IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ABDEL MONIEM ALI EL-GANAYNI,	:	
	:	No. 2:08-cv-00881
Plaintiff,	:	The Honorable Terrence F. McVerry
v.	:	
UNITED STATES DEPARTMENT OF ENERGY, and JEFFREY F. KUPFER, Acting Deputy Secretary of Department of Energy,	:	
Defendants.	:	

BRIEF IN OPPOSITION TO MOTION TO DISMISS

Dr. Abdel Moniem Ali El-Ganayni ("Dr. El-Ganayni") submits this Brief in Opposition to Defendants' Motion to Dismiss. Defendants' Motion is based on a misinterpretation of law regarding the scope of review for constitutional challenges and an extraordinary interpretation of an Executive Order that would allow them absolute power to deny or revoke security clearances and to evade all review or process associated with those decisions. Defendants' "interpretations" are unreasonable and their Motion to Dismiss should be denied in its entirety.

A. This Court Has Jurisdiction to Hear Constitutional Challenges to Defendants' Actions.

The United States government already has tremendous power under *Department of the Navy v. Egan*, 484 U.S. 518 (1988), to deny or revoke security clearances. And it is potentially the most dangerous power that exists, namely, virtually unreviewable by the judiciary. Expansion of such awesome authority should not be lightly countenanced. Yet it is precisely such an expansion of unchecked authority that the government requests in this case.

The Defendants ask this Court to extend their unreviewable discretion beyond the revocation decision itself to decisions about the revocation *process*. The Defendants' brief argues that, "Plaintiff simply cannot ask this Court to second-guess the national security concerns which prevented the use of administrative procedures anymore than it could second-guess the national security concerns that led to the revocation of the security clearance" (Brief at 18). Indeed, Defendants suggest that anytime they invoke "national security" that the decision is unreviewable because that decision involves "predictive judgment." *Id.* at 3. But to allow the government to foreclose judicial review by ritualistically invoking national security, beyond the clearance-revocation decision itself, would alter the balance of power by abdicating the federal courts' traditional oversight responsibility. "[W]hen the President takes official action, the Court has the authority to determine whether he has acted within the law." *Clinton v. Jones,* 520 U.S. 681, 703 (1997). To allow the Executive to have the first and final say on the extent of its own power flies in the face of the most basic separation of powers principles. *Id.* at 699 ("The Framers built into the tripartite Federal Government...a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.") (internal quotation marks omitted).

Admittedly, the Supreme Court has limited judicial review of security-clearance revocations. Where an agency has followed proper procedures, the courts cannot second guess the agency's exercise of discretion in making the final decision to revoke a clearance. *Egan*, 484 U.S. at 527; *Stehney v. Perry*, 101 F.3d 925, 932 (3d Cir. 1996). The reason for this rule is that the agency has a certain level of expertise in the area of national security and numerous intangible factors must be considered in determining whether continued access to classified information may pose a risk to national security. *Egan*, at 529.

The *Egan* limit on judicial review of a revocation decision, however, does not protect agencies from Constitutional challenges to the decision, and certainly not to the agency's process, which is what Plaintiff challenges here. In *Webster v. Doe*, 486 U.S. 592, 603 (1988), the CIA argued that "all agency employment termination decisions, even those normally repugnant to the Constitution, are given over to the absolute discretion of the Director and are precluded from review." The Supreme Court, however, refused to defer to the agency when the denial of security clearance eligibility raises Constitutional concerns, absent Congress' explicit intent to preclude review. *Id.* The Court required this heightened showing "to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Id.* As the United States Court of Appeals for the Third Circuit has held,

> If Stehney had asked for review of the merits of an executive branch decision to grant or revoke a security clearance, we would agree [that such claim should be dismissed]. But not all claims arising from security clearance revocations violate separation of powers or involve political questions. Since *Egan*, the Supreme Court and several courts of appeals have held the federal courts have jurisdiction to review constitutional claims arising from the clearance revocation process.

Stehney v. Perry, 101 F.3d 925, 932 (3d Cir. 1996) (finding that plaintiff presented a justiciable claim for violations of her constitutional and regulatory rights in revoking her security clearance).

Defendants argue that Counts I and II of the Complaint "explicitly seek to second-guess the basis for the revocation decision itself" (Defendants' Brief, p. 16 (emphasis in original)). This statement misconstrues Plaintiff's lawsuit and the relief requested. Counts I and II allege that the decision to revoke his security clearance, and the decision to deny any due process regarding that revocation, were made for constitutionally impermissible reasons (Verified Complaint, paragraphs 76, 77 85 and 86). Counts I and II request "An order requiring D.O.E. to

provide Dr. El-Ganayni notice and hearing procedures consistent with the United States Constitution and D.O.E. regulations to review the security-clearance revocation determination." *See* WHEREFORE clauses to Counts I and II of the Verified Complaint. Plaintiff does not request that this Court decide whether Dr. El-Ganayni has a right to the clearance. Plaintiff requests that the Court hold that the process was unconstitutional, and that the matter be remanded to the agency for compliance with applicable regulations, which already provide for protection of classified information. Therefore, Counts I and II fall squarely within the scope of *Webster* and its progeny.

Defendants appear to concede that Courts have jurisdiction to consider at least some constitutional challenges. Defendants' first argument above appears to simply misinterpret the allegations in Counts I and II of the Verified Complaint as a challenge to an agency's exercise of discretion as opposed to the use of constitutionally impermissible means. Indeed, inasmuch as Defendants next argue below that there is jurisdiction for only certain types of constitutional challenges, Defendants are conceding that at least some such challenges are reviewable.

Defendants next argue in their Brief that constitutional claims are reviewable only if constitutional rights are infringed by some overriding government policy, rather than by an action directed at a specific individual. There is no support for Defendants' position. Indeed, in *Webster*, the Court was unsure whether the employee's termination was due to a general policy as to all homosexuals, or based on an individual decision about that individual:

> We share the confusion of the Court of Appeals as to the precise nature of respondent's constitutional claims. It is difficult, if not impossible, to ascertain from the amended complaint whether respondent contends that his termination, based on his homosexuality, is constitutionally impermissible, or whether he asserts that a more pervasive discrimination policy exists in the CIA's employment practices regarding all homosexuals. This ambiguity in the amended complaint is no doubt attributable in part

> to the inconsistent explanations respondent received from the Agency itself regarding his termination.

Id. at 602. Notwithstanding this confusion, the Court concluded that "a constitutional claim based on an individual discharge may be reviewed by the District Court," and remanded to the District Court for such a consideration. *Id.* at 603-04. The Supreme Court found that the employee's constitutional claim was reviewable, without determining whether the constitutional claim was based on an overriding policy or an individual determination. The Defendants' argument that *Webster*'s holding is limited to overriding policies is simply inaccurate.

In support of their argument, Defendants state: "In making this determination, the Supreme Court noted that the government acknowledges 'that Title VII claims attacking *hiring and promotion policies* of the Agency are routinely entertained in federal court" (Defendants' Brief, p. 18 (emphasis added by Defendants)). This statement is taken out of context and thus misleading. This "note" by the Supreme Court was in response to the government's claim that allowing review of constitutional claims could result in discovery abuses that would harm national security:

> Petitioner complains that judicial review even of constitutional claims will entail excessive 'rummaging around' in the Agency's affairs to the detriment of national security. But petitioner acknowledges that Title VII claims attacking the hiring and promotion policies of the Agency are routinely entertained in federal court, and the inquiry and discovery associated with those proceedings would seem to involve some of the same sort of rummaging. Further, the District Court has the latitude to control any discovery process . . .

Id. at 604 (citations to record omitted). Defendants' suggestion that *Webster* was limited to overriding policies is without support.

Indeed, Defendants cannot cite to ANY case in which a court has made the distinction for which they argue. Some cases alleging constitutional violations involve overriding policies, and

other involve individual determinations, but no court has ever (to Plaintiff's knowledge) found that one category was reviewable while the other was not, or has distinguished other cases on this basis.[1] The cases cited by Defendants on page 20 of their brief (*Hill v. Department of Air Force*, 844 F.2d 1407 (10th Cir. 1988), and *Peterson v. Department of Navy*, 687 F. Supp. 713 (D.N.H. 1988)) are inapposite. Neither of these cases juxtaposed individual determinations versus overriding policies. Rather, both of these cases are pre-*Webster*, and held that there is no jurisdiction at all to consider constitutional claims. 844 F.2d at 1411-12; 687 F. Supp. at 715. Of course, *Webster* held to the contrary, and therefore, these holdings are no longer good law.[2]

Similarly, Defendants citation to *Makky v. Chertoff*, 541 F.3d 205 (3d Cir. 2008), is disingenuous. Defendants argue that the *Makky* opinion "recognized this limitation on review of challenges to a revocation of a security clearance" and quotes the opinion as holding that an

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[1] In fact, each of these cases addressing so-called individual determinations routinely cites as support those cases addressing overriding policies. *See., e.g., National Federation of Federal Employees v. Greenberg*, 983 F.2d 286, 289-90 (D.C. Cir. 1993) (*citing High Tech Gays v. DISCO*, 895 F.2d 563 (9th Cir. 1990) and *Hill v. Air Force*, 844 F.2d 1407 (10th Cir. 1988) as support); *Doe v. Schachter*, 804 F. Supp. 53 (N.D. Cal. 1992) (*citing Dubbs v. CIA*, 866 F.2d 1114 (9th Cir. 1989) and *High Tech Gays v. DISCO*, 895 F.2d 563 (9th Cir. 1990) for support); *Dorfmont v. Brown*, 913 F.2d 1399, 1402-03 (9th Cir. 1990) (same). Apparently, none of these courts see any significance to Defendants' proposed distinction.

[2] Moreover, one of the key bases for the holding in *Hill* was the fact that Hill had received "full due process":

> Both Hill and Egan contested their loss of employment, and received full due process under applicable statutes and regulations: notice, hearing before the Merit Systems Protection Board ("MSPB"), confrontation, and rights of appeal. In that process Hill was able to present affirmative defenses, and defenses on the merits, without success. Egan's loss of employment due to his inability to get a clearance was eventually upheld on appeal. Hill's loss of employment was also upheld on appeal.

Id. at 1410. Here, of course, Dr. El-Ganayni received no process a all, and therefore, even if *Hill* was still good law, it would be easily distinguishable.

individual "is foreclosed under *Egan* from challenging the decision to deny the security clearance, even if it were denied due to discrimination" (Defendants' Brief, p. 21). Defendants' citation to *Makky* is misleading on several levels. First, no constitutional claims were asserted in that case; rather, the quoted statement was made in the context of a Title VII discrimination claim. While statutory causes of action may be prohibited by *Egan*, as *Webster* points out, constitutional claims are not. Second, the language quoted by Defendants was not the holding of the case, but was merely an explanation of what was NOT at issue in the case:

> Makky acknowledges that he would be foreclosed under *Egan* from challenging the decision to deny the security clearance, even if it were denied due to discrimination. He emphasizes that is not what he is arguing.

(Opinion, p. 12).[3] Third, even though the claim at issue was a statutory claim and not a constitutional claim, the Court found that it did have jurisdiction to review the claim. Because Makky claimed that the decision to suspend him without pay was motivated by discriminatory animus, the Court held: "Based on our precedent in *Stehney*, we conclude that we have jurisdiction to review Makky's claim of discrimination because a discrimination claim under a mixed-motive theory does not necessarily require consideration of the merits of a security clearance decision" (Opinion, p. 12). Makky therefore supports the view that discrimination claims (even statutory discrimination claims) can be reviewed so long as they do not require a consideration of the merits of the revocation decision. Defendants' citation to this opinion as support for its distinction between different "types" of constitutional claims, and that there is no jurisdiction to hear claims based on "individual determinations" is misguided.

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[3] Again, this concession by Makky was in the context of a statutory discrimination claim, not a constitutional claim.

Simply put, there is no support for Defendants' assertion. Moreover, Defendants' argument is directly contrary to *Doe v. Schachter*, 804 F. Supp. 53 (N.D. Cal. 1992). There, the plaintiff's security clearance was revoked as a result of his arrest for indecent exposure (appearing in an apartment complex's carport without any pants on); obviously an individual determination. The Court found based on *Webster* that it could review the plaintiff's constitutional challenges to the revocation (including alleged violations of rights to substantive due process, constitutional right of privacy and the privilege against self-incrimination). *Id.* at 58. Defendants do not even acknowledge this case in their brief.

Another case that considered constitutional claims for an "individual determination" is *Dorfmont v. Brown*, 913 F.2d 1399, 1402-03 (9th Cir. 1990) (security clearance revoked where individual "was reckless and used poor judgment" in seeking programming assistance from a Bulgarian national who was serving a life sentence in prison). Defendants try to distinguish this case by arguing that its findings are dicta (Defendants' Brief, p. 20 n.7). But this is not correct. Before a court addresses the merits of a constitutional claim, the court must first determine whether there is jurisdiction to review that claim. As a result, the statements by these courts were necessary prerequisites to a consideration of the underlying claims, and thus are not properly considered dicta.

In fact, Defendants have offered no reason why such a distinction makes sense. The rationale for allowing review of colorable constitutional claims is to protect individual liberties, and it matters not whether those liberties are infringed as a result of an action directed solely at him or at others as well. Defendants cannot cite to any case that supports their proposed

distinction or any statement within the cases that supports the rationale for such a distinction.[4] Dr. El-Ganayni's claims fall squarely within the rule of *Webster*, and Defendants' Motion to Dismiss Counts I and II of the Verified Complaint should be denied.

B. Count III of the Verified Complaint States A Valid Claim Because Defendants' Actions Were Unauthorized And Are Inconsistent With D.O.E.'s Own Regulations

Despite the general rule prohibiting challenges to the merits of a revocation decision, an individual is entitled to certain procedural protections in the making of that decision, and has the right to challenge the failure to provide those protections. *Stehney v. Perry*, 101 F.3d 925, 932 (3d Cir. 1996) ("The courts also have the power to review whether an agency followed its own regulations and procedures during the revocation process"). *See also Webster v. Doe*, 486 U.S. 592, 602 n.7 (1988) (wherein the government conceded this point). Defendants seem to concede this point, in that they do not seek to dismiss Count III on the basis of lack of jurisdiction.

Nevertheless, Defendants' current interpretation of an Executive Order (as expressed in their Brief) would allow them to bypass all of Dr. El-Ganayni's rights under D.O.E. regulations and principles of due process. This argument is without support because such an interpretation is inconsistent with the basic tenets of our democracy and the careful system of checks and balances created by our Constitution, and because this interpretation is contrary to D.O.E.'s own regulations and the language of the Executive Order that those regulations implement.

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[4] Dr. El-Ganayni's equal protection claim alleges that Defendants treated Egyptian-born Muslim scientists different from other groups, and therefore, even under Defendants' proposed distinction, the Court would have jurisdiction to hear that claim.

1. **To Allow Defendants the Unfettered Discretion to Deny or Revoke Security Clearances and Evade Any Review or Process Associated With Those Decisions Would Violate the Basic Principles of our Constitution that Provide Checks and Balances to Protect Against Such Absolute Power.**

In this case, it is undisputed that Dr. El-Ganayni was denied every single procedural protection or safeguard available under D.O.E. regulations. Even in *Egan*, the plaintiff was advised of the reasons for his termination (prior conviction for assault, being a felon in possession of a firearm and drinking problem), was provided an opportunity to respond to those allegations and to provide evidence supporting his response, and took an appeal of the adverse decision. *Egan*, 484 U.S. at 521-22. Here, however, Dr. El-Ganayni still to this day does not know the alleged reasons for the revocation of his security clearance, was never provided any opportunity to respond to those allegations or to present evidence on his behalf and was not allowed a hearing or any appeal. The denial of all procedural rights as occurred in this case is unprecedented.

Notwithstanding this, Defendants contend that Count III fails to state a claim because the Executive Order allegedly permits the withholding of ALL procedural safeguards and protections. In short, it is Defendants' position that they have absolute power to deny or revoke security clearances and can evade any review of those decisions by simply stating that such a review would infringe upon national security. According to Defendants, they can prevent any review of their actions even though those actions themselves may violate fundamental rights guaranteed under the United States Constitution, as is alleged here.

To so hold would allow Defendants to free themselves of the careful system of checks and balances that make up the central framework of our democracy. The Defendants' argument in this case that it has and needs to have unchecked power in the name of national security is not

new, and even in another context (one that is arguably more fraught with national security peril), the Supreme Court has rejected it. In *Hamdi v. Rumsfield*, 542 U.S. 505 (2004), the government argued that the judiciary could not interfere in decisions about the treatment of enemy combatants detained in Guantanamo. The Supreme Court refused the government's invitation to relinquish the judiciary's traditional oversight responsibilities: "as critical as the Government's interests may be in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat." *Hamdi v. Rumsfield*, 542 U.S. 505, 530 (2004). Indeed, even in times of war, the Supreme Court has made clear that civil liberties are not checked at the door.

> We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens. Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake. . . . **Any process in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short.**

Id. at 536-37 (emphasis added). *See also Boumediene v. Bush*, No. 06-1195, p. 35 (June 12, 2008) (responding to the government's claim that the Constitution has no effect at Guantanamo and that therefore, the Executive has the power to govern "without legal constraint," the Court found that "[o]ur basic charter cannot be contracted away like this").[5] The courts' steadfast

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[5] Courts of Appeals likewise have rejected arguments that would allow the executive branch to evade review simply by asserting national security interests. For example, the Court of Appeals for the Fourth Circuit in *In re Washington Post*, 807 F.2d 383, 391 (4th Cir. 1986), wrote:

...*Continued*

defense of the judiciary's traditional review of administrative actions has deep roots in American jurisprudence, dating back more than 200 years to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).[6] Defendants' renewed attempt to bypass this review process should once again fail.

Courts are plainly competent to review cases implicating even the most sensitive national security issues, and have done so routinely.[7] In the past six years, in cases related to the same national security considerations that the government invokes to preclude judicial review here, courts have decided whether the President can detain enemy combatants captured on the

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> [T]roubled as we are by the risk that disclosure of classified information could endanger the lives of both Americans and their foreign informants, we are equally troubled by the notion that the judiciary should abdicate its decisionmaking responsibility to the executive branch whenever national security concerns are present. History teaches how easily the spectre of a threat to 'national security' may be used to justify a wide variety of repressive government actions. *A blind acceptance by the courts of the government's insistence on the need for secrecy . . . would impermissibly compromise the independence of the judiciary and open the door to possible abuse.*

Id. at 391-92 (emphasis added).

[6] There is a "strong presumption that Congress intends judicial review of administrative action." *Bowen v. Michigan*, 476 U.S. 667, 670 (1986). The Supreme Court acknowledged that "from the beginning, our cases have established that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe such was the purpose of Congress." *Bowen*, 476 U.S. 667 at 670. Citing *Marbury v. Madison*, a case itself involving review of executive action, the Court recognized that "the very essence of civil liberty consists in the right of every individual to claim protection of the laws." *Id.* The Court therefore concluded that "only upon a showing of clear and convincing evidence of a contrary legislative intent should the court restrict access to judicial review." *Id.*

[7] *See* Statement of Senator Muskie, 120 Cong. Rec. 17023 (1974) (referring to the "outworn myth that only those in possession of [] confidences can have the expertise to decide with whom and when to share their knowledge," in floor debate regarding standards for judicial review of claims under Exemption 1 of FOIA).

battlefield in Afghanistan and whether those captured are entitled to due process (*Hamdi, supra*); whether individuals detained at Guantanamo Bay can challenge their detention (*Rasul v. Bush*, 542 U.S. 466 (2004)), and whether the trial of detainees by military commissions passes constitutional muster (*Hamdan v. Rumsfeld*, 548 U.S. 557 (2006)). Courts have required access to the testimony of enemy combatant witnesses (*United States v. Moussaoui*, 365 F.3d 292 (4th Cir. 2004)); decided whether, consistent with the Constitution, the FBI can unilaterally demand that Internet Service Providers turn over customer records related to national security investigations and gag them forever without judicial review (*Doe v. Ashcroft,* 334 F.Supp.2d 471; *Doe v. Gonzales,* 386 F.Supp.2d 66 (D. Conn. 2005), *appeal dismissed as moot,* 2006 WL 1409351 (2d Cir. 2006)); whether the government can require closure of all post-9/11 deportation hearings for national security reasons (*Detroit Free Press v. Ashcroft,* 303 F.3d 681 (6th Cir. 2002)); and whether the government must disclose information about the treatment of detainees in Iraq, Afghanistan, and Guantanamo Bay (*ACLU v. Dep't of Defense,* 389 F. Supp. 2d 547 (S.D.N.Y. 2005)). Had the government urged its radical national security theory in these cases – all of which involve national security issues at least as sensitive as those presented in this case – important constitutional issues might never have been decided.

In the past, courts have determined whether the military can try individuals detained inside and outside zones of conflict, during times of hostility and peace;[8] whether the government could prevent newspapers from publishing the Pentagon Papers because it would

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[8] *U. S. ex rel. Toth v. Quarles,* 350 U.S. 11 (1955) (court martial proceedings in Korea); *Madsen v. Kinsella,* 343 U.S. 341 (1952) (commissions in occupied Germany); *Ex parte Quirin,* 317 U.S. 1 (1942) (German saboteurs tried by military commission); *Duncan*, 327 U.S. 304 (military trial of civilians in Hawaii); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) (civilian in Indiana tried by military commission).

allegedly harm national security (*New York Times Co. v. United States,* 503 U.S. 703 (1971)); whether the executive branch, in the name of national security, could deny passports to members of the Communist Party (*Kent v. Dulles,* 357 U.S. 116 (1958)); whether U.S. civilians outside of the country could be tried by court-martial (*Reid v. Covert,* 354 U.S. 1 (1957)); whether the President could seize the steel mills during a labor dispute when he believed steel was needed to fight the Korean War (*Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579 (1952)); whether the Executive could continue to detain a loyal Japanese-American citizen under a war-related executive order (*Ex parte Endo,* 323 U.S. 283 (1944)); whether the President could block southern ports and seize ships bound for Confederate ports during Civil War (*The Prize Cases* (*The Amy Warwick*), 67 U.S. 635 (1862)); and whether the President could authorize the seizure of ships on the high seas in a manner contrary to an act of Congress during a conflict with France (*Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804)). If courts were able to decide these cases, nothing should preclude judicial review in this case.

The Supreme Court has repeatedly reaffirmed the District Courts' ability to be sensitive to matters of national security that may arise and to provide mechanisms for protecting confidential information. *Hamdi v. Rumsfield*, 504 U.S. 530, 538-39 (2004). *Boumediene v. Bush*, No. 06-1195, p. 68 (June 12, 2008). In *Webster*, the Court explained:

> Petitioner complains that judicial review even of constitutional claims will entail excessive 'rummaging around' in the Agency's affairs to the detriment of national security. . . . the District Court has the latitude to control any discovery process which may be instituted so as to balance respondent's need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources and missions.

Webster v. Doe, 486 U.S. 592, 604 (1988). Clearly, the presence of "national security" concerns does not trump judicial review and an individual's constitutional rights.[9]

Defendants' attempt to exclude from this process all branches of government other than itself (and even the internal review and appeals process within its own branch) is contrary to the fundamental structure of our democratic system and contrary to well-established precedent allowing for judicial review in such circumstances. Although an agency is entitled to some deference in matters within its jurisdiction, it is not immune from the constraints imposed by our Constitution. Defendants' attempt to exclude any process and any review of its actions is unfounded and unconscionable.

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[9] The Court has many mechanisms available for safeguarding non-privileged but ultimately sensitive evidence from unauthorized disclosure if need be. In civil cases, courts often utilize seals, protective orders, or discovery in secure locations in order to protect any sensitive information in civil proceedings. *In re Under Seal,* 945 F.2d 1285, 1287 (4th Cir. 1991); *Heine v. Adams,* 399 F.2d 785, 787 (4th Cir. 1968); *Air-Sea Forwarders, Inc. v. United States,* 39 Fed. Cl. 434, 436-37 (Ct. Cl. 1997); *In re Guantanamo Detainee Cases,* 344 F. Supp. 2d 174 (D.D.C. 2004); *United States v. Lockheed Martin Corp.,* 1998 U.S. Dist. LEXIS 11596, 1998 WL 306755 (D.D.C. May 29, 1998). Courts also routinely handle classified evidence in criminal cases, *see generally* Classified Information Procedures Act, 18 U.S.C. app. III § 1 *et seq* (hereinafter "CIPA"); *United States v. Rezaq*, 134 F.3d 1121 (D.C. Cir. 1998) (reviewing classified materials in detail), decide whether to force disclosure of national security information in FOIA cases, *see, e.g., Halpern v. F.B.I.,* 181 F.3d 279 (2d Cir. 1999) (rejecting government's Exemption 1 claim), and review classification decisions to independently determine whether information is properly classified, *see, e.g., McGehee v. Casey*, 718 F.2d 1137, 1148 (D.C. Cir. 1983) (requiring *de novo* judicial review of pre-publication classification determinations to ensure that information is properly classified and agency "explanations justify censorship with reasonable specificity, demonstrating a logical connection between the deleted information and the reasons for classification"); *see also Snepp v. United States*, 444 U.S. 507, 513 n.8 (1980) (requiring judicial review of pre-publication classification determinations). In determining whether information is properly classified, courts must evaluate whether its disclosure could be expected to cause varying levels of harm to the nation's security. E.O. 13292 (Mar. 25, 2003).

2. **To Allow Defendants to Deny All Procedural Protections and To Evade Any Review of That Decision is Contrary to D.O.E.'s Own Regulations and the Language of the Executive Order.**

Not only is Defendants' argument contrary to our careful system of checks and balances, but it is also contrary to D.O.E.'s own regulations and the language of the Executive Order.

Notwithstanding Defendants' current interpretation of the Executive Order to allow D.O.E. to bypass the uniform minimum standards and regulations, when D.O.E. promulgated regulations pursuant to this Order, knowing the language of the Order, D.O.E. chose not to include any such procedures in its regulations. Therefore, whether or not the Executive Order applies, Dr. El-Ganayni still has a claim for Defendants' failure to follow their own regulations pursuant to *Webster* and *Stehney*. Defendants have not explained how the denial of all procedural protections and safeguards is consistent with its regulations. The regulations implement the Executive Order, and there is nothing in the regulations that permit the Defendants' actions in this case. If the Secretary wanted to have a procedure implementing its current interpretation of sections 5.2(d) and (e) of the Executive Order, it should have created such a procedure in the regulations. Having not done so, and instead having required notice and a hearing in the regulations (albeit with certain limitations), Defendants are required to follow their regulations.

Defendants' actions in this case were inconsistent with and in violation of their own regulations. The regulations themselves state that it is D.O.E.'s policy to "afford . . . the opportunity for administrative review of questions concerning their eligibility for access authorization" 10 C.F.R. § 710.4(a). Procedures for the suspension and/or revocation of security clearances are spelled out in detail and provide that each affected individual has a number of

rights, including the right to know the reasons for the suspension or revocation and the right to a hearing. 10 C.F.R. §§ 710.10(c), 710.20 through 710.29. There can be no dispute that these procedures were not used in this instance.

Moreover, the regulations actually require the Secretary himself to issue a final decision where the uniform minimum standards articulated in the regulations are not fully utilized. As set forth in Dr. El-Ganayni's Brief in Support of his Motion for Preliminary and Permanent Injunction, D.O.E.'s regulations allow certain procedural protections to be bypassed or modified in certain situations. When such protections are bypassed or modified, "only the Secretary may issue a final decision to deny or revoke DOE access authorization . . ." 10 C.F.R. § 710.31. Defendants argue that this provision is not applicable because they did not utilize the provisions in the regulations that allow them to bypass or modify the procedural protections (Defendants' Brief, p. 30). But this reasoning is circular, and would allow Defendants to escape the requirements of its regulations by not relying on its regulations in the first place. Because the only permissible ways of bypassing or modifying these procedural protections are through the mechanisms set forth in the regulations, the regulations contemplate that in those rare situations, the Secretary alone is authorized to sign off on the decision to utilize those procedures.

Defendants' actions here violate § 710.31 of the regulations, and are inconsistent with the other regulations that require uniform minimum standards. Further, there is nothing in the regulations to which Defendants can point as authorization for their actions. Not only has Dr. El-Ganayni demonstrated a likelihood of success on the merits, but the undisputed facts demonstrate conclusively that Defendants' actions violate applicable D.O.E. regulations.

The Executive Order, even if permitted to stand alone without the implementing regulations, does not permit Defendants' actions. With respect to section 5.2(d) of the Executive Order, Defendants contend that despite the enabling statute's limitation of authority to the "agency head," the Order can still grant such authority to the "head of an agency or principal deputy" (Defendants' Brief, p. 28). Not only is this argument contrary to basic rules of statutory interpretation, but it also makes little sense next to Defendants' own argument on § 710.31 of the regulations. According to Defendants, pursuant to 10 C.F.R. § 710.31, "only the Secretary" could sign off on a decision to limit certain procedural safeguards set forth in the regulations, but the Secretary *or the principal deputy* could decide to abandon all procedural safeguards altogether, such as was done here. In other words, there are greater protections against smaller modifications than there are against the wholesale denial of rights. Dr. El-Ganayni submits that this is not a reasonable interpretation.[10]

Further, the language of section 5.2 (d) is intended to apply to particular procedures, not a blanket denial of all procedures ("the particular procedure shall not be made available."). Defendants' interpretation of this language to allow it to bypass all of the uniform minimum standards is unreasonable, as it would emasculate all of the protections afforded by Section 5.2(a) and all those procedures Congress sought to protect in requiring the President to implement Section 5.2(a). Indeed, D.O.E. implemented section 5.2(d) in its regulations by making provisions for specific types of procedures. *See, e.g.*, §§ 710.26(l), (o). Defendants'

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[10] For this same reason, the power of the agency head pursuant to section 5.2(e) of the Executive Order cannot be delegated to the principal deputy. This would be contrary to the regulations themselves that require "only the Secretary" to authorize the bypass or modification of these uniform minimum standards.

reliance on section 5.2(d) of the Executive Order, while at the same time ignoring the regulations that implement that provision, is without support.

Section 5.2(e) does not provide independent authority to revoke a security clearance; rather, it merely states that the Executive Order shall not interfere with the "responsibility and power of the agency head pursuant to any law or other Executive Order to deny or terminate access to classified information . . ." Defendants recognized the need for some other authority when they purported to revoke Dr. El-Ganayni's security clearance, and did so "pursuant to the authority granted to the Secretary of Energy by section 145 of the Atomic Energy Act, as amended (42 U.S.C. § 2165)." However, section 145 of the Atomic Energy Act provides no such authority. There is nothing in this section that discusses the revocation of security clearances at all. Subsection (b) of that section provides that "no individual shall be employed by the Commission nor shall the Commission permit any individual to have access to Restricted Data until the Director of the Office of Personnel Management shall have made an investigation and report to the Commission on the character, associations and loyalty of such individual, and the Commission shall have determined that permitting such person to have access to Restricted Data will not endanger the common defense and security." 42 U.S.C. § 2165(b). However, Dr. El-Ganayni had been investigated by the Office of Personnel Management on numerous occasions and had been found fit for a security clearance. This section simply does not provide

Defendants the authority to revoke Dr. El-Ganayni's security clearance. Defendants' reliance on this provision to justify the revocation is unwarranted and unauthorized.[11]

In summary, there was no authority for Defendants to bypass the uniform minimum standards mandated by Congress and implemented by Section 5.2(a) of Executive Order 12,968 and D.O.E.'s own regulations. Further, Defendants' actions are actually inconsistent with those regulations and the protections they provide, and the protections against abuse of power provided by our Constitution. Count III of the Verified Complaint states a valid claim, and the Motion to Dismiss should be denied.

C. Count III Also Sets Forth a Valid Claim For Violation of Dr. El-Ganayni's Fifth Amendment Due Process Rights, as it Has Alleged Valid Constitutionally Protected Property and Liberty Interests.

Count III of the Verified Complaint is based not only on Defendants' failure to follow D.O.E. regulations, but also on their violation of Dr. El-Ganayni's Fifth Amendment due process rights. The United States Supreme Court has authorized Fifth Amendment due process challenges based on similar circumstances. *Greene v. McElroy*, 360 U.S. 474, 507-08 (1959) ("Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process"). In this case, the revocation of Dr. El-Ganayni's security clearance necessarily interfered with his constitutionally protected interest in his continued employment as a practicing nuclear physicist. *Greene v. McElroy*, 360 U.S. 474, 492 (1959) ("the right to hold specific private employment and to follow a chosen profession free from unreasonable

[11] Moreover, pursuant to 50 U.S.C. § 435 (b)(2), in the event that an agency elected to make the determination referenced in subsection (b)(1), the agency head is required to submit a report to the congressional intelligence committees.

governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment"); *King v. Alston*, 75 F.3d 657, 661 (Fed. Cir. 1996); *Piecknick v. Commonwealth*, 36 F.3d 1250, 1259 (3d Cir. 1994); *Novak v. City of Pittsburgh*, 2006 U.S. Dist. LEXIS 85553, *13 (W.D. Pa. 2006). He was employed for 18 years without a single negative evaluation and with authorization by virtue of his security clearance. Given that most jobs for practicing nuclear physicists require some sort of security clearance, this field is now all but foreclosed to him. *Greene,* at 475 (noting that as a result of the revocation of security clearance of an aeronautical engineer employed by a private manufacturer which produced goods for the armed services, "for all practical purposes that field of endeavor is now closed to him").

Additionally, as the Supreme Court recognized years ago in *Meyer v. Nebraska*, 262 U.S. 390 (1923) the interests protected by the due process clause have never been defined with complete exactness but include:

> the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Id. at 399. In the present instance, the revocation of Dr. El-Ganayni's security clearance appears to be based at least in part on his religious beliefs and his activities as Imam. Moreover, at the very least, the "orderly pursuit of happiness by free men" is not protected in a society where one can be stripped of his security clearance and his livelihood with no explanation.

Notwithstanding *Greene*, Defendants argue that Dr. El-Ganayni has failed to identify a property or liberty interest that would support his Fifth Amendment due process claim. Defendants point out that, pursuant to the case law, no one has a "right" to a security clearance,

and Dr. El-Ganayni is not contending otherwise. However, where as here, the revocation of the security clearance not only causes an individual to be fired from his job, but effectively forecloses any occupational opportunities in his chosen field, the action affects a constitutionally protected property interest. *Greene, supra*, 360 U.S. at 475, 492.[12] Moreover, Defendants' actions not only prevent Dr. El-Ganayni from earning a living in his chosen occupation, but because those actions were based on his religious activities, they also interfere with his constitutionally protected liberty interest to practice his chosen religion "according to the dictates of his own conscience." *Meyer, supra*. Dr. El-Ganayni has identified both a protected property interest and a protected liberty interest.

In their brief, Defendants remarkably contend that these interests are insufficient because their actions "do not impugn [Dr. El-Ganayni's] moral character or reputation" (Defendants' Brief, p. 25). However, D.O.E. contended that Dr. El-Ganayni has "**knowingly** established or continued sympathetic association with a saboteur, spy, terrorist, traitor, seditionist, anarchist or revolutionist, espionage agent . . ." (emphasis added), has engaged in conduct demonstrating "that you are not honest, reliable or trustworthy" and that he "may be subject to pressure, coercion, exploitation or duress." (Defendants' Brief, p. 12). D.O.E. has also contended that Dr. El-Ganayni has "conflicting allegiances" (*Id.*). In light of these statements, Defendants' position

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[12] In their brief, Defendants try to separate themselves from the Bettis Laboratory, arguing that the need for a security clearance is a private matter between Dr. El-Ganayni and Bechtel Bettis, Inc., the entity who operates the Laboratory for D.O.E. "If his private employer required him to have a government security clearance in order to keep his employment, that was a condition of employment between him and his private company" (Defendants' Brief, p. 24). However, this statement is misleading because it is D.O.E. that imposes the requirement of a security clearance as a condition of Bechtel, Bettis, Inc. operating the Laboratory. *See* Defendants' Brief, p. 24 n.10. Indeed, in the field of atomic physics, the need for security clearances in private laboratories is the rule rather than the exception.

that they have not impugned Dr. El-Ganayni's "moral character or reputation" cannot be taken seriously.

Moreover, these allegations were published to Dr. El-Ganayni's employer, and he was terminated from his employment directly as a result. While discovery has not yet taken place, at a minimum, Dr. El-Ganayni's employer must have received copies of the various letters issued by D.O.E. For instance, the very same day that Defendant Kupfer's certification was provided to Dr. El-Ganayni, he also received notification from his employer that as a result of that certification, his employment was being terminated (Verified Complaint, paragraphs 63 and 64). Defendants' actions were published to Dr. El-Ganayni's employer and he suffered harm as a result.

In any event, as stated above, Dr. El-Ganayni's APA claim does not require any property or liberty interest, and Defendants have proffered no reason why he could not proceed on that claim. For that reason alone, Defendants' Motion to Dismiss Count III should be denied.

D. Dr. El-Ganayni Has Satisfied the Requirements for Preliminary Injunctive Relief

1. Dr. El-Ganayni Will Present Evidence at the Hearing That He Has Suffered and Continues To Suffer Irreparable Harm.

Defendants point out that one way of establishing irreparable harm is by showing a "chilling effect on free expression" (Defendants' Brief, p. 34). However, contrary to Defendants' argument, such chilling effects are not limited to cases in which a defendant has issued a "regulation or policy." Rather, the only distinction is that while incidental inhibition of First Amendment rights may not be sufficient, "direct penalization" of the exercise of such rights constitutes irreparable harm. *Hohe v. Casey*, 868 F.2d 69, 73 (3d Cir. 1989). And contrary to

Defendants' argument, courts have held that specific actions targeted at an individual (as opposed to regulations or policies) can result in a chilling effect. *See, e.g., Husain v. Springer*, 494 F.3d 108, 128 (2d Cir. 2007) ("When a state university official takes retaliatory action against a newspaper for publishing certain content in an effort to force the newspaper to refrain from publishing that or similar content in the future, the official's action creates a chilling effect which gives rise to a First Amendment injury."); *Zieper v. Metzinger*, 474 F.3d 60, 65 (2d Cir. 2007) ("It is well-established that First Amendment rights may be violated by the chilling effect of governmental action that falls short of a direct prohibition against speech"); *White v. Lee*, 227 F.3d 1214, 1228-29 (9th Cir. 2000) (investigation by government officials, even without seizure of documents, creates a sufficient chilling effect); *National Commodity and Barter Ass'n v. Archer*, 31 F.3d 1521, 1529 (10th Cir. 1994) (seizures of documents by government employees sufficient "chill" to state a First Amendment claim).

Defendants further suggest that because they did not publish their actions to anyone other than Dr. El-Ganayni's employer, they should not be held responsible for any chilling effect on others in the Muslim community (Defendants' Brief, p. 36). This argument is not well taken. Actions speak louder than words, and when the government takes an action in retaliation for someone speaking out against the government, that action in and of itself chills the exercise of freedom of speech and religion. The government need not confirm their actions with verbal statements in order to have the requisite chilling effect.[13]

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[13] Defendants also state that Dr. El-Ganayni has failed to submit any declaration to support his assertion that he has been unable to locate any other employment. Defendants parse the language of the Verified Complaint, arguing that it states only that he is ineligible for other positions, and does not specifically state that he cannot find other positions (Defendants' Brief,

...*Continued*

Defendants also argue that Dr. El-Ganayni delayed in bringing the instant lawsuit and that such delay "undercuts" his allegations of irreparable harm. However, until the day when his security clearance was revoked, Dr. El-Ganayni was led to believe that Defendants would grant him the procedural protections afforded by the regulations. However, once Defendants suddenly reversed course and decided to abandon the hearing process, Dr. El-Ganayni had to locate attorneys to analyze his claims and pursue them. Given the unusual nature of the actions taken by the Defendants, this process naturally took some time. Under the circumstances, filing a Complaint six weeks after this sudden reversal of course, and working diligently to file the injunction motion before Defendants' response to the Complaint was due, is not unreasonable and does not support an argument that Dr. El-Ganayni unduly delayed in seeking to assert his rights.[14]

2. Other Factors (Balance of Harms and Public Interest) Support the Issuance of a Preliminary Injunction.

Defendants' brief essentially argues that because Defendant Kupfer has determined that the hearing procedures cannot be made available without damaging the interests of national security, that decision is conclusive and demonstrates that the balance of harms weighs in favor of the Defendants. Of course, to allow the Defendants to conduct the balance of harms inquiry

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p. 36). Regardless of Defendants' interpretation of the Verified Complaint, Dr. El-Ganayni will testify at the hearing that, to date, he has been unable to locate other employment.

[14] Notwithstanding the fact that Dr. El-Ganayni has satisfied the requirements for preliminary injunctive relief, if a hearing can be scheduled reasonably promptly, he agrees that it would be preferable to have one hearing rather than two. Therefore, depending on the Court's schedule, Dr. El-Ganayni would have no objection to combining the hearings for the preliminary and permanent injunction. It is for this reason that he filed his Motion for both types of relief.

would be to hold that injunctive relief is never appropriate. The determination does not stop there. D.O.E. has already created procedures to account for these situations, including one procedure allowing a Hearing Officer (who has high level security clearance) to review the purported bases for the revocation without releasing that information to the plaintiff. Similarly, the United States Supreme Court and courts around the nation have expressed confidence in the ability of District Courts to fashion relief that will protect concerns such as those raised by Defendants here. Defendants' contrary position in this case does not preempt D.O.E.'s former position (as set forth in its regulations) and the findings of courts throughout the nation.

It is important to note that Dr. El-Ganayni is not seeking public release of national security information. Rather, he is seeking a procedure that will provide reasonable checks and balances to the purportedly unfettered discretion of Defendants. D.O.E. has already had occasion to create and utilize such procedures, and Dr. El-Ganayni has every confidence that it and/or the Court can do so again here.

CONCLUSION

For the above-cited reasons, Defendants' Motion to Dismiss should be denied in its entirety.

Respectfully submitted,

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Dated: October 9, 2008

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing **BRIEF IN OPPOSITION TO MOTION TO DISMISS** has been served on Defendants' Counsel via the Court's CM/ECF system on October 14, 2008:

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