No. 16-_____

IN THE
Supreme Court of the United States

NICHOLAS JAY WILSON,
Petitioner,

v.

DEPARTMENT OF THE NAVY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

MATTHEW AUGUST LEFANDE
ATTORNEY AT LAW PLLC
Counsel of Record
4585 North 25th Road
Arlington VA 22207
(202) 657-5800
matt@lefande.com

Attorney for Petitioner

QUESTIONS PRESENTED

Petitioner Nicholas Wilson alleges his United States Government security clearance was revoked and that he was subsequently terminated from his civilian job with the Department of the Navy in retaliation for the performance of his military duties.

The Uniformed Services Employment and Reemployment Rights Act of 1994 provides a "person who... has performed... service in a uniformed service shall not be denied... retention in employment... or any benefit of employment by an employer on the basis of that... performance of service." 38 U.S.C. § 4311 (a). Section 4324 (c)(1) provides that the "Merit Systems Protection Board shall adjudicate any complaint" brought under the Act by a Federal executive agency employee.

However, the Merit Systems Protection Board asserts, and the Federal Circuit has now affirmed, that this court's decision in *Department of Navy v. Egan*, 484 U.S. 518 (1988), precludes full review of the Petitioner's adverse action by the Board otherwise provided by Section 204 (a) of the Civil Service Reform Act of 1978, as codified at 5 U.S.C. § 7513 (d). This court in *Egan* 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." 484 U.S. at 530.

(1). Does the Uniformed Services Employment and Reemployment Rights Act specifically provide authority to the Merit Systems Protection Board to

inquire as to the existence of a discriminatory pretext in the revocation of an employee's security clearance?

(2). Where the employee alleges the revocation of the security clearance is for a discriminatory pretext, does the inquiry as to the existence of this discriminatory pretext improperly intrude upon the "merits" of the Executive's security clearance determination?

(3). Can the Merit Systems Protection Board then provide a remedy under the Uniformed Services Employment and Reemployment Rights Act to an employee whose security clearance was revoked in violation of the Act?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals, App. 3a, is reported at 843 F.3d 931. The order denying a petition for rehearing *en banc*, App. 1a, is unreported. The decision of the Merit Systems Protection Board, App. 12a, is reported at 2015 MSPB 48.

JURISDICTION

The judgment of the Court of Appeals was entered on December 7, 2016. App. 3a. A petition for rehearing *en banc* was denied on February 23, 2017. App. 1a.

STATUTES INVOLVED

The Uniformed Services Employment and Reemployment Rights Act of 1994. PUB. L. 103-353. 38 U.S.C. §§ 4301-4335.

The Civil Service Reform Act of 1978. PUB. L. 95-454. 5 U.S.C. ch. 11.

INTRODUCTION

Petitioner Nicholas Wilson alleges his United States Government security clearance was revoked and that he was subsequently terminated from his civilian job with the Department of the Navy in retaliation for the performance of his military duties.

The Uniformed Services Employment and Reemployment Rights Act of 1994 provides a "person who... has performed... service in a uniformed service shall not be denied... retention in employment... or any benefit of employment by an employer on the basis of that... performance of service." 38 U.S.C. § 4311 (a). Section 4324 (c)(1) provides that the "Merit Systems Protection Board shall adjudicate any complaint" brought under the Act by a Federal executive agency employee.

The Merit Systems Protection Board asserts, and the Federal Circuit has now affirmed, that this court's decision in *Department of Navy v. Egan*, 484 U.S. 518 (1988), precludes full review of the Petitioner's adverse action by the Board otherwise provided by Section 204 (a) of the Civil Service Reform Act of 1978, as codified at 5 U.S.C. § 7513 (d). This court in *Egan* 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." 484 U.S. at 530.

The District of Columbia Circuit has found a narrow exception to *Egan* to allow inquiry as to false and discriminatory allegations in the referral of an employee for a security clearance determination. *Rattigan v. Holder*, 689 F.3d 764 (D.C. Cir. 2012). This approach has been adopted by the Fifth Circuit, *Toy v. Holder*, 714 F.3d 881, 885-886 (5th Cir. 2013), but remains in conflict with decisions in the Fourth Circuit, *Becerra v. Dalton*, 94 F.3d 145, 149 (4th Cir. 1996) ("[T]here is no unmistakable expression of purpose by Congress in Title VII to subject the decision of the Navy to revoke [the plaintiffs] security clearance to judicial scrutiny."); *Guillot v. Garrett*, 970 F.2d 1320, 1326 (4th Cir. 1992) ("We therefore hold that individual security classification determinations are not subject to MSPB or judicial review for alleged violations of *section 501 of the Rehabilitation Act of 1973*"), and was not adopted by the Federal Circuit in this case, 843 F.3d at 935. This court's consideration of *Rattigan* and Uniformed Services Employment and Reemployment Rights Act is now necessary to preserve the efficacy of the Act, and resolve this conflict in the uniformity of laws among the Circuit Courts of Appeal.

STATEMENT OF THE CASE

For all times relevant to this appeal, Petitioner Nicholas Wilson was a career employee of Naval Reactors, a commissioned officer in the United States Navy, and an armed police reserve officer for the District of Columbia Metropolitan Police Department. For his duties with the Navy Reserve,

Wilson was an armed Command Investigator for the Naval District of Washington Police. Both his civilian position with Naval Reactors and his Navy Command Investigator assignment were located at the Washington Navy Yard in the District of Columbia. As a member of the Metropolitan Police Department, Wilson was a uniformed officer with statutory arrest authority throughout the District of Columbia, including the Washington Navy Yard.

On September 16, 2013, at around 8:20 a.m., a civilian contractor for the Navy suffering from mental illness began shooting personnel at Building 197 at the Washington Navy Yard. According to the Metropolitan Police Department after action report, at least 117 officers from at least eight different agencies responded to the incident. http://www.policefoundation.org/wp-content/uploads/2015/05/Washington-Navy-Yard-After-Action-Report.pdf at 16 (accessed May 18, 2017). Twelve persons were killed and eight injured before the gunman was killed by non-military outside agency police personnel. *Id*. at 4.

Wilson learned of the incident as it was occurring from a co-worker and responded to the Washington Navy Yard from a training session outside of the Navy Yard, but in close proximity and within the District of Columbia. Upon his arrival at the Navy Yard, Wilson presented his Naval District of Washington Command Investigator credentials to base personnel and sought out the Naval District of Washington Police Chief for instruction.

At the direction of the Police Chief, Wilson assisted with the clearing of Navy facilities and the evacuation of personnel during the shooting, and later assisted various agencies investigating the shooting in its aftermath. At the request of the Naval District Washington Police, Wilson remained on military duty on September 18-20, 2013 and October 2, 2013, to support the investigation of the Washington Navy Yard shooting. Wilson was provided muster sheets by the Navy documenting that Wilson was performing military duties as an activated Navy Reservist in his response to the Navy Yard shooting. Wilson immediately informed his supervisors at Naval Reactors that he was on military duty for September 16, 2013, and again for September 18-20, 2013, in accordance with the Uniformed Services Employment and Reemployment Rights Act.

Following the Washington Navy Yard shooting, Wilson requested a job transfer in his civilian employment into the Security Department of Naval Reactors. As one of very few members of the Naval District of Washington Police Department who participated in the Navy Yard shooting response, Wilson attempted to use his experience and performance at the incident to vie for a position in the Naval Reactors Security Department. The acting Director of Security for Naval Reactors, Scott Boaman, appeared in favor of Wilson's transfer, but other existing members of the Security Department, who were out of town during the incident, felt threatened by Wilson. This included the Security Officer for Naval Reactors, Gerald Alford. Wilson

learned from his supervisor, Mike Velasquez, that Adam DeMella of Naval Reactors was also upset about the transfer request.

On October 2, 2013, Velasquez told Wilson that Alford and DeMella were planning on using Wilson's response as a Navy Reservist to the Washington Navy Yard shooting to take disciplinary action against Wilson and prevent Wilson's transfer into the Naval Reactors Security Department. On October 7, 2013, Wilson was put on administrative leave pending the outcome of a security clearance investigation against him. Such investigation was initiated by Alford and DeMella.

On January 3, 2014, administrators at Naval Reactors Headquarters acting on Alford and DeMella's complaint recommended revocation of Wilson's security clearance. All allegations contained in the attached report directly referenced Wilson's military service during September of 2013. On February 18, 2014, DeMella made a Notice of Proposed Indefinite Suspension against Wilson. DeMella personally took this action against Wilson, despite his own knowledge that Wilson had already alleged the complaint against him violated the Uniformed Services Employment and Reemployment Rights Act and that Alford was illegally using the complaint to hinder Wilson's transfer.

On or about January 16, 2014, Wilson was informed by Naval Reactors that he would not receive any documentary evidence related to the allegations against him unless he waived his right to a hearing. Wilson executed the waiver on February

5, 2014, qualifying such waiver as a necessary predicate to receive his "investigative materials". Wilson brought this inappropriate demand by Naval Reactors to the attention of the Department of Energy on May 21, 2014 and expressly demanded such a hearing. Wilson further expressly asserted that such action violated the Uniformed Services Employment and Reemployment Rights Act.

On March 25, 2014, Wilson's security clearance was permanently revoked by Naval Reactors. The revocation notice referenced the same events related to Wilson's military service at the time of the Washington Navy Yard shooting as the cause for the revocation. Wilson timely appealed this decision to the Office of Departmental Personnel Security of the Department of Energy as directed. On July 29, 2014, DeMella proposed to terminate Wilson from his federal career service, solely for the loss of his security clearance, which was of course, itself caused by DeMella and predicated upon Wilson's military service. Wilson again timely appealed the decision and again asserted the unlawful nature of the action. Naval Reactors did not reinstate Wilson and made no attempt to provide Wilson with another "position of like seniority, status, and pay at another Federal executive agency" as required by 38 U.S.C. § 4313.

Wilson timely appealed to the Merit Systems Protection Board. Wilson specifically asserted to the Board that his termination was unlawfully motivated by his military service and violated the Uniformed Services Employment and Reemployment Rights Act.

Wilson further specifically asserted that persons at Naval Reactors unlawfully utilized his military service to commit other personnel practices prohibited by 5 U.S.C. § 2302 (b).

On November 24, 2014, the Administrative Law Judge held a status conference for the Board. The Administrative Law Judge asserted that she could not adjudicate "whether an agency's adverse action, which is premised on the suspension or revocation of a security clearance[,] constitutes impermissible discrimination or reprisal." (citing *Doe v. Department of Justice*, 121 M.S.P.R. 596, ¶ 10 (2014). The Administrative Law Judge afforded the parties to brief the issue, but ultimately prohibited Wilson from offering any evidence of his Uniformed Services Employment and Reemployment Rights Act claims at the evidentiary hearing.

An evidentiary hearing was held on February 11, 2015. The Administrative Law Judge uniformly prohibited any mention of Wilson's military service as a motivating factor in the revocation of his security clearance or his termination. The Administrative Law Judge subsequently affirmed Wilson's termination. Wilson attempted to introduce evidence that he did not access classified information in his position at Naval Reactors, and that he was even permitted to telecommute, to work from home on an ongoing basis, and had no need for a clearance in his assignment. The Administrative Law Judge disregarded this evidence.

Directly contrary to 38 U.S.C. § 4313, the Administrative Law Judge found that Naval Reactors was not required to provide Wilson with another position. The Administrative Law Judge further disregarded Wilson's protestations that he was improperly deprived of a hearing prior to his clearance revocation and completely disregarded the Due Process violations evident in such deprivation. Wilson timely appealed to the Board.

On August 5, 2015, the two member Board affirmed the decision of the Administrative Law Judge. Wilson timely appealed to the Federal Circuit. The parties briefed the matter and oral argument was conducted on November 7, 2016 and the matter affirmed by written opinion on December 7, 2016. 843 F.3d 931. Wilson petitioned for a rehearing on December 21, 2016 and rehearing wasdenied on February 23, 2017.

REASONS FOR GRANTING THE WRIT

I. Congress has specifically provided for the Merit Systems Protection Board to investigate and remedy violations of the Uniformed Services Employment and Reemployment Relief Act.

"A person who... has performed... service in a uniformed service shall not be denied... retention in employment... or any benefit of employment by an employer on the basis of that.... performance of service." 38 U.S.C. § 4311 (a). "Congress intended

that the term 'benefit of employment' be given an expansive interpretation." The Uniformed Services Employment and Reemployment Rights Act should be "broadly construed and strictly enforced." *Yates v. Merit Systems Protection Board*, 145 F.3d 1480, 1484-85 (Fed. Cir. 1998) (quoting H.R. REP. No. 103-65, at 23 (1993)).

The Merit Systems Protection Board has an absolute, exclusive and unique obligation to adjudicate claims of federal employees discriminated against for their military service. 38 U.S.C. §§ 4304 (1), 4324 (b); 5 C.F.R. § 1208.2 (a). The Uniformed Services Employment and Reemployment Rights Act provides specific rights to workers who have been "denied . . . employment, reemployment, retention in employment, promotion, or any benefit of employment" because of their military service. 38 U.S.C. § 4311 (a); 5 C.F.R. § 1208.2 (a).

In order to establish that the Merit Systems Protection Board has jurisdiction over an appeal based on an alleged Uniformed Services Employment and Reemployment Rights Act violation, a petitioner must make non-frivolous allegations that he or she was a member of the uniformed services, and was denied initial or continued employment or a benefit of employment, and that military service was a "substantial or motivating factor" in the denial. *Sheehan v. Department of Navy*, 240 F.3d 1009, 1013 (Fed. Cir. 2001). See *Hayes v. U.S. Postal Service*, 390 F.3d 1373, 1376 (Fed. Cir. 2004).

"[M]ilitary service is a motivating factor for an adverse employment action if the employer 'relied on, took into account, considered, or conditioned its decision' on the employee's military-related absence or obligation." *Erickson v. United States Postal Service*, 571 F.3d 1364, 1368 (Fed. Cir. 2009) (quoting *Petty v. Metro. Government of Nashville-Davidson County*, 538 F.3d 431, 446 (6th Cir. 2008) (quoting *Coffman v. Chugach Support Servs.*, 411 F.3d 1231, 1238 (11th Cir. 2005)) and citing *Robinson v. Morris Moore Chevrolet-Buick, Inc.*, 974 F. Supp. 571, 576 (E.D. Tex. 1997) (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241-42 (1989))).

An employer commits a prohibited action, denies employment or benefits of employment with military service as a motivating factor in the denial, unless the employer can prove that it would have denied the employment or benefit in the absence of such service. 38 U.S.C. § 4311 (c)(1). Extraordinary in the present case is not only was the "substantial or motivating factor" in Wilson's termination repeatedly asserted to be his military service, that allegation was never meaningfully contested by Naval Reactors or the Board. Naval Reactors made it quite clear in each stage of its revocation and termination processes that it was taking such action in direct response to Wilson's military service, and at each stage Wilson unequivocally asserted his rights under the Uniformed Services Employment and Reemployment Rights Act. Compare *Yates*, 145 F.3d at 1485 ("Ms. Yates failed to mention USERRA or to make any allegation of discrimination against her by

the Postal Service on account of her Army Reserve duty.")

Such admitted discrimination overcomes any claim of executive prerogative in bestowing security clearances to its employees. The Merit System Protection Board's decision to even hear the merits of Wilson's Uniform Services Employment and Reemployment Rights Act claim lay in direct conflict with 38 U.S.C. § 4324 (b) ("A person may submit a complaint against a Federal executive agency... directly to the Merit Systems Protection Board..."). This was indeed Wilson's exclusive venue for any such remedy. "To permit an employer to fire an employee because of his military absence would eviscerate the protections afforded by USERRA, the overarching goal of which is to prevent those who serve in the uniformed services from being disadvantaged by virtue of performing their military obligations." *Erickson*, 571 F.3d at 1368 (citing 38 U.S.C. § 4301 (a); S. REP. No. 90-1477, at 2 (1968)).

II. By Congressional enactment, discriminatory conduct cannot not be committed to the discretion of the Executive.

"*Egan* and this court's decisions following it are based on the principle that foreign policy is the 'province and responsibility of the Executive.'" *Romero v. Department of Defense*, 527 F.3d 1324, 1329 (Fed. Cir. 2008) (quoting *Egan,* 484 U.S. at 529 (quoting *Haig v. Agee,* 453 U.S. 280, 293-94 (1981))). "[U]nless Congress specifically has provided

otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Id.* (quoting *Egan*, 484 U.S. at 530).

The conflict arises where Congress has enacted laws providing for blanket prohibitions against discrimination, such as Title VII, the Whistleblower Protection Act, or the Uniformed Services Employment and Reemployment Rights Act and an employee alleges the security clearance revocation is made in violation of one of these laws. "Section 701 of the Administrative Procedure Act, 5 U.S.C. § 701 (1964 ed., Supp. V), provides that the action of 'each authority of the Government of the United States,'... is subject to judicial review except where there is a statutory prohibition on review or where 'agency action is committed to agency discretion by law.'" *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (footnote omitted). "In this case, there is no indication that Congress sought to prohibit judicial review and there is most certainly no 'showing of "clear and convincing evidence" of a . . . legislative intent' to restrict access to judicial review." *Id.* (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967) and citing *Brownell v. We Shung*, 352 U.S. 180, 185 (1956); *Rusk v. Cort*, 369 U.S. 367, 379-380 (1962)). "[T]he exception for action 'committed to agency discretion'... is a very narrow exception." *Overton Park*, 401 U.S. at 410 (quoting Berger, *Administrative Arbitrariness and Judicial Review*, 65 COL. L. REV. 55 (1965)) (footnote omitted). "The legislative history of the Administrative Procedure Act indicates that it is applicable in those rare

instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Overton Park*, 401 U.S. at 410 (quoting S. REP. No. 79-752 at 26 (1945)).

A "presumption of agency discretion can be overcome if Congress indicates that a decision or act is not discretionary." *Sierra Club v. Whitman*, 268 F.3d 898, 902 (9th Cir. 2001) (citing *Heckler v. Chaney*, 470 U.S. 821, 838 (1985)). "Congress may limit the total discretion of the Executive in dismissing an employee". *Anonymous v. Kissinger*, 499 F.2d 1097, 1102 (D.C. Cir. 1974). "It rested with Congress, too, to determine upon the means proper to be adopted to fulfill this guarantee..." *Baker v. Carr*, 369 U.S. 186, 221 (1962) (quoting *Luther v. Borden*, 48 U.S. 1 (1849)). The Uniform Services Employment and Reemployment Rights Act demands exactly this negation of discretion and likewise imposes strict liability upon the Agency if violated.

> The Supreme Court's decisions in *Service v. Dulles*, 354 U.S. 363 (1957), and *Vitarelli v. Seaton*, 359 U.S. 535 (1959), also make clear that federal employees may challenge an agency's compliance with its regulations governing revocation of security clearances. Nothing in *Egan* overrules those cases, and in fact the principle of those cases has been applied even in cases involving employee security issues. See *Duane v. U.S. Department of Defense*, 275 F.3d 988, 993 (10th Cir. 2002) (holding that court was not precluded from reviewing a claim that agency violated its own procedural regulations when

> revoking or denying a security clearance); *Reinbold v. Evers*, 187 F.3d 348, 359 n.10 (4th Cir. 1999) (same).

Romero, 527 F.3d at 1329 (parallel citations omitted).

It is a profoundly strange proposition to suggest that the Merit Systems Protection Board has authority to compel an agency to comply with the agency's own regulations, ***but not compel the agency to comply with the United States Code.*** "[I]f a supervisor performs an act motivated by antimilitary animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA." *Staub v. Proctor Hospital*, 562 U.S. 411, 422 (2011) (emphasis supplied, footnotes omitted).

"The [*Staub*] Court... strays from the statutory text by holding that it is enough for an employee to show that discrimination motivated *some other action* and that this latter action, in turn, caused the termination decision." *Id*. at 424, ALITO, J. *concurring* (emphasis supplied). Despite the expressed misgivings of Justices Alito and Thomas regarding the *Staub* decision, the standing law of this court indeed states as much that the courts must inquire as to the illegal motivation in the underlying security clearance revocation to determine if the subsequent adverse action violates USERRA.

Congress and this court have ascribed authority to USERRA which transcends the executive discretion described in *Egan*. *Staub*

requires that an inquiry be made as to the discriminatory intent in the underlying employment action which led to the termination action.

III. The District of Columbia Circuit's approach in *Rattigan* to permit a inquiry as to a discriminatory intent properly preserves the Act's legislative intent.

In a similar vein to the present case, in *Rattigan*, an employment discrimination plaintiff alleged that officials at the FBI retaliated against him "by reporting unfounded security concerns to the Bureau's Security Division," which "prompted an investigation into his continued eligibility for a security clearance." 689 F.3d at 765. The District of Columbia Circuit explained that "*Egan*'s absolute bar on judicial review covers only security clearance-related decisions made by trained Security Division personnel and does not preclude all review of decisions by other... employees who merely report security concerns." *Id*.

The District of Columbia Circuit concluded that there can be liability for a security investigation referral where "agency employees acted with retaliatory or discriminatory motive in reporting or referring information that they knew to be false." *Id*. at 771. If *Rattigan* appropriately protects an employee from Title VII discrimination in a false referral for a security clearance revocation, the logic applies equally to a Uniformed Services Employment and Reemployment Rights Act claim.

> USERRA expands the scope of liability for differential treatment of an employee based on military status beyond what the Constitution's Equal Protection Clause allows. Because military status is not considered a suspect class, a governmental entity can justify treating workers differently based on military status for equal protection purposes if there is a rational basis for the differential treatment... Under USERRA, by contrast, if an employee's military status is the basis for its differential treatment of an employee, the employer is liable, period; there is no such thing as a "rational basis" defense.

Bello v. Village of Skokie, 200 L.R.R.M. 3543 at 19 (N.D. Ill. 2014) (emphasis added).

While the Plaintiff in *Rattigan* eventually received a "favorable" security clearance decision, and Wilson did not receive a "favorable" security clearance decision, this is of no import. "While it is true that Mr. Rattigan's security clearance was not revoked, the reasoning of *Rattigan I* and *II* was not in any way based on this fact." *Burns-Ramirez v. Napolitano,* 962 F. Supp. 2d 253, 257 (D.D.C. 2013).

> Whereas such officials will frequently have to make investigation decisions based on uncorroborated and acontextual allegations received from non-Security Division employees, the plaintiff may be able to introduce evidence to convince the jury that those employees included in their referral accusations that they knew or should have

> known were false or misleading. Such evidence, if credited, will provide compelling reasons for the factfinder to conclude that the employees' asserted security reasons for the referral were pretextual without ever calling into doubt any Security Division judgment.

Rattigan, 643 F.3d at 986 (citing *Brady v. Office of Sergeant at Arms*, 520 F.3d 490, 495 (D.C. Cir. 2008) (explaining that one way an employee may show that an employer's stated reason for an action was pretextual is to "attempt to demonstrate that the employer is making up or lying about the underlying facts that formed the predicate for the [action]"). See *Burns-Ramirez*, 962 F. Supp. 2d at 257 (quoting *Rattigan*, 689 F.3d at 770 (concerns over permitting allegations of false and discriminatory motives in security clearance investigations are "insufficient to justify 'sweeping immunity from Title VII'")).

> The D.C. Circuit carefully balanced the need for security against a Title VII claimant's rights, explaining "it is our duty not only to follow *Egan*, but also to preserve to the maximum extent possible Title VII's important protections against workplace discrimination and retaliation." *Rattigan II*, 689 F.3d at 770. The Circuit achieved this compromise by declaring that a Title VII claimant may proceed only on a claim that an agency employee acted with retaliatory or discriminatory motive when knowingly reporting or referring false information to security. *Id*. at 771.

Burns-Ramirez, 962 F. Supp. 2d at 257.

Wilson never alleged that Matthew Brott was motivated by Wilson's military service in revoking his security clearance. If he was, it remains immaterial. Wilson has from the very onset of this case properly alleged, and affirmatively demonstrated, that Gerald Alford and Adam DeMella brought the false security clearance complaint to Brott in response to Wilson's performance of his military duties during and after the Washington Navy Yard shooting.

The Merit Systems Protection Board never needed to reach the merits of the revocation proceeding if it is already determined that the initiation of the proceeding was discriminatory. "These two pieces of the statutory scheme fit together tongue and groove. In such circumstances, it is the court's role to give effect to plain meaning rather than to decide whether some other formulation might have been preferable as a matter of policy." *United States v. Hilario*, 218 F.3d 19 (1st Cir. 2000).

CONCLUSION

For these reasons, and for such other reasons as this honorable court finds to be good and sufficient cause, Nicholas Wilson's petition for certiorari should be GRANTED and the decision of the Federal Circuit reversed with instructions to reinstate Wilson to his position with the Department of the Navy.

Respectfully submitted, this 24th day of May, 2017,

Matthew August LeFande
Attorney at Law PLLC
Counsel of Record
4585 North 25th Road
Arlington VA 22207
(202) 657-5800
matt@lefande.com

Attorney for the Petitioner

United States Court of Appeals for the Federal Circuit

NICHOLAS JAY WILSON,
Petitioner
v.
DEPARTMENT OF THE NAVY,
Respondent

2015-3225

Petition for review of the Merit Systems Protection Board in No. DC-0752-15-0038-I-1.

ON PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Before PROST, *Chief Judge*, NEWMAN, MAYER[*], LOURIE, DYK, MOORE, O'MALLEY, REYNA, TARANTO, CHEN, HUGHES, and STOLL, *Circuit Judges*.[**]

PER CURIAM.

[*] Circuit Judge Mayer participated only in the decision on the petition for panel rehearing.
[**] Circuit Judge Wallach did not participate.

O R D E R

Petitioner Nicholas Jay Wilson filed a combined petition for panel rehearing and rehearing en banc. The petition was referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue on March 2, 2017.

FOR THE COURT

February 23, 2017	/s/ Peter R. Marksteiner
Date	Peter R. Marksteiner

United States Court of Appeals for the Federal Circuit

NICHOLAS JAY WILSON,
Petitioner
v.

DEPARTMENT OF THE NAVY
Respondent

2015-3225

Petition for review of the Merit Systems Protection Board in No. DC-0752-15-0038-I-1

Decided: December 7, 2016

MATTHEW AUGUST LEFANDE, Matthew August LeFande Attorney at Law PLLC, Arlington, VA, argued for petitioner.

RENEE BURBANK, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent. Also represented by BENJAMIN C. MIZER, ROBERT E. KIRSCHMAN, JR., ELIZABETH M. HOSFORD.

Before O'MALLEY, MAYER, and STOLL, *Circuit Judges*.

O'MALLEY, Circuit Judge.

Nicholas Wilson ("Wilson") seeks review of the Merit Systems Protection Board's ("the Board") decision denying his request for corrective action under the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), 38 U.S.C. § 4301, *et seq*. Specifically, Wilson alleged that the Department of Energy ("the DOE") improperly revoked his security clearance, and the Department of the Navy ("the Navy") improperly terminated his employment thereafter. The Board rejected Wilson's claims, finding that it lacked the authority to review adverse security clearance determinations and that the Navy had not acted improperly in terminating Wilson given the revoked clearance. *Wilson v. Dep't of the Navy*, 122 M.S.P.R. 585 (2015). For the following reasons, we affirm.

BACKGROUND

A. Clearance Revocation and Termination

Wilson worked as a civilian Resource Analyst at the Nuclear Propulsion Directorate at the Naval Sea Systems Command, a position that required him to hold a DOE security clearance ("Q clearance"). On January 8, 2014, the DOE suspended Wilson's security clearance. The DOE listed as security concerns that Wilson: (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. Wilson maintains that he brought his firearm to the Navy facility in response to the Washington Navy Yard shooting that occurred on September 16, 2013, in perceived fulfillment of his duty as a Navy Reservist.

Wilson argued to the DOE that the clearance revocation was based on his service as a Naval Reservist, in violation of USERRA. Unpersuaded, on July 25, 2014, the DOE revoked Wilson's security clearance. On July 29, 2014, based on the DOE's revocation, Wilson's supervisor at the Department of the Navy proposed Wilson's removal. Wilson filed a response to the Navy's proposal, arguing that the revocation violated USERRA and his due process rights. Nevertheless, on September 12, 2014, the Navy removed Wilson from federal service because he no longer had the security clearance that was a prerequisite for his position. Wilson appealed to the Board.

B. The AJ's Initial Decision

In an initial decision, the administrative judge ("AJ") determined that the Board did not have authority to consider claims of discrimination or reprisal in the context of an appeal from a removal based on security clearance revocation. In particular, the AJ stated that she would not allow discovery, hear witnesses, or consider evidence regarding Wilson's USERRA defense, as it was entirely premised on the allegedly improper revocation. The AJ determined that she could only decide the facts of

(1) whether Wilson's security clearance was required for his former position, and (2) whether it was actually revoked. She answered both of those questions in the affirmative and Wilson does not dispute those conclusions.

Additionally, because Wilson alleged that the Navy violated his due process rights, the AJ examined whether the Navy provided him the procedural protections of 5 U.S.C. § 7513(b): 30 days advance written notice, reasonable time to answer, notification of the right of representation by an attorney, and provision of a written decision detailing the agency's reasoning. Looking to the record, the AJ found that the Navy proposed Wilson's removal in writing, gave him a reasonable time to respond, notified Wilson of his right to an attorney, and provided a written decision as to the agency's reasoning. The AJ also found that the Navy did not have a policy or regulation to reassign employees to alternate positions that do not require a security clearance. Absent such a policy, the AJ concluded, the Navy was not required to reassign Wilson to a position that did not require a security clearance. *See Griffin v. Def. Mapping Agency*, 864 F.2d 1579, 1580–81 (Fed. Cir. 1989) ("[I]f the Defense Mapping Agency had an 'existing policy,' manifested by regulation, to transfer applicants who unsuccessfully seek a security clearance to nonsensitive positions if available, it could be held to that policy and the Board could review its efforts. In the absence of this policy, the Board has no role."). Because the investigation and subsequent procedures were consistent with agency policy, the AJ sustained the agency's decision. Wilson appealed.

C. Appeal to the Board

The Board issued its final decision on August 5, 2015. Wilson had argued that the AJ's decision to not allow discovery, hear witnesses, or consider evidence regarding his USERRA defense was in error. USERRA, Wilson argued, was intended to be broadly construed—such that the Board could (and should) review the merits of his security revocation because it constituted a violation of USERRA. Wilson also noted that he did not claim there was a procedural violation in the *course of* the agency's revocation of his security clearance, but rather that the *revocation itself* violated USERRA. That is, Wilson argued that the agency revoked his security clearance based on his military service, and the revocation was the proximate cause of his dismissal; therefore, the Board must examine the merits of the revocation to determine whether there was a violation of USERRA.

The Board noted at the outset that it could not review agency revocations of security clearances because such revocations are not considered adverse actions. The Board relied in particular on *Department of the Navy v. Egan*, 484 U.S. 518 (1988), stating:

> The Board has thus interpreted *Egan* to preclude review of allegations of prohibited discrimination and reprisal when such affirmative defenses relate to the revocation of a security clearance. *Pangarova* [*v. Dep't of the Army*], 42 M.S.P.R. [319], 322 [(1989)]. Our reviewing court also has taken this approach.

> *See, e.g.*, *Adams v. Department of Defense,* 688 F.3d 1330, 1334 (Fed. Cir. 2012) (stating that neither the Federal Circuit, nor the Board, has authority to review a charge that retaliation and discrimination were the reasons for revocation of a security clearance).

Wilson, 122 M.S.P.R. at 589. Unless Congress has specifically authorized otherwise, the Board held, it cannot review security clearance determinations. Wilson's assertion that USERRA did offer such authorization was rejected; the Board found USERRA's "[s]hall adjudicate any complaint" language insufficiently explicit to "constitute a specific statement of congressional intent." *Id.* (citing *Hesse v. Dep't of State*, 217 F.3d 1372, 1378 (Fed. Cir. 2000)). The Board thus held that it lacked the authority to consider Wilson's USERRA claim as it related to the revocation of his security clearance, and denied Wilson's petition for review, finding no error in the AJ's decision. Wilson timely appealed to this court, and we have jurisdiction pursuant to 5 U.S.C. § 7703(b)(1)(A).

DISCUSSION

The scope of our review in an appeal from a decision of the Board is limited. We must affirm the Board's decision unless it is "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. § 7703(c).

Wilson maintains on appeal that the Board should have reviewed whether the security clearance revocation was in violation of USERRA. Specifically, he argues that: (1) USERRA necessarily authorizes review of security clearance determinations, (2) alternatively, the Board could have reviewed whether his revocation was "initiated" based on a discriminatory motivation without reviewing the merits of the revocation itself, and (3) irrespective of his revocation, he was entitled to reemployment in a similar position under USERRA. None of these arguments are persuasive.

In *Egan*, the Supreme Court "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." *Adams v. Dep't of Def.*, 688 F.3d 1330, 1334 (Fed. Cir. 2012) (citing *Egan*, 484 U.S. at 529–31). That is the well-established limit of our review; "neither this court nor the [Board] has authority to review the charge that . . . discrimination w[as] the reason[] for revocation of the security clearance." *Id.* Congress has not "specifically . . . provided otherwise" in this case, because USERRA makes no mention of security clearances, explicitly or otherwise. *Egan*, 484 U.S. at 530. Nor does Wilson—relying solely on USERRA on appeal— raise a constitutional claim that might transcend these limitations. *See, e.g.*, *Dubbs v. CIA*, 866 F.2d 1114, 1120 (9th Cir. 1989) (permitting review of a security clearance determination on Equal Protection grounds).

Wilson's shift in the alternative to the initiation of revocation—as opposed to the "merits"—

relies on a distinction without a difference. The core of Wilson's allegation is that his security clearance revocation was initiated based on "false" complaints and accusations. Because the DOE's security determination was based on the information contained therein, it evaluated the trustworthiness of those statements as part of its determination—and specifically found them reliable. If 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*. *Kaplan v. Conyers*, 733 F.3d 1148, 1155 (Fed. Cir. 2013).

Wilson's reliance on *Rattigan v. Holder*, 689 F.3d 764 (D.C. Cir. 2012), is misplaced. In *Rattigan*, the D.C. Circuit stated:

> The question, then, is whether we must bar reporting and referral claims altogether, as the government urges, or whether we can sufficiently minimize the chilling effect of Title VII liability by narrowing the scope of such claims. We ask this question because it is our duty not only to follow *Egan*, but also to 'preserv[e] to the maximum extent possible Title VII's important protections against workplace discrimination and retaliation.' . . . Title VII claims based on *knowingly false* reporting present no serious risk of chill, [so] we believe that claims of knowingly false security reports or referrals can coexist with *Egan* . . . .

Rattigan, 689 F.3d at 770 (quoting *Rattigan v. Holder*, 643 F.3d 975, 984 (D.C. Cir. 2011)). Even if this court were to follow the approach set forth in *Rattigan*, which we are not required to do, the "knowingly false" requirement of *Rattigan* has not been met here given the DOE's findings of reliability.

Nor is Wilson entitled to reemployment independent of his USERRA discrimination claim. USERRA does provide a right to reemployment following "absence . . . necessitated by reason of service in the uniformed services." 38 U.S.C. § 4312(a). But when an employee has returned to employment and is *subsequently* terminated due to antimilitary animus, no claim exists under § 4312, even if a claim for discrimination under § 4311 might otherwise be available. *See Pittman v. Dep't of Justice*, 486 F.3d 1276, 1279–80 (Fed. Cir. 2007). Wilson does not dispute either that he returned to work after his alleged military service or that the only reemployment claim he asserted was under § 4312. He thus has not asserted an actionable reemployment claim.

Accordingly, after careful consideration, we find no error in the Board's decision.

AFFIRMED

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2015 MSPB 48

Docket No. DC-0752-15-0038-I-1

Nicholas Jay Wilson,
Appellant,
v.
Department of the Navy,
Agency.
August 5, 2015

Matthew August LeFande, Arlington, Virginia, for the appellant.

David B. Gattis, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision, which sustained his removal based on the revocation of his security clearance. For the reasons set forth below, we DENY the petition for review for failure to meet the Board's criteria for review. *See* 5 C.F.R. § 1201.115.

BACKGROUND

¶2 Effective September 20, 2014, the agency removed the appellant from his position as a Resource Analyst, GS-14, based on the revocation of his security clearance.[1] Initial Appeal File (IAF), Tab 5 at 22-26. The appellant filed an appeal with the Board regarding his removal and requested a hearing. IAF, Tab 1.

¶3 On appeal, the appellant asserted that the agency's decision to revoke his security clearance violated the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at 38 U.S.C. §§ 4301-4333)

[1] Although employed by the Department of the Navy (Navy), because of the nature of the appellant's position involving nuclear material, decisions regarding his security clearance were made by the Department of Energy. Initial Appeal File (IAF), Tab 5 at 141-46.

USERRA) and that, therefore, its removal action also violated USERRA.[2] IAF, Tab 11. During a status conference,the administrative judge informed the parties that the Board lacks authority to consider claims of discrimination and reprisal in the context of an appeal from a removal based on the revocation of a security clearance. IAF, Tab 9. However, because the appellant asserted that the instant appeal is distinguishable from such cases, the administrative judge afforded the parties an opportunity to file briefs regarding this issue. *Id.* After considering the

[2] The stated security concerns included that the appellant: (1) knowingly introduced his personal firearm onto a United States Navy facility on multiple occasions, contrary to Navy regulations and specific directions he had received; (2) armed himself with his personal weapon while performing duties as a Metropolitan Police Department (MPD) reserve officer, contrary to regulations, on numerous occasions; and (3) made false statements and false time and attendance entries regarding his activities for his civilian employer, the Naval Reserve Unit, and the MPD, on numerous occasions. IAF, Tab 5 at 141-46. The appellant appears to assert that the security clearance revocation was based on his military service because many of these actions took place during the course of his performance of duties as a Naval Reservist. *See* IAF, Tab 11 at 5.

parties' submissions, the administrative judge issued an order ruling that she would neither allow discovery, nor hear any witnesses or evidence, as to the appellant's claim that the agency revoked his security clearance and removed him based on his military service. IAF, Tab 13.

¶4 Subsequently, after holding the requested hearing, the administrative judge issued an initial decision affirming the agency's removal action. IAF, Tab 33, Initial Decision (ID). She found that: (1) a security clearance was required for the appellant's position; (2) the appellant's security clearance was revoked; (3) proper procedures were followed in revoking the appellant's clearance, and the agency afforded him the procedural protections of 5 U.S.C. § 7513(b) in effectuating his removal; and (4) the agency was not required to transfer the appellant to a nonsensitive position.[3] ID at 4-11. She also found that the agency's removal action promoted the

[3] The appellant does not challenge these findings in his petition for review, and we discern no basis for disturbing them on review.

the efficiency of the service.[4] ID at 11.

¶5 The appellant has filed a petition for review. Petition for Review (PFR) File, Tab 1. In it, he argues that he should have "been permitted to introduce evidence as to the discriminatory nature of the revocation of his security clearance." *Id.* at 5. He also indicates that he is not making a "claim of a procedural failing in the security clearance revocation process." *Id.* at 10. Rather, he emphasizes, his claim is that "the revocation itself violates USERRA." *Id.* (emphasis in original).

¶6 Disputing the applicability of Board precedent, he contends that Congress intended for USERRA to be broadly construed, such that the Board is permitted to review the merits of the revocation of

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[4] The appellant also alleged below that the revocation of his security clearance was designed to prevent him from competing for a GS-15 position and, therefore, constituted a prohibited personnel practice. IAF, Tab 1 at 6. The disposition of this claim is unclear from the record, though it seems that the administrative judge's January 6, 2015 order regarding affirmative defenses disposed of it. *See* IAF, Tab 13. The appellant does not raise any argument regarding this claim on review. However, to the extent that the January 6, 2015 order was not sufficiently explicit as to this claim, we note that the Board is precluded from reviewing this claim for the same reasons, discussed herein, that preclude it from reviewing his USERRA claim.

his security clearance insofar as that decision was impermissibly based on his military service. *Id.* at 7-16. Accordingly, he asserts, the Supreme Court's decision in *Department of the Navy v. Egan*, 484 U.S. 518 (1988), which holds that the Board lacks authority to review the merits of a security clearance determination in an appeal from an action taken under 5 U.S.C. § 7513, is inapplicable to USERRA claims. *Id.* at 10, 13-14. He also cites *Staub v. Proctor Hospital*, 562 U.S. 411, 422 (2011), which holds that an employer is liable under USERRA if a supervisor performs an act motivated by antimilitary animus with the intention to cause an adverse employment action and that act is the proximate cause of the ultimate employment action. The appellant argues that because the agency revoked his security clearance based on his military service, and that revocation was the proximate cause of his removal, the Board must examine the merits of that revocation in order to determine whether his removal violated USERRA.[5] PFR File, Tab 1 at 11. The agency filed a response, to which the appellant replied. PFR File, Tabs 3-4.

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[5] The appellant also states that the agency has failed to provide him with a "position of like seniority, status and pay at another Federal executive agency," in violation of 38 U.S.C. § 4313. PFR File, Tab 1 at 7. We presume that he is actually referring to 38 U.S.C. § 4314. This statutory provision has no applicability in the instant appeal. It relates to the Federal government's obligations when an employee returns to his civilian Federal position following a period of uniformed service, which is not the issue in this case.

ANALYSIS

¶7 In *Egan*, the Supreme Court held that, unless Congress specifically provides otherwise, the Board lacks the authority to review adverse security clearance determinations. *Roach v. Department of the Army*, 82 M.S.P.R. 464, ¶¶ 50, 52 (1999); *see Egan*, 484 U.S. at 530. The Court found that 5 U.S.C. chapter 75 did not specifically grant the Board such authority. *Egan*, 484 U.S. at 530; *Roach*, 82 M.S.P.R. 464, ¶ 50. In finding that this statute did not confer such authority to the Board, the Court noted that a denial of a security clearance is not an adverse action under chapter 75 and is not, by its own force, subject to Board review. *See Egan*, 484 U.S. at 530; *see also* 5 U.S.C. § 7512. It further found that, when an agency removes an employee for cause under 5 U.S.C. § 7513 based on the denial of a required security clearance, nothing in the Civil Service Reform Act of 1978 authorizes the Board to review the merits of the denial. *Egan*, 484 U.S. at 530.

¶8 Here, the agency cited 5 C.F.R. Part 752, which implements chapter 75, subchapter II, as the authority for the appellant's removal. IAF, Tab 5 at 22; *see* 5 U.S.C. § 7514. Thus, *Egan* is clearly applicable here. We simply do not have the authority to look behind the security clearance determination in this chapter 75 removal appeal.

¶9 We are not persuaded by the appellant's arguments to the contrary. First, the Supreme Court in *Egan* drew no distinction between the merits and affirmative defenses in precluding Board review of security clearance determinations. *See Pangarova v. Department of the Army*, 42 M.S.P.R. 319, 322-23 (1989) (citing *Egan*, 484 U.S. at 530-32). The Board has thus interpreted *Egan* to preclude review of allegations of prohibited discrimination and reprisal when such affirmative defenses relate to the revocation of a security clearance. *Pangarova*, 42 M.S.P.R. at 322. Our reviewing court also has taken this approach. *See, e.g.*, *Adams v. Department of Defense*, 688 F.3d 1330, 1334 (Fed. Cir. 2012) (stating that neither the Federal Circuit, nor the Board, has authority to review a charge that retaliation and discrimination were the reasons for revocation of a security clearance).

¶10 In addition, USERRA does not authorize the Board to review security clearance determinations. *See generally* 38 U.S.C. chapter 43; *see also Egan*, 484 U.S. at 530. The appellant asserts that USERRA contains such authorization because it states that the Board "shall adjudicate any complaint" brought before it under USERRA. PFR File, Tab 1 at 10; *see* 38 U.S.C. § 4324(c)(1). This, however, is not an explicit authorization. *See Hesse v. Department of State*, 217 F.3d 1372, 1378 (Fed. Cir. 2000) (finding that a "catch-all clause" in 5 U.S.C. § 2302 does not constitute a specific statement of congressional intent to allow Board review of security clearance determinations in the context of a whistleblower retaliation claim); *Roach*, 82 M.S.P.R. 464, ¶ 52 (finding authority lacking to review security

clearance determinations absent a specific unmistakable expression of congressional intent to confer such authority).

¶11 Based on the foregoing, we lack the authority to consider the appellant's USERRA claim relating to the revocation of his security clearance as an affirmative defense raised in the context of his chapter 75 removal appeal and we also lack jurisdiction over the claim as a separate appeal. *See Roach*, 82 M.S.P.R. 464, ¶ 48 (holding that the Board lacked jurisdiction over the appellant's claim relating to the suspension of his security clearance as either an individual right of action appeal or a whistleblowing retaliation affirmative defense in a chapter 75 appeal). Accordingly, we DENY the appellant's petition for review. We find no error in the administrative judge's decision to preclude the appellant from taking discovery and introducing evidence regarding the merits of the revocation of his security clearance. The initial decision, therefore, is affirmed.

ORDER

¶12 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).