
Security-Clearance Decisions and Constitutional Rights

Max Jesse Goldberg

ABSTRACT. Over four million Americans must hold security clearances to work. But because courts have regarded security-clearance decisions as committed to the Executive's discretion, they generally decline to review claims that adverse decisions violate employees' and applicants' constitutional rights. Recently, the judiciary has begun to recognize its competency to adjudicate some of these constitutional claims without improperly encroaching on the Executive. As the national-security workforce grows larger and more diverse, this Essay outlines an emerging exception to the bar on judicial review of security-clearance decisions: courts' ability to review substantiated claims that adverse decisions violate constitutional rights.

INTRODUCTION

In a "striking act of retaliation against an outspoken critic," President Trump announced in 2018 that he had revoked former Central Intelligence Agency (CIA) Director John Brennan's security clearance.¹ Commentators remarked that even this obviously retaliatory decision was within the Executive's nearly unchecked authority to deny, revoke, and suspend security clearances.² Through

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1. Julie Hirschfeld Davis & Michael D. Shear, *Trump Revokes Ex-C.I.A. Director John Brennan's Security Clearance*, N.Y. TIMES (Aug. 15, 2018), <https://www.nytimes.com/2018/08/15/us/politics/john-brennan-security-clearance.html> [<https://perma.cc/56K2-9WYF>].
 2. See, e.g., Kel McClanahan, *The Case for Legislative Security Clearance Reform*, JUST SEC. (Aug. 24, 2018) (emphasizing that *Dep't of the Navy v. Egan*, 484 U.S. 518 (2018), allows for Congress to provide for substantive review of security-clearance adjudications; noting D.C. Circuit Judge Gregory Katsas's skepticism of the application of *Egan* to constitutional claims in *Palmieri v. United States*, 896 F.3d 579 (D.C. Cir. 2018); and advocating legislative reform), <https://www.justsecurity.org/60440/case-legislative-clearance-reform> [<https://perma.cc/W25R-HPPH>]; Bradley P. Moss, *Can the President Revoke Former Officials' Security Clearances?*, LAWFARE (July 23, 2018, 10:12 PM) (remarking that courts have relied upon *Egan's* dicta "to state that the judiciary has no role at all in the *substance* of security clearance determinations"),

this announcement, President Trump bypassed the normal process for revocations, which would have required civil servants to “put their names on a document moving to revoke someone’s security clearance for . . . protected activities under the First Amendment”—an act one prominent intelligence lawyer was confident they “would not” do.³

For all the President’s tough talk, Brennan’s clearance was never revoked. Either the White House did not bother to jump through the necessary hoops, CIA civil servants balked, or both.⁴ Nevertheless, President Trump’s actions emphasize the risk that clearance decisions may infringe upon constitutional rights. In the words of former Office of the Director of National Intelligence (ODNI) General Counsel Robert Litt, “[I]t’s hard to imagine a stronger constitutional case than the one the president . . . handed advocates of judicial review.”⁵

The prospect that Brennan might have successfully brought a First Amendment retaliation claim in court hints at a broader issue: judicial review in this context is hard to come by. That is because courts have historically privileged the national-security imperatives of the Executive over security-clearance applicants’ and holders’ claims that their constitutional rights were violated. Even if a plaintiff has a sound basis to believe that a clearance decision violates her constitutional rights, it will be nearly impossible to prevail on that claim. This is true both at the Merit Systems Protection Board (MSPB)—a quasi-judicial administrative body with authority over civil-service employment decisions—and in federal court. In most circuits, a plaintiff may be able to obtain judicial review if she alleges that the agency failed to follow its own procedures⁶ or that the agency’s official policies or practices were unconstitutional.⁷ But it will be nearly

<https://www.lawfareblog.com/can-president-revoke-former-officials-security-clearances> [<https://perma.cc/T2N9-62GA>]; Robert S. Litt, *How Trump’s Outburst Over Security Clearances Harms the Presidency*, LAWFARE (Aug. 16, 2018, 5:35 PM) (noting Judge Katsas’s concurrence in *Palmieri*), <https://www.lawfareblog.com/how-trumps-outburst-over-security-clearances-harms-presidency> [<https://perma.cc/5E73-YVY3>].

3. Moss, *supra* note 2.
4. Interestingly, it remains unclear whether the President even attempted to take the legal actions necessary to revoke Brennan’s clearance. See David Frum, *The Mystery of the Disappearing Security Clearance*, ATLANTIC (Jan. 13, 2019), <https://www.theatlantic.com/politics/archive/2019/01/does-john-brennan-have-clearance/579772> [<https://perma.cc/B768-NW9N>].
5. Litt, *supra* note 2.
6. See, e.g., *Drumheller v. Dep’t of the Army*, 49 F.3d 1566, 1570-73 (Fed. Cir. 1995); *Dorfmont v. Brown*, 913 F.2d 1399, 1402-04 (9th Cir. 1990); *Jamil v. Secretary, Dep’t of Def.*, 910 F.2d 1203, 1209 (4th Cir. 1990); *High Tech Gays v. Def. Indus. Sec. Clearance Off.*, 895 F.2d 563, 570-81 (9th Cir. 1990); *Hill v. Dep’t of the Air Force*, 844 F.2d 1407, 1411-12 (10th Cir. 1988).
7. See, e.g., *Nat’l Fed’n of Fed. Emps. v. Greenberg*, 983 F.2d 286, 290 (D.C. Cir. 1993); *Harmon v. Thornburgh*, 878 F.2d 484, 491-92 (D.C. Cir. 1989).

impossible to obtain review of an individual decision on the merits.⁸ Indeed, the D.C. Circuit – one of the most important fora for these disputes – has never entertained such a challenge.⁹ Although some courts have paid lip service to reviewing security-clearance determinations for constitutional error, the D.C. Circuit has not.¹⁰ However, as this Essay argues, that may soon change. Several D.C. judges have expressed openness to either reconsidering the doctrine or articulating more clearly its application to constitutional claims.¹¹

This Essay proceeds in three parts. Part I surveys the development of the doctrine surrounding judicial review of security-clearance decisions from *Department of the Navy v. Egan*¹² and *Webster v. Doe*¹³ onward. Part II analyzes three recent opinions – two in the D.C. Circuit and one in the D.C. District Court – and argues that these cases trace a trajectory towards a future decision that may clarify what *Egan*, *Webster*, and their progeny have to say about judicial review of clearance decisions. The D.C. Circuit decisions are notable not only because of how their majorities treat challenges to security-clearance decisions, but also because Judge Tatel’s and Judge Katsas’s concurrences represent distinct judicial

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8. See, e.g., *Duane v. Dep’t of Def.*, 275 F.3d 988, 993 (10th Cir. 2002) (citing *Hill*, 844 F.2d at 1412); *Greenberg*, 983 F.2d at 290; *Jamil*, 910 F.2d at 1209.
 9. Because most national security-related agencies are headquartered in Washington, D.C., disputes related to security clearances are concentrated there. Since *Egan*, the D.C. Circuit has heard more challenges to security clearance adjudications than any other federal court of appeals except the Federal Circuit. A search of Westlaw conducted on August 6, 2022 for cases including “Navy v. Egan” and “security clearance” resulted in twenty-two cases from the D.C. Circuit and sixty-eight from the Federal Circuit; no other circuit heard more than eleven such cases. While the Federal Circuit is also an important venue for claims involving security clearances because it hears appeals from the Merit Systems Protection Board (MSPB), see 28 U.S.C. § 1295(a)(9) (2018), *Egan*’s statutory holding prevents either the MSPB or the Federal Circuit from reviewing the merits of security-clearance decisions. See, e.g., *Drumheller*, 49 F.3d at 1571 (“[T]he MSPB does not have jurisdiction to review the merits of such a decision . . . and neither do we.” (internal citations omitted)).
 10. See, e.g., *Stehney v. Perry*, 101 F.3d 925, 932 (3d Cir. 1996) (“[N]ot all claims arising from security clearance revocations violate separation of powers.”); *Dubbs v. CIA*, 866 F.2d 1114, 1120 (9th Cir. 1989) (“[F]ederal courts may entertain colorable constitutional challenges to security clearance decisions.”). But see *Brown*, 913 F.2d at 1403-04 (reserving the question whether *Egan* bars nonfrivolous constitutional challenges to adjudicatory processes). Some judges on the D.C. Circuit have articulated the need to address the issue. See, e.g., *Palmieri v. United States*, 896 F.3d 579, 590 (D.C. Cir. 2018) (Katsas, J., concurring) (discussed in Part II, *infra*); *Gill v. Dep’t of Just.*, 875 F.3d 677, 684 (D.C. Cir. 2017) (Tatel, J., concurring) (same).
 11. See *infra* Part II.
 12. 484 U.S. 518 (1988).
 13. 486 U.S. 592 (1988).

approaches.¹⁴ The D.C. District Court case is the only recent instance in which a court has allowed a plaintiff's constitutional challenge to an individual clearance decision to survive a motion for summary judgment. Finally, Part III presents a normative case for why, in light of these decisions, the D.C. Circuit should recognize a limited exception to *Egan*. I argue that judicial review of an individual security-clearance decision is appropriate where a plaintiff can independently substantiate her claim that a government agency denied, suspended, or revoked her security clearance in violation of her constitutional rights.

I. ARE SECURITY-CLEARANCE DECISIONS EVER REVIEWABLE?

This Essay contends that the doctrine surrounding judicial review of security-clearance decisions has evolved in important and subtle ways that permit courts to review the merits of plaintiffs' claims under the right circumstances. However, the doctrine's broader shape is defined by two Supreme Court rulings. Before this Essay turns to more recent and intricate legal developments, this Part examines the impact and continuing legacy of those foundational decisions.

A. *Egan's (Categorical) Bar*

In 1988, the Supreme Court ruled in *Department of the Navy v. Egan* that the MSPB, a quasi-judicial executive agency established by the Civil Service Reform Act (CSRA), could not review the merits of clearance decisions without clear statutory authorization.¹⁵ The case arose after Thomas Egan's security clearance was denied by the Navy based on state criminal convictions that he had failed to disclose and his self-admitted problems with alcohol abuse.¹⁶ Reviewing his firing, the MSPB disclaimed any authority to review the substance of the Navy's

14. See, e.g., Ann E. Marimow, *Judge David Tatel's Lack of Eyesight Never Defined Him, but His Blindness Is Woven into the Culture of the Influential Appeals Court in D.C.*, WASH. POST (July 8, 2021) (describing Judge Tatel as "a leading, liberal-leaning voice on the bench"), https://www.washingtonpost.com/local/legal-issues/dc-judge-david-tatel-career/2021/07/07/bf48778e-c486-11eb-8c18-fd53a628b992_story.html [https://perma.cc/MQD3-PRGZ]; Kevin Freking, *Senate Gives Trump Another Victory on Judges*, ASSOCIATED PRESS (Nov. 28, 2017) (discussing Judge Katsas's work in Republican administrations, including as "one of President Donald Trump's legal advisers"), <https://apnews.com/article/53a02a2693e54bf5accd27a3cf3f9e23> [https://perma.cc/A7KJ-Y5XB].

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

16. *Id.* at 520-21.

decision to deny Egan a security clearance.¹⁷ After the Federal Circuit reversed the MSPB's decision, the Supreme Court granted review.¹⁸

The Court's decision in *Egan* was fundamentally about statutory interpretation: specifically, whether the CSRA granted an employee whose clearance was denied on national-security grounds the right to appeal the merits of that decision to the MSPB.¹⁹ But Justice Blackmun's opinion went beyond the question of the scope of the MSPB's authority under the CSRA into a more general pronouncement about the constitutional separation of powers. In a much-quoted passage,²⁰ the Court held that "the grant of security clearance to a particular employee, a sensitive and inherently discretionary judgment call, is committed by law to . . . the Executive Branch."²¹ To support this broad dictum, the Court referred to "reasons . . . too obvious to call for enlarged discussion"²² and asserted that "it is not reasonably possible for an outside nonexpert body to review the substance of such a judgment"²³ in line with "the generally accepted view that foreign policy [is] the province and responsibility of the Executive."²⁴ With its reasoning that "unless Congress has specifically provided otherwise, courts . . . [ought to be] reluctant to intrude upon the authority of the Executive in military and national security affairs,"²⁵ the Court's opinion set the foundation for a doctrine that has precluded most judicial review of clearance decisions.

That restrictive interpretation of *Egan* was not inevitable. One could imagine how lower courts might have characterized *Egan* as enshrining a rebuttable presumption against judicial review. Nevertheless, most courts today understand

17. *Id.* at 521.

18. *Id.*

19. *Id.* at 530-33; see 5 U.S.C §§ 7513(d), 7532 (2018).

20. See, e.g., *Dubuque v. Boeing Co.*, 917 F.3d 666, 667 (8th Cir. 2019); *Hale v. Johnson*, 845 F.3d 224, 230 (6th Cir. 2016); *Brackett v. Mayorakas*, No. 17-988, 2021 WL 5711936, at *4 (D.D.C. Dec. 2, 2021); *Young v. Perdue*, No. 19-2144, 2020 WL 3448011, at *2 (D.D.C. June 24, 2020).

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

22. *Id.* at 529.

23. *Id.*

24. *Id.* (quoting *Haig v. Agee*, 453 U.S. 280, 293-94 (1981)).

25. *Id.* (first citing *Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953); then citing *Burns v. Wilson*, 346 U.S. 137, 142, 144 (1953); then citing *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973); then citing *Schlesinger v. Councilman*, 420 U.S. 738, 757-58 (1975); and then citing *Chappell v. Wallace*, 462 U.S. 296 (1983)). While the government has occasionally tried to get courts to read *Egan* as a categorical ban on judicial review, these attempts have been unsuccessful. See, e.g., *Stillman v. Dep't of Def.*, 209 F. Supp. 2d 185, 208 (D.D.C. 2002) ("The government's attempt to read into *Egan*'s discussion of Article II a blanket ban on judicial review of challenges to access decisions places more weight on that discussion than it can bear. . . . *Egan* says nothing about what happens when an exercise of [the President's] discretion conflicts with another provision of the Constitution.").

Egan as establishing a categorical bar on judicial review of clearance decisions, with limited exceptions.²⁶ William N. Eskridge Jr. and Lauren E. Baer place *Egan*'s deference standard in the same category as that of *United States v. Curtis-Wright Export Corp.*²⁷ — the Court's "strongest form of deference."²⁸ Even among other cases in that category, Eskridge and Baer argue, *Egan* is unusual because the Court not only applied "super-strong" deference but actually "announce[d]" it.²⁹ In the decades since it was decided, *Egan* and its dicta have been highly influential. The decision has frequently led courts to decline to review claims of unlawful employment decisions in the national-security context on the merits, even though such a rule against review expands *Egan*'s holding far beyond the portion of the CSRA that concerns MSPB appeals.³⁰

B. Webster's (Supposed) Exception

Just four months after *Egan*, the Court indirectly opened the door, if only by a crack, to judicial review of clearance decisions. In *Webster v. Doe*, the Court — interpreting a different statute — modestly qualified *Egan*'s bar. The case concerned a CIA employee who sued the Agency for an allegedly unconstitutional firing.³¹ While Doe's work had been "consistently rated" as "excellent or outstanding," then-CIA director William Webster had determined that Doe's voluntary admission that he was gay made it "necessary and advisable in the interests of the United States to terminate [Doe's] employment . . . pursuant to" a statute that vested the CIA director with the discretion to "terminate the employment of any officer or employee of the Agency whenever [the director] shall deem such termination necessary or advisable in the interests of the United

26. See, e.g., *Zeinali v. Raytheon Co.*, 636 F.3d 544, 549–50 (9th Cir. 2011) ("[C]ourts may not review the merits of the executive's decision to grant or deny a security clearance."); *El-Ganayni v. Dep't of Energy*, 591 F.3d 176, 183 (3d Cir. 2010) ("[W]e cannot review the merits of the decision to revoke [the plaintiff's] security clearance."); *Makky v. Chertoff*, 541 F.3d 205, 212 (3d Cir. 2008) ("[T]here is no judicial review of the merits of a security clearance decision.").

27. 299 U.S. 304 (1936).

28. William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1100 (2007). Eskridge and Baer note that *Egan* shares this distinction with only eight other cases, and that in all nine, the government won. *Id.* at 1101.

29. *Id.* at 1101 & n.56.

30. See, e.g., *Campbell v. McCarthy*, 952 F.3d 193, 205 (4th Cir. 2020); *Wilson v. Dep't of the Navy*, 843 F.3d 931, 935 (Fed. Cir. 2016); *Kaplan v. Conyers*, 733 F.3d 1148, 1162 (Fed. Cir. 2013); *Ryan v. Reno*, 168 F.3d 520, 523–24 (D.C. Cir. 1999); *Brazil v. Dep't of the Navy*, 66 F.3d 193, 196–97 (9th Cir. 1995).

31. 486 U.S. 592, 593 (1988).

States.”³² Doe sued, alleging in part that the decision violated his due-process and equal-protection rights.

Chief Justice Rehnquist’s majority opinion emphasized that “where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear.”³³ Although the majority was silent on whether the statute at issue in *Egan* had clearly precluded judicial review (in fact, the *Webster* opinion never cited *Egan*), it was confident that the statute in *Webster* had not. The presumption underlying that clear-statement rule was not novel,³⁴ but the majority opinion broke new ground by rejecting the government’s contentions that courts would unduly impinge on the Executive if they reviewed constitutional claims in this context.³⁵

The Court reached its conclusion about judicial review of constitutional claims in a part of its opinion that left many questions unanswered. In justifying its interpretation of the statute at issue in *Webster* so as not to preclude “colorable constitutional claims,” the Court suggested that any statute that purported to do so would raise a “serious constitutional question.”³⁶ Although this part of the opinion suggests that *any* colorable constitutional claim ought to be reviewable, other parts of the opinion imply that the availability of review would depend on the “precise nature of [Doe’s] constitutional claim[]”; in particular, whether his firing was based on “his homosexuality” or “a more pervasive discrimination policy . . . regarding *all* homosexuals.”³⁷ The more limited view prevailed. The D.C. Circuit eventually denied Doe’s due-process claim after finding that the discretion granted to the Director by the statute and the CIA’s implementing regulations did not afford Doe a property interest in his continued employment.³⁸ The court went on to deny Doe’s equal-protection claim because his termination resulted “from an individualized determination that his own case represented a threat to the national security mission of the Agency” and “not from a blanket policy.”³⁹

32. *Id.* at 595; 50 U.S.C. § 403(c) (1988).

33. *Webster*, 486 U.S. at 603 (first citing *Johnson v. Robison*, 415 U.S. 361, 373-74 (1974); and then citing *Weinberger v. Salfi*, 422 U.S. 749 (1975)).

34. *See id.* (noting that “this heightened showing” is required “in part to avoid the ‘serious constitutional question’ that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim”) (quoting *Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 681 n.12 (1986)).

35. *Id.* at 604-605.

36. *Id.* at 603.

37. *Id.* at 602.

38. *Doe v. Gates*, 981 F.2d 1316, 1320-21 (D.C. Cir. 1993).

39. *Id.* at 1324.

Thus, against the backdrop of *Egan*, *Webster* has come to stand for the limited proposition that when Fifth Amendment procedural-due-process protections are implicated, courts may review the “bureaucratic workings of the process of revoking an individual’s security clearance” but not the substance of that decision.⁴⁰ Although *Webster* did not directly address *Egan*’s bar on judicial review of clearance decisions, its reasoning seems to allow a collateral attack on the standards used in the decision-making process, if not an individual result.

To be sure, *Egan* and *Webster* involved different subject matter—*Egan* dealt with a clearance decision while *Webster* concerned the CIA director’s discretion to dismiss personnel under a specific statutory provision. Perhaps even more importantly, the opinion in *Egan* leaned heavily on the President’s inherent Article II authority “to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch,” which, the Court asserted, “exists quite apart from any explicit constitutional grant.”⁴¹ Nevertheless, the two cases are in tension.⁴² Although the *Webster* majority did not mention *Egan*, each of the dissenting Justices cited the case in passages that emphasized the majority’s failure to give due weight to the Executive’s constitutional primacy in this domain.⁴³ On a practical level, employees whose jobs require access to classified information and whose security clearances are denied or revoked will lose their job or job offer.⁴⁴ So it is no surprise that, in the years since *Webster*, federal courts have struggled to reconcile *Egan*’s “super-strong” deference standard with *Webster*’s requirement to allow for at least some judicial review of national-security determinations in the employment context.⁴⁵

40. Moss, *supra* note 2. Although Moss is an expert in intelligence law, not all courts have provided for this kind of judicial review. See *infra* Part II.

41. *Dep’t of the Navy v. Egan*, 484 U.S. 518, 527 (1988).

42. The Supreme Court had an opportunity to clarify the relationship between the two cases in *Carlucci v. Doe*, 488 U.S. 93 (1988), but chose to rest that decision on statutory grounds. Since then, many jurists have struggled over the tension between the two decisions. See, e.g., *Hegab v. Long*, 716 F.3d 790, 798 (4th Cir. 2013) (Motz, J., concurring); *Stehney v. Perry*, 101 F.3d 925, 932 (3d Cir. 1996); *Dorfmont v. Brown*, 913 F.2d 1399, 1404-05 (9th Cir. 1990) (Kozinski, J., concurring).

43. *Webster v. Doe*, 486 U.S. 592, 606 (1988) (O’Connor, J., concurring in part and dissenting in part); *id.* at 609, 615 (Scalia, J., dissenting).

44. See, e.g., *Carlucci*, 488 U.S. at 98 (“Because [obtaining a security] clearance is a condition of NSA employment, the Director, pursuant to the authority delegated to him under the 1959 NSA Act, removed Doe.”); *Smith v. Schlesinger*, 513 F.2d 462, 465 (D.C. Cir. 1975) (engineer required clearance to begin employment with government contractor). The D.C. Circuit has held that *Egan* extends to judicial review of “employment actions based on denial of security clearance.” *Bennett v. Chertoff*, 425 F.3d 999, 1001 (D.C. Cir. 2005).

45. See Eskridge & Baer, *supra* note 28 at 1100-01, for a discussion of *Egan*’s “super-strong” deference standard.

These difficulties have cropped up across a range of claims, from Title VII to *Bivens*.⁴⁶ Although courts of appeals have almost universally sided with agencies in these disputes—often by reciting mantras of deference to the Executive in matters of national security—they have reconciled the tensions between the demands of *Egan* and *Webster* in a variety of ways.⁴⁷ Surveying this doctrinal disarray, Nadia A. Patel has decried courts’ use of *Egan* to deny relief for employees whose constitutional rights have been violated, arguing that Congress should amend the CSRA to abrogate *Egan* and explicitly provide for the MSPB to review clearance decisions on the merits.⁴⁸ David C. Mayer has advocated similar amendments to Title VII.⁴⁹ If, however, Congress were to provide for the broad-ranging review that Patel and Mayer advocate, it would raise many of the same concerns that informed the *Egan* decision. Given that no Supreme Court case has cast doubt upon the characterization of clearance decisions as part of the Executive’s core Article II functions, the constitutionality of such potential legislation is unclear. To date, proposals along these lines have not attracted support from the legislative or executive branches.

For its part, the D.C. Circuit has attempted to reconcile *Egan* and *Webster*. But these efforts have resulted in only two extremely limited exceptions to *Egan*’s otherwise categorical bar. First, in line with *Webster*, judicial review is available where a plaintiff alleges that the agency’s procedures or methods are constitutionally defective. In *National Federation of Federal Employees v. Greenberg*, the Circuit held that at least some constitutional claims challenging “the methods used to gather information on which [a clearance decision] presumably will be based” were exempt from *Egan*’s bar.⁵⁰ Judge Randolph’s opinion distinguished *Egan* as concerning “a particular employee’s security clearance,” whereas the *Greenberg* exception allowed review only of “the constitutionality of the methods used” for clearance decisions.⁵¹ Second, the Circuit has permitted judicial review of

46. See generally Frank Russo, Comment, *Clearing the Air: Does Choosing Agency Deference in Security Clearance Rulings Dilute Constitutional Challenges?*, 67 CATH. U. L. REV. 189 (2018) (discussing constitutional claims); Demetri Blaisdell, *Title VII Challenges to Security Clearance Referrals: Rattigan Points the Way*, 4 COLUM. J. RACE & L. 177 (2014) (discussing Title VII claims).

47. For example, the Tenth Circuit treats *Egan* as a ban on any review on the merits of an adjudication, the Ninth Circuit reads *Webster* as allowing such challenges, and the Fourth Circuit allows for the possibility of review only in cases where a decision violates a person’s constitutional rights. See Nadia A. Patel, *You’re Fired! Egan and MSPB Review of Security Clearance Decisions*, 21 FED. CIR. B.J. 93, 112 (2011). Patel does not include the D.C. Circuit in her analysis, presumably because it does not yet appear to have established a comparable standard.

48. *Id.* at 94.

49. See David C. Mayer, *Reviewing National Security Clearance Decisions: The Clash Between Title VII and Bivens Claims*, 85 CORNELL L. REV. 786, 812 (2000).

50. 983 F.2d 286, 290 (D.C. Cir. 1993).

51. *Id.*

decisions pertaining to a particular employee's clearance where that employee alleged in a Title VII claim that the informational *inputs* to the clearance process were constitutionally deficient.⁵² Writing for a majority of the divided panel in *Rattigan v. Holder*, Judge Tatel limited the court's review to determining whether the inputs were "knowingly false."⁵³ In his dissent, then-Judge Kavanaugh argued that *Egan* should have entirely foreclosed the inquiry.⁵⁴

Although the tension between *Egan* and *Webster* persists, the next Part describes recent judicial openness to applying *Webster*'s logic in contexts where *Egan* would seem to apply with full force.

II. IS THERE A "MERITORIOUS CONSTITUTIONAL CLAIM" EXCEPTION TO *EGAN*?

Despite the tensions between them, both *Webster* and *Egan* remain good law.⁵⁵ Nevertheless, no court of appeals has invoked the *Webster* exception to allow a constitutional challenge to an individual clearance decision to proceed. However, two recent D.C. Circuit decisions and concurrences suggest that the lack of any appellate ruling in that vein may have more to do with the underlying merits of past cases rather than an unyielding disposition toward a strict application of *Egan*.⁵⁶ And a recent D.C. District Court opinion suggests that if a plaintiff were to bring a substantial claim that a clearance decision violated their constitutional rights, a court may rule in their favor, or at least provide additional clarity on the issue.⁵⁷ Viewed as an emerging body of law, these cases explain why allowing for limited judicial review of the merits of clearance decisions is consistent with the constitutional separation of powers. These cases also confirm that courts can recognize situations in which they may exercise their competence to hear and adjudicate constitutional claims without unduly encroaching on executive-branch prerogatives.

52. *Rattigan v. Holder*, 689 F.3d 764, 770-71 (D.C. Cir. 2012).

53. *Id.* at 770.

54. *Id.* at 773-74 (Kavanaugh, J., dissenting).

55. For cases recognizing both *Egan* and *Webster* as good law, see, for example, *Hegab v. Long*, 716 F.3d 790, 793-95 (4th Cir. 2013); *Vahora v. Holder*, 626 F.3d 907, 916 (7th Cir. 2010); and *El-Ganayni v. Dep't of Energy*, 591 F.3d 176, 180-83 (3d Cir. 2010).

56. See *Palmieri v. United States*, 896 F.3d 579, 584-85 (D.C. Cir. 2018) (emphasizing that the petitioner's claims were "frivolous"); *id.* at 590 (Katsas, J., concurring) (same); *Gill v. Dep't of Just.*, 875 F.3d 677, 681 (D.C. Cir. 2017) (declining to reach the petitioner's constitutional claims because "even if [his] claims are not barred by *Egan*, they fail for other reasons"); *Gill*, 875 F.3d at 682 (Tatel, J., concurring) (arguing that, "were [the petitioner's] equal protection claims viable," they would not be barred by *Egan*).

57. *Garcia v. Pompeo*, No. 18-CV-01822, 2020 WL 134865 (D.D.C. Jan. 13, 2020).

A. *Gill v. Department of Justice and Palmieri v. United States*

The D.C. Circuit's recent opinions in *Gill v. Department of Justice* and *Palmieri v. United States* illustrate how the Circuit has exposed cracks in *Egan's* wall.

Gill involved a suit by a “decorated veteran and Pakistani immigrant” who lost his job as a special agent at the Federal Bureau of Investigation after the Bureau revoked his security clearance following his unauthorized searches of a government database.⁵⁸ Among several other statutory and constitutional claims, Gill alleged that the government “denied him equal protection . . . by treating him, a Muslim, differently from non-Muslims guilty of similar misconduct.”⁵⁹ While the court remarked that the issue of whether *Egan* bars judicial review of clearance decisions for claims based on constitutional violations was “interesting,” it declined to address the issue, stating that Gill’s equal-protection claims failed on their merits.⁶⁰

Judge Tatel wrote separately to explain his view that Gill’s claims, if viable, would not be barred by *Egan*. Citing *Webster’s* distinction between statutory and constitutional claims and other circuits’ decisions recognizing “limitations on *Egan’s* reach,” Judge Tatel reasoned that because an equal-protection challenge to an allegedly unconstitutional “policy or practice” did not require courts to review the Executive’s discretionary judgments about an employee’s trustworthiness—the concern that lay at the core of *Egan’s* reasoning—such constitutional challenges should be exempt from *Egan’s* bar.⁶¹ Although Judge Tatel stopped short of suggesting that courts should review constitutional challenges to the merits of a clearance decision that were unrelated to a policy or practice, his argument plausibly extends that far. After all, both the decision to establish a general policy or practice and to make an individualized determination are exercises of executive discretion. Further, none of the cases upon which Tatel grounded his analysis distinguish between individual, isolated instances and questions of policy or practice.⁶²

58. *Gill*, 875 F.3d at 679.

59. *Id.* at 680.

60. *Id.* at 682.

61. *Id.* at 684-85 (Tatel, J., concurring).

62. *Id.* at 683-84 (first citing *El-Ganayni v. Dep’t of Energy*, 591 F.3d 176, 183 (3d Cir. 2010); then citing *Oryszak v. Sullivan*, 576 F.3d 522, 525-26 (D.C. Cir. 2009); then citing *Ryan v. Reno*, 168 F.3d 520, 524 (D.C. Cir. 1999); then citing *Stehney v. Perry*, 101 F.3d 925, 932 (3d Cir. 1996); then citing *Nat’l Fed. of Fed. Emps. v. Greenberg*, 983 F.2d 286, 289-90 (D.C. Cir. 1993); then citing *Jamil v. Dep’t of Def.*, 910 F.2d 1203, 1209 (4th Cir. 1990); and then citing *Dubbs v. CIA*, 866 F.2d 1114, 1120 (9th Cir. 1989)).

Palmieri v. United States focused more squarely on the context of an individual clearance decision.⁶³ In *Palmieri*, the D.C. Circuit reviewed a suit by a former government contractor regarding the Department of Defense's (DoD) suspension of his security clearance.⁶⁴ In addition to his statutory claims, Palmieri raised numerous constitutional challenges to the DoD's decision, all of which the court dismissed as barred by *Egan*; these determinations were facilitated by Palmieri's decision to proceed pro se and his failure to create a robust record.⁶⁵ In its ruling, the Circuit noted the narrow, procedural exception to *Egan* that it first recognized in *Greenberg*.⁶⁶ But since Palmieri's claims went to the merits of his security-clearance adjudication and not the methods used in the clearance investigation, the court ruled that his claims were not covered by *Greenberg*. As in *Gill*, Judge Henderson's opinion for the panel avoided the question whether *Egan* would bar a similar but more substantiated claim, instead dismissing Palmieri's claims as "wholly frivolous."⁶⁷

Addressing *Egan* in his concurrence, Judge Katsas took a different view. He noted that the D.C. Circuit had yet to decide the "weighty and difficult" question of whether *Egan* bars nonfrivolous challenges to clearance decisions.⁶⁸ Acknowledging "the ongoing tension in the relevant precedents," Katsas observed the government's warning that "individuals denied clearances are increasingly invoking cases like *Webster v. Doe* and *Greenberg* to chip away at *Egan*."⁶⁹ Ultimately, Judge Katsas concluded that the majority's decision to reserve the question for a later case was the right approach, "given the *pro se* representation and the sprawling, unfocused nature of the complaint."⁷⁰

While Gill's and Palmieri's claims fell short on their merits, Judge Tatel's and Judge Katsas's concurring opinions can be read as invitations for a better-resourced plaintiff to mount a more credible constitutional challenge to an unfavorable clearance decision.

63. 896 F.3d 579, 583 (D.C. Cir. 2018).

64. *Id.*

65. *Id.* at 585. The court noted that "the 30-count complaint invokes (*inter alia*) the Bill of Attainder Clause; the Treason Clause; the Due Process Clause; [and] the First, Fourth, Ninth and Tenth Amendments." *Id.* at 584 (citations omitted).

66. *Id.* at 585.

67. *Id.* (quoting *Greenberg*, 983 F.2d at 290).

68. *Id.* at 590 (Katsas, J., concurring).

69. *Id.*

70. *Id.* at 591. On appeal, Palmieri received "able" assistance from a court-appointed amicus curiae. *Id.* at 582 & n.2.

B. *Garcia v. Blinken*

Garcia v. Blinken,⁷¹ a case pending before the federal district court in D.C., illustrates what can happen when a plaintiff accepts that invitation. Because the case appears to be on the cusp of settlement, it is unlikely to become the subject of an appeal in the D.C. Circuit.⁷² But the government’s very willingness to settle indicates the parties’ understanding that the courts might recognize a meritorious-constitutional-claim exception to the *Egan* bar. In the same vein as Judge Tatel and Judge Katsas, Judge Mehta’s opinion in *Garcia* demonstrates how, in an appropriate case, the D.C. Circuit may clarify the scope of merits review of individual clearance decisions when a plaintiff alleges underlying constitutional violations.

The facts of the case present a novel test for *Egan*. Gustavo Garcia, an attorney and U.S.-Mexico dual citizen, applied for a job at the U.S. Embassy in Mexico City and received a conditional offer of employment, which was revoked when he was denied a security clearance.⁷³ From responses to Garcia’s Freedom of Information Act (FOIA) and Privacy Act requests to the Embassy Regional Security Office, which conducted his background check, he learned that the Office

had collected and maintained a significant amount of information about [his] First Amendment-protected activities, including his involvement in protests against U.S. immigration policy, his participation in community groups, his publication of a book about the visa process, and his seminars about the visa process, and that it had denied him a security certification based on these activities.⁷⁴

Garcia sued under a variety of legal theories, bringing seven counts alleging Administrative Procedure Act, Title VII, Privacy Act, and constitutional violations.⁷⁵ In Count V of his complaint, Garcia alleged that “when the State Department denied [him] a security certification based on his First Amendment protected activities, it violated his rights under the Constitution.”⁷⁶

71. No. 18-CV-01822 (D.D.C.).

72. See Joint Status Report at 1, *Garcia v. Blinken*, No. 18-CV-01822 (D.D.C. July 18, 2022), ECF No. 71 [<https://perma.cc/ZR3N-KMEJ>].

73. *Garcia v. Pompeo*, No. 18-CV-01822, 2020 WL 134865, at *1 (D.D.C. Jan. 13, 2020).

74. *Id.* (internal quotations omitted).

75. *Id.* at *2, *11.

76. *Id.* at *7 (internal quotations omitted).

In January 2020, Judge Mehta issued a memorandum opinion on the government’s motion for summary judgment.⁷⁷ Analyzing Garcia’s First Amendment claim, Judge Mehta cited a series of cases in which the D.C. Circuit asserted that *Egan* “does not apply to actions alleging deprivation of constitutional rights.”⁷⁸ He distinguished the facts of *Palmieri* by noting that “*Egan* does not stand in the way of a well-pleaded constitutional claim that, as here, would appear to have record support.”⁷⁹ After examining Garcia’s proffered evidence against the requirements of a First Amendment retaliation claim, Judge Mehta concluded that Garcia supplied “ample evidence to create a genuine dispute of material fact” and denied the government’s motion for summary judgment.⁸⁰

If Garcia or a similarly situated plaintiff were to prevail on his First Amendment claim in the D.C. Circuit, the case could change the trajectory of the *Egan* doctrine.⁸¹ Such a case could raise the full set of issues that *Egan* and *Webster* dealt with over three decades ago. Since the 1980s, the context surrounding those issues has changed dramatically. The affected workforce is growing larger by the year. According to ODNI’s most recent publicly available statistics, over 4.24 million people currently hold security-clearance eligibility, and 964,138 clearances were granted in FY 2019 alone.⁸² By comparison, only 594,864;

77. *Id.*

78. *Id.* (quoting *Ryan v. Reno*, 168 F.3d 520, 524 (D.C. Cir. 1999)) (internal quotations omitted).

79. *Id.*

80. *Id.* at *8.

81. Admittedly, a First Amendment retaliation claim is a particularly fraught context for the D.C. Circuit to recognize a constitutional exception to *Egan*. As several circuits have recognized or implied, refuting the plaintiff’s *prima facie* First Amendment retaliation claim would require the government to offer evidence that it would have taken the same action in the absence of the plaintiff’s protected speech, colliding with the core concerns of *Egan*. See *El-Ganayni v. Dep’t of Energy*, 591 F.3d 176, 185 (3d Cir. 2010) (discussing this concern in detail); see also *Beattie v. Boeing Co.*, 43 F.3d 559, 566 (10th Cir. 1994) (surfacing the issue but not discussing it); *High Tech Gays v. Def. Indus. Sec. Clearance Off.*, 895 F.2d 563, 578 (9th Cir. 1990) (same). Interestingly, Judge Mehta did not discuss these concerns in his ruling on the summary judgment motion in *Garcia*.

The First Amendment context raises a separate and complex set of policy questions. For instance, should courts be allowed to compel the government to grant a security clearance to someone who—without advocating illegal activity—has repeatedly expressed the view that China should be supported in its struggle against U.S. hegemony? What about someone who has publicly lauded a notorious terrorist? Addressing these questions is far beyond the scope of this Essay. Suffice it to say that many national-security professionals would balk at the prospect of courts deciding these questions.

82. NAT’L COUNTERINTELLIGENCE & SEC. CTR., FISCAL YEAR 2019 ANNUAL REPORT ON SECURITY CLEARANCE DETERMINATIONS 8 (2020), <https://fas.org/sgp/othergov/intel/clear-2019.pdf> [<https://perma.cc/9H7L-7CHS>].

597,423; and 668,546 clearances were granted in FYs 2016, 2017, and 2018, respectively.⁸³

To be sure, Garcia is an unusual plaintiff. Through diligent use of FOIA and the Privacy Act, he obtained what appears to be strong evidence of a constitutional violation without discovery, enough to allow his case to survive motions to dismiss and summary judgment. Garcia’s multiple FOIA and Privacy Act requests doubtless required significant time and resources that other plaintiffs might not have. And in the broader context of litigation over clearance decisions, Judge Mehta’s ruling is unusual. Across all federal district-court decisions since *Egan*, there appears to be only one other case outside the *Rattigan* context⁸⁴ in which a district court allowed a plaintiff’s constitutional challenge to an individual security-clearance decision to survive summary judgment.⁸⁵ Since the State Department has argued that its interest in protecting national security outweighs Garcia’s First Amendment interests, it is possible that the government would ultimately prevail on the merits if the case were to be appealed.⁸⁶ Alternatively—as now seems overwhelmingly likely—the parties may settle, if the government wishes to avoid further proceedings complicated by legitimate national security concerns.⁸⁷

That said, Judge Mehta’s opinion seems to point in Garcia’s favor. It expresses skepticism that the balance would tip in the government’s favor, noting that the government’s allegation that Garcia’s activities posed actual security concerns “is, at most, vague and is heavily reliant on hearsay.”⁸⁸ While the case’s ultimate outcome is uncertain, *Garcia* at least shows that the crack that *Webster*

83. *Id.*; NAT’L COUNTERINTELLIGENCE & SEC. CTR., FISCAL YEAR 2017 ANNUAL REPORT ON SECURITY CLEARANCE DETERMINATIONS 5 (2018), <https://sgp.fas.org/othergov/intel/clear-2017.pdf> [<https://perma.cc/U3VJ-DZYZ>].

84. Under *Rattigan v. Holder*, courts review constitutionally defective inputs to the clearance process to ascertain whether the inputs were “knowingly false.” 689 F.3d 764, 770-71 (D.C. Cir. 2012); see *supra* notes 52-54 and accompanying text.

85. See *Buttino v. FBI*, 801 F. Supp. 298, 302 (N.D. Cal. 1992); see also *Chien v. Sullivan*, 313 F. Supp. 3d 1, 14 (D.D.C. 2018) (presenting a *Rattigan* challenge); *Njang v. Whitestone Grp., Inc.*, 187 F. Supp. 3d 172, 181 (D.D.C. 2016) (same).

86. Memorandum of Points and Authorities in Support of Defendants’ Motion to Dismiss and for Summary Judgment at 22, *Garcia v. Blinken*, No. 18-CV-01822, (D.D.C. Apr. 19, 2019), ECF No. 15-1 [<https://perma.cc/GSW4-QPEJ>] (arguing that even if the activities that formed the basis for the government’s decision to deny Garcia’s security clearance were protected by the First Amendment, “the government appropriately balanced Garcia’s speech interests with the government’s interests in maintaining a secure embassy and hiring suitable federal employees who do not undermine United States immigration law”).

87. *Garcia*, 2020 WL 134865, at *8; Joint Status Report, *supra* note 72, at 1. As of time of publication, a stipulation of dismissal has not been filed, and the parties’ next joint status report is due on September 19, 2022. See Docket, *Garcia*, No. 18-CV-01822 (D.D.C.).

88. *Garcia*, 2020 WL 134865, at *8.

exposed in *Egan* continues to expand and that the prospect of judicial review of clearance decisions remains very much alive.

III. RECALIBRATING EGAN

The problem of unreviewable clearance decisions is bigger than John Brennan, President Trump, and Gustavo Garcia. As of 2019, a staggering 2.5% of the entire civilian labor force—well over 4 million people—have been adjudicated eligible to hold a clearance, of which over 2.94 million had access to classified information.⁸⁹ Since the 9/11 attacks, security clearances became *de rigueur* for all sorts of federal employees and contractors.⁹⁰ Even some food-service jobs in federal agencies require top-secret clearances.⁹¹ As the number of positions requiring a clearance has swelled, so have the number of denials, suspensions, and revocations, of which only a very small number are contested in court.⁹² As a larger and more diverse part of the nation's workforce depends on security clearances for their jobs, the law should adapt accordingly.

89. NAT'L COUNTERINTELLIGENCE & SEC. CTR., *supra* note 82, at 8; U.S. BUREAU OF LABOR STATISTICS, EMPLOYMENT STATUS OF THE CIVILIAN NONINSTITUTIONAL POPULATION, 1951 TO DATE (2021), <https://www.bls.gov/cps/cpsaato1.htm> [<https://perma.cc/V9WC-XWKM>].

90. *Security Clearance Reform—Upgrading the Gateway to the National Security Community*, H.R. Rep. No. 110-916, at 5 (2008) (“The number of positions requiring security clearances throughout the federal government and the contracting community . . . appears to have grown substantially in the years since the attacks of September 11, 2001.”).

91. Emily Wax-Thibodeaux, *For Kitchen Staff at Federal Agencies, Background Checks Are a Must-Order Item*, WASH. POST (Aug. 9, 2014), https://www.washingtonpost.com/politics/for-kitchen-staff-at-federal-agencies-background-checks-are-a-must-order-item/2014/08/09/fefaife6-1c08-11e4-ae54-0cfe1f974f8a_story.html [<https://perma.cc/MB42-79B4>].

92. NAT'L COUNTERINTELLIGENCE & SEC. CTR., *supra* note 83, at 8. The Office of the Director of National Intelligence's year-over-year statistics do not break down denials and revocations by agency, making more granular analysis difficult. Applying the average revocation rate across agencies (0.56%) to the total number of top-secret security clearances (1.3 million in FY 2017), revocations alone are conservatively estimated at approximately 7,300. To give a rough comparison, in 2017, federal district courts issued only nine opinions involving federal clearance revocation decisions, only one of which was published. See *Perez v. New Breed Logistics, Inc.*, No. 16-CV-127, 2017 WL 40289, at *1 (S.D. Tex. Jan. 4, 2017); *Lambert v. Kelley*, No. 15-CV-00147, 2017 WL 238435, at *1 (E.D. Tenn. Jan. 19, 2017), *aff'd sub nom. Lambert v. Sessions*, No. 17-5324, 2017 WL 8217699 (6th Cir. Oct. 4, 2017); *Brown v. Mattis*, No. 15-CV-26, 2017 WL 664240, at *5 (E.D. Cal. Feb. 16, 2017), *adopted*, 2017 WL 1192915 (E.D. Cal. Mar. 30, 2017); *Kuklinski v. Mnuchin*, No. 14-CV-00843, 2017 WL 1193066, at *4 (W.D. Ky. Mar. 30, 2017); *Kuklinski v. Lew*, No. 14-CV-00843, 2017 WL 1364604, at *4 (W.D. Ky. Apr. 13, 2017); *Tahir v. Sessions*, No. 16-CV-781, 2017 WL 1735158, at *2 (E.D.N.C. May 2, 2017), *aff'd*, 703 F. App'x 211 (4th Cir. 2017); *Bilski v. McCarthy*, No. 16-CV-322, 2017 WL 3484686, at *9 (E.D. Ky. Aug. 14, 2017); *Webster v. Dep't of Energy*, 267 F. Supp. 3d 246, 262 (D.D.C. 2017); *Adams v. Dep't of Def.*, No. 16-CV-1468, 2017 WL 6699484, at *1 (E.D. Va. Sept. 29, 2017).

Viewed as parts of this evolving context, *Gill*, *Palmieri*, and *Garcia* provide a strong argument for a meaningful but cautious approach to judicial review of the substantive aspects of clearance decisions. When it announced a seemingly categorical bar against such review in *Egan*, the Court was primarily concerned with the impact of judicial review in this context on the separation of powers, especially given the judiciary's limited expertise in sensitive matters of national security. These concerns seem far less salient where the legal questions to be decided concern alleged violations of constitutional rights and where allowing a lawsuit to proceed would *not* require a court to compel the government to reveal sensitive national-security information within the Executive's domain. Allowing these claims would give plaintiffs an important opportunity to vindicate their constitutional rights and might indirectly improve the government's ability to recruit and retain a more diverse and competitive national-security workforce.

Some may worry that the government will be subject to extensive, costly litigation if courts throw open their doors for judicial review of security-clearance decisions. While such concerns are legitimate, this Essay argues that judicial review of the merits of a clearance decision would be appropriate only where a plaintiff could independently substantiate a claim that her constitutional rights were violated when her security clearance was denied, suspended, or revoked. Such claims could proceed, as in *Garcia*, only where a plaintiff has independently substantiated a plausible claim for relief without seeking potentially intrusive discovery from the government. The kind of judicial review at issue in a case like *Garcia* does not unduly subject the government to litigation. Admittedly, even this slight relaxation of the *Egan* bar would allow more claims to survive a motion to dismiss, forcing the government to dedicate more resources to litigating them. But it seems unlikely that these constitutional challenges would harm national security because the government has an array of tools to prevent disclosure in litigation of sensitive national-security information.⁹³ These range from the common-law state-secrets privilege⁹⁴ and the provision of security clearances to qualified counsel⁹⁵ to the use of statutes like the Classified Information Procedures Act.⁹⁶ And, of course, among the most powerful tools for preventing the

93. See Faaris Akreimi, *Does Justice "Need to Know"?: Judging Classified State Secrets in the Face of Executive Obstruction*, 70 STAN. L. REV. 973, 988-997 (2018) (extensively cataloging and describing these judicial tools).

94. See, e.g., *United States v. Reynolds*, 345 U.S. 1 (1953).

95. See, e.g., *In re Nat'l Sec. Agency Telecomms. Records Litig.*, 595 F. Supp. 2d 1077, 1089 (N.D. Cal. 2009); *Al-Haramain Islamic Found. v. Bush*, 451 F. Supp. 2d 1215 (D. Or. 2006), *rev'd on other grounds*, 507 F.3d 1190 (9th Cir. 2007).

96. 18 U.S.C. app. §§ 1-16.

disclosure of sensitive information in litigation is the government's power to settle claims.⁹⁷

Others may worry that courts will put national security at risk by scrutinizing security-clearance decisions. Like the limited collateral exception implied by *Webster* and the procedural exception recognized in *Greenberg*, though, this new, limited exception for presubstantiated constitutional challenges to security-clearance decisions would not harm national security. Plaintiffs would still have to clear a high bar due to the requirement of independent substantiation. But the new regime would be less harsh than the orthodox interpretation of *Egan* while staying consistent with the Court's reasoning in both *Egan* and *Webster*. It would remedy the most egregious consequence of *Egan*: that, so long as the violations occur in the context of a clearance decision, courts cannot remedy even the most flagrant and obvious violations of constitutional rights. Under the new regime, where the government allows the security-clearance process to violate a person's constitutional rights, it will have to defend its actions in court.

This new exception would bring significant benefits with limited costs. Importantly, the benefits would accrue not only to plaintiffs seeking to vindicate their constitutional rights but also to the government itself. National-security agencies have come under increasing scrutiny for actions involving invidious discrimination and chilling effects on the exercise of constitutional rights.⁹⁸ At the same time, civil-rights groups have called on the government to "examine systemic racial bias . . . in all federal agencies, particularly those with jobs requiring security clearances."⁹⁹ Given the well-recognized importance of recruiting and retaining a multitalented set of national-security professionals in government,¹⁰⁰

97. As *Garcia* demonstrates, the government sometimes settles cases in this area rather than to allow them to proceed to discovery. See, e.g., *Horn v. Huddle*, 636 F. Supp. 2d 10, *subsequent determination*, 647 F. Supp. 2d 55 (D.D.C. 2009), *vacated*, 699 F. Supp. 2d 236 (D.D.C. 2010) (ordering expedited security clearances to be granted to eligible plaintiff's counsel to allow them to review classified material; the case subsequently settled).

98. See, e.g., Mary Louise Kelly, *The Fine Line Between Countering Security Threats and Racial Profiling*, NPR (Aug. 16, 2016, 5:05 AM ET), <https://www.npr.org/sections/parallels/2016/08/16/490174040/the-fine-line-between-countering-security-threats-and-racial-profiling> [<https://perma.cc/3ULX-NS8F>]; Lindy Kyser, *Your Security Clearance and Protests: What You Need to Know*, GOV'T EXEC. (June 15, 2020), <https://www.govexec.com/management/2020/06/your-security-clearance-and-protests-what-you-need-know/166155> [<https://perma.cc/94ES-8KLLK>].

99. *Asian Americans Advancing Justice Demands Racial Bias Investigation*, ASIAN AMS. ADVANCING JUST., <https://www.advancingjustice-chicago.org/asian-americans-advancing-justice-demands-racial-bias-investigation> [<https://perma.cc/AHA3-7AJN>].

100. See, e.g., Lonnie Garris III, *Diversity & Inclusion: A National Security Imperative*, YALE SCH. OF MGMT. (Apr. 16, 2021), <https://som.yale.edu/blog/diversity-inclusion-national-security-imperative-o> [<https://perma.cc/JLY5-GXS9>]; Trevor Sutton & Carolyn Kenney, *Diversifying and Strengthening Our National Security Workforce*, CTR. AM. PROGRESS (Jan. 10, 2017),

recognizing and compensating plaintiffs who make substantive claims of unlawful discrimination and other violations of constitutional rights is a necessary step in moving towards a stronger national-security workforce that reflects the full capacities of our diverse nation.

Finally, even if agencies do not affirmatively seek to recruit candidates with diverse backgrounds and viewpoints, that outcome may be the natural result of shifting demographic trends as millennials replace baby boomers in the workforce.¹⁰¹ The national-security workforce of tomorrow is more diverse, enjoys more opportunities for foreign contact, and has new proclivities for drug use and online behavior that will require the security-clearance adjudication process to adapt.¹⁰² As these changes unfold, they provide strong reasons for the courts to stand ready to protect the constitutional rights and liberties of a new generation of national-security workers.

CONCLUSION

Even before John Brennan's very public conflict with President Trump, the D.C. Circuit in *Gill* and *Palmieri* recognized the importance of resolving the conflict between *Egan* and *Webster*. Beneath the legal reasoning of these cases lies a rejection of the idea that millions of Americans who depend on security clearances could lose them because of the color of their skin, the religion they practice, or their political preferences. Faced with a Congress that seems focused on other priorities, the courts represent the best prospect for a resolution. *Gill*, *Palmieri*, and *Garcia* indicate that they are ready, should an appropriate case arise.

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<https://www.americanprogress.org/article/diversifying-and-strengthening-our-national-security-workforce> [https://perma.cc/PMX7-NPXX].

101. *Millennials Outnumber Baby Boomers and Are Far More Diverse*, U.S. CENSUS BUREAU (June 25, 2015, 10:11 AM), <https://2014-2017.commerce.gov/news/blog/2015/06/millennials-outnumber-baby-boomers-and-are-far-more-diverse-census-bureau-reports.html> [https://perma.cc/9DQA-FZDR].
102. See generally Marek N. Posard, Emily Ellinger, Jamie Ryan & Richard S. Girven, *Updating Personnel Vetting and Security Clearance Guidelines for Future Generations*, RAND CORP. (2021), https://www.rand.org/pubs/research_reports/RRA757-1.html [https://perma.cc/M4L5-YWNY] (discussing these and other ongoing generational changes in the national-security workforce).

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