IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

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

REPLY MEMORANDUM OF LAW
IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Defendants the National Geospatial-Intelligence Agency ("NGA") and its Director, Letitia A. Long, respectfully submit this memorandum of law in reply to plaintiff Mahmoud Hegab's opposition to defendants' motion to dismiss for lack of jurisdiction or, in the alternative, for failure to state a claim upon which relief may be granted.

INTRODUCTION

In its opening memorandum, the Government argued that under controlling case law of the Supreme Court and the Fourth Circuit, this court lacks jurisdiction to review plaintiff's claims. The Government further argued that plaintiff's action, though styled as a constitutional challenge concerning his right to be free from

religious discrimination, is in fact a routine federal-sector employment-discrimination case that, pursuant to well-settled law, must be brought under Title VII of the Civil Rights Act and not directly under the federal Constitution. Finally, the Government argued that even assuming *arguendo* that this court were to assume jurisdiction over this action despite a lack of authority to do so, plaintiff's claims still would fail because his complaint does not plead a cognizable legal cause of action.

In response, plaintiff presents the following arguments. Preliminarily, he argues that he has pleaded a sufficient number of detailed *facts* in his complaint to satisfy the pleading standard under Rule 12(b)(6)—an argument that is inapposite to the Government's point that, regardless of the facts he pleads, plaintiff lacks a *legal* cause of action to sustain his claims. Somewhat more salient, plaintiff asserts that the Supreme Court in *Department of Navy v. Egan* foreclosed judicial review of security clearance determinations through "*dictum*" that has been "subject to much interpretation," and therefore this court is not bound by that holding—without acknowledging that *all* the circuit courts, including the Fourth Circuit, have been uniform in holding that *Egan* does in fact apply to the Judiciary. Plaintiff further argues that *Egan* and its application by the Fourth Circuit, which speak directly to the issue of judicial review of security clearance decisions, do not apply to his challenge because two Supreme Court cases (in his view) indicate otherwise, even though neither of those cases involved a security clearance determination or mentioned the *Egan* ruling. Finally, plaintiff attempts to distinguish the

controlling case law of this Circuit by asserting that the cases cited by the Government did not involve constitutional claims directly against the agency but rather against individual federal officials under *Bivens*, without providing any reasons for why this is a distinction that makes a difference.

None of plaintiff's arguments are persuasive or have merit, and the court should grant defendants' motion and dismiss this action with prejudice.

DISCUSSION

Before addressing plaintiff's arguments, two aspects of his opposition are worth noting. First, plaintiff has failed to cite, and Government counsel is unaware of, a single case where a court has actually delved into and reviewed the merits of the Executive's discrete judgment that a particular individual should be denied a security clearance. Second, plaintiff does not deny and in fact acknowledges that, despite the lack of legal authority, this is precisely what he is urging this court to do. The court should decline plaintiff's invitation for the reasons explained in defendants' opening brief, and because plaintiff's arguments in favor of such a course are unpersuasive and lack merit, as explained below.

I. THE SUPREME COURT'S HOLDING IN *EGAN*, AND THE APPLICATION THEREOF BY THE FOURTH CIRCUIT, FORECLOSE PLAINTIFF'S CLAIMS

1. Plaintiff's opening argument is that *Egan* simply does not apply to his case because the ruling governs only an administrative tribunal's (as opposed to a federal court's) jurisdiction to review a security clearance determination. Dkt 15, at 14-15 (arguing that *Egan* "did not hold that . . . a decision regarding a security

clearance was not subject to judicial review" and that the portions of the opinion relied upon by the Government are mere "*dictum*"). In support of this view, he cites one Fourth Circuit case and two cases from other courts, *see id.* at 15, that, in fact, hold precisely the opposite of what plaintiff contends regarding the applicability of *Egan*. *See Jamil v. Secretary of Defense,* 910 F.2d 1203, 1206 (4th Cir. 1990) ("The discretionary nature of the decision to withhold a security clearance combined with the constitutional delegation of the obligation to protect national security to the Executive Branch is such that neither the MSPRB *nor a court of appeals* . . . can be permitted to intrude upon the authority of the Executive in military and national security affairs absent specific authorization from Congress." (citations and quotation marks omitted) (emphasis added)); *Cheney v. DOJ*, 479 F.3d 1343, 1352 (Fed. Cir. 2007) ("Neither the Board *nor this court* may review the underlying merits of an agency's decision to suspend a security clearance." (emphasis added)); *King v. Alston*, 75 F.3d 657, 662 (Fed. Cir. 1996) ("We agree . . . that *Egan* precludes our court . . . from reviewing the substance of an agency decision to suspend access or to revoke a security clearance."). Indeed, the law of the Fourth Circuit in this regard could not be clearer: "[U]nder our circuit precedent, in the absence of a specific mandate from Congress providing otherwise, *Egan* deprives the federal courts of subject-matter jurisdiction to review an agency's security clearance decision." *Reinbold v. Evers*, 187 F.3d 348, 357-58 (4th Cir. 1999).

2. In addition to these cases, plaintiff relies primarily upon *Webster v. Doe*, 486 U.S. 592 (1988), which he erroneously contends carved out an exception to *Egan*

that allows bringing constitutional challenges to adverse security clearance determinations.

But the Supreme Court's opinion in *Webster* does not mention *Egan*—a surprising omission if it applied to security clearances as plaintiff contends, particularly as it was handed down less than four months after *Egan*. Instead, it addressed only whether the CIA's statutory authority to terminate its employees was insulated from judicial review. *Id.* at 599-602 (discussing Section 102(c) of the National Security Act of 1947, 61 Stat. 498, as amended). Significantly, the Fourth Circuit consistently has declined to hold that *Webster* has any applicability to *Egan*'s ruling regarding judicial review of security clearance determinations. *See, e.g.*, *Reinbold*, 187 F.3d at 358 (noting the "arguable" exception to *Egan* "in the limited circumstance" where the clearance determination "violated an individual's constitutional rights," but finding it unnecessary to reach the issue (citing *Jamil*, 910 F.2d at 1209)).[1] Indeed, in the latest *Egan* challenge to reach the Fourth Circuit, the Court of Appeals was explicitly confronted with the argument that *Webster* permitted a constitutional challenge to the revocation of a security clearance under circumstances virtually indistinguishable from Hegab's. *See Ciraslky v. Tenet*, Brief of the Plaintiff-Appellant, 2011 WL 719614, *15-*16 (4th

[1]In *Reinbold*, it was unnecessary for the Fourth Circuit to address this question because the plaintiff had failed to state a constitutional claim in any event, and thus could not avail himself of the alleged exception. 187 F.3d at 359. Likewise, plaintiff here also fails to state a constitutional claim, as explained in the Government's opening brief, *see* Dkt 11, at 18-25, and this court need not decide the issue for the same reasons as the Fourth Circuit in *Reinbold*.

Cir. Mar. 1, 2011); *see also* Dkt 11, at 15 (describing the similarities between *Ciralsky* and the case *sub judice*). Rather than accepting or addressing this argument, the Fourth Circuit found that all of plaintiff's "claims arise from the revocation of his security clearance and his subsequent termination from federal employment," and affirmed Judge Brinkema's opinion, which had held that under *Egan* federal courts lack subject matter jurisdiction over security clearance claims—including constitutional claims of religious discrimination.[2] *See Ciralsky v. Tenet,* 2011 WL 6367072 (4th Cir. 2011) (unpublished), *affirming Ciralsky v. CIA*, 2010 WL 4724279 (E.D.Va. 2010) (unpublished). In short, there is no Circuit precedent, and plaintiff cites none, finding that *Webster* in any way vitiates the central holding of *Egan* with respect to constitutional challenges; to the contrary, the Fourth Circuit has declined to provide for such an exception, even when squarely presented with the opportunity to do so.

In any event, assuming *arguendo* that this court were inclined to break new

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[2]Plaintiff's attempt to distinguish the virtually indistinguishable circumstances of *Ciralsky* on the ground that *Ciralsky* involved constitutional claims against federal officials in their individual capacities under *Bivens,* whereas he asserts claims directly against the agency under the APA, is unavailing. *See* Dkt 15, at 26-27. Plaintiff fails to provide any reason or explanation for why a constitutional claim against an agency is any different than a constitutional claim against a federal official for purposes of judicial review of a security clearance decision: In both cases, for a court to adjudicate the matter, it would be required to assess the factual bases underlying the Executive Branch's national security assessment, in contravention of *Egan*. Moreover, the real reason why a plaintiff may choose to bring suit under *Bivens* rather than the APA is more mundane: Under *Bivens* a plaintiff may obtain money damages that are precluded in a case brought under the APA. Here, plaintiff seeks money damages yet declined to bring suit under *Bivens* for reasons unknown, but perhaps because he continues to believe (mistakenly) that the APA permits the monetary damages he seeks, *see id.* at 26.

circuit ground in this area of law, it should reject plaintiff's attempt to apply *Webster* to the merits of individualized security clearance determinations. This is so because *Webster*, at most, permits judicial review of an allegedly unconstitutional policy, not of an agency's discrete judgment that a particular employee should not be granted access to classified information for reasons of national security. In *Webster*, the CIA employee challenged his termination on the ground that the CIA had a general policy against employing homosexuals. 486 U.S. at 604 n.8. Indeed, in support of its holding in *Webster*, the Supreme Court pointed to the Government's acknowledgment that "claims attacking [agencies'] hiring and promotion *policies* . . . are routinely entertained in federal court." *Webster*, 486 U.S. at 604 (emphasis added). *Cf. Egan*, 484 U.S. at 527 ("[T]he grant of security clearance *to a particular employee*, a sensitive and inherently discretionary judgment call, is committed by law to the appropriate agency of the Executive Branch." (emphasis added)). Likewise, the constitutional claims that have been (rarely) considered by courts after *Webster* and cited by plaintiff have involved challenges to policies. *See, e.g., Stehney v. Perry*, 101 F.3d 925, 937 (3d Cir. 1996) (equal protection challenge to the National Security Agency's policy of exempting a small number of internationally renowned mathematicians from a polygraph examination requirement, not the merits of the plaintiff's revocation);[3] *Nat'l Federation of Fed. Employees v.*

[3]Subsequently, the Third Circuit has clarified *Stehney* as applying only to judicial review of "constitutional claims arising from the clearance revocation *process*," and not to review of the "the *merits* of that revocation," which the court found remained barred by *Egan*. *El-Ganayni v. U.S. Dep't of Energy*, 591 F.3d 176, 183 (3d Cir. 2010) (emphases added).

Greenberg, 983 F.2d 286, 291-95 (D.C. Cir. 1993) (a constitutional challenge to a standard questionnaire employed by DoD in connection with its security clearance process). As for the remaining cases cited in plaintiff's brief, they puzzlingly say nothing about, or decline to address, the issue of constitutional challenges to security clearance determinations[4]—with the exception of the Third Circuit's *El-Ganayni* decision, which actually supports the Government's argument to such a degree that plaintiff, after citing it, immediately disavows its central holding, *see* Dkt 15, at 18 & n.12; *see also supra* note 3.

In contrast, all the federal courts, including the Fourth Circuit, have repeatedly concluded that they lack the power to review the exercise of discretion in denying or revoking a security clearance with respect to a particular individual. *See, e.g., Guillot v. Garrett*, 970 F.2d 1320, 1326 (4th Cir. 1992) ("*individual* security classification determinations are not subject to ... judicial review" (emphasis added)); *Jamil*, 910 F.2d at 1209 (no due process right in a security clearance for a particular individual). As the Tenth Circuit has observed, "if the [fundamental] constraints imposed in *Egan* can be bypassed simply by invoking alleged constitutional rights, it makes the authority of *Egan* hardly worth the effort." *Hill v. Dep't of Air Force*, 844 F.2d 1407, 1411 (10th Cir. 1988); *see also, e.g., Peterson v.*

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[4] *See, e.g., Bennett v. Chertoff*, 425 F.3d 999, 1001-04 (D.C. Cir. 2005) (saying nothing about constitutional challenges); *Oryszak v. Sullivan*, 576 F.3d 522, 526 (D.C. Cir. 2009) (not addressing the issue of constitutional challenges); *Ryan v. Reno*, 168 F.3d 520, 524 (D.C. Cir 1999) (same); *Dorfmont v. Brown*, 913 F.2d 1399, 1404 (9th Cir. 1990) ("We do not today decide if the court may hear constitutional attacks on [security clearance] decisions, or the precise contours of such claims if allowed.").

Dep't of the Navy, 687 F. Supp. 713, 715 (D.N.H. 1988) (If judicial review limitations could be "bypassed simply by alleging illegal discrimination, *Egan* would be vitiated.").

The central distinction between these two types of cases hinges on whether the court's review would excessively intrude into the agency's exercise of discretion over national security matters. Where the decision involves simply a non-discretionary application of a policy, such as a purported policy excluding homosexuals from federal employment, the court's review does not necessarily interfere with the agency's discretionary security determinations. Where a particular discretionary security decision is involved, however, the court would need to immerse itself in precisely the issues the Supreme Court determined in *Egan* were committed to the discretion of the Executive Branch. *See, e.g., El-Ganayni v. U.S. Dep't of Energy*, 591 F.3d 176, 183 (3d Cir. 2010) (reading "*Egan* and *Webster* together as holding that Article III courts have jurisdiction to hear constitutional claims arising from the clearance revocation process" but not "the merits of that revocation," and holding that the courts were precluded from "question[ing] the motivation behind the decision to deny [a] security clearance" (quotation marks omitted)). Because Hegab's complaint squarely challenges the merits and motivation behind the particular decision to revoke his security clearance, and not the overarching policies of the agency as whole, he cannot avail himself of whatever exception *Webster* may bestow, if any.

3. Plaintiff further contends that *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004),

"subsequently reaffirmed" *Webster*'s holding. But the *Webster* case goes unmentioned in the *Hamdi* decision, and as this court is well aware, *Hamdi* said nothing about judicial review of a security clearance determination, and did not involve a dispute arising from the federal-employment relationship.[5] Rather, *Hamdi* dealt with the far different circumstance of the indefinite detention of a U.S. citizen seeking a writ of habeas corpus. 504 U.S. at 510-11. Indeed, plaintiff's attempt to use *Hamdi* to vitiate *Egan* has already been rejected by at least one appellate court. In *Bennett v. Chertoff*, the D.C. Circuit specifically found that *Hamdi* "does not unsettle" the ruling in *Egan* regarding judicial review of the merits of a security clearance determination. 425 F.3d 999, 1004 (D.C. Cir. 2005). The Court of Appeals explained that *Hamdi* is "inapposite" to that issue, because in *Hamdi* the Supreme Court "emphasized that physical liberty is a fundamental right that must be accorded great weight," and that it was "far from clear that the Court would strike the same balance in the context of employment termination."[6] *Id.* *Al-Marri v. Wright*, another case relied upon by plaintiff, is similarly

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[5]Plaintiff also cites *Rasul v. Bush*, 542 U.S. 466 (2004), but provides no argument as to why that case applies to the case *sub judice*. *Rasul* in any event is even more irrelevant to plaintiff's cause than *Hamdi*, as the question presented in *Rasul* was whether the federal habeas statute's territorial scope included the Guantanamo Bay detention center in Cuba.

[6]Confirmation that concerns over physical liberty and indefinite detention animated the Court in *Hamdi* may be found in its subsequent decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), which authorized district courts to examine the reasons for designating a detainee an enemy combatant: "[G]iven that the consequence of error may be detention of persons for the duration of hostilities that may last a generation or more, this is a risk too significant to ignore." *Id.* at 785.

distinguishable because it, too, concerned the physical imprisonment of a U.S. resident, not the employment relationship. 487 F.3d 160, 191 (4th Cir. 2007), *judgment vacated*, *Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008) (en banc), *judgment vacated with instructions to dismiss appeal as moot*, *Al-Marri v. Spagone*, 555 U.S. 1220 (2009) (Mem.).

Moreover, *Hamdi* and its related cases arose out of federal habeas proceedings, in which "the government bears the initial burden of establishing a sufficient basis for" the physical detention of the petitioner. *Basardh v. Obama*, 612 F. Supp.2d 30, 35 n.12 (D.D.C. 2009) (citing *Hamdi*). The Government does not bear that burden in a non-habeas case like the one presently before the court. To the contrary, in rendering the "discretionary security decision" to grant a security clearance, the clearance shall issue only when "clearly consistent with the national security interests of the United States," with "any doubt [being] resolved in favor of national security." E.O. 12968 § 3.1(b).

4. Finally, the court should reject plaintiff's attempt to avoid having to bring his routine federal-sector employment-discrimination action under Title VII by simply casting his claims as arising directly under the Constitution. In this regard, plaintiff's argument that *Middlebrooks v. Leavitt*, 525 F.3d 341 (4th Cir. 2008), is distinguishable because it involved a *Bivens* claim is again beside the point. *Middlebrooks* stands for the unremarkable and long-settled proposition that for a federal employee like Hegab to bring a suit against the Government based upon employment discrimination, he must do so under Title VII, not under *Bivens* and

not directly under the Constitution. *See id.* at 349; *see, e.g., Green v. Caldera*, 19 Fed. Appx. 79, 80-81 (4th Cir. 2001) (unpublished) (holding that a constitutional challenge involving employment discrimination brought in a non-*Bivens* context must be brought under Title VII, not directly under the Constitution); *see also Francis v. Mineta*, 505 F.3d 266, 271 (3d Cir. 2007) ("Title VII thus sweeps within its reach all claims of employment discrimination whether they are based on religion or another enumerated form of discrimination that may impact a constitutionally protected right [and] precludes actions against federal officials for alleged constitutional violations as well as actions under other federal legislation."). Similarly, plaintiff's attempt to limit the reach of *Brown v. GSA*—which squarely held that Title VII is the exclusive and preemptive judicial remedy for federal-sector employment-discrimination claims, 425 U.S. 820, 829 (1976)—to non-constitutional challenges, *see* Dkt 15, at 27, is unavailing: Time and again the *Brown* ruling has been applied to preclude constitutional challenges; *Middlebrooks* and *Green*, for example, cited *supra*, are just two such cases from the Fourth Circuit.

II. AT ALL EVENTS, PLAINTIFF'S CLAIMS FAIL TO STATE A CLAIM AS A MATTER OF LAW

In its opening brief, the Government argued alternatively that, even assuming *arguendo* the court's jurisdiction over the clearance revocation, plaintiff's claims still must fail as a matter of law.

In response, plaintiff initially argues that he has pleaded a sufficient number of facts and details to satisfy the plausibility standard set out in *Iqbal v. Ashcroft*, 129 S. Ct. 1937 (2009). *See* Dkt 15, at 12-14. But this argument is irrelevant

because the Government contends that plaintiff lacks a cognizable legal cause of action or has failed to plead a key element of his purported cause of action, not that his complaint is too vague, general, or unbelievable to satisfy *Iqbal*'s plausibility standard. Similarly, plaintiff asserts that the Fourth Circuit's decision in *Jamil* allows for a property interest in continued employment under the Due Process Clause. *Id.* at 21. But again, plaintiff's assertion is inapposite to the Government's argument that even if that is the case, plaintiff already has received all the process he is due under the Constitution in the revocation procedures NGA provided him—an argument that plaintiff completely ignores. *See* Dkt 11, at 21 (citing *Jamil*, 910 F.2d at 1209). Likewise, that *Jamil* "arguably might" allow—but in fact expressly declined to address whether to allow—an equal protection claim in the context of clearance revocations, Dkt 15, at 21, does not speak to the Government's argument that plaintiff cannot prove such a claim, even if it were permitted by the Fourth Circuit, because doing so would require delving into the merits of a security clearance decision in contravention of *Egan*. *See* Dkt 11, at 25 (citing *El-Ganayni*, 591 F.3d at 186).

Also unavailing is plaintiff's argument that his reputation has been "harmed" by the clearance decision because other employers may find out that his security clearance was revoked. *See* Dkt 15, at 22-23. In response to the Government's argument that, under Fourth Circuit precedent, plaintiff must allege a likelihood that prospective employers or the public at large will be made aware of allegedly stigmatizing accusations regarding his character, Dkt 11, at 23-24 (citing *Sciolino v.*

City of Newport News, Va., 480 F.3d 642 (4th Cir. 2007)), plaintiff's *opposition brief* identifies three Government databases that, he contends, would include information about the revocation of his security clearance, and to which future employers might have access. *See* Dkt. 15, at 22.

But to establish the requisite "likelihood" that the public or prospective employers will inspect the record of his clearance revocation, plaintiff must either "allege (and ultimately prove) that his former employer has a practice of releasing personnel files to all inquiring employers"—which plaintiff concedes is not the case, as his opposition brief alleges only that Government agencies and contractors have access to the databases—or he that "he intends to apply to at least one of these employers"—which he fails to allege in his complaint and in his opposition brief. *See Sciolino,* 480 F.3d at 350. Indeed, plaintiff's allegations in this regard ring particularly hollow, as his complaint does not even allege that he has chosen a career within an industry that may require a security clearance but rather that he works as a financial/budget analyst, Compl. ¶ 8, a line of work that does not normally require a security clearance. In any event, even if plaintiff's allegations were sufficient as a matter of law, and even if they were contained in his complaint, and not (as here) merely in an opposition brief, plaintiff still could not overcome the alternative, independent ground for dismissal of this claim raised by the Government: that the law precludes him from pleading another essential element of a reputational-injury cause of action, a stigma on his character, because a

clearance revocation is not an adjudication of one's character.[7] *See* Dkt 11, at 24. This argument, and the authorities cited by the Government in support thereof, plaintiff fails to address at all.

Plaintiff also fails to address adequately the Government's argument that the APA provides no cause of action for the claims he asserts. *See id.* at 18-19. Instead, he says that the case the Government relied upon for this proposition, *Oryszak v. Sullivan*, 576 F.3d 522, 526 (D.C. Cir. 2009), "left open the question of judiciability of a Constitutional claim," which says nothing about whether the APA is the appropriate legal vehicle for such a claim. Dkt 15, at 26. In fact, *Oryszak*, as the Government explained, expressly held that the APA provided no cause of action to challenge a security clearance determination—a point which plaintiff simply ignores. 576 F.3d at 526. In similar fashion, plaintiff responds to the Government's assertion that money damages are unavailable in an APA action by attempting to distinguish the relevant authority while ignoring what that authority actually says about the money damages plaintiff seeks, *i.e.*, back pay, *see* Compl. p. 22. *M.K. v. Tenet*, 99 F. Supp.2d 12, 24-25 (D.D.C. 2000) ("[T]he APA does not waive sovereign immunity with respect to claims for back pay, except where a defendant has directly deprived a plaintiff of pay due for work completed. The APA does not waive sovereign immunity where the employee alleges he was deprived of pay by wrongful firing, demotion, non-hiring or non-promotion.").

In short, plaintiff cannot survive defendants' motion to dismiss by simply

[7]For these reasons, among others, amendment of plaintiff's complaint would not cure the pleading deficiencies.

ignoring the Government's arguments and discussing irrelevant points, and therefore the court should grant defendants' motion to dismiss for failure to state a claim, even assuming that jurisdiction exists to review his claims.

CONCLUSION

For the foregoing reasons and for those stated in defendants' opening memorandum of law, the court should dismiss this action for lack of jurisdiction or, in the alternative, for failure to state a claim upon which relief may be granted.

Respectfully submitted,

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DATED: January 4, 2012

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 4, 2012, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing to the following:

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