# Presidential Nominees and Foreign Influence: Mitigating National Security Risks

*By Sean M. Bigley*

## Note from the Editor:

This article describes the procedures involved in determining whether to grant security clearances to presidential appointees, and argues that the Senate confirmation process is not the proper venue for security vetting.

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• Jason Rathod, *Not Peace, But a Sword: Navy v. Egan and the Case Against Judicial Abdication in Foreign Affairs*, 59 Duke L.J. 595 (2009), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1447&context=dlj.

• Jeff Stein, *Despite Potential Conflicts of Interest in Asia, Commerce Appointee Wilbur Ross Will Get Confirmed First, Cleared Later*, Newsweek (Jan. 9, 2017), http://www.newsweek.com/donald-trump-appointees-security-clearances-540767.

• Susan Hennessey, *Ethics Rules Are National Security Rules*, Lawfare (Jan. 10, 2017), https://www.lawfareblog.com/ethics-rules-are-national-security-rules.

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Should a businessman with overseas interests and connections be barred from serving in the federal government? Should a policy expert with relatives in other countries be excluded from presidential appointment shortlists? What legal standards apply to such determinations, how are they applied, and by whom? Do current laws and investigative norms protect the American public from appointees whose overseas entanglements risk subjecting them to coercion or manipulation by foreign adversaries?

Questions like these raise what the national security community calls "foreign influence" concerns. Although it is worthy of careful consideration, the risk of foreign influence is often entirely mitigatable using standards promulgated under President Bill Clinton and in use government-wide since that time. The process of applying those standards is overseen by career government officials whose tenure transcends both Republican and Democratic administrations, and who have proven in the past their willingness to defend their prerogatives, even against the White House.[1] Their security determinations about a nominee can ultimately be overridden by the President, yet history provides no known precedent for such an action, and likely for good reason. The political fallout for any President would be catastrophic after the inevitable media leak.

Foreign entanglements are uniquely matters of national security, as opposed to matters of nominee suitability, a distinction discussed below. These national security matters are best resolved by the nation's security apparatus—which functions within the Executive Branch—and the extensive background investigation to which all presidential nominees submit before being granted security clearances.[2] The Supreme Court weighed in on this issue in a little-known 1988 case—*Department of the Navy v. Egan*. In *Egan*, the Court held that security clearance decisions were exclusively the purview of the Executive Branch[3] and reaffirmed "the generally accepted view that foreign policy was the province and responsibility of the Executive."[4] Although the case arose as one of statutory construction, the Court apparently

1 *See, e.g.*, Aaron Boyd, *White House Tech Advisor Denied Security Clearance*, Federal Times (Feb. 1, 2016), http://www.federaltimes.com/story/government/management/hr/2016/02/01/soltani-denied-clearance/79645394/. *See also* Email from Cassandra Butts to John Podesta, "Re: Security Clearance Issue," (Oct. 29, 2008), https://wikileaks.org/podesta-emails/emailid/11883 (published by Wikileaks; noting that the FBI denied an interim security clearance for unspecified reasons to Ben Rhodes, who later became President Obama's Deputy National Security Advisor, presumably after mitigating the FBI's concerns).

2 *See* Dept. of the Navy v. Egan, 484 U.S. 518, 529 (1988) (noting that personnel security determinations "must be made by those with the necessary expertise in protecting classified information").

3 *Egan*, 484 U.S. at 527.

4 *Id.* at 529 (quoting Haig v. Agee, 453 U.S. 280, 293-294 (1981)).

recognized that it had serious constitutional implications and, in an extraordinarily broad opinion, raised those matters sua sponte.

Over the past three decades, neither Republican nor Democratic Congresses have seen fit to legislatively neutralize *Egan*; it remains unclear whether such an effort would be an unconstitutional infringement on the President's Commander-in-Chief or appointment powers. Notwithstanding the absence of legislative action, however, some Senators are now attempting to override the spirit of *Egan* by purporting to condition their approval of key presidential nominees on issues like foreign influence that are fundamentally personnel security determinations.[5] The result is a blurring of the line between the Senate's constitutional "advice and consent" authority and the deference granted to the Executive Branch on matters of national security.

Below, I explore the framework of the security clearance process; why, despite certain flaws, it generally works; and how presidential nominees with overseas entanglements can obtain security clearances using the legal standards established by President Clinton. I also argue that the Senate's constitutional "advice and consent" authority with respect to nominees is appropriately limited by *Egan* to questions of nominee suitability instead of national security.

## I. The Federal Government's Background Investigation System

### *A. Investigation*

Processing for any prospective security clearance holder begins with the completion of Standard Form (SF) 86, the Questionnaire for National Security Positions.[6] The 127-page document, and the in-person questioning by federal agents that accompanies it, covers almost every conceivable issue pertaining to applicant judgment, reliability, and honesty. This includes some areas—such as substance abuse, dishonesty, and criminal history—covered in the general pre-employment suitability screenings that federal employers undertake by law apart from any security clearance investigations.[7] But it also includes numerous other areas like finances, blackmail potential, and misuse of information technology systems that are uniquely security concerns. Notably, security clearance investigations are designed to assess in great depth applicants' overseas connections: friends, family, property, bank accounts, investments or other personal assets, and business entanglements of any kind.

White House staff members and presidential appointees or nominees typically complete additional, more invasive screening questionnaires and, in some cases, a polygraph examination. The FBI's Special Inquiries Squad handles these cases and prepares comprehensive reports of investigation to present their findings to career adjudicators within the FBI and the Executive Office of the President's (EOP) Office of Security.

To prepare their reports of investigation, investigators review intelligence and law enforcement databases; assess any suspicious financial transactions;[8] compare the current SF-86 to past submissions for discrepancies; query the applicant's employers, colleagues, neighbors, associates, and friends; and interview the applicant at great length to further elucidate admitted issues or confront him or her with any areas of concern. Best practice is for investigators to develop their own sources of information, preventing the applicant from "guiding" the investigation by only providing references who will report positively about his or her attributes.

One of the most serious criticisms of the federal background investigation system is that it relies too much on applicant self-reporting.[9] In other words, government investigators only learn about certain issues if applicants choose to disclose them on the SF-86 form or during investigative interviews. There is merit in this argument, yet to-date little action has been taken to implement the recommendations of a 2014 presidential task force designed to examine the issue.[10] Fundamentally, the government has both a sword and a shield to combat falsified security clearance applications: prosecution under the federal false statements statute,[11] and cross-checking of information with human references and databases. The latter is only as effective as those performing the investigations, and many have raised concerns

5 *See, e.g.*, Lesley Wroughton and Patricia Zengerle, *Tillerson to Face Questions on Russian Ties at Confirmation Hearing*, Reuters (Jan. 11, 2017) http://www.reuters.com/article/usa-congress-tillerson-idUSL1N1F01XW (last accessed January 11, 2017).

6 Questionnaire for National Security Positions (Standard Form 86), https://www.opm.gov/forms/pdf_fill/sf86-non508.pdf (last accessed January 4, 2017).

7 5 CFR § 731 et seq. (noting that suitability assessments are designed to determine whether the hiring of a particular applicant would be detrimental to the integrity or efficiency of the federal service).

8 This is accomplished with the assistance of the "FINCEN"—the U.S. Treasury Department's Financial Crimes Enforcement Network, which keeps records of large cash deposits or withdrawals from U.S. financial institutions, as well as those which may be designed with the intent of "structuring" (i.e. avoiding tax reporting requirements by making multiple deposits of funds just under the $10,000 reportable limit).

9 *See* Suitability and Security Processes Review: Report to the President (Feb. 2014), https://www.whitehouse.gov/sites/default/files/omb/reports/suitability-and-security-process-review-report.pdf (last accessed January 10, 2017) (noting that an over-reliance on applicant self-reporting is caused primarily by local law enforcement agency non-cooperation in the federal background investigation process, combined with the inadequacy of counter-measures for detecting applicant falsifications).

10 *Id.*

11 18 U.S.C. § 1001. In recent years, the government has stepped up prosecutions for falsifying the security clearance application. *See, e.g.*, Press Release, Department of Justice, Maryland Resident Charged with Making False Statements and Submitting False Documents in Applications for Federal Jobs (March 16, 2011), https://www.justice.gov/opa/pr/maryland-resident-charged-making-false-statements-and-submitting-false-documents-applications (Maryland woman allegedly falsified her criminal and employment history); Press Release, U.S. Attorney's Office, Middle District of Florida, Government Employee Convicted Of Making False Statements (Sept. 30, 2015), https://www.justice.gov/usao-mdfl/pr/government-employee-convicted-making-false-statements (Florida man convicted of making false statements about his relationship with a foreign national); Press Release, U.S. Attorney's Office, Eastern District of Virginia, Former Fox News Commentator Pleads Guilty to Fraud (April 29, 2016), https://www.justice.gov/usao-edva/pr/former-fox-news-commentator-pleads-guilty-fraud (Maryland man convicted of falsifying a past career with the CIA in order to obtain new positions).

about the thoroughness and completeness of investigations undertaken by the nation's primary background investigations service provider, the Office of Personnel Management's National Background Investigations Bureau (OPM).[12] Once again, the criticisms do have merit; I have written previously about clear shortcomings in the federal background investigation process.[13] However, the general opinion within the personnel security community is that the FBI operates in a different league from the OPM. One of the chief reasons for this disparity in investigative quality likely stems from the difference in the two agency missions. The OPM is, at heart, a human resources functionary, while the FBI is primarily charged with building criminal cases.

Yet regardless of the shortcomings that plague the OPM and, to a much lesser extent, the FBI, it is doubtful that a Senate Committee hearing would achieve different results in borderline cases. After all, a nominee who lies to federal agents during a background investigation will have an added incentive—the specter of prosecution—to cover-up that lie during subsequent inquiries. The question is thus fundamentally which government body is best situated to ferret out and assess the relevancy of potential security issues: a panel of senators who may or may not have any familiarity with national security background investigations, or the federal law enforcement agency charged with detecting and apprehending foreign spies.

*B. Adjudication*

Once the investigative service provider (here, the FBI) has completed its investigation, a report of the investigation is compiled and forwarded to career adjudicators within that agency (and, in the case of presidential personnel, to the EOP Office of Security). The separation of investigative and adjudicative functions is an important feature that ensures quality control and helps defend against outside influences and other improprieties.

Adjudicators are required to review any concerns raised within the report under a regime of thirteen adjudicative guidelines titled "A" through "M." These "National Adjudicative Guidelines for Security Clearances" were originally promulgated in 1995 at the direction of President Bill Clinton pursuant to Executive Order 12968. Each Guideline provides a series of facts and circumstances that, if present, raise security concerns. These are followed by a complementary set of facts and circumstances that could mitigate the concerns.

For example, under the Adjudicative Guidelines:

> Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism.[14]

The government raises a prima facie case against granting a security clearance simply by alleging facts or circumstances that implicate one or more of the nine potentially disqualifying factors:

> (a) contact with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion;
>
> (b) connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information;
>
> (c) counterintelligence information, that may be classified, indicates that the individual's access to protected information may involve unacceptable risk to national security;
>
> (d) sharing living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion;
>
> (e) a substantial business, financial, or property interest in a foreign country, or in any foreign-owned or foreign-operated business, which could subject the individual to heightened risk of foreign influence or exploitation;
>
> (f) failure to report, when required, association with a foreign national;
>
> (g) unauthorized association with a suspected or known agent, associate, or employee of a foreign intelligence service;
>
> (h) indications that representatives or nationals from a foreign country are acting to increase the vulnerability of the individual to possible future exploitation, inducement, manipulation, pressure, or coercion;
>
> (i) conduct, especially while traveling outside the U.S., which may make the individual vulnerable to exploitation, pressure, or coercion by a foreign person, group, government, or country.[15]

Once a prima facie case has been established, the burden of proof then shifts to the security clearance applicant to provide sufficient evidence of mitigation via one or more of the six mitigating factors:

> (a) the nature of the relationships with foreign persons, the country in which these persons are located, or the positions

12 Two of the most high-profile examples are investigators' failure to uncover the security risks posed by the Washington Navy Yard or Fort Hood shooters, both of whom held security clearances.

13 Sean M. Bigley, *Opinion: Security Clearance Reform Misses the Mark*, ClearanceJobs.com (Nov. 3, 2016), https://news.clearancejobs.com/2016/11/03/opinion-security-clearance-reform-misses-mark/.

14 32 CFR § 147. *See also* Dept. of Defense Dir. 5220.6; Dept. of Defense Dir. 5220.2-R; Intel. Comm. Policy Guidance 704.2; 10 CFR § 710, Subpart A, Appx. B (Dept. of Energy).

15 *Id.*

or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S.;

(b) there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest;

(c) contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation;

(d) the foreign contacts and activities are on U.S. Government business or are approved by the cognizant security authority;

(e) the individual has promptly complied with existing agency requirements regarding the reporting of contacts, requests, or threats from persons, groups, or organizations from a foreign country;

(f) the value or routine nature of the foreign business, financial, or property interests is such that they are unlikely to result in a conflict and could not be used effectively to influence, manipulate, or pressure the individual.[16]

Over the past 20 years, foreign influence concerns have become commonly referred to as "B" issues, as a result of their placement in the Guidelines under that subsection. No particular country is currently "blacklisted" as a matter of policy, but, in practice, security clearance applicants with ties to certain countries—most commonly Russia, China, Iran, South Korea,[17] Israel,[18] and Cuba[19]—do receive additional scrutiny. Nonetheless, even ties to the most problematic countries can be fully mitigated given the right applicant and the right set of circumstances.

A security clearance applicant provides such mitigation first by responding in writing to a "Statement of Reasons" (SOR), the administrative equivalent of an indictment that informs an applicant of the government's concerns. Pursuant to Executive Order 12968, security concerns, unless classified, must be pleaded by the government in the SOR with sufficient specificity as to adequately put the applicant on notice of the charges.[20] Much like discovery in an Article III court case, the government is required upon demand to provide an initially denied applicant with a complete copy of the government's unclassified files for use in rebutting the charges. Depending upon the strength of the applicant's rebuttal, initial unfavorable decisions can often be overturned simply by providing the government with appropriate mitigating context via written reply.

Subsequent procedures vary slightly among clearance-granting agencies, but all applicants are guaranteed a trial-type challenge before a federal Administrative Law Judge or Senior Security Adjudicator, followed, if necessary, by an appeal to a panel of senior agency officials commonly known as a Personnel Security Appeals Board.[21] Every applicant is entitled to appear personally and present his or her case at some point in the process, but agencies differ as to whether that right is granted at the hearing or appeal stage. Pursuant to *Egan*, an adverse agency determination is final and cannot be appealed to an Article III court.[22]

In foreign influence cases, there are a variety of ways in which initially denied applicants can address the government's concerns and obtain a favorable final adjudication. For example, in cases involving foreign relatives or associates, applicants often highlight, where feasible, the lack of significant bonds of affection, obligation, or influence, then compare those relationships to those that the applicant maintains with his or her relatives or associates in the United States. For cases involving foreign business investments, property, or other financial entanglements, applicants work toward divestment or present detailed accountings of their broader financial picture in order to put the value of the overseas assets in perspective. In cases of unsavory prior conduct while traveling abroad, applicants can offer an assessment—often with the assistance of an expert witness psychologist—of the likelihood that the conduct is known to a hostile foreign intelligence service and the extent to which it could realistically be used against the applicant for blackmail purposes.

No matter the type of foreign influence concerns, the goal in a successful defense is to provide strong evidence that whatever ties the applicant has abroad could not be leveraged against him or her by foreign actors in a way that would be inimical to the interests of national security. That can be challenging when close relatives live in a hostile foreign country or a substantial portion of the applicant's finances are tied up in a particular country and thus subject to the dominion of that government.

But for prominent titans of industry, law, and policy—the very types of people so often nominated for service in a presidential

16 *Id.*

17 The strong U.S.-Korean relationship notwithstanding, the South Korean government is known to operate an active industrial espionage program in the United States, seemingly rendering security clearance applicants in the defense contracting world particularly suspect.

18 Likewise, the Israeli government is known to operate a vibrant espionage program in the United States, but one that is targeted less at industry than it is at diplomacy and military operations. Given the Obama Administration's tense relationship with the Netanyahu government, many commentators have argued that the Israelis had no other choice in protecting their interests. Whether the intensity of Israeli intelligence collection efforts slows during the Trump era remains to be seen.

19 Despite a diplomatic upgrade in U.S.-Cuba relations under President Obama, security clearance holders are still effectively barred from traveling there and security clearance applicants with Cuban ties face steep barriers to favorable adjudication.

20 Exec. Order 12968 § 5.2.

21 *Id.*

22 Similarly, the U.S. Merit Systems Protection Board is barred from hearing the merits of security clearance cases (the fundamental issue in *Egan*), although the Board does have limited review authority to determine if an applicant was properly granted his procedural appeal rights under the Executive Order. As of October 2012, denied security clearance applicants do have one other, albeit rare, avenue of redress: filing a whistle-blower retaliation complaint with their agency's Inspector General under Presidential Policy Directive 19.

administration—there are a variety of ways in which foreign influence concerns can be effectively and ethically neutralized. The wealthier the individual, the less likely overseas business interests are considered a coercion concern insofar as they are small pieces of a very large financial picture. The deeper the individual's roots are in the United States, the more zealously he or she will likely resist espionage efforts by foreign associates. And an individual with holdings and contacts spread across multiple countries is less of a security risk than someone with investments or relationships concentrated in a single nation.

These are not mere hypotheticals; countless high profile individuals from the private sector successfully navigate the security clearance process every year. Those in the American defense and aerospace sectors are the most obvious examples because they need security clearances to perform their jobs. Yet the fact remains that, ultimately, "[n]o one has a 'right' to a security clearance. The grant of a clearance requires an affirmative act of discretion on the part of the granting official. The general standard is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'"[23] Given the subject matter expertise of federal personnel security officials, their proven willingness to protect their prerogatives even against the White House,[24] the intensity of the scrutiny directed at presidential nominees, and the substantial ties most presidential nominees have in the United States, there is little risk that a favorably cleared nominee poses any risk of foreign influence, much less a national security risk in general.

## II. *Egan* and the Original Understanding of "Advice and Consent"

The framework of the national security landscape described above is significantly reinforced by the *Egan* precedent. To understand the importance of *Egan*, it is important to understand the historical context of the Senate's "advice and consent" function, which forms the outer bounds of the Senate's authority to reject nominees. A plain reading of the Appointments Clause text finds nothing to limit what the Senate may consider in assessing a nominee.[25] Some Senators, including then-Senator Joseph Biden, have used the Constitution's silence to claim limitless authority to reject presidential nominees for any reason, including broad concerns about national security or ideology.[26] The Senate's procedural rules are silent on the matter.[27] However, the responsible exercise of power requires a fundamental understanding of its basis in law, as determined by the fairly understood meaning of words at the time the law was promulgated.[28] Therefore, a review of the Framers' original understanding of the advice and consent power is crucial to understanding how the Senate should exercise that power in considering nominees today.

Alexander Hamilton addresses this issue in Federalist No. 76; there, he describes the understanding of the Senate's advice and consent role as "an excellent check upon a spirit of favoritism in the President, [which] would tend greatly to preventing the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity."[29] Hamilton goes on to explain that:

> Out of a concern for both reputation and re-election, the president would be "ashamed and afraid" to bring forward unmeritorious candidates, whose only qualifications would be [hailing] from particular states, or being personally allied to the president, or "possessing the necessary insignificance and pliancy to render them the obsequious instruments of his pleasure."[30]

According to one scholar, "[t]he thrust of Hamilton's discussion is [thus] to suggest that the great desideratum regarding the appointment power is to secure 'merit' by resisting temptations to geographic partiality (especially state) and personal partiality."[31]

To be fair, not all contemporaneous interpretations of "advice and consent" agreed with Hamilton's. Another Framer,

23 *Egan*, 484 U.S. at 528 (referencing Exec. Order No. 10450, §§ 2 and 7, 3 CFR § 936, 938 (1949-1953 Comp.); 10 CFR § 710.10(a) (1987) (Department of Energy); 32 CFR § 156.3(a) (1987) (Department of Defense)).

24 Boyd, *supra* note 1; Email from Butts to Podesta, *supra* note 1.

25 The Constitution simply states, in pertinent part, that "The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . . ." U.S. Const. art. II, § 2, cl. 2.

26 One oft-cited example of the exercise of such unbounded authority is the contentious, and ultimately unsuccessful, nomination of Judge Robert H. Bork to the United States Supreme Court in 1987. Although various presidential nominees have been rejected *in part* based upon ideology as far back as Supreme Court nominee John Rutledge in 1795, the Bork affair is widely viewed as one of the first rejections of a presidential nominee on *solely* ideological grounds.

27 Interestingly, however, Rule 10(c) of the Senate Foreign Relations Committee requires that any nominee being reported by the Committee to the full Senate for consideration be "accorded a security clearance on the basis of a thorough investigation by executive branch agencies." The rule seemingly acknowledges a degree of acceptance by the Senate of the Executive Branch's authority and competency in personnel security matters.

28 The late Justice Scalia articulated the nuanced difference between original intent and original understanding in this way: "I don't care if the framers of the Constitution had some secret meaning in mind when they adopted its words. I take the words as they were promulgated to the people of the United States, and what is the fairly understood meaning of those words." Associate Justice Antonin Scalia, Address at the Catholic University of America (Oct. 18, 1996), *available at* http://www.proconservative.net/PCVol5Is225ScaliaTheoryConstlInterpretation.shtml.

29 The Federalist No. 76, at 385 (Alexander Hamilton) (Garry Wills ed., 1982).

30 Christopher Wolfe, *The Senate's Power to Give "Advice and Consent" In Judicial Appointments*, 82 Marq. L. Rev. 355, 358 (1999), http://scholarship.law.marquette.edu/mulr/vol82/iss2/2/.

31 *Id.*

George Mason, described his understanding of the advice and consent power more broadly:

> I am decidedly of opinion, that the Words of the Constitution . . . give the Senate the Power of interfering in every part of the Subject, except the Right of nominating . . . . The Word 'Advice' here clearly relates in the Judgment of the Senate on the Expediency, or the Inexpediency of the Measure, or Appointment; and the Word 'Consent' to their Approbation or Disapprobation of the Person nominated; otherwise the word Advice has no Meaning at all—and it is a well-known Rule of Construction, that no Clause or Expression shall be deemed superfluous or nugatory, which is capable of a fair and rational Meaning. The Nomination, of Course, brings the Subject fully under the Consideration of the Senate; who have then a Right to decide upon its Propriety or Impropriety. The peculiar Character or Predicament of the Senate in the Constitution of the General Government, is a strong Confirmation of this Construction.[32]

Nonetheless, juxtaposed against *Egan*, the absence of any reference to national security considerations is stark; like Hamilton, Mason understood "advice and consent" to deal with issues of merit, competency, and character—factors most aptly described as suitability concerns.

The term "suitability" is defined at 5 C.F.R. § 731 for the purpose of federal civil service hiring.[33] The provisions of § 731 set forth a number of discrete factors a federal agency should consider in making hiring judgments—including criminal or dishonest conduct, material, intentional false statements in the appointment process, and any recent substance abuse—ultimately leading to the determination of whether a particular appointment would adversely impact the efficiency or integrity of the federal service. These considerations are independent of, albeit sometimes overlapping with, security investigations. Certainly, the discretion of the Senate is broader is evaluating presidential nominees, but § 731, combined with the Constitution's Article I, Section 6, Clause 2 (commonly referred to as the "Incompatibility Clause"), is a useful guidepost for the Senate in wielding its advice and consent authority in the manner intended by the Framers.

Such guideposts are particularly important in tempering senatorial overreach given that the President's national security authority is granted by the Constitution, not Congress. The Supreme Court articulated this in *Egan*, finding that the President's:

> [A]uthority to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to such information flows primarily from [the] constitutional investment of power in the President [as Commander in Chief of the Armed Forces], and exists quite apart from any explicit congressional grant.[34]

Because the Framers did not understand the advice and consent function to encompass a determination of whether nominees were security-worthy, and because the Constitution counsels deference to the President in national security matters, the Senate's nominee inquiries should be limited to matters of merit, competency, character, and, arguably, ideology. This is the most rational and efficient outcome: "[t]he attempt to define not only the [appointee's] future actions but those of outside and unknown influences renders the 'grant or denial of security clearances . . . an inexact science at best.'"[35] It is not reasonably possible for an outside nonexpert body to review the substance of such judgments and second-guess the decisions of career personnel security experts.[36]

## III. Conclusion

All presidential nominees deserve scrutiny, and the Senate is constitutionally mandated to apply it. But both the separation of powers and the efficient administration of government require that nominee security-worthiness be vetted and adjudicated by national security experts within the executive branch. Moreover, in the case of foreign influence concerns, potential national security risks can be mitigated in a variety of ways, including reasonable divestment or diversification of assets, responsible compliance with reporting obligations, and a showing of overwhelming U.S. obligations and allegiance. The relative wealth, education, and sophistication that most presidential nominees possess renders them quite well-positioned to mitigate national security risk.

32 David A. Strauss and Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 Yale L.J. 1491, 1495 (1992).

33 *See supra* note 7.

34 *See* Cafeteria Workers v. McElroy, 367 U.S. 886, 890 (1961).

35 *Egan*, 484 U.S. at 529 ((quoting Adams v. Laird, 136 U.S.App.D.C. 388, 397, 420 F.2d 230, 239 (1969), *cert. denied*, 397 U.S. 1039 (1970)).

36 *Id.*