FORMAL WRITTEN TESTIMONY OF MARK S. ZAID, ESQUIRE*

DELIVERED BEFORE THE
SUBCOMMITTEE ON NATIONAL SECURITY, EMERGING
THREATS, AND INTERNATIONAL RELATIONS
COMMITTEE ON GOVERNMENT REFORM,
U.S. HOUSE OF REPRESENTATIVES

National Security Whistleblowers in the post-9/11 Era:
Lost in a Labyrinth and Facing Subtle Retaliation

FEBRUARY 14, 2006

Good afternoon Mr. Chairman, Members of the Subcommittee, it is a pleasure to testify once again before this distinguished Subcommittee.

I cannot emphasize enough the importance of today's hearing. While I know that Members of this Subcommittee personally view this topic with great seriousness, it is long overdue that Congress exercises its full weight to create adequate protections for national security Whistleblowers as well as anyone who falls victim to a security clearance process that is rife with abuse. I applaud your interest and your efforts, but this hearing must be considered only the first step. The need for Whistleblowers, especially those from within the tight-lipped national security community, is now of even greater importance in the wake of 9/11, as well as due to the ever increasing tug of war between the need to protect national security at the potential expense of our valued civil liberties.

A security clearance has grown to become a valuable commodity, especially in and around Washington, D.C. It is no longer viewed as simply a requirement of certain federal employment. To hold a valid security clearance is to possess access, and access in this town can be equated with power. Additionally, it offers the capability to derive significant financial benefits at levels far in excess ever seen or possible during federal employment.

At the same time it can be used as a ticket to open doors, it can also be used to ruin lives, particularly against those within the Intelligence Community who have known nothing else during their careers but a covert environment. For one thing, loss of a security clearance automatically results in the termination of any federal employment that requires possession of clearance as a prerequisite. Moreover, for many in the Intelligence Community loss of a clearance effectively precludes them from finding any work in their chosen field. To them an active security clearance represents their life plain and simple. Thus, it is far more than "subtle" retaliation, though its use as a retaliatory tool can be analogously viewed as similar to simply pushing a small snow ball down a hill and watching it grow ever larger and larger. It does not take much to initiate the retaliation but the consequences arising from the loss of a security clearance are very serious.

Few individuals strive to, or even after the fact desire to, become a Whistleblower. Many times they become a Whistleblower because of frustrations encountered with their own

* Managing Partner, Krieger & Zaid, PLLC, 1920 N Street, N.W., Suite 300, Washington, D.C. 20006. Tel. No. 202-454-2809. E-mail: ZaidMS@aol.com.

agency in trying to find someone who would either listen or act on the expressed concerns.[1] Unfortunately, particularly given the laudable role most Whistleblowers have played in our history, to be designated a Whistleblower is to be typically viewed with scorn within the federal community and witness a destructive end to a career. Federal agencies, of course, encourage Whistleblowing and assure the individual, through written policies and high-ranking speeches, that they will be protected. Sadly, that is nothing more than rhetoric.[2]

In reality an individual's categorization or even perception as a Whistleblower is often equivalent to an invitation to the door. For those Whistleblowers who chose to remain employed with their federal agency, if that choice even presents itself, the repercussions and ostracization can be quite traumatizing. It envelops not only their professional life, but permeates their personal life as well. Retaliation against Whistleblowers is common and takes many forms, whether one holds a clearance or not. For those who do hold a clearance, one manifestation is the suspension, denial or revocation of that security clearance.

This hearing, however, represents just the tip of the iceberg. I have spent the majority of my legal career, now nearing 15 years, representing Whistleblowers of all types and defending security clearance cases across the federal spectrum. The alleged existing protections provided to any generic Whistleblower, whether statutory, regulatory or judicial, are so weak or limited that I rarely, if ever, even consider them as available or worthy of review. The cost incurred in seeking to pursue remedies, especially through litigation, is simply not worth the minuscule chance of success. Instead, remedies afforded through other statutory or regulatory provisions, such as the Privacy Act, the Federal Tort Claims Act, the Administrative Procedure Act or the Constitution, are often pursued as substitutes.

For those Whistleblowers employed or contracted to the Intelligence Community, the scope of remedies is even more limited. There is simply no genuine protection. Absent significant media attention (and often even that may only serve as a temporary reprieve from retaliation) or the adoption of the cause by a high-ranking Member of Congress, the chance for survival, or even maintaining the status quo, is often slim.

Additional statutory amendments are required and my esteemed colleagues on this Panel will no doubt address those issues directly as they pertain to Whistleblower protection. But in

[1] In the cases of national security Whistleblowers, in particular, individuals should generally first attempt to report concerns or problems through their relevant chain of command (if possible), and/or to their agency's internal or larger component's Office of Inspector General, any appropriate Office of Professional Responsibility or the Office of Special Counsel (if available). Outside of the Executive Branch individuals can also approach the relevant Congressional oversight committees and in certain situations individual Members of Congress (though Whistleblowers have to be particularly sensitive in determining that the Member or their staff holds the appropriate security clearance if classified information is at issue). Finally, usually as a last resort, the media or watchdog entities can be considered. In identifying non-governmental venues that are available to national security Whistleblowers to provide information, I am in no way condoning or recommending that any individual acts to commit the unauthorized and unlawful release of properly classified information.

[2] Interestingly, Executive Order 12958 encourages a mild form of Whistleblowing for "Authorized holders of information who, in good faith, believe that its classification status is improper." These individuals "are encouraged and expected to challenge the classification status of the information in accordance with agency procedures." Yet the Information Security Oversight Office, which handles such challenges, informed me that only one person, who I happened to represent during the proceedings, has ever sought to utilize this provision despite its existence for more than a decade. Given the ease by which this form of Whistleblowing could occur, even with some degree of anonymity, I would submit this is reflective of the unfriendly environment of and perception for national security Whistleblowers.

order to understand what needs to be done to shelter Whistleblowers from abuses surrounding their security clearance an examination of and modification to the security clearance system in general will be necessary. The two are not isolated in any way. Addressing the more general problem may serve to correct the specific concern.

More than 2 million people alone have security clearances that permit access to Secret information.[3] Clearances can permit access to a range of information from Confidential to Top Secret code-words so high that even the names of the compartments are themselves classified. Yet the number of those people who will ultimately become a Whistleblower is few. Indeed, the number will be statistically insignificant.

Yet any one of the millions of people who hold a clearance face the possibility that their security clearance, which is designed to act as a shield to protect the national security interests of the United States, will be used as a sword against them for malicious, frivolous, unjustifiable or inappropriate reasons. While the vast majority of those holding clearances will never find themselves having to defend their ability to maintain a clearance, those that do will often find themselves facing a hostile environment that offers little objective protections and can, at times, be rift with vindictiveness and retaliatory behavior. In fact, in recent years I have personally observed that many agencies have begun to use clearance decisions as a substitute for personnel actions that would otherwise afford the employee greater opportunity or ability to challenge and overcome.

Moreover, it is virtually impossible to prove that an adverse clearance decision was initiated based solely on a Whistleblower's activities. To be sure the initiation of proceedings, as well as the timing, can often be at least circumstantially tied to the Whistleblower's status, but the actual suspension or revocation will typically have, at least arguably, a justifiable independent basis. There are so many regulations that federal employees run afoul in the common course of their business, as well as the existence of generic catch-alls within the security framework, that it is not at all difficult to target someone's clearance and achieve the intended objective.

In fact, the various agency security offices will not care as to the manner or motive that led allegations to come to their attention as they are viewed as generally irrelevant. Despite the conventional thinking that many federal employees regularly try to argue, it is not an available defense in responding to a security allegation that the person who filed the allegation was retaliating against you or that the motivating factor was Whistleblowing activity. The only thing that matters is the accuracy of the allegation, not the source or the motive.

As I noted, I have been litigating cases involving national security claims (which has included my authorized access to classified information up to the TS/SCI level) for more than a decade, and I have handled several dozen security clearance cases before numerous federal agencies. I am also co-teaching a DC Bar Continuing Legal Education class on defending adverse security clearance decisions this Spring. Additionally, my firm has represented hundreds of federal employees and contractors within the Intelligence and Military Communities regarding matters that touch directly upon national security issues. The experience I bring before you today is crucial to understanding exactly how the security clearance environment operates for unlike our legal system precedent plays little to no role. Indeed, only two agencies – the Department of Defense and Department of Energy – even

[3] Report on the Commission of Protecting and Reducing Government Secrecy, S. Doc. 105-2, 103rd Cong. (1997).

publish decisions in security clearance cases that are available to the public, and these are at best incomplete in offering a portrait of the system.[4]

Thus, anecdotal experience is really the only true manner in which to obtain information about the process and the results. Of course, anecdotal experience has its own drawbacks because it is limited to specific cases and the experiences of those relaying their knowledge. Nevertheless, having studied this issue and conversed with colleagues who often routinely handle these types of cases, I can at least provide this Subcommittee with a realistic and likely accurate depiction of the current circumstances.

That being said, there are many shining examples of how some agencies, and the individuals who are employed therein, implement their security clearance programs, and my testimony today is in no way designed to ignore or minimize the excellent contributions many make to the system. However, it is necessary to present the darker side of the process that continues to increasingly spread throughout the system in order to bring about necessary change.

To be sure, I have little doubt that some agencies will complain that they lack either the manpower or financial resources, or perhaps both, to address some of the problems I have identified. For some agencies, or even all, this may be true. But that is no justification for the allowance of abuses to continue or the failure to ensure both substantive and procedural due process exists.

BRIEF LEGAL ANALYSIS SURROUNDING CHALLENGES TO ADVERSE DECISIONS

Following World War II, various presidents have issued a series of Executive Orders designed to protect sensitive information and to ensure its proper classification throughout the Executive Branch.[5] Those afforded the luxury of a security clearance are typically required to undergo a background investigation that varies according to the degree of adverse effect the applicant could potentially have on the national security, i.e., the higher the level of clearance that is to be granted the greater the potential threat to national security and the risks that must be assessed.[6]

It is now unquestionable that except in very, very limited circumstances, there does not exist any right to judicial review of any aspect of a substantive security clearance determination.[7] The U.S. Supreme Court made this perfectly clear in, and all that is needed to

---

[4] The Department of Defense issues its opinions at *http://www.defenselink.mil/dodgc/doha/industrial/* while the Department of Energy's decisions can be found at *http://www.oha.doe.gov/persec2.asp*.

[5] See e.g., Exec. Order No. 10290, 3 C.F.R. 789 (1949-1953 Comp.); Exec. Order No. 10501, 3 C.F.R. 979 (1949-1953 Comp.); Exec. Order No. 11652, 3 C.F.R. 678 (1971-1975 Comp.); Exec. Order No. 12065, 3 C.F.R. 190 (1979); Exec. Order No. 12356, § 4.1(a), 3 C.F.R. 174 (1983); Exec. Order No. 12968, 60 Fed.Reg. 19,825 (1995).

[6] See Exec. Order No. 10450, § 3, 3 C.F.R. 937 (1949-1953 Comp.).

[7] The primary exceptions are challenges to procedural due process violations (i.e., failure of an agency to afford certain administrative rights or abide by applicable regulations) or an allegation of a Constitutional violation (virtually impossible to prove). See e.g., Webster v. Doe, 486 U.S. 592 (1988); Service v. Dulles, 354 U.S. 363, 373 (1957); Stehney v. Perry, 101 F.3d 925 (3rd Cir. 1996); Hill v. Dep't. of Air Force, 844 F.2d 1407, 1412 (10th Cir. 1988).

be known is, the landmark case of Department of Navy v. Egan.[8] Since this decision time and time again federal courts have declined to address substantive clearance decisions.[9] Denial of relief is primarily based on the premise that the courts lack appropriate jurisdiction or knowledge to adjudicate or review the merits of any security clearance determination.

In Egan the Court ruled that "[i]t should be obvious that no one has a 'right' to a security clearance. The grant of a clearance requires an affirmative act of discretion on the part of the granting official. The general standard is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'"[10] The Court also noted that "a clearance does not equate with passing judgment upon an individual's character. Instead, it is only an attempt to predict his possible future behavior and to assess whether, under compulsion of circumstances or for other reasons, he might compromise sensitive information. It may be based, to be sure, upon past or present conduct, but it also may be based upon concerns completely unrelated to conduct, such as having close relatives residing in a country hostile to the United States." "The attempt to define not only the individual's future actions, but those of outside and unknown influences renders the 'grant or denial of security clearances . . . an inexact science at best.'"[11]

To those who believe their clearance determinations were inappropriately or even vindictively pursued, the Court condemned any realistic chance of judicial oversight when it opined that:

> Predictive judgment of this kind must be made by those with the necessary expertise in protecting classified information. For "reasons . . . too obvious to call for enlarged discussion," the protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it. Certainly, it is not reasonably possible for an outside nonexpert body to review the substance of such a judgment and to decide whether the agency should have been able to make the necessary affirmative prediction with confidence. Nor can such a body determine what constitutes an acceptable margin of error in assessing the potential risk. The Court accordingly has acknowledged that with respect to employees in sensitive positions "there is a reasonable basis for the view that an agency head who must bear the responsibility for the protection of classified information committed to his custody should have the final say in deciding whether to repose his trust in an employee who has access to such information." As noted above, this must be a judgment call. The Court also has recognized "the generally accepted view that foreign policy was the province and responsibility of the Executive." "As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities." *Thus, unless Congress specifically has provided otherwise*, courts traditionally

---

[8] 484 U.S. 518 (1988).

[9] The cases could be listed ad naseum. See generally Bennett v. Chertoff, 425 F.3d 999 (D.C.Cir. 2005); Ryan v. Reno, 168 F.3d 520 (D.C.Cir. 1999); Stehney, 101 F.3d at 932; Dorfmont v. Brown, 913 F.2d 1399 (9th Cir. 1990), cert. denied, 499 U.S. 905 (1991).

[10] Egan, 484 U.S. at 528.

[11] Id. at 528-529 (internal citations omitted).

> have been reluctant to intrude upon the authority of the Executive in military and national security affairs.[12]

Now is the time for Congress to meet the Judiciary's challenge head-on. In order for any legitimate oversight to exist in the realm of security clearances, whether it be to protect Whistleblowers specifically or anyone facing retaliation or unjustified punishment for whatever reason, Congress must take action.

GENERAL EXPLANATION OF SECURITY CLEARANCE APPEAL PROCESS

Executive Order 12968, issued by President Clinton in 1995, created the current framework for the granting, denial or revocation of security clearances. Section 5.2 sets forth the minimum requirements an agency must provide for denials or revocations of eligibility for access. Applicants and employees who are determined to not meet the standards for access to classified information established in Section 3.1 of the Order shall be:

> (1) provided as comprehensive and detailed a written explanation of the basis for that conclusion as the national security interests of the United States and other applicable law permit;
> (2) provided within 30 days, upon request and to the extent the documents would be provided if requested under the Freedom of Information Act (5 U.S.C. 552) or the Privacy Act (3 U.S.C. 552a), as applicable, any documents, records, and reports upon which a denial or revocation is based;
> (3) informed of their right to be represented by counsel or other representative at their own expense; to request any documents, records, and reports as described in section 5.2(a)(2) upon which a denial or revocation is based; and to request the entire investigative file, as permitted by the national security and other applicable law, which, if requested, shall be promptly provided prior to the time set for a written reply;
> (4) provided a reasonable opportunity to reply in writing to, and to request a review of, the determination;
> (5) provided written notice of and reasons for the results of the review, the identity of the deciding authority, and written notice of the right to appeal;
> (6) provided an opportunity to appeal in writing to a high level panel, appointed by the agency head, which shall be comprised of at least three members, two of whom shall be selected from outside the security field. Decisions of the panel shall be in writing, and final except as provided in subsection (b) of this section; and
> (7) provided an opportunity to appear personally and to present relevant documents, materials, and information at some point in the process before an adjudicative or other authority, other than the investigating entity, as determined by the agency head. A written summary or recording of such appearance shall be made part of the applicant's or employee's security record, unless such appearance occurs in the presence of the appeals panel described in subsection (a)(6) of this section.

[12] Id, at 530 (internal citations omitted, emphasis added).

Significant discretionary exceptions exist throughout the implementation of the above minimum standards as well as elsewhere within the relevant Sections. Within the Order itself, for example, subsection (c) while noting that agencies may "provide additional review proceedings beyond those required by subsection (a) of this section. This section does not require additional proceedings, however, and creates no procedural or substantive rights." Moreover, subsection (d) permits an agency to certify that if "a procedure set forth in this section cannot be made available in a particular case without damaging the national security interests of the United States by revealing classified information, the particular procedure shall not be made available. This certification shall be conclusive." Finally, not surprisingly, Section 7.2 (e) notes that "[t]his Executive order is intended only to improve the internal management of the executive branch and is not intended to, and does not, create any right to administrative or judicial review, or any other right or benefit or trust responsibility, substantive or procedural, enforceable by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person." Agency implementation of the Executive Order varies significantly throughout the federal government and inconsistencies exist even within the same agency.[13]

The current adjudicative guidelines have been, though issued in 1995, in effect throughout the Government since 1997 (but have been or are about to be superseded by new guidelines issued on December 29, 2005 that are more favorable to prospective clearance holders). The Guidelines pertain to all U.S. government civilian and military personnel, consultants, contractors, employees of contractors, licensees, certificate holders or grantees and their employees and other individuals who require access to classified information. "They apply to persons being considered for initial or continued eligibility for access to classified information, to include sensitive compartmented information (SCI) and special access programs (SAPs) and are to be used by government departments and agencies in all final clearance determinations."[14]

As the 1995 Guidelines make perfectly clear:

> the adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance. Eligibility for access to classified

---

[13] For example, since October 2000, hundreds of individuals have had their security clearance revoked due to the enactment of the Smith Amendment, 10 U.S.C. § 986. This Act prohibits the Department of Defense from granting or renewing a security clearance to anyone who was convicted of a crime and sentenced to more than a year in jail. It applies to those who are employees of the Department of Defense, a member of Armed Forces on active or inactive status, or an employee of a defense contractor. As my colleague Sheldon Cohen has noted, "the Smith Amendment has been handled differently not only among the military departments, but even within the Office of the Secretary of Defense, notably regarding the effect of a pardon. The Defense Office of Hearings and Appeals (DOHA) which handles contractor employee cases, has ruled that a pardon does *not* eliminate Smith Amendment consideration. On the other hand, the Washington Headquarters Services, Clearance Appeals Board which reviews clearances for government employees *does* consider that a state pardon removes the case from Smith Amendment sanction." See Cohen, Sheldon, "Smith Amendment Update" (May 2004) (emphasis original), available at *http://www.fas.org/sgp/eprint/smithamend2.pdf*. Frankly, the manner in which agencies established even the basic framework for the appeal process varies across the board. Some agencies grant personal appearances as the initial level of appeal, others permit written submissions. Some agencies hold appeal panels for the individual to appear before, but some offer panels where the identities of the deciding officials are not even known. Some agencies allow hearings with live witnesses before an administrative judge, whereas others only the petitioner can appear before a judge. The list of differences and variances goes on and on.

[14] *http://www.dss.mil/nf/adr/adjguid/adjguidF.htm*.

> information is predicated upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination. In evaluating the relevance of an individual's conduct, the adjudicator should consider the following factors:
>
> a. The nature, extent, and seriousness of the conduct;
> b. The circumstances surrounding the conduct, to include knowledgeable participation;
> c. The frequency and recency of the conduct;
> d. The individual's age and maturity at the time of the conduct;
> e. The voluntariness of participation;
> f. The presence or absence of rehabilitation and other pertinent behavioral changes;
> g. The motivation for the conduct;
> h. The potential for pressure, coercion, exploitation, or duress; and
> i. The likelihood of continuation or recurrence.
>
> Each case must be judged on its own merits, and final determination remains the responsibility of the specific department or agency. Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security. *The ultimate determination of whether the granting or continuing of eligibility for a security clearance is clearly consistent with the interests of national security must be an overall common sense determination based upon careful consideration of the following, each of which is to be evaluated in the context of the whole person.*[15]

Thirteen adjudicative categories exist that can be addressed individually or collectively where deemed appropriate to deny or revoke an individual's security clearance.[16] Each has a non-exhaustive list of disqualifying circumstances that can raise security concerns and conditions that conceivably can mitigate security concerns.

Obtaining a favorable resolution to a security clearance appeal is primarily based on demonstrating that mitigating circumstances exist rather than necessarily refuting the allegations against the individual. As an extreme example, it is possible that someone who committed murder can be granted a security clearance. As mitigation the individual could show that the incident occurred years earlier when he was a minor, and that he has acted as an exemplary citizen ever since. Or, more commonly, the case would be where an individual who was arrested for a DUI would need to demonstrate why that incident was the exception rather than the norm.

---

[15] Id. (emphasis added).

[16] They are Guideline A: Allegiance to the United States; Guideline B: Foreign influence; Guideline C: Foreign preference; Guideline D: Sexual behavior; Guideline E: Personal conduct; Guideline F: Financial considerations; Guideline G: Alcohol consumption; Guideline H: Drug involvement; Guideline I: Emotional, Mental, and Personality Disorders; Guideline J: Criminal conduct; Guideline K: Security violations; Guideline L: Outside activities; and Guideline M: Misuse of information technology systems.

Arriving at a security clearance determination, however, is not entirely based simply on past events. The adjudicator is being called upon to assess unpredictable future behavior. Virtually any act can serve as the basis to revoke or deny an individual a security clearance. The conduct in question could have taken place completely outside the context of work, years prior or include actions that have previously been favorably adjudicated.

EXAMPLES OF ABUSE AND PROBLEMS THAT DOMINATE THE FEDERAL SECURITY CLEARANCE SYSTEM THAT REQUIRE ATTENTION

As described above, other than being certain administrative rights, though limited they may be, no other venue exists to challenge a substantive adverse security clearance decision.

Some of the other problems that inherently exist across the board at the different agencies include:

- *Significant delays*. For most agencies the entire clearance appeal process routinely takes from one to two years to conclude. Sometimes even longer. Few agencies will resolve a clearance dispute in less than six months to one year. During that time the individual may be in an unpaid status as a federal employee or face loss of their employment as a federal contractor since their access has been suspended. The CIA process is so lengthy for contractors and applicants that it, quite candidly, appears deliberately designed to encourage individuals to simply withdraw their appeals.

- *Unpaid suspension during pendency of clearance processing.* Some agencies will suspend employees without pay while their clearance status is adjudicated.[17] Given that the process, even for employees, can take months to resolve, it does not require a stretch of the imagination to fathom the severity of the consequences that such action will impose upon an individual and his family. Suspensions are no-mans land and can often be worse than actually facing a clearance revocation or denial where at least administrative rights are afforded to the individual. Worse, though suspensions are realistically the equivalent of a scarlet letter that negatively taints an individual, it is not considered an adverse personnel action that in and of itself can be challenged. That allows it to be used in a retaliatory fashion to punish individuals including Whistleblowers. There is typically no time frame that an agency must abide by when addressing suspension actions. Ultimately the only true recourse is to seek judicial review under the Administrative Procedure Act not for the substantive suspension but to challenge the unreasonable delay in adjudicating the matter.

- *The employee/contractor must absorb all financial loses.* Except in an extremely limited circumstance in a DOHA proceeding, the loss of any wages, bonuses, and attorney's fees incurred by the individual are borne by that person even when the final resolution is favorable and their clearance is restored. That includes situations where the person was in

[17] Such agencies include the Departments of Air Force and Army. Suspension without pay is not a requirement or mandated by any regulation or force of law. It is nothing less than an intentional personnel choice that is made by the agency on a case by case basis. Some agencies, in fact, will provide unclassified paid work to its employee whose clearance is suspended. To its credit, the DIA will routinely suspend its employees in a paid status while their clearance process is underway. This management decision appears to recognize that it is not at all uncommon for the DIA process to take anywhere between 12-24 months before a final resolution is reached. In only one case in the 13 years I have represented DIA employees has DIA moved to suspend an employee without pay, and that was recently with respect to national security Whistleblower Anthony Shaffer.

unpaid status during the entire time. This prompts many to either forgo appeals and silently disappear or consider handling their case *pro se*.

- *No chance to confront accusers*. The closest that an individual is provided to confront the allegations against them is written documentation, usually in redacted form. Sometimes the individual is permitted to know the identity of the individual who has provided derogatory information against them, but only when the supplier of the information permits the disclosure of their identity pursuant to the Privacy Act. Only DOHA and DOE typically permit live witnesses to appear during administrative proceedings, and these witnesses are routinely only from the applicant's side. Rarely will an individual ever be permitted to challenge a live witness who has provided alleged derogatory information.

- *Access to underlying records is often limited.* Only the bare minimum of information is often provided to an individual facing denial or revocation of their security clearance. Many agencies hide behind the cloak of "classification" to withhold information from the individual, even when the individual themselves or their attorney possess the requisite clearance level. This, of course, significantly constrains the individual's ability to challenge the allegations levied against them. On some occasions an agency does utilize and rely upon information outside the permitted scope of the evidence which prevents any meaningful challenge.

- *Defense contractors are granted greater rights than contractors at other federal agencies or even federal employees.* Initial DOHA administrative proceedings, though subject to their own criticisms, offer some of the best and fairest possibilities towards reversing an adverse clearance decision. Witnesses are permitted on behalf of the individual, and rules of evidence, relaxed they might be, are in effect. An Administrative Judge hears all claims and renders a written decision. Department Counsels are invariably, with few exceptions, fair and professional in their handling of cases. There is simply no reason why this type of challenge cannot be permitted throughout the federal system. The Department of Energy offers a similar mechanism.

- *Delay of implementation of new Adjudicative Guidelines*. On December 29, 2005, National Security Advisor, Stephen Hadley, issued a new set of Adjudicative Guidelines which were approved by the President.[18] These Guidelines significantly modified the previous version mostly, if not entirely, in favor of the individual clearance holder or prospective holder. This is especially true with respect to Foreign Influence concerns (i.e., an individual having foreign relatives abroad or in the United States). Hadley's cover memorandum notes that the Guidelines are to be implemented immediately. This, however, has set off a rash of disputes throughout the federal government with agencies differently interpreting that instruction. The Justice Department, for example, takes the position that the Guidelines are effective upon issuance and should be applied immediately. Yet the Department of Defense, and its numerous entities, asserts the Guidelines must be subject to a notice (and perhaps comment) period that means, based on the implementation of the prior Guidelines, a delay of 12-18 months.

[18] A copy of the new Guidelines can be found at the website for the Information Security Oversight Office (ISOO) at *http://www.archives.gov/isoo/pdf/hadley-adjudicative-guidelines.pdf*. ISOO is a component of the National Archives and Records Administration (NARA) and receives its policy and program guidance from the National Security Council (NSC).

- *Refusal to transfer existing clearances*. This method of retaliation is subtle but quite effective. Section 2.4 of Executive Order 12968 requires that “eligibility determinations conducted under this order shall be mutually and reciprocally accepted by all agencies.” Based on my experiences the CIA, in particular, routinely utilizes this tactic especially against defense contractors. The typical situation involves a defense contractor with an “unfavorable” past history or experience with CIA or its officials. The CIA either “sits” on the transfer of the clearances for such a period of time that the contractor is forced to reassign or terminate the individual or perhaps verbally tells the contractor’s Facility Security Officer that the individual has unspecified “problems” that may lead to a denial if the clearance is further pursued. Such a statement can prompt either the recission of the clearance request or the termination of the individual. In neither of these above situations is the individual ever afforded any opportunity to challenge the conduct. Thus, an agency can act with complete impunity while imparting serious consequences to the individual.

- *Time delay punishment for reevaluation following initial favorable DOHA decision that is overturned on appeal*. Section E3.1.37 of DoD Directive 5220.6 (1992) states that an “applicant whose security clearance has been finally denied or revoked by the DOHA is barred from reapplication for 1 year from the date of the initial unfavorable clearance decision.” The positive intended effect of this provision is actually to ensure an individual is not penalized from pursuing an appeal following the issuance of an unfavorable initial hearing decision. That is, if an individual is denied a clearance by a decision issued January 1st and appeals that decision, they are eligible for reconsideration no matter the outcome of the appeal the following January 1st of the next calendar year. However, the practical effect of this provision also serves to unfairly penalize those individuals who prevail at their administrative hearing but then face an appeal by the Government. During the pendancy of the appeal that individual remains in absolute clearance limbo and should they ultimately lose to the Government on appeal the one year time clock does not begin to run until the appeal decision is issued. This date may be long after the one year period would have expired. For example, if an individual receives a favorable administrative decision on January 1st and the Government appeals, and that appeal results in a reversal nine months later (which unfortunately would not be an unusual lapse of time) on September 1st, this provision would not apply. The individual could not have their clearance access reconsidered until the following September 1st resulting in a loss of nearly one year of valuable time that may have directly caused the individual to lose his business or employment.

- *Central Intelligence Agency*. While I have generally not singled out any particular agency during my testimony, my experiences with the CIA require me to comment specifically on the manner in which they implement their clearance proceedings. For one thing, the personal appearance is little more than a meeting with a representative of the CIA´s Office Security. That Agency official rarely engages in any substantive exchange with the individual or their representative. They serve as a glorified note taker and document recipient. The meeting offers little to nothing beyond the equivalent of a written submission and appears designed to merely meet the bare minimum (arguably) requirements of Executive Order 12968. Unlike with other federal agencies, the chance for success in persuading the CIA to overturn ant adverse security clearance decision is virtually slim to non-existent. The perceived attitude is that to reverse its own decision would be to admit fault in arriving at the decision in the first place. Initial appeal decisions routinely provide little to no substantive feedback or explanation that could assist an individual to prepare a second level appeal. Indeed, as one former CIA attorney once told me even “factual impossibility” is no defense.

It is also my opinion, and that of some of my colleagues, that the CIA purposefully permits its challenge process to languish in order to dissuade individuals from pursuing or completing their appeals. The CIA will also routinely withhold significant substantive segments of the underlying documentation that is being relied upon for the basis of the clearance action. For applicants the operative document is typically the polygraph report and any perceived admissions that occurred before or after the actual examination. Although the applicant at this time does not yet possess a security clearance and the examination itself is not classified, the CIA routinely classifies much of the polygraph report to include alleged incriminating statements uttered by the applicant. Given that it is the applicant's own alleged admissions being used as evidence to justify the denial of a clearance, it would seem logical to release that information to the individual so that they can properly and fully respond to the accusations. When that is requested the CIA's usual response is to simply "ask your client what they said" or "your client knows what they said." Of course, the fact that the interrogation session in question was likely 18-24 months earlier has never seemed to bother the CIA as a matter of due process.

- *Foreign preferences.* The Intelligence and Defense Communities are particularly strict and inconsistent in arriving at determinations involving foreign preferences, i.e., the existence of foreign relatives in the United States or abroad. Each case must, of course, be determined by the specific facts that exist. However, the inconsistencies in the decisions involving countries that are either perceived as "enemies" of the United States or on the front lines in the war against terrorism (i.e., Middle Eastern States) should be viewed as unacceptable. In one DOHA case I had in 2004 involving Pakistan, the contractor had bare minimum contacts with his elderly parents and siblings. The Judge determined that since Pakistan was on the front lines in the war against terrorism and terrorists frequented the area it was too dangerous to allow this individual to hold a security clearance even though the Executive Branch, which determines foreign policy, held contrary positions regarding Pakistan. Yet three years earlier, just weeks after September 11th, another DOHA Judge held, based on similar facts, that as Pakistan was on the front lines in the war against terrorism, and was side-by-side with the United States, the contractor was qualified for a clearance. I have also repeatedly seen agencies deny clearances to individuals from the very countries where our need is actually the greatest to have qualified individuals who speak the native language. The cited factors are completely outside of the individual's control, and there is absolutely no genuine evidence (at least that is publicly available) to support that the assessed risk is greater for one individual than another, though the inconsistencies are frequent.

- Agencies will typically throw the proverbial kitchen sink at those who face revocation/denial proceedings and attempt to revive incidents that occurred many years earlier. This occurs even if those very incidents had already been investigated and mitigated and led to the individual being granted a security clearance. The agency´s justification is that somehow these prior acts comprise a pattern and practice of concerned conduct. Of course, there may be instances where this is completely appropriate such as an individual has a history of drunk driving. The prior incidents can and should be utilized, particularly absent significant mitigating factors, as a basis upon which to predict future behavior. However, there must be some sort of nexus between the events that are being tied together.

  The fact that someone may also find himself a national security whistleblower complicates the equation. It is seemingly impossible to prove that an agency is retaliating

against someone for the purposes of ridding itself of a whistleblower. To be sure it does happen. But because any incident, no matter how minor, can serve as the basis for the revocation of a clearance, it is simple fodder to use a clearance as a weapon.

EXAMPLES OF SPECIFIC QUESTIONABLE SECURITY CLEARANCE DENIAL/REVOCATION PROCEEDINGS[19]

- A DIA employee lost his security clearance for misusing his Government credit card for personal reasons due to some financial problems. This 20+ year experienced veteran had no prior infractions in his personnel history and initially faced termination from his position through the normal disciplinary process. That personnel action was deemed to have been mitigated and he was instead punished with a 45 day unpaid suspension, which in and of itself was a very harsh penalty for this particular offense. The misuse of the credit card never cost the Government one penny as the employee always paid off the card when the debt was due. On the day the employee's suspension was to have ended, DIA's security office, which had known from the beginning of the personnel proceedings, suspended his access, prevented his return from his unpaid status, and moved to revoke his clearance. This action was nothing less than vindictive and retaliatory as DIA security officials, based on my experience with this Agency and conversations with employees with personal knowledge, was particularly incensed that the employee was not terminated for it their view that the individual had lied to a security officer. This employee has been without employment for years due to DIA's revocation of his clearance.

- An Air Force civilian employee and reserve officer had her TS clearance suspended for nearly one year (most of which was spent in unpaid status) after an ex-boyfriend filed at best exaggerated claims, and at worst false claims, of stalking against her. It became poignantly clear that a civilian supervisor who disliked her then used these allegations against her for his own purposes. Allegations of improperly using her Government computer to send three e-mails were also cited (coincidentally senior officials of this very office routinely communicated with me on personal matters). Though the TS clearance was eventually restored, the Air Force then instituted proceedings to revoke her SAP access which prevented her from returning to her old position. She finally quit her civilian Air Force position and obtained employment at another federal agency.

- An Army civilian faced revocation and had his clearance suspended over allegations that dated back a decade that touched upon Whistleblower activities and complaints filed with Members of Congress. He was the only source for the information and the Army chose not to undertake any independent investigation of its own to confirm or refute the allegations. Though his supervisors provided letters of support literally pleading that he be permitted to work on unclassified projects during the tenure of the suspension given the existing workload, the Army refused to do so and instead intentionally chose to impose financial hardships on the individual. One year later his clearance was restored. The individual quit his Army position in protest of his treatment immediately afterward.

- An Air Force OSI contractor had his clearance suspended in the wake of 9/11 when his employer filed false allegations against him. Given the fact the contractor was of Middle Eastern origin and the climate at the time, he was perceived as Muslim and treated as a potential terrorist. He is, however, a Lebanese Christian who had fought with the Israelis

[19] In each of these described circumstances I served as the attorney of record for the individual. I can provide additional information, to include the identification of and contact information for the individual, for further use by the Subcommittee.

and our cover forces during the Lebanese Civil War in the early 1980s. He has never been provided access to the substantive allegations against him. To this day agencies of the U.S. Government refuse to grant him a security clearance though they routinely seek to utilize his expertise on short-term projects in cleared and dangerous environments when it suits their interests. This has included protecting former U.S. Iraqi Civilian Administrator Paul Bremer in the initial months of the war.

- You will also hear today from my client, DIA employee Anthony Shaffer. While revocation proceedings against Mr. Shaffer appear to have been initiated for vindictive purposes by certain DIA officials, the ultimate adverse security clearance determination by the DIA appears genuinely motivated by his Whistleblowing activities involving ABLE DANGER.

- A veteran DIA Intelligence Officer had his clearance revoked amidst a variety of allegations that appeared retaliatory due to his Cuban nationality. This occurred in the wake of the DIA Cuban espionage scandal. When the allegations were challenged on appeal DIA substantively modified the information to justify its decision.[20] Moreover, it was made clear to me from an inside source that perceived conduct that fell outside of the issued Statement of Reasons, which is to serve as the sole basis for the personnel decision, was being used for adjudication purposes.

- An individual though cleared at the TS/SCI level through other agencies, has yet – despite the passage of three years and numerous inquiries - had a decision issued by the DOE as to whether his clearance will be granted or denied. As a result this individual has been unable to handle DOE information which his position would normally require.

- A DIA employee was suspended and faced revocation of his security clearance primarily for internally faxing his resume to another DIA office without having it formally cleared for release. Although a supervisor had tacitly approved the transmission, and it was well known that few DIA employees ever had their resumes "cleared", the employee was alleged to have committed numerous security violations with his unauthorized disclosure of classified information. He was also alleged to have displayed his DoD badge outside of the work compound. I was provided access to both the redacted unclassified versions and unredacted classified versions of the multiple copies of this individual's resume that had been seized off of his computer. Upon comparison the DIA security officials' determinations as to which portions constituted classified information was as varied as the spots on a leopard. Information classified on version #1 of the resume could be found unclassified on version #5 and so on. This employee's clearance was ultimately restored.

- One DoD contractor, who represented himself in appeal proceedings, lost his security clearance with the NSA because he admitted he *possibly* viewed child pornography on his home computer while searching for non-pornographic information. Disgusted by what he saw he reported the site to law enforcement authorities. Months later he returned to the site to see if action had been taken but discovered that the images still existed. He reported the site yet again. He returned a third time and confirmed that the images were finally gone. The NSA polygrapher described the contractor's conduct in returning to the website as an "unexplained curiosity"; a subjective and inappropriate assessment that

[20] For example, one allegation was that the Officer had committed an unauthorized disclosure of classified information to foreign nationals. After the appeal the allegation was modified, without any indication of the justification or evidence, that the unauthorized disclosure involved assets, a far more sensitive allegation and one which had no evidentiary basis in the existing record.

unequivocally contributed to NSA's adverse action. When DoD was informed of the adverse decision DOHA initiated revocation proceedings as well based solely on the NSA information. During the DOHA proceedings, which I handled, NSA refused to identify the polygrapher or disclose additional information. After hearing detailed testimony from live witnesses, as well as information concerning the fallacies of the NSA investigation, the DOHA Administrative Judge completely rejected NSA's substantive findings and dismissed the revocation proceedings. The Government did not appeal.

Agency Efforts To Use Security Clearances As Weapons Against Attorneys And The Games Surrounding "Need-to-Know" Determinations

I would be remiss if I did not also address the manner in which security clearances are used as weapons against attorneys representing federal employees, particularly within the Intelligence Community. On this topic I will focus specifically upon the CIA and DIA for those are the two agencies with which I have the most experience. On many occasions I am retained to represent covert operatives who work for the CIA/DIA. The mere fact of their relationship with the federal government requires access to classified information. As a result for the last decade I have been routinely and regularly granted authorized access to classified information, predominantly at the SECRET level.

In the usual case in order for attorneys to obtain access to classified information an agency merely runs a National Agency Check (NAC) to determine whether any criminal record exists or derogatory information is held regarding the attorney by another agency. It is rare that either a background investigation is conducted or that a SF-86 is required to be filled out and submitted, both of which are common place in the usual arena of security clearances.

Both DIA/CIA argue that outside attorneys are not accorded "security clearances". Instead they argue, particularly the CIA, that the attorney has nothing beyond a "limited security access approval"; a term that does not exist anywhere. In effect, this case-by-case determination is the equivalent of an interim SECRET level clearance. Sometimes the execution of a non-disclosure, secrecy agreement is requested, but this requirement varies from time to time.

What eventually does occur is that once any "clearance" or "access" is granted the attorney is subject to the control of the agency, and the CIA in particular attempts to use that access as a weapon against the attorney at every given opportunity. For example, the CIA asserts that it is the entity that determines when a "need to know" exists. Yet Section 2.5 of Executive Order 12968 states that "[i]t is the responsibility of *employees* who are authorized holders of classified information to verify that a prospective recipient's eligibility for access has been granted by an authorized agency official and to ensure that a need-to-know exists prior to allowing such access, and to challenge requests for access that do not appear well-founded," federal agencies, particularly within the Intelligence Community, regularly assert that their employees are not permitted to reach such decisions when it involves access to their retained counsel even when that attorney has been authorized to receive classified information in that case. Indeed, in such situations the agencies, especially the CIA and DIA, have threatened their employees with termination and prosecution, as well as retaliation against counsel themselves, if disclosure of relevant information – which the Government considers classified – is provided to counsel. That is, the agencies in question deliberately attempt to limit the amount of "classified" information that an attorney is authorized to hear or review in order to minimize the ability of an employee to properly defend himself against agency action.

For example, in Sterling v. Tenet et al.[21], a state secrets case which involved a racial discrimination claim brought by an Operations Officers against the CIA, the CIA properly declassified an EEO administrative file that was provided to Sterling's counsel. On the eve of the due date of Sterling's Opposition brief, the CIA suddenly claimed that the EEO file, which had been released two years prior, contained classified information. The CIA contacted me and threatened that if I did not return the documents, without being provided any opportunity to challenge this new convenient determination, I would have my "security clearance" or access revoked.[22] My co-counsel who had arbitrarily and for no reason had not been permitted classified access during the litigation was threatened with criminal prosecution for possessing "defense information" if he refused to return the EEO file. Needless to say, both of us reluctantly capitulated to the CIA's intimidation tactics.

In my professional opinion, and this topic should itself be the subject of Congressional hearings, this deliberate interference with counsel violates both administrative and Constitutional rights. With respect to counsel's access to classified information, at least one district court judge has agreed with the proposition.[23]

PROPOSED RECOMMENDATIONS FOR LEGISLATIVE CHANGE OR ACTION

After having spent years handling security clearance cases and litigating national security matters, it is beyond question that only the Legislative Branch of our Government can step in to protect those who would suffer abuse and retaliation that targeted their clearances. The Judicial Branch has openly demonstrated its adamant unwillingness to do so, and the Executive Branch has exploited that weakness whenever possible. In light of my own experiences, and in the canvassing of colleagues who also routinely handle such cases, my recommendations, in no meaningful order, are as follows:

- Task GAO with conducting a thorough assessment of the security clearance appeal process as it is implemented throughout the federal government. Standardization should be the norm throughout the federal system. There is simply no justifiable reason why one agency should be applying a different level of due process, procedural or substantive, than another.

- Create an independent body outside of the involved federal agency (most Offices of Inspector General believe they do not have jurisdiction to entertain challenges or reviews, nor does the Merit Systems Protection Board) to adjudicate final challenges to an unfavorable security clearance decision; OR

- Grant the federal judiciary statutory jurisdiction to review substantive security clearance determinations. While agencies always argue, and federal judges generally seem willing to accept, that such decisions require expertise lacking in the federal judiciary, the fact of the matter is that the majority of the decisions are based solely on common sense rationale. The granting of jurisdiction does not require that agencies no longer be accorded deference to their decisions. Yet Article I Administrative Judges, many of whom have little to no security clearance experience before being hired, substantively adjudicate

---

[21] 416 F.3d 338 (4th Cir. 2005), cert. denied, __ U.S. __ (2006).

[22] My co-counsel at the time, who did not possess a "security clearance", was threatened with criminal prosecution.

[23] Stillman v. Department of Defense et al., 209 F.Supp.2d 185 (2002), rev'd on other grounds, Stillman v. Central Intelligence Agency et al., 319 F.3d 546 (D.C.Cir. 2003).

DOHA and DOE cases and reverse DoD and DOE security decisions, respectively on a daily basis. How is it then that an Article III Judge, who is not even required to undergo a background investigation and is permitted automatic access to classified information by virtue of their Constitutional authority, cannot adjudicate a clearance challenge? Presumably DOHA and DOE Administrative Judges participate in certain trainings before assuming their initial responsibilities so there is obviously no good reason why Article III judges can not do the same.

- Require all federal agencies to audiotape security interviews and, most importantly, polygraph sessions and maintain preservation of those tapes for a reasonable period of time as well as permit unfettered access to at least a written transcript if a security clearance denial/revocation proceeding is initiated. Very often clearance decisions come down to a “did he or did he not say” what is alleged, or in what context was the statement made.

- Legislate additional protections into the system to include, but not be limited to, the release of further information and the ability of counsel/petitioners to have access to classified information.

- Remove immunity from civil liability from individuals who submit information that they should know or is known to be false to a federal agency that leads to the initiation of adverse clearance proceedings to include a suspension.

- Legislatively forbid agencies from suspending employees without pay during the pendency of their security clearance proceedings, or at least require agencies to provide back pay to those who favorably resolve their case.

- Legislatively require that agencies cover attorneys fees for those cases in which the adverse decision is reversed.

- Create a system of penalties for those federal officials who knowingly and intentionally retaliate against individuals for Whistleblower or other activities/conduct which then leads to the initiation of adverse security clearance proceedings. Section 6.4 of Executive Order 12968 states that “[e]mployees shall be subject to appropriate sanctions if they knowingly and willfully grant eligibility for, or allow access to, classified information in violation of this order or its implementing regulations. Sanctions may include reprimand, suspension without pay, removal, and other actions in accordance with applicable law and agency regulations.” Yet absolutely no sanctions, or even the perceived threat of such, exist for those who abuse the system for purposes of harming others.

These are but just some examples that I would hope you consider. Again, I thank you for the opportunity to appear before this august body today. I am more than willing to answer any questions you might have, as well as work with Members of this Subcommittee and its staff to best design the legislative actions I have suggested today.