan* that “made these points clear.”<sup>33</sup> Former Secretary of State James A. Baker, citing *Egan*, wrote simply: “Under the Constitution and laws of the United States, the President

<sup>25</sup> *Helms v. Dep’t of Army*, 114 M.S.P.R. 447 (2010) (citing *Egan* and denying review of a disparate treatment claim brought by a male Intelligence Specialist for lack of jurisdiction).

<sup>26</sup> *Hinton v. Dep’t of Navy*, 61 M.S.P.R. 692 (1994) (citing *Egan* and denying review of a handicap discrimination claim brought by a Heavy Mobile Equipment Mechanic Helper as “outside the Board’s authority”).

<sup>27</sup> *Hesse v. Dep’t of State*, 82 M.S.P.R. 489 (1999), *aff’d*, 217 F.3d 1372 (Fed. Cir. 2000) (citing *Egan* for the proposition that MSPB review is limited to procedural due process and denying review of a claim of whistleblower retaliation for lack of jurisdiction).

<sup>28</sup> *See, e.g.*, *Bennett v. Chertoff*, 425 F.3d 999 (D.C. Cir. 2005) (rejecting a Title VII claim even where the employee alleged that the decision to terminate employee was based on “unsuitability” rather than denial of security clearance; the claim that revocation of security clearance was pretextual could not be evaluated under *Egan*); *Ryan v. Reno*, 168 F.3d 520 (D.C. Cir. 1999) (rejecting a challenge to denial of security clearances as nonjusticiable under *Egan*); *Perez v. FBI*, 71 F.3d 513 (5th Cir. 1995) (finding Hispanic FBI employee’s Title VII retaliation claim nonjusticiable under *Egan*); and *Becerra v. Dalton*, 94 F.3d 145, 149 (4th Cir. 1996) (civilian employee of the Navy’s national origin discrimination claim under Title VII barred by *Egan*).

<sup>29</sup> *Bennett*, 425 F.3d at 1001. While there may be analytically rigorous ways of arriving at this point, the *Bennett* court opened a paragraph with this assertion, cited to *Egan* and a recent D.C. Circuit case, and moved on to a discussion of whether the waiver at issue in the case was analogous to a security clearance.

<sup>30</sup> *Dep’t of the Navy v. Egan*, 484 U.S. 518, 527 (1988).

<sup>31</sup> Louis Fisher cites four examples from letters and public statements by the Attorney General or Assistant Attorney generals between 2003 and 2007. In each of them, *Egan* is cited for the proposition that the President has constitutional control or exclusive constitutional control over security clearance determinations. FISHER, *supra* note 11, at 1–2.

<sup>32</sup> Letter from John Ashcroft, Attorney Gen. of the U.S., to Dennis Hastert, Speaker, U.S. House of Representatives 2 (Oct. 15, 2002), available at <http://www.fas.org/sgp/othergov/dojleaks.pdf>.

<sup>33</sup> *Id.*

commands the intelligence community. As a practical matter, he also controls access to classified information.”<sup>34</sup>

## B. A Minority View: A Narrower *Egan* Doctrine

The broad reading of *Egan* is not without its critics. In a pair of articles,<sup>35</sup> constitutional law specialist Louis Fisher argues that the holding of *Egan* is the narrower, statutory ruling that §7513 was not intended to extend to the merits of security clearance determinations.<sup>36</sup> Under this reading, the “. . . unless Congress specifically has provided otherwise” language cited above is a qualification essential to the holding of the case.<sup>37</sup> This reserves for Congress the right to restrict the “range of presidential authority.”<sup>38</sup> This formulation calls to mind Justice Jackson’s concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>39</sup> which set forth a framework for judging the legitimacy of presidential action justified by executive war powers.<sup>40</sup> With respect to the broad “quite apart from any explicit grant of Congress” sentence, Mr. Fisher argues that it “only affirms that the President may act in the absence of statutory authority, not against statutory authority.”<sup>41</sup> Fisher also points to the language in *Egan* that the *Rattigan* court relied upon regarding expertise of Executive branch officials as the source of deference.<sup>42</sup> In sum, Fisher believes *Egan* was decided on statutory and administrative competence grounds, and Justice Blackmun’s separation of powers discussion was not part of the holding. This Note will refer to this alternate reading of *Egan* as the narrow reading of the case.

The *Rattigan* court cited language from *Egan* to suggest that administrative expertise is the proper limit on the *Egan* doctrine.<sup>43</sup> Justice Blackmun grounds judicial deference in competency of a specialized agency, a familiar administrative law principle.<sup>44</sup> He writes that “[p]redictive judgment of this kind

<sup>34</sup> James A. Baker, *Intelligence Oversight*, 45 HARV. J. ON LEGIS. 199, 202–03 (2008).

<sup>35</sup> FISHER, *supra* note 11 (directly criticizing the broader reading of *Egan*); Louis Fisher, *Congressional Access to National Security Information*, 45 HARV. J. ON LEGIS. 219, 220 (2008) (arguing that the “duties and needs of Congress to obtain national security information from the Executive Branch” give it a much greater role in controlling access to classified documents).

<sup>36</sup> *Egan*, 484 U.S. at 530.

<sup>37</sup> *Id.*

<sup>38</sup> FISHER, *supra* note 11, at 1. In the earlier of his two works, Fisher also reminds us that “[t]o the extent the judiciary decides to defer to executive branch arguments for secrecy in national security matters, such deference has no direct application to Congress, as Article I of the Constitution vests in Congress explicit powers and responsibilities concerning national security issues.” Fisher, *supra* note 35, at 220.

<sup>39</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring) (describing three categories of executive action by reference to their interaction with Congress: 1) where the President acts with an express or implied delegation of authority by Congress; 2) where the President acts in an area where Congress has been silent; and 3) where the President acts in defiance of Congressional action).

<sup>40</sup> For more on the impact of *Youngstown Sheet & Tube Co.* and its doctrinal and historical significance, see MAEVA MARCUS, *TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER* (1994).

<sup>41</sup> FISHER, *supra* note 11, at 7–8. Fisher identifies the source of this language as the Justice Department’s brief. However, he notes that DOJ’s brief “spoke of power as flowing ‘directly’ from Article II, where Justice Blackmun referred to authority flowing ‘primarily’ from Article II.” *Id.*

<sup>42</sup> FISHER, *supra* note 11, at 8 (citing *Dep’t of the Navy v. Egan*, 484 U.S. 518, 529 (1988)).

<sup>43</sup> *Rattigan II*, 689 F.3d 764, 769 (D.C. Cir. 2012).

<sup>44</sup> *Chevron* is the case most often cited when discussing deference to administrative agencies. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). However, in the more recent *Mead* decision, the Court considered under what circumstances agency decisions should get deference. *United States v. Mead Corp.*, 533 U.S. 218 (2001) (reviving *Skidmore* deference for situations where *Chevron* does not apply; the *Skidmore* factors include experience of the agency, thoroughness of its consideration, validity of its reasoning, and consistency with earlier and later pronouncements). Unlike under *Chevron*, *Skidmore* deference is decided based on the facts of the particular case.

[security clearance determinations] must be made by those with the necessary expertise in protecting classified information.”<sup>45</sup> There is a constitutional foundation to this deference: later in the same paragraph, Blackmun recognizes that military, national security, and foreign affairs are all “responsibilities” of the President.<sup>46</sup> The D.C. Circuit accepted these premises but narrowed the doctrine by elevating an inference from this language to law: those who lack such expertise are not deserving of deference—whether grounded in the Constitution or administrative law. The central thesis of this Note is that, by adopting this expertise-based limit,<sup>47</sup> the *Rattigan* decision represents a moderate step towards the narrow view of *Egan* with respect to security clearance referrals.<sup>48</sup>

### C. The *Egan* doctrine and Title VII

Title VII of the Civil Rights Act of 1964 provides a statutory remedy for discrimination based on an employee’s “race, color, religion, sex, or national origin.”<sup>49</sup> The Court set forth the familiar balancing test that governs such discrimination claims in *McDonnell Douglas Corp. v. Green*.<sup>50</sup> The complainant must first make a prima facie showing of discrimination, which shifts the burden to the employer to provide a non-discriminatory reason for the adverse employment action.<sup>51</sup> Provision of such a reason shifts the burden back to the complainant to show that the justification provided was pretextual.<sup>52</sup> As this brief description illustrates, this somewhat complicated scheme has proved difficult to implement in the security clearance realm.

Title VII challenges to denials or revocations of security clearances have not fared well under the broad *Egan* doctrine. In *Ryan v. Reno*, a case illustrative of the approach of several circuit courts, a group of Irish-American dual citizens challenged denials of security clearances, alleging Title VII discrimination based on national origin.<sup>53</sup> After summary denial before the DOJ Complaint Adjudication Office, the Equal Employment Opportunity Commission (“EEOC”) ruled that, while it had jurisdiction to hear a challenge of discriminatory denial of security clearance, the complainants had not proved discrimination.<sup>54</sup> Article III courts also proved unsympathetic: both the district court and the D.C. Circuit rejected the claims for lack of jurisdiction, explaining that the second step of the *McDonnell Douglas* framework (the legitimate, nondiscriminatory reason for adverse employment action) would “run[] smack up against *Egan*.”<sup>55</sup> The *Ryan* court noted that the D.C. Circuit was joining the Fifth and Ninth Circuits, which had barred similar challenges to revocation or denial of security clearance.<sup>56</sup>

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Although of course there are constitutional dimensions to the D.C. Circuit’s *Egan* analysis in *Rattigan*, its decision to limit deference in *Rattigan* seems consistent with the *Skidmore* case-by-case approach.

<sup>45</sup> Dep’t of the Navy v. Egan, 484 U.S. 518, 529 (1988).

<sup>46</sup> *Id.* at 529–30. That there are constitutional underpinnings to deference to administrative agencies is a fairly uncontroversial point. The *Rattigan* opinion did not specifically address the constitutional grounding for deference to administrative competency in this area, but the fact that the D.C. Circuit carved out limited judicial review appears to show that there was a constitutionally-significant difference between executive officials who routinely carry out this function and those that are merely referring a colleague for review.

<sup>47</sup> *Rattigan II*, 689 F.3d at 673.

<sup>48</sup> See *infra* Part III-A.

<sup>49</sup> Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2006).

<sup>50</sup> *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1976).

<sup>51</sup> *Id.* at 802–05.

<sup>52</sup> *Id.*

<sup>53</sup> *Ryan v. Reno*, 168 F.3d 520, 522 (D.C. Cir. 1999).

<sup>54</sup> *Id.* at 522–23.

<sup>55</sup> *Id.* at 523–24.

<sup>56</sup> *Perez v. FBI*, 71 F.3d 513 (5th Cir. 1995) (holding Hispanic FBI employee’s Title VII racial discrimination claim barred); *Brazil v. U.S. Dep’t of Navy*, 66 F.3d 193 (9th Cir. 1995) (holding African American civilian Navy



In the wake of these rulings, clever plaintiffs have attempted an end run around *Egan*, arguing that their Title VII challenges are to the decision to investigate a security clearance rather than to a final security clearance determination (a denial or revocation).<sup>57</sup> This argument has been rejected by the Fourth, Ninth, and Eleventh Circuits in cases where the review in fact led to a revocation or denial of security clearance.<sup>58</sup> The Fourth Circuit concisely explained how *Egan* applies to this situation, writing:

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 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.” *Egan*, 484 U.S. at 529, 108 S.Ct. at 825. 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.<sup>59</sup>

As Part III will explain, the D.C. district court categorically distinguished these cases in reaching the merits of Mr. Rattigan’s Title VII challenge; the D.C. Circuit’s more nuanced approach, however, yields interesting doctrinal tension.

In 2005, the D.C. Circuit heard its most recent Title VII challenge to a security clearance determination prior to *Rattigan*. In *Bennett*, the plaintiff, a former Department of Defense (“DoD”) employee, was told by the agency that she was going to be fired and then preemptively quit for that reason. On a subsequent job application for a TSA position, she lied, asserting that she quit her job at DoD of her own volition.<sup>60</sup> Bennett brought a Title VII claim for retaliatory termination, arguing that she was dismissed for filing an administrative complaint against DoD.<sup>61</sup> After her case was found nonjusticiable under *Egan* by the district court, she argued on appeal that the pretextual reason for her dismissal was a negative suitability determination rather than revocation of her security clearance (which

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employee’s Title VII racial discrimination challenge to revocation of Nuclear Weapons Personnel Reliability Program certification barred by *Egan*).

<sup>57</sup> One such example is in the reply brief in support of an ultimately unsuccessful cert petition in the *Perez* case. *Perez*, 71 F.3d 513. The plaintiff argued, “[T]he government tries to redefine Petitioner’s claim as ‘a review of a security clearance’ so that the FBI can hide behind the protection of *Egan*. However, Petitioner’s claim is about *retaliation*, not the revocation of a security clearance.” Reply Brief in Support of the Petition for Certiorari, *Mata v. FBI*, 517 U.S. 1234 (1996) (No. 95-1482), 1996 WL 33439302, at \*6.

<sup>58</sup> *Becerra v. Dalton*, 94 F.3d 145, 149 (4th Cir. 1996) (holding civilian employee of the Navy’s national origin discrimination claim under Title VII was barred by *Egan*); *Hill v. White*, 321 F.3d 1334 (11th Cir. 2003) (affirming a grant of summary judgment to the U.S. Army in a Title VII age discrimination challenge, citing *Becerra* and *Egan*); *Panoke v. U.S. Army Military Police Brigade*, Haw., 307 F. App’x 54 (9th Cir. 2009), *aff’g* 2007 WL 2790750 (D. Haw. Sept. 21, 2007) (affirming a grant of summary judgment to the government in a Title VII case brought based on multiple allegations of discrimination).

<sup>59</sup> *Becerra*, 94 F.3d at 149.

<sup>60</sup> *Bennett v. Chertoff*, 425 F.3d 999, 1000–01 (D.C. Cir. 2005). Essentially, Ms. Bennett argued that she was fired as unfit for the position instead of being denied a security clearance (for lying on the application form) and fired on account of not having the requisite clearance. *Id.*

<sup>61</sup> *Id.* at 1001.

she had retained after quitting her previous job).<sup>62</sup> The D.C. Circuit ruled that her claim was properly dismissed as nonjusticiable because the court could not “adjudicate the credibility” of her argument because to do so “would require the trier of fact to evaluate the validity of the agency’s security determination.”<sup>63</sup> Significantly, this opinion was authored by Judge Rogers, who would join Judge Tatel’s opinion for the majority in *Rattigan*. The significance of this prominent jurist’s apparent change of opinion is discussed in Part IV.<sup>64</sup>

#### D. Exceptions to *Egan* Nonjusticiability

Notwithstanding a general presumption of nonreviewability, courts have recognized limitations on the doctrine for constitutional and statutory due process challenges. The MSPB held that it retained discretion to hear procedural due process challenges in *Weissberger*, one of its first rulings after *Egan*.<sup>65</sup> The Board noted that the government’s petition for writ of certiorari in *Egan* conceded that due process required notice, a statement of reasons for denial or revocation of the clearance, and an opportunity to respond.<sup>66</sup> The Board reaffirmed this more recently in *Hesse*, which was upheld by the Federal Circuit.<sup>67</sup> The *Hesse* court explained that a procedural challenge can be either constitutional or statutory.<sup>68</sup> Procedural due process provides only limited review, however, and plaintiffs rarely prevail on such challenges.<sup>69</sup>

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<sup>62</sup> *Id.* at 1002. According to Ms. Bennett, TSA had decided that the falsification itself made her unfit for employment (arguably outside of *Egan*). The government argued that the falsification formed the basis for the subsequent revocation of her security clearance (a requirement for TSA employment) and thus the case turned on the merits of a security clearance determination, a fairly obvious application of *Egan*. *Id.* at 1001–02. The D.C. Circuit leaned heavily on its decision in *Ryan* (see *supra* note 53) to explain that it could not adjudicate this particular disagreement.

<sup>63</sup> *Id.* at 1003.

<sup>64</sup> Although this Note argues that *Rattigan* represents a doctrinal shift, see *infra* Part III.A, it should be noted that the two cases are factually distinguishable: Ms. Bennett sued for her termination after having her security clearance revoked, *Bennett*, 425 F.3d at 1001, while Mr. Rattigan brought suit alleging that the security clearance referral (which did not lead to him losing his clearance) itself constituted an adverse employment action, *Rattigan II*, *Rattigan II*, 689 F.3d 764, 776 (D.C. Cir. 2012).

<sup>65</sup> *Weissberger v. U.S. Info. Agency*, 39 M.S.P.R. 370, 373–74 (1988).

<sup>66</sup> *Id.* at 374.

<sup>67</sup> *Hesse v. Dep’t of State*, 82 M.S.P.R. 489 (1999), *aff’d*, 217 F.3d 1372 (Fed. Cir. 2000).

<sup>68</sup> *Id.* at 492. The statutory provision is 5 U.S.C. § 7513(b), which provides in relevant part that:

An employee against whom an action is proposed is entitled to-- (1) at least 30 days’ advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action; (2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer; (3) be represented by an attorney or other representative; and (4) a written decision and the specific reasons therefor [sic] at the earliest practicable date.

5 U.S.C. § 7513(b)(1)–(4).

<sup>69</sup> Procedural due process challenges are limited in two ways: (1) the plaintiff must show the action is related to a policy of the agency (i.e., that it is not a Title VII or other claim that has been styled as procedural); and (2) even proper procedural challenges appear to receive a deferential review by the MSPB and Federal Circuit. See, e.g., *Stoyanov v. Dep’t of Navy*, 348 F. App’x 558 (Fed. Cir. 2009) (finding that plaintiff’s claim that revocation of a security clearance was in retaliation for whistle-blowing is not a procedural challenge, and that procedural due process did not require the agency to describe in detail more than 200 alleged incidents of using government resources and work time for unauthorized purposes); *Romero v. Dep’t of Def.*, 527 F.3d 1324 (Fed. Cir. 2008) (dismissing plaintiff’s claim of retaliatory revocation as not procedural and remanding to the MSPB for consideration of procedural challenges that the board did not address); *Bruce v. Dep’t of Def.*, 55 F. App’x 913 (Fed. Cir. 2003) (holding that plaintiff’s procedural

At least some (non-due process) constitutional claims are justiciable under *Webster v. Doe*.<sup>70</sup> In *Webster*, a CIA technician with stellar performance evaluations voluntarily informed his superiors that he was gay; the Office of Security informed him that his homosexuality was a threat to security and the CIA Director dismissed him.<sup>71</sup> Rejecting the CIA's argument that the Director's decision was discretionary and not reviewable by any court, the Court held that, while statutory challenges under the Administrative Procedure Act were barred by the National Security Act, "a constitutional claim based on an individual discharge may be reviewed."<sup>72</sup> Interestingly, the Court responded to the CIA's complaint that its ruling would result in "rummaging around in Agency affairs" by citing Title VII as a claim the government conceded was not barred.<sup>73</sup>

Notwithstanding the Court's reference to Title VII, such claims do not fall squarely within the holding of *Webster*. Two decades earlier, the Court ruled that Title VII provides the exclusive remedy for discrimination claims covered by the statute in *Brown v. General Services Administration*.<sup>74</sup> Other writers have noted the irony in the doctrine: claims of discrimination that are recognized under Title VII (race, color, religion, sex, and national origin) are barred by *Egan* and *Brown* while *Webster* at least seems to allow courts to examine the substance of security clearance determinations in evaluating claims of discrimination on non-recognized grounds (e.g., sexual orientation, age, and immigration status).<sup>75</sup> The issue of discrimination on the basis of sexual orientation remains a live one: prior to 1995, sexual orientation could be explicitly considered in the security clearance review process and the language of the adjudicative guidelines may still allow it to be considered in some situations.<sup>76</sup> The Third and Ninth Circuits have considered this issue, reaching different conclusions.

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challenge to reassignment after being denied a security clearance fails because he could not prove that reassignment to a non-sensitive position was a policy of the agency).

<sup>70</sup> *Webster v. Doe*, 486 U.S. 592 (1988).

<sup>71</sup> *Id.* at 595.

<sup>72</sup> *Id.* at 603–04.

<sup>73</sup> *Id.* at 604–05. Also note that *Webster v. Doe* was decided almost five months after *Egan*. While *Webster v. Doe* did not involve a formal denial of security clearance, the fact that the CIA cited a threat to security in dismissing him brings the case into the orbit of *Egan*. It also may provide contemporaneous support for the narrow reading of *Egan* urged by Louis Fisher and others.

<sup>74</sup> *Brown v. Gen. Servs. Admin.*, 425 U.S. 820 (1976) (affirming dismissal of a Title VII racial discrimination claim because it had been filed beyond the thirty-day appeal window afforded by the statute).

<sup>75</sup> See, e.g., Rathod, *supra* note 12, at 608–09, 630–31 (arguing that to restore judicial review of security clearance decisions, the Court must first nullify *Brown* through the constitutional avoidance canon and then use equal protection as the basis for review of security clearance determinations); Mayer, *supra* note 12, at 811–15 (arguing that amending Title VII is the appropriate fix); Reply Brief in Support of the Petition for Certiorari, *Mata v. FBI*, 517 U.S. 1234 (1996) (No. 95-1482), 1996 WL 33439302, at \*5 (arguing that while *Webster v. Doe* vindicated a harm based on sexual orientation, an interest at the periphery of constitutional rights, petitioner's claim of racial discrimination fell within "the core" of constitutional rights).

<sup>76</sup> The revisions were part of an Executive Order issued in August 1995. Exec. Order No. 12,968, 60 Fed. Reg. 40,245 (Aug. 2, 1995). Although consideration of "sexual orientation or preference" is explicitly prohibited in subsection (a), the adjudicative guidelines that govern security clearance determinations still allow the consideration of sexual behavior if it "causes an individual to be vulnerable to coercion, exploitation or duress." Adjudicative Guidelines for Determining Eligibility for Access to Classified Information, 32 C.F.R. § 147.6(a) (2004). The end of the "don't ask, don't tell" policy is another example of the changing legal status of sexual orientation discrimination. The firing of dozens of military translators with critical legal skills, especially those proficient in Arabic and Farsi, raises the possibility of *Webster*-style claims. Margie Mason, *Gay Linguists Get the Boot*, CBS NEWS (Feb. 11, 2009), [www.cbsnews.com/2100-500164\\_162-529418.html](http://www.cbsnews.com/2100-500164_162-529418.html).

The availability to plaintiffs of *Doe*-style constitutional challenges was called in to question by the Third Circuit's ruling in *El-Ganayni v. U.S. Department of Energy*.<sup>77</sup> In that case, an Egyptian-born physicist employed by a private contractor under license from the Department of Energy ("DoE"), alleged First Amendment, equal protection, and APA violations connected to revocation of his security clearance.<sup>78</sup> The Third Circuit, guided by *Doe* and subsequent cases, found that it technically had jurisdiction to hear the challenge.<sup>79</sup> However, as to the first two counts, the Third Circuit ruled that El-Ganayni could not possibly prevail because the legal framework "would inevitably involve scrutiny of the merits of the DoE's decision to revoke El-Ganayni's clearance."<sup>80</sup> Thus, *Egan* functionally barred constitutional challenge.

However, the Ninth Circuit subsequently applied a significantly more flexible approach in *Zeinali*, ruling that an Iranian-American could proceed on a state-law discrimination claim against Raytheon despite the private employer citing lack of eligibility for a security clearance as the reason for termination.<sup>81</sup> The Ninth Circuit distinguished *Brazil* and *El-Ganayni* on the grounds that Zeinali's suit was against a private employer and did not seek to challenge the merits of the security clearance determination.<sup>82</sup> Because of this factual distinction, it is not completely clear what *Zeinali* says about the broad *Egan* doctrine. At the very least, the Ninth Circuit, like the *Rattigan* court, refused to dismiss a suit as nonjusticiable at the assertion of a connection to the security clearance process; this is evidence the Ninth Circuit views the *Egan* doctrine as more flexible than did the Third, Fourth, and Fifth Circuits in *El-Ganayni*, *Becerra*, and *Perez*, respectively.<sup>83</sup>

### III. RATTIGAN V. HOLDER AND THE D.C. CIRCUIT

This Part will begin with the facts of the case and the outcome of the jury trial before the D.C. District Court. Then, it will discuss the government's appeal of Rattigan's initial victory to the D.C. Circuit Court. Finally, it will discuss the government's arguments for re-hearing and the slight revision that the same panel of the D.C. Circuit made to its initial ruling. This close reading will draw on the doctrinal framework set forth in Part II and will provide the foundation for the central argument of the Note regarding the significance of the case, which is set forth in Part IV.

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<sup>77</sup> *El-Ganayni v. U.S. Dep't of Energy*, 591 F.3d 176 (3d Cir. 2010).

<sup>78</sup> *Id.* at 177–80. El-Ganayni alleged that the First Amendment violation related to his speeches criticizing the FBI, U.S. foreign policy, and the war in Iraq. *Id.* The equal protection claims were based on allegations of discrimination based on religion and national origin. *Id.* The APA claims were rooted in a challenge to procedural deficiencies. *Id.* at 180.

<sup>79</sup> *Id.* at 183. Two Third Circuit cases supported el-Ganayni's contention that the court had jurisdiction to hear his challenge under *Webster*. *Stehney v. Perry*, 101 F.3d 925, 932 (3d Cir. 1996) (reversing district court's determination that plaintiff's constitutional claims were nonjusticiable under *Egan* but affirming on other grounds); *Makky v. Chertoff*, 541 F.3d 205, 212–13 (3d Cir. 2008) (citing *Stehney* and reaching the merits of constitutional challenges to the revocation process, rather than the actual decision to revoke the security clearance).

<sup>80</sup> *El-Ganayni*, 591 F.3d at 186. On the third count, the Third Circuit reached the merits, concluding that the DOE followed all "applicable regulations and executive orders in revoking El-Ganayni's clearance." *Id.* at 187.

<sup>81</sup> *Zeinali v. Raytheon Co.*, 636 F.3d 544 (9th Cir. 2011).

<sup>82</sup> *Id.* at 549–50. The *Zeinali* court squared its decision with *Egan* by finding that, instead of challenging the merits of his security clearance denial, Zeinali was arguing that Raytheon's stated policy of requiring security clearance for the position was applied inconsistently as to the plaintiff. *Id.* at 554–55. Consequently, the *McDonnell Douglas* pretext inquiry was targeted at Raytheon's employment policies, not the security clearance determination. *Id.*

<sup>83</sup> See *supra* notes 56, 58, and 77.

### A. The Facts of *Rattigan*

Mr. Rattigan is an African American of Jamaican descent and has worked as an attorney at the FBI since 1987.<sup>84</sup> In 1999, he was transferred to the United States embassy in Riyadh, Saudi Arabia, to serve as assistant legal attaché before being promoted to legal attaché in 2000; he converted to Islam in 2001.<sup>85</sup> After a late-2001 confrontation with his supervisor, Rattigan filed an Equal Employment Opportunity Office complaint in January 2002, alleging requests for additional assistance and weapons had been denied on account of his race and that his supervisor had made racially-tinged threats.<sup>86</sup> At about the same time, Office of International Operations Special Agent Donovan Leighton submitted a security clearance referral based on a long list of suspicious behavior he perceived during an October stint at the Riyadh embassy.<sup>87</sup> The grounds for the referral were: (1) Rattigan wore traditional Saudi clothing; (2) his contacts in Saudi intelligence were looking for a wife for Rattigan; (3) Rattigan allegedly discussed attending parties with prostitutes he referred to as “nurses”; (4) Rattigan was inattentive to an investigation of the 9/11 attacks; (5) Rattigan went on a pilgrimage to Mecca and could only be contacted through members of Saudi intelligence; and (6) Rattigan refused to allow other staff members to communicate with his Saudi counterparts.<sup>88</sup> Most of these accusations were ultimately rejected and the Security Division closed the investigation, leaving Rattigan with his security clearance (as of 2012, he was still employed by the FBI). He sued in 2004, alleging discrimination on the basis of race and national origin under Title VII among several other claims.<sup>89</sup>

### B. Trial Before the D.C. District Court

In a series of rulings which stretched over several years, the district court dismissed all of Rattigan’s claims except for his Title VII retaliation claim, based on a claim of retaliation for the EEOC report he filed alleging race/national origin discrimination.<sup>90</sup> One business day before the trial was set to begin (and more than five years after the complaint was filed), the government lawyers filed a motion to dismiss for lack of subject matter jurisdiction.<sup>91</sup> They argued that *Becerra* and subsequent cases extended *Egan* to preclude review of the decision to initiate a security clearance review.<sup>92</sup> Judge Huvelle found these cases inapposite as the agency reached a final determination to deny or revoke the plaintiff’s security clearance in each case.<sup>93</sup> Because the case thus presented an issue of first impression, she went on to discuss *Egan* in some detail. Judge Huvelle’s reading of *Egan* grounds nonjusticiability in deference to the expertise of reviewing agencies and an understanding of the “sensitive and inherently discretionary judgment call” of whether to allow someone access to classified information.<sup>94</sup> Judge Huvelle explained that such deference was unnecessary in the present matter, writing:

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<sup>84</sup> Rattigan I, 643 F.3d 975, 977 (D.C. Cir. 2011).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 978.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 978–79.

<sup>89</sup> *Id.* at 979.

<sup>90</sup> Rattigan v. Holder, 636 F. Supp. 2d 89, 90 (D.D.C. 2009).

<sup>91</sup> *Id.*

<sup>92</sup> The cases cited by the government are in note 58, *supra*. In denying the motion, Judge Huvelle also noted that *Ryan v. Reno* and *Bennett v. Chertoff* (both D.C. Circuit cases) were not cited in the government’s brief. *Rattigan*, 636 F. Supp. 2d at 91–92.

<sup>93</sup> *Rattigan*, 636 F. Supp. 2d at 92. Judge Huvelle explained that “*Egan* and its progeny thus command that *once the executive has determined that an individual is unworthy of a security clearance*, the judiciary cannot probe the circumstances surrounding that determination for discriminatory or retaliatory animus.” *Id.* (emphasis added).

<sup>94</sup> *Id.* (quoting *Dep’t of the Navy v. Egan*, 484 U.S. 518, 527 (1988)).

The Security Division concluded that Leighton's concerns about plaintiff were unfounded. Therefore, the FBI decisionmaking body responsible for making security determinations has *already determined* that plaintiff's activities were not inconsistent with the needs of national security. Plaintiff does not challenge this determination—he embraces it. And, contrary to defendant's implication, there is no question before the Court or the jury as to the reasonableness of the Security Division's investigatory process. Rather, the only remaining question in this litigation is the legitimacy of the referral, *by those who have no role in security clearance decisions*, that triggered the Security Division's fact-gathering interviews.<sup>95</sup>

Judge Huvelle accordingly denied the government's motion to dismiss.<sup>96</sup>

The case proceeded to trial and Judge Huvelle charged a jury with deciding the merits of Rattigan's claim. The judge gave careful instructions that the jury should avoid considering the merits of the review of Rattigan's security clearance and instead decide whether the “defendant [Security Division Section Chief Shubert] initiated the Security Division investigation because Rattigan made allegations of discrimination.”<sup>97</sup> A jury found that the FBI had violated Title VII by investigating Rattigan's security clearance.<sup>98</sup>

### C. The First Ruling of the D.C. Circuit

The FBI appealed the ruling to the D.C. Circuit, renewing its argument that *Egan* rendered non-justiciable any review of Rattigan's Title VII claim.<sup>99</sup> They argued *Egan* could not tolerate distinctions between agency officials based on familiarity or expertise in security matters and that the initiation of a security clearance investigation was entitled to the same level of deference as a final determination.<sup>100</sup> In June 2011, a divided panel of the D.C. Circuit reversed in part and upheld in part the decision below.<sup>101</sup> Writing for the court, Judge Tatel rejected the FBI's first argument, finding that *Egan* protected only FBI employees within the Security Division because the *Egan* court emphasized that deference was proper only for the “predictive judgment by those with the *necessary expertise* in protecting classified information.”<sup>102</sup> On this point, Judge Tatel distinguished seemingly-contrary language in *Egan*, *Ryan*, and *Bennett*, saying that the Supreme Court has warned lower courts not to “dissect the sentences of the United States Reports as though they were the United States Code.”<sup>103</sup>

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<sup>95</sup> *Id.* at 93 (citations and footnotes omitted).

<sup>96</sup> *Id.* at 95. Judge Huvelle also offered a policy-based rationale to support her decision. She was concerned that “officials could present spurious national security allegations about a disfavored employee to another agency official who is, in fact, responsible for clearance determinations, and thereby insulate themselves from Title VII review in a situation where the security clearance decisionmaker ultimately *rejects* the allegations as unfounded.” *Id.*

<sup>97</sup> *Rattigan I*, 643 F.3d 975, 985 (D.C. Cir. 2011). In the substance of the instructions, the district court apparently failed to insulate the jury from a determination foreclosed by *Egan*. *Id.* at 985–86. However, Judge Huvelle attempted exactly what the D.C. Circuit would later approve of in *Rattigan I* and *II*.

<sup>98</sup> *Id.* at 977.

<sup>99</sup> Final Brief for Appellant, *Rattigan v. Holder*, 643 F.3d 975 (D.C. Cir. 2011) (No. 10-5014), 2010 WL 4720741, at \*21–22.

<sup>100</sup> *Id.* at \*21–22, \*29–30.

<sup>101</sup> *Rattigan I*, 643 F.3d at 977.

<sup>102</sup> *Id.* at 983.

<sup>103</sup> *Id.* at 983–84 (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993)). Judge Tatel distinguished several references to “agency” determinations in *Egan* and subsequent cases. *Id.*

Judge Tatel was only somewhat more sympathetic to the FBI's second contention, that decisions to initiate security clearance investigations are precluded by *Egan*. In the words of the court, the *Egan* problem was "invi[te] the jury to look into [Security Division Section Chief] Shubert's decisionmaking process and assess his reasons for authorizing the investigation."<sup>104</sup> Accordingly, the D.C. Circuit vacated the jury verdict.<sup>105</sup> However, that was not the end of the matter. While the decision by the Security Division to initiate the investigation on receipt of referral material was not reviewable, Rattigan's claim that his coworkers at the Riyadh embassy retaliated against him by referring him for security clearance review could proceed on remand as a potential adverse employment action under Title VII.<sup>106</sup> To prevail on this challenge, Rattigan would be required to prove the reasons for the referral were pretextual by showing the referring party "knew or should have known [the accusations] were false or misleading."<sup>107</sup>

Judge Kavanaugh dissented, arguing that *Egan*'s deference is not limited in scope to security decisions made by employees in the Security Division.<sup>108</sup> Quoting extensively from *Egan*, Kavanaugh accuses the majority of "slicing and dicing of the security clearance process into reviewable and unreviewable portions," relying on a "single sentence" in the opinion.<sup>109</sup> He cites *Ryan* and *Bennett* to support his broad view of deference, asserting that the security process "as a whole" was meant to be protected.<sup>110</sup> Finally, in an argument that would be seized upon by the government during the subsequent re-hearing, Kavanaugh points to Executive Order 12,968 which reads: "[e]mployees are encouraged and expected to report any information that raises doubts as to whether another employee's continued eligibility for access to classified information is clearly consistent with the national security."<sup>111</sup> For Judge Kavanaugh, "second-guess[ing] the decisions of agency employees who report security risks" could not be squared with *Egan* and the Executive Order.<sup>112</sup>

#### D. The Appeal for Rehearing

Obviously concerned by the D.C. Circuit's limitation on the scope of *Egan* deference, the FBI appealed the decision. In an unusual step, the D.C. Circuit granted the appeal for re-hearing, certifying the following questions:

- (1) Does *Egan's* bar on judicial review of national security clearance decisions extend to actions by employees outside of the Security Division?
- (2) If *Egan's* bar does not extend to decisions by employees outside the Security Division, would allowing Title VII retaliation claims against such employees chill their reporting of information involving suspicion of national security concerns to the Security Division pursuant to Executive Order 12,968? If so, why? Would departmental complaint procedures not also chill such reporting?<sup>113</sup>

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<sup>104</sup> *Id.* at 985.

<sup>105</sup> *Id.* at 986.

<sup>106</sup> *Id.* at 986–88.

<sup>107</sup> *Id.* at 988.

<sup>108</sup> *Id.* at 989 (Kavanaugh, J., dissenting).

<sup>109</sup> *Id.* at 989–90.

<sup>110</sup> *Id.* at 991.

<sup>111</sup> *Id.* (citing Exec. Order No. 12,968, § 6.2(b), 60 Fed. Reg. at 40,245, 40,253 (Aug. 2, 1995)).

<sup>112</sup> *Id.*

<sup>113</sup> *Rattigan v. Holder*, No. 10-5014, 2011 WL 4101538, at \*1 (D.C. Cir. Sept. 13, 2011). The D.C. Circuit also certified a third question which showed where the court was heading: "(3) If the court were to allow Title VII retaliation claims based on referrals of knowingly false information, does any record evidence in this case support such a claim? If not, should a remand be ordered?" *Id.*

The government's brief focuses on two major arguments. The first is that *Egan* could not be limited in application to employees with "necessary expertise."<sup>114</sup> This argument begins by repeating familiar *Egan* arguments but then stridently asserts that *because* E.O. 12,968 requires all employees to raise potential security issues, *Egan* extends to referrals.<sup>115</sup> This bold assertion of executive power is supported in the government's brief by reference to *Egan*'s "separation-of-powers holding."<sup>116</sup>

The appellants' second argument is that judicial review of referrals "would likely chill necessary reporting by agency employees."<sup>117</sup> The argument proceeds by repeating bare assertions of a chilling effect, with reference to two Supreme Court opinions (which themselves simply posit such an effect).<sup>118</sup> This claim will be taken up more fully in Part IV.<sup>119</sup>

### E. The D.C. Circuit's Decision on Rehearing

On July 10, 2012, the court narrowed its ruling slightly, heightening the standard for Title VII liability to claims based on referrals of knowingly false information.<sup>120</sup> While Judge Tatel "agree[d] that [the court's] earlier decision could indeed discourage critical reporting by permitting jurors to infer pretext based on their own judgment," he found that "the government's concerns are insufficient to justify the sweeping immunity from Title VII liability that it seeks."<sup>121</sup> Balancing the important goals of *Egan* against "congressionally mandated protections against and remedies for unlawful retaliation in the workplace"<sup>122</sup> represents a significant victory for the narrow reading of *Egan*, which emphasizes the "unless Congress specifically has provided otherwise" language from the Court's opinion.

Judge Kavanaugh, the dissenter in *Rattigan I*, was unmoved. He described the majority's opinion on rehearing as a "slight[] tweaking [of] its analysis" and reprinted his original dissent.<sup>123</sup> Neither side ultimately filed a petition for writ of certiorari, although the government requested two extensions of the

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<sup>114</sup> Brief for Appellant on Panel Rehearing, *Rattigan II*, 689 F.3d 764 (No. 10-5014), 2011 WL 4831233, at \*6.

<sup>115</sup> *Id.* at \*10–11.

<sup>116</sup> *Id.* at 12. This citation is a telling indicator of how far the government has stretched *Egan*. While there is circuit precedent that supports this, *see Conyers v. Dep't of Def.*, 115 M.S.P.R. 572, 590 (2010), discussion at *infra* note 136, re-casting *Egan* as a separation-of-powers case ignores that at least the narrow holding was decided on statutory grounds. *See also* FISHER, *supra* note 11.

<sup>117</sup> Brief for Appellant on Panel Rehearing, *supra* note 114, at \*26.

<sup>118</sup> *Id.* at 26–30 (citing *Bush v. Lucas*, 462 U.S. 367, 389 (1983) (positing, without data, that it is "quite probable" that when faced with the possibility of personal liability for disciplining actions, management personnel will be deterred from undertaking such actions) and *Anderson v. Creighton*, 483 U.S. 636, 646 (1987) (explaining, without data, that creating an exception to qualified immunity would "utterly defeat" the peace of mind that qualified immunity gives to public officials because they would not know whether they were protected by the rule or not)). The government's brief also gives the salacious example of Special Agent Robert Hanssen, who allegedly financially supported an exotic dancer as he conducted espionage for foreign governments. *Id.* at 29. It is hard to reconcile the appellant's concern with chilling the reporting of such essential tidbits with the later assurance that "internal complaint procedures" provide an adequate check on instances where the employee knows or should know that the information is false. *Id.* at 30–31.

<sup>119</sup> At present, it suffices to say that there is disagreement as to whether the posited chilling effect would actually occur and, perhaps surprisingly, disagreement over whether the chilling would have a positive or negative impact on the quality of the underlying agency decisions. *See infra* Part III.D.

<sup>120</sup> *Rattigan II*, 689 F.3d 764, 770 (D.C. Cir. 2012).

<sup>121</sup> *Id.* at 769–771.

<sup>122</sup> *Id.* at 771; *see also* FISHER, *supra* note 11, at 8–9.

<sup>123</sup> *Rattigan II*, 689 F.3d at 773 (Kavanaugh, J., dissenting).



filing deadline.<sup>124</sup> Thus, *Rattigan* will stand as the last word in the D.C. Circuit regarding judicial review of security clearance referrals.

#### F. The D.C. District Court's Decision on Remand

Because the jury in the original trial did not expressly find that Rattigan's supervisor knew the allegations underlying the security clearance referral were false, the D.C. Circuit vacated the original verdict and remanded for discovery to determine whether there should be a new trial under the new heightened knowingly false standard.<sup>125</sup> The district court granted Defendants' motion for summary judgment filed on the eve of trial.<sup>126</sup> The court reasoned that because (crediting Rattigan's version of events) his *co-workers* fabricated several of the bases for the security referral and passed it along to his supervisor who forwarded it to the security division without ascertaining the truth of the events, Rattigan could not show that his "employer" had knowingly passed on false information.<sup>127</sup> Furthermore, an intervening Supreme Court precedent, *University of Texas Southwest Medical Center v. Nassar*,<sup>128</sup> had heightened Title VII's requirement of a causal link between the animus and the adverse employment action to a "but for" cause.<sup>129</sup> Given that some of the allegations in Rattigan's referral were factually true (even if they were not cause to revoke his clearance), proving a particular piece of information was a "but for" cause of his security review would have required jurors "to determine the motivation for each statement in the [security referral report] in isolation," violating *Egan*, even as restricted by *Rattigan*.<sup>130</sup> Thus, despite lending his name to a D.C. Circuit opinion that this Note argues broke new ground in restricting *Egan*,<sup>131</sup> Mr. Rattigan's claim was dismissed almost twelve years after the underlying events took place.

#### IV. RATTIGAN'S EFFECT ON TITLE VII AND THE EGAN DOCTRINE

Part IV will make the central argument of this Note: it will explain why *Rattigan* matters. It will recount what the D.C. Circuit decided and, critically, what it did not decide. It will also describe how district courts are applying *Rattigan* to reject government lawyers' motions to dismiss predicated on the broad *Egan* approach. It will examine potential criticisms of the argument that *Rattigan* is a significant decision, most notably that the case represents a false push-back on *Egan* because its knowingly false standard sets the bar so high that few plaintiffs will be able to make out a successful challenge. This Part will then take up the chilling argument pressed by the government and examine it critically through the lens of recent scholarship in a related area of the law.

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<sup>124</sup> Letter informing parties of Justice Roberts's decision to grant application for extension of time to file a petition for writ of certiorari, *Rattigan v. Holder*, No. 10-5014 (D.C. Cir. Feb. 21, 2013).

<sup>125</sup> The D.C. Circuit explained, "Because we set forth this knowingly false standard for the first time on appeal, Rattigan had little reason to thoroughly develop evidence of knowing falsity in the district court. Given this, and given that the record contains some evidence that could form the basis for a claim of knowingly false security reports, we shall remand for the district court, after permitting any necessary discovery, to determine in the first instance whether there is sufficient evidence of knowing falsity to allow Rattigan to bring his claim before a jury." *Rattigan II*, 689 F.3d at 773.

<sup>126</sup> *Rattigan v. Holder*, Civil Action No. 04-2009 (ESH), 2013 WL 5834481 (D.D.C. Oct. 31, 2013).

<sup>127</sup> *Id.* at \*6–9. One of the elements of a Title VII unlawful retaliation claim is showing that a plaintiff's supervisor—as opposed to a co-worker or subordinate—discriminated against the plaintiff. *Id.* at \*6 (citing *McGrath v. Clinton*, 666 F.3d 1377, 1380 (D.C. Cir. 2012) (listing the elements of unlawful retaliation)).

<sup>128</sup> *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013).

<sup>129</sup> *Rattigan*, 2013 WL 5834481, at \*9–11.

<sup>130</sup> *Id.* at \*11. The extensive trial record, uncontroverted nature of the relevant facts, and the intervening *Nassar* precedent compelled the district court to deny Rattigan's request for additional discovery. *Id.* at \*11–12.

<sup>131</sup> See *infra* Part IV.A.

### A. The Significance of *Rattigan*

This Note proposes that *Rattigan* is significant for three reasons. The first reason is that the standard adopted in the case may allow dozens if not hundreds of future Title VII challenges to proceed past summary judgment motions. It is impossible to know how many such challenges will be brought, but one starting point is classification and government secrecy. The staggering number of documents classified by the federal bureaucracy has been well treated elsewhere.<sup>132</sup> These countless terabytes of classified data require secret-keepers with security clearances—4,917,751 government employees and contractors at the most recent published count.<sup>133</sup> It is difficult to know how many of those employees are referred for security clearance review and how many of those referrals are based on knowingly false information, but the number may well be significant.<sup>134</sup> However, it is not merely successful claims that have an effect on government bureaucracy. The threat of litigation may incentivize reform in the direction of having more accountability and oversight, and, if these claims are like most civil litigation, a large majority will end with settlements, rather than litigation carried through to judgment.<sup>135</sup>

The second reason *Rattigan* is significant is that it represents the most significant rebuke yet to the expansive reading of *Egan* discussed in Part II.<sup>136</sup> Part II described the major features of the two readings of *Egan* in some detail. A reader need not accept the arguments of critics of the broad reading (i.e. that a narrow statutory holding has evolved over time into an expansive separation-of-powers nonjusticiability doctrine) to acknowledge that there are two fair readings of the case. The *Rattigan* decision is at least an uncomfortable fit with the broad reading and could represent a shift in legal trajectory surrounding *Egan*. If no other *Egan* cases before the D.C. Circuit are resolved in a similar way, it will remain an outlier case. If, on the other hand, it represents new thinking by two of the more senior judges on the court, we may see more cases in the same line. Concededly, it is difficult to quantify the importance of this development; however, the fact that the government did not file a petition for writ of certiorari in *Rattigan* may show that government attorneys are nervous that the Court could have affirmed the ruling or taken the opportunity to narrow *Egan* more significantly.<sup>137</sup> Also, the D.C. Circuit is known as the “administrative agency circuit,” so its view of the law is likely to have the greatest impact on the federal bureaucracy.

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<sup>132</sup> See, e.g., Steven Aftergood, *Reducing Government Secrecy: Finding What Works*, 27 YALE L. & POL'Y REV. 399, 400 (2009) (describing the scope of the overclassification problem and discussing various approaches to solving it); REPORT OF THE COMMISSION ON PROTECTING AND REDUCING GOVERNMENT SECRECY, S. DOC. NO. 105-2 (1997), available at <http://www.gpo.gov/fdsys/pkg/GPO-CDOC-105sdoc2/content-detail.html>. The report of the Moynihan Commission is still one of the most comprehensive treatments of the topic of overclassification.

<sup>133</sup> See OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, *supra* note 10.

<sup>134</sup> It is beyond the scope of this Note and resources of this student author to examine these numbers. However, this line of inquiry could be pressed in a subsequent work through Freedom of Information Act requests. A clearer picture of the security clearance review process could aid examination of the government's chilling argument, see *infra* Part IV.D, and could help in evaluating the integrity of the security clearance program more generally.

<sup>135</sup> See Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Cases Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 440 (2004) (showing that almost 70% of civil employment discrimination cases settle). This figure is, however, slightly lower than the rate for other cases. *Id.* The effect of *Rattigan* on future Title VII cases is also discussed in Part IV.C, *infra*.

<sup>136</sup> Recent decisions of the full board of the MSPB also showed some pushback on the broad reading of *Egan*. In 2010, a full panel of the MSPB held that *Egan* only barred review of the decisions to revoke, deny, or suspend clearance to access classified information. *Conyers v. Dep't of Def.*, 115 M.S.P.R. 572, 590 (2010) (holding that denial of eligibility to occupy a sensitive position was reviewable); *Northover v. Dep't of Def.*, 115 M.S.P.R. 451, 467 (2010) (same). However, these decisions were consolidated for review and reversed by the Federal Circuit in *Berry v. Conyers*. *Berry v. Conyers*, 692 F.3d 1223 (Fed. Cir. 2012). The Federal Circuit affirmed this ruling after rehearing the case en banc. *Kaplan v. Conyers*, 733 F.3d 1148 (Fed. Cir. 2013).

<sup>137</sup> Of course, it could also be that the government feels that a knowingly false standard is such a high bar that few claims will meet it. This anticipated criticism is taken up in Part IV.C, *infra*.

The third reason that *Rattigan* matters is that it is already having an impact on cases at the trial level. Although it has been less than two years since the opinion was handed down, district courts have already applied it in dismissing defendants' summary judgment motions. In *Burns-Ramirez v. Napolitano*,<sup>138</sup> the plaintiff, a Secret Service employee with almost thirty years of experience, filed suit under Title VII, alleging that two suspensions and the ultimate revocation of her security clearance constituted adverse employment actions.<sup>139</sup> Defendants, invoking *Egan* and *Rattigan*, argued that the plaintiff's claims were nonjusticiable because she ultimately had her security clearance revoked.<sup>140</sup> In rejecting this argument, the district court rejected the approaches of several other circuits, explaining that *Rattigan* is clear that "the actions of [non-security division] employees who knowingly and falsely refer a matter for investigation due to discrimination or retaliation are not protected from review."<sup>141</sup> The plaintiff in *Thomas v. Johnson*<sup>142</sup> brought a Title VII claim alleging he had been demoted and ultimately fired on the basis of his race and denied procedural protections similarly-situated white colleagues had received.<sup>143</sup> The defendants filed a motion for judgment on the pleadings arguing that because Mr. Thomas had been fired for improperly permitting employees to work in sensitive positions pending determinations of their security clearances, *Egan* rendered his claim nonjusticiable.<sup>144</sup> In denying the motion, the court cited *Rattigan* and firmly rejected this invocation of broad *Egan* doctrine.<sup>145</sup> Yet another recent D.C. district court opinion acknowledged the significance of *Rattigan* as a challenge to "extension[s] of *Egan*."<sup>146</sup> The Fifth Circuit also recently acknowledged that *Rattigan* "somewhat limited *Egan*'s scope."<sup>147</sup> It is too early to tell, but it appears that *Rattigan* may signify a new trajectory to *Egan* jurisprudence in the D.C. Circuit.

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<sup>138</sup> *Burns-Ramirez v. Napolitano*, 962 F. Supp. 2d 253 (D.D.C. Aug. 2013).

<sup>139</sup> *Id.* at 254–55.

<sup>140</sup> *Id.* at 257. This argument was reinforced by citations to precedents from several other circuits, including *Becerra v. Dalton*, *Hill v. White*, and *Panoke v. U.S. Army Military Police Brigade*. *Id.*; see *supra* note 58.

<sup>141</sup> *Id.* at 258.

<sup>142</sup> *Thomas v. Johnson*, Civil Action No. 13-359(GK), 2013 WL 6994525 (D.D.C. Jan. 16, 2013).

<sup>143</sup> *Id.* at \*1–2.

<sup>144</sup> *Id.* at \*2.

<sup>145</sup> *Id.* at \*3. The court distinguished defendants' *Egan* cases, writing "Each of the cases cited involved an adverse employment action directly predicated on an unfavorable security clearance determination, such that adjudicating the plaintiff's employment claim necessarily required a merits review of the underlying security clearance decision." *Id.* Even if the court were to credit defendants' contention that Thomas had granted interim security clearances, it noted, *Rattigan* limited application of *Egan* to "trained Security Division personnel," which Mr. Thomas clearly wasn't. *Id.* at \*3 n.3 (internal quotation marks and emphasis removed).

<sup>146</sup> *Foote v. Chu*, 928 F. Supp. 2d 96, 98–99 (D.D.C. 2013). Judge Kotelly contrasted the approaches of the *Conyers* court and the *Rattigan* court, noting that the *Conyers* decision had been vacated and thus had no precedential effect. *Id.* Even though the case did not involve an allegation of a discriminatory referral, Judge Kotelly used the reasoning of *Rattigan* to evaluate the plaintiff's claims, illustrating the significance of the D.C. Circuit's decision. However, the court ultimately reached the opposite outcome from *Rattigan* on the grounds that Foote's challenge was to final agency action (rather than a referral) and that the officials involved did possess the necessary expertise to be worthy of deference. *Id.* at 100–01. The court granted the defendant's summary judgment motion, following *Bennett* and *Brazil* in holding that the Human Reliability Program was a national security decision that merited *Egan* nonjusticiability. *Id.* at 100–02.

<sup>147</sup> *Toy v. Holder*, 714 F.3d 881, 885 n.8 (5th Cir. 2013). The Fifth Circuit held that *Egan* does not bar a Title VII challenge to a building access decision but affirmed dismissal on grounds that access is covered by Title VII's national security exemption. *Id.* at 885–87. In rejecting the government's argument that the broad reading of *Egan* covered building access determinations, the Fifth Circuit explained that "[s]ecurity clearances are different from building access; security-clearance decisions are made by specialized groups of persons, charged with guarding access to secured information, who must make repeated decisions." *Id.* at 885. By contrast, "[b]uilding access may be revoked, as in this case, by a supervisor, someone who does not specialize in making security decisions." *Id.* The court reasoned "A lack of

Two additional facts support the idea that *Rattigan* represents sturdy precedent: (1) the same panel of the D.C. Circuit heard and reheard the case and largely affirmed its earlier opinion and (2) Judge Rogers, author of the D.C. Circuit's opinion in *Bennett* joined Judge Tatel in both opinions. Twenty-five years of *Egan* jurisprudence illustrate that aggressive lawyering by government counsel<sup>148</sup> and judicial deference in the national security realm<sup>149</sup> have led courts to adopt a broad nonjusticiability doctrine.<sup>150</sup> The *Egan* doctrine expanded through selective quotation, emphasizing broad constitutional language of the original opinion rather than the statutory analysis.<sup>151</sup> Consequently, there is ample material in the original opinion to support a narrower reading of *Egan*, should the D.C. Circuit adopt such a doctrine.

## B. Unanswered Questions

Although it represents a significant shift in the law, the *Rattigan* court left several important questions unanswered. First, how should courts reconcile *Rattigan* with *Ryan* and *Bennett*, cases where the court used *Egan* to reject Title VII claims entirely?<sup>152</sup> The D.C. Circuit's original opinion discussed *Ryan* and *Bennett*, distinguishing *Rattigan* from the rule set forth in those cases.<sup>153</sup> The court's rationale, however, is unavailing; it is counterintuitive that a Title VII challenger who suffers the comparatively minor reputational harm that attaches to review that leaves her security clearance in place is allowed to bring her claim while her colleague that loses her security clearance and consequently her job (and quite possibly her career) due to knowingly false information cannot bring a claim. The D.C. Circuit rules also highlight this tension: *Bennett* cannot be overruled by another panel of the circuit without following formal procedures.<sup>154</sup> Because these procedures were not followed, the counterintuitive result that security clearance referrals leading to denials are nonreviewable while referrals like *Rattigan*'s are justiciable appears to be the law in the D.C. Circuit. However, as described above in Part III.A, a recent

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oversight, process, and considered decision-making separates this case from *Egan*, which therefore does not bar Toy's suit." *Id.* at 885–86. The Fifth Circuit even noted that their “decision is in accord with *Rattigan v. Holder*.” *Id.* at 885 n.8.

<sup>148</sup> For example, the government's brief in *Rattigan* cites to the “separation-of-powers holding” of *Egan*. Brief for Appellant on Panel Rehearing, *supra* note 114, at \*12. This shorthand statement made without elaboration shows a constitutionalization of the holding of *Egan*, which was decided on statutory grounds according to Louis Fisher. See FISHER, *supra* note 11. Statements and writings by executive branch officials also show a bold vision of *Egan* deference. See *supra* notes 31, 32, and 34.

<sup>149</sup> See generally Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 132 (2006) (arguing that during times of war or national crisis, the government tends to keep more secrets and that increased judicial deference to government secrecy claims is contrary to the Constitution's system of checks and balances). Security clearance decisions, though not discussed in Fuchs's article, present the same difficulties of high-stakes judgments and a lack of judicial experience compared to members of the executive branch.

<sup>150</sup> Indeed, as this Note has attempted to show, circuits have diverged considerably on how to read *Egan*. The words of the Supreme Court opinion have not changed, but interpretation has expanded the holding considerably.

<sup>151</sup> See FISHER, *supra* note 11 (tracking almost 200 treatments of *Egan* to show evolution of the doctrine).

<sup>152</sup> See *supra* note 28.

<sup>153</sup> Addressing the issue, the D.C. Circuit wrote: “In contrast to the claims raised in *Ryan*, *Bennett*, and *Egan* itself, *Rattigan*'s claim implicates neither the denial nor revocation of his security clearance nor the loss of employment resulting from such action.” *Rattigan I*, 643 F.3d 975, 981 (D.C. Cir. 2011). This appears to adopt the reasoning of Judge Huvelle's opinion for the district court. See *supra* notes 90, 92, and 96.

<sup>154</sup> To overrule the prior decision of another panel, the D.C. Circuit must either rule on the subsequent case en banc or go through a process where a judge on the majority in the subsequent case submits the case to his or her colleagues for consideration and gets a majority to approve the new rule. See, e.g., *United States v. Southerland*, 466 F.3d 1083, 1084 n.1 (D.C. Cir. 2006); *Irons v. Diamond*, 670 F.2d 265, 268 n.11 (D.C. Cir. 1981). Only then can the new rule become the law of the Circuit. *Southerland*, 466 F.3d at 1084 n.1; *Irons*, 670 F.2d at 268 n.11. Because the court did not follow this procedure, it appears that *Bennett* still controls in situations where the security clearance is denied. But see *infra* note 157. For a more thorough discussion of the procedures adopted by different circuits for overturning precedents, see Phillip M. Kannan, *The Precedential Force of Panel Law*, 76 MARQ. L. REV. 755 (1993).

D.C. District Court opinion held that ultimate revocation of a security clearance was not a complete bar to a Title VII challenge, so long as the security clearance referrals were not made by “trained security division personnel.”<sup>155</sup> This approach would mean that the identity of the referrer is more important than the outcome of the referral itself.

If, notwithstanding this district court opinion, denial of a security clearance in fact does preclude review, what consequences would flow from such a regime? On a policy level, there are obvious concerns with insulating from liability referrals that result in denials.<sup>156</sup> Relatedly, could future litigants argue that the utmost deference to predictive judgments of the Executive that *Egan* speaks of is actually satisfied by the heightened knowingly false standard (rather than outright nonjusticiability)?<sup>157</sup> If what triggers nonjusticiability under *Bennett* and *Ryan* is the denial or revocation of security clearance, could some form of interlocutory appeal to security clearance determinations be heard? In essence, the problem is one of line-drawing: a categorical rule that excluded even Rattigan’s claims would be much easier to apply.<sup>158</sup> If the D.C. Circuit hears an appeal in *Burns-Ramirez*, the court might provide an indication whether Title VII claims depend on the identity of the referrer, the outcome of the security clearance, or both.

*Rattigan* also does not provide meaningful guidance on the separation-of-powers issues that arise when the executive’s national security powers conflict with Congress’s attempt to provide a remedy for discrimination in the workplace under Title VII.<sup>159</sup> While there does not seem to be significant interest in amending Title VII or the National Security Act<sup>160</sup> to provide for more substantial judicial review of

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<sup>155</sup> The court rejected the government’s argument that a revocation or denial of security clearance precluded review, writing, “*Rattigan I* and *II* are clear that security personnel decisions regarding whether to investigate, suspend, or revoke a clearance are protected from review, but the actions of other employees who knowingly and falsely refer a matter for investigation due to discrimination or retaliation are not protected from review.” *Burns-Ramirez v. Napolitano*, 962 F. Supp. 2d 253, 257–58 (D.D.C. 2013).

<sup>156</sup> The incentives would seem clear: when a referral comes to the Security Division that appears to be based on knowingly false information or motivated by discriminatory purposes, the Division should revoke the security clearance to render any future claims nonjusticiable under *Bennett*. Of course, further study would be required to show that decision-makers are aware of these incentives and are willing and able to act on them. In some ways, these questions can be answered by reference to the discussion of chilling effects below. *See infra* Part IV.D.

<sup>157</sup> This appears to be the approach taken by the district court in *Burns-Ramirez*. *Burns-Ramirez*, 962 F. Supp. 2d at 257 (“The D.C. Circuit carefully balanced the need for security against a Title VII claimant’s rights, explaining ‘it is our duty not only to follow *Egan*, but also to preserve to the maximum extent possible Title VII’s important protections against workplace discrimination and retaliation.’ *Rattigan II*, 689 F.3d at 770. The Circuit achieved this compromise by declaring that a Title VII claimant may proceed only on a claim that an agency employee acted with retaliatory or discriminatory motive when knowingly reporting or referring false information to security. *Id.* at 771.”).

<sup>158</sup> These line-drawing problems may explain why the court felt the need to grant the government’s petition for re-hearing. The court seems to have felt the need to allow government lawyers to directly brief the issue of where the line would be set. *See Rattigan v. Holder*, No. 10-5014, 2011 WL 4101538 (D.C. Cir. Sept. 13, 2011) (questions presented on re-hearing). In *Berry v. Conyers*, the Federal Circuit appeared to grapple with the same problem; the Federal Circuit granted a re-hearing en banc, vacating (but subsequently preserving) an opinion that found *Egan* categorically barred MSPB review of discharge connected to denial of security clearance even in cases where the position did not require access to classified information. *See Berry v. Conyers*, 692 F.3d 1223 (Fed. Cir. 2012); *see also supra* note 136.

<sup>159</sup> Here, recall that the holding of *Egan* was “*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.” *Dep’t of the Navy v. Egan*, 484 U.S. 518, 530 (1988) (emphasis added).

<sup>160</sup> National Security Act of 1947, Pub. L. 80–253, 61 Stat. 495 (codified as amended at 50 U.S.C. ch.15).

security clearance determinations, would such a statute be constitutional?<sup>161</sup> If the instinctive answer is “of course Congress can regulate,” consider the fact that the D.C. Circuit granted a highly unusual rehearing in *Rattigan* in part to consider the possibility that their previous ruling conflicted with an executive order.<sup>162</sup> If *Egan*’s so-called “separation of powers holding” calls for courts to defer not just to the fact of executive control but to the precise manner, there are legitimate questions about the power—judicial or legislative—to place limits on the President’s control. Because these concerns address the issue of hypothetical conflicts that could arise from future legislation, they are outside the scope of this Note.

### C. Is it Possible the Government Won *Rattigan*?

Perhaps the strongest criticism this Note’s argument may face is that *Rattigan* fails as a challenge to the broad reading of *Egan*. Under this theory, the government did not appeal *Rattigan* because its attorneys are convinced that it was either a very minor defeat or a victory. As discussed above, *Bennett* and *Ryan* categorically bar Title VII challenges to employees who have their security clearance revoked or denied. It stands to reason that there are relatively few employees who will feel aggrieved enough to litigate when they ultimately are allowed to remain in their position. Future *Rattigans* might also be deterred by fears of antagonizing their colleagues and superiors, with whom they will likely still be working. Furthermore, without the possibility of recovering back pay, potential damage awards will be lower in these cases than in Title VII challenges to terminations. This might make these cases less attractive to plaintiffs’ lawyers who work on contingency fee arrangements. These factors will undoubtedly reduce the number of claims that are brought.

Those that do proceed with litigation will find that knowingly false is a high standard to meet. Proving that a security clearance referral was based on particular information will require careful discovery, especially in light of the state secrets privilege.<sup>163</sup> Even after proving that particular allegations

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<sup>161</sup> The words of several former Executive branch officials suggest a belief that the sole power to control access to sensitive information is vested in the President by the Constitution. See *supra* notes 31, 32, and 34. Because Congress has not acted, these views have not been tested.

<sup>162</sup> *Rattigan II*, 689 F.3d 764, 766 (D.C. Cir. 2012) (“The government filed a petition for rehearing . . . arguing that our decision conflicts with both *Egan* and reporting obligations established by the President [in Executive Order 12,968].”).

<sup>163</sup> First recognized by the Court in 1953 in *Reynolds*, the state secrets privilege, if properly invoked, renders a claim nonjusticiable because proceeding with litigation would harm national security. See *United States v. Reynolds*, 345 U.S. 1 (1953) (widows of civilians killed in an Air Force test plane crash had their case dismissed because litigating it would require revealing sensitive documents that would harm national security). Courts have recognized the state secrets privilege in Title VII challenges to terminations relating to final security clearance determinations, both before and after *Egan*. See *Sterling v. Tenet*, 416 F.3d 338, 345–46 (4th Cir. 2005) (African American CIA agent’s Title VII racial discrimination claims were barred by the state secrets privilege because litigating the factual issues surrounding his claim would result in “disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign governments”); *Molerio v. F.B.I.*, 749 F.2d 815, 823 (D.C. Cir. 1984) (prior to *Egan*, then-judge Scalia found that a Title VII racial discrimination claim failed on the third step of the *McDonnell Douglas* balancing test when the plaintiff failed to show that the denial of security clearance was pretextual while First Amendment and FOIA/Privacy Act claims were barred by the state secrets privilege). For a thorough examination of published opinions where the state secrets privilege is actually invoked, see Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77 (2010). Relevant to this Note, Professor Donohue traces the history of its use as a defense in employment lawsuits back to 1883. *Id.* at 189. She also argues convincingly that the threat by government lawyers to apply the state secrets doctrine may give them a tactical advantage. *Id.* at 197–206. Delays in litigation and the prospect of complete dismissal of the case may make it particularly difficult for plaintiffs with limited resources to continue litigating. *Id.* The reason the state secrets privilege is treated in a footnote here is that, given the comparatively high cost for the government of invoking the privilege and the relatively low stakes of *Rattigan*-style claims, it seems unlikely the government will invoke the privilege. Also, a 2009 memo from Attorney General Holder outlined somewhat stricter parameters for invocation of the state secrets privilege. Memorandum from Eric Holder, Attorney Gen. of the U.S., to the Heads of Exec. Dep’t & Agencies on Policies &

formed the basis for the challenge, plaintiffs will have to prove that the referring employee actually knew that the allegations were false. For the government, nudging the standard higher than “knew or should have known” (as it stood after *Rattigan I*) might have made the case a less significant defeat, if not a partial victory.

Notwithstanding these arguments, there are several reasons why *Rattigan* cannot be considered a victory for the government. First, as described above, district courts have rejected motions to dismiss Title VII claims invoking broad *Egan* doctrine in cases involving security clearance referrals or even denials.<sup>164</sup> Second, anecdotal evidence suggests the prejudice faced by Rattigan is not unique to his case. Incredibly, both Rattigan’s immediate supervisor, Bassem Youssef,<sup>165</sup> and his immediate subordinate, Gamal Abdel-Hafiz,<sup>166</sup> in the legal attaché’s office in Riyadh have publicly alleged religious and national origin discrimination, although none of the allegations related to security clearance referrals. Though, like Rattigan, Abdel-Hafiz was ultimately reinstated, the experiences of these three men may indicate that other Muslim and/or Arab employees of the FBI may face discriminatory abuses of the security clearance system. In addition to a possible pattern of discrimination in at least one Bureau office, it

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Procedures Governing Invocation of the State Secrets Privilege (Sept. 23, 2009) (outlining new, higher standards for invoking the state secrets privilege, creating a special review committee, and requiring the personal approval of the Attorney General for each invocation).

<sup>164</sup> See discussion of *Burns-Ramirez v. Napolitano* and *Thomas v. Johnson*, *supra* Part IV.A.

<sup>165</sup> Bassem Youssef, Rattigan’s supervisor in Riyadh, filed a Title VII challenge, alleging religious and national origin discrimination because, after September 11, he was posted to several positions that were below his grade and experience. *Youssef v. F.B.I.*, 687 F.3d 397, 399–401 (D.C. Cir. 2012). While Youssef is in fact an Egyptian-born Coptic Christian, he allegedly faced discrimination based on the perception of being a Muslim. *Id.* at 400. The D.C. Circuit reversed a district court’s grant of summary judgment to the government on Mr. Youssef’s Title VII discrimination claim. *Id.* at 401–02. A jury found against Youssef on his retaliation claims, a verdict that was upheld on appeal. *Id.* Despite facing discrimination, Bassem Youssef, the legal attaché before Rattigan, was subsequently appointed as a unit chief and is the highest-ranking fluent Arabic-speaker in the Bureau. *Bassem Youssef*, NAT’L WHISTLEBLOWERS CENTER, [http://www.whistleblowers.org/index.php?option=com\\_content&task=view&id=85](http://www.whistleblowers.org/index.php?option=com_content&task=view&id=85) (last visited Apr. 5, 2014).

<sup>166</sup> Gamal Abdel-Hafiz was accused of refusing to cooperate with an investigation of financing of terrorist groups by wearing a concealed recording device, saying that “a Muslim doesn’t record another Muslim,” according to interviews with another FBI agent. Marlena Telvick, *The Story of Gamal Abdel-Hafiz: Former Agent in the FBI’s International Terrorism Squad*, PUB. BROADCASTING SERVICE/FROTLINE (Oct. 16, 2003), <http://www.pbs.org/wgbh/pages/frontline/shows/sleeper/fbi/gamal.html>. According to several news articles, the remarks were taken out of context; Mr. Abdel-Hafiz apparently was explaining he was concerned for the safety of his family in the U.S. and Egypt because, culturally, such a recording would be considered a betrayal. *Id.*; Michael Isikoff, *The Bureau*, NEWSWEEK (Oct. 19, 2003), <http://www.thedailybeast.com/newsweek/2003/10/19/the-bureau.html> (adding also that Mr. Abdel-Hafiz had worn a wire to record meetings with Muslim suspects on at least two previous occasions). A few months after his dismissal, Abdel-Hafiz was reinstated. Cam Simpson & Todd Lighty, *Muslim FBI Agent to be Reinstated, Lawyer, Source Say*, CHICAGO TRIB., Feb. 26, 2004, News, at 18, available at [http://articles.chicagotribune.com/2004-02-26/news/0402260216\\_1\\_senior-fbi-official-terrorism-investigations-chicago-fbi](http://articles.chicagotribune.com/2004-02-26/news/0402260216_1_senior-fbi-official-terrorism-investigations-chicago-fbi). According to confidential sources contacted by the Tribune, the real reason for his termination was a fraudulent insurance claim that he allegedly filed 14 years before his termination; it was apparently submitted to the Bureau by his ex-wife. *Id.* Mr. Abdel-Hafiz also filed suit against Fox and ABC news, alleging defamation in connection with news reports about the circumstances of his erroneous termination. *Abdel-Hafiz v. ABC, Inc.*, 240 S.W.3d 492 (Tex. App. 2007) (finding a lack of jurisdiction over FBI agents that gave interviews to ABC news and a lack of actual malice by reporters for the news network); *Fox Entm’t Group, Inc. v. Abdel-Hafiz*, 240 S.W.3d 524 (Tex. App. 2007) (same result for suit against Fox News and Bill O’Reilly). Abdel-Hafiz, who worked as Assistant Legal Attaché under Rattigan, was erroneously discharged from the Bureau in 2003, allegedly because of concerns over his loyalty. Michael Isikoff, *The Bureau*, NEWSWEEK (Oct. 19, 2003), <http://www.thedailybeast.com/newsweek/2003/10/19/the-bureau.html>.

appears that internal procedures failed to prevent a discriminatory referral, at least in the case of Rattigan.<sup>167</sup>

Another reason to think *Rattigan* is a defeat for the government is that future plaintiffs may achieve a favorable settlement, even if they do not take their cases to trial. Every challenger will by definition be an employee in a sensitive government position and will be able to tell a jury that he or she was determined still fit for security clearance by the reviewing agency. The government will likely consider the sympathies of juries in deciding whether to litigate or settle future claims. Accordingly, there may be a substantial number of settled cases. The response on burden of proof and damages (for cases that do proceed to trial) is that while both will serve to limit the number of claims that are litigated, those that are worth litigating will be examples of truly egregious misconduct. Indeed, the high standard of proof shouldered by plaintiffs could necessitate significant discovery. This discovery process, even if limited by the state secrets doctrine, could be quite burdensome to the government: it could attract media interest, expose embarrassing misconduct, and impose significant administrative costs. For this reason, simply surviving a summary judgment motion could well mean a financial settlement.<sup>168</sup>

Ultimately, the reason why *Rattigan* is not a victory for the government is that, as set forth in Part I, the broad reading of *Egan* has provided a safe harbor in similar situations. Government lawyers argued for nonjusticiability before the district court and were rebuffed. They argued for nonjusticiability before the D.C. Circuit twice and were rebuffed twice. *Egan* does not bar challenge to security clearance referrals where the employee retains his or her security clearance.<sup>169</sup> Although the government did not file a certiorari petition, it is becoming increasingly clear that the government lost *Rattigan*, as we see district judges interpret and apply it to rule in favor of Title VII plaintiffs on summary judgment motions.

#### **D. Will Narrow Judicial Review of Security Clearance Referrals Based on Racist, Discriminatory, or Otherwise Knowingly False Information Chill Reporting?**

It is worth separately analyzing the chilling argument raised by the government in its brief on rehearing. The intuitive appeal of the claim that review of security referrals will result in a chilling of reporting with resultant ill-effects on national security may not stand up to further scrutiny. In a recent work, Professor Gia Lee critically scrutinized the so-called presidential privilege, concluding that the alleged chilling effect of disclosure requires several caveats.<sup>170</sup> Professor Lee's factors provide a useful framework to analyze the claim that review of security clearance referrals will chill candor. In particular,

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<sup>167</sup> The government argued in its briefs that “internal complaint procedures” will weed out most objectionable referrals or punish those who make them. Brief for the Appellant on Panel Rehearing, *supra* note 114, at 30–31. When salacious claims like those made about Rattigan did not merit reprimand (we can safely assume that had there been sanctions, the government would have brought them to the court's attention), it seems unlikely that these procedures are robust enough to stop actionable Title VII discrimination from occurring. For more discussion of the inefficacy of internal measures, see *infra* Part IV.D.

<sup>168</sup> In *Thomas v. Johnson*, the plaintiff survived a Rule 12(c) motion for judgment on the pleadings. *Thomas v. Johnson*, Civil Action No. 13-359(GK), 2013 WL 6994525 (D.D.C. Jan. 16, 2014). The docket indicates the case is ongoing. Similarly, in *Burns-Ramirez v. Napolitano*, several of the plaintiff's Title VII claims survived a motion to dismiss under *Rattigan*, although others were barred by *Egan*. *Burns-Ramirez v. Napolitano*, 962 F. Supp. 2d 253 (D.D.C. Aug. 2013). As in *Thomas*, the case appears to be ongoing. Although neither of these cases have yet settled, surviving motions to dismiss will put these and future similarly-situated plaintiffs in a stronger position to settle or litigate future cases.

<sup>169</sup> *Rattigan II*, 689 F.3d 764, 768 (D.C. Cir. 2012).

<sup>170</sup> Gia B. Lee, *The President's Secrets*, 76 GEO. WASH. L. REV. 197 (2008). With respect to chilling effects on candid advice, Lee proposes that at least five factors affect the extent and nature of chilling: 1) timing of anticipated disclosure; 2) anticipated disclosure's level of detail; 3) identity of the anticipated parties who will gain access to disclosures; 4) the certainty of actual disclosure; and 5) the form of disclosure. *Id.* at 221–25.



the considerable delay between reporting and disclosure (the events in *Rattigan*, for example, took place three years before Mr. Rattigan filed suit, eight years before the trial, and more than a decade before final determination of the claim), coupled with significant uncertainty of eventual disclosure (only a small minority of claims will ever be litigated) and the manner in which such referrals would be released (likely as evidence in a multi-count lawsuit without significant media attention) all would seem to point away from meaningful chilling here.

The chilling effect is also weakened because Title VII discrimination claims are brought against the government rather than individual employees in their personal capacity.<sup>171</sup> A 2002 federal statute, the No FEAR Act, does provide that federal employees may be disciplined for Title VII violations and that damage awards must be paid out of the agency's own budget (through reimbursement to the treasury).<sup>172</sup> However, it seems unlikely that any employee rash enough to report false and discriminatory allegations would spend significant time contemplating the possible fallout under multiple federal statutes.

It is also important to consider what particular speech will be chilled. Knowingly false referrals are by definition unhelpful to the security clearance process.<sup>173</sup> Or, in the words of the *Rattigan* court, "the Security Division cannot possibly be assisted by employees who knowingly report false information—that is, outright lies—about fellow employees."<sup>174</sup> Of course, it will not be exclusively false referrals that are chilled: the threat of litigation (remote though it may be) might deter a few employees from reporting hunches or suspicions that are sincere. But this must be balanced by the benefit to the security clearance review system of having to deal with fewer referrals that the referring employee knows to be false, freeing up resources to focus on referrals grounded in genuine loyalty concerns.<sup>175</sup>

Equally troubling for the government's argument is Ms. Lee's more controversial point: less-than-candid speech may actually be better-reasoned and provide more useful information to a decision-maker.<sup>176</sup> Racially-derogatory epithets and stereotypes, the two examples Ms. Lee cites, are exactly the kind of information that would be targeted by future Title VII litigation;<sup>177</sup> it is certainly worth considering what value, if any, such speech has to security clearance determinations. Furthermore, when left to its own devices, the national security apparatus has occasionally made potentially destructive and counter-productive decisions.<sup>178</sup> An assessment of the effects of security clearance law on translators and language experts would be another excellent contribution to scholarship in this area.

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<sup>171</sup> *Rattigan II*, 689 F.3d at 769.

<sup>172</sup> Notification and Federal Employee Antidiscrimination and Retaliation ("No FEAR") Act of 2002 § 203, Pub. L. No. 107-174, 116 Stat. 566 (2002).

<sup>173</sup> Of course, there is the possibility that a security clearance review begun by a malintentioned, knowingly false referral might reveal unrelated, credible reasons to suspect the clearance holder. However, a plaintiff's later challenge would likely be nonjusticiable under *Ryan* and *Bennett* (if the security clearance is ultimately denied or revoked) and it is dubious at best to justify discriminatory actions based on the random possibility that the victim might turn out to be undeserving of the security clearance for other reasons.

<sup>174</sup> *Rattigan II*, 689 F.3d at 770.

<sup>175</sup> Of course, supporters of *Egan* deference would argue that striking the right balance between increased credibility and foundation of referrals against chilling hunches and speculation is the province of the Executive branch. This constitutional argument was discussed above in tracing the *Egan* doctrine. See *supra* Parts II.A through II.C.

<sup>176</sup> Lee, *supra* note 170, at 232.

<sup>177</sup> Apart from the detrimental candid speech that disclosure may avoid, benefits of more openness may include better reasoned referrals, an ability to pierce groupthink, and greater reliance on rational principles instead of gut feelings. *Id.* at 234–42.

<sup>178</sup> *Rattigan*'s colleagues, by all accounts qualified and indeed exemplary FBI agents, faced serious discrimination. See *supra* Part IV.C. Relatedly, it is difficult to justify, at least on national security grounds, the application of "don't ask don't tell" to discharge homosexual language experts during wartime. See *supra* note 76.

Even assuming that the effect would be significant, would such chilling weaken or strengthen the security clearance process? In an almost *Marbury*-an twist,<sup>179</sup> it may be that by giving up power (opening the referral process to greater judicial scrutiny), the executive will actually get more power over the process. Compare this to the theory of Professor David Pozen, who has argued that a permissive culture of government leaks, while occasionally destructive of executive power in the short-term, “sustain[s] the institution’s credibility and legitimacy and thereby secur[es] popular approval of further grants of discretionary authority.”<sup>180</sup> It’s not difficult to apply this logic to security referrals: if the government submits to occasional judicial review of referrals, the credibility of final determinations (which are not subject to review) will increase over the long run. More broadly, limited judicial oversight of one aspect of the security clearance process may lend legitimacy to the entire classification regime, an area where many (both in and out of government) have argued government credibility is sorely lacking.<sup>181</sup>

Beyond the benefits to external credibility of the security clearance regime, there may be a correlation between judicial oversight of the referral process and employee buy-in to the broader classification regime.<sup>182</sup> In the same way that a belief that only truly sensitive documents are being marked top secret would be expected to lead to more careful stewardship of those documents, a belief that those charged with carrying out security clearance determinations do so in a conscientious way might be expected to result in more respect for the system.<sup>183</sup> This “employee buy-in effect” might give another reason why enhanced review of security clearance referrals would help rather than hinder the underlying goals of the system.

Critics of this theory might argue that what Professor Pozen refers to as “power-reducing first-order effects” may chill the referral of double agents and spies that have slipped through the cracks.<sup>184</sup> Perhaps such individuals are disproportionately likely to be members of groups that are protected by Title VII (which covers, among other things, national origin discrimination). Well short of such alarmist

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<sup>179</sup> Of course, this superficial reading of Chief Justice John Marshall’s opinion in *Marbury* as giving up power to get power is little more than a high school civics course cliché—however, what it lacks in doctrinal rigor it makes up for in staying power.

<sup>180</sup> David Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 574 (2013). Professor Pozen specifically focuses on the “secretive realms of national security and foreign policy, where congressional and judicial checks are least robust and the executive’s activities least visible to the average citizen.” *Id.*

<sup>181</sup> *Id.* at 575 (describing the official secrecy system as “bloated” and not able to “inspire trust”); see, e.g., *Too Many Secrets: Overclassification as a Barrier to Critical Information Sharing: Hearing Before the Subcomm. on Nat’l Sec., Emerging Threats & Int’l Relations of the H. Comm. on Gov’t Reform*, 108th Cong. (2004); REPORT OF THE COMMISSION ON PROTECTING AND REDUCING GOVERNMENT SECRECY, S. DOC. NO. 105-2, at 19–48 (1997), available at <http://www.gpo.gov/fdsys/pkg/GPO-CDOC-105sdoc2/content-detail.html>.

<sup>182</sup> This idea may be particular to the security referral context. While it is somewhat difficult to imagine government employees feeling proud of working in a leaky bureaucracy (at least in their official capacities), it is possible that enhanced oversight of the referral process may engender feelings of respect towards the institutional culture surrounding government secrets.

<sup>183</sup> This respect could manifest itself in several ways: more care taken not to divulge information that is beyond a fellow employee’s security clearance, more cooperation with the security review and referral process (which could include heightened vigilance of truly suspicious activities of co-workers), and less of a feeling that security clearance determinations are arbitrary or unfair. Also, perceptions of the security clearance system are undoubtedly linked to perceptions of the classification system. Executive officials could view an overhaul of the referral system as part of a broader effort to reform the classification scheme. See, e.g., Exec. Order No. 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009).

<sup>184</sup> Pozen, *supra* note 180, at 576. Professor Pozen notes that the ultimate source of “power-enhancing second- and third-order effects” is the “power-reducing first-order effects.” *Id.* Supporters of broad *Egan* deference would argue that, even if there are a hundred referrals based on unsavory or impolitic accusations for every hunch that proves to reveal a double agent, saboteur, or future security breach, we must err on the side of national security.

arguments, the judiciary's focus on individual rights might simply be ill-suited to make the determinations in the national security realm. Critics may bolster this point (as the government did in *Rattigan*) by arguing that internal mechanisms can address isolated instances of discrimination or retaliation.<sup>185</sup> Right or wrong, judges do, in general, seem to defer in areas where the consequences of mistakes could be severe and putting probability values on outcomes is difficult.<sup>186</sup> While these arguments have some force, it is difficult to see how a knowingly false standard like that set forth in *Rattigan* could represent a significant paradigm shift in this regard. It seems more likely to provide exactly the credibility-building imprimatur described by Professor Pozen without significant costs either in government liability or increased false negatives on the referral end.

## V. CONCLUSION

This Note was not intended to (and did not unintentionally) discover heretofore unnoticed wisdom in Title VII or the *Egan* doctrine. It sought to situate a recent ruling of the D.C. Circuit in a broader legal framework and argue that it represents a significant legal development. As has been outlined here, *Rattigan* is an uncomfortable fit with many of the cases decided before it, including cases in the D.C. Circuit. The first few district court cases to apply *Rattigan* have treated invocation of the broad *Egan* doctrine with skepticism. Going forward, courts will continue to consider both the narrow and the broad reading of *Egan* in evaluating challenges to security clearance referrals. The D.C. Circuit showed conviction in preserving its essential holding on rehearing. Its opinion in *Rattigan* points the way towards an appropriate judicial role in supervising security clearance referrals.

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<sup>185</sup> Professor Sunstein has written that, in the national security realm, “[d]eliberative processes within a unitary branch are likely to lead to an amplification of preexisting tendencies, not toward a system of internal checks and balances.” Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 75 (2004).

<sup>186</sup> See Fuchs, *supra* note 149 (showing that in the FOIA context, despite clear congressional intent to provide for robust judicial review, courts have largely deferred to assertions of privilege by executive branch lawyers).

