SHARRATT v. MURTHA Doc. 103

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ABDEL MONIEM ALI EL-GANAYNI,	:	
	:	No. 2:08-cv-00881
Plaintiff,	:	The Honorable Terrence F. McVerry
v.	:	
UNITED STATES DEPARTMENT OF ENERGY, and JEFFREY F. KUPFER, Acting Deputy Secretary of Department of Energy,	:	
Defendants.	:	

SUPPLEMENTAL BRIEF AND MOTION FOR RECONSIDERATION

In its October 31, 2008 Memorandum Order, this Court requested supplemental briefing on the following issues: (1) the standard of review of the agency's interpretation of the Executive Orders; and (2) the relationship and application of Executive Orders 12968 and 10865. Parts A and B of this Supplemental Brief address these issues. In Part C, Dr. El-Ganayni moves for reconsideration of the Court's dismissal of Counts I and II of the Complaint on the grounds that the Court's concerns can be addressed by requiring Defendants to conduct the review themselves in the first instance, and because such an approach is consistent *Webster* and *Stehney*.

A. Defendants' Interpretations of the Executive Orders In This Litigation Are Not Entitled to Deference. To The Contrary, To The Extent Any Deference is Appropriate, Deference Should Be Provided to the Department's Official Interpretation As Set Forth in Its Regulations.

Plaintiff recognizes that the Supreme Court has established as a general rule that "an agency's consistently held interpretation of its own regulation is entitled to deference." *INS v. National Ctr. for Immigrants' Rights*, 502 U.S. 183, 190 (1991); *see also Chevron, U.S.A., Inc. v.*

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NRDC, Inc., 467 U.S. 837, 845 (1984). Agencies are afforded this deference primarily for two reasons: (1) Congress delegated such interpretive authority to the agency; and (2) an agency has superior expertise in the disputed area. *See Williams v. Babbitt*, 115 F.3d 657, 662 (9th Cir. 1997). However, such deference is not appropriate where the proffered interpretation crosses the constitutional line, as it does here, or where the proffered interpretation is inconsistent with prior interpretations. In fact, to the extent any deference is appropriate, this Court should defer to the agency's official interpretation as set forth in its regulations because that interpretation is the one that has been consistently held and applied and because that interpretation does not raise troubling constitutional concerns.

While courts are required to scrutinize constitutional objections to a particular agency interpretation skeptically, if the agency's proffered interpretation raises serious constitutional concerns, deference should not be afforded. *Id. See also Chamber of Commerce v. Federal Elections Comm'n*, 69 F.3d 600, 605 (D.C. Cir. 1995) (declining to accord *Chevron* deference to a Federal Election Commission regulation because it would raise troubling constitutional questions) and *Republican Nat'l Comm. v. Federal Election Comm'n*, 76 F.3d 400, 409 (D.C. Cir. 1996) (according *Chevron* deference because "we can easily resolve the [constitutional questions] through the application of controlling precedent"), *cert. denied*, 117 S. Ct. 682 (1997). Just as the courts will not infer from an ambiguous statute that Congress intended to encroach upon a constitutional boundary, they also will not presume from ambiguous language that Congress intended to authorize an agency to do so. *Williams v. Babbitt*, 115 F.3d 657, 662 (9th Cir. 1997). Thus there is a presumption that if Congress means to push the constitutional envelope, it must do so explicitly. *Id.* Moreover, when an agency adopts a constitutionally troubling interpretation, the law presumes that the agency not only lacked the expertise to

evaluate the constitutional problems, but probably didn't consider them at all. *Id. Accord Gilbert v. NTSB*, 80 F.3d 364, 366-67 (9th Cir. 1996) ("Generally, challenges to the constitutionality of a statute or a regulation promulgated by an agency are beyond the power or jurisdiction of an agency."). Judges, by contrast, specialize in "saying what the law is." *Id.* (*citing Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803)). The balance of expertise therefore shifts against judicial deference when a constitutional line is about to be crossed. *Id.* (*citing* The Supreme Court, 1990 Term - Leading Cases, 105 Harv. L. Rev. 177, 398 (1991) ("When constitutional rights are implicated..., the balance of values clearly shifts against agency deference.")).

Furthermore, as stated above, to be entitled to deference, the interpretation at issue must be one that is "consistently held." In *Udall v. Tallman*, 380 U.S. 1, 17 (1965), for example, it was significant that the Secretary had "consistently construed Executive Order No. 8979" in the same manner. In explaining why consistent interpretation is important, the Court stated:

> It may be argued that while these facts and rulings prove a usage they do not establish its validity. But government is a practical affair intended for practical men. Both officers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department – on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself – even when the validity of the practice is the subject of investigation.

Id. at 17 (*quoting United States v. Midwest Oil Co.*, 236 U.S. 459, 472-73 (1915)). Part of the reason for deferring to the agency in *Udall* was that the department's construction had been a matter of "public record and discussion". *See also Aulston v. United States*, 915 F.2d 584, 595 and n.16 (10th Cir. 1990).

Even for "informal" agency interpretations, courts will require consistency in those interpretations before deferring to the agency. *Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F.3d 735, 759-60 (10th Cir. 2005). Indeed, where the interpretation of a statute or regulation changes, courts cannot give deference to both of the competing interpretations. For all these reasons, courts require an interpretation to be, at a minimum, consistently held and applied before giving any deference to that interpretation.

The agency's regulations themselves represent interpretations of the statute or executive order. *Alaniz v. Office of Personnel Management*, 728 F.2d 1460, 1465-66 (Fed. Cir. 1984). *See also California Association of the Physically Handicapped, Inc. v. Federal Communications Commission*, 840 F.2d 88, 93 (D.C. Cir. 1988). In *Alaniz*, the Court of Appeals reversed and remanded the district court's determination that the agency interpretation was reasonable, finding that the district court failed to consider the impact of the agency's "*official* interpretation of the order as reflected in its regulations" *Id.* (emphasis in original).

Where current interpretations conflict with interpretations as set forth in regulations, courts refuse to give any deference to the current interpretation. For example, in *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), the Supreme Court declined to give deference to an agency's interpretation that was proffered for the first time in the context of litigation. The Court noted that the agency's interpretation as set forth in its regulations was inconsistent with the position taken in litigation, and found that the interpretation as set forth in the regulations was the appropriate one. *Id.* at 214. *See also Watt v. Alaska*, 451 U.S. 259, 272 (1981) (holding that the "Department's current interpretation, being in conflict with its initial position, is entitled to considerably less deference," and finding the new interpretation "wholly unpersuasive"). Similarly, in *Beno v. Shalala*, 30 F.3d 1057 (9th Cir. 1994), the Secretary of the

Department of Health and Human Services argued that her interpretation was entitled to deference, even though it was contrary to the department's own regulations. In response, the Court stated: "an agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view'." *Id.* at 1071 (*quoting INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987)). The Court concluded that the Secretary's new interpretation was not entitled to any deference. *Id.*

Here, deference to the Defendants' current interpretation of the Executive Orders and regulations is not appropriate. First, their interpretation allows D.O.E. to insulate itself from any and all review of its actions, even if those actions violate fundamental rights guaranteed by our Constitution. According to Defendants' interpretation, one person can make a determination that Dr. El-Ganayni will have no knowledge of the allegations against him and will be provided no opportunity to address those allegations and defend against them. This one person can do so without any review, internal or external to the Department, and the Secretary may delegate this responsibility to anyone of his choosing. At a minimum, this interpretation raises "troubling constitutional questions," and for that reason alone, no deference should be afforded.

Second, the Defendants' current interpretation is inconsistent with their prior, official interpretation as set forth in D.O.E.'s own regulations. Whether or not the Executive Orders are "self-actuating,"[1] it cannot be disputed that Executive Order 12,968 required the Secretary to

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[1] On page 20 of the Court's October 31, 2008 Memorandum Opinion, the Court made a finding that Executive Order 12,968 "is self-actuating." This conclusion appears to be based on the following language from section 5.2(c) of that Order: "This section does not require additional proceedings, however, and creates no procedural or substantive rights." (as quoted on page 20 of the Court's opinion). The full language of subsection (c) is as follows:

...Continued

promulgate regulations, and the Secretary did so based on his reading of the language. In drafting these regulations, the Secretary did not provide any mechanism for the wholesale denial of rights as occurred in this case. Further, the Secretary did not provide any mechanism to allow the principal deputy to make decisions regarding the denial of the uniform minimum standards. The interpretation as set forth in the regulations is the official interpretation, the interpretation that has been consistently held and applied, and is the interpretation that should be accorded deference.

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> Agency heads **shall promulgate** regulations to implement this section **and**, at their sole discretion and as resources and national security considerations permit, **may provide additional review proceedings** beyond those required by subsection (a) of this section. This section does not require **the additional proceedings**, however, and creates no procedural or substantive rights.

(emphasis added). The "additional proceedings" referenced in the second sentence refers to the discretionary "additional review proceedings" described in the first sentence, not to the regulations implementing subsection (a) that the Secretary "shall promulgate." Dr. El-Ganayni submits that the language and structure of Executive Order 12,968 make clear that both the President and the Department understood that regulations would be necessary to implement the requirements of the Order, and the Order was not to be implemented without such regulations. The fact that the Department promulgated such regulations is clear evidence that this was the Department's understanding. Dr. El-Ganayni notes that Executive Order 10,865 also required the department heads to promulgate regulations (section 1(a)).

Moreover, even if executive orders generally can be implemented in the absence of regulations, the executive cannot by *ipse dixit* preclude review of its own actions. Preclusion of review is up to the legislative branch, not the executive. Finally, agency regulations, even those whose authority arises not from delegated legislation but are rather merely internal rules of procedure, are binding upon agencies. *United States v. Caceres*, 440 U.S. 741, 754 (1979); 2 K. Davis, Administrative Law Treatise 7.21 (2d ed. 1979); 3 B. Mezines, J. Stein and J. Gruff, Administrative Law 13.03[2] (1981); B. Schwartz, Administrative Law 58, at 153, 159-60 (1976). Therefore, whether or not the executive order is self-actuating, D.O.E. is still bound by its regulations. Dr. El-Ganayni respectfully requests that the Court reconsider its conclusion that Executive Order 12,968 can be implemented in a manner that violates D.O.E.'s own regulations that implement that Order.

B. With Respect To The Uniform Minimum Standards Set Forth in Section 5.2(a) of Executive Order 12,968, Any Inconsistencies Between the Executive Orders Are Controlled by Executive Order 10,865.

Section 7.2(c) of Executive Order 12,968 reads in pertinent part:

> No prior Executive orders are repealed by this order. To the extent that this order is inconsistent with any provision of any prior Executive order, this order shall control, except that this order shall not diminish or otherwise affect the . . . denial and revocation procedures provided to individuals covered by Executive Order No. 10865, as amended . . .

With this language, Executive Order 12,968 made clear that with respect to the denial and revocation procedures set forth in E.O. 10,865, the language of E.O. 10,865 would control in the event of any inconsistencies. Undersigned counsel has not located any published opinions that address the interplay of the two executive orders, but the language of Section 7.2(c) unambiguously demonstrates an intent not to diminish the procedures set forth in E.O. 10,865.

Section 9 of Executive Order 10,865 reads as follows:

> Nothing contained in this order shall be deemed to limit or affect the responsibility and powers of the head of a department to deny or revoke access to a specific classification category if the security of the nation so requires. **Such authority may not be delegated and may be exercised only when the head of a department determines** that the procedures prescribed in sections 3, 4 and 5 cannot be invoked consistently with the national security and such determination shall be conclusive.

(emphasis added). The language of section 9 makes clear that the regular procedures attendant to revocation decisions may be avoided only by a decision of the "head of a department." *See also Clifford v. Shoultz*, 413 F.2d 868, 871 (9th Cir. 1969) ("An exception to these procedures is provided in the Order's section 9, but the exception applies only in the event that the Secretary of Defense or the head of another executive department personally finds, without delegating his

authority, that the procedures 'cannot be invoked consistently with the national security and such determination shall be conclusive'.").

To the extent that Executive Order 12,968 is inconsistent with this provision, the language of Executive Order 10,865 would control. To hold otherwise would allow the language of E.O. 12,968 to "diminish or otherwise affect the . . . denial and revocation procedures provided to individuals covered by Executive Order No. 10865", directly contrary to section 7.2(c) of E.O. 12,968.

Defendants relied on two sections of Executive Order 12,968 in revoking Dr. El-Ganayni's security clearance (sections 5.2(d) and (e)), and only one of those sections (5.2(d)) even purports to allow someone other than the head of the department to make such decisions. Section 5.2(e) states: "This section shall not be deemed to limit or affect the responsibility and power of an **agency head** pursuant to any law or other Executive Order to deny or terminate access to classified information . . . " (emphasis added). Although section 5.2(e) does not specify that such authority may not be delegated, it clearly limits authority to the "agency head." If section 5.2(e) were interpreted to allow the agency head to delegate such authority, such an interpretation would be inconsistent with section 9 of E.O. 10,865 (which prohibits such delegation). As set forth above, in the event of such an inconsistency, E.O. 10,865 would control and the purported delegation to Defendant Kupfer in this case would be improper and ineffective. Alternatively, if section 5.2(e) is interpreted according to its plain language to limit authority to the "agency head," the purported delegation to Defendant Kupfer also is improper and ineffective. Under either interpretation, Defendant Kupfer did not have authority to revoke Dr. El-Ganayni's security clearance under section 5.2(e) of E.O. 12,968.

Section 5.2(d) purports to allow "the head of an agency or principal deputy" to certify that a procedure cannot be made available. Despite this language, the principal deputy is not so authorized because any such conclusion is inconsistent with the enabling statute, inconsistent with E.O. 10,865 and inconsistent with D.O.E.'s own interpretation of E.O. 12,968 as set forth in its implementing regulations.

Executive Order 12,968 was issued in response to 50 U.S.C. § 435, which required that "[n]ot later than 180 days after October 14, 1994, the President **shall**, by Executive Order or regulation, establish procedures to govern access to classified information . . ." (emphasis added). Section (b)(1) of that provision states:

> Subsection (a) of this section shall not be deemed to limit or affect the responsibility and power of an **agency head** pursuant to other law or Executive Order to deny or terminate access to classified information if the national security so requires. Such responsibility and power may be exercised only when the **agency head** determines that the procedures prescribed by subsection (a) of this section cannot be invoked in a manner that is consistent with the national security.

(emphasis added). The President's inclusion of the phrase "or principal deputy" in his Executive Order was not authorized by the enabling legislation. Further, as set forth above, the inclusion of this language directly conflicts with the language from E.O. 10,865, which prohibits anyone other than the agency head from making this determination. As explained above, in the event of such a conflict, E.O. 10,865 controls and therefore, the principal deputy is without authority to make these determinations. Finally, D.O.E.'s own regulations that implement E.O. 12,968 actually require the Secretary himself to issue a final decision where the uniform minimum standards articulated in the regulations are not fully utilized. 10 C.F.R. § 710.31. For all these reasons, the principal deputy is not authorized to make these determinations, and the revocation of Dr. El-Ganayni's security clearance was improper and ineffective.

C. This Court Should Reconsider Its Dismissal of Counts I and II of the Verified Complaint Because the Concerns Raised By The Court Can Be Addressed By Requiring Defendants to Conduct the Review Themselves, and Such a Procedure is Consistent With *Webster* and *Stehney*.

Dr. El-Ganayni respectfully requests that the Court reconsider its conclusion on page 11 of its October 31, 2008 Memorandum Opinion that the Defendants' Motion to Dismiss Counts I and II should be granted. This conclusion appears to stem in part from the Court's concern that a consideration of Dr. El-Ganayni's claims would cause it to violate the separation of powers. Further, the Court based its decision on its view that *Webster* applied narrowly, only to statutory interpretation cases, and that *Stehney* limited the types of constitutional claims that were reviewable. With all due respect, Dr. El-Ganayni submits that these findings are in error. Further, any concerns regarding separation of powers would be addressed by requiring D.O.E. to conduct the appropriate review procedures itself, which is the relief Plaintiff seeks.

In applying *Webster* and *Stehney* to the facts of this case, this Court concluded that if review were permitted, it necessarily would have to second-guess the merits of the invocation of national security (October 31, 2008 Memorandum Opinion, p. 10-11). The Court also concluded that a consideration of those claims "would require the Court to second-guess the Executive branch" (p. 11). However, these concerns are much less of an issue if this Court simply requires the Defendants to provide a hearing as set forth in the regulations and to let D.O.E.'s own hearing officer make these determinations.

D.O.E. has established procedures for review of clearance revocation decisions, and these procedures provide various mechanisms for protecting against the disclosure of sensitive

information. This procedure involves a review by a D.O.E.-employed Hearing Officer, who has a security clearance and can get higher clearances as necessary. By utilizing this procedure, the Defendants are at least providing some review of the decisions that have adversely affected Dr. El-Ganayni. The Hearing Officer assigned to this matter has more than a decade of experience and is certainly sensitive to the need to protect classified information. If appropriate, the Hearing Officer can limit the disclosure of such information or prohibit the disclosure of certain information entirely.

In his Verified Complaint, Dr. El-Ganayni's primary request is to order D.O.E. to make these determinations through the procedures set forth in its regulations. By doing so, this Court would not be making a determination itself, but simply would be requiring the Defendants to conduct their own internal review of the determinations. Through this mechanism, the Court does not need "clear principles by which the Court may decide which party is correct" and need not exercise any "predictive judgment" about the merits of the revocation decision. Through the process of administrative review, many constitutional violations can be identified and corrected without the need for any "second-guessing" by the Courts. While Dr. El-Ganayni believes this Court has the authority and the procedures available to it to evaluate his claims and require the Defendants to reconsider his security clearance without using any unconstitutional means, the far simpler solution is to require Defendants themselves to provide a review, as is required by their regulations. Given the "potential abuse of unconstrained, unreviewable assertions of 'national security'," Dr. El-Ganayni submits that he is entitled to such a review.

The Court's conclusion also appears to be based on its reading of the interplay between *Egan* and *Webster* and the consequent impact of *Stehney*. In *Webster v. D.O.E.*, 486 U.S. 592 (1988), the Supreme Court held that although review of revocation decisions on their merits was

precluded by the language of Section 102(c) of the National Security Act, the federal courts nonetheless did have jurisdiction to review colorable constitutional claims arising from the revocation decision and process (See October 31, 2008 Memorandum Opinion, at p. 8). However, this Court found that *Webster* was distinguishable from the instant case on the following grounds:

> However, *Webster* is distinguishable because it was a statutory interpretation case, which construed the delegation of power to the Director of CIA contained in section 102(c) of the National Security Act, 50 U.S.C. § 403(c). By contrast, the authority of the executive branch to revoke security clearances is not derived from a statute, but flows directly from the United States Constitution, Art. II, § 2, "and exists quite apart from any explicit congressional grant." *Egan*, 484 U.S. at 527. Thus, the fact that Congress did not empower the CIA Director to evade judicial review of constitutional claims when terminating an employee is not precedential to the issues in this case.

(October 31, 2008 Memorandum Opinion, at p. 8-9). In so holding, this Court appears to have made a distinction as to the authoritative basis for the conduct at issue: if the conduct is purportedly based on legislation, then judicial review of colorable constitutional claims may be had, but if the conduct is purportedly based on the Constitution itself (or an Executive Order whose own basis was the Constitution), then no judicial review is available.

Dr. El-Ganayni respectfully notes that while the opinion for the Court in *Webster* did not cite *Egan*, the two dissents both cited *Egan* and argued—as this Court did in its Memorandum Opinion—that no judicial review could be had where the plaintiff alleges a violation of his constitutional rights. Accordingly, when the opinion for the Court in *Webster* is read in conjunction with the two dissents, it becomes clear that the Supreme Court does in fact allow judicial review of claims that an agency has violated the constitutional rights of the plaintiff.

Courts since *Webster* routinely find that there should be no distinction between cases in which the authority to act comes from an Act of Congress and cases in which the authority to act

is purportedly based on an Executive Order (which itself was based on constitutional authority). *Dorfmont v. Brown*, 913 F.2d 1399, 1404 (9th Cir.1990) (authority based on Executive Order 10865); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 570-74 (9th Cir. 1990); *Dubbs v. CIA*, 866 F.2d 1114 (9th Cir. 1989); *Doe v. Schacter*, 804 F. Supp. 53, 58 (N.D. Cal. 1992) ("this Circuit views constitutional challenges raised under presidential authority to be no different from challenges raised under congressional legislation").

In *Dorfmont*, the authority at issue was derived from Executive Order 10865. Although holding that it could not review certain claims which challenged the merits of the revocation decision, the Court did review claims of alleged constitutional violations. Similarly, in *Dubbs*, the Court remanded to the district court for a consideration of whether the CIA unconstitutionally discriminated against Dubbs in revoking his security clearance. Indeed, the Court of Appeals for the District of Columbia Circuit has found this distinction unpersuasive:

> The government dismisses *Webster v. Doe* on the basis that the CIA Director there was exercising statutory power in firing the employee for security reasons, see § 102(c) of the National Security Act, 50 U.S.C. § 403(c), whereas the Defense Department's use of the Questionnaire rests on a delegation of the President's constitutional power as Commander-in-Chief under article II, section 2. The Court in *Webster v. Doe* did not mention any such distinction and its significance is far from evident.

National Federation of Federal Employees v. Greenberg, 983 F.2d 286, 289-290 (D.C. Cir. 1993) (citations omitted).

Dr. El-Ganayni submits that there is no reason why review of constitutional claims should depend on the source of authority of the questioned action.[2] Whatever the source, if the

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[2] In this matter, Defendants claim both legislative and constitutional authority for Executive Order, 12,968 (See Defendants' Brief in Support of Motion to Dismiss, pages 7-8). In ...*Continued*

action violates fundamental rights guaranteed by the Constitution, there should be some type of review. Although the nature and extent of that review necessarily will fluctuate depending upon the interests involved, individual liberties mean nothing unless there is at least some mechanism to protect them.[3]

In support of its conclusion, this Court also cited *Stehney v. Perry,* 101 F.3d 925 (3d Cir. 1996), for the proposition that: "The courts may only adjudicate those constitutional claims that do not violate the separation of powers or involve political questions" (October 31, 2008 Memorandum Opinion, at p. 9). Dr. El-Ganayni respectfully submits that this is a misinterpretation of *Stehney*. The language from that opinion reads as follows:

> If Stehney had asked for review of the merits of an executive branch decision to grant or revoke a security clearance, we would agree [that such claims are unreviewable]. But not all claims arising from security clearance revocations violate separation of powers or involve political questions. Since *Egan*, the Supreme Court and several courts of appeals

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cases such as this, it would be impractical to have different standards for each alleged source of authority.

[3] Although the Court characterized *Department of Navy v. Egan*, 484 U.S. 518 (1988) as "rather sweeping," Dr. El-Ganayni submits that *Egan* is actually quite narrow. First, that decision merely held that a particular statute did not authorize the Merit Systems Protection Board to review security clearance determinations. Not only was that decision limited to a source of statutory authority (same as *Webster*), but it also involved administrative review, not judicial review. Regardless, Dr. El-Ganayni does not dispute that Courts of Appeals have extended *Egan* to apply to judicial review of security clearance decisions on their merits. Secondly, and more importantly, in *Egan*, there was a thorough administrative review, including full notice, the opportunity to present evidence, a hearing and a right to appeal. The *Egan* court was not presented with a case where no internal or external review was provided, and there is nothing in the *Egan* opinion that would suggest that the Court intended to trump ANY review at all. For this reason, Dr. El-Ganayni submits that its application to cases such as this one should be circumscribed at best.

> have held the federal courts have jurisdiction to review constitutional claims arising from the clearance revocation process.

Id. at 932. It is decisions **on the merits** that may involve political questions and violate separation of powers. For over 200 years the Courts have asserted their jurisdiction to review constitutional claims, and alleged violations of fundamental rights guaranteed under the Constitution cannot fairly be described as political questions. The Stehney court did not attempt to limit the types of constitutional claims that may be reviewed; rather the Stehney court simply was distinguishing constitutional claims from claims on the merits.

Indeed, the claims asserted by Dr. El-Ganayni are precisely the types of claims that *Webster* and *Stehney* indicate are permissible. In holding that review of constitutional challenges was permissible, the Court of Appeals for the Third Circuit cited to *Dorfmont*, *Jamil*, *Dubbs* and *Greenberg*, all cases involving claims that constitutional rights were infringed through the clearance revocation process. *Id.* at 932. And in each of those cases cited by the Court of Appeals, the Courts found jurisdiction and proceeded to analyze whether the individual's constitutional rights were in fact violated.

As the United States Supreme Court has held:

> Any process in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short.

Hamdi v. Rumsfield, 542 U.S. 505,536-37 (2004). *See also Boumediene v. Bush*, No. 06-1195, p. 35 (June 12, 2008).[4] The Courts can either require the executive departments to conduct

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[4] The President's power as Commander in Chief, which is relied upon in part in the Court's opinion in *Egan*, is subject to limits which are reviewable by the Courts, even in times of war. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

appropriate reviews, or if they refuse, can conduct those reviews themselves. The courts have been performing these reviews for over 200 years, even in cases involving national security. Dr. El-Ganayni's Brief in Opposition to Defendants' Motion to Dismiss cited literally dozens of cases in which such reviews were conducted. Dr. El-Ganayni respectfully requests that this Court reconsider its ruling that Counts I and II of the Complaint should be dismissed, and instead, order that D.O.E. provide a hearing, as per its regulations, to Dr. El-Ganayni.

Respectfully submitted,

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Dated: November 14, 2008

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing **SUPPLEMENTAL BRIEF AND MOTION FOR RECONSIDERATION** has been served on Defendants' Counsel via the Court's CM/ECF Court Filing System on November 14, 2008:

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United States Department of Justice
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/s/ Keith E. Whitson
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