

# Reviewing National Security Clearance Decisions: The Clash between Title VII and Bivens Claims

David C. Mayer

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

---

## Recommended Citation

David C. Mayer, *Reviewing National Security Clearance Decisions: The Clash between Title VII and Bivens Claims*, 85 Cornell L. Rev. 786 (2000)

Available at: <http://scholarship.law.cornell.edu/clr/vol85/iss3/6>

This Note is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact [jmp8@cornell.edu](mailto:jmp8@cornell.edu).

## NOTE

### REVIEWING NATIONAL SECURITY CLEARANCE DECISIONS: THE CLASH BETWEEN TITLE VII AND *BIVENS* CLAIMS

*David C. Mayer*

|  |     |
|--|-----|
| INTRODUCTION .....   | 787 |
| I. NATIONAL SECURITY CLEARANCES IN A NUTSHELL .....  | 792 |
| A. History of Formulation .....  | 792 |
| B. Granting, Denying, Revoking, and Firing .....   | 795 |
| II. REVIEW OF DISCRIMINATION CLAIMS IN NATIONAL<br>SECURITY CLEARANCE DETERMINATIONS.....                                | 797 |
| A. Internal Review.....  | 797 |
| B. Title VII Claims .....  | 798 |
| 1. <i>The Political Question Doctrine, Executive Privilege,<br/>        and Separation of Powers</i> .....               | 798 |
| 2. <i>Department of Navy v. Egan</i> .....   | 801 |
| 3. <i>Federal Courts and Title VII Post-Egan</i> .....   | 802 |
| C. Constitutional Claims .....   | 804 |
| 1. <i>Bivens Claims</i> .....  | 804 |
| 2. <i>Webster v. Doe and Its Progeny</i> .....   | 805 |
| D. Preclusion of <i>Bivens</i> Claims by Title VII.....  | 807 |
| 1. <i>Statutory Preclusion of Bivens Claims in General</i> ....  | 807 |
| 2. <i>Without Recourse: Simultaneous Title VII and Bivens<br/>        Claims in the Security Clearance Context</i> ..... | 809 |
| III. REMEDYING THE ANOMALY: PROPOSED AMENDMENT TO<br>TITLE VII .....   | 811 |
| A. Challenges to Legislation .....   | 814 |
| B. Defending the Amendment.....  | 815 |
| CONCLUSION .....   | 821 |

*Steve and Joe are both federal employees who have national security clearance. One day, the agencies for which they work revoke their security clearances and subsequently terminate them. Steve, who is gay, believes the federal government has discriminated against him on the basis of his sexual orientation. However, Steve cannot bring a Title VII claim under the Civil Rights Act of 1964<sup>1</sup> because that statute does not include gays and lesbians within its sphere of protection from discrimination. Consequently, Steve brings an equal protection claim directly under the Constitution, and the*

---

<sup>1</sup> 42 U.S.C. § 2000e to e-17 (1994).

court performs a substantive review of the security clearance decision. Joe, who is an African American, believes the federal government has discriminated against him on the basis of his race. Joe is able to bring a claim of discrimination under Title VII, but the court rules that it does not have subject matter jurisdiction to review the merits of the agency's decision to revoke his security clearance. Undaunted, Joe also brings a constitutional equal protection claim, but the court holds that Joe's Title VII claim precludes the constitutional claim, because Congress created Title VII to provide the sole judicial remedy for a protected class member's claim of discrimination in federal employment. Thus, a court will conduct a review of the merits of Steve's claim, but will refuse to substantively review Joe's claim.

## INTRODUCTION

Such disparate treatment raises a red flag whenever it occurs, but becomes even more significant in light of the tenuous balance of interests that plagues the security clearance<sup>2</sup> review process. On one hand, these decisions are vital to the nation's protection, as recent high-profile security breaches have demonstrated.<sup>3</sup> At stake is the very safety of the nation's secrets—its intelligence sources, strategies, strengths, and weaknesses.<sup>4</sup> On the other hand, security clearance decisions can have a profound effect on the livelihood of a significant portion of the federal workforce, as more than 3.2 million government employees and contractors hold security clearances.<sup>5</sup> For example, many federal and defense contracting jobs are not accessible without a security clearance.<sup>6</sup> Moreover, a loss of security clearance may result in the termination of the employee.<sup>7</sup> Subsequently, the individual may have difficulty finding comparable employment and

---

<sup>2</sup> This Note only discusses U.S. national security clearances and does not address state, private sector, or any other type of security clearance.

<sup>3</sup> See, e.g., Evan Thomas, *Inside the Mind of a Spy*, NEWSWEEK, July 7, 1997, at 34 (detailing the conviction of FBI agent Earl Pitts, who spied for the KGB for only \$32,000 per year, because "a \$25,000 salary was too little to live on in New York City"); Tim Weiner, *C.I.A. Traitor Severely Hurt U.S. Security, Judge Is Told*, N.Y. TIMES, June 4, 1997, at A24 (describing how Harold J. Nicholson, "the highest-ranking C.I.A. official ever convicted of espionage, unmasked 'a large number of C.I.A. officers' to his Russian handlers and destroyed important clandestine operations overseas"); Tim Weiner, *Report Finds Ames's Sabotage More Vast Than C.I.A. Admitted*, N.Y. TIMES, Sept. 24, 1994, at A1 (reporting that Ames, a CIA agent who spied for the Russians, exposed over 50 secret operations and suggesting that he helped the Soviets catch and execute at least 10 double agents working for the CIA).

<sup>4</sup> See *infra* Part I.

<sup>5</sup> See U.S. GEN. ACCOUNTING OFFICE, GAO/NSIAD-95-101, BACKGROUND INVESTIGATIONS: IMPEDIMENTS TO CONSOLIDATING INVESTIGATIONS AND ADJUDICATIVE FUNCTIONS 12 (1995). Of those individuals, over 768,000 hold top secret clearances. See *id.*

<sup>6</sup> See William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2426 (1997); see also Katrina J. Church, *Loss or Denial of Security Clearance: An Employee's Rights*, 4 SANTA CLARA COMPUTER & HIGH TECH. L.J. 197, 198 (1988) ("The nature of defense contracting is such that, without access to classified information, applicants at many levels cannot obtain work.").

<sup>7</sup> See *infra* notes 58-66 and accompanying text.

may also suffer the stigma of being branded as a disloyal person by society.<sup>8</sup>

In certain situations, these security clearance decisions conflict with the nation's interest in the enforcement of statutory and constitutional civil rights protections.<sup>9</sup> Because of the significance of national security, courts treat security clearance decisions with great deference<sup>10</sup> and often refuse to review the merits<sup>11</sup> of those decisions on the ground that such review would impermissibly intrude upon executive authority.<sup>12</sup> When courts refuse to review the merits of security clearance decisions, however, they insulate government agencies from discrimination claims.<sup>13</sup> Employees who want to vindicate their constitutional and statutory rights to be free from discrimination may have little or no recourse.<sup>14</sup>

This conflict between the nation's security and the individual's civil rights has led to an untenable compromise. When individuals who have suffered adverse security clearance decisions<sup>15</sup> bring actions under Title VII<sup>16</sup> alleging discrimination on the basis of race, color,

<sup>8</sup> See *infra* notes 67-74 and accompanying text.

<sup>9</sup> See, e.g., *Webster v. Doe*, 486 U.S. 592 (1988) (involving termination based on employee's sexual preference); *Department of Navy v. Egan*, 484 U.S. 518 (1988) (involving termination based on criminal record); *Perez v. FBI*, 71 F.3d 513 (5th Cir. 1995) (involving alleged retaliatory termination for filing Title VII claim); *Brazil v. United States Dep't of Navy*, 66 F.3d 193 (9th Cir. 1995) (involving termination allegedly based on race). For a discussion of each case and these conflicts, see *infra* Part II.

<sup>10</sup> See, e.g., *Egan*, 484 U.S. at 529-30 (reasoning that the "agency head . . . must bear responsibility for the protection of classified information . . . [and] should have the final say in deciding whether to repose his trust in an employee" (citing *Cole v. Young*, 351 U.S. 536, 546 (1956) (internal quotation marks omitted))); *United States v. Nixon*, 418 U.S. 683, 710 (1974) ("As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities."); see also Note, *Keeping Secrets: Congress, the Courts, and National Security Information*, 103 HARV. L. REV. 906, 906 (1990) ("[T]he judiciary . . . ha[s] declined to challenge either the breadth or the scope of executive classification decisions.").

<sup>11</sup> A review of the merits in this context means that the adjudicating body will first consider all available evidence that the government used to make a security clearance determination and will subsequently review the reasonableness of the government's action based on that evidence. This Note also refers to this type of review as "substantive review" or "de novo review."

<sup>12</sup> See *Egan*, 484 U.S. at 530; *Perez*, 71 F.3d at 514-15; *Brazil*, 66 F.3d at 196; *Guillot v. Garrett*, 970 F.2d 1320, 1324 (4th Cir. 1992); *Hill v. Department of Air Force*, 844 F.2d 1407, 1410 (10th Cir. 1988); see also *infra* Part II.B (describing the firm establishment of deference to the Executive's national security decisions).

<sup>13</sup> Some members of the Supreme Court, led by Justice Scalia, find the absence of substantive review in security clearance cases unobjectionable. See *Webster*, 486 U.S. at 614 (Scalia, J., dissenting) (arguing that "Congress can prescribe, at least within broad limits, that for certain jobs the dismissal decision will be unreviewable").

<sup>14</sup> See *infra* Part I.B.

<sup>15</sup> The scope of this Note includes federal employees and the employees of government contractors.

<sup>16</sup> 42 U.S.C. § 2000e to e-17 (1994 & Supp. III 1997).

religion, sex, or national origin,<sup>17</sup> courts consistently refuse to assert jurisdiction.<sup>18</sup> However, when individuals with claims falling outside

---

<sup>17</sup> Title VII prohibits employment discrimination on the basis of "race, color, religion, sex, or national origin." *Id.* § 2000e-2(a). Congress extended the protection of Title VII to federal employees by adding section 717 to Title VII in 1972. *See id.* § 2000e-16. Individuals belong to a "protected class" under Title VII for the purposes of this Note if they have suffered discrimination on the basis of race, color, religion, sex, or national origin.

A protected class is not the same as the common constitutional law term "suspect class." *See* Evan H. Pontz, Comment, *What a Difference ADEA Makes: Why Disparate Impact Theory Should Not Apply to the Age Discrimination in Employment Act*, 74 N.C. L. REV. 267, 310 (1995). The distinction involves one of breadth; a protected class under Title VII includes more categories than a suspect class. *See id.* Courts define a suspect class as a group with "a history of having been subjected to purposeful, unjustified discrimination, and a history of political powerlessness." Mark Strasser, *Suspect Classes and Suspect Classifications: On Discriminating, Unwittingly or Otherwise*, 64 TEMP. L. REV. 937, 938 (1991). Whether a plaintiff is a member of a suspect or quasi-suspect class determines which level of scrutiny a court will apply—strict, intermediate, or a rational relationship test. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.3, at 601-06 (5th ed. 1995). To qualify as a suspect class, the group (1) "must be discrete and insular," (2) "must have a 'disability' over which [it does] not have control," (3) must have endured a history of intentional discrimination or suffered disparate treatment because of an erroneous stereotype, and (4) must be subject to stigmatization by society. Strasser, *supra*, at 938-39 (internal quotation marks omitted). Suspect classifications include those "based on race, nationality, and alienage." *Id.* at 939.

A court will apply strict scrutiny to any law that discriminates against a suspect class and hold that law as violating equal protection, unless the government can (1) justify the discrimination with a compelling government interest and (2) prove that the law is narrowly tailored to promote that compelling interest. *See* NOWAK & ROTUNDA, *supra*, § 14.3, at 601-02. A quasi-suspect class differs from a suspect class in that a quasi-suspect class has suffered "less severe" discrimination. Strasser, *supra*, at 938 n.5. If a group falls under a quasi-suspect class category, a court will employ an intermediate scrutiny test and will not uphold the discriminatory law, unless it bears a "rational relation to a legitimate state purpose." *Id.* at 939. The Supreme Court considers gender and illegitimacy classifications to be quasi-suspect. *See* NOWAK & ROTUNDA, *supra*, § 14.3, at 602.

If a classification is neither suspect nor quasi-suspect, a court employs a rational relationship test, whereby the discrimination must bear a rational relationship to a government interest that the Constitution does not prohibit. *See id.* at 601. The Supreme Court has regarded sexual orientation classifications as non-suspect since *Bowers v. Hardwick*, 478 U.S. 186 (1986). *See* Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285 (1985) (arguing that the Court should classify gays and lesbians as a suspect class).

<sup>18</sup> *See, e.g.*, Ryan v. Reno, 168 F.3d 520 (D.C. Cir. 1999); *Becerra v. Dalton*, 94 F.3d 145 (4th Cir. 1996) (unpublished table decision); *Bodkin v. West*, 91 F.3d 129 (4th Cir. 1996) (unpublished table decision); *Perez v. FBI*, 71 F.3d 513 (5th Cir. 1995); *Brazil v. United States Dep't of Navy*, 66 F.3d 193 (9th Cir. 1995); *Edwards v. Widnall*, 17 F. Supp. 2d 1038 (D. Minn. 1998); *Phillips v. Dalton*, No. 94-CV-4828, 1997 WL 24846 (E.D. Pa. Jan. 22, 1997); *see also infra* Part II.B (discussing judicial deference to national security decisions of the Executive).

Individuals suffer a similar fate when they bring claims under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 (1994), *see, e.g.*, *McDaniel v. AlliedSignal, Inc.*, 896 F. Supp. 1482, 1490 (W.D. Mo. 1995) (holding that the ADA's reasonable accommodation standard does not require a government contractor to assure freedom from discrimination by the federal government's security clearance decisions because, under *Department of Navy v. Egan*, 484 U.S. 518 (1988), "an agency's decision to grant, deny, or revoke a security clearance is not open to further review"), and under section 501 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 791 (1994). *See, e.g.*, *Humm v. Crow-*

of Title VII's coverage<sup>19</sup> challenge security clearance decisions on constitutional grounds,<sup>20</sup> courts typically exercise judicial review of the merits of an adverse security clearance decision.<sup>21</sup> The result is both anomalous and counterintuitive. As the foregoing hypothetical illustrates, if two plaintiffs bring identical claims for discrimination, one couching the complaint in the language of Title VII and the other in terms of an equal protection claim, as was used in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,<sup>22</sup> courts will refuse to review the Title VII claim, but will review the equal protection claim. In addition, courts preclude plaintiffs who *could* bring a Title

---

ell, No. 97-5988, 1998 WL 869981, at \*5 (6th Cir. 1998) (reasoning that plaintiff's Rehabilitation Act claim of discrimination in the revocation of security clearance was unreviewable, because such a decision is an "inherently discretionary decision which is committed to the executive agency having the necessary expertise in protecting classified information"); Guillot v. Garrett, 970 F.2d 1320, 1325 (4th Cir. 1992) ("We can discern . . . no . . . expression of congressional intent in the provisions of the Rehabilitation Act . . . that the Executive's security clearance decisions be reviewable by the . . . federal courts on appeal."); Lovelace v. Stone, 814 F. Supp. 558 (E.D. Ky. 1992) (applying Supreme Court precedent that holds that the Judiciary cannot review an Executive Branch decision to deny review to a Rehabilitation Act claim); see also Keith Alan Byers, *No One Is Above the Law When It Comes to the ADA and the Rehabilitation Act—Not Even Federal, State, or Local Law Enforcement Agencies*, 30 LOY. L.A. L. REV. 977, 1022-23 (1997) (arguing that courts that prohibit review of Rehabilitation Act claims involving security clearance decisions "potentially provide[ ] federal law enforcement agencies with an effective and powerful means to eliminate any applicant or employee, even if unjustifiably motivated by the individual's disability status[,] . . . an arbitrary blanket exclusion, an unjustified stereotype, or what otherwise would constitute illegal disability discrimination"). Presumably, courts would also deny substantive review of claims brought by individuals under section 15 of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 633a (1994), but my research did not find any ADEA claims in the security clearance context.

<sup>19</sup> Title VII does not protect individuals discriminated against on the basis of sexual orientation. Because this is the only group that has been able to challenge its security clearance revocations without recourse to a statutory claim, the only group unprotected from discrimination that this Note will focus on is gays and lesbians.

<sup>20</sup> Claimants may bring actions against federal officials for damages implied under the Constitution (hereinafter "*Bivens* claims") on the basis of the Supreme Court's holding in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). For a discussion about this type of claim, see *infra* Part II.C.

<sup>21</sup> See, e.g., *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 570-74 (9th Cir. 1990) (reviewing the merits of defense contractor employees' class-action equal protection claim regarding their security revocation); *Dubbs v. CIA*, 866 F.2d 1114 (9th Cir. 1989) (reversing summary judgment for CIA where plaintiff alleged that the CIA had a blanket policy that denied security clearances to homosexuals); *McKeand v. Laird*, 490 F.2d 1262, 1264 (9th Cir. 1974) (finding revocation of security clearance based on sexual preference "supported by substantial evidence" after review of the merits); *Buttino v. FBI*, 801 F. Supp. 298, 308 (N.D. Cal. 1992) (performing substantive review to deny in part defendant's motion for summary judgment where plaintiff alleged that FBI revoked security clearance on the basis of sexual preference); see also *infra* Part II.C (exploring the constitutional basis for discrimination claims); cf. *National Fed'n of Fed. Employees v. Greenberg*, 983 F.2d 286 (D.C. Cir. 1993) (reviewing labor union's claim that court should enjoin Defense Department from using clearance questionnaires).

<sup>22</sup> 403 U.S. 388 (1971). For a discussion of the *Bivens* decision, see *infra* Part II.C.1.

VII claim from asserting *Bivens* claims.<sup>23</sup> Therefore, individuals who have been discriminated against based on race, color, religion, sex, or national origin lack any legal recourse when that discrimination comes in the form of a security clearance revocation. Consequently, gays and lesbians currently are the only minority group that receives substantive judicial review of their discrimination claims after adverse security clearance decisions.

Thus far, courts have offered no real alternative to the stark choice between allowing unfettered review of all constitutional claims and prohibiting any review of statutory claims. The distinction between constitutional and statutory claims remains undeveloped, and those courts that do question this distinction press for more, rather than less, Executive Branch discretion.<sup>24</sup> Moreover, the scholarship addressing judicial review of security clearance decisions has inexplicably overlooked the anomalous treatment of Title VII protected-class plaintiffs as compared to gays and lesbians who are able to receive judicial review.<sup>25</sup>

This Note proposes an Amendment to Title VII to remedy this anomaly and to provide for review of the merits of discrimination claims in the national security clearance context.<sup>26</sup> Part I of this Note offers an overview of national security clearances, including the history of security clearance formulation and the process behind clearance decisions. Part II explains the three forms of review available to individuals who believe that the government has discriminated against them. The first section in Part II explains internal review procedures. The second section of Part II explains how judicial review of those procedures laid the groundwork for the preclusion of Title VII claims in security clearance decisions. The third section of Part II considers the Supreme Court's willingness to review the merits of discrimination claims implied directly from the Constitution. The fourth section of Part II examines statutory preclusion of colorable constitutional

---

<sup>23</sup> See *Perez*, 71 F.3d 513; *Brazil*, 66 F.3d 193.

<sup>24</sup> See *Hill v. Department of Air Force*, 844 F.2d 1407, 1411 (10th Cir. 1988) (refusing to allow plaintiff to circumvent "the statutory constraints imposed in *Egan* . . . simply by invoking alleged constitutional rights"); *Peterson v. Department of Navy*, 687 F. Supp. 713, 715 (D.N.H. 1988) (same).

<sup>25</sup> I would like to thank Joseph M. Terry for bringing to my attention and explaining this problematic situation, which forms the basis of this Note.

<sup>26</sup> As provided *supra* note 18, other employment discrimination statutes, such as the Rehabilitation Act, the ADA, and the ADEA, suffer from the same defects as Title VII. While this Note may refer to cases that concern other statutory claims to support its thesis, however, this Note's scope focuses only on remedying Title VII and leaves the reparation of other statutes for another day. Hopefully this work will provide an adequate stepping stone for further amendments to other federal employment discrimination statutes. Interestingly, my research has not detected any instance of this anomalous situation where a claimant brought a *Bivens* claim with any other statute other than Title VII. Presumably, however, claimants in those situations would suffer the same fate as Title VII plaintiffs.

claims and then focuses on the anomaly that Title VII's preclusion of *Bivens* constitutional claims presents in security clearance decisions. Part III proposes an amendment to Title VII to remedy this distinction and discusses potential challenges to this legislation.

## I

### NATIONAL SECURITY CLEARANCES IN A NUTSHELL

#### A. History of Formulation

National security depends on the protection of sensitive data from foreign powers and subversive elements on the homefront.<sup>27</sup> During a war, breaches in informational security can provide opponents with a decided advantage in military operations.<sup>28</sup> Moreover, the need for military secrecy does not disappear during peacetime. For example, technical information leaks during the post-World War II arms race allowed the Soviets to close the gap on the development of new weapons systems and decreased the United States' strategic advantage.<sup>29</sup>

Secrecy also serves an important role in the protection of our nation's intelligence operations. The United States depends on diplomatic and military intelligence to provide advance warning of aggressive enemy moves, especially in an age when conventional forces have great mobility and instant strike capacity.<sup>30</sup> Compromising these intelligence operations might deprive the United States of important information<sup>31</sup> or lead to diplomatic embarrassment.<sup>32</sup> In particular, if allied nations doubt a government's ability to protect its

<sup>27</sup> See David H. Topol, *United States v. Morison: A Threat to the First Amendment Right to Publish National Security Information*, 43 S.C. L. REV. 581, 593-602 (1992) (recognizing need for secrecy, yet arguing for more public disclosure of government information); see also *supra* note 3 and accompanying text (discussing CIA security leaks).

<sup>28</sup> See Karl Tage Olson, Note, *The Constitutionality of Department of Defense Press Restrictions on Wartime Correspondents Covering the Persian Gulf War*, 41 DRAKE L. REV. 511, 531-32 (1992). During the Gulf War, the military defended its press pooling arrangements as essential for protecting journalists, U.S. troops, and operational security. See *id.* at 532.

<sup>29</sup> See LANSING LAMONT, *DAY OF TRINITY* 282 (1965). Lamont suggests that Klaus Fuchs's leak of information about the American's atom bomb accelerated Soviet development of a bomb "by as much as eighteen months to three years." *Id.*

<sup>30</sup> See Topol, *supra* note 27, at 593-95.

<sup>31</sup> See *id.* at 594 (noting that if the Japanese had discovered that the United States broke Japanese codes, the Allies might have lost a significant advantage); *id.* at 595 (discussing how a *Los Angeles Times* story about a CIA mission to salvage a sunken Soviet submarine allowed the Soviets to thwart the mission).

<sup>32</sup> See N.Y. TIMES, May 18, 1960, at I (headline reporting that Premier Khrushchev canceled a summit with President Eisenhower because of the United States' failure to apologize for American espionage).

own confidential material, they might become reluctant to share sensitive information.<sup>33</sup>

Even in the absence of the threat of war, secrecy is essential for the promotion of national security. In this post-Cold War era, the U.S. Government has shifted its attention to international terrorism.<sup>34</sup> In this climate, secrecy enables the government to disrupt terrorist activity<sup>35</sup> and to prevent weapons from falling into the wrong hands.<sup>36</sup> The post-Cold War era has also ushered in the rise of economic espionage.<sup>37</sup> As the threat of war continues to decline, nations have focused on strengthening their economic positions in the world.<sup>38</sup> To that end, countries have increasingly developed methods to steal U.S. technology.<sup>39</sup>

The need for secrecy prompted the United States to implement a system to ensure that the nation's own employees do not leak confidential information that might jeopardize the security of the nation.<sup>40</sup> Contemporary national security clearances evolved from the document classification system which the Executive Branch created during the early part of the twentieth century to protect sensitive informa-

---

<sup>33</sup> See Secretary Rogers' News Conference of July 1: The Duty of the Executive Branch to Protect the National Security, DEP'T ST. BULL., July 5, 1971, at 78, 79-80 (reporting that Secretary Rogers stated that several nations doubted the U.S. Government's ability to protect confidential information in the wake of the Pentagon Papers leak to the *New York Times*).

<sup>34</sup> See Dante B. Fascell, *Combatting International Terrorism: The Role of Congress*, 16 GA. J. INT'L & COMP. L. 655, 655-57 (1986) (noting that the U.S. considers international terrorism a top priority); W. Michael Reisman, *Covert Action*, 20 YALE J. INT'L L. 419, 421 (1995) ("[G]lobal issues' like international terrorism . . . have moved to the fore.").

<sup>35</sup> See Reisman, *supra* note 34, at 424 ("One way, if not the only way, to prevent terrorist incidents is by covert counter-action.").

<sup>36</sup> See Robert Chesney, *National Insecurity: Nuclear Material Availability and the Threat of Nuclear Terrorism*, 20 LOY. L.A. INT'L & COMP. L.J. 29, 30-33 (1997) (warning of the threat of nuclear terrorism in light of the "disintegration of the Soviet Union" into countries with "unsecured and unaccounted-for" nuclear materials and "the potential existence of a black market in fissile material, which is the one component in nuclear weapons that is hard to find"). The CIA considers successful monitoring of the former Soviet states by American operatives a high priority, but the agency has only recently begun to develop intelligence to monitor the nuclear fission material security in those areas. See *id.* at 60. Congress codified the means to protect nuclear energy and weapons technology when it passed the Atomic Energy Act of 1946, ch. 724, § 10, 60 Stat. 766 (1946) (codified as amended at 42 U.S.C. §§ 2161-2163, 2165 (1994)).

<sup>37</sup> See Karen Sepura, Note, *Economic Espionage: The Front Line of a New World Economic War*, 26 SYRACUSE J. INT'L L. & COM. 127, 127 (1998) (arguing that "economic competition," rather than "military alliances," now defines a nation's national security policy); Darren S. Tucker, Comment, *The Federal Government's War on Economic Espionage*, 18 U. PA. J. INT'L ECON. L. 1109, 1109-10 (1997) (attributing the rise of economic espionage to intelligence services' desire "to adopt new roles" in the face of post-Cold War budget cuts).

<sup>38</sup> See Sepura, *supra* note 37, at 127-28; Tucker, *supra* note 37, at 1110.

<sup>39</sup> See Tucker, *supra* note 37, at 1110.

<sup>40</sup> See *Department of Navy v. Egan*, 484 U.S. 518, 527-28 (1988) (describing the Executive Branch's creation of a classification system to promote national security).

tion.<sup>41</sup> The outbreak of World War I prompted Congress to pass the Espionage Act of 1917,<sup>42</sup> which outlined the description of and punishment for spying.<sup>43</sup> Meanwhile, the General Headquarters of the American Expeditionary Force created the first formal document classification system by requiring officials to mark all military information "Secret," "Confidential," or "For Official Circulation Only."<sup>44</sup> Later, the advent of the Cold War motivated Congress to pass the Atomic Energy Act of 1946<sup>45</sup> in an effort to protect nuclear energy and weapons technology.<sup>46</sup>

In 1951, President Truman extended the military's formal classification system to civilian departments and federal agencies for the first time.<sup>47</sup> Since Truman's order, a number of subsequent Presidents have issued Executive Orders that delegate the classification of sensitive material to the heads of agencies.<sup>48</sup> Each of these orders envisioned a system similar to the one in place today, whereby agency heads have the responsibility of classifying documents as "Top Secret," "Secret," or "Confidential."<sup>49</sup>

Pursuant to these classified document designations, the Executive Branch created a uniform security clearance program that regulates which employees can gain access to sensitive information.<sup>50</sup> Under the security clearance program, government departments and agen-

<sup>41</sup> See *id.*; FOREIGN AFFAIRS DIV., LEGISLATIVE REFERENCE SERV., LIBRARY OF CONGRESS, 92D CONG., 1ST SESS., SECURITY CLASSIFICATION AS A PROBLEM IN THE CONGRESSIONAL ROLE IN FOREIGN POLICY 3 (Comm. Print 1971) [hereinafter SECURITY CLASSIFICATION].

The history preceding this relatively recent development, however, proves that the United States has conducted certain military and diplomatic affairs under a veil of secrecy since the nation's inception. See *id.* at 2. In 1790, President Washington laid the groundwork for a treaty with the Creek Indian Nation by submitting a secret article to the Senate. See *id.* By the early nineteenth century, federal officials began marking documents that they wanted to withhold from the public with the words "Secret," "Confidential," or "Private." See *id.* at 3. During the Civil War, the Union made an arrangement with the press to disclose the details of military operations on the condition that the newspapers exclude any information that could assist the Confederates. See FREEDOM OF THE PRESS FROM HAMILTON TO THE WARREN COURT 227-29 (Harold L. Nelson ed., 1967).

<sup>42</sup> Espionage Act of 1917, ch. 30, 40 Stat. 217 (1917) (codified as amended at 18 U.S.C. §§ 793-794 (1994)).

<sup>43</sup> See *id.* The Espionage Act replaced the nation's first criminal espionage law, which Congress had passed in 1911. See Act of March 3, 1911, ch. 226, 36 Stat. 1084 (repealed 1917).

<sup>44</sup> See SECURITY CLASSIFICATION, *supra* note 41, at 3.

<sup>45</sup> Atomic Energy Act of 1946, ch. 724, § 10, 60 Stat. 766 (codified as amended at 42 U.S.C. §§ 2161-63, 2165 (1994)).

<sup>46</sup> See *id.*

<sup>47</sup> See Exec. Order No. 10,290, 3 C.F.R. 789 (1949-1953); SECURITY CLASSIFICATION, *supra* note 41, at 4.

<sup>48</sup> See Exec. Order No. 10,501, 3 C.F.R. 979 (1949-1953); Exec. Order No. 11,652, 3 C.F.R. 678 (1971-1975); Exec. Order No. 12,065, 3 C.F.R. 190 (1978); Exec. Order No. 12,356, § 4.1(a), 3 C.F.R. 174 (1982).

<sup>49</sup> See Exec. Order No. 12,958, § 1.3, 3 C.F.R. 335-36 (1995).

<sup>50</sup> See Exec. Order No. 12,968, § 1.2, 3 C.F.R. 392-93 (1995).

cies classify jobs under three categories: critical sensitive, noncritical sensitive, and nonsensitive.<sup>51</sup> Thus, obtaining—and keeping—a security clearance is a prerequisite to holding many government jobs.

## B. Granting, Denying, Revoking, and Firing

Under the foregoing classification framework, agency officials possess the discretionary power to grant, deny, or revoke security clearance.<sup>52</sup> The Supreme Court has held that no one has a constitutional or statutory right to a security clearance.<sup>53</sup> The relevant agency determines all security clearance eligibility issues—grants, denials, and revocations—under a “clearly consistent with the interests of national security” standard.<sup>54</sup> Before an agency will grant a security clearance to an individual, it must conduct a background investigation, which varies “according to the degree of adverse effect” the applicant could have on national security.<sup>55</sup> Even after the government grants a clearance, it periodically reinvestigates employees. These reinvestigations of eligibility may lead to the revocation of an employee’s security clearance.<sup>56</sup>

A security clearance revocation does not always result merely in a loss of status for a federal employee or a government contractor.<sup>57</sup> In fact, a clearance revocation commonly results in the employee’s termination.<sup>58</sup> Thus, discretionary revocation decisions actually constitute termination decisions. The foundation for removals after security revocations began with Executive Order No. 10,450,<sup>59</sup> which authorized agency heads to remove an employee after a security clearance revocation if the agency head deemed such termination “necessary or advisable in the interests of the national security.”<sup>60</sup> Congress codified this action in the removal procedures of the Civil Service Reform Act (CSRA) of 1978.<sup>61</sup> Sections 7512 and 7513 of the CSRA allow an

---

<sup>51</sup> See Exec. Order No. 10,450, § 3(b), 3 C.F.R. 937 (1949-1953).

<sup>52</sup> See Exec. Order No. 12,968, § 3.1(b), 3 C.F.R. 397 (1995).

<sup>53</sup> See *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988).

<sup>54</sup> Exec. Order No. 12,968, § 3.1(d), 3 C.F.R. 397 (1995); see also Exec. Order No. 10,865, § 2, 3 C.F.R. 399 (1959-1963) (same); Exec. Order No. 10,450, § 2, 3 C.F.R. 936-37 (1949-1953) (same). Note that Executive Order 12,968 did not repeal Executive Orders 10,865 and 10,450, but merely restated some propositions and made additions to President Eisenhower’s orders. See Exec. Order No. 12,968, § 7.2(c), 3 C.F.R. 402 (1995).

<sup>55</sup> Exec. Order No. 10,450, § 3(a), 3 C.F.R. 937 (1949-1953).

<sup>56</sup> See Exec. Order No. 12,968, § 3.4(a)-(b), 3 C.F.R. 399 (1995).

<sup>57</sup> See Church, *supra* note 6, at 198; Lieutenant Colonel Victor R. Donovan, USAF, *Administrative and Judicial Review of Security Clearance Actions: Post Egan*, 35 A.F. L. REV. 323, 327-28 (1991); *Developments in the Law—The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130, 1183 (1972) [hereinafter *Developments*].

<sup>58</sup> See Church, *supra* note 6, at 198.

<sup>59</sup> Exec. Order No. 10,450, § 6, 3 C.F.R. 937-38 (1949-1953).

<sup>60</sup> *Id.*

<sup>61</sup> 5 U.S.C. §§ 7512, 7513, 7532 (1994).

agency to take adverse action, including removal, "only for such cause as will promote the efficiency of the service."<sup>62</sup> Section 7532 mirrors Executive Order 10,450 in that it authorizes the agency to remove an employee when the agency head deems it "necessary in the interests of national security."<sup>63</sup> Yet agencies rarely use § 7532 to justify an employee's removal.<sup>64</sup> More commonly, agencies rely on the "efficiency" provision of § 7513, arguing that employees who have lost their security clearances are not qualified to work.<sup>65</sup> Thus, the agency can argue that removal promotes the efficiency of the service under § 7513.<sup>66</sup>

In addition to termination, two other serious consequences may stem from a security clearance revocation. First, many employees who lose both their clearance and job will often have difficulty finding comparable employment.<sup>67</sup> Although a § 7513 removal does not automatically bar a person from all federal employment, once an agency terminates an employee for security reasons, the government cannot rehire that employee without approval from the department or agency head and the Civil Service Commission.<sup>68</sup> In the context of defense contracting, a revocation of clearance makes finding another job in the same industry almost impossible.<sup>69</sup> Second, the security clearance revocation may brand the employee a disloyal person.<sup>70</sup> Although the Supreme Court reasoned in *Department of Navy v. Egan*<sup>71</sup> that a loss of security clearance does not necessarily imply disloyalty,<sup>72</sup> it previously recognized that society might infer disloyalty from a revocation.<sup>73</sup> Thus, even if an *agency* does not interpret the label "security risk" as a character judgment, "in the common understanding of the public with whom [the employee] must hereafter live and work, the term 'security risk' carries a much more sinister meaning."<sup>74</sup> Given the severe consequences that flow from security clearance revocations,

<sup>62</sup> *Id.* § 7513(a).

<sup>63</sup> *Id.* § 7532(a).

<sup>64</sup> See Donovan, *supra* note 57, at 328.

<sup>65</sup> See *id.*

<sup>66</sup> See *id.*

<sup>67</sup> See *Developments, supra* note 57, at 1183.

<sup>68</sup> See Executive Order No. 10,450, § 7, 3 C.F.R. 938 (1949-53); *Developments, supra* note 57, at 1183 n.290 (discussing procedure for rehiring).

<sup>69</sup> See Church, *supra* note 6, at 198-99. Church argues that security clearance revocations destroy the careers of highly specialized defense contractor employees in Silicon Valley. See *id.* at 199.

<sup>70</sup> See *Developments, supra* note 57, at 1183.

<sup>71</sup> 484 U.S. 518 (1988).

<sup>72</sup> See *id.* at 528 (theorizing that a revocation could be "completely unrelated to conduct").

<sup>73</sup> See *Wieman v. Updegraff*, 344 U.S. 183, 190-91 (1952) (finding unconstitutional a state statute that excluded certain employees from public employment "on disloyalty grounds," asserting that such a "stain is a deep one" and "has become a badge of infamy").

<sup>74</sup> *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 901-02 (1961) (Brennan, J., dissenting).

the availability of review of clearance determinations constitutes a high priority for government employees.

## II

### REVIEW OF DISCRIMINATION CLAIMS IN NATIONAL SECURITY CLEARANCE DETERMINATIONS<sup>75</sup>

#### A. Internal Review

Before an agency denies or revokes a security clearance, due process entitles an applicant or employee to review within the agency.<sup>76</sup> Under President Eisenhower's Executive Order 10,865,<sup>77</sup> an employee's<sup>78</sup> due process rights included the following: the right to a written statement of the reasons supporting the denial or revocation, the right to a reasonable time to respond in writing and appear personally before the department head, and the right to written notice of the final decision in the case.<sup>79</sup>

In 1995, President Clinton extended these rights to include the right to appeal the denial or revocation "to a high level panel."<sup>80</sup> This panel, which the agency head selects, must be composed of at least three individuals, two of whom come from outside "the security field."<sup>81</sup> However, this additional process may represent a pyrrhic victory for employees, because Clinton's order allows the agency head to make a final decision upon hearing the recommendations of the panel.<sup>82</sup>

An employee may be entitled to judicial review if the security clearance revocation results in termination.<sup>83</sup> When an agency removes an employee for cause under § 7513, the agency must provide the employee with the following: advance written notice of the reasons for dismissal, a reasonable time to respond, attorney represen-

---

<sup>75</sup> This Note considers discrimination only in the context of Title VII and *Bivens* equal protection claims under the Due Process Clause of the Fifth Amendment, U.S. CONST. amend. V.

<sup>76</sup> See Exec. Order No. 12,968, § 5.2(a), 3 C.F.R. 399-400 (1995); Exec. Order No. 10,865, § 3, 3 C.F.R. 399 (1959-1963).

<sup>77</sup> 3 C.F.R. 398 (1959-1963).

<sup>78</sup> The order expressly included within its coverage employees of the U.S. industries that contract with federal agencies. See Exec. Order No. 10,865, § 1(b), 3 C.F.R. 398-99 (1959-1963); see Church, *supra* note 6, at 201.

<sup>79</sup> See Exec. Order No. 10,865, § 3, 3 C.F.R. 399 (1959-1963). In addition to the foregoing rights, the order also provides for an opportunity to be represented by counsel, and an opportunity to cross-examine witnesses and officials. See *id.*

<sup>80</sup> Exec. Order No. 12,968 § 5.2(a)(6), 3 C.F.R. 400 (1995).

<sup>81</sup> *Id.* President Clinton's order also provides for the right of the employee to receive any documents, records, or reports on which the government based its decision. See *id.* § 5.2(a)(2), 3 C.F.R. 399.

<sup>82</sup> See *id.* § 5.2(b), 3 C.F.R. 400.

<sup>83</sup> See 5 U.S.C. §§ 7702, 7703(a)(1), 7513(b), 7532(c) (1994).

tation, and a written statement of the final decision.<sup>84</sup> Employees may then appeal their removal to the Merit Systems Protection Board (MSPB).<sup>85</sup> In addition, 5 U.S.C. §§ 7702 and 7703 provide for judicial review of any claim of discrimination appealed to the MSPB under § 7512.<sup>86</sup>

When an agency terminates an employee for national security reasons under § 7532, the pre-removal process requirements are similar, except that § 7532 requires an internal hearing.<sup>87</sup> However, the decision of the agency head is final under § 7532; employees have no right to MSPB or judicial review.<sup>88</sup> Thus, § 7513 offers the only route within the CSRA for employees to receive review outside the agency.<sup>89</sup> Although the language of § 7512 seems to limit judicial review to the agency's termination decision,<sup>90</sup> courts must also review the underlying revocation if that revocation constitutes the cause for removal.<sup>91</sup> In this context, the Supreme Court's determination of the permissible scope of review of clearance revocations would lay the foundation for all future statutory discrimination claims involving security clearance revocations and denials.<sup>92</sup>

## B. Title VII Claims

### 1. *The Political Question Doctrine, Executive Privilege, and Separation of Powers*

Judicial deference to executive national security decisions springs from three interconnected principles: the political question doctrine,

<sup>84</sup> See *id.* § 7513(b).

<sup>85</sup> See *id.* § 7513(d). The MSPB is a product of the Civil Service Reform Act of 1978 (CSRA). See 5 U.S.C. § 7701. Prior to the CSRA, the Civil Service Commission conducted reviews of adverse determinations. See *Donovan, supra* note 57, at 327. The CSRA split the Civil Service Commission into separate branches for management and adjudication (the MSPB) to promote efficiency and fairness. See *id.* This Note discusses the MSPB's review of adverse actions under § 7513 in more detail below. See *infra* note 107 and accompanying text.

<sup>86</sup> See 5 U.S.C. §§ 7702, 7703. Section 7702 provides for judicial review of MSPB decisions on claims of discrimination. See *id.* § 7702. Section 7703 allows judicial review of any other MSPB determination. See *id.* § 7703.

<sup>87</sup> See *id.* § 7532(c).

<sup>88</sup> See *id.*

<sup>89</sup> See *id.* §§ 7513(b), 7702.

<sup>90</sup> Section 7512 only allows review of a list of "adverse actions" that does not include security clearance revocations and denials. *Id.* § 7512(A). Specifically, § 7512 provides that review procedures under § 7513 apply only to: "(1) a removal; (2) a suspension for more than 14 days; (3) a reduction in grade; (4) a reduction in pay; and (5) a furlough of 30 days or less." *Id.*

<sup>91</sup> See *Donovan, supra* note 57, at 328 (noting that the MSPB reviewed the merits of revocations for a brief time).

<sup>92</sup> See generally *Department of Navy v. Egan*, 484 U.S. 518 (1988) (holding that the MSPB did not have authority to review the merits of a decision to deny or revoke a security clearance).

executive privilege, and separation of powers.<sup>93</sup> Discrimination claims within the security clearance context must always negotiate the obstacles that these three doctrines present.<sup>94</sup> Under the political question doctrine, federal courts decline to adjudicate cases that are better suited for resolution by the elected branches.<sup>95</sup> Courts deem such cases nonjusticiable, rendering government action immune from judicial review.<sup>96</sup> If courts adjudicated these cases, constitutional concerns would arise “regarding separation of powers, institutional competence, or the maintenance of the judiciary’s authority.”<sup>97</sup> In 1962, Justice Brennan synthesized the modern political question doctrine in the landmark case of *Baker v. Carr*.<sup>98</sup> The *Baker* Court asserted that six analytical strands comprised the political question doctrine and that each strand originated from separation of powers principles:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>99</sup>

Under the executive privilege doctrine, courts have no jurisdiction to control the Executive’s “performance of [its] official duties.”<sup>100</sup>

---

<sup>93</sup> This section focuses on only those aspects of these principles that courts use to deny Title VII claimants review of the merits of security clearance decisions. Part III, *infra*, offers a contrary interpretation of these principles.

<sup>94</sup> See, e.g., *Egan*, 484 U.S. at 529-30.

<sup>95</sup> See NOWAK & ROTUNDA, *supra* note 17, § 2.15(a), at 106. The political question doctrine stems from *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), which simultaneously granted and limited the Court’s power to decide questions of law for all three branches of government:

The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.

*Id.* at 170.

<sup>96</sup> See NOWAK & ROTUNDA, *supra* note 17, § 2.15(a), at 106.

<sup>97</sup> *Stehney v. Perry*, 101 F.3d 925, 931 n.4 (3d Cir. 1996).

<sup>98</sup> 369 U.S. 186 (1962).

<sup>99</sup> *Id.* at 217.

<sup>100</sup> NOWAK & ROTUNDA, *supra* note 17, § 7.1(a), at 235 (quoting *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1866)). Some scholars argue in favor of a broad interpretation of the doctrine of executive privilege, asserting that the President is immune from judicial review when performing his constitutional duties. See, e.g., CHARLES K. BURDICK, *THE LAW OF THE AMERICAN CONSTITUTION* § 50, at 125-27 (1922) (noting that the Executive cannot

In the context of national security, support for this notion exists in the Constitution's grant of broad discretion to the Executive to conduct foreign affairs.<sup>101</sup> Loaded with this constitutional ammunition, the Supreme Court has repeatedly granted deference to claims of executive privilege concerning military, diplomatic, or national security matters.<sup>102</sup>

Given this broad notion of executive discretion in matters of national security, one could argue that any attempt to require the judiciary to review the merits of a clearance decision violates the separation of powers principle.<sup>103</sup> According to this doctrine, "one branch is not permitted to encroach on the domain or exercise the powers of another branch."<sup>104</sup> To determine whether a breach of the separation

be compelled to exercise its discretion in a particular way); 3 WESTEL WOODBURY WILLOUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES* §§ 979-80, at 1497-1500 (2d ed. 1929) (arguing that the President is not "subject to compulsory judicial process" regarding "the performance of a purely ministerial act").

<sup>101</sup> For example, the Constitution provides that (1) "the executive Power shall be vested in [the] President," U.S. CONST. art. II, § 1, cl. 1, and (2) "[t]he President shall be Commander in Chief of the Army and Navy of the United States," *id.* This constitutional evidence also supports Justice Brennan's first category of the political question doctrine, whereby courts shall not adjudicate claims when "a textually demonstrable constitutional commitment of the issue to a coordinate political department" exists. *Baker*, 369 U.S. at 217.

<sup>102</sup> See, e.g., *CIA v. Sims*, 471 U.S. 159, 172-73 (1985) (allowing CIA to avoid Freedom of Information Act request); *Regan v. Wald*, 468 U.S. 222, 224 (1984) (reversing grant of preliminary injunction which would have prevented enforcement of Cuban travel restrictions); *Haig v. Agee*, 453 U.S. 280, 293-94 (1981) ("[F]oreign policy [is within] the province and responsibility of the Executive."); *United States v. Nixon*, 418 U.S. 683, 710 (1974) (noting that executive privilege may be asserted only to safeguard "military or diplomatic secrets"); *United States v. Reynolds*, 345 U.S. 1, 6-7 (1953) (finding executive privilege not waived by Tort Claims Act); *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948) ("[C]ourts [cannot] sit *in camera* in order to be taken into executive confidences."); *Totten v. United States*, 92 U.S. 105, 106-07 (1875) (noting that the President had authority "during the war, as commander-in-chief of the armies of the United States, to employ secret agents to enter the rebel lines and obtain information" relevant to the war effort); see also *New York Times Co. v. United States*, 403 U.S. 713, 727 (1971) (Stewart, J., concurring) (noting that executive power "has been pressed to the very hilt since the advent of the nuclear missile age").

<sup>103</sup> See Note, *supra* note 10, at 918.

<sup>104</sup> BLACK'S LAW DICTIONARY 1365 (6th ed. 1990). In simple terms, the three branches have three separate jobs: the Legislature legislates, the Executive executes the laws, and the Judiciary interprets the laws and adjudicates disputes arising from the laws. See U.S. CONST. arts. I-III; BLACK'S LAW DICTIONARY, *supra*, at 1365; see also *Nixon*, 418 U.S. at 703 ("[E]ach branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others.").

In *New York Times*, Justice Stewart's concurrence offers the most illuminating example of this formalist view of the separation of powers doctrine:

If the Constitution gives the Executive a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense, then under the Constitution the Executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully. . . . [I]t is the constitutional duty of the Executive—as a matter of sovereign prerogative and not as a matter of law

of powers exists, the Supreme Court “focuses on the extent to which [the act in question] prevents the Executive Branch from accomplishing its constitutionally assigned functions.”<sup>105</sup>

## 2. Department of Navy v. Egan

The Supreme Court’s decision in *Department of Navy v. Egan*,<sup>106</sup> provides the precedential basis for the application of the foregoing principles and subsequent judicial reluctance to review Title VII claims.<sup>107</sup> In *Egan*, the Navy denied security clearance to a civilian employee.<sup>108</sup> The Federal Circuit found that the employee was entitled to substantive review.<sup>109</sup> The Supreme Court reversed, ruling that the MSPB lacked the statutory authority to review the merits of a national security clearance revocation.<sup>110</sup>

Although the *Egan* Court never explicitly invoked the doctrines of political question, executive privilege, and separation of powers, it implicitly relied on them to bolster its argument.<sup>111</sup> Writing for the majority, Justice Blackmun hinted at the executive privilege doctrine by noting that the discretionary nature of security clearance decisions requires that they be “committed by law to the appropriate agency of the Executive Branch.”<sup>112</sup> Blackmun then alluded to the first strand of the *Baker* political question test<sup>113</sup> and separation-of-powers principles<sup>114</sup> by asserting that the President has a constitutional mandate

---

as the courts know law—. . . to protect the confidentiality necessary to carry out its [foreign affairs] responsibilities . . . .

*New York Times*, 403 U.S. at 728-29 (Stewart, J., concurring).

<sup>105</sup> *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977).

<sup>106</sup> 484 U.S. 518 (1988).

<sup>107</sup> *Egan* was not a Title VII case, but rather an appeal of a § 7513 removal to the MSPB. *See id.* at 520. Prior to *Egan*, the MSPB reviewed the merits of security clearance revocations when it decided claims brought under § 7513 removals. *See Bogdanowicz v. Department of Army*, 16 M.S.P.R. 653 (1983) (reviewing merits of security clearance revocations under § 7513). *Bogdanowicz* was the first case in which the MSPB reviewed the merits of a security clearance revocation, but the MSPB based its opinion in that case on the D.C. Circuit’s opinion in *Hoska v. United States Dep’t of Army*, 677 F.2d 131 (D.C. Cir. 1982). *See Bogdanowicz*, 16 M.S.P.R. at 656. In *Hoska*, the D.C. Circuit reviewed the Army’s evidence supporting a security revocation on appeal from the MSPB. *See Hoska*, 677 F.2d at 139.

<sup>108</sup> *See Egan*, 484 U.S. at 520.

<sup>109</sup> *See Egan v. Department of Navy*, 802 F.2d 1563, 1571 (Fed. Cir. 1986), *rev’d*, 484 U.S. 518 (1988) (noting that if *Egan*’s case had involved highly sensitive information, the government could have terminated him under § 7532).

<sup>110</sup> *See Egan*, 484 U.S. at 534.

<sup>111</sup> *See id.* at 527-30. In fact, since *Baker v. Carr*, 369 U.S. 186 (1962), the Court has dismissed only two cases based on the political question doctrine. *See Nixon v. United States*, 506 U.S. 224 (1993) (denying review of Senate impeachment proceedings); *Gilligan v. Morgan*, 413 U.S. 1 (1973) (finding issues concerning military command and training nonjusticiable).

<sup>112</sup> *Egan*, 484 U.S. at 527.

<sup>113</sup> *See supra* notes 98-99 and accompanying text.

<sup>114</sup> *See supra* notes 103-05 and accompanying text.

under his Article II powers to control access to national security information.<sup>115</sup> According to the Court, the government possessed the right and a compelling reason to withhold sensitive national security information from unauthorized persons.<sup>116</sup>

The *Egan* Court also advanced an institutional competence argument.<sup>117</sup> According to the Court, one cannot have a right that is completely dependent upon "an affirmative act of discretion."<sup>118</sup> Blackmun concluded that, because the "[p]redictive judgment" of determining who should have access to sensitive information is "an inexact science," these decisions are not suitable for review by an outside, nonexpert body.<sup>119</sup>

The Court would have reached a different conclusion if Congress had specifically provided for review of the merits of clearance revocations and denials under § 7513.<sup>120</sup> However, § 7702 of the CSRA only sanctions judicial review to ensure that the agency provides § 7513 procedural protections.<sup>121</sup> Therefore, the Court held that the MSPB may review only the questions of whether the agency had cause to terminate, whether the agency in fact denied clearance, and whether the agency could have transferred the employee to another position.<sup>122</sup> This holding would have a profound effect on statutory claims of discrimination—even on claims extending beyond the CSRA.

### 3. *Federal Courts and Title VII Post-Egan*

Claimants who believe the government has unlawfully discriminated against them by revoking their federal security clearances are not necessarily limited to the CSRA's review procedures. Title VII of

---

<sup>115</sup> See *Egan*, 484 U.S. at 527. Justice Blackmun cited the President's constitutional authority as the Commander-in-Chief of the armed forces. See *id.* Under this mandate, Blackmun argued:

[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 this constitutional investment of power in the President and exists quite apart from any explicit congressional grant.

*Id.*

<sup>116</sup> See *id.*

<sup>117</sup> See *id.* at 528-30.

<sup>118</sup> *Id.* at 528.

<sup>119</sup> *Id.* at 529 (citation omitted) (internal quotation marks omitted).

<sup>120</sup> See *id.* at 530 ("[U]nless 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>121</sup> See 5 U.S.C. § 7702 (1994); see also *Egan*, 484 U.S. at 530-31 (noting that "[n]othing in the Act . . . directs or empowers the Board to go further").

<sup>122</sup> See *Egan*, 484 U.S. at 530.

the Civil Rights Act of 1964<sup>123</sup> may be another option for federal employees seeking redress.<sup>124</sup> However, two factors limit the availability and attractiveness of this option. First, Title VII only prohibits discrimination on the basis of race, color, religion, sex, or national origin.<sup>125</sup> Thus, the statute limits the field of claimants who can sue to these specified protected classes. Second, membership in a Title VII protected class can preclude an employee from seeking other forms of relief. The Supreme Court has held that Title VII is “an exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination.”<sup>126</sup>

While *Egan*'s holding only addresses the MSPB's lack of statutory authority to review security clearance decisions, federal courts have stretched this logic to preclude judicial review of the merits of clearance decisions in Title VII claims.<sup>127</sup> Like *Egan*, these courts have found that the language of Title VII fails to provide for review of executive security clearance decisions.<sup>128</sup> In fact, one court has even inter-

---

<sup>123</sup> 42 U.S.C. § 2000e to e-17 (1994 & Supp. III 1997). Congress extended Title VII protection to federal employees when it added section 17 to Title VII in 1972. *See id.* § 2000e-16.

<sup>124</sup> After unsuccessful MSPB review, a claimant may file a charge of discrimination with the Equal Employment Opportunity Commission (EEOC). *See id.* § 2000e-5(b). The claimant may not seek judicial review until the EEOC has made a final disposition of her claim. *See id.* § 2000e-5(e). The EEOC must first seek voluntary compliance, but if such efforts fail, the Commission may take no further action when the respondent is a government agency. *See id.* § 2000e-5(f)(1). However, the EEOC must refer the case to the Attorney General, who may bring a civil action on behalf of a claimant. *See id.* If the Attorney General declines to act, the EEOC must notify the claimant of her right to sue, and the claimant may then file suit in the appropriate federal court. *See id.* § 2000e-16(c).

<sup>125</sup> *See id.* § 2000e-2. The key provision of Title VII provides in relevant part:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

*Id.* § 2000e-2(a).

<sup>126</sup> *Brown v. General Servs. Admin.*, 425 U.S. 820, 829 (1976) (grounding this conclusion in congressional intent as well as “the structure of the 1972 Amendment itself”).

<sup>127</sup> *See, e.g., Ryan v. Reno*, 168 F.3d 520 (D.C. Cir. 1999); *Becerra v. Dalton*, 94 F.3d 145 (4th Cir. 1996); *Bodkin v. West*, 91 F.3d 129 (4th Cir. 1996); *Perez v. FBI*, 71 F.3d 513 (5th Cir. 1995); *Brazil v. United States Dep't of Navy*, 66 F.3d 193 (9th Cir. 1995); *Edwards v. Widnall*, 17 F. Supp. 2d 1038 (D. Minn. 1998); *Phillips v. Dalton*, No. 94-CV-4828, 1997 WL 24846 (E.D. Pa. Jan. 22, 1997). As demonstrated *supra* note 18, individuals suffer a similar fate when they bring claims under the ADA and the Rehabilitation Act.

<sup>128</sup> *See Becerra*, 94 F.3d at 149 (“[T]here is no unmistakable expression of purpose by Congress in Title VII to subject the decision of the Navy to revoke *Becerra*'s security clearance to judicial scrutiny.”); *Brazil*, 66 F.3d at 197 (“Neither the express language nor the

preted section 703(g) of the Civil Rights Act of 1964<sup>129</sup> to expressly foreclose discrimination claims based on security clearance determinations.<sup>130</sup> The Title VII cases also mirror *Egan* by uniformly grounding their logic in notions of institutional competence,<sup>131</sup> separation of powers,<sup>132</sup> and deference to the Executive on national security matters.<sup>133</sup> Thus, no member of a class protected by and suing under Title VII can receive substantive review of security clearance revocations or denials in federal court.<sup>134</sup>

## C. Constitutional Claims

### 1. Bivens Claims

Although Title VII fails to protect a significant number of claimants from discrimination,<sup>135</sup> unprotected individuals do not lack recourse. Under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*<sup>136</sup> claimants may bring actions against federal officials for

legislative history of Title VII . . . 'confer[s] broad authority' on the federal courts to review security clearance decisions." (quoting *Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988)).

<sup>129</sup> 42 U.S.C. § 2000e-2(g).

<sup>130</sup> See *Ryan*, 168 F.3d at 524 n.3 ("Our decision [to foreclose Title VII claims based on security clearance decisions] is fortified by Title VII's express language exempting employment actions based on security clearance possession *vel non*"). The Fourth Circuit reached the same conclusion when it dismissed a claim based on section 501 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 791 (1994). See *Guillot v. Garrett*, 970 F.2d 1320, 1325-26 (4th Cir. 1992) ("Congress may have even confronted the specific question of whether there should be review of security clearance decisions under the authority of the Civil Rights Act and concluded that such decisions should instead be committed solely to the discretion of the responsible Executive branch departments and agencies.").

<sup>131</sup> See *Ryan*, 168 F.3d at 523 ("[A]n outside nonexpert body [cannot reasonably] decide whether the agency should have been able to make the necessary affirmative prediction with confidence. Nor can such a body determine what constitutes an acceptable margin of error in assessing the potential risk."); *Bodkin v. West*, No. 95-2853, 1996 WL 406249, at \*1 (4th Cir. June 18, 1996) ("[N]on-expert bodies [like the Judiciary] are institutionally incompetent to second-guess the substantive judgment of whether to deny or revoke a security clearance." (quoting *Egan*, 484 U.S. at 529) (internal quotation marks omitted))).

<sup>132</sup> See *Perez*, 71 F.3d at 515 (arguing that substantive review of a security clearance decision would be "an impermissible intrusion by the Judicial Branch into the authority of the Executive Branch over matters of national security"); *Brazil*, 66 F.3d at 196 ("[The Judiciary has] no more business reviewing the merits of a decision to grant or revoke a security clearance than [did the MSPB in *Egan*]. . . . The decision to grant or revoke a security clearance is committed to the discretion of the President by law." (quoting *Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990))).

<sup>133</sup> See *Ryan*, 168 F.3d at 523 ("[T]he protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it." (quoting *Egan*, 484 U.S. at 529) (internal quotation marks omitted)); *Brazil*, 66 F.3d at 196 ("At the core of *Egan*'s deference to the national security mission is the recognition that security clearance determinations are 'sensitive and inherently discretionary' exercises . . ." (quoting *Egan*, 484 U.S. at 527-28)).

<sup>134</sup> See *Stehney v. Perry*, 101 F.3d 925, 932 (3d Cir. 1996).

<sup>135</sup> See *supra* note 17.

<sup>136</sup> 403 U.S. 388 (1971).

damages implied under the Constitution.<sup>137</sup> In *Bivens*, the Court recognized a cause of action for damages under the Fourth Amendment.<sup>138</sup> Subsequently, federal courts have expanded the *Bivens* doctrine to allow claims for damages grounded in the violation of other constitutional rights.<sup>139</sup> Then, in *Davis v. Passman*,<sup>140</sup> the Supreme Court recognized a *Bivens* claim that alleged violations of the equal protection component of the Due Process Clause of the Fifth Amendment.<sup>141</sup> The *Davis* model provides the procedural framework for non-Title VII claimants seeking redress for discrimination in clearance decisions.

## 2. Webster v. Doe and Its Progeny

In stark contrast to its treatment of Title VII claims, the Supreme Court provided for review of constitutional claims relating to security clearance decisions in *Webster v. Doe*.<sup>142</sup> In *Webster*, a homosexual electronics technician for the CIA challenged the Agency's decision to terminate him on the ground that his homosexuality "posed a threat to security."<sup>143</sup> Doe argued that his termination (1) violated § 706 of the Administrative Procedure Act (APA),<sup>144</sup> "because it was, inter alia, arbitrary and capricious," (2) violated his property, liberty, and privacy rights under the First, Fourth, Fifth, and Ninth Amendments, and (3) violated his equal protection rights by discriminating against him on the basis of his sexual preference.<sup>145</sup> The CIA had revoked his clearance pursuant to section 102(c) of the National Security Act (NSA),<sup>146</sup> which provides that "the Director [of Central Intelligence] may, in the Director's discretion, terminate . . . any . . . employee of the [CIA] whenever the Director shall deem such termination necessary or advisable in the interests of the United States."<sup>147</sup> In light of this statute, the Supreme Court held that it lacked a "meaningful standard of review" against which to judge the agency's exercise of discretion under the APA,<sup>148</sup> and it dismissed the statutory claim.<sup>149</sup>

---

<sup>137</sup> See *id.* at 397.

<sup>138</sup> See *id.*

<sup>139</sup> See, e.g., *Carlson v. Green*, 446 U.S. 14 (1980) (upholding Eighth Amendment claim); *Dellums v. Powell*, 566 F.2d 167 (D.C. Cir. 1977) (allowing First Amendment claim); *Cox v. Stanton*, 529 F.2d 47 (4th Cir. 1975) (granting review of Thirteenth and Fourteenth Amendments claims).

<sup>140</sup> 442 U.S. 228 (1979).

<sup>141</sup> See *id.* at 230.

<sup>142</sup> 486 U.S. 592, 601-05 (1988).

<sup>143</sup> *Id.* at 594-95.

<sup>144</sup> 5 U.S.C. § 706 (1994).

<sup>145</sup> See *Webster*, 486 U.S. at 596.

<sup>146</sup> See *id.* at 595.

<sup>147</sup> National Security Act of 1947, 50 U.S.C. § 403-4(g) (1994).

<sup>148</sup> *Webster*, 486 U.S. at 600.

<sup>149</sup> See *id.* at 601.

However, the Court found Doe's constitutional claims justiciable, because Congress had not expressly foreclosed judicial review of constitutional claims in the text of section 102(c).<sup>150</sup> The Court held the government to this heightened standard "in part 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."<sup>151</sup> Moreover, the court rejected the CIA's argument that judicial review would entail "extensive 'rummaging around' in the [CIA's] affairs."<sup>152</sup> Chief Justice Rehnquist, writing for the majority, noted that courts routinely entertain Title VII claims attacking the CIA's hiring and promotion decisions, which involve similar discovery processes.<sup>153</sup> Most importantly, the Court seemed confident that a lower court could balance the plaintiff's need for access to evidence "against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission."<sup>154</sup>

In the wake of *Webster*, courts routinely review the merits of adverse security clearance decisions if the plaintiffs present colorable constitutional claims.<sup>155</sup> These courts undertake this review in an effort to prevent executive agencies from abrogating constitutional norms in the name of security.<sup>156</sup> However, courts have yet to find any constitutional violations in *Webster*-type cases. To date, only one district court has allowed a *Webster* equal protection claim to withstand summary judgment.<sup>157</sup> These suits fail because the only claimants excluded by Title VII who bring constitutional challenges to security clearance decisions are individuals who believe they have been discriminated against on the basis of sexual preference. Because homosexuals do not constitute a suspect or quasi-suspect class,<sup>158</sup> an agency's policy regarding homosexuals needs to survive only a rational relationship test. But this fact does not diminish the paradox that courts provide substantive review to claimants deemed unworthy of protection under Title VII and the Constitution, yet deny substantive

---

<sup>150</sup> See *id.* at 603 ("[W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear.").

<sup>151</sup> *Id.* (quoting *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681, n.12 (1986)).

<sup>152</sup> *Id.* at 604.

<sup>153</sup> See *id.* The CIA conceded this point in its Reply Brief for Petitioner at 13-14. See Brief for Respondent at 37-38, *Webster v. Doe*, 486 U.S. 592 (1988) (No. 86-1294); *Turbeville v. Casey*, 525 F. Supp. 1070 (D.D.C. 1981).

<sup>154</sup> *Webster*, 486 U.S. at 604.

<sup>155</sup> See *supra* note 21.

<sup>156</sup> See, e.g., *Buttino v. FBI*, 801 F. Supp. 298, 301 (noting that the government cannot use "revocation [as] a mere pretext for the implementation of a discriminatory policy").

<sup>157</sup> See *id.* at 303 (denying in part a motion for summary judgment, where FBI failed to show that it would have revoked the plaintiff's clearance "even if he were heterosexual").

<sup>158</sup> See *supra* note 17.

review to groups traditionally favored by Title VII and the Constitution.

#### D. Preclusion of *Bivens* Claims by Title VII

##### 1. *Statutory Preclusion of Bivens Claims in General*

The paradoxical treatment of statutory and constitutional claims stems from dicta in the *Bivens* decision.<sup>159</sup> Interpreting *Bivens*, courts originally recognized two instances in which a constitutional claim is unavailable.<sup>160</sup> First, Congress may preclude a plaintiff from asserting a constitutional claim by expressly providing an alternative remedy that it considers to be an "equally effective" substitute.<sup>161</sup> Second, a court can use its discretion to preclude a *Bivens* claim if "special factors counselling hesitation" exist.<sup>162</sup>

Under this two-pronged test, Title VII should not preclude a *Bivens* equal protection claim for two reasons. First, Congress failed to expressly declare that Title VII serves as a substitute for recovery under the Constitution.<sup>163</sup> Second, in the decade after *Bivens*, the Supreme Court declined to treat a congressional remedial scheme as a special factor counseling hesitation.<sup>164</sup> Shortly after *Bivens*, however, the Supreme Court's opinion in *Brown v. General Services Administration*<sup>165</sup> made a constitutional remedy unlikely in the Title VII context. In that decision, the Court held that Title VII "provides the exclusive judicial remedy for claims of discrimination in federal employment."<sup>166</sup> Relying exclusively on *Brown*, and excluding from their analysis any mention of the two-part *Bivens* test, lower federal courts uniformly hold that Title VII precludes claims of discrimination brought under the Fifth Amendment.<sup>167</sup> As an additional roadblock

---

<sup>159</sup> See Note, *Bivens Doctrine in Flux: Statutory Preclusion of a Constitutional Cause of Action*, 101 HARV. L. REV. 1251, 1251 (1988) (discussing the *Bivens* dicta).

<sup>160</sup> See *id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* (quoting *Carlson v. Green*, 446 U.S. 14, 18 (1980)).

<sup>163</sup> See 42 U.S.C. § 2000e-16 (1994 & Supp. III 1997).

<sup>164</sup> See Note, *supra* note 159, at 1251-52 (noting that the court did not seize upon the "special factor" exception until 1983).

<sup>165</sup> 425 U.S. 820 (1976).

<sup>166</sup> *Id.* at 835.

<sup>167</sup> See, e.g., *Kizas v. Webster*, 707 F.2d 524, 542 (D.C. Cir. 1983) (finding that Title VII preempts all other remedial statutes and the Constitution); *Lawrence v. Staats*, 665 F.2d 1256, 1259 (D.C. Cir. 1981) (same); *Richardson v. Wiley*, 569 F.2d 140, 141 (D.C. Cir. 1977) (asserting that the only remedy possibly available to claimant was under Title VII, even though claimant also brought a claim under the Fifth Amendment, because "§ 717 of the Civil Rights Act of 1964 . . . provides the exclusive judicial remedy for claims of discrimination in federal employment" (quoting *Brown v. General Servs. Admin.*, 425 U.S. 820, 835 (1976)) (internal quotation marks omitted)); *Gissen v. Tackman*, 537 F.2d 784, 786 (3d Cir. 1976) (finding that "*Brown* effectively precludes [plaintiff] from any judicial relief").

to constitutional claims, dicta in *Davis v. Passman*<sup>168</sup> have implied that Title VII would preclude a *Bivens* remedy when covered federal employees "seek to redress the violation of rights [already] guaranteed by the statute."<sup>169</sup>

Moreover, Supreme Court decisions after *Bivens* have skewed the original two-part analysis to such an extent that a constitutional claim would probably fail under the new test anyway. In *Bush v. Lucas*,<sup>170</sup> the Court displayed its growing distaste for constitutional claims when it ruled that a claimant could not maintain a First Amendment action because the available statutory remedies, though "less than complete,"<sup>171</sup> constituted "special factors counselling hesitation before authorizing a new kind of federal litigation."<sup>172</sup> The Court stressed that (1) the remedial scheme did not need to satisfy the "alternative remedy" prong and (2) the statutory remedy did not need to be as effective as the *Bivens* remedy.<sup>173</sup> Thus, the Court's new spin on the special factors prong has effectively swallowed the two-part preclusion rule.<sup>174</sup>

Five years after *Bush*, the Court made matters even worse for proponents of *Bivens* claims when it ruled that complete congressional inaction could preclude constitutional claims in *Schweiker v. Chilicky*.<sup>175</sup> Whereas in *Bush* the Court had deferred to a congressional scheme that, while concededly not equally effective,<sup>176</sup> did offer substantial relief, the *Chilicky* Court yielded to a congressional scheme that, although complex, did not even purport to redress the constitutional injuries claimed.<sup>177</sup> Judicial deference grew so broad under this third installment of the special factors test that the Court would defer to the Legislature unless congressional inaction was "inadvertant."<sup>178</sup> Therefore, coupling the Supreme Court's *Bivens* jurisprudence with *Brown*'s decree that Title VII is an exclusive remedy effectively bans plaintiffs from asserting *Bivens* claims to circumvent the deficiencies of Title VII's remedial structure.

---

<sup>168</sup> 442 U.S. 228 (1979).

<sup>169</sup> *Id.* at 247 n.26. In *Davis*, the Supreme Court allowed a *Bivens* claim to proceed in a case involving employment in a congressman's office, which is outside Title VII's domain. *See id.* at 245.

<sup>170</sup> 462 U.S. 367 (1983).

<sup>171</sup> *Id.* at 373.

<sup>172</sup> *Id.* at 378.

<sup>173</sup> *See Note, supra* note 159, at 1252.

<sup>174</sup> *See* Gene R. Nichol, *Bivens, Chilicky, and Constitutional Damages Claims*, 75 VA. L. REV. 1117, 1147 (1989).

<sup>175</sup> 487 U.S. 412 (1988).

<sup>176</sup> *See Bush*, 462 U.S. at 372.

<sup>177</sup> *See Nichol, supra* note 174, at 1148.

<sup>178</sup> *Chilicky*, 487 U.S. at 423; *see also* Nichol, *supra* note 174, at 1149 ("*Chilicky*, if not *Bush* before it, converted the special factors exception to an expansive loophole.").

2. *Without Recourse: Simultaneous Title VII and Bivens Claims in the Security Clearance Context*

Courts do not deviate from the foregoing trend when claimants bring Title VII and *Bivens* claims simultaneously in the security clearance context.<sup>179</sup> The two federal circuits that confronted this situation denied *Bivens* review because of Title VII's exclusivity.<sup>180</sup> In addition, these courts also refused to review the merits of the Title VII claim on the authority of *Egan*.<sup>181</sup> Thus, while individuals who cannot seek protection under Title VII may seek judicial review of a security clearance revocation, members of protected classes who rely on Title VII may not.<sup>182</sup>

In *Brazil v. United States Department of Navy*,<sup>183</sup> a civilian employee of the Navy alleged that the Navy discriminated against him on the basis of his race when it revoked his security clearance.<sup>184</sup> In addition to bringing a Title VII action, Brazil asserted that the clearance revocations denied him equal protection guaranteed by the Fifth Amendment.<sup>185</sup> The Ninth Circuit denied review of the Title VII claim on the basis of *Egan*.<sup>186</sup> The court then ruled that Title VII provided the sole remedy for a civilian employee of the military who alleges employment discrimination.<sup>187</sup> The court also reiterated the Supreme Court's rules of statutory preclusion of constitutional claims, as laid out in *Bush v. Lucas*.<sup>188</sup> Reasoning that Title VII provided what Congress considered adequate remedial measures for constitutional violations, the Ninth Circuit held that "'*Bivens* actions should not be

---

<sup>179</sup> See *Perez v. FBI*, 71 F.3d 513 (5th Cir. 1995); *Brazil v. United States Dep't of Navy*, 66 F.3d 193 (9th Cir. 1995).

<sup>180</sup> See *Perez*, 71 F.3d at 515; *Brazil*, 66 F.3d at 198. In *Jamil v. Secretary, Dep't of Defense*, 910 F.2d 1203 (4th Cir. 1990), the Fourth Circuit did not reach the plaintiff's equal protection claim, because "nothing in the record . . . indicate[d] improper motivation based on national origin." *Id.* at 1209 (affirming lower court's grant of summary judgment). However, the court expressed doubt that it would have reviewed the security clearance decision even if the plaintiff had provided such evidence: "[I]t is arguable that [the plaintiff] might have a valid claim of denial of his constitutional rights to equal protection . . . . Whether, however, review of such alleged denial . . . is reachable by a court in the light of *Egan* presents a difficult question . . ." *Id.*

<sup>181</sup> See *Perez*, 71 F.3d at 514; *Brazil*, 66 F.3d at 197.

<sup>182</sup> Compare, e.g., *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990) (granting review of constitutional equal protection claim), with *Perez*, 71 F.3d at 513 (denying review of Title VII retaliation claim); see also *supra* note 127 and accompanying text (citing these and other cases).

<sup>183</sup> 66 F.3d 193 (9th Cir. 1995).

<sup>184</sup> See *id.* at 195.

<sup>185</sup> See *id.* at 197.

<sup>186</sup> See *id.*

<sup>187</sup> See *id.*

<sup>188</sup> See *id.* at 198; see also *supra* notes 170-74 and accompanying text (discussing *Bush*).

implied.’”<sup>189</sup> The *Brazil* court rationalized this anomalous result by noting that such a striking exception to Title VII’s coverage could not possibly be “inadvertent.”<sup>190</sup>

In *Perez v. FBI*,<sup>191</sup> Fernando Mata, an FBI agent, alleged that the FBI revoked his security clearance and terminated him in retaliation for filing a Title VII claim.<sup>192</sup> Like *Brazil*, Mata asserted both Title VII and *Bivens* claims,<sup>193</sup> and the Fifth Circuit refused to review either claim.<sup>194</sup> The court denied review of Mata’s Title VII claim because it would have involved examining the merits of the FBI’s decision.<sup>195</sup> The court also rejected the *Bivens* claims, because Title VII provides the exclusive remedy and cause of action for federal employees alleging discrimination.<sup>196</sup> Thus, just as in *Brazil*, Mata did not receive the judicial review normally afforded to members of even non-protected classes.

The Tenth Circuit is the only other court that has recognized this anomaly, but it argues for less, not more, judicial review.<sup>197</sup> Based on the theory that allowing constitutional claims to trump statutory remedies threatens to eviscerate executive discretion, this court would find all claims that require a review of the merits of security clearance revocations non-justiciable.<sup>198</sup>

---

<sup>189</sup> *Brazil*, 66 F.3d at 198 (quoting *Kotarski v. Cooper*, 866 F.2d 311, 312 (9th Cir. 1989)). The Court also stated: “So long as Congress’ failure to provide . . . significant relief] has not been inadvertent, courts should defer to its judgment, because ‘Congress is the body charged with making the inevitable compromises required in the design of a massive and complex . . . program.’” *Id.* (quoting same) (internal quotation marks omitted).

<sup>190</sup> *Brazil*, 66 F.3d at 198.

<sup>191</sup> 71 F.3d 513 (5th Cir. 1995).

<sup>192</sup> *See id.* at 514.

<sup>193</sup> *See id.* at 515. Mata brought *Bivens* claims under both the First Amendment and the Fifth Amendment. *See id.*

<sup>194</sup> *See id.*

<sup>195</sup> *See id.* at 514.

<sup>196</sup> *See id.* at 515.

<sup>197</sup> *See Hill v. Department of Air Force*, 844 F.2d 1407, 1411 (10th Cir. 1988) (“[I]f the statutory constraints imposed in *Egan* can be bypassed simply by invoking alleged constitutional rights, it makes the authority of *Egan* hardly worth the effort.”).

<sup>198</sup> *See id.* In *Hill*, the Tenth Circuit ruled that a claimant who challenged an adverse security clearance determination could not assert Fifth Amendment claims under the due process and equal protection clauses. *See id.* at 1413. Although the claimant did not argue for any statutory rights, *Egan* is the sole benchmark for the court’s reasoning. *See id.* at 1409-11. Interestingly, the Tenth Circuit handed down the decision immediately after *Egan*, but before *Webster v. Doe*, 486 U.S. 592 (1988).

In his dissent in *Webster*, Justice Scalia considered this conflict. *See Webster*, 486 U.S. at 613 (Scalia, J., dissenting). Scalia argued that “it is simply untenable that there must be a judicial remedy for every constitutional violation.” *Id.*

## III

REMEDYING THE ANOMALY: PROPOSED AMENDMENT TO  
TITLE VII

In his *Webster v. Doe* dissent, Justice Scalia argued that the Court should not allow *Bivens* claims, because constitutional rights are not more important than statutory rights.<sup>199</sup> Justice Scalia may have been correct in equating constitutional and statutory rights. However, this Note argues that courts should vindicate both rights instead of denying them. Unfortunately, a judicial solution is not likely for two reasons. First, the lower federal courts have uniformly barred *Bivens* claims when the employee qualifies for Title VII protection.<sup>200</sup> Although the Supreme Court has not directly considered this issue, its prior decisions in *Bush v. Lucas*,<sup>201</sup> *Schweiker v. Chilicky*,<sup>202</sup> *Brown v. General Services Administration*,<sup>203</sup> and *Davis v. Passman*<sup>204</sup> suggest that *Bivens* claims are a dying breed—both generally and in the Title VII context.<sup>205</sup>

Second, the chances of the Supreme Court overruling *Egan* or its Title VII progeny are remote. On the basis of the political question, executive privilege, and separation of powers doctrinal triumvirate,<sup>206</sup> the current law recognizes that (1) the Executive has constitutional

---

<sup>199</sup> See *Webster*, 486 U.S. at 618 (Scalia, J., dissenting) (asserting that the principle that “a constitutional right is by its nature so much more important to the claimant than a statutory right that a statute which plainly excludes the latter should not be read to exclude the former unless it says so . . . has never been announced . . . because its premise is not true”). In *Webster*, the Court dismissed a statutory claim under the APA, but remanded for constitutional claims arising from the claimant’s security clearance revocation. See *id.* at 601, 605; see also *supra* notes 142-54 and accompanying text (discussing the *Webster* decision).

<sup>200</sup> See *supra* note 167 and accompanying text.

<sup>201</sup> 462 U.S. 367 (1983).

<sup>202</sup> 487 U.S. 412 (1988).

<sup>203</sup> 425 U.S. 820 (1976).

<sup>204</sup> 442 U.S. 228 (1979).

<sup>205</sup> See *supra* notes 167-69 and accompanying text. Susan Bandes argues that the judicial branch must enforce constitutional claims when congressional authorization does not exist and even when a statutory scheme exists, but is inadequate. See Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 293-325 (1995). According to Bandes, the Judiciary must provide *Bivens* claims to individuals in order to fulfill its role in a functionalist separation-of-powers regime in which the three branches share duties and serve as checks and balances to each other to avoid governmental tyranny. See *id.* at 316. If the Supreme Court adheres to Bandes’s advice, the anomaly that this Note addresses might find an alternative solution to a proposed amendment to Title VII. Thus, the Court could reverse its trend of increasing deference to congressional inaction and begin to support Bandes’s broader *Bivens* approach, which mandates that the Judiciary, “whenever necessary, fashions adequate remedies for constitutional wrongs.” *Id.* at 298. However, this argument is beyond the scope of this Note, and Bandes has effectively provided a framework for the courts to employ should they choose not to allow Title VII to preclude *Bivens* claims in security clearance determinations.

<sup>206</sup> See *supra* Part II.B.1.

authority and discretion to control the security clearance process,<sup>207</sup> and (2) the judiciary lacks the institutional competence to infringe upon this discretion.<sup>208</sup> However, *Egan* left one door open for substantive review.<sup>209</sup> The Court acknowledged that if Congress had specifically provided for review of the merits of security clearance decisions, the Judiciary would not defer to the Executive.<sup>210</sup>

In light of the foregoing situation, Congress should take action to protect the rights of employees who are currently handicapped by Title VII coverage. Specifically, Congress should amend Title VII to provide for a review of the merits of security clearance determinations. The proposed amendment would be most effective if Congress altered subsections (c) and (e) of the Equal Opportunity Act of 1972<sup>211</sup> to read as follows (proposed additions in italics):

(c) CIVIL ACTION BY EMPLOYEE OR APPLICANT FOR EMPLOYMENT FOR REDRESS OF GRIEVANCES; TIME FOR BRINGING OF ACTION; HEAD OF DEPARTMENT, AGENCY, OR UNIT AS DEFENDANT

Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant. *Any court in which an employee files a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, shall have the authority to review the merits of such a claim, including a claim in which an employee files a complaint of discrimination arising from the revocation or denial of that employee's national security clearance.*

...

<sup>207</sup> See *supra* notes 111-16, 118-19 and accompanying text.

<sup>208</sup> See *supra* notes 117, 119 and accompanying text.

<sup>209</sup> See *supra* notes 121-22 and accompanying text.

<sup>210</sup> See *Department of Navy v. Egan*, 484 U.S. 518, 530 (1988); *supra* notes 121-22 and accompanying text.

<sup>211</sup> 42 U.S.C. § 2000e-16(c), (e) (1994).

(e) Government agency or official not relieved of responsibility to assure nondiscrimination in employment or equal employment opportunity

Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment, *including nondiscrimination in the revocation and denial of national security clearances*, as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.<sup>212</sup>

Additionally, Congress should amend section 703(g) of the Civil Rights Act of 1964<sup>213</sup> to silence critics who have argued that Congress enacted section 703(g) to foreclose judicial review of security clearance decisions.<sup>214</sup> Thus, an amendment to section 703(g) should read as follows (proposed additions in italics):

(g) NATIONAL SECURITY

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement. *However, any court of competent jurisdiction in which an employee files a complaint of discrimination regarding this determination, pursuant to section 2000e-5 of this title, shall have the authority to review*

---

<sup>212</sup> *Id.* (proposed additions in italics).

<sup>213</sup> *Id.* § 2000e-2(g).

<sup>214</sup> *See, e.g.,* Ryan v. Reno, 168 F.3d 520, 524 n.3 (D.C. Cir. 1999) (“Our decision [that a discrimination claim based on an adverse security clearance decision is not actionable under Title VII] is fortified by Title VII’s express language exempting employment actions based on security clearance possession *vel non.*”); Guillot v. Garrett, 970 F.2d 1320, 1325 (4th Cir. 1992) (“Congress may have even confronted the specific question of whether there should be review of security clearance decisions under the authority of the Civil Rights Act and concluded that such decisions should instead be committed solely to the discretion of the responsible Executive branch departments and agencies.”); Pamela L. Perry, *Balancing Equal Employment Opportunities with Employers’ Legitimate Discretion: The Business Necessity Response to Disparate Impact Discrimination Under Title VII*, 12 INDUS. REL. L.J. 1, 41 n.193 (1990) (“Congress determined . . . that . . . national security would outweigh disparate impact discrimination . . .”).

*the merits of such a claim, even if such review requires a determination as to whether such individual has fulfilled or has ceased to fulfill that requirement.*<sup>215</sup>

An amendment to section 703(g) would not strip the government of its authority to revoke a security clearance if an employee "has not fulfilled or has ceased to fulfill" a "requirement imposed in the interest of national security."<sup>216</sup> Instead, the amendment would merely provide a judicial check to ensure that the government grounds such decisions on legitimate national security requirements.

To clarify these amendments, Congress should also define the term "review of the merits." An addition to section 701 of the Civil Rights Act of 1964 would provide a guideline for courts when they review security clearance decisions. The addition should read as follows:

(o) *The term "review of the merits" means that the adjudicating body will first consider all the available evidence that the employer used to make the disputed decision and will subsequently review the reasonableness of the employer's action based on that evidence.*

These amendments would enable courts to review the merits of security clearance decisions affecting employees protected under Title VII.

#### A. Challenges to Legislation

The viability of the amendment hinges upon overcoming several obstacles. The first hurdle is to convince Congress that an amendment that could compel the Executive to disclose sensitive information is necessary. Opponents of a Title VII amendment might argue that this would be difficult because section 703(g) of the Civil Rights Act of 1964 arguably forecloses judicial review of security clearance decisions.<sup>217</sup> Moreover, during the passage of the Equal Employment Act of 1972, Congress explicitly stated that it did not intend to infringe upon executive discretion in decisions affecting national security.<sup>218</sup>

Even if Congress passes an amendment to Title VII, the revisions would probably encounter other challenges from the President. First, the President can exercise his veto power if he believes the legislation would interfere with executive discretion in security clearance proce-

---

<sup>215</sup> 42 U.S.C. § 2000e-2(g) (proposed additions in italics).

<sup>216</sup> *Id.*

<sup>217</sup> See *supra* note 214 and accompanying text.

<sup>218</sup> See H.R. REP. NO. 92-238 (1972), reprinted in 1972 U.S.C.C.A.N. 2137, 2185 ("In providing the statutory basis for such appeal or court access, it is not the intent of the Committee to subordinate any discretionary authority or final judgment now reposed in agency heads by, or under, statute for national security reasons in the interests of the United States.").

dures.<sup>219</sup> Judging from the Executive Branch's previous reaction to attempts to limit its discretion in national security matters, the veto seems likely.<sup>220</sup> However, Congress could override the veto if it garnered a two-thirds vote.<sup>221</sup>

The President can also exercise another check by challenging the constitutionality of the amendment in court.<sup>222</sup> Constitutional objections to the legislation would proceed under the doctrine of separation of powers.<sup>223</sup> Arguing that the discretion to control security clearance decisions "must be committed to the broad discretion of the agency responsible,"<sup>224</sup> opponents could view mandatory judicial review of security clearance decisions as an encroachment upon the President's privilege in the protection of national defense and international relations.<sup>225</sup>

## B. Defending the Amendment

Despite these stiff challenges, this Note concludes that the doctrine of separation of powers provides Congress with the responsibility and the authority to pass the foregoing amendment to Title VII. The Supreme Court's inability to settle on a uniform approach to this doctrine, however, may have a profound effect on the amendment's durability.

The history of separation-of-powers jurisprudence reflects a vacillation by the Supreme Court "between a formalist approach and a functionalist approach."<sup>226</sup> The formalist approach, which provides the firepower for opponents of the amendment, relies on "adherence to a strict interpretation of the Constitution and the intent of the

---

<sup>219</sup> See U.S. CONST. art. I, § 7, cl. 2.

<sup>220</sup> See *supra* notes 111-16, 118-19.

<sup>221</sup> See U.S. CONST. art. I, § 7, cl. 2. On a related topic, Congress passed the 1974 Amendment to the Freedom of Information Act, which provided for judicial review of information classification determinations. See James A. Goldston et al., Comment, *A Nation Less Secure: Diminished Public Access to Information*, 21 HARV. C.R.-C.L. L. REV. 409, 477 & n.343 (1986). President Ford vetoed the Amendment on the grounds that discretion was necessary and substantive review was detrimental to national security. See *id.* Nevertheless, Congress overrode the veto. See *id.* Nothing in the history of this *de novo* review since that time suggests any detrimental effect on the Executive's power to promote national security.

<sup>222</sup> See John Norton Moore, *Do We Have an Imperial Congress?*, 43 U. MIAMI L. REV. 139, 152-53, 153 n.48 (1988).

<sup>223</sup> See *supra* notes 103-05 and accompanying text. The separation-of-powers doctrine would encompass political question and executive privilege principles as well. See *supra* notes 93-102.

<sup>224</sup> *Department of Navy v. Egan*, 484 U.S. 518, 529 (1988).

<sup>225</sup> See *New York Times Co. v. United States*, 403 U.S. 713, 727-30 (1971) (Stewart, J., concurring).

<sup>226</sup> Michael L. Yoder, Note, *Separation of Powers: No Longer Simply Hanging in the Balance*, 79 GEO. L.J. 173, 173 (1990). I would like to thank Stacey A. Miness for her expert guidance on this complicated history.

framers"<sup>227</sup> by focusing on the constitutionally mandated separation among the three branches of government.<sup>228</sup> Additionally, adherents to this view believe that "power that is characterized as executive, legislative, or judicial must be consolidated exclusively within the corresponding branch of government, the only exceptions being the few explicit checks provided for by the Constitution."<sup>229</sup>

For example, Justice Stewart argued in favor of this "formalist" view of the separation of powers in *New York Times Co. v. United States*<sup>230</sup> (The Pentagon Papers Case): "[U]nder the Constitution the [E]xecutive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully."<sup>231</sup> Despite this argument for plenary national security discretion, Justice Stewart recognized the need to check such unbridled power.<sup>232</sup> However, because his strictly compartmentalized view of separation of powers left the judicial and legislative branches out of this process, the only check that Justice Stewart could identify was the public's ability to vote the President out of office.<sup>233</sup>

But Justice Stewart only scratched at the surface of the true framework for a legitimate separation-of-powers system which the Founding Fathers contemplated at the nation's inception. To begin with, Justice Stewart ignored the constitutional language which gives Congress the authority to check executive action in national security matters.<sup>234</sup> But most significantly, Justice Stewart overlooked the fact that Congress had to serve as a check if the republic was to remain

<sup>227</sup> Lisa A. Cahill & J. Russell Jackson, Note, *Nondelegation After Mistretta: Phoenix or Phaëthon?*, 31 WM. & MARY L. REV. 1047, 1051 (1990).

<sup>228</sup> See Ronald J. Krotoszynski, Jr., *On the Danger of Wearing Two Hats: Mistretta and Morrison Revisited*, 38 WM. & MARY L. REV. 417, 417 n.4 (1997).

<sup>229</sup> Yoder, *supra* note 226, at 173.

<sup>230</sup> 403 U.S. 713 (1971).

<sup>231</sup> *New York Times*, 403 U.S. at 729 (Stewart, J. concurring); see also NOWAK & ROTUNDA, *supra* note 17, § 16.17, at 1025-27 (summarizing the Justices' opinions on the separation of powers doctrine in the Pentagon Papers Case).

<sup>232</sup> See *New York Times*, 403 U.S. at 728 (Stewart, J., concurring).

<sup>233</sup> See *id.* (Stewart, J., concurring) ("In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in . . . an informed and critical public opinion . . .").

<sup>234</sup> For example, the Constitution grants Congress the power, *inter alia*, to (1) "provide for the common Defence," U.S. CONST. art I, § 8, cl. 1; (2) "declare War . . . and make Rules concerning Captures on Land and Water," *id.* art. I, § 8, cl. 11; (3) "make Rules for the Government and Regulation of the land and naval Forces," *id.* art. I, § 8, cl. 14; and (4) "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution," *id.* art. I, § 8, cl. 18. Furthermore, the Constitution gives Congress the power of the purse, by declaring that "[n]o money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." *Id.* art. I, § 9, cl. 7.

viable.<sup>235</sup> According to James Madison, the separation of powers principle did not stand for the proposition that the branches of government “ought to have no *partial agency* in, or no *controul* over the acts of each other.”<sup>236</sup> Rather, Madison took a functionalist approach, cautioning that “where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution [will be] subverted.”<sup>237</sup> Drawing from this history, courts employing a functionalist analysis “presuppose[ ] that the Framers’ intent was to create a government in which the necessary segregation of powers would be accomplished through a system of checks and balances, rather than by complete separation of the three branches.”<sup>238</sup> The Supreme Court has reiterated this functionalist approach in many separation of powers cases.<sup>239</sup>

Despite the aforementioned vacillation by the Court between formalism and functionalism, the majority of the Justices have recently appeared to favor functionalism in separation-of-powers cases. The fact that “[e]very Supreme Court Justice except Justice Scalia agreed with the functionalist approach in [*Mistretta v. United States*<sup>240</sup> and *Morrison v. Olson*]<sup>241</sup> supports this assertion.<sup>242</sup> Moreover, the leading formalist cases have invalidated power-sharing arrangements between Congress and the President, while the functionalist decisions have

<sup>235</sup> See THE FEDERALIST NO. 48, at 332 (James Madison) (Jacob E. Cooke ed., 1961); Jonathan L. Entin, *Separation of Powers, the Political Branches, and the Limits of Judicial Review*, 51 OHIO ST. L.J. 175, 179 (1990).

<sup>236</sup> THE FEDERALIST NO. 47, at 325 (James Madison).

<sup>237</sup> *Id.* at 325-26.

<sup>238</sup> Yoder, *supra* note 226, at 173.

<sup>239</sup> See, e.g., *Mistretta v. United States*, 488 U.S. 361, 381 (1989) (“[T]he greatest security against tyranny—the accumulation of excessive authority in a single Branch—lies not in a hermetic division among the Branches, but in a carefully crafted system of checked and balanced power within each Branch.”); *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977) (rejecting as “archaic” complete isolation of the three branches); *Buckley v. Valeo*, 424 U.S. 1, 121 (1976) (per curiam) (noting Madison’s belief that the branches have a duty of interdependence, a lack of which “would preclude the establishment of a Nation capable of governing itself effectively”); *United States v. Nixon*, 418 U.S. 683, 704 (1974) (adhering to Madison’s flexible approach to the separation of powers); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (“[The Constitution] enjoins upon its Branches separateness but interdependence, autonomy but reciprocity.”).

<sup>240</sup> 488 U.S. 361 (1989).

<sup>241</sup> 487 U.S. 654 (1988).

<sup>242</sup> Yoder, *supra* note 226, at 173 n.6. Although some scholars do not agree that *Mistretta* and *Morrison* represent an adoption of functionalism, see Cahill & Jackson, *supra* note 227, at 1048 n.7 (citing scholars who hold this view), most acknowledge that “functionalism has been somewhat more prevalent than formalism in the Supreme Court’s separation of powers jurisprudence.” Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 CORNELL L. REV. 1, 6-7 (1994). For a helpful categorization of many of the significant separation-of-powers decisions along functionalism/formalism lines, see McCutchen, *supra*, at 7 n.21.

permitted the Judiciary to assume legislative and executive functions, favoring the power transfer at issue here.<sup>243</sup> However, the Court has sidestepped official endorsement of one school of thought over the other and instead continues to rely on both approaches—sometimes even in cases decided contemporaneously.<sup>244</sup> Consequently, the Court might conceivably rely on either functionalist or formalist rhetoric to analyze a constitutional challenge to this Note's proposed amendment.<sup>245</sup>

If the Court uses a functionalist analysis, it will probably rely on the framework set forth in *Mistretta v. United States*.<sup>246</sup> The *Mistretta* Court held that Congress cannot usurp power that properly belongs to another branch.<sup>247</sup> In addition, the Court found that legislation which creates a "potential for disruption" of another branch could be struck down.<sup>248</sup> In such cases, courts must determine "whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress."<sup>249</sup>

Under *Mistretta*, a court might strike down this Note's proposed Title VII legislation. However, despite the Supreme Court's history of protecting executive discretion—both generally<sup>250</sup> and particularly in the national security context<sup>251</sup>—this result seems unlikely.<sup>252</sup> Although *Mistretta's* disruption standard might provide ammunition

<sup>243</sup> See Krotoszynski, *supra* note 228, at 480 (comparing the formalist decisions in *Bowsher v. Synar*, 478 U.S. 714 (1986), and *INS v. Chadha*, 462 U.S. 919 (1983), to the functionalist decisions in *Morrison* and *Mistretta*).

<sup>244</sup> See McCutchen, *supra* note 242, at 6 n.20 (citing, among other cases, *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252 (1991), as an example of formalism and *Freitag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991), decided 10 days later, as an example of functionalism).

<sup>245</sup> Incidentally, at least one scholar has espoused the view that "the functional approach offers the judge a purportedly realistic rhetoric with which to justify a decision upholding a statute" and "the formal approach offers the judge a purportedly legalistic rhetoric with which to justify a decision that strikes down the statute." Mark Tushnet, *The Sentencing Commission and Constitutional Theory: Bowls and Plateaus in Separation of Powers Theory*, 66 S. CAL. L. REV. 581, 581 (1992). This theory suggests that the fate of this Note's amendment hinges upon the Justices' determination of whether or not they want the amendment to take effect. Nonetheless, this Note contends that the amendment can survive scrutiny under either approach.

<sup>246</sup> 488 U.S. 361 (1989).

<sup>247</sup> See *id.* at 382-83.

<sup>248</sup> *Mistretta*, 488 U.S. at 383 n.13 (quoting *Nixon v. Administrator of Gen. Serv.*, 433 U.S. 425, 433 (1977)).

<sup>249</sup> *Id.*

<sup>250</sup> See *supra* note 102.

<sup>251</sup> See *Department of Navy v. Egan*, 484 U.S. 518 (1988); cf. *Webster v. Doe*, 486 U.S. 592 (1988) (Scalia, J., dissenting) (contending that a "textually demonstrable constitutional commitment" of national security issues to the Executive Branch may exist).

<sup>252</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 647 (1952) (Jackson, J., concurring) ("[Although] [t]he claim of inherent and unrestricted presidential powers has long been a persuasive dialectical weapon in political controversy[,] . . . a judge cannot accept self-serving . . . statements . . . in answering a constitutional question . . .").

for opponents of a Title VII amendment, the courts should consider the importance of this amendment as “an overriding need to promote” Congress’s constitutionally sanctioned objectives. Therefore, the legislation should prevail under a functionalist approach.

Alternatively, the amendment may also survive analysis under a formalist approach. As described above, formalism provides an exception to its strict power-within-each-branch mentality in the form of checks among the branches of government specifically provided in the Constitution.<sup>253</sup> In the context of national security, Congress does possess this requisite constitutional authority to check executive action.<sup>254</sup> Consequently, the proposed legislation still has a chance to succeed under formalism’s more exacting standard.

Thus, the doctrine of separation of powers under either approach requires Congress to serve as a check on executive discretion in national security matters. Because the Legislative Branch bears the responsibility of funding and maintaining the Executive’s national security system,<sup>255</sup> it must have reassurance that the Executive is carrying out these affairs competently. Congress can achieve this result by providing for judicial review of the merits of security clearance decisions. On the other hand, if claimants remain unable to receive substantive review under Title VII in these situations, Congress will be unable to ensure that the Executive Branch is administering the nation’s business legitimately and effectively. Moreover, the unamended provisions as they now stand represent an inexcusable abdication of responsibility on the part of Congress. Until Title VII furnishes a forum for claims of discrimination in the security clearance context, thousands of federal employees will be subject to the whims of executive discretion, because the Legislature has lost sight of the statute’s overarching theme: freedom from discrimination in employment.<sup>256</sup>

---

<sup>253</sup> See *supra* text accompanying note 104.

<sup>254</sup> See *supra* note 234.

<sup>255</sup> See U.S. CONST. art. I, § 9, cl. 7.

<sup>256</sup> In *United States Info. Agency v. KRC*, 905 F.2d 389 (D.C. Cir. 1990), Chief Judge Wald of the D.C. Circuit recognized this dilemma after ruling that the APA did not provide for substantive review of a security clearance determination:

I find highly disconcerting the notion that government agencies can terminate outstanding civil servants without any substantive review simply by invoking “national security.” The possibility of unreviewable agency “security officers” giving effect to homophobic or other biases is all too apparent. Congress clearly has the authority to provide for substantive review of security clearance determinations, *Department of the Navy v. Egan*, 484 U.S. 518, 530 (1988) . . . I hope that this case will encourage it to consider such a course.

*Id.* at 400 (separate statement). Judge Mikva agreed and asserted that

[n]o one can be comfortable with the process that has been afforded the federal employee in this case, even though it may be all the process that is due under the statute. I too hope that Congress will revisit the statutory scheme and provide federal employees with a better plan.

To quell the congressional and judicial discomfort that inevitably will result from this amendment, the legislative history should emphasize that substantive judicial review does not need to trample the Executive Branch's important need for secrecy. As Chief Justice Rehnquist noted in *Webster v. Doe*,<sup>257</sup> courts can easily control the discovery process with in camera proceedings.<sup>258</sup> Thus, a judge can safely balance the needs of the employee and the agency without risking security breaches.<sup>259</sup> Under the foregoing discovery framework, there is no reason to believe that a court could not determine whether a revocation or denial is merely a pretext for discrimination.<sup>260</sup>

Because courts already conduct similar inquiries in other types of discrimination cases, these determinations are unlikely to be beyond the scope of their institutional competence.<sup>261</sup> Moreover, courts regularly review security clearance decisions when the plaintiff has asserted

*Id.* (separate statement).

Interestingly, even though the judges bemoaned the employee's lack of statutory protection from discrimination in this context, the D.C. Circuit remanded the claimant's equal protection claim so that the district court could conduct a substantive review. *See id.*<sup>257</sup> 484 U.S. 518 (1988).

<sup>258</sup> *See id.* at 604. In contrast, the Court in *Department of Navy v. Egan*, 484 U.S. 518 (1988), had argued that review of security clearance determinations was generally beyond the ken of federal courts. *See id.* at 528-30; *see also* notes 111-19 and accompanying text (discussing the *Egan* Court's decision).

<sup>259</sup> *See Webster*, 484 U.S. at 604. The Chief Justice asserted that the District Court has the latitude to control any discovery process which may be instituted so as to balance [a claimant'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 mission.

*Id.* (citing *Kerr v. United States District Court*, 426 U.S. 394, 405 (1976) and *United States v. Reynolds*, 345 U.S. 1 (1953)).

In *Kerr*, the Supreme Court sanctioned in camera review of state prison parole documents. *See Kerr*, 426 U.S. at 405. The Court viewed in camera review as a "relatively costless and eminently worthwhile method to ensure that the balance between petitioners' claims of irrelevance and governmental privilege and plaintiffs' asserted need for the documents . . ." *Id.* (citing *United States v. Nixon*, 418 U.S. 683, 706 (1974)).

In *Reynolds*, the Supreme Court allowed the government to assert privilege and avoid producing military documents in a tort case. *See Reynolds*, 345 U.S. at 2. The Court noted that the government may prevail on a privilege claim without submitting documents for in camera review:

Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. It may be possible to satisfy the court, from all the circumstances of the case, that there is reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case . . . the court should not jeopardize the security . . . by insisting upon examination of the evidence, even by the judge alone, in chambers.

*Id.* at 9-10.

<sup>260</sup> *See Webster*, 486 U.S. at 604.

<sup>261</sup> *See id.* ("Title VII claims attacking the hiring and promotion policies of the Agency are routinely entertained.")

a constitutional claim.<sup>262</sup> This inquiry would not require a court to tackle the difficult questions that agencies face when they conduct background investigations “to define not only the individual’s future actions, but those of outside and unknown influences.”<sup>263</sup> Therefore, it seems unlikely that review of statutory claims would force courts to delve into terrain that is either unfamiliar or beyond the boundaries of their institutional competence.

#### CONCLUSION

There is no acceptable rationale behind the disparate treatment of constitutional and Title VII claims in national security clearance decisions. To base distinctions on the empty recitation of words is to place form above function, often with deleterious results. The inability of Fernando Mata and Ernest Brazil to vindicate their Title VII retaliation claims demonstrates the absurdity of this distinction.<sup>264</sup> Because courts have abdicated their power of review over the Executive in Title VII security clearance cases, the only remedy is to enlist the aid of Congress. Thus, Congress must amend Title VII to provide for review of the merits of security clearance claims. Without this legislative action, the Executive Branch’s national security policies could conceivably run rampant over individuals who have no forum for their valid discrimination claims.

---

<sup>262</sup> See, e.g., *Dubbs v. CIA*, 866 F.2d 1114, 1120 (9th Cir. 1989) (reversing summary judgment on plaintiff’s constitutional claim when plaintiff alleged discrimination on the basis of sexual preference).

<sup>263</sup> *Egan*, 484 U.S. at 529.

<sup>264</sup> See *Perez v. FBI*, 71 F.3d 513, 515 (5th Cir. 1995); *Brazil v. Navy*, 66 F.3d 193 (9th Cir. 1995).