EMPOWER OVERSIGHT
Whistleblowers & Research

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VIA EMAIL: HQ-DIV11-CAU-ASSISTANCE@FBI.GOV

Timothy M. Dunham
Executive Assistant Director
Human Resources Branch
Federal Bureau of Investigation
935 Pennsylvania Avenue, NW
Washington, DC 20535-0001

RE: REQUEST FOR RECONSIDERATION OF REVOCATION OF MARCUS ALLEN'S SECURITY CLEARANCE

Dear Mr. Dunham:

INTRODUCTION

Empower Oversight Whistleblowers & Research ("Empower Oversight") is a nonpartisan, nonprofit educational organization, which is dedicated to enhancing independent oversight of government and corporate wrongdoing. It works to help insiders safely and legally report waste, fraud, abuse, corruption, and misconduct to the proper authorities, and seeks to hold those authorities accountable to act on such reports. Empower Oversight represents Marcus Allen, whom the Federal Bureau of Investigation ("FBI") has suspended indefinitely without pay because of the FBI's decision to suspend his security clearance.

BACKGROUND

Mr. Allen served honorably in the United States Marine Corps from 2000 to 2005 as an intelligence analyst and rifleman. He received a Top Secret security clearance in 2001. Mr. Allen was deployed to Kuwait and served two tours in Iraq, contributing to Operation Iraqi Freedom. During those deployments Mr. Allen was exposed to live enemy fire on multiple occasions despite being there to serve in intelligence and analytical roles. The Marine Corps recognized his outstanding military service by awarding him the Navy and Marine Corps Commendation Medal and the Navy and Marine Corps Achievement Medal. In 2004 he was the Marine Corps Intelligence Activity Runner-Up for Intelligence Non-Commissioned Officer of the year.

After being honorably discharged from the Marine Corps in 2005, Mr. Allen worked as an intelligence analyst for several civilian contractors. One of them, SM Consulting/SAIC, provided a support role for the FBI. Through this work, Mr. Allen was hired by the FBI in 2015 as a Staff Operations Specialist in the Bureau's Charlotte Field Office. He also accepted collateral duties as a Critical Incident Operation Specialist. Among other responsibilities, he was assigned to provide ad hoc all-source analytic support to Charlotte FBI's Joint Terrorism Task Force ("JTTF"), helping provide it with strategic awareness on any issues that might impact its work.

Mr. Allen has consistently received an "Exceeds Fully Successful" rating on his performance evaluations since he was hired by the FBI. In 2019 the Charlotte Field Office recognized him with its Employee of the Year Award. He also received a time-off award that year. From 2015 to 2021, Mr. Allen was never disciplined or counseled in any form by the FBI.

On January 10, 2022, your predecessor, then-Executive Assistant Director ("EAD") Jennifer Leigh Moore, suspended Mr. Allen's security clearance. Because of his clearance suspension, on May 13, 2022 he was placed on indefinite unpaid suspension, a status in which he remains to this day.

On May 3, 2023 EAD Moore proposed revoking Mr. Allen's security clearance. On May 11, 2023, counsel for Mr. Allen requested the records upon which that decision was based, which were necessary to prepare this request for reconsideration. Mr. Allen did not receive them until September 20, 2023. By withholding the file so long, the FBI delayed resolution of this matter for an additional four months during which Mr. Allen was without pay.

Having reviewed the records, this letter constitutes his request for reconsideration of the clearance revocation proposed in EAD Moore's May 3, 2023 letter.

Mr. Allen's clearance should be restored because:

1) The readjudication of Mr. Allen's clearance occurred in reprisal for a protected whistleblower disclosure, a violation of Presidential Policy Directive 19 ("PPD-19") and 50 U.S.C. § 3341(j)(1);

2) The proposed revocation is based on erroneous factual conclusions that do not meet the standards for revocation under Security Executive Agent Directive 4, the National Security Adjudicative Guidelines (June 8, 2017) ("Adjudicative Guidelines"); and

3) Mr. Allen was not provided with all of records to which he is entitled under Executive Order No. 12,968 § 5.2(a)(2), 60 Fed. Reg. 40252 (Aug. 2, 1995) and 28 C.F.R. § 17.47(a)(3);

4) The proposed revocation is in violation of the First and possibly Fifth Amendments to the U.S. Constitution.

I. THE REVOCATION OF MR. ALLEN'S SECURITY CLEARANCE IS IN REPRISAL/RETALIATION FOR A PROTECED WHISTLBELOWER DISCLOSURE.

A. Applicable Law and Presidential Policy Directive

Under Presidential Policy Directive/PPD-19 ("PPD-19) § B:

> Any officer or employee of an executive branch agency who has authority to take, direct others to take, recommend, or approve any action affecting an employee's Eligibility for Access to Classified Information shall not, with respect to such authority, take or fail to take, or threaten to take or fail to take, any action affecting an employee's Eligibility for Access to Classified Information as a reprisal for a Protected Disclosure.

In relevant part, PPD-19 § F(5) defines a "protected disclosure" as:

> [A] disclosure of information by the employee to a supervisor in the employee's direct chain of command up to and including the head of the employing agency, to the Inspector General of the employing agency . . . that the employee reasonably believes evidences (i) a violation of any law, rule, or regulation; or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety . . . . , lawfully participating in an investigation or proceeding regarding a violation of Section A or B of this directive; or . . . cooperating with or disclosing information to an Inspector General . . . .

Like PPD-19, 50 U.S.C. § 3341(j)(1) prohibits the use of security clearance determinations "in retaliation" for disclosing "(i) a violation of any Federal law, rule, or regulation; or (ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." It also includes a provision that "nothing in [50 U.S.C. § 3341(j)(1)] shall be construed to authorize the withholding of information from Congress or the taking of any personnel action or clearance action against an employee who lawfully discloses information to Congress." 50 U.S.C. § 3341(j)(2).

B. Mr. Allen's September 29, 2021 Disclosure Regarding FBI Leadership Was Unquestionably Protected.

On March 2, 2021, two months after the January 6, 2021 attack on the Capitol, FBI Director Christoper Wray testified before the Senate Committee on the Judiciary for a hearing titled "Oversight of the Federal Bureau of Investigation: the January 6 Insurrection, Domestic Terrorism, and Other Threats."[1] This was Director Wray's first appearance before Congress since the events of January 6, 2021.

During a round of questioning by Senator Amy Klobuchar, she had the following exchange with Director Wray:

> KLOBUCHAR: Our witnesses now all agree that there is clear evidence that supports the conclusion that this insurrection was planned and a coordinated attack on the Capitol, that white supremacists and extremist groups were involved, and that what happened would have been much more dangerous if not for the brave actions of law enforcement. Would you agree with that?
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> WRAY: Certainly there were aspects of it that were planned and coordinated, but—yes.
>
> KLOBUCHAR: . . . [O]n Monday, a complaint was filed against a member of the Proud Boys in Washington State, where federal prosecutors alleged that, in fact, there were plans made for many different entries into the Capitol. Is that correct?

[1] https://www.judiciary.senate.gov/committee-activity/hearings/oversight-of-the-federal-bureau-of-investigation-the-january-6-insurrection-domestic-terrorism-and-other-threats.

> WRAY: Yes. There have been a growing number of charges as we continue to build out the investigation. Either individuals who are now starting to get arrested involving charges that involved more things like planning and coordination, or in some instances, individuals were charged with more simple offenses but now we're superseding as we build out more of an understanding of what people were involved. And there were clearly some individuals involved, which I would consider the most dangerous, most serious cases among the group, who did have plans and intentions and some level of coordination.
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> * * *
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> KLOBUCHAR: [T]hey show up, we now know in this complaint, with encrypted two-way Chinese radios in military gear. There must be moments where you think, "**If we would have known, if we could have infiltrated this group or found out what they were doing** . . . ." Do you have those moments?
>
> WRAY: Absolutely. I will tell you Senator, and this is something I feel passionately about, that any time there is an attack, our standard at the FBI is we aim to bat a thousand, right? And we aim to thwart every attack that's out there. So any time there's an attack, especially one that's this horrific, that strikes right at the heart of our system of government, right at the time the transfer of power is being discussed, you can be darn tooting that we are focused very, very hard on how can we get better sources, better information, better analysis so that we can make sure something like what happened on January 6 never happens again. (emphasis added)

Director Wray's congressional testimony soon came under scrutiny, however. An April 26, 2021 *Reuters* article titled "Before Jan. 6, FBI collected information from at least 4 Proud Boys" began:

> Among the far-right groups whose members are suspected of planning the Jan. 6 attack on the U.S. Capitol are the Proud Boys. In March, the Federal Bureau of Investigation's director told the Senate Judiciary Committee that he "absolutely" wished the agency had penetrated the group beforehand, or knew its plans.
>
> "I do not consider what happened on January 6th to be an acceptable result," Director Christopher Wray said. "We are focused very, very hard on how we can get better sources, better information, better analysis."
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> The FBI had deeper insight into the group than Wray disclosed, however.
>
> Bureau agents maintained connections with key Proud Boys leaders starting as early as 2019, a Reuters examination has found. At least four Proud Boys have provided information to the FBI, Reuters learned.[2]

According to the *Reuters* story, "The FBI declined to answer written questions for this story or to comment on the four Proud Boy connections detailed here."[3] However, FBI headquarters did tell Reuters that Director Wray's testimony "reinforced '"the need to detect and deter acts of violence.'"[4]

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[2] Aram Roston, *EXCLUSIVE Before Jan. 6, FBI collected information from at least 4 Proud Boys*, REUTERS (Apr. 26, 2021), *available at* https://www.reuters.com/world/us/exclusive-before-jan-6-fbi-collected-information-least-4-proud-boys-2021-04-26.
[3] *Id.*
[4] *Id.*

On September 25, 2021, *The New York Times* published a story alleging that, "according to confidential records" it had reviewed, the FBI had an informant texting a real-time account of the march to the Capitol on January 6, 2021.[5] The individual had reportedly started working with the FBI in July 2020.[6] *The New York Times* further reported:

> [T]he records indicate that F.B.I. officials in Washington were alerted in advance of the attack that the informant was traveling to the Capitol with several other Proud Boys.
>
> The F.B.I. also had an additional informant with ties to another Proud Boys chapter that took part in the sacking of the Capitol, according to a person familiar with the matter, raising questions about the quality of the bureau's informants and what sorts of questions they were being asked by their handlers before Jan. 6.
>
> Christopher A. Wray, the bureau's director, acknowledged to Congress in March that the F.B.I. was studying the quality of the intelligence it had gathered about Jan. 6.[7]

The FBI provided a comment for *The New York Times*' story: "While the FBI's standard practice is not to discuss its sources and methods, it is important to understand that sources provide valuable information regarding criminal activity and national security matters."[8] The article's headline appeared above the fold on the front page of *The New York Times*' Sunday, September 26 print edition.[9]

The New York Times' reporting received significant attention and was covered by several other media outlets.[10] *Business Insider* reported based on the *Times'* story: "[T]he [FBI] had real-time knowledge that a pro-Trump mob was headed toward the building."[11] *Slate* concluded: "[T]he records do suggest law enforcement officials had a much clearer understanding of what was happening on the ground than what was previously known."[12]

In a subsequent video a reporter named Darren Beattie from Revolver News discussed the *New York Times* story.[13] Beattie stated:

> *The New York Times* story revealed a very problematic . . . dilemma . . . that the . . . media finds itself in, and this goes all the way back to Christopher Wray.

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[5] Alan Feuer and Adam Goldman, *Among Those Who Marched Into the Capitol on Jan. 6: An F.B.I. Informant*, NEW YORK TIMES (Sept. 25, 2021), *available at* https://www.nytimes.com/2021/09/25/us/politics/capitol-riot-fbi-informant.html.
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *See* https://www.nytimes.com/issue/todayspaper/2021/09/26/todays-new-york-times.
[10] *See, e.g.*, Jordan Williams, *FBI had informant in crowd during Capitol riot: report*, THE HILL (Sept. 25, 2021), *available at* https://thehill.com/policy/national-security/fbi/573915-fbi-had-informant-in-crowd-during-capitol-riot-report; Daniel Politi, *FBI Reportedly Had Informant in the Crowd During Capitol Riot*, SLATE (Sept. 25, 2021), *available at* https://slate.com/news-and-politics/2021/09/fbi-informant-crowd-capitol-riot-january.html; Connor Perrett, *A Proud Boys member and FBI informant was texting his handler during the January 6 Capitol riot, report says*, BUSINESS INSIDER (Sept. 25, 2021), *available at* https://www.businessinsider.com/proud-boys-member-was-fbi-informant-at-capitol-riot-nyt-2021-9; Megan VerHelst, *FBI Informant Among Those Who Joined Jan. 6 Capitol Riot: Report*, PATCH (Sept. 25, 2021), *available at* https://patch.com/us/across-america/fbi-informant-among-those-who-joined-jan-6-capitol-riot-report.
[11] BUSINESS INSIDER (Sept. 25, 2021), *available at* https://www.businessinsider.com/proud-boys-member-was-fbi-informant-at-capitol-riot-nyt-2021-9.
[12] SLATE (Sept. 25, 2021), *available at* https://slate.com/news-and-politics/2021/09/fbi-informant-crowd-capitol-riot-january.html.
[13] https://rumble.com/vn2jzj-capitol-had-uniquely-poor-security-on-jan.-6.html.

> The very first Revolver.News article that started it all began with a sort-of question posed by Senator Klobuchar to Wray. I say 'sort-of question' because she addresses the issue of informants, but she assumes the answer to her question. . . . And because she did him the courtesy of not asking the question directly, he dodged the question. But now we know for a fact that there were at least two and likely many, many more informants embedded in the militia groups who were on the ground that day and in the Capitol.[14]

Subsequent reporting has indicated Mr. Beattie's suspicion about more FBI informants being present for the January 6 attack was correct,[15] and continued attention on the issue (including by *The New York Times*) has demonstrated its enduring significance in our understanding of the events of that day.[16]

Given the significance of this new reporting, at 7:51 AM on September 29, 2021, Mr. Allen emailed a link to the Darren Beattie interview video to nine of his colleagues, including his supervisors and Charlotte's Chief Division Counsel (CDC), with the subject "6 Jan awareness vid link." Mr. Allen emailed the same recipients approximately one hour later, at 8:47 AM, with the subject "6 Jan awareness." This email read:

> There is a significant counter-story to the events of 6 January 2021 at the US Capitol. There is a good possibility the DC elements of our organization are not being forthright about the events of the day or the influence of government assets. . . . The information presented in the linked video and seconded by the New York Times raises serious questions about the nature of government involvement at the US Capitol on 6 January 2021.

Following Mr. Allen's second email, Mr. Allen's Senior Intelligence Analyst (SIA) asked Mr. Allen to come to his office. When he entered, his Assistant Special Agent in Charge (ASAC) was also in the office. In that meeting, the ASAC told Mr. Allen that the CDC was very upset about Mr. Allen's emails that day. Mr. Allen proceeded to disclose in even more detail his concerns about the truthfulness of Director Wray's testimony to Congress because of his failure to correct the premise in Senator Klobuchar's question and because her premise—that the FBI had failed to infiltrate the groups at the Capitol on January 6—was now being debunked as false.

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[14] *Id.*

[15] *See, e.g.*, Alan Feuer and Zach Montague, *In Proud Boys Jan. 6 Sedition Trial, F.B.I. Informants Abound*, NEW YORK TIMES (Mar. 24, 2023), *available at* https://www.nytimes.com/2023/03/24/us/proud-boys-fbi-informants.html ("Over the past two months, one subject has repeatedly come up at the trial of five Proud Boys accused of sedition in connection with the storming of the Capitol: the unusual number of informants that the F.B.I. had in or near the group."); Miranda Devine, *FBI lost count of how many paid informants were at Capitol on Jan. 6, and later performed audit to figure out exact number: ex-official*, NEW YORK POST (Sept. 19, 2023), *available at* https://nypost.com/2023/09/19/fbi-lost-count-of-number-of-informants-at-capitol-on-jan-6-ex-official ("The FBI had so many paid informants at the Capitol on Jan. 6, 2021, that it lost track of the number and had to perform a later audit to determine exactly how many 'Confidential Human Sources' run by different FBI field offices were present that day, a former assistant director of the bureau has told lawmakers.").

[16] *See, e.g.*, Alan Feuer and Adam Goldman, *F.B.I. Had Informants in Proud Boys, Court Papers Suggest*, NEW YORK TIMES (Nov. 14, 2022), *available at* https://www.nytimes.com/2022/11/14/us/politics/fbi-informants-proud-boys-jan-6.html; Ryan J. Reilly, *Informant warned FBI weeks before Jan. 6 that the far right saw Trump tweet as 'a call to arms'*, NBC NEWS (Dec. 21, 2022), *available at* https://www.nbcnews.com/politics/justice-department/informant-warned-fbi-weeks-jan-6-far-right-saw-trump-tweet-call-arms-rcna62683; Tess Owen, *FBI Informants Who Marched With Proud Boys on Jan. 6 Will Testify for Their Defense*, VICE NEWS (Jan. 13, 2023), *available at* https://www.vice.com/en/article/5d3vyd/proud-boys-trial-fbi-informants-testify-defense; Michael Kunzelman and Lindsay Whitehurst, *Federal prosecutors reveal Proud Boys witness was informant*, ASSOCIATED PRESS (Mar. 22, 2023), *available at* https://apnews.com/article/proud-boys-enrique-tarrio-capitol-riot-informant-ce0a1cf20c17c95b1ea3306fb70d93c4.

Mr. Allen's email and follow-up conversation with his SIA and ASAC constituted a disclosure of his belief that the FBI Director may have violated the law. Lying to Congress is a violation of 18 U.S.C. 1001, which prohibits, "in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully . . . falsif[y], conceal[], or cover[] up by any trick, scheme, or device a material fact; [or] make[] any materially false, fictitious, or fraudulent statement or representation."

That the concern Mr. Allen disclosed was in fact reasonable was noted by his ASAC . According to the record the FBI provided in support of its proposed security clearance revocation ("Clearance File"), the ASAC recounted in an interview with the FBI's Security Division (SecD): "For the most part, Allen's stated motivation for sending the email appeared reasonable . . . . Allen's position on the matter was likely influenced by his knowledge [Charlotte] *did* have a source at the Capitol, who was reporting *as the events unfolded* on January 6." Clearance File at 99 (emphasis added).

By disclosing in good faith to supervisors in his direct chain of command his reasonable belief that Director Wray may have lied to Congress, Mr. Allen's September 29, 2021 communications were protected by various provisions of law. Under 5 U.S.C. § 2303, no employee at the FBI could take one of the personnel actions listed in 5 U.S.C. § 2302(a)(2)(A) against Mr. Allen because of his disclosure. Under PPD-19 § B and 50 U.S.C. § 3341(j)(1), no FBI employee with authority to take any action affecting Mr. Allen's eligibility for access to classified information could legally do so as a reprisal or in retaliation for this protected disclosure.

That the FBI understood Mr. Allen to have made a protected disclosure on September 29, 2021 is indicated by ASAC Kaplan's statement in a November 17, 2021 interview: "Allen remains assigned to the JTTF, as the FBI Office of General Counsel cautioned [Charlotte] to avoid taking action which could be interpreted as retaliatory." *Id.* at 99-100.

C. Mr. Allen's Protected Disclosure Regarding FBI Director Wray was the Clear Predicate for His Referral to SecD.

Despite these clear protections, the FBI initiated a security investigation process based on Mr. Allen's protected disclosure that would ultimately produce the same result—in violation of PPD-19 and 50 U.S.C. § 3341—as removing Mr. Allen through a traditional personnel action.

The Clearance File demonstrates that the entire security investigation into Mr. Allen was predicated solely upon his protected disclosure. The FBI appears to have completed a Tier 5 reinvestigation of Mr. Allen on September 29, 2021. *Id.* at 550. It concluded: "Based on this review, it is recommended that captioned subject's reinvestigation be closed favorably. Subject remains eligible for a Top Secret security clearance and continued access to FBI space." *Id.* This document was approved by SecD on September 30, 2021. *Id.* at 549. Yet on the same day, Charlotte's CDC forwarded Mr. Allen's September 29, 2021 email to FBI's Office of General Counsel, which in turn forwarded the email to SecD. *Id.* at 70. The FBI's "Opening EC – Marcus O'Ryan Allen" states that Mr. Allen's September 29, 2021 email was the sole basis for the Charlotte Field Office's Chief Security Officer sending a security referral on September 30, 2021. *Id.* at 4-5. SecD appears to have initiated its "Opening EC" on October 19, 2021. *Id.* at 3, 1679.

In a series of phone interviews on November 17, 2021, Mr. Allen's supervisory chain all made clear that they had no concerns about Mr. Allen's allegiance to the United States. *Id.* at 82, 89, 94, 99. Rather, they objected to his September 29 email because it accused FBI leadership of wrongdoing—the very heart of protected whistleblower activity.

Mr. Allen's SIA stated he believed the September 29 email "crossed the line" because "it was inappropriate for Allen to have included accusatory language toward the leadership of the FBI . . . ."

Mr. Allen's Supervisory Special Agent (SSA) stated he "felt it was out of line for Allen to have insinuated in the [September 29] email FBI leadership was lying," and that Mr. Allen "overstepped." *Id*. at 94.

Mr. Allen's ASAC indicated his concern was specifically about Mr. Allen disclosing his concern about FBI leadership forthrightness—even though, as he told the interviewer, "Allen's stated motivation for sending the email appeared reasonable." *Id*. at 98-99.

The Charlotte CDC told SecD that "what was unusual to [him] regarding the September 29, 2021 email he received from Allen regarding January 6[] was it included conclusions and direction as opposed to simply relaying open source information"—specifically, his statement about the forthrightness of the FBI's "DC elements." *Id*. at 88-89. Yet this conclusion was precisely what made the email a protected disclosure, and therefore an impermissible basis on which to base an investigation and subsequent personnel action. The CDC told SecD the disclosure "created potential discovery implications which could negatively impact ongoing investigations," *id*. at 89, yet this legal concern has nothing to do with Mr. Allen's loyalty and everything to do with the FBI's institutional interests—interests superseded by various whistleblower protection laws with the purpose of encouraging employees to speak up about potential government wrongdoing.

D. Basing an Investigation and Subsequent Personnel Actions on a Protected Disclosure Constitutes Reprisal and Retaliation.

No case law defines the terms "as a reprisal" from PPD-19 § B or "in retaliation" from 50 U.S.C. § 3341(j)(1). However, extended analysis of causation and burdens of proof is unnecessary here since the personnel actions in question (the suspension and subsequent proposed revocation of Mr. Allen's clearance) are clearly predicated on Mr. Allen's protected disclosure and cite the disclosure as their basis.

It is instructive to look at the Title 5 context where the connection between a complainant's protected disclosures and a subsequent investigation and personnel action is not so clear. The case law is well established. The foundational Merit Systems Protection Board case in this area is *Russell v. Department of Justice*, 76 M.S.P.R. 317 (1997). In *Russell*, the Board held:

> When, as here, an investigation is so closely related to the personnel action that it could have been a pretext for gathering evidence to retaliate, and the agency does not show by clear and convincing evidence that the evidence would have been gathered absent the protected disclosure, then the appellant will prevail on his affirmative defense of retaliation for whistleblowing. That the investigation itself is conducted in a fair and impartial manner, or that certain acts of misconduct are discovered during the investigation, does not relieve an agency of its obligation to demonstrate by clear and convincing evidence that it would have taken the same personnel action in the absence of the protected disclosure. See 5 U.S.C. § 1221(e)(2).

Id. The Board explained that "an agency's selective use of investigations, i.e., its choice to investigate a whistleblower, because of his or her status as a whistleblower, would contravene [the] goal" to "'encourage government personnel to blow the whistle on wasteful, corrupt, or illegal government practices without fearing retaliatory action by their supervisors or those

harmed by the disclosures.'" *Id.* (quoting *Marano v. Department of Justice*, 2 F.3d 1137, 1141 (Fed. Cir. 1993)).

In *Sistek v. Department of Veterans Affairs* (955 F.3d 948, 954 (Fed. Cir. 2020)), the U.S. Court of Appeals for the Federal Circuit noted that Congress had reaffirmed *Russell* as the governing law when it passed the Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, 126 Stat. 1465 (2012). *Sistek* at 955; *see also* S. REP. NO. 112-155, at 21 (2012). The *Sistek* court added: "We agree with the holding of *Russell* that . . . the Board should 'consider evidence regarding the conduct of an agency investigation when the investigation was so closely related to the personnel action that it could have been a pretext for gathering evidence to retaliate against an employee for whistleblowing activity.'" *Sistek* at 957.

There is no question in this case that the FBI initiated a referral to SecD and gathered information on Mr. Allen solely because of his protected disclosure. Furthermore, the FBI simply would not have taken the personnel actions of suspending and then revoking Mr. Allen's clearance in the absence of his protected disclosure of September 29, 2021.

The disclosure constitutes the central basis for the FBI's eight-page "Clearance Suspension EC" of January 10, 2022, every substantive page of which references Mr. Allen's September 29, 2021 email. 321-28. The EC cited "his questioning of the honesty of FBI leadership," *id.* at 325, and expanded on the fact Mr. Allen believed Director Wray might have perjured himself in his testimony before Congress, *id.* at 326. While the analysis in the Clearance Suspension EC does not explicitly cite Mr. Allen's questioning of Director Wray's honesty, it makes a series of sweeping and unfounded statements about his reasons for disseminating the email. *Id.* at 326-27. It is impossible to separate this analysis, such its assertions that Mr. Allen held "hostile views towards the government" and that "given Allen's hoax-based conspiratorial beliefs, his judgment is impaired," *id.* at 327, from his protected disclosures criticizing FBI leadership.

Similarly, SecD's September 23, 2022 "Summary EC for Marcus Allen" centered on Mr. Allen's protected disclosure:

> Allen explained . . . he wanted to make certain [Charlotte] employees working Domestic Terrorism matters were exposed to alternative viewpoints. Allen was also concerned the FBI Director perjured himself in a Congressional hearing regarding January 6, 2021. (*Id.* at 527.)
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> * * *
>
> [Redacted] felt the [protected disclosure] did not seem objective and Allen was possibly biased regarding the events of January 6. . . . (*Id.* at 528.)
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> * * *
>
> [Redacted's] concern with Allen's 09/29/2021 email was it contained conclusions . . . as opposed to simply referencing open source information. Allen's statements doubting the truthfulness of the FBI's "DC elements" . . . created potential discovery implications, and portrayed Allen as biased. (*Id.*)
>
> * * *
>
> [Redacted] felt it was out of line for Allen to suggest FBI leadership was lying in his 09/29/2021 email . . . . (*Id.* at 529.)

* * *

> [Redacted] said Allen's 09/29/2021 was an exception as it included what he described as accusatory language toward the leadership of the FBI . . . . (*Id.*)

* * *

> [Redacted] . . . wonders where things would have gone had Allen not sent the email on 09/29/2021. (*Id.* at 538.)

* * *

> Allen was asked about the email he sent to various [Charlotte] employees on 09/29/2021. . . . Allen believed he had a moral imperative to share the information . . . . (*Id.* at 540.)

Mr. Allen filed a formal whistleblower retaliation complaint with the Department of Justice ("DOJ") Office of Inspector General ("OIG") on April 26, 2023. Nevertheless, the May 3, 2023 document "Marcus O'Ryan Allen – Revocation EC" still focuses from the beginning on Mr. Allen's protected disclosures: "[Charlotte] reported Allen sent an email on 09/29/2021 to multiple [Charlotte] employees with links to a news article and other websites alleging the FBI was not being truthful about the events at the Capitol on 01/06/2021." *Id.* at 1678. (The Revocation EC proceeds to falsely claim that Mr. Allen had been previously admonished by his supervisor not to send emails on FBI systems which relied on "dubious" news sources, *id.*, a claim rebutted below.) The Revocation EC proceeds to detail Mr. Allen's September 29, 2021 email and notes, "[Charlotte] believed this email called into question Allen's judgment and his ability to accurately report information that is relevant to his job duties." *Id.* at 1681. The Revocation EC explicitly details how Mr. Allen followed the disclosure in his September 29, 2021 email with an even more explicit disclosure in his meeting with supervisors:

> Allen was subsequently counseled . . . . Allen wanted to make sure the team working [domestic terrorism] matters had a full understanding of alternative perspectives appearing in open sources. . . . [Redacted] stated Allen did not "back off" what he had done, but offered explanations for his actions. Allen expressed concern the FBI Director perjured himself in a hearing regarding January 6th. [Redacted] asked Allen if he knew what perjury meant. Allen indicated he did understand the meaning of the word, and explained he was referring to testimony the Director provided wherein he stated the FBI did not have [confidential informants present at the Capitol] on January 6th. [Redacted] asked Allen if he believed the Director intentionally lied or if it was possible the Director did not have all of the information when he testified. Allen stood by his opinion the Director lied.

Id. at 1684.

Given the centrality of Mr. Allen's protected whistleblower disclosure of September 29, 2021 to his security clearance investigation, suspension, and proposed revocation, they constitute reprisal and retaliation for that disclosure. Because this is prohibited by PPD-19 and 50 U.S.C. § 3341(j)(1), the decision to revoke Mr. Allen's clearance should be reversed. To do otherwise would ignore the intent of both Congress and the President in adopting these legal protections for whistleblowers. It would also chill good-faith communications from future potential whistleblowers, who can help to root out waste, fraud, and abuse and make the FBI a better agency.

II. THE REVOCATION OF MR. ALLEN'S SECURITY CLEARANCE IS BASED ON ERRONEOUS FACTUAL CONCLUSIONS THAT DO NOT MEET THE REQUIREMENTS OF THE ADJUDICATIVE GUIDELINES.

Not only is the proposed revocation of Mr. Allen's clearance in reprisal and retaliation for his protected disclosure, his conduct fails to meet the standards for revocation under Security Executive Agent Directive 4, National Security Adjudicative Guidelines (June 8, 2017) ("Adjudicative Guidelines") A ("Allegiance to the United States") and E ("Personal Conduct"). The conclusions in SecD's Revocation EC are without basis and, in fact, undercut by the results of its own investigation. Furthermore, SecD relies on faulty legal claims. Mr. Allen's conduct does not meet the standards for revocation.

A. Applicable Adjudicative Guidelines

1. Allegiance to the United States

Under Guideline A, allegiance to the United States is a concern if there is "participation in or support for acts against the United States or placing the welfare or interests of another country above those of the United States. . . . An individual who engages in acts against the United States or provides support or encouragement to those who do has already demonstrated willingness to compromise national security."

2. Personal Conduct

Under Guideline E, personal conduct involves a concern about "[c]onduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations . . . . Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes."

B. SecD's Erroneous Factual and Legal Conclusions

1. Mr. Allen Has Never Expressed Sympathy for Persons or Organizations Advocating or Using Force or Violence, or Other Illegal or Unconstitutional Means to Disrupt the U.S. Government.

The Revocation EC falsely attributes motives and beliefs to Mr. Allen that he never expressed and that he has never had. Specifically, it claims that Mr. Allen "express[ed] sympathy for persons or organizations that advocate, threaten, or use force or violence, or use any other illegal or unconstitutional means, in an effort to prevent Federal government personnel from performing their official duties and accomplishing the FBI mission." Clearance File at 1691. Similarly, the EC claims that Mr. Allen believed "that individuals involved in the Capitol riot who were using force and/or other illegal or unconstitutional means in an effort to prevent Congress from performing their official duties were just exercising their Constitutional rights . . . ." *Id.* at 1692.

Mr. Allen, a decorated veteran who loves our nation, has never expressed that anyone using force or other illegal or unconstitutional means was "just exercising their Constitutional rights" or that he has sympathy for anyone advocating such illegality. The FBI can point to no evidence to the contrary and offers only unsupported assertions. Instead, Mr. Allen has consistently expressed concerns that individuals should be treated fairly, according to the law and the U.S. Constitution.

A review of Mr. Allen's emails and communications show that he was questioning whether individuals accused of such wrongdoing had actually done so, and whether the FBI was

violating individuals' constitutional rights during the course of its investigation. Mr. Allen cited FBI wrongdoing that has been confirmed by the DOJ OIG and Congress. The FBI's wrongdoing in COINTELPRO is well established.[17] Regarding the Crossfire Hurricane investigation, which Mr. Allen referred to as the "Russia collusion investigation," the OIG found "serious performance failures by the supervisory and non-supervisory agents with responsibility over the FISA applications" and "at least 17 significant errors or omissions in the Carter Page FISA applications, and many additional errors in the Woods Procedures."[18] In fact, the FBI's failures in that investigation were so serious as to result in the conviction of an FBI lawyer.[19]

Just two months before Mr. Allen's September 29, 2021 email, the OIG found even more egregious wrongdoing in the Larry Nassar case, which Mr. Allen cited. According to the OIG, after USA Gymnastics reported sexual abuse allegations against physician Larry Nassar to the FBI in 2015, FBI officials, including a special agent in charge ("SAC"), assistant special agent in charge, and supervisory special agent, failed to take appropriate investigative steps. They also failed to notify the FBI resident agency and state/local law enforcement where Nassar continued to practice. Because of this inaction, Nassar was able to abuse approximately seventy young female athletes during the fourteen months between when USA Gymnastics first reported allegations to the FBI and when Nassar was removed from his position. While those young women and girls were being abused by Nassar, the SAC of the FBI's Indianapolis field office was seeking assistance from a USA Gymnastics official to get a job with the U.S. Olympic Committee. During those discussions, the USA Gymnastics official expressed concern about how his organization was being portrayed in the media, and the SAC proposed putting out a public statement from the FBI to put USA Gymnastics in a positive light.[20]

The Revocation EC's assertions are contradicted by Mr. Allen's own words during Skype chats with another employee. Far from expressing sympathy for violent insurrectionists, Mr. Allen expressed concern for law enforcement officers who suffered as a result of the riot. On February 19, 2021, Mr. Allen wrote in reference to Capitol Police officers, "Pretty sad about the guys who committed suicide a few days later as well." *Id.* at 234. Mr. Allen also took a careful, balanced approach when writing about the death of Capitol Police Officer Brian Sicknick, writing: "I've seen conflicting reports on it via the media which is par for the course. The truth of the matter will eventually come out and then it will be yesterday's news." He also wrote, "Yeah, CNN did a low key release about a week ago retracting that he had been killed by a fire extinguisher but there was little fanfare around it. I read where the family didn't want his death politicized. One story reported he actually died of heart complications several hours later but I haven't seen that thread in a while." *Id.* Although Mr. Allen reviewed news sources which the FBI characterizes as "right wing," he also reviewed sources with different viewpoints and took an appropriate view that investigations will determine what happened, sometimes contradicting initial reports.

The two first-level managers supervising Mr. Allen's work had no concerns that he espoused violence or illegality. Mr. Allen's SIA said that he "had no concerns regarding Mr.

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[17] See U.S. Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities ("Church Committee"), Intelligence Activities and the Rights of Americans, Book II, Final Report, S. Rep. No. 94-755 (1976).
[18] OIG, *Oversight and Review Division 20-012, Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation (revised)* (Dec. 2019) *available at* https://www.justice.gov/storage/120919-examination.pdf (Last visited Oct. 12, 2023).
[19] U.S. Attorney's Office for the District of Connecticut, Press Release, *FBI Attorney Admits Altering Email Used for FISA Application During "Crossfire Hurricane" Investigation* (Aug. 19, 2020) *available at* https://www.justice.gov/usao-ct/pr/fbi-attorney-admits-altering-email-used-fisa-application-during-crossfire-hurricane (last visited Oct. 12, 2023).
[20] OIG, *21-093 Investigation and Review of the Federal Bureau of Investigation's Handling of Allegations of Sexual Abuse by Former USA Gymnastics Physician Lawrence Gerard Nassar* (Jul. 2021) at ii, iii, 76 *available at* https://oig.justice.gov/sites/default/files/reports/21-093.pdf (last visited Oct. 12, 2023).

Allen's objectivity" and that Mr. Allen "did not blindly 'take sides' on issues." *Id.* at 82. The SIA "explained Allen reads a lot of 'far right' information on various websites," but said, "I think he doesn't know yet whether he believes it or not." *Id.* Even if Mr. Allen believed some information on websites characterized by the FBI as "far right," it would not indicate he espoused violence or illegality. Mr. Allen's JTTF SSA told SecD that he was not concerned about Mr. Allen's statement in the September 29, 2021 email where he warned JTTF personnel to exercise extreme caution. The SSA said, "Allen, like the other members of the JTTF, was appropriately cautious in his work to ensure he was not overstepping boundaries regarding 1st Amendment protected activity." *Id.* at 94. SecD tries to taint Mr. Allen with the links he was sending to investigators, but he should be evaluated based on his own words where he simply questioned whether the FBI was obeying the law and Constitution.

Finally, there was a legitimate investigative reason for Mr. Allen to send links to news sites providing critical views of the government and FBI. Agents interviewing witnesses and subjects of the January 6, 2021 riot should have been aware of the media diet of those witnesses and subjects. Mr. Allen's background is in international terrorism, where investigators and analysts are expected to understand Islam as well as the beliefs of radical extremists. For Mr. Allen, sending "far right" news sites to the agents in the field to make them aware of what witnesses and subjects may believe was part of his job, consistent with what he had done when investigating international terrorism. In fact, the JTTF SSA told SecD that:

> Prior to the FBI, Allen was assigned to a United States Marine Corps (USMC) intelligence group, and Allen had always approached things a little bit differently. Allen did not accept the obvious theory; he frequently played the Devil's Advocate and looked at alternative theories as well. At one point [SSA] asked Allen his reason for sending out open source links to the squad. Allen explained that is how he operated in the USMC, and he wanted to make sure everyone is aware of all of the available information.

Id. at 93-94.

SecD has conflated warning FBI employees to make sure they are conducting lawful investigations and providing media reports relevant to investigations with sympathy for those engaging in violence or illegal behavior. The Revocation EC itself acknowledges that "[t]he FBI's mission is to uphold the Constitution and protect the American people . . . ." *Id.* at 1691. Thus, it is odd that SecD sees Mr. Allen as advocating illegality when he was expressing concern for rights and the presumption of innocence guaranteed by the Constitution.

2. Mr. Allen Did Not Intentionally Withhold or Fail to Find Relevant Information.

The Revocation EC's other factual assertions appear to be tainted by its false claim that Mr. Allen expressed sympathy for the viewpoints expressed in the open-source material he forwarded. Without evidence, the Revocation EC claimed intentionality in two incidents—one in June 2021 and the other in September 2021—identified in its lengthy post-suspension investigation and first raised in the May 3, 2023 EC.

Regarding the June 2021 incident, the Revocation EC alleges that Mr. Allen "decid[ed] not to provide relevant information responsive to a lawful tasking" regarding the subject of a January 6, 2021 riot investigation. *Id.* at 1692. Specifically, Mr. Allen is alleged to have missed an open-source report that the subject was arrested for a curfew violation on January 6, 2021 and a Tweet with a video of the subject. The Revocation EC asserts that because Washington Field Office later found the information and SecD was able to find the information through a

Google search in January 2023, Mr. Allen must have intentionally omitted the information. *Id.* at 1687-88, 1691-92.

This attribution of intentionality ignores the fact that Mr. Allen provided derogatory information about the subject in June 2021. Specifically, Mr. Allen "noted Subject was an associate of an individual who 'reportedly stated on social media application 'Parler' during the 6 Jan 2021 thru 11 Jan 2021 timeframe, 'Hang these 'M**r F**ker' on the capital lawn . . . .Find the traitors and get the rope. THIS IS OUR HOUSE!!'" *Id.* at 1687. If Mr. Allen were intentionally withholding derogatory information about the subject out of some alleged sympathy, then why did he provide this information? The claim in the Revocation EC is simply not supported by the record.

The second assertion in the Revocation EC that Mr. Allen failed to provide "relevant" information in September 2021 is baseless since SecD has no evidence to show the failure to provide information was intentional. The Revocation EC failed to even indicate what kind of information it was.

a. Questioning the Use of Resources is Not Unreasonable.

As an initial matter, the Revocation EC notes that the special agent who reported that Mr. Allen failed to provide information to her "recalled Allen describing to others in their work area that the investigative efforts taken by the FBI in the aftermath of the events of 01/06/2021 were a 'waste of time.'" *Id.* at 1688.

DOJ statistics show that it is convicting January 6, 2021 riot defendants of misdemeanors, as opposed to felonies, at a much higher rate than DOJ normally does. According to the U.S. Attorney's Office for the District of Columbia, in the thirty months since January 6, 2021, approximately 594 individuals have pleaded guilty to a variety of federal charges. U.S. Attorney's Office for the District of Columbia, *30 Months Since the Jan. 6 Attack on the Capitol* (July 6, 2023) *available at* https://www.justice.gov/usao-dc/30-months-jan-6-attack-capitol (last visited Oct. 14, 2023). Of those 594 guilty pleas, 160 individuals pleaded guilty to felonies and 434 pleaded guilty to misdemeanors. *Id.* Thus, about 73% of January 6, 2021 riot defendants are being convicted of misdemeanors and only about 27% are being convicted of felonies.

By contrast, based on DOJ's own report on Federal Justice Statistics for 2019, out of 84,782 cases terminated in U.S. district courts that year, only 6,239 were misdemeanors. Bureau of Justice Statistics, Federal Justice Statistics, 2019 (Oct. 2021) at 10 Table 6 *available at* https://bjs.ojp.gov/content/pub/pdf/fjs19.pdf (last visited Oct. 15, 2023). Thus, about 7.35% of all federal cases terminated in 2019 were misdemeanors. By definition, misdemeanors are less serious than felonies. So, when 73% of January 6, 2021 subjects are being convicted of misdemeanor offenses at least ten times the rate of misdemeanor cases in 2019, it would not be unreasonable for someone to question whether expending resources on those investigations was a "waste of time."[21]

Yet that does not mean Mr. Allen did not do his work thoroughly, which his supervisors clearly believed he did. Mr. Allen's SIA told investigators "Allen never demonstrated an unwillingness to work on matters related to January 6 . . . ." and that "Allen was very well respected in [Charlotte], and was a great asset. Allen 'digs and digs' in support of his work on the

[21] Mr. Allen's view is further supported by the fact that in 2019 a higher percentage of misdemeanor cases were dismissed, 33.8%, when 7.3% of all offenses were dismissed. *Id.* Thus, there is an even greater disparity when comparing the percentage of all misdemeanor *convictions* in 2019 with the percentage of January 6, 2021 misdemeanor convictions.

JTTF." Clearance File at 82-83. The JTTF SSA said Allen "was a hard worker." *Id*. at 94. Mr Allen's ASAC "advised Allen . . . is an asset to [Charlotte]." *Id*. at 100.

b. Internet Searches Are Not Consistent and Mr. Allen Primarily Used a Different Search Engine.

The Revocation EC's attribution of intentionality to Mr. Allen in the two instances it could find ignores several facts. First, different search engines will yield different results. Second, different people will use different search terms and the search engine those individual people use may return different results because of past searches by that individual. Third, SecD assumes that its Google search about the Guardian lead subject would be less likely to return a January 2021 arrest, but that is not necessarily true if that information were frequently accessed during the period since Mr. Allen's search. Considering the importance of the January 6, 2021 cases and the large number of people conducting online searches related to those subjects over the past two years, it is highly likely that the Tweet and news report about the subject's arrest would over time have been accessed by many people, leading Google to prioritize it in search results.

The Revocation EC's accusation also rests on the false premise that Mr. Allen exclusively used Google. In fact, he primarily used Duck Duck Go, which likely explains the disparity. While he occasionally used a different search engine with a Google plug-in, there is no basis to assume he used such a search engine for these searches. Furthermore, Mr. Allen had access to approximately thirty-six databases. Considering all the potential searches he could have run on the hundreds of January 6, 2021 riot leads he assisted, the Revocation EC's attribution of intentionality to this search is without basis.

SecD has itself failed to take every possible investigative step despite its lengthy investigation. Should that failure be assumed to indicate SecD intentionally hid relevant information from its findings? For example, it failed to interview Mr. Allen about this issue at all. He was never afforded an opportunity to respond before the untested allegation was written up as a conclusive determination—and aired publicly. Had SecD interviewed Mr. Allen, he would have told them that he does not normally use Google to perform searches, and thus jumping to the conclusion that he intentionally hid results of a Google search was unfounded.

Furthermore, it appears as though SecD did not ask any of the analysts or agents if they had ever failed to find something in an open-source check. Mr. Allen has observed that different people come up with different results, especially when using a different search engine. Many agents cannot find information that Mr. Allen has been able to find and, based on his experience, the analysts have varying results. Since to his knowledge the FBI provides no checklist mandating that specific search engines be used, there is no uniformity in the searches and thus no basis for SecD to assert that he intentionally hid information simply because a different search uncovers something that his search did not.

c. Two Oversights in Hundreds of Checks and Leads Does Not Indicate Intentional Withholding of Information.

The Revocation EC also ignores the sheer volume of Guardian leads and checks being performed in Charlotte and by Mr. Allen during this time period. During a Skype chat with an analyst on February 19, 2021, Mr. Allen commented: "we've been going full tilt here since last May and even more so since 6 Jan." *Id*. at 234. By June 2021, when the Guardian lead subject check was run, Mr. Allen would most likely have run hundreds of checks and possibly suffered from fatigue (something noted by the aforementioned analyst who chatted regularly with Mr. Allen on Skype, *id*. at 534). As the Charlotte CDC noted, "A number of [Charlotte's] employee[]s have felt the pressure from the volume of work [Charlotte] has received." *Id*. at 88. Also,

contrary to SecD's baseless claims that Mr. Allen intentionally withheld information on a couple of occasions, the truth is that he frequently reported derogatory information about January 6th subjects in dozens of checks.

SecD's claim that Mr. Allen has a generalized bias sympathizing with the January 6 subjects is also undermined by the JTTF SSA, who told interviewers that "there were [estimated] over 600 Guardian leads addressed by the JTTF related to 01/06/202[1]. Allen assisted in research for these leads and of the 600, [SSA] recalled only one that drew Allen's attention," the Guardian lead discussed above, about which Allen expressed concerns. *Id.* at 1610. If the SSA who oversaw all of the January 6, 2021 riot leads, about 600 of them, could only recall one lead on which Mr. Allen raised an issue, that record does not support a claim that Mr. Allen intentionally sabotaged any leads based on some alleged improper bias in favor of January 6 subjects.

That is consistent with Mr. Allen's own unvarnished expression of his opinion about the January 6, 2021 riot leads during Skype chats. On February 19, 2021, he wrote to a co-worker, "Yep . . . we've been sifting through Type1/Type2s for weeks on end now . . . some legit but a lot not . . . Have to go through the process though." *Id.* at 234. Mr. Allen certainly had no improper objection to the January 6, 2021 riot leads. Like any other employee, the repetitive work was difficult and as is most often the case, some leads were not legitimate, but he expressed a commitment to the proper process.

d. SecD's Witness to the Two Oversights Appears to Have an Agenda and Committed Her Own Investigative Oversight.

SecD did not ask the FBI special agent who reported both of these oversights why she did not run the June 2021 lead subject through the National Crime Information Center ("NCIC") for a criminal history. Mr. Allen did not normally perform NCIC checks. Agents would have those checks performed by Charlotte's Command and Tactical Operations Center. An FBI agent relying on open-source information to determine if an individual has a criminal history is severely negligent. The best source for that information is NCIC. Basically, it appears that the agent and SecD are blaming Mr. Allen for the agent's own failure to have a criminal history check performed.

In addition to blaming Mr. Allen for her own failure to run an NCIC check, the agent objected to Mr. Allen's political viewpoints. *Id.* at 1668. Thus, she appears to have been biased against Mr. Allen, which is further evidenced by her decision to document in an FD-302 the second time she claims Mr. Allen did not find allegedly relevant information. *Id.* at 1673. It is not normal practice for an agent to document another employee's failure to find relevant information in an FD-302, particularly when Mr. Allen documented his search results in an email. The agent's decision to write an investigative report about Mr. Allen suggests that she may have had an agenda to find and document derogatory information about him.

Instead of relying on one apparently biased witness, SecD should have relied on the statement by the JTTF SSA, who, as discussed above, only recalled one issue with Mr. Allen out of the 600 Guardian leads related to the January 6, 2021 riot. Since the JTTF SSA oversaw all of the work Mr. Allen performed on that matter, he was in a substantially better position to determine if there was a problem with Mr. Allen's work. The SSA "described Allen as a good SOS who performed the responsibilities of his job role well." *Id.* at 1609.

There is no basis for the Revocation EC's conclusion that Mr. Allen intentionally withheld information.

3. Mr. Allen Stopped Sending Certain Emails After Receiving Official Counseling.

Part of the Revocation EC relies on the claim that Mr. Allen "was admonished by his supervisor in summer 2021" to stop sending the aforementioned emails, but "Allen disregarded this warning and sent the 09/29/2021 email." *Id.* at 1692. Mr. Allen disputes that he ever received such an admonishment prior to September 29, 2021. The counseling from the ASAC after the September 29, 2021 email was the first time he was told to stop sending those emails.

Since the Revocation EC does not cite its sources, it is difficult to be sure what information is being relied upon. However, the sole basis for the claim that Allen's supervisor admonished him appears to be the second interview of his SIA. *Id.* at 507. The record of that interview states he "instructed Allen to stop sending emails and to focus on actual news sites." *Id.* Yet the Clearance File contains no contemporaneous written record by the SIA to document the alleged admonishment. Further, the SIA did not make such a claim until his second SecD interview on September 13, 2022, which was almost a year after the September 29, 2021 email. Memories are less reliable over time, not more so.

In the SIA's interview on November 17, 2021—far closer in time to the subject events—he does not mention any such admonishment. In fact, in that interview (six weeks after the September 29, 2021 email), the SIA stated:

> Allen has always been one to consider all of the available information on a given issue, but the . . . email he sent . . . on September 29, 2021 . . . "crossed the line." It was not unusual for Allen to send UNET emails to the core group of employees involved in the investigation of DT matters . . . . It was also not unusual for Allen to include open source information or links to additional sources of information, some of which expressed alternative theories.

Id. at 81. According to his own words, the SIA only became concerned after Mr. Allen's September 29, 2021 email. The SIA further stated in his November 17, 2021 interview that on the one occasion the SIA did counsel Mr. Allen (regarding a comment made during a Threat Review and Prioritization Session, not regarding his emails), "Allen appeared receptive to the feedback." *Id.* at 82.

Consistent with the SIA's first interview, an internal FBI EC dated December 23, 2021 reads: "Based upon the interviews of [Charlotte] Supervisory Intelligence Analyst [] and Supervisory Special Agent [], captioned employee did not receive unfavorable feedback from [them] regarding emails of this nature until the dissemination of the 09/29/2021 email." *Id.* at 307. Just as SecD failed to ask Mr. Allen about its claim regarding missed information in open-source searches, SecD failed to ask Mr. Allen about the SIA's alleged admonishment. The SIA's second interview was after SecD's only interview of Mr. Allen on May 16, 2022. If SecD had asked Mr. Allen about this, Mr. Allen would have explained that the SIA did not even tell him that the September 29, 2021 email had crossed the line of impropriety, let alone clearly admonish him to stop sending similar emails beforehand.

The SIA's changed narrative over almost a year may have been motivated by his own management coming under scrutiny. In a July 11, 2022 interview, an Intelligence Analyst ("IA") interviewed by SecD stated that "Allen was also very vocal in squad meetings and his comments were condoned and often encouraged by his colleagues and by his Supervisors, including Supervisory Special Agent (SSA) [redacted] and Supervisory Intelligence Analyst (SIA) [redacted]." *Id.* at 471. The report of the SIA's September 13, 2022 interview suggests this issue may have been raised by SecD: "As both Allen and [SIA] had been in the military, [SIA] became somewhat of a confidant of Allen's, and Allen would often come into [SIA's] office to 'rant' and

get things off his chest. [SIA] and Allen would have wide ranging conversations and [SIA] would at times counsel Allen." *Id*. at 507. This suggests the SIA had an informal relationship with Mr. Allen that blurred the lines between personal and professional. Even if the issue of Mr. Allen's emails was discussed (which is unlikely, given that the SIA's November 17, 2021 interview supports Mr. Allen's adamant recollection it did not), it could easily have been mistaken for friendly advice given the context, and hardly be described as being officially "admonished."

The Revocation EC asserted that Mr. Allen might continue to send other emails expressing concerns that the FBI might act unlawfully or unethically. Yet Mr. Allen sent no more such emails after he was counseled by the ASAC on September 29, 2021, even though he remained in the same position with the FBI until about Thanksgiving 2021, almost two months later. This is consistent with the other supervisor overseeing Mr. Allen's work, the JTTF SSA, who indicated that "although Allen 'overstepped' in his September 29, 2021 email, his opinion was Allen would be receptive to counseling.'" *Id*. at 94. The record shows that Mr. Allen was indeed receptive to this guidance from his supervisors.

The Revocation EC's conclusion that Mr. Allen failed to heed an alleged admonishment, which was not contemporaneously documented in writing, and that he would continue to send similar emails is baseless and contradicted by the facts uncovered in SecD's investigation.

4. Mr. Allen's Concerns About Financial Institution Consumers' Right to Financial Privacy is Based on Protections Guaranteed by Law and He Correctly Warned Fellow Employees About Possible Illegalities.

The Revocation EC uses Mr. Allen's warning of the potential illegality of sharing information with financial institutions despite the Right to Financial Privacy Act and recent court of appeals precedent. As an initial matter, Mr. Allen is not an attorney, and using his legal opinion as a basis to question to his allegiance to the U.S. and personal conduct is blatantly unfair to Mr. Allen.

According to the Revocation EC: "Allen encouraged another employee not to provide publicly available information relating to individuals who had been arrested in relation to the 01/06/2021 Capitol riot to a financial institution attempting to comply with federal law." *Id*. at 1692-93.

The claim that the financial institution was "attempting to comply with federal law" is itself dubious. The financial institution was seeking a list of January 6, 2021 riot arrestees, writing that it was "proactively searching our holdings. We have been pulling names from news articles and arrest reports, but was wondering if there is a more central list that we can use." *Id*. 1634.

a. The Bank Secrecy Act is in Tension with the Right to Financial Privacy Act.

Although the Revocation EC claims that the bank's information was collected under the "Bank Secrecy Act (BSA) and is a legal method of collection," *id*. at 1686, SecD and the bank apparently ignored the Right to Financial Privacy Act. As codified at 12 U.S.C. § 3402, the Right to Financial Privacy Act prohibits any Government authority to have access or obtain copies of a customer's financial records without the customer's consent or legal/administrative process.

The Bank Secrecy Act, on the other hand, in relevant part authorizes the Secretary of the Treasury to prescribe regulations for financial institutions to report information "to guard against money laundering, the financing of terrorism, or other forms of illicit finance." 31 U.S.C. § 5318(a)(2). Pursuant to that section, the Secretary of the Treasury has prescribed regulations

requiring suspicious activity reports ("SARs"). However, the regulations only require SARs when the bank detects a certain set of financial crimes involving: a) bank insiders, b) "where the bank believes that it was either an actual or potential victim of a criminal violation, or series of criminal violations or that it was used to facilitate a criminal transaction," or c) "if the bank knows, suspects, or has reason to suspect" money laundering, an attempt to evade a reporting requirement, or there is "no business or apparent lawful purpose for a transaction."[22] Based on the plain wording of SAR regulations, banks do not have a duty to seek information from the government, or, for that matter, to read news reports to conduct searches of its holdings.

Also, the mere fact that someone was arrested related to the January 6, 2021 riots does not provide a basis for the bank to conclude that all of the individual's financial transactions close to that time period were a financial crime, that the bank was, or could have been, a victim, or that the bank facilitated a criminal "transaction." Furthermore, the bank had no basis to suspect that any of the transactions associated with people arrested in connection with the January 6, 2021 riots were "money laundering," sought to evade a reporting requirement, or had no apparent lawful purpose. Money laundering requires a transaction based upon the proceeds of a specified unlawful activity. *See* 18 U.S.C. §§ 1956, 1957. The bank had no basis to conclude that January 6, 2021 arrestees' financial transactions were the proceeds of a specified unlawful activity, since there is no reason to believe there were any financial proceeds of the riot. There is similarly no reason to believe these arrestees were seeking to evade a reporting requirement, since they likely had no need for such large transactions ($10,000 in cash or more, *see* 31 C.F.R. § 1010.311), and the mere fact that they were later arrested does not suggest their prior transactions could have had no lawful purpose.

Basically, spending money around the time a customer commits a crime is no basis for a bank to file a suspicious activity report, and does not authorize it to violate the Right to Financial Privacy Act.

Finally, the bank's actions in seeking a list of arrestees from the FBI do not comport with the fundamental purpose of that Bank Secrecy Act: to alert law enforcement to a limited set of criminal activity. If the FBI was already aware of a bank customer's arrest, it was also aware of possible criminal activity and could easily provide legal process to obtain those customers' information. Thus, the bank appears to have been violating its customers' financial privacy.

While SecD may dispute whether the Bank Secrecy Act and its associated regulations would be read so carefully and literally, the Supreme Court has recently addressed the scope of regulations prescribed under the Bank Secrecy Act and has chosen to read them strictly.[23] The Court is more likely to take a dim view of the broad reading of regulation here, because in *Bittner* there was no conflicting statute at issue. Here, the Bank Secrecy Act is in tension with the Right to Financial Privacy Act, because Congress has passed a separate act protecting bank customers' privacy.

b. Mr. Allen Gave His Advice Respecting Civil Liberties In Good Faith.

Mr. Allen pointed out the privacy concerns in his email in response to the bank's request for the list of January 6, 2021 arrestees. He wrote, "In an abundance of caution and concern for American citizens civil liberties I would hold off." Clearance File at 1636. Mr. Allen provided a greater explanation for his concerns when the same issue later came up in a Guardian lead. He wrote, "Do proactive discussions with a bank in this regard present a violation of the 4th amendment to the US Constitution? The opening paragraph insinuates the bank acted at our

[22] 12 C.F.R. § 21.11.
[23] See Bittner v. United States, 598 U.S. __ (2023).

behest to generate derogatory information pertaining to Mr. [redacted], a private citizen." *Id*. at 1621.

Mr. Allen's concerns for privacy were probably better grounded in the Right to Financial Privacy Act—again, he is not an attorney—but he was correct in alerting the possibility that the bank and FBI may have been violating legal privacy protections. The bank was acting to provide private financial information to law enforcement without the legal or administrative process required under 12 U.S.C. § 3402. As discussed above, the bank's conduct was not authorized by the Bank Secrecy Act or regulations implemented under its regulations.

Furthermore, Mr. Allen's citing of "proactive discussions" between the FBI and a private institution is consistent with a recent U.S. Court of Appeals decision holding the FBI violated citizens' First Amendment rights when it coordinated with social media companies.[24] Thus, not only is SecD's claim about the legality of the bank's searches dubious, but Mr. Allen's concerns about the FBI's collaboration with these private entities would likely raise the question of whether the FBI was unlawfully attempting to obtain this information in violation of the Right to Financial Privacy Act. Regardless of whether Mr. Allen is correct, he raised reasonable concerns about the legality of the FBI's and the bank's actions.

In addition to the Revocation EC's questionable legal conclusions, it exaggerates the possible impact of Mr. Allen's emails questioning these possibly unlawful acts and recommending caution. The claim that Mr. Allen's voicing of reasonable concerns is a basis to question his allegiance to the U.S. and personal conduct ignores Mr. Allen's own words. He specifically wrote, "That is my recommendation. Of course the decision is yours. My role is to advise." *Id*. at 1636. Furthermore, the Revocation EC relies heavily on Mr. Allen's comment about there being "a lot of grayness/murkiness around the events at the Capitol" to question his voicing reasonable concerns, *id*. at 1693, but ignores the fact that Mr. Allen sent that email on January 13, 2021, one week after the January 6, 2021 riot, *id*. at 1636. Almost three years later, the FBI is still investigating what happened that day and a congressional committee has investigated the matter and provided a substantial amount of information about it. Mr. Allen made his observation one week afterwards when there was very little confirmed information available.

SecD should not use of Mr. Allen's voicing of reasonable concerns about individuals' right to financial privacy as a basis to revoke his security clearance.

C. Mr. Allen's Actual Conduct Does Not Merit Revocation of His Security Clearance Under the Adjudicative Guidelines.

1. Guideline A: Allegiance to the United States

As described above, the Revocation EC falsely accuses Mr. Allen of expressing sympathy for those who committed illegal acts when he did no such thing. Mr. Allen has only expressed concern for citizens' constitutional rights and questioned whether the FBI is obeying the law. In fact, Mr. Allen has engaged in conduct that, under the Adjudicative Guidelines confirms his allegiance to the United States, by trying to stop the possible prevention of "others from exercising their rights under the Constitution or laws of the United States or of any state." *See* Guideline A, Adjudicative Guidelines at 8.

Each of Mr. Allen's supervisors agreed that "Allen has never said or done anything which caused [them] to believe Allen was directly involved in, or that he supported, the criminal

[24] See Missouri v. Biden, No. 23-30445 (5th Cir. Oct. 3, 2023) (reh'g granted) at 54-57.

activity which occurred at the Capitol on January 6": his SIA (*id*. at 82); his SSA (*id*. at 94), and his ASAC (*id*. at 99). So did the Charlotte CDC (*id*. at 89).

Similarly, each of Mr. Allen's supervisors agreed: "Allen has never given [them] cause to question his allegiance to the US. Allen has never given [them] cause to believe he advocates violence against the US, supports overthrowing the government, or supports those who do." *Id*. at 82, 89, 94, 99.

Simply put, expressing concern for constitutional rights and questioning government actions is not a reason to question someone's allegiance to the United States, it is a reason to confirm their allegiance to our constitutional form of government. There is no basis to revoke Mr. Allen's clearance under Guideline A.

2. Guideline E: Personal Conduct

Again, the Revocation EC's reference to Guideline E is based on erroneous factual conclusions. The only allegations that appear to be applicable here are the claim that Mr. Allen intentionally withheld open-source information and that he did not obey an alleged "admonishment" not to send certain kinds of emails. As discussed above, this claim is meritless. Two investigative oversights out of 600 Guardian leads by the JTTF and one email after an unproven, undocumented alleged admonishment by an SIA with a less-than-professional managerial relationship are not indicative of "questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations."

Furthermore, Mr. Allen's strict adherence to FBI and DOJ regulations since his security clearance has been suspended has caused him and his family extreme financial distress. Mr. Allen has followed the FBI's outside employment regulations meticulously, even though doing so has rendered him unable to earn a living while on indefinite suspension without pay. For more than a year, the FBI failed to give Mr. Allen permission to sell a prayer journal that has no references to the FBI. Furthermore, the FBI violated its own rules on outside employment by failing to respond in a timely manner to Mr. Allen's request for outside employment, causing him to lose a job opportunity. Yet, he continues to follow the FBI and DOJ regulations.

There is no basis for revoking Mr. Allen's security clearance under Guideline E.

3. SecD Violated the Adjudicative Guidelines by Failing to Follow the Whole-Person Concept.

According to the Adjudicative Guidelines:

> The adjudicative process is an examination of a sufficient period and a careful weighing of a number of variables of an individual's life to make an affirmative determination that the individual is an acceptable security risk. This is known as the whole-person concept. All available reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a national security eligibility determination.

Adjudicative Guidelines at 6.

SecD did not engage in a "careful weighing of a number of variables," nor did it consider "[a]ll available reliable information" in its decision to revoke Mr. Allen's security clearance. SecD did not consider Mr. Allen's prior service with the Marine Corps, including deployments to combat zones. As discussed above, it did not consider Mr. Allen's strict adherence to FBI and DOJ regulations at great financial and personal cost to him and his family. SecD did not follow

the evidence as a legitimate investigative entity would have. It appears to have determined an outcome and looked for ways to justify that outcome.

SecD's revocation of Mr. Allen's security clearance is in violation of the Adjudicative Guidelines.

III. MR. ALLEN WAS NOT PROVIDED WITH THE RECORDS TO WHICH HE IS ENTITLED UNDER EXECUTIVE ORDER 12,968 AND THE CODE OF FEDERAL REGULATIONS.

In addition to SecD's false factual conclusions and failure to abide by the Adjudicative Guidelines, SecD has also violated the administrative procedures for revoking his clearance, because SecD has not provided Mr. Allen with the records to which he is entitled. Under Executive Order No. 12,968 § 5.2(a)(2), 60 Fed. Reg. 40252 (Aug. 2, 1995), SecD shall provide "any documents, records, and reports upon which a denial or revocation is based." This requirement is codified in federal regulations for Justice Department employees at 28 C.F.R. § 17.47(a)(3).

The Revocation EC primarily relies on its baseless claim related to his failure to find information in two open-source searches. *Id*. at 1691-92. However, SecD did not provide the specific records related to the second questioned search from September 2021. Based on a SecD internal email on February 7, 2023, SecD has Microsoft Excel files entitled, in part "Open Source Research" with the date "09-24-2021." Clearance File at 1674. However, those Excel files do not appear to have been included in the file provided to Mr. Allen. Mr. Allen and his counsel can only rely on SecD's claim that Mr. Allen failed to provide "relevant" information. *Id*. at 1692. However, considering SecD is claiming that Mr. Allen intentionally withheld or failed to find the information based on its claim of Mr. Allen's political beliefs, the nature of the so-called "relevant" information is essential to determining whether SecD has any basis to draw that conclusion.

Thus, SecD's revocation is in violation of Executive Order No. 12,968 and the C.F.R.

IV. SECD'S REVOCATION OF MR. ALLEN'S SECURITY CLEARANCE IS IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS.

As discussed above, in its adjudication of Mr. Allen's clearance SecD relies on false factual assertions and dubious, if not outright wrong, legal claims. SecD obviously revoked Mr. Allen's security clearance because he dared to question the legality of what the FBI was doing and because of his political and religious beliefs. Thus, its revocation violates Mr. Allen's rights protected by the Constitution.

A. SecD Revoked Mr. Allen's Security Clearance Based on His Political Beliefs in Violation of the First Amendment.

The Supreme Court has observed: "'If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein.'" *Elrod v. Burns*, 427 U.S. 347, 356 (1976) (quoting *Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). "[T]he First Amendment protects political association as well as political expression." *Id*. at 357 (internal quotation omitted). "These protections reflect our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,' . . . ." *Id*. (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). For these reasons, the Supreme Court held that terminating public employees for political patronage purposes—belonging to the wrong political party—"to the

extent it compels or restrains belief and association is inimical to the process which undergirds our system of government and is at war with the deeper traditions of democracy embodied in the First Amendment." *Id.* (internal quotation omitted).

Although the FBI has a legitimate interest in limiting access to classified material of employees who seek to overthrow the United States, as the Supreme Court has observed:

> The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.

Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589, 602 (1967) (internal quotation omitted). For that reason, the Court held that a law allowing the removal of public school teachers for "treasonable or seditious utterances or acts" was vague and violated the First Amendment. *Id.* at 604.

Under *Keyishian*, the Adjudicative Guidelines themselves may be subject to a facial challenge. However, Mr. Allen does not need to establish that, because, as applied to Mr. Allen, SecD's revocation violates his First Amendment rights under *Elrod* and *Keyishian*. SecD suspended his clearance based on his email questioning whether government leadership was not being truthful, after which he specifically told his ASAC that he believed the FBI Director may have perjured himself. Furthermore, SecD has used against Mr. Allen his expression of concerns that a bank and the FBI may have been violating legal financial privacy protections and continuing to send emails questioning whether the FBI and government are obeying the law and Constitution. Because of his expressed concerns for the law and Constitution and the possible waste of resources—where the FBI is investigating crimes that are resulting in misdemeanor convictions at more than ten times the rate than cases DOJ prosecuted in 2019—SecD has made dubious claims that Mr. Allen intentionally withheld information, twice, out of about 600 Guardian leads associated with the January 6, 2021 riot. Even if Mr. Allen violated some administrative requirement of the FBI, SecD's use of the security clearance process is clearly based on Mr. Allen's political viewpoints. Any other employee who sent out allegedly improper emails or missed open-source checks would not have their clearances suspended and revoked.

Furthermore, independent of its representation of Mr. Allen, Empower Oversight has assisted an FBI employee in providing a protected disclosure to Congress showing that the second highest FBI official, Deputy Director Paul Abbate, was encouraging FBI managers to take action against FBI employees who expressed disagreement with how the FBI was handling January 6, 2021 riot cases during a video teleconference in February 2021. Specifically, the whistleblower reported that Abbate "told the audience that anyone who questions the FBI's response or his decisions regarding the response to January 6 should find a different job." Furthermore, Abbate told all SACs "if they had an employee that did not agree, the SACs could have that employee call him personally and he would set them straight." The whistleblower had observed hundreds of teleconferences with senior FBI officials but had never "seen a direct threat like that any other time."[25]

[25] *See* Letter from Empower Oversight President to Chairmen and Ranking Members, U.S. Senate Judiciary Committee and U.S. House of Representatives Judiciary Committee, pp. 1-2 (June 21, 2023) *available at* https://empowr.us/wp-content/uploads/2023/06/2023-06-21-TL-to-Congress-FBI-WB-affidavit-Final-w-Aff.pdf.

Mr. Allen's security clearance file shows that the Charlotte SAC appears to have followed Mr. Abbate's admonishment. Mr. Allen's ASAC sent an email to SecD on November 2, 2021 asking the status of Mr. Allen's clearance, specifically citing the fact that "SAC Wells has asked me to get more information about the status of the SecD inquiry in SOS Allen. Generally, we have some added concerns about the employee, particularly since he is only one of two employees in Charlotte who is refusing to follow policy and attest to his current vaccination status . . . . " Clearance File at 119.

Also, even though it is not directly provided in Mr. Allen's clearance file, it appears that SAC Wells was personally involved in suspending Mr. Allen's clearance. The ASAC stated in an interview on November 17, 2021 that SAC Wells sent him an email that SecD was in the process of preparing documentation to suspend Allen. *Id*. at 100. While SAC Wells appears to have been communicating with SecD to advocate for suspension, the ASAC expressed a hope that Mr. Allen could avoid a clearance action. *Id*. SAC Wells's personal involvement in the matter—contrary to the opinions of managers who more closely supervised Mr. Allen—suggests that the SAC was following Deputy Director Abbate's wishes to express how FBI employees who dare to question the FBI's handling of January 6, 2021 matters can find themselves a different job.

Mr. Allen has never advocated violating the law or Constitution, nor has he ever advocated acts of violence. In fact, he has consistently advocated obeying the law and Constitution. SecD's revocation of Mr. Allen's security clearance is based on his political beliefs in violation of the First Amendment.

B. SecD's Revocation of Mr. Allen's Security Clearance Based on His Religious Beliefs Violates His First and Fifth Amendment Rights.

The Supreme Court observed in *Elrod*, a government cannot prescribe what is orthodox in religion, in addition to political beliefs. 427 U.S. 356. Obviously, discrimination against individuals for their religious beliefs implicates the First Amendment's Free Exercise and Establishment Clauses. However, it may also implicate the equal protection guaranteed by the Due Process Clause of the Fifth Amendment.

SecD made various references to Mr. Allen's religious beliefs in its Revocation EC to justify its revocation of his security clearance. Specifically, SecD used Mr. Allen's statement that he would be compelled to send the September 29, 2021 email as the basis to conclude that he would continue to send the allegedly offending emails in the future. Clearance File at 1692. However, SecD's own file shows that Mr. Allen specifically cited his religious beliefs as the basis for that compulsion. *Id*. at 397. Setting aside the fact that Mr. Allen sent no more such emails for the almost two months he continued in his position after he was officially counseled by his ASAC, SecD has used Mr. Allen's religion against him.

Furthermore, although not in SecD's adjudication portion of the Revocation EC, SecD describes messages between Mr. Allen and a Charlotte special agent about religious websites, as part of its investigation. Specifically, SecD relied on Mr. Allen's citation of a website that he expressed trust in because Regina Magazine reposted it and "'Regina has a very good reputation.'" *Id*. at 1685. Regina Magazine is a Catholic publication, specifically writing on its website, "We're interested in everything under the Catholic sun—from work and family to religious and eternal life."[26] While SecD attempts to hide its bias based on Mr. Allen's religious beliefs, its discriminatory intent shines through.

Furthermore, as discussed above, SAC Wells appears to have influenced SecD's decisions in part because of a concern over Mr. Allen's religious concerns over the vaccine mandate. The

[26] Home, Regina Magazine available at https://reginamagazine.org/ (last visited Oct. 15, 2023).

ASAC also stated that the reason Mr. Allen was referred to SecD was a combination of the September 29, 2021 email and his refusal to attest to his COVID-19 vaccination status. In fact, the ASAC considered the September 29, 2021 email matter addressed until he learned of Mr. Allen's issue with the vaccination status "a week or two later." Clearance File at 99. If SAC Wells or the ASAC had a problem with Mr. Allen's actions regarding the vaccine mandate, they were free to take administrative action against him. However, short-circuiting that process and its legal protections by using the security clearance process shows SAC Wells, the ASAC, and SecD are motivated by their own opinions about Mr. Allen's religious beliefs.

Thus, SecD's revocation of Mr. Allen's security clearance violates the First and Fifth Amendments.

C. Alternatively, SecD's Revocation of Mr. Allen's Security Clearance Violates His Free Speech Rights Under the First Amendment.

SecD has claimed that Mr. Allen's September 29, 2021 email was unauthorized, because it alleges that he was admonished by his SIA to stop sending such emails. Although Mr. Allen disputes this claim, if SecD is relying on this erroneous factual claim, its use of this email to suspend Mr. Allen's security clearance violates his right to free speech protected by the First Amendment.

The Supreme Court has identified two inquiries to guide interpretation of the constitutional protections accorded to public employee speech. "The first requires determining whether the employee spoke as a citizen on a matter of public concern." *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) (citing *Pickering v. Bd. of Educ. of Township High Sch. Dist. 205, Will Cty., Ill.*, 391 U.S. 563, 568 (1968)). If the answer is "yes," then "[t]he question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." *Id.* (citing *Pickering*, 391 U.S. at 568). "When, however, the employee is simply performing his or her job duties, there is no warrant for a similar degree of scrutiny." *Id.* at 423.

If, as SecD claims, Mr. Allen had no authority to send his email, then he was not performing his job duties, and he was acting as a private citizen when he sent it. *See Lane v. Franks*, 134 S. Ct. 2369, 2379 (2014) ("The critical question . . . is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties.") Beyond that, Mr. Allen's email alleging government wrongdoing was a matter of public concern. "Government employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions." *Waters v. Churchill*, 511 U.S. 661, 674 (1994) (citing *Pickering*, 391 U.S. at 572). "[C]orruption in a public program and misuse of [public resources]. . .obviously involve[] a matter of significant public concern." *Lane*, 134 S. Ct. at 2380.

So, the question is whether the FBI had adequate justification for its actions against Mr. Allen. While the FBI has legitimate basis to stop employees from sending personal emails on its network, it does not have an "adequate justification" to take such an extreme action as revocation of a security clearance. Based upon the facts of this case, a simple counseling by an ASAC was enough to have Mr. Allen stop sending the emails the FBI found so offensive.

The Revocation EC's use of Mr. Allen's September 29, 2021 email as the basis to revoke his security clearance violates the First Amendment.

V. CONCLUSION

As described above, SecD's decision revocation is: 1) in reprisal/retaliation for protected disclosures; 2) based on erroneous factual and legal claims that ignore the standards of the Adjudicative Guidelines; 3) made without the procedural protections required by Executive Order 12,968 and the C.F.R.; and 4) in violation of the First and possibly Fifth Amendments. SecD's revocation decision should be reversed, Mr. Allen's clearance should be reinstated, and he should be immediately returned to duty and provided back pay for his time on unpaid leave.

Cordially,

/Tristan Leavitt/
Tristan Leavitt
President