United States General Accounting Office

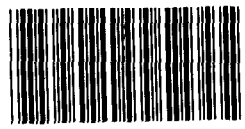
GAO

Report to Congressional Requesters

May 1992

SECURITY CLEARANCES

Due Process for Denials and Revocations by Defense, Energy, and State



GAO/NSIAD-92-99

GAO

United States
General Accounting Office
Washington, D.C. 20548

National Security and
International Affairs Division

B-247246

May 6, 1992

The Honorable William L. Clay
Chairman, Committee on Post Office
and Civil Service
House of Representatives

The Honorable Gerry Sikorski
Chairman, Subcommittee on the
Civil Service
Committee on Post Office
and Civil Service
House of Representatives

The Honorable Don Edwards
Chairman, Subcommittee on Civil
and Constitutional Rights
Committee on the Judiciary
House of Representatives

This report responds to your request that we review the due process practices of the Departments of Defense, Energy, and State for individuals for whom security clearances are denied or revoked. As agreed with your offices, we focused on:

- the agencies' practices for suspending individuals' security clearances;
- whether individuals are given access to their investigative records; and
- whether appeals to unfavorable decisions are heard by independent decisionmakers who document their decisions.

As also agreed with your offices, we will review due process practices for special access programs separately.

Background

Federal agencies determine the loyalty, reliability, and trustworthiness of individuals before they are authorized access to national security (classified) information. That determination is called a security clearance. About 3 million military, civilian, and contractor employees hold clearances granted by Defense, Energy, and State. When agencies are unable to determine that the granting of a clearance is clearly consistent with the interest of national security, the clearance is denied. If unfavorable information surfaces or actions occur concerning an individual with a clearance, the clearance may be revoked. However, prior to the revocation,

the individual's clearance or access to classified information may be suspended. Suspension is an interim action to protect classified information until the derogatory information raising doubt about an individual's ability or intent to protect classified information can be resolved. When agencies deny or revoke clearances, they are required to provide due process. Under the due process requirements generally adopted by agencies for government employees and military personnel, the individual at a minimum should be:

- notified of the reason or reasons for an unfavorable clearance decision,
- given an opportunity to respond, and
- notified of any appeal rights.

Contractor employees, who hold over 1 million of the 3 million clearances, are entitled to additional due process measures (e.g., they may request a hearing and be represented by counsel), pursuant to a 1960 executive order.

A proposed executive order, released for agency comment in January 1989, would have established uniform standards for the award and retention of security clearances for federal and contractor employees. However, the Congress expressed concern that it also would have denied employees their due process rights when their clearances are denied or revoked. Following release of the proposed order, the Subcommittee on Civil Service, House Committee on Post Office and Civil Service, and the Subcommittee on Civil and Constitutional Rights, House Committee on the Judiciary, held a series of joint hearings from October 1989 to March 1990 to review the adequacy of existing due process rights afforded federal and contractor employees following unfavorable security clearance determinations. The proposed order had not been issued as of March 31, 1992.

Results in Brief

The three agencies' regulations do not require that letters be sent to individuals advising them when their clearances are suspended and the reasons for it. However, two of Defense's components have regulations that require such letters.

About 11,500, or about 70 percent, of the individuals in the Army, Navy, and Air Force whose access or clearances were suspended for security reasons did not get their cases adjudicated by the services' central clearance offices. As a result, their clearances were never formally revoked

but were left indefinitely suspended. Also, Defense's annual report on clearance activity does not accurately show the number of clearances revoked or indefinitely suspended because of security reasons.

State's letters to individuals informing them of unfavorable security clearance actions also inform them of procedures for getting access to investigative material about themselves, which is permitted by the Privacy Act of 1974. Defense and Energy regulations do not require that letters to individuals contain similar guidance.

An appeal process is not specifically required by governmentwide regulation; however, the three agencies have established procedures for employees to appeal unfavorable security clearance determinations. Energy uses independent individuals to hear appeals and make recommendations; however, in some cases Defense and State use officials tied administratively to the organizations responsible for those determinations. Consequently, their appeal boards do not give a clear perception of independence.

Access Suspended for Long Periods Without Formal Notification of Reasons

The regulations of Defense, Energy, and State do not specify how or what individuals are to be told when their access or clearances are suspended. However, those of the Defense Mapping Agency and Defense Investigative Service (for contractor employees in the Defense Industrial Security Program) require that letters be sent and that they contain the reasons for the suspensions.

Energy, unlike Defense and State, considers suspension to be the first step in its due process procedures. Energy managers are required to request headquarters authority to conduct a hearing within 10 days of a suspension. Headquarters is required to authorize the hearing or clearance reinstatement within 30 days of the request. If the hearing is authorized, the manager has 30 days to deliver a notification letter to the individual explaining the reasons and the individual's rights under Energy's procedures. Our random sample of Energy's cases showed that 56 percent of the letters were issued to the individuals within 3 months of their suspension of access. Table 1 shows the length of suspensions for Defense (Air Force only), Energy, and State.

Table 1: Suspensions of Access or Clearances

	Defense		Energy		State	
Months	**Number**	**Percent**	**Number**	**Percent**	**Number**	**Percent**
0 - 3	1	4	14	56	6	22
3 - 6	2	8	7	28	5	19
6 -12	17	65	3	12	9	33
Over 12	6	23	1	4	7	26
Total	**26**	**100**	**25**	**100**	**27**	**100**

Defense's regulation states that every effort should be made to resolve a suspension as expeditiously as possible. The services' implementing regulations do not establish time frames to ensure promptness for resolving suspensions. Our random sample of Air Force cases showed that only 4 percent of the letters of intent to revoke clearances were sent in 3 months or less. We were unable to make a similar comparison for the Army or Navy because data generally was not available in the case files.

State's regulation provides for suspension of clearances, whose duration may be (1) for a specific period of time, (2) dependent upon occurrence of a specific event, or (3) dependent upon additional investigation or evaluation. In mid-1989, State began generating a bi-weekly report of suspensions that identifies reasons, status, and other data. This report should help officials comply with the Foreign Affairs Manual, which states that issues requiring the temporary suspension of clearances should be resolved as quickly as possible (normally within 90 days). Our review showed that in 22 percent of State's cases, the suspensions lasted 3 months or less before letters of intent were sent or other actions were taken. However, in three cases (11 percent), the suspensions ranged from 33 to 50 months.

Most Defense Suspensions of Access Not Formally Resolved or Reported

When derogatory information surfaces about individuals, Defense's Personnel Security Program Regulation requires commanders and organization heads to suspend the individuals' access to classified information, until the central adjudication offices make final determinations to either continue or revoke their clearances. However, many cases are not sent to the central adjudication offices for a final determination. In such cases, the individuals are discharged or separated from the services without further action on their clearances, even when the reasons for their leaving could be the basis for revoking their clearances. Without the central offices' adjudication, clearances are not formally

revoked, but are left indefinitely suspended and are not included in annual Defense clearance activity reports.

Defense and service officials consider only those cases handled by the central adjudication offices to be clearance revocations. Generally, they are the only offices authorized to grant, deny, or revoke clearances and provide due process. In most cases handled by commanders and organization heads, the individuals were subsequently discharged or separated from government service. Table 2 shows the number of revocation cases handled by the central offices of the three services and the number of indefinite suspensions handled by local commanders for fiscal year 1990. (Complete data was not available for 1989 cases handled exclusively by Army and Navy commanders and organization heads.)

Table 2: Clearances Revoked or Indefinitely Suspended (Fiscal Year 1990)

	Revocations by central clearance offices		Indefinite suspensions by commanders and organization heads		Total	
	Cases[a]	Percent	Cases	Percent	Cases	Percent
Army	4,186	55	3,371	45	7,557	100
Air Force	402	9	4,192	91	4,594	100
Navy	680	15	3,893	85	4,573	100
Total	**5,268**	31	**11,456**	69	**16,724**	**100**

[a]About 95 percent of these cases are clearance revocations and 5 percent are clearance denials.

In 1989, our sample year, local Air Force commanders indefinitely suspended access in 4,420 cases. We randomly selected 100 of these cases for review and found 46 with complete information. In 13 cases, the period of time between suspension of access and separation or discharge from the Air Force exceeded 6 months. For example, in one case, an individual's access was suspended in September 1988 because of financial problems. The individual was honorably discharged 10 months later in July 1989 with no action to revoke the individual's clearance. Another individual's access was suspended in May 1988 because of involvement with drugs. The individual was court martialed and incarcerated in June 1988 and given a bad conduct discharge 18 months later in December 1989. The individual's clearance was not revoked.

Individuals Not Told How to Request Access to Investigative Records

The Privacy Act of 1974, as amended, allows individuals to request investigative material about themselves, provided such disclosure does not reveal the identity of a source who wanted to remain confidential. State's regulation requires that individuals be told of procedures for requesting access to such records about themselves in letters advising them of unfavorable security clearance actions. Defense and Energy do not have a similar requirement.

Department of State

State's personnel security regulation requires individuals to be notified of the procedures for obtaining access to their investigative files. The notification is included in letters to individuals denying their clearances and in letters of intent to revoke or reduce their clearances. The Department of State's Diplomatic Security Service conducts investigations of State's employees. In addition to notifying employees of access procedures by letter, State often sends employees copies of the investigative material in their files.

Department of Energy

Energy's personnel security regulation does not require that individuals be told how to obtain access to reports on investigations made of them by the Office of Personnel Management, Federal Bureau of Investigation, or other agencies that conduct investigations for Energy. The individuals may be referred to the investigating agency, which determines if the information will be disclosed. However, the regulation requires that individuals be given copies of all other investigative records that will be used by hearing officers in arriving at recommendations concerning the status of their clearances.

Department of Defense

Personnel security regulations of Defense, the Army, the Navy, the Air Force, and the Defense Mapping Agency do not require that employees be informed about access to their investigative records. The regulation for contractor employees provides for them to be furnished copies of the investigative material on which determinations are based. Officials told us that security officers verbally inform employees of the procedures for requesting access when they give the employees letters involving unfavorable security clearance actions (e.g., letters of intent to deny or revoke a clearance).

From our random sample of 159 cases of individuals at the military services and Defense Mapping Agency whose clearances were denied or

revoked, we identified 9 requests to the Defense Investigative Service for access to investigative material—4 from Defense Mapping Agency, 3 from Navy, and 2 from Air Force employees. In January 1992, Defense officials told us that regulations would be revised to require that employees be told in writing how to obtain access to investigative material about themselves.

Defense and State Appeal Processes Do Not Always Appear to Be Administratively Independent

Regulations of Defense, Energy, and State require that employees be given an opportunity to appeal unfavorable determinations. Whereas Energy uses non-agency examiners to handle appeals, Defense and State generally use officials or employees within, or in close relationship administratively to, the organizations that had earlier recommended denial or revocation of the individuals' clearances. Consequently, Defense and State appeal boards do not give as clear a perception of being administratively independent. We also identified Defense appeal board practices such as lack of documentation supporting board decisions and the attendance of agency adjudicating officials—but not the appellants—at appeal board meetings.

Table 3 shows the number of clearances denied and revoked, number of cases appealed, and their resolution. We reviewed 119 of the 395 cases appealed.

Table 3: Number of Cases Appealed, Affirmed, and Reversed (Fiscal Year 1989)

		Cases		
	Clearances denied and revoked	Appealed	Cases affirmed	Reversed
Energy[a]	121	56	48	8
Defense				
Army	4,361	68	47	21
Navy	765	61	55	6
Air Force	278	8	7	1
Defense Mapping Agency	32	2	2	0
Contractor employees	993	200	185	15[b]
State	1	0	0	0

[a]Data provided by Energy was for calendar year 1989.

[b]Of the 40 cases remanded to hearing examiners for reconsideration, 25 were not reversed.

Department of Energy

Energy's regulation, applicable to government and contractor employees, requires the Assistant Secretary for Defense Programs[1] to inform individuals by letter of their right to appeal unfavorable recommendations by hearing officers. The employee then has 10 days to file a written brief. Extensions of time for filing can be granted.

The regulation also requires the Assistant Secretary to designate three examiners who are not federal employees to handle appeals. The examiners are under contract to Energy and must consider the appeals without communicating with each other and make recommendations to the Assistant Secretary. The Assistant Secretary is not bound by their recommendations. In at least one case during 1989, three examiners recommended that an employee's clearance not be revoked, but the Assistant Secretary overruled them. The Assistant Secretary can also request examiners to review favorable clearance recommendations made by hearing officers. In our random sample of 50 cases, the Assistant Secretary requested four reviews of favorable recommendations. The examiners reversed all four favorable recommendations; three clearances were revoked and one was denied. The examiners documented all of their recommendations.

Department of Defense

Defense's personnel security regulation allows employees to appeal to a higher level of authority designated by a service or other component but does not specify the process. Consequently, the military services and other components have established different appeal processes. The Defense Mapping Agency and Air Force give military and civilian employees 30 days to file appeals. The Navy gives the individual 15 days, but the individual's command may extend it to 30 days. Army and contractor employees are given 60 days.

Army employees must submit appeals through their commanding officers, who are required to comment on the appeals. The appeals then go to the Office of the Deputy Chief of Staff for Intelligence at Army headquarters, where an adjudicator reviews them and drafts a decision. Each case is reviewed by two of the adjudicator's supervisors and sent to the Director of Counter-Intelligence, who signs the decision. Appeals cannot be resubmitted.

[1]Effective December 23, 1991, security responsibilities were transferred from the Assistant Secretary to the Director, Office of Security Affairs, who reports directly to the Under Secretary of Energy.

The Chief of Naval Operations appoints a three-member appeal board to handle Navy appeals. The head of the board must have a security-oriented background, and one member must be from the same group as the appellant (e.g., a Marine Corps appellant requires a Marine Corps board member). The head of the board is in the same command as the central adjudication office, but reports to a different deputy commander. The decisions of the board are final.

The Director of the Air Force clearance office, based on the appeal, may restore or grant a clearance or convene a security review panel. The panel is comprised of three Air Staff officials appointed by the Administrative Assistant to the Secretary of the Air Force. The panel submits its recommendations to the administrative assistant, whose decision is final. In 1989, the panel met at the clearance office. Two nonvoting members—the Director or Deputy Director of the clearance office and an adjudicator—were present during the panel's meeting. They provided technical assistance to the panel, such as answering questions concerning adjudication criteria used in denying or revoking the clearances, according to clearance office officials. Appellants were not represented at the meeting.

Defense Mapping Agency employees submit appeals to the Agency's Chief of Staff, whose determination is final.

Contractor employees send appeals to the Director, Directorate for Industrial Security Clearance Review, who is responsible for managing their clearance review program, including the adjudication of derogatory information, hearings, and appeals. Defense's General Counsel designates attorneys to be hearing examiners and appeal board members. A contractor employee (appellant) or the Department Counsel (assigned to the Directorate to present the government's case) may appeal a hearing examiner's determination. When an appeal is made, the appeal board can affirm or remand a hearing examiner's determination. If the board affirms the determination, further appeals are not permitted.

In our examination of appeals by military and civilian employees of the Army, Air Force, and Defense Mapping Agency, we found that case files contained documentation supporting the recommendations of panel or board members. Also, the files showed that appellants had been notified of the reasons for the denial of their appeals. The Navy's case files did not contain documentation supporting appeal board members' decisions, and

letters to appellants did not contain reasons for the board's denial of their appeals.

In our examination of appeals by contractor employees, we found that case files contained supporting documentation for the board's recommendations and that appellants had been told the reasons for the recommendations.

In our examination of contractor employee appeals, we found that the Department Counsel had initiated the appeal of 20 of the 40 cases remanded to hearing examiners. Of 20 favorable determinations appealed by the Department Counsel, 15 were reversed. In another case, however, the Department Counsel appealed an unfavorable determination, but the determination was not reversed. There is no stated limit on the number of times that the Department Counsel may appeal a hearing examiner's determination. For example, in one case, the Department Counsel appealed three times, unsuccessfully, but was successful on the fourth appeal after the hearing examiner was appointed to another position and replaced by another examiner.

In January 1992, Defense officials told us that the regulation for contractor employees was being revised to give appeal boards authority to reverse hearing examiners' determinations.

Department of State

The Foreign Affairs Manual permits employees to appeal in writing a decision to revoke or reduce their clearance eligibility. The appeal is to be submitted within 30 days of notification of State's determination to revoke or reduce a clearance. The Under Secretary for Management is to convene a three-person management level panel consisting of himself; the Assistant Secretary, Diplomatic Security; and the Director General of the Foreign Service and Director of Personnel. The adjudication and revocation of clearances are handled by the Diplomatic Security Service.

Recommendations

We recommend that the Secretary of Defense revise suspension procedures to require:

- detailed notification letters to individuals,
- prompt reporting of actions to central clearance offices,
- time limits for subsequent actions, and
- final resolution of all clearance suspension actions.

We also recommend that the Secretary of Defense:

- require that individuals be told by letter of procedures for requesting access to investigative records about themselves and
- consider establishing an independent board or boards to hear appeals from Defense and contractor employees.

We recommend that the Secretary of Energy require that letters be used to tell individuals (1) when their clearances are suspended, including the reasons, and (2) the procedures for getting access to investigative records about themselves.

We recommend that the Secretary of State revise the Foreign Affairs Manual to require the use of clearance suspension letters and that the letters contain the reasons for the action. We also recommend that the Secretary consider establishing an appeal board independent of the organizations involved in unfavorable clearance decisions.

Agency Comments and Our Evaluation

Department of Defense

Defense fully agreed with four of our recommendations and partially concurred with two. Defense told us that its personnel security regulation would be revised before the end of calendar year 1992 to require:

- explanatory letters to be sent to individuals when their access is suspended, where appropriate and consistent with the interests of national security;
- the prompt reporting of suspensions to the central clearance offices; and
- letters to be sent to individuals advising them of procedures for requesting access to investigative records about themselves.

Defense also said that it would consider establishing independent appeal boards during its review of consolidated adjudication options and that a final decision would be made before December 31, 1992.

Defense partially agreed with our recommendation concerning the establishment of time limits for access suspensions. Defense did not agree that firm time limits were appropriate because each case is different in regard to its scope and complexity. Our recommendation was not intended

to require the establishment of time limits to resolve suspensions, rather it was intended to establish time frames after which cases should be monitored more closely. Defense agreed and said that provisions would be included in its revised personnel security regulation.

Defense also partially agreed with our recommendation concerning the final resolution of all suspension actions. Defense said that its policy is to defer final clearance processing on military personnel who are subject to other administrative or disciplinary procedures that could result in their discharge or dismissal because they are normally afforded other forms of due process. Defense said that once a person leaves, there is no basis for continuing due process unless the person returns and requires a clearance. Then, a complete reevaluation is undertaken of all relevant information and due process is afforded where required. Defense also told us that the regulation will be reviewed to ensure that the language actually reflects that final action is to be taken on all clearance suspension actions.

It is not clear from Defense's comments whether the issues previously described will be corrected because (1) commanders and organization heads will still determine which cases will be sent to the central clearance offices for final action and (2) Defense did not address the issue of reporting all cases of clearance revocations and indefinite suspensions resulting from security concerns. As noted earlier, some individuals whose access was suspended were incarcerated or otherwise under Defense control long enough for Defense to provide some form of due process prior to their discharge. Also, unless changed, Defense's annual reports of clearance activity will continue to substantially understate the number of individuals whose clearances were revoked or indefinitely suspended because continued retention was considered inconsistent with the interests of national security. (See app. I for a complete copy of Defense's comments.)

Department of Energy

Energy agreed that, at the time of suspension, individuals should be informed by letter of the reasons and of the procedures for obtaining access to investigative records about themselves. Energy said that an additional procedure had been developed to provide for use of suspension letters. (See app. II for a complete copy of Energy's comments.)

Department of State

State said that we had misinterpreted its regulation, which it believes does not require suspension letters. Thus, State concluded that a proposed recommendation in our draft report that State require compliance with its regulation was inappropriate. State further said that, by confronting employees directly with the allegations against them and documenting their responses, its employees are provided a form of investigative due process that is normally more effective in resolving such issues than formal statements of charges.

We believe State's regulation is unclear because the general provision (3 FAM 161.2b (3)) indicates that its requirement that the employee be informed of the administrative action and the reasons therefore, applies to both subsections of section 163 (3 FAM 163.4 and 163.5). In this regard, subsection 163.4 sets forth procedures for revocation or reduction of security clearances, and subsection 163 covers the suspension of security clearances. However, given State's interpretation of its regulation, we revised our recommendation to the effect that State require the use of suspension letters, including the reasons for suspension.

We do not believe that confronting individuals with allegations against them is a substitute for suspension letters, nor that such letters should be used to resolve issues. We believe that the suspension letters are a formal way of notifying individuals of actions affecting their clearance and employment status. We further believe that an agency has an obligation to formally, and promptly, notify individuals of such action and a preliminary indication of the reasons for it, where national security considerations permit. In almost 60 percent of the State cases that we reviewed, suspensions lasted from 6 months to 4 years before State formally notified the individuals with letters of intent containing reasons or took other actions. We do not believe that suspension letters would impair investigation of the issues or impose an administrative burden on State.

State did not agree with our recommendation that it consider establishing an appeal board independent of the organizations involved in unfavorable clearance decisions. State does not believe that it needs an "intermediary body between the appellant and the decision makers," such as Energy uses, because the senior officials on the board were in no way associated with the original recommendation to revoke a clearance.

We believe that the issue is one of perception, not whether an official on the board had been involved in a decision to revoke a clearance. The fact remains, the individuals who investigate, adjudicate, and revoke clearances

are administratively under the Assistant Secretary, Diplomatic Security, and that official is on the appeal board. An appellant or others could perceive that an unfavorable decision by the board was in part due to an official's desire to support subordinates' actions. (See app. III for a complete copy of State's comments.)

Scope and Methodology

We reviewed the due process policies and procedures of the Departments of Defense, Energy, and State. Our review included Defense-wide requirements and those of the Army, Navy, Air Force, Defense Mapping Agency, and Directorate for Industrial Security Clearance Review. To review compliance with those policies and procedures, we obtained random samples of individuals for whom clearances were denied or revoked from the automated personnel data systems of Defense and Energy. At State, we reviewed a representative number of cases to ascertain compliance with requirements. The scope of our review covered individuals whose eligibility or access to classified information was denied, revoked, or suspended during fiscal year 1989. Also, we reviewed the makeup and decision-making process of the departments' appeal boards. We conducted our review from December 1989 to November 1991 in accordance with generally accepted government auditing standards.

Unless you publicly announce this report's contents earlier, we plan no further distribution until 30 days after its issue date. At that time, we will send copies to the Secretaries of Defense, Energy, and State and other interested parties. We will also make copies available to others upon request.

Please contact me at (202) 275-8412 if you or your staffs have any questions concerning this report. The major contributors to this report are listed in appendix IV.

Donna M. Heivilin
Director, Logistics Issues

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Comments From the Department of Defense

COMMAND, CONTROL, COMMUNICATIONS AND INTELLIGENCE

ASSISTANT SECRETARY OF DEFENSE

WASHINGTON, D.C. 20301-3040

April 6, 1992

Mr. Frank C. Conahan
Assistant Comptroller General
National Security and International Affairs Division
U.S. General Accounting Office
Washington, D.C. 20548

Dear Mr. Conahan:

This is the Department of Defense (DoD) response to the General Accounting Office (GAO) draft report, "DUE PROCESS: Defense, Energy and State Security Clearance Denials and Revocations," dated February 10, 1992 (GAO Code 398024/ OSD Case 8934). The DoD partially concurs with the report.

The GAO correctly reported that no requirement currently exists in the DoD to provide DoD civilian or military personnel a written notification of a suspension of clearance or instructs the individual on procedures for obtaining his or her security file. It is also recognized that suspension issues can often take a relatively long time to resolve and that a number of individuals under suspension are separated from DoD employment as a result of other administrative processes before the clearance suspension process has been completed. The DoD also does not require an appeal of a clearance denial or revocation to be reviewed by an independent body outside of the DoD Component taking the action.

With regard to written notification of suspension actions, procedures for obtaining one's investigative file, and prompt reporting of a suspension action to the central clearance authority, the DoD will implement those procedures in DoD 5200.2-R, "Defense Personnel Security Program," by the end of 1992. The issue of an independent board to hear clearance appeals will be considered during the review of consolidated DoD adjudication and a decision made by the end of 1992.

While prompt and expeditious resolution of all suspension actions remains a DoD policy, unfortunately that is not always possible due to the complex nature and scope of many cases, as well as other investigative factors beyond the control of the adjudicative authority. However, the DoD continues to support monitoring the successful conclusion of such actions in a timely fashion. The DoD also supports the completion of due process procedures for individuals under clearance suspension who remain affiliated with DoD. Those persons whose employment with the DoD may have been terminated for related reasons are subject to equivalent protections under other appropriate and applicable administrative procedures.

The GAO inquiry into the DoD due process procedures was both professional and thorough. The DoD process is comparable to any in the Federal government and meets or exceeds all relevant tests of fairness and equity to both the individual and the interests of national security.

The detailed DoD comments on the report findings and recommendations are enclosed. The DoD appreciates the opportunity to comment on the GAO draft report.

Sincerely,

Duane P. Andrews

Enclosure

GAO DRAFT REPORT - DATED FEBRUARY 10, 1992
(GAO CODE 398024) OSD CASE 8934

"DUE PROCESS: DEFENSE, ENERGY, AND STATE
SECURITY CLEARANCE DENIALS AND REVOCATIONS"

DEPARTMENT OF DEFENSE COMMENTS

* * * * *

FINDINGS

FINDING A: Basis For Security Clearance Denials And Revocations. The GAO reported that when Federal agencies are unable to determine that the granting of a security clearance to an individual is clearly consistent with the interests of national security, the clearance is denied. The GAO further reported that if unfavorable information surfaces or actions occur concerning an individual with a clearance, the clearance may be revoked. The GAO noted that prior to the revocation, however, the individual's clearance or access to classified information may be suspended--an interim action to protect classified information until the situation can be resolved.

The GAO explained that when agencies deny or revoke clearances, they are required to provide due process. The GAO reported that under the due process requirements generally adopted by Federal agencies, the individual, at a minimum should be (1) notified of the reason or reasons for an unfavorable clearance decision, (2) given an opportunity to respond, and (3) notified of any appeal rights. The GAO noted that contractor employees are entitled to additional due process measures.

The GAO reported that a proposed executive order, released for agency comment in January 1989, would have established uniform standards for the award and retention of security clearances. According to the GAO, however, the Congress expressed concern that the order would also have denied employees their due process rights when their clearances are denied or revoked, and a series of hearings were held to review the adequacy of existing due process rights. The GAO reported that as of December 31, 1991, the proposed executive order had not been issued. (pp. 2-3/GAO Draft Report)

Now on pp. 1-2.

DoD Response: Concur. The DoD policy governing due process and appeal procedures for military and civilian personnel is contained in Chapter 8, DoD 5200.2-R, "Defense Personnel Security Program Regulation," January 1987. It is DoD policy that all adjudicative authorities responsible for the issuance and denial of final TOP SECRET, SECRET or CONFIDENTIAL clearances follow the provisions of Chapter 8 for personnel still affiliated with the Department. The individual is notified in writing of the proposed action, given an opportunity to reply in writing, within a specified period of time, and then permitted to appeal to the next higher level of authority, if his or her clearance is revoked or denied by the adjudication authority. It has long been the position of the DoD that this is a fair and equitable practice that gives due consideration to an individual's Constitutional guarantees.

FINDING B: Agencies Suspended Access For Long Periods Without Formal Notification Of Reasons. The GAO reviewed the due process practices for the Departments of Defense, Energy, and State, and found the agencies have different regulations and practices regarding whether notification to an individual whose access is suspended should be in writing, whether it should contain the reason for suspension, and when it should be sent. The GAO found that neither Defense nor Energy regulations specify how or what individuals are to be told when their access or clearances are suspended. The GAO found that, on the other hand, the Department of State regulation, as well as those of the Defense Mapping Agency and the Defense Investigative Service, require that letters be sent and that they contain the reasons for the suspensions. The GAO noted, however, that although the State regulation contains this requirement, the letters did not contain the reasons.

According to the GAO, Energy, unlike Defense and State, considers suspensions to be the first step in its due process procedures. The GAO explained that Energy managers are required to request headquarters authority to conduct a hearing within 10 days of a suspension and headquarters is required to authorize the hearing or clearance reinstatement within 30 days of the request. The GAO further explained that if the hearing is authorized, the manager has 30 days to deliver a letter of intent or revoke the clearance. The GAO sample of Energy cases showed that 56 percent of the letters were issued within three months of the individual's suspension of access.

The GAO reported that the Defense regulation states that every effort should be made to resolve a suspension as expeditiously as possible, although the implementing regulations of the Services do not establish time frames to ensure promptness for resolving suspensions. The GAO reported that its sample of Air Force cases showed that only 3 percent of the letters of intent to revoke clearances were sent in three months or less. The GAO noted that data was generally not available in case files to make a similar comparison for the Army or the Navy.

The GAO reported that the State regulation provides for suspension, whose duration may be (1) for a specific period of time, (2) dependence on the occurrence of a specific event, or (3) dependent on additional investigation or evaluation. The GAO found that in 22 percent of the State cases, suspensions lasted three months or less before letters of intent were sent or other actions were taken. (pp. 3-6/GAO Draft Report)

Now on pp. 3-4.

DoD Response: Concur. The DoD policy has never required that notification of suspension of clearance, which is considered to be an interim action, be provided in writing. However, the DoD has already agreed that written notification of clearance suspension will be implemented in DoD 5200.2-R in 1992, to include the reason(s), where appropriate and consistent with the interests of national security.

FINDING C: Most Defense Suspensions Of Access Not Formally Resolved Or Reported. The GAO reported that when derogatory information surfaces, the Defense Personnel Security Program Regulation requires that the individual's access to classified information be suspended, until the central adjudication offices make final determinations to either continue or revoke their clearance. According to the GAO, however, many cases are not sent to the central adjudication offices for a final determination. The GAO explained that in those cases, the individuals are

discharged or separated from the Services without further action on their clearances, even when the reasons for leaving could be the basis for revoking their clearances. The GAO observed that without central office adjudication, clearances are not formally revoked, but are left indefinitely suspended and not included in annual DoD clearance activity reports.

The GAO reported that Defense officials consider only those cases handled by the central adjudication offices to be clearance revocations, and only those offices are authorized to grant, deny, or revoke clearances and provide due process. The GAO noted that in most of the cases handled by commanders and organization heads, the individuals were subsequently discharged or separated from Government service. Based on information available for FY 1990, the GAO found that about 31 percent of the Defense suspensions were revocations handled by central clearance offices, and about 69 percent were indefinite suspensions by commanders and organization heads. The GAO concluded most Defense suspensions of access are not formally resolved.

The GAO also sampled 100 Air Force cases from 1989, where commanders indefinitely suspended access, and found 46 of the cases with complete information. The GAO also found that in 13 of the cases, the period of time between suspension and separation or discharge from the Service exceeded six months. (p. 3, pp. 6-8/ GAO Draft Report)

Now on pp. 4-5.

DoD Response: Partially concur. As previously mentioned, it is the DoD policy to provide due process procedures to all affiliated personnel. It is also the DoD policy to defer final clearance processing on military or civilian personnel who are subject to other administrative or disciplinary procedures that could result in their discharge or dismissal from DoD employment. A person who is separated from military or civilian employment is normally afforded other forms of due process associated with such procedures and no longer has a need for access to classified information. If the person is retained in the DoD, then the adjudicative facilities will thoroughly pursue DoD 5200.2-R due process to its ultimate conclusion.

FINDING D: Individuals Are Generally Not Told How To Request Access To Investigative Records. The GAO reported that the Privacy Act of 1974 allows individuals to request investigative material about themselves, provided such disclosure does not reveal the identity of a source who wanted to remain confidential. The GAO found that State regulations require individuals be told of procedures for requesting access to such records in letters advising them of unfavorable security clearance actions. The GAO reported that Defense and Energy do not have a similar requirement.

The GAO described the Department of State procedures and noted that, in addition to notifying employees of access procedures by letter, State often sends employees copies of the investigative material in their files. In describing the Department of Energy procedures, the GAO noted that individuals may be referred to the investigating agency, who determines if the information will be disclosed. The GAO also noted that the Energy regulation requires that individuals be given copies of all other investigative records that will be used by hearing officers.

The GAO reported that the Defense personnel security regulation does not cover access of employees to their investigative records. The GAO further

reported that similarly, the Service and Defense Mapping Agency regulations do not require that employees be informed about their access. The GAO noted that the regulation for contractor employees provides that they be furnished copies of investigative material on which determinations are based. The GAO reported that Defense officials said security officers verbally inform employees of procedures for requesting access when they are given letters involving unfavorable security clearance action.

The GAO reported that, from 160 cases sampled whose clearances were denied or revoked, 9 were identified where requests were made to the Defense Investigative Service for access to investigative material. The GAO noted that in January 1992, Defense officials said the regulations would be revised to require that employees be told, in writing, how to obtain access to investigative materials about themselves. (p. 4, pp. 8-9/GAO Draft Report)

Now on pp. 6-7.

DoD Response: Concur. While the Defense Investigative Service and other DoD investigative agencies are extremely responsive to Privacy Act requests for investigative files from the subjects of investigation, the DoD will implement a policy that will require all DoD adjudicative facilities to include instructions for requesting investigative files in all letters of intent to deny or revoke a security clearance. This policy will also be included in DoD 5200.2-R by the end of 1992.

FINDING E: The Extent That Unfavorable Decisions Are Heard By Independent Decisionmakers. The GAO observed that the regulations of Defense, Energy, and State require that employees be given an opportunity to appeal unfavorable determinations. The GAO found that Energy uses non-agency examiners to handle appeals, whereas Defense and State generally use officials or employees within, or in close relationship administratively, to the organizations that had earlier recommended denial or revocation of the clearances. The GAO concluded, therefore, that the Defense and State appeal boards do not give as clear a perception of being administratively independent.

The GAO reported that the DoD personnel security regulation allows employees to appeal to a higher level of authority designated by the Service or other Component, but does not specify the process. The GAO found that as a result, the Services and Components have established different appeal processes. The GAO then discussed the appeal processes followed by the Services and the Defense Mapping Agency, and also the appeal process for contractor employees.

The GAO also discussed the results of its review of a sample of appeals cases. According to the GAO, the case files for Army, Air Force, and Defense Mapping Agency employees contained documentation supporting the recommendations of panel or board members, and indicated that appellants had been notified of the reasons for the denial of appeals.

The GAO found, however, that the Navy case files did not contain documentation supporting appeal board members' decisions, and letters to appellants did not contain reasons for the denial of appeals by the boards. With regard to contractor employees, the GAO found that case files contained supporting documentation and appellants had been told the reasons for the recommendations.

Now on pp. 7-10.

In its examination of contractor employee appeals, the GAO found that the Department Counsel had initiated the appeal of 21 of 42 cases remanded for hearing examiners. The GAO also found that of 18 favorable determinations, 15 were reversed. The GAO noted in another case, however, an unfavorable determination appealed by the Department Counsel was reversed and the employee was given a clearance. The GAO also pointed out that there is no stated limit on the number of times the Department Counsel may appeal a hearing examiner's determination, and cited an example where the Department Counsel appealed three times unsuccessfully, but was successful on a fourth appeal, after the hearing examiner was appointed to a new position and replaced. The GAO reported that in January 1992, DoD officials said the regulation was being revised to give appeal boards authority to reverse hearing examiners' determinations. The GAO concluded that this should eliminate multiple appeals of the same case by the Department Counsel. (p. 4, pp. 9-14/GAO Draft Report)

DoD Response: Partially concur. Applicable DoD Directive 5220.6 governing due process procedures for contractor employees was revised March 16, 1992, to give the appeal board authority to reverse administrative judges. The GAO has not demonstrated that processing appeals of clearance denials or revocations within the same agency has led to abuses of individual due process protections. On the contrary, many DoD Components that rule on appeals from their own employees routinely reverse previous unfavorable determinations and restore the security clearance. There is no empirical evidence that would lead to the conclusion that independent appeals board would be more unbiased or fair in their rulings than is presently the case. However, the issue of creating an independent board to consider clearance appeals will be examined further in the course of an ongoing study regarding consolidation of adjudicative activities in the DoD. A final decision can be expected during 1992.

The DoD concurs that documentation of clearance appeals needs to be improved. While the Defense Clearance and Investigations Index reflects the final outcome of the appeals process, the supporting documentation should be retained for future retrieval. Such a policy will be included in the forthcoming revision to DoD 5200.2-R and should be in effect by the end of 1992.

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RECOMMENDATIONS

Now on p. 10.

RECOMMENDATION 1: The GAO recommended that the Secretary of Defense revise suspension procedures to require detailed notification letters to individuals (pp. 14-15/GAO Draft Report).

DoD Response: Concur. The DoD will develop guidance by the end of 1992, requiring that all suspensions of access be communicated in writing to the subject, including the reason for the action, consistent with the interests of national security.

Now on p. 10.

RECOMMENDATION 2: The GAO recommended that the Secretary of Defense revise suspension procedures to require prompt reporting of actions to central clearance offices (pp. 14-15/GAO Draft Report).

DoD Response: Concur. More detailed guidance pertaining to expeditious reporting of all suspensions of access by the Component field elements to the central adjudication facility will become DoD policy in DoD 5200.2-R by the end of 1992.

Now on p. 10.

RECOMMENDATION 3: The GAO recommended that the Secretary of Defense revise suspension procedures to require time limits for subsequent actions (pp. 14-15/GAO Draft Report).

DoD Response: Partially concur. The DoD policy continues to be that suspension of clearance actions be resolved as expeditiously as possible. Since each case is different with regard to its scope and complexity, some can be resolved in a matter of days while other more involved cases could take months, especially if they involve a lengthy investigation by the Defense Investigative Service or a non-DoD agency like the Federal Bureau of Investigation or civil authorities. Many DoD adjudication facilities have an internal tracking system to monitor suspension cases to ensure that they do not "fall between the cracks." Once the investigation is completed, due process procedures can then consume a significant amount of time, especially if the subject requests extensions of deadlines in order to obtain his or her investigative file and/or seek assistance from legal counsel. Such extensions are routinely granted. While the DoD does not agree with setting a fixed period of time as a matter of policy, after which the suspension must be resolved, it does concur with the concept of monitoring suspension cases to ensure every effort is made to resolve these cases as expeditiously as possible. Provisions for such monitoring will be included in the revision of DoD 5200.2-R by the end of 1992.

Now on p. 10.

RECOMMENDATION 4: The GAO recommended that the Secretary of Defense revise suspension procedures to require final resolution of all clearance suspension actions(pp. 14-15/GAO Draft Report).

DoD Response: Partially concur. The DoD supports the complete and expeditious resolution of all suspensions of clearance or access. If the subject remains affiliated with the DoD, the Component must comply fully with the due process provisions in DoD 5200.2-R. However, once a person has left the DoD (quit, fired, discharged, deserted, incarcerated, etc), there is no basis for continuing due process and the appropriate code is entered in the Defense Clearance and Investigations Index to indicate that the case is closed. If the individual returns to the DoD and a clearance is required, a complete reevaluation will be undertaken of all relevant information and due process procedures afforded where required. Chapter 8, DoD 5200.2-R, will be reviewed to ensure the language contained therein accurately reflects that a final action is to be taken on all clearance suspension actions.

Now on p. 11.

RECOMMENDATION 5: The GAO also recommended that the Secretary of Defense require that individuals be told by letter of procedures for requesting access to investigative records about themselves (p. 15/GAO Draft Report).

DoD Response: Concur. As referred to in the DoD response to Finding D, a change to DoD 5200.2-R will be made by the end of 1992 requiring such notification.

Now on p. 11.

RECOMMENDATION 6: The GAO also recommended that the Secretary of Defense consider establishing an independent board or boards to hear appeals from Defense and contractor employees (p. 15/GAO Draft Report)

DoD Response: Concur. As referred to in the DoD response to Finding E, the issue of creation of an independent board or boards to hear appeals will be considered during the review of consolidated adjudication options for the DoD. A final decision will be made by the end of 1992.

Comments From the Department of Energy

Department of Energy
Washington, DC 20585

April 27, 1992

Mr. Frank C. Conahan
Assistant Comptroller General
National Security and
International Affairs Division
U.S. General Accounting Office
Washington, D.C. 20548

Dear Mr. Conahan:

The Department of Energy (DOE) appreciates the opportunity to review and comment on the General Accounting Office (GAO) draft report entitled "Due Process: Defense, Energy, and State Security Clearance Denials and Revocations."

GAO conducted an audit of the due process practices from the Departments of Defense, Energy, and State for individuals for whom security clearances are denied or revoked. Their report focused on the agencies' practices for suspending individuals' security clearances; whether individuals are given access to their investigative records; and whether appeals to unfavorable decisions are heard by independent decision makers who document their decisions.

The Department has completed an independent evaluation and prepared comments on the draft report which are enclosed. DOE agrees with the GAO recommendations to inform individuals in writing when their clearances are suspended and the procedures for obtaining access to investigative records about themselves.

In regard to the recommendation that individuals be informed of the reason(s) for clearance suspension at the same time as notification of clearance suspension action, the Department has developed an additional procedure that will provide the individual involved in the clearance suspension action with a letter stating the general reasons for clearance suspension.

Sincerely,

Elizabeth E. Smedley

Elizabeth E. Smedley
Acting Chief Financial Officer

Enclosure

COMMENTS ON THE GAO DRAFT REPORT
"DUE PROCESS:
DEFENSE, ENERGY, AND STATE SECURITY CLEARANCE DENIALS AND REVOCATIONS"

Now on p. 3.

1. page 5 "... If the hearing is authorized, the manager has 30 days to deliver a letter of intent to revoke an individual's clearance."

comment- This statement incorrectly states the Department of Energy (DOE) procedures. The sentence should read: "If the hearing is authorized, the manager has 30 days to deliver a **notification letter to the individual that states the information that creates a doubt as to the individual's eligibility for clearance and explains the individual's rights under DOE administrative review procedures."**

A DOE manager does not have the authority to revoke an individual's security clearance.

Now on p. 8.

2. page 11 "..., requires the Assistant Secretary for Defense Programs to inform ..."

comment- During the course of this audit, the Office of Security Affairs was responsible to the Assistant Secretary for Defense Programs. On April 1, 1991, the Office of Security Affairs was realigned from Defense Programs to a direct reporting relationship with the Under Secretary. The Delegation of Authorities, signed by the Secretary on December 23, 1991, transferred security responsibilities from the Assistant Secretary for Defense Programs to the Director, Office of Security Affairs.

Now on p. 11.

3. page 15 "We recommend that the Secretary of Energy require that letters be used to tell individuals (1) when their clearances are suspended, including the reasons, and (2) the procedures for getting access to investigative records about themselves."

comment- DOE concurs with the recommendation that suspension letters be used to tell individuals when their clearances are suspended. The Department will provide a letter to the suspended individual stating the reasons, in general terms, for clearance suspension action. 10 CFR 710 is being modified to reflect this procedure. The DOE also concurs in the recommendation that individuals be informed in writing as to the procedures for obtaining access to investigative records about themselves, specifically Privacy and Freedom of Information Acts regulations.

Further, individuals are offered a copy of the transcript prepared as a result of a DOE personnel security interview and, upon request, a copy of all material connected with the conduct of the hearing in their case, if one is held.

Comments From the Department of State

United States Department of State

Washington, D.C. 20520

MAR 11 1992

Dear Mr. Conahan:

Thank you for the opportunity to comment on your draft report, "Due Process: Defense, Energy and State Security Clearance Denials and Revocations" (GAO Job Code 398024). Comments are enclosed.

If you have any questions on this issue, please call Gary H. Gower, DS/I/EV on 663-0158.

Sincerely,

Barry J. Eisenhart
Deputy Chief Financial Officer

Enclosure:
As stated.

Mr. Frank C. Conahan,
Assistant Comptroller General,
National Security and International Affairs,
U.S. General Accounting Office,
441 G Street, N.W.,
Washington, D. C. 20548

GAO Draft Report: Due Process: Defense, Energy, and State Security Clearance Denials and Revocations (GAO Job Code 398024)

GAO RECOMMENDATION: "We recommend that the Secretary of State enforce compliance with the requirement that clearance suspension letters contain the reasons for the action. We also recommend that the Secretary consider establishing an appeal board independent of the organizations involved in unfavorable clearance decisions."

We cannot concur with the recommendation. The report is in error in asserting that "State's regulation requires that letters containing reasons be sent to the individuals when their clearances are suspended" (page 3), and that "Although State's regulation contains this requirement, the letters did not contain the reasons" (page 4). GAO's error is the result of a misreading of our regulations, which do not require that clearance suspension letters contain the reasons for the action and, in this regard, do not differ from Defense and Energy regulations. Mr. Irv Boker of GAO was advised of this error during an exit briefing with the Office of Investigations and later telephone conversations.

The provision GAO cites is contained in 3 FAM 161.2b, a general policy section addressing actions that may be taken under P.L. 81-733, to include suspension from employment and other actions of a more limited nature, such as revocation of clearance and temporary suspension of clearance. The specific sentence cited by GAO, in 3 FAM 161.2b(3), is qualified by reference to subsequent detailed procedural sections that clearly distinguish between procedures applicable to clearance revocations and reductions, and those applicable to temporary administrative suspensions of clearance. Since the draft GAO report continues to cite this provision as overriding policy, and does not recognize the qualification, we must make this point very clear by quoting our regulation:

3 FAM 161.2b(3). "The employee will be informed by letter of such action and the reasons therefor to the extent permitted by the national security, in accordance with procedures set forth in section 163 below." The reference to "such action" refers to the range of actions discussed in the preceding subparagraphs of 3 FAM 161.2b, which are addressed in detail in two subsections of Section 163, subsections 163.4 and 163.5. Subsection 163.4 sets forth procedures for revocation or reduction of security clearance eligibility, and provides fully for notice of intent to take such action, along with the reasons therefor and guidance on appeal procedures. Subsection 163.5 clearly explains various administrative alternatives to, or interim measures pending, suspension from employment or revocation/reduction of security clearance eligibility.

The latter section is clearly intended to provide administrative measures to ensure the protection of national security pending resolution of issues that may or may not lead to formal revocation or reduction of security clearance. Such measures include suspension of clearance as a nonprejudicial means of withholding access to classified information until security concerns are fully resolved by investigation and evaluation, and are usually resolved by reinstatement of clearance. As such measures are nonprejudicial and preliminary in nature, often in the early stages of a special investigation, it would be inappropriate to initiate a formal documentation of charges against the employee. Rather, the employee is contacted directly by investigative Special Agents of the Diplomatic Security Service to be informed of the allegations and interviewed to obtain and document the employee's responses.

In erroneously arguing that State regulations differ from Defense and Energy regulations (by supposedly requiring inclusion of the reasons in written employee notifications on the suspension of security clearance), the GAO appraisers missed the more critical fact that, by confronting employees directly with the allegations against them and documenting their responses, all three Departments uniformly provide employees a form of investigative due process that is normally more effective in resolving such issues than formal statements of charges.

While the foregoing addresses our main objection to the report as written, the GAO report also fails to acknowledge State's position on the following issues, resulting in a lack of balance.

Now on pp. 7-10.

With regard to the suggestion that State's (and Defense's) appeal boards do not give as clear (as Energy's) a perception of being administratively independent (pages 4 and 10), we note that the non-agency examiners used by Energy do not decide the cases finally, but only make recommendations to Energy officials. In this respect, Energy's process differs only in the interposition of an intermediary body between the appellant and the decision makers. State sees no need for such an intermediary body. The issues are sufficiently important that designated senior officials, who are in no way associated with the original recommendation, simply make the time to review the appeal and the investigative file and render a final decision after discussing the issues.

Now on pp. 3-4

Regarding the timeliness of efforts to resolve issues following the suspension of security clearance (pages 5 and 6 of the report), two points must be made that the report does not recognize. First, while we do indeed set ourselves a goal to strive for resolving issues within 90 days, the policy clearly states that the suspension of clearance must be continued in any case until the relevant issues have been fully resolved sufficiently to allow the restoration or revocation (or reduction of the level) of clearance. Finally, State requires that proposals to revoke clearance defer to Personnel disciplinary procedures in the event such issues are resolved by a proposal by Personnel to separate the employee for cause. A number of the cases which have been pending for more than 90 days have to remain in that status, because no further security action may be taken until the resolution of employee appeals or grievances related to such Personnel proposed separations.

STATE RECOMMENDATIONS:

Request GAO's report be rewritten to correct the erroneous assertion that State requires notification of the suspension of clearance to include the reasons for the action.

Request that the GAO report acknowledge State's position that it does not need to add an intermediary body of non-agency examiners to ensure the independence of State's appeal panel.

Request that the GAO report acknowledge that State's goal of resolving cases is a target, not a matter of compliance.

Major Contributors to This Report

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