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29 November 2010

The Honorable Anna G. Eshoo, Chairman
The Honorable Sue Myrick, Ranking Member
House Permanent Select Committee on Intelligence
Subcommittee on Intelligence Community Management
United States House of Representatives
Capitol Visitor Center HVC-304
Washington, DC 20515

Dear Chairwoman Eshoo and Ranking Member Myrick:

This Wednesday, 1 December 2010, the Subcommittee on Intelligence Community Management will hold a hearing on Security Clearances. If history is any guide, the witnesses at this hearing will be senior officials from the agencies that comprise the Joint Security and Suitability Reform Team (“Joint Reform Team”), as well as a representative from the Government Accountability Office. All the previous hearings featuring the Joint Reform Team held by your subcommittee and the Senate Committee on Homeland Security and Government Affairs’ Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, have only called witnesses from the agencies to testify.

In light of this fact, it is our view that your subcommittee will not hear sufficient testimony concerning the myriad amount of real-life problems that Intelligence Community (“IC”) employees and contractors are facing in the current security and suitability process. As private attorneys with a combined 20 years of experience representing IC employees and contractors, we are submitting to you the enclosed list of the most pressing problems that we believe have not been adequately addressed by the agencies. The three problems described herein are but the tip of the iceberg of due process issues that we hoped the Joint Reform Team would address, so far without any sign of progress. We respectfully request that you seek answers from your witnesses about these issues in hopes of effecting meaningful reform that will actually be felt by the men and women caught in the process. Additionally, if the witness list is not finalized, we strongly suggest that you invite a witness who can speak to these matters and more from the perspective of the people who actually experience the security and suitability process first hand. Either of the undersigned are available to testify, and we can also suggest several other experts for your consideration.

To our knowledge, Congress has never before publicly engaged in a due process review of the IC's procedures to suspend, revoke, or deny security clearances, and instead has primarily limited its oversight to matters of efficiency. For too long the IC has proceeded in this area without checks or balances or any independent review. The Government Accountability Office has not been permitted to review the IC's procedures, despite having regularly investigated those of the Department of Defense. However, these matters are of paramount importance to the American national security workforce, and the types of inequities of which we speak are beginning to draw the attention of the general public, as evidenced by Saturday's *Washington Post* front page story on the revocation of former Defense Intelligence Agency employee John Dullahan's TS/SCI clearance without any due process (available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/26/AR2010112605017.html>). This story cites just one example of circumstances that cry out for independent Congressional oversight, and on behalf of dedicated employees like Mr. Dullahan and the men and women referenced in the attached memo, we respectfully implore you to answer the call.

Thank you very much for your time and consideration.



Kel McClanahan
Executive Director
National Security Counselors

Sincerely,



Mark S. Zaid
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Enclosures:
Items of Concern for Security Clearance Reform
Biographies of List Authors

ITEMS OF CONCERN FOR SECURITY CLEARANCE REFORM

The list below is presented in outline format to assist in its use as a quick reference source.

- **“Loss of Jurisdiction” for Contractors**
 - **Description:** A contractor is deemed ineligible, either by way of a proposed denial or revocation or simply an interim suspension, by a DoD agency¹ for the required level of security clearance to work on a particular contract. Prior to adjudication of the appeal, the employer either terminates the individual’s employment or otherwise withdraws sponsorship. Once notified of this, the DoD agency ceases all administrative due process procedures as a result of a “loss of jurisdiction”
 - **Why It Is a Problem:**
 - § Until the individual regains sponsorship by a contractor, the appeals process, which is afforded by way of Executive Orders 10,865, as amended, and 12,968, as well as DoD Directive 5220.6, will not be resumed due to the agency’s “loss of jurisdiction.”
 - § Thus, the individual has no independent means by which to obtain due process and challenge or mitigate the allegations asserted against him.
 - § The contractor’s Joint Personnel Adjudication System (“JPAS”) (which will soon be replaced by another system) record will be “red-flagged” and reflect either the interim suspension or a proposed denial/revocation and that there was a “loss of jurisdiction” prior to adjudication.
 - § As a version of the JPAS record is available to eligible defense contractors as well as federal agencies, the practical reality is that the individual has become completely stigmatized and is unlikely to be hired, and indeed may be permanently precluded from ever exercising his due process rights.
 - **Proposed Solution:** Ensure consistency throughout the federal system and eliminate “loss of jurisdiction” and mandate that administrative due process is required for all individuals whose security clearances are either suspended or proposed for denial/revocation regardless of the existence of sponsorship.

¹ DoD and its non-intelligence component agencies are normally the only perpetrators of this practice. Most other agencies allow a contractor to complete the appeal process regardless of the absence of a continuing need-to-know or sponsor. Successfully overturning the adverse decision, however, does not automatically grant an individual a security clearance but rather restores their eligibility if sponsorship is renewed.

- **Suggested Questions for the Witnesses:**

- § *What steps is the Joint Reform Team taking to address the problems faced by contractors caught in the security clearance appeals process when agencies “lose jurisdiction” over their appeals due to their removal from the contracts that required the clearances?*

- § *Why are contractors whose sponsorship or employment is removed treated differently with respect to the granting of due process in challenging proposed adverse security clearance actions within DoD from other agencies throughout the government?*

- **Agencies Substituting Suitability Decisions for Security Clearance Decisions in Order to Avoid Providing an Individual with Administrative Due Process**

- **Description:**

- § With respect to when an agency denies or revokes an individual’s security clearance, or a proposal thereto, the agency is required by various Executive Orders and internal regulations to provide a minimal level of specific due process including, but not limited to, being provided: (1) a comprehensive and detailed written explanation of the basis for that conclusion; (2) a reasonable opportunity to reply in writing to, and to request a review of, the determination; and (3) an opportunity to appear personally before an adjudicative body or other authority and to present relevant documents, materials, and information at some point in the process.

- § On the other hand, an agency that rescinds a Conditional Offer of Employment for “suitability” reasons, most of which are identical to or mirror the bases cited for security clearance denials/revocations, is not required to provide any due process to that individual.² This problem only pertains to federal employees, not contractors.

- § In recent years there has been a growing trend in which agencies have determined that an individual’s ability to obtain a security clearance has become a Condition of Employment. Several agencies have seemingly adopted the practice of rendering a “preliminary” determination of an individual’s eligibility for a security clearance. An adverse decision is then relied upon as the basis to rescind the individual’s Conditional Offer of Employment on suitability rather than clearance grounds. The

² This issue addresses only those federal employees who are not entitled to due process protections afforded under the Civil Service Reform Act (“CSRA”) to challenge adverse personnel actions. Several of the agencies in the Intelligence and Law Enforcement Community, such as FBI and DIA, are generally exempt from the CSRA.

justification is that the individual would not be able to obtain a security clearance.

○ **Why It Is a Problem:**

§ Section 5.2(f)(1) of Executive Order 12,968 clearly states, “Nothing in this section shall require that an agency provide the procedures prescribed in subsection (a) of this section to an applicant where a conditional offer of employment is withdrawn for reasons of suitability or any other reason other than denial of eligibility for access to classified information.”

§ Certain agencies, such as the DIA, have relied upon this provision in conjunction with its “preliminary” determination that an individual would not be able to obtain a security clearance in a manner that enables them to avoid providing the otherwise-requisite due process guarantees.

- **Proposed Solution:** Prohibit federal agencies from rendering adverse suitability determinations based on the individual’s presumed “inability to obtain a security clearance” and require federal agencies to issue formal security determinations or create the existence of administrative due process procedures to allow for an appropriate challenge to the decision.

○ **Suggested Questions for the Witnesses:**

§ *What measures is the Joint Reform Team taking to ensure that agencies do not deny prospective employees due process by rendering suitability determinations based on clearance ineligibility?*

§ *How many Conditional Offers of Employment were rescinded based solely on the individual’s failure or inability to obtain a security clearance?*

§ *To what extent has the Joint Reform Team discussed this issue as part of its proceedings?*

· **Lack of Consistency between Federal Agencies in Releasing Relevant Investigative Records to Individuals Whose Security Clearances Were Denied or Revoked**

- **Description:** When an individual is denied a security clearance or faces revocation, he is entitled to request the entire investigative file, as permitted by the national security and other applicable law, which shall be promptly provided prior to the time set for a written reply. Some agencies dutifully comply with this requirement through their respective Offices of Security and provide the investigative file promptly. Others, instead, process the request as a routine Freedom of Information/Privacy Act (FOI/PA) request and delegate responsibility

to the agency's FOIA office, where it becomes caught in bureaucratic delay and infringes upon the individual's due process rights.

- **Why It Is a Problem:** Individuals are allowed a limited amount of time to pursue an appeal of a security clearance denial or revocation. Some agencies are quite adamant against granting requests for extension beyond 60 to 90 days. Yet typical FOIA processing in most agencies requires several months, if not years, for response. As a result, many individuals are forced to file their appeals without having access to the full set of records that served as the basis for the adverse security determination.
- **Proposed Solution:** Establish a uniform standard among federal agencies that requests for investigative files in security clearance challenges are processed by the relevant security, rather than FOIA, office, and that an individual's time for response cannot expire prior to the production of such a file.
- **Suggested Questions For The Witnesses:**
 - § *What efforts is the Joint Reform Team making to ensure that individuals who have been denied security clearances or face revocation are given full access to their investigative records in a timely manner?*
 - § *What efforts is the Joint Reform Team making to ensure that agencies across the IC have a consistent approach to the way in which they provide investigative records to individuals who have been denied security clearances or face revocation?*

BIOGRAPHIES OF LIST AUTHORS

Mark S. Zaid, Esq.

Mark S. Zaid specializes in matters relating to national security, foreign sovereign and diplomatic immunity, international torts and crimes, defamation, the Constitution (First and Fifth Amendments), and the Freedom of Information/Privacy Acts (FOI/PA). He teaches CLE courses for the D.C. Bar Association on both FOIA and defending security clearances. He was named as a 2009 and 2010 Super Lawyer, as well as a 2009 Best Lawyer by *Washingtonian* magazine, for his work on national security issues. Mr. Zaid is also the Executive Director of the James Madison Project, a Washington, D.C.-based organization with the primary purpose of educating the public on issues relating to intelligence gathering and operations, secrecy policies, national security and government wrongdoing. He is the co-editor of *Litigation Under the Federal Open Government Laws*. He is a graduate of Albany Law School of Union University (NY) and the University of Rochester (NY) and is a member of the Bars of New York State, Connecticut, Maryland, the District of Columbia, and numerous federal courts.

Kel McClanahan, Esq.

Kel McClanahan, Executive Director of National Security Counselors, is an attorney specializing in national security law and information and privacy law. He received his Master of Arts *cum laude* in Security Studies from the Georgetown University Edmund A. Walsh School of Foreign Service, his Juris Doctorate from the American University Washington College of Law, and his Master of Laws in National Security Law from the Georgetown University Law Center. In addition to his work with NSC, he serves as Counsel to the National Security Program for the National Whistleblowers Center, and he teaches National Security Law at the University of the District of Columbia and Point Park University. He also sits on the Board of Directors of the National Military Intelligence Association and serves as Associate Editor for the *American Intelligence Journal*. He is a member of the Bars of New York, the District of Columbia, and several federal courts.