No. 16-1400

In the Supreme Court of the United States

NICHOLAS JAY WILSON, PETITIONER

v.

DEPARTMENT OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Merit Systems Protection Board correctly determined that it lacked authority to review allegations of discrimination in the revocation of petitioner's security clearance.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-11a) is reported at 843 F.3d 931. The decision of the Merit Systems Protection Board (Pet. App. 12a-20a) is reported at 122 M.S.P.R. 585.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 2016. A petition for rehearing was denied on February 23, 2017 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on May 24, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The President, as "'Commander in Chief of the Army and Navy of the United States,' U.S. Const., Art. II, § 2," has the "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 * * * that will give that person access to such information." *Department of the Navy* v. *Egan*, 484 U.S. 518, 527 (1988). Presidents have exercised that power through a series of Executive Orders that authorize agency heads to determine which employees will have access to classified information. See *id.* at 528.

Executive Order 12,968, 3 C.F.R. 391 (1996), instructs that a decision to grant a security clearance "is a discretionary security decision." *Id.* § 3.1(b), 3 C.F.R. 397 (1996). A person may be granted a security clearance "only where facts and circumstances indicate access to classified information is clearly consistent with the national security interests of the United States." *Ibid.*; see 50 U.S.C. 3161(a)(1) (Supp. III 2015) ("[E]xcept as may be permitted by the President, no employee in the executive branch of Government may be given access to classified information by any department, agency, or office of the executive branch of Government unless, based upon an appropriate background investigation, such access is determined to be clearly consistent with the national security interests of the United States."). Even after an employee receives a security clearance, the employing agency must ensure that the employee "continue[s] to meet the requirements for access" throughout the time he holds that clearance. Exec. Order No. 12,968, § 1.2(d), 3 C.F.R. 392-393 (1996).

Executive Order 12,968 also establishes internal agency procedures designed to provide meaningful review of agency decisions to deny or revoke security

clearances, while still protecting the interests of national security. See Exec. Order No. 12,968, § 5.2(a) and (d), 3 C.F.R. 399-400 (1996). Under the order, employees or applicants whose eligibility for access to classified information is denied or revoked must receive "as comprehensive and detailed a written explanation of the basis for that conclusion as the national security interests of the United States and other applicable law permit." *Id.* § 5.2(a)(1), 3 C.F.R. 399 (1996). They must also be given the opportunity to respond in writing to the denial or revocation and to obtain counsel. *Id.* § 5.2(a)(3) and (4), 3 C.F.R. 399-400 (1996). In addition, the agency must permit the employee to appeal an adverse decision to "a high level panel, appointed by the agency head, which shall be comprised of at least three members, two of whom shall be selected from outside the security field." *Id.* § 5.2(a)(6), 3 C.F.R. 400 (1996).

2. Petitioner was employed by the Department of the Navy in a position involving nuclear-propulsion systems. Pet. App. 4a. A security clearance from the Department of Energy is a prerequisite for that position. *Ibid.* In 2014, the Department of Energy suspended petitioner's security clearance. *Ibid.* The Department of Energy explained that it was doing so based on concerns that petitioner had "(1) knowingly brought a personal firearm onto a Navy facility in violation of regulations and directions he received; (2) armed himself with a personal weapon while acting as a Metropolitan Police Department ('MPD') reserve officer, contrary to regulations; and (3) made false statements and false time and attendance entries to his civilian employer, the Naval Reserve Unit and the MPD." *Id.* at 4a-5a.

Petitioner has asserted that he brought his firearm into a Navy facility in response to a shooting at the

Washington Navy Yard, "in perceived fulfillment of his duty as a Navy Reservist." Pet. App. 5a. Relying on that assertion, he argued to the Department of Energy that divesting him of his security clearance would violate the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. 4301 *et seq.*, which prohibits, *inter alia*, the termination of employment or the denial of a "benefit of employment by an employer" on the basis of an individual's military service, 38 U.S.C. 4311(a). See Pet. App. 5a. The Department of Energy declined to lift the suspension and instead determined that petitioner's security clearance should be revoked altogether. *Ibid.*

Because petitioner no longer possessed the security clearance required for his position, the Navy proposed his removal. Pet. App. 5a. Petitioner contested that removal, again arguing that the revocation of his security clearance had violated USERRA (as well as his due-process rights). *Ibid.* The Navy nevertheless removed him based on his lack of the required security clearance. *Ibid.*

3. Petitioner filed an appeal of his removal with the Merit Systems Protection Board (MSPB or Board), "an independent Government agency that operates like a court." 5 C.F.R. 1200.1; see Pet. App. 13a. The Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 1101 *et seq.*, provides that certain removal actions against certain federal employees are appealable to the MSPB. 5 U.S.C. 7513(d). USERRA separately provides that claims under its antidiscrimination provision may be submitted to the MSPB in certain circumstances. See 38 U.S.C. 4324.

The Board determined that it could not set aside petitioner's removal because it was not empowered to review the security-clearance revocation that had necessitated that removal. Pet. App. 18a-20a. The Board explained that, under this Court's decision in *Department of the Navy* v. *Egan*, *supra*, "unless Congress specifically provides otherwise, the Board lacks the authority to review adverse security clearance determinations." Pet. App. 18a (citing *Egan*, 484 U.S. at 530). The Board observed that petitioner had challenged his removal under the CSRA, which the *Egan* Court had construed as not containing any such specific review provision. *Ibid.* The Board similarly found no "explicit authorization" in USERRA for "the Board to review security clearance determinations." *Id.* at 19a.

4. The court of appeals affirmed. Pet. App. 3a-11a. The court explained that *Egan* had "established that MSPB review of an agency's denial or revocation of a security clearance is limited to determining whether the agency provided minimal due process protection." *Id.* at 9a (citation omitted). Like the Board, the court of appeals found that USERRA, which "makes no mention of security clearances, explicitly or otherwise," does not authorize a more expansive review of a security-clearance determination. *Ibid.*; see *ibid.* (noting that petitioner had raised no "constitutional claim that might transcend these limitations").

The court of appeals further explained that petitioner's "alternative" characterization of his claim as a challenge "to the initiation of the revocation" of his security clearance, rather than to the revocation itself, was "a distinction without a difference." Pet. App. 9a-10a. The court noted that the "core" of petitioner's claim was "that his security clearance revocation was

initiated based on 'false' complaints and accusations." *Id.* at 10a. The court observed that, because the Department of Energy's "security determination was based on the information contained" in those complaints, the decision to revoke petitioner's clearance reflected that the relevant decisionmakers had "evaluated the trustworthiness of those statements as part of [their] determination" and had "specifically found them reliable." *Ibid.* The court concluded that, "[i]f the Board—or this court—were to reverse or remand on the basis that those statements were false, it would therefore necessarily involve second-guessing national security determinations in abrogation of *Egan*." *Ibid.* (citation, ellipsis, and internal quotation marks omitted).

The court of appeals also found that the same result would be warranted under "the approach set forth in" *Rattigan* v. *Holder*, 689 F.3d 764 (D.C. Cir. 2012). Pet. App. 11a. In *Rattigan*, the D.C. Circuit had held that a federal employee could pursue a Title VII claim alleging that a security-clearance review, in which the agency had allowed the employee to keep his clearance, had been triggered by the raising of "knowingly false" security concerns in retaliation for his protected activity. 689 F.3d 770; see *id.* at 766. The court of appeals explained that "the 'knowingly false' requirement of *Rattigan* has not been met here given the [Department of Energy's] findings of reliability." Pet. App. 11a.

ARGUMENT

Petitioner contends (Pet. 9-19) that the MSPB was required to review his claim of discrimination in the revocation of his security clearance. The court of appeals'

decision is correct and does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. In *Department of the Navy* v. *Egan*, 484 U.S. 518 (1988), this Court held that the CSRA did not authorize the MSPB to review "the substance of [a] * * * decision to deny or revoke a security clearance." *Id.* at 520. The Federal Circuit had held that such decisions were reviewable, relying on the "strong presumption in favor of appellate review" that this Court has articulated in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), and subsequent decisions. *Egan*, 484 U.S. at 526 (citation omitted). This Court concluded, however, that the *Abbott Laboratories* presumption "is not without limit, and it runs aground when it encounters concerns of national security, as in this case, where the 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." *Id.* at 527.

That judgment call, the Court explained, entails a prediction about whether an individual is likely to compromise classified information, and a "[p]redictive judgment of this kind must be made by those with the necessary expertise in protecting classified information." *Egan*, 484 U.S. at 529. The Court stated that it was not "reasonably possible for an outside nonexpert body to review the substance of such a judgment" or to "determine what constitutes an acceptable margin of error in assessing the potential risk." *Ibid.* It also observed that, "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Id.* at 530.

The Court was "fortified in [its] conclusion" of non-reviewability based on an examination of the CSRA's "express language along with the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Egan*, 484 U.S. at 530 (citation and internal quotation marks omitted). The Court observed that the CSRA "by its terms does not confer broad authority on the Board to review a security-clearance determination." *Ibid.* Although the CSRA empowered the Board to review, *inter alia*, removals, "[n]othing in the Act * * * directs or empowers the Board to go further." *Ibid.* The Court further explained that the preponderance-of-the-evidence standard that the Board would apply in reviewing a removal "seem[ed] inconsistent" with the standard for granting a security clearance, which requires that the clearance be "'clearly consistent with the interests of the national security.'" *Id.* at 531. Whereas the "clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials," requiring the government "to support the denial by a preponderance of the evidence would inevitably shift this emphasis and involve the Board in second-guessing the agency's national security determinations." *Ibid.*

2. The court of appeals correctly held that *Egan* controls this case. Petitioner's appeal of his removal to the Board under the CSRA is identical in all relevant respects to the dispute that reached this Court in *Egan*. See Pet. App. 18a-19a. And the reasoning of *Egan* applies in full to bar review of the Department of Energy's security-clearance determination in the context of petitioner's separate claim under USERRA.

The relief that petitioner seeks under USERRA, like the relief he seeks under the CSRA, is reinstatement to a position that requires a security clearance. See Pet. 19 (requesting reversal of the decision below "with instructions to reinstate [petitioner] to his position with the Department of the Navy").* That relief is impossible to grant without overturning the Department of Energy's determination that petitioner should not receive a security clearance. Such judicial (or MSPB) intrusion into national-security determinations is no more warranted for petitioner's USERRA claim than it was for the CSRA claim in *Egan*.

Here, as in *Egan*, the relief sought would require "an outside nonexpert body" (the Board) "to review the substance" of a "predictive judgment" about whether an individual may be entrusted with classified information, 484 U.S. at 529. Such review is no more "reasonably possible," *ibid.*, when the claim for relief arises under USERRA than when it arises under the CSRA. Nor is USERRA a statute in which "Congress specifically has provided" that courts should forgo their "traditional[] * * * reluctan[ce] to intrude upon the authority of the Executive in military and national security affairs," *id.* at 530. Like the CSRA, USERRA "does not confer broad authority on the Board to review a security-clearance determination," *ibid.*, but instead simply authorizes the Board more generally to review certain types of actions alleged to be discriminatory, see 38 U.S.C. 4311(a),

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* In the court of appeals, petitioner also asserted the alternative argument that he was entitled to reassignment to a different position that does not require a security clearance. See Pet. App. 6a, 9a. The court held that USERRA did not authorize such relief in the circumstances here, *id.* at 11a, and the petition does not contest that conclusion.

4324. Indeed, USERRA's general terminology may not even reach the circumstances of this case: it is far from clear that a security clearance is a "benefit of employment" whose revocation could even provide the basis for a USERRA claim, or that such a claim could be brought when the revocation was effected not "by" an agency acting as "an employer" (the Navy), but instead by a different agency (the Department of Energy). 38 U.S.C. 4311(a). Furthermore, the standard of review under USERRA is similar to the preponderance standard under the CSRA that the *Egan* Court viewed as "inconsistent" with the standard for security-clearance determinations, 484 U.S. at 531; see p. 8, *supra*; *Sheehan* v. *Department of the Navy*, 240 F.3d 1009, 1013 (Fed. Cir. 2001) (explaining that, once a USERRA claimant satisfies his initial burden of production, the employing agency must "show, by a preponderance of the evidence," that it "would have taken the adverse action anyway").

Petitioner's reliance (Pet. 12-16) on general principles of judicial and administrative review cannot be squared with *Egan*, in which this Court rejected similar arguments. See 484 U.S. at 526-527 (finding presumption of judicial review inapplicable); *id.* at 529, 531 (finding MSPB ill-suited to review security-clearance determinations). Petitioner's reliance (Pet. 15) on *Staub* v. *Proctor Hospital*, 562 U.S. 411 (2011), is also misplaced, since the Court in *Staub* addressed only the proper attribution of discriminatory animus in a private USERRA suit that involved neither an appeal to the Board nor a security-clearance determination. And petitioner's effort (*e.g.*, Pet. 19) to separate his discrimination claim from the underlying merits of the security-clearance determination is misconceived. Petitioner's

claim is necessarily broader than a claim that "the *initiation* of the proceeding was discriminatory," *ibid.* In order to obtain the relief he seeks (restoration to his former position), he would have to show that the ultimate *determination* to revoke his security clearance was unwarranted, that he is entitled to have access to classified information, and that his security clearance should be reinstated. A Board or judicial decision on any of those matters would necessarily require "second-guessing national security determinations in abrogation of *Egan*." Pet. App. 10a (citation, ellipsis, and internal quotation marks omitted).

3. In accord with the decision below, other courts of appeals have held that *Egan* precludes review of claims of discrimination in the context of an adverse security-clearance determination. See, *e.g.*, *Hall* v. *United States Dep't of Labor, Admin. Review Bd.*, 476 F.3d 847, 851-854 (10th Cir.), cert. denied, 552 U.S. 993 (2007); *Bennett* v. *Chertoff*, 425 F.3d 999, 1003 (D.C. Cir. 2005); *Becerra* v. *Dalton*, 94 F.3d 145, 148-149 (4th Cir. 1996), cert. denied, 519 U.S. 1151 (1997); *Perez* v. *Federal Bureau of Investigation*, 71 F.3d 513, 514-515 (5th Cir. 1995) (per curiam), cert. denied, 517 U.S. 1234 (1996).

Contrary to petitioner's contention (Pet. 16-18), the decision below does not conflict with the D.C. Circuit's decision in *Rattigan* v. *Holder*, 689 F.3d 764 (2012). As previously noted, see p. 6, *supra*, the court in *Rattigan* permitted a plaintiff who had been allowed to *keep* his security clearance following a review to pursue a Title VII claim alleging that the review had been triggered by "knowingly false security reports" made in retaliation for protected activity. 689 F.3d at 770; see *id.* at 766. Unlike the plaintiff in *Rattigan*, whose security clearance was not revoked, petitioner cannot show the

submission of "knowingly false" security reports without challenging the ultimate decision to revoke his security clearance, which necessarily rests on a determination that the security reports about him were well-founded. Pet. App. 11a. *Rattigan*, moreover, involved only a claim for money damages, not a claim seeking reinstatement to a position requiring a security clearance that the Executive Branch has declined to grant. 689 F.3d at 766; see *id.* at 770 (noting that the case would require "no judgments * * * as to whether the plaintiff's continued access to classified information was clearly consistent with national security").

Petitioner's passing suggestion (Pet. 3) that the decision below conflicts with the Fifth Circuit's decision in *Toy* v. *Holder*, 714 F.3d 881, cert. denied, 134 S. Ct. 650 (2013), is likewise incorrect. The contested agency action in *Toy* was not a security-clearance determination of the sort at issue in *Egan* and this case, but instead a determination that a contract employee would be denied access to a particular building. *Id.* at 885. The court distinguished *Egan* on the ground that security-clearance determinations, which "are made by specialized groups of persons" and involve "significant process," are "different from" building-access determinations, which lack similar "oversight, process, and considered decision-making." *Id.* at 885-886. *Toy* therefore does not support petitioner's contention that he is entitled to MSPB or judicial review of the revocation of his security clearance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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