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Analysis

# Trump Clearance Withdrawal May Raise Constitutional Issues



By [Daniel Wilson](#)

*Law360* (August 21, 2018, 9:38 PM EDT) -- Former CIA director John Brennan has a potential constitutional basis to challenge President Donald Trump's revocation of his security clearance in court, but to succeed he will have to convince the court to go over legal ground that's never been touched before, attorneys said.

Brennan's security clearance was revoked by Trump on Aug. 15 following sustained criticism of the president, such as tweets issued after Trump's July 16 summit with Russian President Vladimir Putin in which Brennan said that the president's comments at the summit were "imbecilic" and "nothing short of treasonous," accusing Trump of being "wholly in the pocket of Putin."

The clearance revocation had been driven by Brennan's alleged "lying and recent conduct characterized by increasingly frenzied commentary" and "wild outbursts on the internet and television," which made Brennan unfit to have access to government secrets, Trump said, following through from an earlier [revocation threat](#) against Brennan and five other high-ranking former national security officials.

Brennan has since threatened legal action, and Trump, despite a massive public backlash from around 200 former national security officials — who have argued, among other claims, that the president is effectively using the clearance process to impose a "political litmus test" — has not backed down, suggesting more revocations will follow, and publicly daring Brennan to sue.

I hope John Brennan, the worst CIA Director in our country's history, brings a lawsuit. It will then be very easy to get all of his records, texts, emails and documents to show not only the poor job he did, but how he was involved with the Mueller Rigged Witch Hunt. He won't sue!

— Donald J. Trump (@realDonaldTrump) [August 20, 2018](#)

But although Trump has welcomed a court fight and may perceive himself to be in a position of strength, given that the president is afforded significant deference by courts for decisions related to national security — as shown in the [U.S. Supreme Court's](#) recent ruling [upholding his "travel ban"](#) — and that security clearance decisions are also generally considered to be outside courts' jurisdiction to review, Brennan might still have a shot at overturning his clearance revocation, attorneys claimed, pointing to the circumstances behind the case.

The touchstone for court challenges to security clearances, they said, is the U.S. Supreme Court's 1988 [Department of the Navy v. Egan](#) decision, which essentially held that as a national security issue, courts lack jurisdiction to hear challenges to clearance-related decisions.

But the same year, the high court also decided [Webster v. Doe](#), in which the justices — in the context of the termination of a CIA employee — effectively added a caveat that constitutional claims related to national security decisions may be able to be heard by a court.

So far, however, there's been no definitive court decision regarding the issue at the intersection of the two cases, involving a constitutional challenge to a security clearance denial or revocation, a fact noted last month by D.C. Circuit Judge Gregory Katsas, just days before Trump first threatened to revoke Brennan's clearance.

In a concurrence in [Palmieri v. U.S.](#), a decision [affirming the dismissal](#) of a former federal contractor's challenge to the revocation of his security clearance, Judge Katsas noted the issue at the intersection of Egan and Webster v. Doe is "weighty and difficult because, in such cases, judicial review bumps up against the president's enumerated and exclusive power as Commander-in-Chief."

But, while Palmieri was perhaps not the right vehicle for addressing the issue, "at some point, we will likely need to decide it, for the government warns us that individuals denied clearances are increasingly invoking cases like Webster v. Doe ... to chip away at Egan," the judge said.

And Brennan's case could be a way into the issue for the courts, particularly given that Trump appeared to have issued his revocation decision without going through the standard process, likely the first time any president has carried out such a decision unilaterally since the modern security clearance process was established in the 1950s, attorneys said.

"I can't purport to have a comprehensive knowledge of clearance decisions that are made, but I'm not aware of any [similar revocation decisions], and I have certainly read others who say they are not aware of any," said Robert Litt, of counsel at [Morrison & Foerster LLP](#) and the former general counsel for the [Office of the Director of National Intelligence](#).

The current standard process for revoking or denying security clearances was established by a 1995 executive order, according to Bradley Moss, a partner at the Law Office of [Mark S. Zaid PC](#) who specializes in security clearances and national security law. It requires notice be given to the clearance holder or applicant regarding the government's concerns, access to the underlying investigative file, and at least two levels of administrative appeal, including a chance to plead their case in person.

The process is used in "99.5 percent" of all clearance cases, with the rarely-used exception in which the head of a relevant agency certifies that national security concerns preclude that appeal process, Moss said.

"This is where those cases have always struggled, because no matter how horrifically stupid the underlying merits may have been, the process has almost always [been followed], so it's very difficult to make a viable constitutional claim," he said.

Given that Trump appears to have acted on his own, however, going around the standard process to instead invoke his own latent constitutional authority, that could open up a Fifth Amendment due process claim, Moss said.

"The courts will, of course, afford deference to the president on matters of national security, [but] we don't know how far that deference will take the president if they are depriving a U.S. citizen of their Fifth Amendment rights," he said.

George Chuzi, a partner at [Kalijarvi Chuzi Newman & Fitch PC](#) whose practice includes security clearance issues, was skeptical about the possibility of Brennan being able to successfully raise a due process claim, noting that a security clearance, in itself, is not a right.

Regardless, Trump's public comments make it clear that his revocation of Brennan's security clearance was effectively built on objections to Brennan's public comments, rather than any substantive national security concerns, meaning a First Amendment challenge could be viable, Chuzi claimed.

"To me, that is an opening that we've never been presented with before, and the question it raises — and I think it's fairly pure — is, 'Can a president revoke a security clearance solely on the grounds of speech, the exercise of speech, without any implication of national security issues?'" he said.

Proving injury in a First Amendment case requires a showing that free speech has been chilled, which is an issue that definitely could be implicated in any court challenge by Brennan, Chuzi noted.

"Are people going to be less likely to criticize the president if they believe that he will yank their security clearance ... and what does that mean for free exercise of speech?" he said.

--Editing by Pamela Wilkinson and Alanna Weissman.

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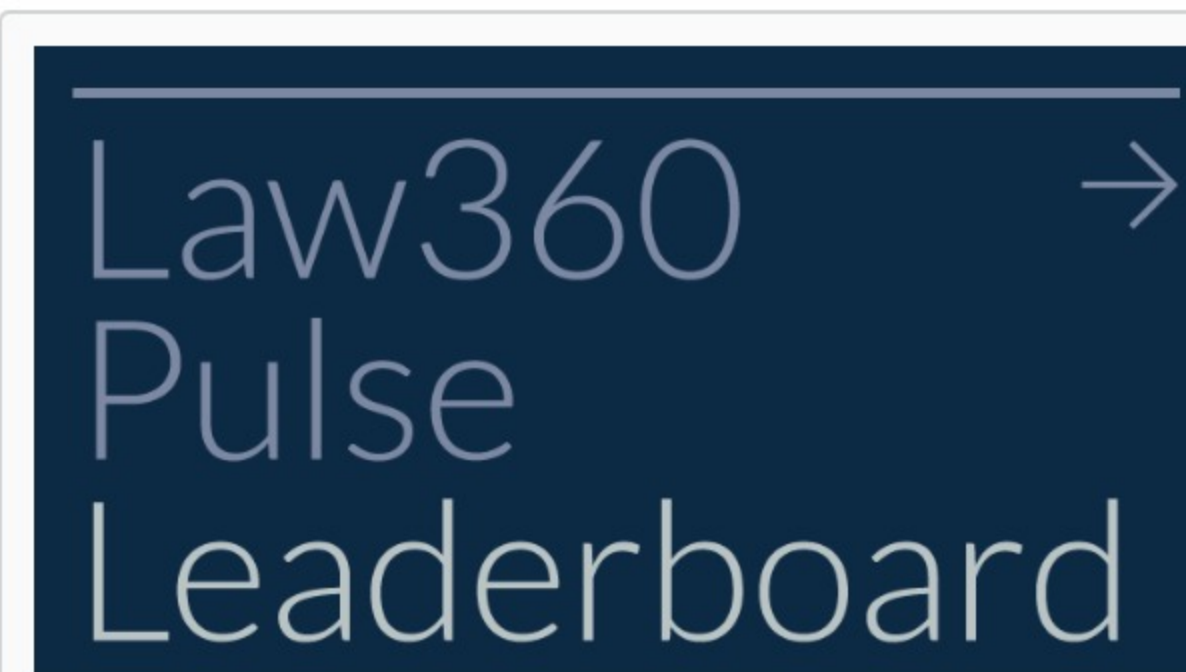
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