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ADMINISTRATIVE DUE  
PROCESS

Denials and Revocations of  
Security Clearances and  
Access to Special Programs

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Mr. Chairmen and Members of the Subcommittees:

We appreciate the opportunity to discuss today our reviews of the administrative due process procedures that are in place for individuals for whom security clearances and access to special programs are denied or revoked.

#### BACKGROUND

In January 1989, the executive branch released a proposed executive order for agency comment that would have established uniform standards for granting and retaining security clearances for federal and contractor employees. One section of the order would have made it possible for agency heads to deny administrative due process to individuals for whom clearances are denied or revoked. Following release of the proposed order, which has not yet been finalized, you asked GAO to review the administrative due process policies and procedures of several agencies. Because of the size of this undertaking, we conducted this review in two phases. The first phase covered security clearance denials and revocations at the Departments of Defense, Energy, and State.<sup>1</sup> The second phase covered denials and revocations of access to special access programs (SAP) and sensitive compartmented information (SCI) at Defense.

When unfavorable information surfaces or actions occur that indicate that granting or continuing an individual's clearance or access to a SAP or SCI is not clearly consistent with national security interests, the clearance and/or access to classified information may be denied or revoked. Generally, an individual's clearance or access to classified information is suspended pending resolution of the unfavorable information. Before a clearance or SAP/SCI access is denied or revoked, it is generally agreed that an individual should receive fair treatment, including notification, reasons, and a chance to appeal a proposed action, provided that classified information is not subjected to unauthorized disclosure. This process is commonly referred to as administrative due process. There is no legislative requirement or executive order that spells out the due process requirements for government employees. Agencies have set up varying procedures for such employees.

There is a 1960 executive order that applies to contractor employees and their access to classified information, but the order

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<sup>1</sup>Security Clearances: Due Process for Denials and Revocations by Defense, Energy, and State (GAO/NSIAD-92-99, May 6, 1992).

does not mention special access programs.<sup>2</sup> The executive order specifies procedures for administrative due process for contractor employees, including evidentiary hearings. In compliance with the order, the Departments of Defense and Energy have established procedures for contractor employees in cases where security clearances are denied or revoked. Energy's procedures also apply to its government employees. Defense has separate procedures for its military and civilian employees that are not as extensive as the ones established for contractor employees, because they do not provide for evidentiary hearings. Essentially, Defense gives its military and civilian employees written notice of proposed unfavorable clearance or access determinations and the reasons for them, a chance to respond, and an opportunity to appeal to a higher authority.

The Director of Central Intelligence has established minimum appeal procedures for government and contractor personnel for whom SCI access is denied or revoked. Notification of unfavorable action does not have to be written, and there is no requirement to provide reasons for the action. These procedures, as well as the opportunity to appeal an unfavorable decision, can be waived.

Over 3 million military, civilian, and contractor employees hold clearances granted by Defense, Energy, and State. During fiscal year 1992, Defense granted about 640,700 clearances and about 68,100 SCI accesses. Defense denied about 1,200 clearances and revoked about 2,900. It also denied about 900 SCI accesses and revoked about 500. The total number of SAP access authorizations is unknown, but is estimated to be between 200,000 and 250,000. The number of denials and revocations of SAP access is also unknown.

#### RESULTS IN BRIEF

Our reviews indicated that a wide range of practices are observed by Defense, Energy, and State when these agencies deny or revoke clearances of government or contractor employees to classified information, and by Defense when it revokes access to special access programs and sensitive compartmented information. For example, Defense and State suspended clearances for long periods without telling employees why. We also found that Defense suspended many clearances indefinitely, never revoking them, even though the individuals had either been discharged or incarcerated because of the actions that prompted the suspensions. Defense and Energy did not tell individuals how they could obtain investigative information about themselves. Finally, it appeared to us that the appeal procedures at Defense and State could be perceived as

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<sup>2</sup>Executive Order 10865, "Safeguarding Classified Information Within Industry" (Feb. 20, 1960).

lacking independence because the officials hearing the appeals were either involved in the unfavorable determinations or were in the same chain of command.

Our review of administrative due process for Defense's special access programs showed that the Navy and Air Force did not provide the process to government or contractor employees. However, the three services were providing due process when access to sensitive compartmented information was initially denied or revoked. The Navy and Air Force appeal procedures for sensitive compartmented information, like their procedures for security clearances, could be perceived as lacking independence.

We are particularly concerned about the special access program administrative due process procedures proposed for contractor employees in the recently authorized National Industrial Security Program.<sup>3</sup> If these procedures are adopted, contractor employees could be denied due process because the procedures can be waived. Even if the procedures are not waived, their use would result in contractor employees receiving less than what is generally required by DOD's regulation for these programs.

First, I'll briefly discuss the findings in our May 1992 report on due process for security clearance denials and revocations.

CLEARANCES SUSPENDED FOR LONG PERIODS  
WITHOUT FORMAL NOTIFICATION OF REASONS

Defense, Energy, and State regulations did not specify how or what individuals were to be told when their access or clearances were suspended. However, two Defense components--the Defense Mapping Agency and Defense Investigative Service (for contractor employees)--had regulations requiring written notices of suspensions with reasons.

Energy, unlike Defense and State, considered suspensions to be the first step in its administrative due process procedures. It specified time frames for completing suspensions and other procedures. Energy's treatment of suspensions may account for its generally shorter suspension periods for Energy and contractor employees, compared to those of Defense and State. As noted in table 1, only 16 percent of the Energy cases in our random sample were in a suspended status over 6 months, compared with 88 percent for Defense and 59 percent for State.

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<sup>3</sup>Executive Order 12829 authorized this program on January 6, 1993. It establishes standards for protecting national security information held by contractors and provides for administrative due process procedures for contractor employees.

Table 1: Suspensions of Access or Clearances

<u>Months</u>	<u>Air Force<sup>a</sup></u>		<u>Energy</u>		<u>State</u>	
	<u>Number</u>	<u>Percent</u>	<u>Number</u>	<u>Percent</u>	<u>Number</u>	<u>Percent</u>
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	<u>6</u>	<u>23</u>	<u>1</u>	<u>4</u>	<u>7</u>	<u>26</u>
Total	<u>26</u>	<u>100</u>	<u>25</u>	<u>100</u>	<u>27</u>	<u>100</u>

<sup>a</sup>Army and Navy case files contained insufficient data to determine suspension periods.

DOD CLEARANCE SUSPENSIONS  
NOT FORMALLY RESOLVED OR  
REPORTED AS REVOCATIONS

DOD's regulation requires commanders and organization heads to suspend individuals' access when derogatory information surfaces. Then, they are to send the cases to the central adjudication offices for disposition. About 70 percent of Army, Navy, and Air Force cases in fiscal year 1990 were not sent forward. The individuals were separated or discharged from the military or incarcerated, with no final action taken. As a result, the individuals' clearances were left indefinitely suspended with no final determination made on the status of the clearances, even though the individuals had been separated from the military.

Further, DOD's annual clearance activity reports substantially understated the number of individuals whose clearances were revoked or could have been revoked for security reasons. For example, DOD reported about 5,300 clearance revocations for the Army, Navy, and Air Force for fiscal year 1990. However, it did not report 11,500 cases that were not sent to the central adjudication offices. In the Air Force, only about 9 percent of the cases were revoked by the central adjudication office; 91 percent, or about 4,200 clearances, were left indefinitely suspended, even though the individuals were no longer in the Air Force or were incarcerated in military or civilian jails.

INDIVIDUALS NOT TOLD HOW TO GET  
ACCESS TO INVESTIGATIVE RECORDS

The DOD regulation for government employees and the Energy regulation for government and contractor employees did not require that the agencies inform individuals how to obtain investigative records about themselves. However, the DOD regulation for contractor employees provided that, upon request, employees be furnished with copies of the investigative records supporting

unfavorable determinations. State's regulation also provided for notification of access procedures.

PERCEPTION OF INDEPENDENT APPEAL PROCESS  
NOT APPARENT AT DEFENSE OR STATE

Energy's due process procedures for security clearances, which are applicable to Energy and contractor employees, give a perception of independence because the individuals hearing appeals are not part of the adjudicative process that produced an unfavorable clearance determination. DOD's regulation leaves the type of appeal process to the individual services and components. State's procedures delineate the officials authorized to hear appeals. The designated appellate panels at State and most of those at DOD did not appear to be administratively independent of the officials responsible for making the clearance denial and revocation decisions being appealed. Exceptions at DOD were the Army military and civilian employees and most DOD contractor employees.

There was an unusual situation at the Air Force. The three-member appeal panel met at the central clearance office, where two nonvoting members--the Director or Deputy Director of the office and a chief adjudicator, who were responsible for the denial or revocation--were present during the panel's meetings to provide technical assistance. However, appellants were not represented at the meetings.

We recommended that Defense and Energy revise their regulations to provide that suspension notification letters to individuals contain the reasons for unfavorable actions and procedures for requesting access to their investigative records. The two agencies agreed with our recommendations and said that their regulations would be revised accordingly. We also recommended that Defense resolve clearance suspensions more promptly and consider establishing appeal boards that can be perceived as being independent of the groups that make final unfavorable security clearance determinations. Defense said that it would study the makeup of the appeal panels during its review of consolidated adjudication options and review its regulation to ensure that the language ensures that final action is taken on all clearance suspensions.

State did not agree with our recommendations that (1) it should send letters to individuals informing them that their security clearances are suspended, with the reasons for the action, and (2) that appeal boards consist of officials independent from the individuals who made the original unfavorable clearance determinations. State 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 statement of charges. With regards to our recommendation about the appeal board, State said that it did not need an intermediary body

between the appellant and the decision makers. We do not agree with State. We believe our recommendations are still valid and in line with procedures at Defense and Energy.

Next, I'll briefly discuss the findings in our current review of administrative due process in DOD's special access programs.

NO ADMINISTRATIVE DUE PROCESS  
IN NAVY AND AIR FORCE SAPs

The Navy and Air Force were not providing administrative due process to government personnel (military or civilian) or contractor employees for whom access to a SAP was denied or revoked. DOD's personnel security program regulation generally requires it for government personnel, but there is no comparable DOD regulation requiring it for contractor employees. Although there is a 1960 executive order that requires agencies to provide administrative due process to contractor employees for whom access to classified information is denied or revoked, DOD told us that it believes that the order is not applicable to SAPs. The Army was providing administrative due process to contractor employees and Army personnel.

ADMINISTRATIVE DUE PROCESS  
PROVIDED FOR ACCESS TO SCI

The three services provided administrative due process to government and contractor employees for whom access to SCI was denied or revoked, but followed different procedures. The Army followed procedures in DOD's personnel security regulation, while the Navy and Air Force followed the minimum procedures prescribed by the Director of Central Intelligence, which is permitted by DOD's regulation. As a result, individuals associated with the Army were notified that they would be denied access or that their access was being revoked, while those associated with the Navy and Air Force were notified after the access was denied or revoked. The Army used the same procedures for security clearances and accesses for SCI and SAPs, as provided for in the DOD regulation.

CONTRACTOR EMPLOYEES WILL RECEIVE  
LESS SAP ADMINISTRATIVE DUE PROCESS IN  
THE NATIONAL INDUSTRIAL SECURITY PROGRAM

Administrative due process procedures proposed for contractor employees under the recently authorized National Industrial Security Program are patterned after the Director of Central Intelligence's minimum appeal procedures for SCI. If these procedures are adopted, contractor employees would receive less due process than that generally required by DOD's regulation for SAPs, or they could be denied it completely, as now allowed in the SCI appeal procedures.



The provisions of the SCI procedures require a determination that it is in the national interest to (1) inform an individual of access denial or revocation, (2) inform the individual that the reasons for an unfavorable access action may be requested (no requirement that the reasons be provided), and (3) allow the individual to appeal the unfavorable access action. Under DOD's personnel security regulation 5200.2-R, DOD is required to give an individual written notification of a proposed security clearance or SCI/SAP access denial or revocation action, including the reasons; an opportunity to respond in writing; a written response explaining why the final action is being taken; and an opportunity to appeal to a higher authority within the service or DOD component.

The proposed procedures, with the provision that permits the waiving of administrative due process, are similar to the provision in the January 1989 draft executive order that some Members of the Congress objected to. The draft order's provision would have given agency heads the authority to waive administrative due process.

In addition, DOD told the Members of these two Subcommittees during a February 1990 hearing that it followed the SCI appeal procedures in its SAPs. In fact, however, it actually followed the procedures' waiver authority and did not provide any administrative due process to either contractor or government employees in those programs. That practice is contrary to the DOD regulation covering DOD employees, but is in conformity with the SCI procedures prescribed by the Director of Central Intelligence.

DOD's regulations do not specifically provide for contractor employee SAP administrative due process.

NAVY AND AIR FORCE SAP AND SCI  
APPEAL PROCEDURES CAN BE PERCEIVED  
AS LACKING INDEPENDENCE

SCI appeal procedures of the Navy and Air Force can be perceived as not being independent because some officials handling the appeals are in the same chain of command as the individuals involved in the unfavorable adjudication of the SCI access or are higher officials in the same command. For example, in one Navy office that adjudicates SCI access, the three officials adjudicating appeals are all from the same command as the adjudicating office. Therefore, an appellant or others could perceive a lack of independence on the part of the officials adjudicating an appeal.

In contrast, the Army's appeal process provides for appeals to be adjudicated by the Deputy Chief of Staff for Intelligence, who is not in the same command as the central adjudication office. The Army uses the same process for security clearances and SCI/SAP accesses. The Army, pursuant to DOD's personnel security regulation, has one central adjudication office that handles security clearances and SCI/SAP accesses, which may make it easier

for it to have an appeal process that appears to be independent. By contrast, the Navy and Air Force have multiple offices that adjudicate security clearances and SCI/SAP accesses and handle appeals.

We recommended that DOD establish criteria for the appeal process that will make appeal panel or board members appear to be independent of the adjudication process; establish procedures that ensure that the services and components are complying with the DOD regulation requiring administrative due process for SAPs; and propose that the National Industrial Security Program establish administrative due process procedures for SAPs that are similar to DOD's procedures for its own personnel.

DOD generally did not agree with our findings. We made some revisions in response to their comments, but basic differences exist with respect to (1) the interpretation of the requirements of DOD's personnel security regulation, 5200.2-R; (2) DOD's practical definition of administrative due process; and (3) the results of our review and accompanying recommendations. DOD said that, consistent with several paragraphs in DOD Regulation 5200.2-R, it sometimes upgraded SAP adjudicative standards to those of the Director of Central Intelligence for SCI, but the approval of the Deputy Secretary of Defense was needed to waive the Director's SCI procedures.

We believe that the regulation's language is very clear in specifying the administrative due process generally required when access to a SAP is denied or revoked. The paragraphs referred to by DOD do not mention administrative due process. They refer to definitions and descriptions of SAPs and the approval needed to use special investigative procedures. The DOD directive governing SAPs requires compliance with all DOD regulations, including 5200.2-R.

With respect to the waiving of the Director of Central Intelligence's procedures for SCI, a DOD official responsible for SAP security policy said that he knew of no approval being given by the Deputy Secretary of Defense to waive the procedures. Even though DOD Regulation 5200.2-R does not specify that the administrative due process procedures may be waived under extenuating circumstances, we recognize that some programs, because of national security considerations, will be authorized a specific exemption. However, in every SAP case that the Navy and Air Force gave us for review, the individuals did not receive the due process required by DOD Regulation 5200.2-R, nor did they receive the due process specified for SCI by the Director of Central Intelligence. The individuals were not notified that an access had been denied or revoked and were not given reasons for the actions. In contrast, the Army seemed to be providing administrative due process under existing regulations for all individuals for whom access to a SAP or SCI was denied or revoked.

Although DOD did not concur with all of our findings, DOD said that our report will facilitate efforts to refine existing policy documents. DOD intends to revise its regulations to specifically define the requirements for administering due process in SAPs.

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Mr. Chairmen, that concludes my prepared testimony. We would be happy to respond to questions that you may have.

DOD AUTHORIZATIONS FOR ACCESS TO  
CLASSIFIED INFORMATION - FY 1992

**TOP SECRET, SECRET, AND CONFIDENTIAL CLEARANCES**

Total held	3,100,000
Granted	640,700
Denied	1,200
Revoked	2,900
Discharged before revocation	12,800

**SENSITIVE COMPARTMENTED INFORMATION AUTHORIZATIONS**

Total held	214,500
Granted	68,100
Denied	900
Revoked	500

**SPECIAL ACCESS PROGRAM AUTHORIZATIONS**

Total held estimated at:	200,000 - 250,000
Granted	N/A
Denied	N/A
Revoked	N/A

Note: Figures included military, civilian, and contractor personnel.

ACCESS REQUIREMENTS FOR  
CLASSIFIED INFORMATION

<u>INFORMATION CATEGORY</u>	<u>REQUIREMENTS FOR ACCESS</u>
TOP SECRET, SECRET and CONFIDENTIAL	<ul style="list-style-type: none"><li>● Security clearance at or above level of classified information</li><li>● Need-to-know</li></ul>
SENSITIVE COMPARTMENTED INFORMATION (SCI)	<ul style="list-style-type: none"><li>● Top secret clearance</li><li>● Meets Director of Central Intelligence SCI standards</li><li>● Need-to-know</li></ul>
SPECIAL ACCESS PROGRAMS (SAPs)	<ul style="list-style-type: none"><li>● Usually Top Secret or Secret clearance</li><li>● Meets standards for the program</li><li>● Need-to-know</li></ul>

**ADMINISTRATIVE DUE PROCESS REQUIRED FOR**  
**DOD PERSONNEL AND CONTRACTOR EMPLOYEES**

	<u>DOD Personnel</u>			<u>Contractor Employees</u>		
	<u>Security clearances</u>	<u>SCI access</u>	<u>SAP access</u>	<u>Security clearances</u>	<u>SCI access</u>	<u>SAP access</u>
Executive Order 10865	N/A	N/A	N/A	Yes	*	*
DOD Regulation 5200.2-R	Yes	Yes	Yes	N/A	N/A	N/A
Director of Central Intelligence Directive 1/14	N/A	Yes	N/A	N/A	Yes	N/A

Note: N/A is not applicable.

\*It is not clear whether the order covers classified SCI and classified information in a SAP.

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