UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

MAHMOUD M. HEGAB Plaintiff,	)	
v.	)	Civil No.1:11 CV 1067 JCC/IDD
LETITIA A. LONG, Director, National Geospatial-Intelligence Agency	)	
and	)	
NATIONAL GEOSPATIAL-INTELLIGENCE AGENCY	)	
Defendants.	)	

PLAINTIFF'S OPPOSITION TO
DEFENDANTS' MOTIONS TO DISMISS

Plaintiff opposes defendants' motion to dismiss this action under Rule 12(b)(1) and Rule 12.b(6), Fed. R. Civ. Pro. Defendants move under *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009) to dismiss for plaintiff's failure to plead specific facts to support his claim, and to dismiss under *Dept. Of Navy v. Egan*, 484 U.S. 518 (1988) on the ground that the Executive Branch has plenary authority over the grant or denial of security clearances and access to classified information. Neither position is well founded.

The Facts

Plaintiff pleaded that when employed by defendant NGA, he held a Top Secret security clearance and Access to Sensitive Compartmented Information and there were no problems with his employment, and his performance was well regarded by his supervisors. (¶9).[1] When plaintiff began working at NGA on January 4, 2010 he informed the security officer that he had gotten married to

[1] "¶" refers to the paragraphs of Complaint in this case.

Bushra Nusurait in a civil ceremony, but they had not yet begun to live together because, according to their religion, until there was a religious ceremony, they were considered betrothed and not married (¶10).[2] Plaintiff pleaded that they were married in a religious ceremony on October 2, 2010 after which they began living together as husband and wife (¶ 10); that on November 18, 2010 he received a memorandum dated November 2, 2010, by which NGA notified him of its immediate suspension of, and intent to revoke his security clearance and his access to classified information (¶¶13-15) (Gov't Ex. 7).[3] The proposed revocation was based in part on his marriage to Ms. Nusurait and her connections to various organizations, and in part on information he had previously provided in 2009 as part of his security clearance investigation which had been reviewed, discussed, and cleared by NGA prior to his being hired and being granted a security clearance (¶ 12) (Govt Ex. 7). As of November 18, 2010 plaintiff was not allowed to re-enter NGA facilities and NGA proposed to indefinitely place him on administrative leave based on the suspension of his security clearance (¶¶ 13 and 14).

The issues raised by NGA in the proposed revocation of access concerning plantiff's wife were: (1) "your spouse's attendance and graduation from the Islamic Saudi Academy, whose curriculum, syllabus, and materials are influenced, funded, and controlled by the Saudi government";

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[2] Defendants state that when NGA hired and initially granted plaintiff a clearance it knew of his religious affiliation (Def't Memo, p. 20, f.n. 5), but fail to note that after granting plaintiff a clearance, NGA on November 2, 2010,in addition to its objection to his marriage, proposed to revoke plantiff's clearance based on the very same information plaintiff had initially provided (Gov't Ex. 7, p. 4). NGA now proposed to revoke on the additional ground that plaintiff would have to be in contact with Egyptian officials to get a new Egyptian passport to replace the expired one he had already turned so he could turn it in again. Plaintiff's response to NGA pointed to the regulation which required only that he turn in any active passport to a designated official, which he had long since done (Plt. Ex. 2, pp. 16-18).

[3] "Gov't. Ex." refers to the exhibits attached to Defendants' Motion to Dismiss.

and (2) "information available through open sources [which] identifies your spouse as being or having been actively involved in one or more organizations which consist of groups who are organized largely around their non-United States origin and their advocacy of or involvement in foreign political issues" (¶ 16) (Gov't. Ex. 7, p. 4). Plaintiff subsequently requested and received from NGA the file which contained the information which NGA claimed supported its proposal to revoke plaintiff's security clearance (¶ 17) (Plt. Ex. 1, Investigative File, p. 6-13).[4] NGA never provided any additional information, although requested, regarding plaintiff's wife or her employer, Islamic Relief USA for its decision.

With respect to plaintiff, the file contained the same materials which plaintiff had submitted in 2009 prior to his being hired by NGA and prior to having been granted a security clearance (¶ 18) (Plt. Ex.1). With respect to his wife, the file contained: (1) reports of statements of various anti-Islamic organizations concerning the Saudi Islamic Academy; (2) a photograph "believed to be that of applicant's spouse taken at an 'anti-war occupation protest in Washington'" on the grounds of the Washington monument, carrying a sign which bore the website identification of an organization with the acronym "ANSWER", the sign stating, "War No - Act Now to Stop War and End Racism"; (3) a statement that "open source references to Bushra Nusairat indicate that following her graduation from Islamic Saudi Academy in 2005 she attended George Mason University (GMU)", (4) the further statement that "She reportedly attended GMU from 2005 to 2009 and her area of study was shown as 'Global Affairs, International Development, Diplomacy and Global Governance, Islamic Studies';

[4] "Plt. Ex." refers to the exhibits attached to this Opposition. Although the investigative file provided stated that all information on Ms. Nusarait was "open source" or from the internet and was not marked "Secret or Classified", more than 6 pages were totally redacted.

and (5) she was also shown to be president of Students for Justice in Palestine at GMU." (¶ 19) (Plt. Ex. 1, p. 12).

The file provided by NGA further quoted Ms. Nusairat as saying: "SJP has a mission, like that of the U.S.C., which is concentrated on educating our membership, and the GMU community at large, about the ongoing Israel and Palestine conflict", and that "Our goal on this campus is to disseminate correct information about the plight of the Palestinian people and to be the voice of the under-represented." (¶ 20) (Plt. Ex.1, p.13).

As a further basis for revoking plaintiff's clearance, the NGA file contained the statement that: "Subject told an NGA polygrapher in March, 2010 that Bushra Nusairat now works for a non-profit organization called 'Islamic Relief' which supports 'humanitarian relief efforts.'" (¶ 21) (Plt. Ex 1, p. 13).

On January 19, 2011 plaintiff responded to the proposed revocation of his clearance and access. With respect to the allegations against him personally, plaintiff provided the same information he had initially provided to NGA prior to his hire. With respect to his wife, plaintiff responded that his wife "is a U.S. citizen residing in the U.S. who has never been accused of any illegal activity or being associated with any illegal activity." Along with the response, plaintiff provided fifty exhibits of supporting documentary evidence (¶ 22, 23, 24) (Plt. Ex 2).

With respect to the allegation concerning his wife's attendance at the Islamic Saudi Academy, plaintiff provided evidence that his wife was enrolled by her parents in Islamic Saudi Academy because: it taught Arabic and Islamic Studies which no other school in the D.C. area did at that time; that his wife attended Islamic Saudi Academy from the first through twelfth grades with the exception of sixth and seventh grades when her father held a teaching position abroad; that

Islamic Saudi Academy encourages sports, community service, national leadership, and arts participation; that the curriculum it uses is based on the Fairfax County, Virginia curriculum for Math, Science, English, and Social Studies, and on the Saudi curriculum for Arabic and Islamic Studies; that Islamic Saudi Academy students participate in activities that allow them to interact with non-Muslims, such as Model United Nations, varsity soccer and basketball, community service programs, and Help the Homeless Walkathons; and that Islamic Saudi Academy has served as an advisor to the U.S. Army, Fort Belvoir, on Arabic language and Arabic cultural studies (¶ 25) (Plt. Ex.2, pp. 21-29).

Plaintiff further provided evidence that the combined secular-religious curriculum of the Islamic Saudi Academy is no different than other religious schools such as, for example, the Yeshiva of Greater Washington which teaches based on a Jewish curriculum, the Blessed Sacrament School which teaches a Catholic curriculum, and Fairfax County Christian Academy which teaches in a Christian atmosphere, and that the stated goal of each of these schools is virtually identical, with the only difference being the particular religious viewpoint taught to the students (¶ 26) (Plt. Ex.2, pp 21-29).

Further, plaintiff provided evidence with respect to the allegation concerning his wife's connection to "ANSWER", that she attended a rally in 2003 on the U.S. Capitol steps protesting the war in Iraq, a rally in which tens of thousands of Americans converged on Washington to voice their disapproval of the war, that his wife was at the time sixteen years of age, that she picked up a poster at the rally grounds that described how she felt about the Iraq war, and that she was not affiliated with the organization, ANSWER, its missions, or its objectives in any way (¶ 27) (Plt. Ex. 2, pp. 29-31).

Plaintiff further provided evidence that at the rally one of the day's many speakers was a Democratic presidential candidate, and that a large number of veterans and military families with loved ones in Iraq also participated (¶ 28) (Plt. Ex.2, pp 29-31).

With respect to NGA's concerns regarding his wife's connection to Students for Justice in Palestine, plaintiff presented evidence that his wife, while attending George Mason University as an undergraduate between 2005 and 2009 was the president of Students for Justice in Palestine, that it was a student organization sanctioned and funded by George Mason University like other student organizations, and that the organization advocated a peaceful solution for a difficult problem, the differences between the state of Israel and the Palestinians in the West Bank (¶ 29) (Plt. Ex.2, pp.31-34).

With respect to NGA's concerns about his wife's employment by Islamic Relief USA, plaintiff provided evidence that his wife had held the position of Program Associate with that organization since shortly after her graduation from George Mason University, that Islamic Relief USA is a U.S. based organization founded in 1993 in California and was currently based in Alexandria, Virginia, that its mission is to alleviate suffering, hunger, illiteracy and disease worldwide, and to provide aid in a dignified and compassionate manner regardless of color, race, religion or creed (¶ 30) (Plt. Ex. 2, pp 34-35). Plaintiff further provided evidence that Islamic Relief USA is part of Inter-Action, the largest network of non-governmental development organizations in the USA, that it is a participating member of the Combined Federal Campaign, and that its purpose is no different than other faith-based relief organizations, such as the American Jewish Joint Distribution Committee, Catholic Charities USA, and the Latter Day Saints Charities, to name but a few (¶ 31) (Plt. Ex2, pp34-35).

In his response to the proposed revocation of his security clearance plaintiff argued that NGA's proposed action was based on rumor, innuendo and guilt by association, that it was religiously biased against Islam and violated plaintiff's and his wife's free exercise of their religion of Islam, their right to peaceably assemble to petition the government for a redress of grievances, and their right to freedom of speech to express legitimate political concerns, all guaranteed by the First Amendment to the Constitution of the United States (¶ 32) (Plt. Ex.2, pp1-20).

On March 4, 2011 NGA issued its decision revoking plaintiff's security clearance and access to SCI. In its decision, NGA stated that plaintiff had mitigated the concerns of his citizenship, foreign contact, overseas employment and residency, the same issues of which it had previously cleared plaintiff prior to his having been hired (¶ 33) (Gov't. Ex. 8). NGA also determined that plaintiff had satisfied its concerns about spouse's education at the Islamic Saudi Academy (¶ 34).

NGA's decision did not resolve all issues. It further stated:

> However, the information provided does not mitigate your spouse's current affiliation with one or more organizations which consist of groups who are organized largely around their non-United States origin and/or the advocacy of or involvement in foreign political issues. This concern elevates the potential for conflicts of interest between your obligation to protect sensitive or classified United States information and technology and your desire to help a foreign person, group, or country by providing that information. (Emphasis added) (¶ 35) (Gov't. Ex. 8).

Because plaintiff's wife had by then graduated from George Mason University and was no longer a member of the student organization, Students for Justice in Palestine, because evidence had been presented that she was never affiliated with "ANSWER", and because the only other group identified in NGA's file of supporting information accompanying the proposed revocation, was his wife's current affiliation with her employer, Islamic Relief USA, plaintiff's counsel, on March 15, 2011 wrote to the Chief of NGA's Adjudications Branch requesting that due to the ambiguity of the

decision revoking plaintiff's clearance and access, to "please advise if NGA is referring solely to Ms. Nusairat's current affiliation with Islamic Relief USA or if it is referring to some other organization or organizations not previously identified." (¶ 36) (Plt. Ex.3). In response on March 24, 2011, NGA's Chief, Adjudications Branch replied, "NGA is not referring to organizations not previously identified" (¶ 37) (Plt. Ex. 4).

Plaintiff thereafter filed a timely appeal to the NGA Personnel Security Appeals Board of the decision revoking his clearance and access, consisting of his further written response and eighty five accompanying exhibits (¶ 38) (Plt. Ex.5). Plaintiff presented evidence that Islamic Relief USA is a charitable organization whose purpose is to alleviate poverty and suffering wherever it is found, paying no heed to gender, race or creed; that it was incorporated in the State of California in 1993; that it was granted non-profit status as a 501(c)(3) charitable organization by the Internal Revenue Service in 1994; that it is a member of the Combined Federal Campaign, a requirement of which is not to be affiliated with any terrorist or terrorist supporting organizations; and that it sponsors an annual Iftar (end of Ramadan) dinner in Washington, which in the past has been attended by the Director of President Obama's faith-based initiatives, representatives from the Department of Homeland Security, the U.S. Institute for Peace, and an Ambassador and former U.S. Senator (¶ 39) (Plt. Ex.5. pp. 1-12 and attachments). Plaintiff further presented evidence that Islamic Relief USA has been included in the White House Leadership Consultation for Faith, Health, and Development; that it was announced in President Obama's "United Who We Serve Initiative" as part of the Interfaith Service Week; that it was recognized by President Obama in his message to Muslims worldwide as one of the Muslim-American organizations engaged in volunteering community-wide service; and that it was recognized by the White House Office of Faith Based and Neighborhood

Partnerships as an example of more than thirty organizations represented at the Consultation on Global Hunger (¶ 40) (Plt. Ex.5, passim). Plaintiff further presented evidence that Islamic Relief USA has been recognized by the Department of Defense, Department of Homeland Security, the United States Mission to the United Nations, the Department of State, the United States Census Bureau, USAID, the Department of Agriculture, and the White House for its role for many years in providing disaster relief in the United States and throughout the world, along with other non-government organizations (¶ 41) (Plt. Ex. 5, pp. 1-12).

Plaintiff further presented evidence that the CEO of Islamic Relief USA, Mr. Abed Ayoub, was invited by the Department of Agriculture and USAID to be part of the International Food, Aid, and Development Conference, and to be part of a panel session on interfaith cooperation to feed hungry people, and was invited by USAID to be a member of the Advisory Committee on Voluntary Foreign Aid (¶ 42); that Islamic Relief USA has partnered with the Church of Jesus Christ of Latter Day Saints and numerous other faith-based charitable organizations to provide relief worldwide (¶ 43); that a number of U.S. Senators and Representatives have also recognized the importance of the work of Islamic Relief USA, including Senator John Kerry, Senator Carl Levin, Representative Elliott Engel, and Representative Maxine Waters (¶ 44); that Islamic Relief USA has been commended by the Governor of the State of Illinois for its commitment to providing crucial services to refugees in Illinois (¶ 45); that numerous agencies of the United Nations, including the United Nations Relief and Works Agency (UNRWA), United Nations Economic and Social Council (ECOSOC), International Fund for Agricultural Development (IFAD), and the United Nations Fund for Providing Relief for Children (UNICEF) all have noted and recognized Islamic Relief USA's worldwide charitable efforts (¶ 46); that its charitable work has been recognized by other non-

governmental organizations including the Church of Jesus Christ of the Latter Day Saints, Catholic Relief Services, progressive Evangelical leaders, the Jewish Council for Public Affairs, Meals on Wheels, the Jewish World Service, Tents of Hope, Save Darfur Coalition, the American Council for Voluntary International Relief, and Religions for Peace, among other non-governmental organizations which have all collaborated with Islamic Relief USA in providing charitable relief throughout the world and which have recognized its important role in this area (¶ 47); and that Charity Navigator, the leading organization in judging the quality and effectiveness of charitable organizations in the United States, gives Islamic Relief USA a four star rating, its highest rating, and that the Chronicle of Philanthropy rated Islamic Relief as number 132 among the top 400 charities in the United States (¶ 48) (Plt. Ex.5, pp. 13-18).

Importantly, plaintiff provided evidence of who and what Islamic Relief is not: that it is not listed on the Department of Treasury's list of foreign controlled or subversive organizations even though it has the word, Islam, in its name; that it has not been identified by the CIA as a subversive or terrorist organization; that it has not been subject to an IRS inquiry; that it is not of interest to the FBI; and has not been the subject of Congressional hearings (¶ 49) (Plt. Ex. 5, pp. 18-19).

Plaintiff provided overwhelming evidence in great detail refuting the allegation that it is "organized largely around its non-United States origin and/or its advocacy of or involvement in foreign political issues" (¶ 50). Plaintiff argued in his appeal that NGA's security staff either did not take the time or effort to review the readily available information previously presented to it, or other open source information, or that the security staff assumed that anything with the name "Islam" associated with it is a subversive terrorist organization. Plaintiff further argued that the denial of his clearance and access because his wife is employed as Program Associate by Islamic Relief USA

reflects, most generously, a failure to examine and a misunderstanding of the facts and, less generously, an anti-Islamic bias among the NGA security staff. If the latter were true plaintiff argued, NGA"s actions and conclusions would be in violation of plaintiff's and his wife's constitutionally protected rights of freedom of religion, freedom of expression, and freedom of association (¶ 51) (Plt. Ex.5, pp.1-4).

On July 26, 2011 plaintiff appeared with counsel before the NGA Personnel Security Appeals Board to orally present his appeal. There plaintiff presented additional evidence that Islamic Relief USA's CEO had been appointed to the Advisory Committee on Voluntary Foreign Aid by the United States Agency for International Development; that it had partnered with the Red Cross and other national relief organizations to provide relief to tornado victims in Alabama; and that it had collaborated with the Department of Agriculture and several other faith-based organizations to provide summer food service programs at a local Maryland school (¶ 52) (Plt. Ex.6). Plaintiff again argued that his wife's employment by Islamic Relief USA did not constitute a security risk, that the action taken was solely due to the anti-Islamic bias of NGA's security personnel, and that the revocation of Plaintiff's security clearance and access was in violation of his constitutional rights and privileges (¶ 53).

Nevertheless, NGA Personnel Security Appeal Board (PSAB) the next day, by letter dated July 27, 2011, notified plaintiff that it had affirmed the decision revoking his eligibility for access to sensitive compartmented information. The only reason given was that "the PSAB determined that your written appeal and the information provided during your personal appearance failed to mitigate security concerns related to the Adjudicative Guidelines provided in Reference D." (¶ 54) (Gov't. Ex. 9).

On September 7, 2011 plaintiff's counsel wrote to the Chief, NGA Personnel Security Division, requesting that if NGA possessed other information not previously provided to plaintiff concerning Islamic Relief USA, that supports its decision revoking plaintiff's security clearance due to his wife's employment by that organization that would dissuade plaintiff from filing suit, to please provide it (¶ 55) (Plt. Ex.7). NGA never responded and never provided any additional information (¶ 56).

Plaintiff Has Pleaded Sufficient Facts to State a Claim for Purposeful and Unlawful Violation of his Constitutional Rights.

Defendants argue that the claim is barred because under *Department of Navy v. Egan*, *supra,* it does not satisfy the "plausibility standard" of *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009) (Def't. Memo, p. 10). If the complaint, however, is considered to state a valid cause of action under the Constitution, it does indeed meet the plausibility standard of *Iqbal*.

Ashcroft v. Iqbal holds that:

> to survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face . . .A claim has facial plausibility[5] when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. . . . The plausibility requirement is not akin to a 'probability[6] requirement' but it asks

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[5] Plausibility: The quality of being plausible. Plausible: seemingly true, acceptable, seemingly honest, trustworthy. *Webster's New 20th Century Dictionary, Unabridged, 2d Ed.*, World pub. Co. 1955.

The state of being plausible. Plausible: superficially worthy of belief, credible, superficially fair, reasonable. *Webster's New International Dictionary, 2d. Ed. Unabridged*, G&C Merriam Co. 1939.

[6] Probability: 1. likelihood, chance stronger than possibility but falling short of certainty, quality or state of being probable. Probable: likely;, that can reasonably be expected or believed on the basis of available evidence, though not proved or certain. *Webster's New 20th Century Dictionary, Unabridged, 2d Ed.*, World pub. Co. 1955.

(continued...)

> more than a sheer possibility[7] that a defendant has acted unlawfully. . . .Where a complaint pleads facts that are 'merely consistent with' a defendant's liability it stops short of the line between possibility and plausibility of 'entitlement to relief'" . . . Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals Observed, be a context-specific task the requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 129 S.Ct. 1949-1950.

The facts pleaded in the complaint, as it reflects NGA's conduct, show that it is more than likely that plaintiff's security clearance and access to classified information was revoked solely due to an anti-Islamic bias against his wife's employment by Islamic Relief USA, a non-profit charitable organization. From the evidence presented to NGA and not disputed, there is no likelihood that her employer is "a group largely organized around [its] non-United States origin and/or [its] advocacy of or involvement in foreign political issues", and no likelihood that his wife's employment by it would be a security risk. The facts pleaded go well beyond the *plausibility* requirement of *Iqbal*, if not indeed into the realm of *probability*.

A complaint has facial probability when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Iqbal*, 129 S. Ct. 1949. The single dominant thread throughout NGA's action is its objection to anything

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[6](...continued)

Quality or state of being probable, likelihood, likely to occur. Probable: having more evidence for than against; supported by evidence strong enough to establish presumption but not proof of the truth. *Webster's New International Dictionary, 2d. Ed. Unabridged*, G&C Merriam Co. 1939.

[7] Possibility: "The quality of being possible". Possible: "1. That can be; capable of existing 2." That can be in the future; that may or may not happen, distinguished from probable. *Webster's New 20th Century Dictionary, Unabridged, 2d Ed.*, World pub. Co. 1955.

"The character, state of fact of being possible. Possible, That may or may not occur, that may chance, dependent on contingency, neither probable nor impossible, potential as by nature or circumstance. *Webster's New International Dictionary, 2d. Ed. Unabridged*, G&C Merriam Co. 1939.

with the name "Islam" in it, regardless of the evidence presented that plaintiff's wife was neither involved with, nor associated with any organization that was subversive, terrorist, a danger to the national security, or organized largely around its non-United States origin, and/or its advocacy or involvement in foreign political issues. In this case, the facts pleaded lead to the necessary conclusion of a likelihood that NGA revoked plaintiff's clearance and access because of his wife's connection with Islam and Islamic organizations and for no other reason.

Dept. Of Navy V. Egan, Does Not Bar the Court from Hearing a Challenge to a Revocation of a Security Clearance in Violation of Plaintiff's Constitutional Rights

The President's power to regulate security clearances, under Article II of the Constitution is not unlimited when it conflicts with an individual's constitutional rights. All of plaintiff's claims arise under the Constitution. The government argues that *Dept. Of Navy v. Egan*, *supra*, gives the Executive Branch plenary authority over determining access to classified information. Defendants state: "The Supreme Court in *Egan* held that the Merit Systems Protection Board ("MSPB") lacked authority to review the Executive Branch's decision to deny a newly hired employee a security clearance even though the employee then lost his job," and further state that, "Therefore the Court held, 'unless Congress specifically has provided otherwise' the MSPB could not intrude on that judgment" (Def't. Memo, p. 12-13). With those statements plaintiff agrees, however, that is all the Supreme Court held. *Bacerra v. Dalton*, 94 F.3d 145, 148 (4th Cir. 1996) cert. den. 519 U.S. 1151(1997). The rest of what defendants rely on is dictum. *Dep't of Navy v. Egan* never excluded the role of the courts or Congress in security clearance matters, and the Supreme Court has, since *Egan*, made it abundantly clear that the other two branches of government have a role in these matters.

The *dictum* in *Egan* has been subject to much interpretation.[8] See, *Jamil v. Secretary, Dept. of Defense,* 910 F.2d 1203, 1209 (4th Cir. 1990). Other Federal courts, in interpreting *Egan,* have also found that an agency's discretion in a security clearance determination is not plenary. *King v. Alston*, 75 F.3d 657 (Fed. Cir. 1996) (employee at least entitled to notice of reasons for suspension of access to classified information when that is cause of employee being placed on a forced leave); *Cheney v. Dep't. of Justice*, 479 F.3d 1343 (Fed. Cir. 2007) (or when employee is placed on leave pending a decision on his security clearance). These decisions recognize that even in the realm of security clearances there must be a basic fundamental fairness in a decision that could destroy person's livelihood.

In *Egan,* the Supreme Court held that an agency's discretionary authority to determine a security clearance was based not on a statute, but under the President's authority as Commander-in-Chief under Article II, § 2 of the U.S. Constitution. Although the Court, in dictum, stated that the determination of whether to grant a security clearance was a discretionary judgment call committed by law to the appropriate Executive Branch agency under the President's authority, it did not hold that the President's discretion was unfettered, or that a decision regarding a security clearance was not subject to judicial review. What is clear is that the Supreme Court never meant that the President's power trumped an individual's rights guaranteed by the Constitution, as it so held later the same Term in *Webster v. Doe,* 486 U.S. 592 (1998). It subsequently reaffirmed that position, in *Hamdi v. Rumsfeld,* 542 U.S. 507 (2004) and *Rasul v. Bush,* 542 U.S. 466 (2004).

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[8] For a comprehensive review of the cases interpreting and applying *Egan*, see, L. Fisher, *Judicial Interpretations of Egan,* the Law Library of Congress, LL File No. 2010-003499, Nov. 13, 2009 (Plt. Ex. 8).

In *Webster v. Doe, supra*, the Supreme Court held for there to be a preclusion of judicial review of an individual's constitutional claims in the context of a security clearance, Congress's intent to do so must be clear, which requires a "heightened showing" in part to avoid the "serious constitutional question" that would arise if a federal statute were construed to deny the judicial forum for a colorable constitutional claim 486 U.S. 603. In that case the plaintiff charged that the termination of his employment by the CIA because he was a homosexual deprived him of a property and liberty interest under the due process clause of the Fifth Amendment, that he was denied equal protection of the laws and that the Agency's decision unjustifiably burdened his right to privacy. 486 U.S. 602. The Supreme Court found that nothing in the National Security Act of 1947 demonstrated that Congress meant to preclude consideration of colorable constitutional claims arising out of the actions of the Director of the CIA, and that a constitutional claim based on individual discharge could be reviewed by the District Court. 486 U.S. 603.

The Supreme Court has made it abundantly clear that the President's authority under Article II, Sec. 2 of the Constitution does not automatically override an individual's Constitutional rights. In *Hamdi v. Rumsfeld,*542 U.S. 507 the Supreme Court, reversing the 4th Circuit, acknowledged its earlier ruling in *Egan*, "noting the reluctance of the courts to intrude upon the authority of the Executive in military and national security affairs", 542 U.S. 531, but rejected the Government's argument that a factual exploration of Hamdi's incarceration was unwarranted and inappropriate in light of the extraordinary constitutional interests at stake. 542 U.S. 527-528.[9] The Court did not read *Egan* as prohibiting judicial review in matters questioning the President's powers as

[9] Hamdi was asserting his right to have a hearing on his *Habeas Corpus* petition to challenge the government's assertion that he was an enemy combatant. *Hamdi*, 542 U.S. 528.

Commander-in-Chief.[10] Of the nine Justices, only Justice Thomas, dissenting, cited *Dep't of Navy v Egan*, as giving the President plenary authority to override Constitutional due process requirements under his powers as Commander in Chief. 542 U.S. 598. The Court rejected the government's argument that separation of powers principles mandated a heavily circumscribed role of the courts in balance the rights of individuals against the power of President.[11]

The fourth Circuit has followed *Webster v. Doe,* holding that before a court can conclude that Congress intended to preclude judicial review of a constitutional claim the intent must be clear. *Jamil v. Secretary, Dept. of Defense,* 910 F.2d 1203, 1209 ("It is arguable that [Jamal] might have a valid claim of denial of his constitutional rights to equal protection and to be free fo discrimination because of national " citing *Webster v. Doe* at f.n. 6) . Also, in *Reinbold v. Evers*, 187 F.3d 348, 358 (4th Cir. 1999) the 4th Circuit held: "We have, however, stated that despite *Egan's* admonition restraining judicial review, it is arguable that we could review an agency's security clearance

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[10] In *Rasul v. Bush*, decided the same day as *Hamdi v. Rumsfeld*, the Supreme Court also rejected the President's contention that the Judicial Branch has no say in the conduct of the President's war power, holding that the federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individual who claims to be wholly innocent of wrongdoing. The issue in that case was whether those individuals incarcerated at Guantanamo Naval Base, Cuba could bring an action in *habeas corpus* in the U.S. Courts. 524 U.S. 466, 485 (2004).

[11] "Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake. *Mistretta* v. *United States*, 488 U. S. 361, 380 (1989) (it was 'the central judgment of the Framers of Constitution, that within our political scheme, the separation of governmental powers into three coordinate branches is essential to the preservation of liberty'). *Home Building & Loan Assn*. v. *Blaisdell*, 290 U. S. 398, 426 (1934)." *Hamdi* 542 U.S. 536.

decision in the limited circumstance where the agency's security clearance decision violated an individuals' constitutional rights."

Other Courts have also recognized the authority of *Webster v. Doe*, the courts to review a constitutional challenge to the revocation of a security clearance. *Stehney v. Perry*, 101 F.3d 925, 934 (3d Cir 1996) (cited by defendants in Def't. Memo, pp. 21, 22) held: "Nor does § 701(a)(2) [of the APA] preclude judicial review of constitutional challenges to an agency's exercise of discretion Webster v. Doe, 486 U.S. 592, 108 S. Ct. 2047, 100 L. Ed2d 632 (1988)." *National Federation of Government Employees v. Greenberg*, 983 F.2d 286, 289 (D.C. Cir.1993); *Ryan v. Reno*, 168 F.3d 520, 524 (D.C. Cir 1999); *Bennett v. Chertoff*,425 F.3d 999, 1001 (D.C. Cir. 2005); *Oryszak v. Sullivan*, 576 F.3d 522, 526 (D.C. Cir. 2009); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (1990), cert. Den. 499 U.S. 905 (1991); *El-Ganayni v. U.S. Dep't of Energy*, 591 F.3d 176, 183 (3d Cir. 2010).[12]

There is nothing in the Act of Congress establishing the NGA (10 U.S.C. Chap. 22), nor in any other Act of Congress of which plaintiff is aware, indicating Congress' intent to preclude an individual from asserting his constitutional rights. To the contrary, Congress was specific in limiting the type of claim barred against NGA, to civil actions based on the content of a navigational aid prepared or disseminated by the NGA. 10 U.S.C. § 456(a). Also, there is nothing in 50 U.S.C. § 435(a) (cited by defendants for the proposition that the President has the authority to establish

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[12] *El-Ganayni v. U.S. Dep't of Energy*, reviewed the *Egan* and the *Webster v. Doe* decisions and held that Article III courts have jurisdiction to hear Constitutional claims arising from the clearance process. 591 F.3d 183. It nevertheless, affirmed the dismissal of the claims of Constitutional violations on the basis that it had no authority to review the merits of the reasons for dismissal. 591 F.3d 184. While we agree with the court's finding that it had jurisdiction to hear Constitutional claims, we disagree with its further finding that it could not review the allegations on the merits as being wrongly decided and inconsistent with other authority cited here.

procedures governing access to classified information (Def't. Memo p. 6)) barring an individual from seeking judicial review of a constitutional claim in connection with the revocation of a security clearance. 50 U.S.C. § 435(a) clearly establishes that Congress shares with the President authority over security clearances. Without Congress' clearly expressed intent, the Judicial Branch is not deprived of jurisdiction to hear disputes concerning security clearances. *Webster v. Doe*, supra.

The decisions of the Supreme Court and the 4th Circuit make clear that the President's authority under Article II of the Constitution is not plenary, and where an individual's Constitutional rights conflict, the actions of a government agency acting ostensibly under that authority are judicially reviewable.

Constitutional Rights of Plaintiff Which Are Implicated

Plaintiff does not claim to have a constitutionally protected right to a security clearance, but he does have constitutional rights and protections that have been abridged by the revocation of his security clearance under the circumstances of this case. There are numerous constitutional rights and liberties implicated in the government's action against plaintiff under the First, Fifth, and Ninth Amendments;[13] the right of privacy under the First and Ninth Amendments, *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Stanley v. Georgia*, 394 U.S. 557 (1969); the right to the exercise of religion free from state interference, *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136 (1987); a liberty interest in employment in one's chosen career field and freedom from constraints on future employment opportunities, *Board of Regents v. Roth*, 408 U.S. 564, 573 1972);[14] a liberty interest

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[13] *Adarand v. Pena*, 515 U.S. 200 (1995) (5th Amendment analysis for the Federal Government is the same as 14th Amendment analysis for State Action).

[14] The critical questions are whether the government's actions: (1) automatically

(continued...)

in one's reputation and standing in the community, *Wisconsin v. Constantineau,* 400 US 433 (1971); a property interest in continued employment, *Cleveland Board of Education v. Loudermill*, 470 U.S. 542 (1985); freedom from discrimination in employment, *Washington v. Davis*, 426 U.S. 229 (1976); freedom to associate with others, *United States v. Robel*, 389 U.S. 258 (1967);[15] *NAACP v. Alabama,* 357 U.S. 449 (1958); *NAACP v. Button,* 371 U.S. 415 (1963); *Employment Division v. Smith*, 494 U.S. 872 (1990); *Keyishian v. Bd. of Regents of NY,* 385 U.S. 589 (1967); freedom from being limited in government employment without due process and freedom to follow one's chosen profession, *Green v. McElroy* 360 U.S. 474, 492(1959); freedom from blatantly arbitrary and discriminatory exclusion from government employment and freedom from of being stigmatized as untrustworthy, *Wieman v. Updegraff*, 344 U.S. 183, 190-91 (1952); freedom from being excluded from government employment for reasons that are patently arbitrary or discriminatory, *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886, 898 (1961); right not to be barred from federal employment by laws which would discriminate on race, religion, or political preference, *United Public Workers v. Mitchell*, 330 U.S. 75, 100 (1947); and not to be excluded from government employment for reasons that are patently arbitrary or discriminatory, *Cafeteria and Restaurant*

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[14](...continued)
exclude the plaintiff from a definite range of employment opportunities with the agency taking the action or or with other agencies; or (2) broadly preclude the plaintiff from continuing in his chosen career. *Kartseva v. Dept. of State*, 37 F.3d 1524, 1527 (D.C. Cir. 1994).

[15] In *United States v. Robel*, 389 U.S. 258, 2660 (1967) the court recognized the interest of protecting the national defense, but held that the statute in question which established guilt by association without establishing that the individual's association poses the threat feared by the government in prescribing it, was not consistent with the First Amendment rights to freely associate with others.

Workers Union v. McElroy, 367 U.S. 886, 898 (1961), or without due process, *Green v. McElroy* 360 U.S. 474, 492(1959).

The Fourth Circuit in *Jamil v. Secretary, Department of Defense* has also held that although the plaintiff in that case did not have a property right to a security clearance, he did a property interest in continued employment, and if he had been dismissed because of his national origin he arguably might have a valid claim of denial of his constitutional rights to equal protection and to be free of discrimination because of national origin. 910 F.2d 1203 (4th Cir. 1990).

The revocation of plaintiff's security clearance goes far beyond his simply not having a security clearance at NGA. Reciprocity of security clearances is required both by the Office of Management and Budget, a part of the Executive Office of the President[16], the Department of Defense[17] and by the Office of the Director of National Intelligence.[18] The Department of Defense regularly cites unfavorable security clearance decisions by other Agencies as the basis for denying DoD Security clearances.[19]

Defendants argue that plaintiff's reputation has not been harmed because the denial of his security has not been publicized, but it has. Although NGA may not publish notice of the clearance

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[16] Memoranda for Deputies of Executive Departments and Agencies, Re: Reciprocal recognition of Existing Personnel Security Clearance,, Dec. 12, 2005 and July 17, 2006. (Plt. Ex 9).

[17] DoD Personnel Security Program, DoD 5200.2R, Chapter 4. Available at www.dtic.mil/directives/correspondence/pdf/52002r.pdf

[18] Intelligence Community Policy Guidance, ICPG No. 704.4, Re: Reciprocity of Personnel Security Clearance and Access Determinations, Oct. 2, 2008. (Plt. Ex 10). Available at http://www.dni.gov/electronic_reading_room.htm

[19] See Eg., Statements of Reasons issued by the Department of Defense, Defense office of Hearings and Appeals (Plt Ex. 11).

revocation in the newspapers, but it does publish notice where it counts. The denial or revocation of any security clearance is placed in three government databases: the Joint Personnel Adjudication System (JPAS) which lists all DoD security clearance applications and adjudications; "Scattered Castles" which records all Sensitive Compartmented Information (SCI) clearance determinations; and in the Defense Clearance and Investigative Index (DCII) maintained by the Department of Defense.[20] Every government agency has access to these databases and must search them whenever considering an applicant for employment for a position requiring any level of clearance.[21] Every government contractor dealing with classified projects also has access to at least JPAS and will search it when considering an applicant for employment. That is a government-wide and industry-wide publication sufficient to stigmatize his reputation and with the requirement for reciprocal recognitions of other agencies clearance determinations, most likely prevent plaintiff from being hired for any position requiring a security clearance throughout the government and defense industry community.

Plaintiff does not dispute that he has no right to a security clearance at NGA, but he has the rights to be fairly considered for security clearances by other agencies and government contractors, to seek and hold government employment not requiring a security clearance, to freely practice his religion and to associate with others who practice his religion, and to not have his reputation stigmatized all of which is impaired by NGA's improper revocation of his security clearance.

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[20] DoD Directive 5200.2 R, Chapter 12.

[21] Memoranda for Deputies of Executive Departments and Agencies, Re: Reciprocal recognition of Existing Personnel Security Clearance,, Dec. 12, 2005 , p. 2, and Memorandum *Id,* July 17, 2006, p. 3 (Plt. Ex 9); Intelligence Community Policy Guidance No. 704.1 Oct 2, 2008; Intelligence Community policy guidance No. 704.5, Oct. 2, 2008 (Plt Ex. 12). Available at http://www.dni.gov/electronic_reading_room.htm

Plaintiff's First Amendment right to the free exercise of his religion and freedom of association do not require proof of stigmatization. Plaintiff, of course, could divorce his wife to satisfy NGA but the law does not require that as a remedy.

BALANCING OF CONFLICTING CONSTITUTIONAL INTERESTS

In this case, defendants argue that the power to determine who should have access to classified information is given to the President under Article II, Sec. 2 of the Constitution, and delegated to his subordinates. Plaintiff claims that his rights under the First, Fifth, and Ninth Amendments have been abridged. As noted in *Hamdi*,

> Both of these positions highlight legitimate concerns. And both emphasize the tension that often exists between the autonomy that the Government asserts is necessary in order to pursue effectively a particular goal and the process that a citizen contends he is due before he is deprived of a constitutional right. The ordinary mechanism that we use for balancing such serious competing interests, and for determining the procedures that are necessary to ensure that a citizen is not "deprived of life, liberty, or property, without due process of law," U. S. Const., Amdt. 5, is the test that we articulated in *Mathews* v. *Eldridge,* 424 U. S. 319 (1976). See, *e. g., Heller* v. *Doe,* 509 U. S. 312, 330-331 (1993); *Zinermon* v. *Burch,* 494 U. S. 113, 127-128 (1990); *United States* v. *Salerno,* 481 U. S. 739, 746 (1987); *Schall* v. *Martin,* 467 U. S. 253, 274-275 (1984); *Addington* v. *Texas, supra,* at 425. *Mathews* dictates that the process due in any given instance is determined by weighing "the private interest that will be affected by the official action" against the Government's asserted interest, "including the function involved" and the burdens the Government would face in providing greater process. 424 U. S., at 335. The *Mathews* calculus then contemplates a judicious balancing of these concerns, through an analysis of "the risk of an erroneous deprivation" of the private interest if the process were reduced and the "probable value, if any, of additional or substitute procedural safeguards." *Hamdi,* 542 U.S.507, 528-529.
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> Striking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat. But it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship. It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those

> times that we must preserve our commitment at home to the principles for which we fight abroad. See *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 164-165 (1963) ("The imperative necessity for safeguarding these rights to procedural due process under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with fundamental constitutional guarantees which, it is feared, will inhibit governmental action"); see also *United States* v. *Robel*, 389 U. S. 258, 264 (1967) ("It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties ... which makes the defense of the Nation worthwhile"). *Hamdi*, 542 U.S. 507, 532.

The Supreme Court has elsewhere defined the balance when there is a conflict with the government's authority to regulate an individual's rights and liberties guaranteed by the Constitution, there must be a compelling state interest to impose a burden on the individual. *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136 (1987). When there is conflict between a constitutional right and a state interest, the state must provide clear proof of compelling evidence that the action involving the individual rights could not be protected adequately by lesser means. *Employment Division v. Smith*, 494 U.S. 872 (1990) (freedom of association).[22]

The 4th Circuit more recently rejected the government's argument that the President had inherent power under the Constitution to imprison a U.S. resident. *Al-Marri v. Wright*, 487 F.3d 160, 191 (4th Cir. 2007). The court found that where the President takes measures incompatible with the will of Congress "his power is at its lowest ebb" for then he can rely only on his constitutional powers. "In such cases Presidential claims to power must be scrutinized with caution, for what is at stake is the equilibrium established by our constitution's system". *Al-Marri v. Wright*, 487 F.3d 191.

To hold that a court has jurisdiction to hear a constitutional claim but then refuse to hear it

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[22] *Adarand v. Pena*, 515 U.S. 200 (1995) (5th Amendment analysis for the Federal Government is the same as 14th Amendment analysis for state action.).

rings hollow. Review of agency security decisions is carried out hundreds of times each year by Administrative Judges at the Department of Defense, Defense Office of Hearings and Appeals. (See, DoD Directive 5220.6)[23] While this process applies only to employees of Department of Defense contractors, and not to government employees or applicants for SCI access, it is a model of review that has worked for sixty years. There is no reason to believe that an Article III judge, would be any less than able than a Federal Administrative Judge, to determine if there is sufficient evidence, by whatever standard the court sets, to withstand a constitutional challenge. These are not the type of questions such as the allocation of Federal resources, foreign relations with other nations, or decisions to wage war that need or ought to be left to the unfettered discretion of the Executive Branch.

To deprive citizens of access to the courts for redress of their constitutional rights would make this country subject to the arbitrary rule of men rather than the rule of law. We need look no further than to Germany in the 1930's to see that it is the first step in the road to despotism, a road our founding fathers took care to avoid.

Response to Other Issues in Defendant's Motion

Defendants argue that Executive Order 12968 does not create any right to administrative or judicial. It does, in fact, create a right to administrative review (Part V, Sec 5.2) (Def't. Memo, p. 5). Nevertheless, plaintiff is not claiming any right to judicial review under the Executive Order.

Defendants remark that plaintiff " is a dual citizen of Egypt" (Def't. Memo, p. 7), but fail to state that he is a native-born American whose dual citizenship is by virtue of his father being born in Egypt which, under Egyptian law, automatically grants him Egyptian citizenship.(Plt. Ex. 1, pp.2,

[23] DoD Directives may be found at http://www.dtic.mil/whs/directives/corres/dir.html

3; Plt Ex. 2. Attach.1, p. 2-3).

Defendants cite *Oryszak v. Sullivan*, 576 Fed.3d 522 (D.C. Cir. 2009) for the proposition that the plaintiff fails to state a claim for relief under the Administrative Procedures Act (Def't. Memo, p. 18). The claim in *Oryszak* was that agency's decision was arbitrary, capricious and unsupported by substantial evidence. The court ruled that it had jurisdiction to hear the claim under 28 U.S.C. § 1331, because it was a federal question, but because plaintiff had not raised a constitution claim it was nonjudiciable. The court specifically left open the question of judiciability of a Constitutional claim, if one were to be presented. 576 F.3d 526.

Defendants argue that the APA "does not vest the court with jurisdiction to award [monetary] relief, in the absence of a claim that plaintiff is seeking pay for work already completed" (Def't. Memo. P. 18). However, the case cited by defendants, *M.K. v. Tenet*, 99 F.Supp.2d 12, 24-25 (D. D.C. 2000) states that the APA waiver of sovereign immunity does not exclude equitable claims for specific monetary relief.

Many of the cases cited by defendants are inapposite because they did not raise constitutional claims against the agency involved. *Ciralsky v. CIA*, No. 1:10-CV-911 (E.D.Va. 2010) presently on appeal to the 4th Circuit, Docket No. 10-2414, raised a Title VII violation by the CIA, and *Bivens* claims against various individuals. *Guillot v. Garrett*, 970 F.2d 1320 (4th Cir. 1992) claim under the Rehabilitation Act of 1973. *Becerra v Dalton*, 94 F.3d145 (4th Cir. 1996), *cert den*. 513 U.S. 1151 (1997) was a Title VII claim. *Hall v. Clinton*, 235 F.3d 202 (4th Cir. 2000) was a *Bivens* action brought by a federal employee against her supervisors. The plaintiff raised no claims against the agency. *Pueschl v. United States*, 369 F.3d 345 (4th Cir. 2004) involved a claim under the Federal Tort Claims Act and Title VII of the Civil Rights Act for discrimination and personal, and

retaliation. The court held that the Title VII claim was properly dismissed because it was *res judicata* and dismissed claim under the Federal Tort Claims Act because it should have been brought under Title VII as a federal employee. *Romero. v. Gates,* 93 F.Appx. 431 (4th Cir.2011) (unpublished, "not precedential") raised claims under Title VII and the Age Discrimination Act. *Middlebrooks v. Leavitt*, 524 F.3d 341 (4th Cir.) *cert den*. 1295 S. Ct. 581, 172 L.Ed 2d 432 (2008) raised claims under the Civil Rights Act 42 U.S.C. 1981 and a *Bivens* claim Public Health Service (" i.e. military") officers . Each of these cases raised claims under statutes or *Bivens* claims against individuals,, but in none of the statutes under consideration did the courts find that Congress provided an unmistakable expression of purpose to subject security decisions to judicial review under *those* statutes, *Becerra v. Dalton*, 945 F.3d *supra*, 148-149. Nowhere has Congress expressed a clear intent to deprive judicial review where a constitutional violation is at issue. *Webster v. Doe, supra*.

Defendants' reliance on *Brown v. General Services Administration*, 425 U.S. 820 (1976) for the proposition that Title VII, as amended, is plaintiff's sole remedy is misplaced. No constitutional claim was brought in that case. The Court in *Brown* held that the extension of Title VII to Federal employees precluded a suit under the general civil rights statute, 42 U.S. C. 1981. That case predated by 12 years *Webster v. Doe,* which held that an action could be brought if there were a Constitutional claim (See pp. 15-16, *supra).*

Conclusion

The government's interest in protecting the security of its agencies or its contractors does not give it the right to trammel on the constitutional rights and freedoms of the citizens who work for it. *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886, 898 (1961); *Green v.*

McElroy, 360 U.S. 474, 492(1959); *Weiman v. Updegraff*, 344 U.S. 183, 190-91 (1952); *United States* v. *Robel*, 389 U. S. 258, 264 (1967); *Webster v. Doe*, 486 U.S. 592 (1998); *Kartseva v. Dept. of State*, 37 F.3d 1524, 1527 (D.C. Cir. 1994).

WHEREFORE, Plaintiff prays that defendants' Motion to Dismiss be denied.

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CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2011, I will electronically file the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing to the following: Bernard G. Kim, Assistant United States Attorney, Attorney for the Defendants, Justin W. Williams U.S. Attorney's Building, 2100 Jamieson Avenue, Alexandria, Virginia 22314.

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