

ELAINE MITTLEMAN, ESQ.
MEMORANDUM ABOUT THE SECURITY CLEARANCE PROCESS
July 27, 2015

This memorandum is prepared to discuss my thoughts about the security clearance process. These thoughts are based on my experience and my continued interest in the issues involving security clearances. I was a witness in a joint House hearing conducted on “Standards and Due Process Procedures for Granting, Denying, and Revoking Security Clearances.” I am submitting this memorandum with the hope that my experience may help improve the process.

The recent hacking of files at the Office of Personnel Management (OPM) brought to the attention of the public the massive amount of personal information collected and maintained on federal employees and applicants. This awareness should be an impetus to examining the entire security clearance process.

BACKGROUND OF SECURITY CLEARANCE PROCESS

A. Purpose and function of security clearances

The State Department website states that “[t]he purpose of a security clearance is to determine that a person is able and willing to safeguard classified national security information, based on his or her loyalty, character, trustworthiness, and reliability.” The website explains that there are various reasons why someone may be denied a security clearance. The website states that “[t]he most important factors in an investigation are the individual’s honesty, candor, and thoroughness in the completion of their security clearance forms.” Further, “every case is individually assessed, using the National Security Board’s 13 Adjudicative Guidelines, to determine whether the granting or continuing of eligibility for a security clearance is clearly consistent with the interests of national security.” <http://www.state.gov/m/ds/clearances/c10977.htm>

The history of the federal personnel security program was described in a PERSEREC report. The report explained that Executive Order 10450, Security Requirements for Government Employment, was created in response to increasing security concerns. It has changed little since April 24, 1953, when it was issued. The provision that “ all persons privileged to be employed in the departments and agencies of the Government shall be reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States” forms the standard for employment in the federal government.

Eric L. Lang, *Security Background Investigations and Clearance Procedures of the Federal Government*, PERSEREC Management Report 05-5, April 2005, p. A-5. <http://www.dhra.mil/perserec/reports/mr05-05.pdf>

The 2005 PERSEREC Report at p. 39 discussed the right to privacy as a fairness-related issue. It noted what has certainly become a very prominent concern now by stating that “[t]he evolving ability to use information technology to do data-mining does raise questions about its impact on the remaining privacy of cleared personnel.”

The Report further explained that “[t]he issue of monitoring of private life by government is controversial, and it has become more so after the terrorist attacks of September 11, 2001, and legislation passed in response to it such as the USA Patriot Act of 2001. Policies supporting increased monitoring and data-mining of information have expanded more rapidly than studies can be conducted to document the results of such activities.”

It is clear that there needs to be fresh analysis and review of the information collected on federal employees. The vast array of information collected must now be reviewed in light of heightened concerns for privacy and threats of hacking and other computer-related concerns. The security clearance process should not continue based primarily on the generic principles from the 1953 Executive Order.

There are also fundamental concerns about due process and the adequacy of review procedures for background investigations.

B. Security clearance determinations are not reviewable in court

The Supreme Court ruled in *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988), that “no one has a ‘right’ to a security clearance.” Further, a clearance may be granted only when clearly consistent with the interests of the national security. Also, a clearance “is only an attempt to predict [an individual’s] possible future behavior and to assess whether, under compulsion of circumstances or for other reasons, he might compromise sensitive information.”

It is significant that *Egan* and the security clearance process rest on the assumption that the process concerns the prediction of an individual’s future behavior and whether that individual might compromise sensitive information. However, there seems to be little analysis or basis for assuming that the

information collected serves as a valid and effective predictor of behavior. Moreover, there appears to be insignificant consideration as to whether the information collected is accurate, well-balanced and complete.

The PERSEREC Report at pp. 36-37 stated that “the due process rights of government employees faced with unfavorable access determinations at present remain less than for employees of defense contractors, and this could be argued to be unfair.”

I believe that the refusal of the courts to get involved in security clearance issues means that there has been less analysis and oversight about the effectiveness of the process. In other words, one branch of government – the judicial – is essentially uninvolved in the important issues of security relating to federal employees. Further, the lack of due process in conjunction with the massive collection of personal information on an applicant constitutes a seriously-flawed system with little opportunity to correct fundamental errors in the background investigation.

C. The goals of the security clearance process

The security clearance process apparently is intended to serve multiple goals. The security clearance process began during the Truman and Eisenhower Administrations when the concerns were about loyalty and membership in Communist organizations. Those concerns are no longer the primary issues in the security clearance process. Also, the security clearance process was used in an effort to detect spies, such as Aldrich Ames. It is not clear that these procedures were effective in finding spies.

Now the security clearance process apparently serves multiple goals. It seems that the process is used to predict behavior, including who might become violent. In addition, there are issues about who may be subject to coercion because of negative information or who might be considered untrustworthy. Also, there is now concern after the Snowden matter about predicting who might be likely to hack into computers or take sensitive information.

D. Continuing concerns about quality of OPM’s background investigations

There continue to be concerns about the quality of OPM’s background investigations. An article from Federal News Radio stated that “there are no national quality-assessment standards used by both investigators and agency

adjudicators, alike, to measure the quality of a particular investigation. The lack of standards means, in practice, that investigations can be missing key elements and still be classified by OPM as meeting investigative standards.” Jack Moore, *Concerns over quality continue to plague OPM’s background investigations*, Federal News Radio, May 14, 2014.

<http://federalnewsradio.com/congress/2014/05/concerns-over-quality-continue-to-plague-opms-background-investigations/>

An earlier article also discussed concerns about quality. “The Office of Personnel Management, which along with its contractors account for 90 percent of the federal government’s background investigations, has faced persistent challenges with security clearances over the years, according to the Government Accountability Office.” Jack Moore, *Quality not a priority in security clearance process, GAO says*, Federal News Radio, September 24, 2013.

<http://federalnewsradio.com/federal-drive/2013/09/quality-not-a-priority-in-security-clearance-process-gao-says/>

A recent article after a false alarm at the Washington Navy Yard noted that the response to a possible active shooter situation went smoothly. However, the article points out that there is still a long path ahead on the need to improve the security clearance process. The agencies won’t make the transition to a system of continuous evaluation for clearance holders for several more years. Jared Serbu, *A long path ahead on security clearance reform*, Federal News Radio, July 6, 2015.

<http://federalnewsradio.com/defense/2015/07/a-long-path-ahead-on-security-clearance-reform/>

The Government Accountability Office (GAO) estimated that 87 percent of about 3,500 investigative reports used for Department of Defense clearance decisions were missing some required documentation, such as verification of the applicant’s employment, the required number of social references for the applicant, and complete security forms. In addition, GAO estimated that 22 percent of the adjudicative files did not contain all the required documentation. *See* GAO-14-138T, Statement for the Record on Personnel Security Clearances February 11, 2014, p. 15. <http://www.gao.gov/assets/670/660832.pdf>.

The GAO Statement at pp. 1-2 explained that the federal government processes a high volume of personnel security clearances at significant costs. As of October 2013, more than 5.1 million federal government and contractor employees held or were eligible to hold a security clearance. The federal government spent over \$1 billion to conduct more than 2 million background

investigations in fiscal year 2011. The Department of Defense conducted 788,000 background investigations that cost over \$787 million in fiscal year 2011.

The GAO Statement at pp. 12-13 described the adjudication phase. The adjudicators from the hiring agency use the investigative report from OPM, then apply adjudication guidelines to decide whether the applicant is eligible for a security clearance. The guidelines require adjudicators to evaluate the relevance of an individual's overall conduct by considering factors, including the nature, extent, and seriousness of the conduct and the circumstances surrounding the conduct.

E. Information that is useful for predicting behavior

It is unclear what type of information is useful for predicting behavior, including dangerousness. It seems that the emphasis of security clearances now is on predicting behavior, such as who might be likely to bring a gun into the workplace or who might be likely to hack into computers. Thus, when an incident occurs (such as the Navy Yard shooting), there may be questions about the inadequacy of the background investigation.

The Army's tools for identifying troubled soldiers would not have flagged Ivan Lopez, who shot three people to death and wounded 16 others at Fort Hood. Officials would have had difficulty recognizing any personal problems, because risk assessment relied on self-reporting. See Emily Schmall, *Report faults Army's ability to predict violence*, The Boston Globe, January 24, 2015.

<https://www.bostonglobe.com/news/nation/2015/01/24/army-says-fort-hood-lacked-system-threat-rampage/jYh51ccQIGliOTiKkiMsVI/story.html>

See also Ian Austen and Sarah Maslin Nir, *Ottawa Gunman, Despite Past, Was Not Identified as Threat*, The New York Times, October 23, 2014, available at <http://www.nytimes.com/2014/10/24/world/americas/ottawa-canada-parliament-attack.html?hp&action=click&pgtype=Homepage&version=HpSum&module=first-column-region®ion=top-news&WT.nav=top-news>.

I think it is important to understand that even experts, such as psychiatrists, cannot predict behavior or who will become violent. The collection of information during the security clearance process may provide some background on whether a person has been violent in the past. However, that past behavior, particularly if there was no tendency to violence, does not provide any certainty about likelihood of violence in the future.

I think that the information collected concerning likelihood of violence should be strictly reviewed. Further, there should not be the unquestioned assumption that the fact that a person has a security clearance provides any prediction or certainty that the person will not become violent.

F. Procedures to ensure that background report includes accurate information

The security clearance process involves several steps. OPM and the contractors prepare the report, but the adjudication is performed by the requesting agency. I believe there are several problems with this. First, this permits the requesting agencies to apply a variety of review processes and analysis. It is not clear that uniform standards are applied across agencies.

Further, the report is sent to the requesting agency before the applicant has a chance to comment on the contents. This permits a report that can contain false, misleading or incomplete information. It is possible that no adjudication occurs with the result that there has been no due process or right to comment by the applicant.

In my background investigation, there was no adjudication. However, the OPM report was completed and I had no opportunity to correct or comment on the false statements included in the report. See J. Jennings Moss, *Panel hears pleas to change security clearance system*, The Washington Times, October 6, 1989 (attached hereto).

Several letters emphasize the shortcomings of my OPM report. Joseph Laitin, Ombudsman, The Washington Post, indicated that there was a question of credibility for the OPM report. He wrote, "I do not know what recourse you have but you are an attorney and surely there must be some process which would permit you to have this report expunged" or to have the problematic statements retracted. Joseph Laitin, letter dated March 20, 1987 (attached hereto).

Bill Kovach, Washington Editor, The New York Times, wrote, "I don't understand why you can't challenge [the] entry in your file. It would seem to me he would have to substantiate such an allegation. I am confident he can't. I would be willing to write a letter ... to the Office of Personnel Management if you think it would help." Bill Kovach, letter dated May 24, 1985 (attached hereto).

The recent comments about the security clearance process show concerns for whether the subject provided accurate and complete information in submitting

information for the report. However, there should also be concern for whether the other information, including statements from persons interviewed, is accurate and complete. It is not clear that OPM and the contractors determine the credibility and accuracy of witness statements and documents. This is a serious shortcoming in the preparation of background reports.

It is significant there seems to be little remedy to correct a false or misleading OPM report. The Privacy Act likely does not provide a remedy. For example, opinions cannot typically be corrected through the Privacy Act.

G. OPM's use of personal identity verification credentials

The Office of Management and Budget (OMB) directed federal agencies to issue and use personal identity verification (PIV) credentials to control access to federal facilities and systems. In February 2015, OMB reported that, at OPM, only 1 percent of user accounts required PIV cards for accessing agency systems. Statement of Gregory C. Wilshusen, GAO, Information Security, Cyber Threats and Data Breaches Illustrate Need for Stronger Controls across Federal Agencies, Testimony before subcommittees of House Committee on Science, Space, and Technology, July 8, 2015, pp. 13-14.

http://science.house.gov/sites/republicans.science.house.gov/files/documents/HHR-G-114-SY15-WState-GWilshusen-20150708_0.pdf

EXAMPLES OF SECURITY VIOLATIONS

The effectiveness of the security clearance process can be questioned based on examples of significant violations by persons with security clearances. It must be appreciated that the fact that a person has a security clearance does not assure that there will be no violations related to classified information.

Also, the recent reviews of the system have emphasized the timeliness of completing reports, rather than assessing the quality or effectiveness of those reports. There is little assurance that this extensive and costly system prevents or predicts security violations. The emphasis on statistics about completion of reports diverts attention from important questions about whether the reports are effective in predicting whether persons can be trusted with classified information.

The Department of Justice Office of Inspector General prepared a report that examined the performance of the FBI in deterring, detecting, and investigating the espionage of Robert Hanssen. The Special Report stated that the serious security

flaws in the FBI's Automated Case Support (ACS) computer system had been apparent since the system's inception in 1995, but had not been remedied. Further, more than two years after Hanssen's arrest, the ACS system remained insecure and vulnerable to misuse.

The Special Report included 21 recommendations for the FBI. One recommendation was that the FBI should adopt new procedures to ensure that background reinvestigations are thorough, meaningful, and timely. Also, an automated case management system should be installed that captures, stores, and facilitates the analysis of personnel security information. U.S. DOJ/OIG Special Report A Review of the FBI's Performance, August 14, 2003. <https://oig.justice.gov/special/0308/>

The Department of Justice Office of Inspector General prepared a report about FBI's progress in responding to the recommendations in the OIG report about Robert Hanssen. <https://oig.justice.gov/special/s0710/>

Benjamin Bishop, a retired U.S. Army lieutenant colonel, was sentenced to more than seven years in prison. He confessed to taking home top-secret documents and sending an email to his Chinese girlfriend with details about a classified meeting. The documents were taken from Bishop's workplace at U.S. Pacific Command. *Oahu defense contractor sentenced on espionage charges*, Hawaii Reporter, September 18, 2014.

<http://www.hawaiireporter.com/oahu-defense-contractor-sentenced-on-espionage-charges>

Former Army General David Petraeus was charged with one count of mishandling classified information. Petraeus admitted that he kept highly classified information in his unsecured home after he resigned from the CIA. He also admitted that he shared black books with his biographer/mistress that contained highly sensitive information. It has been reported that Petraeus no longer has a CIA security clearance. Jeff Stein, *Petraeus Advising White House on ISIS*, Newsweek, March 14, 2015.

<http://www.newsweek.com/petraeus-advising-white-house-isis-313885>

CONCLUSION

The recent hacking of OPM records has raised awareness of the massive amount of data concerning federal employees and job applicants that is stored by OPM. There should be a review of the entire security clearance process, including

the collection and retention of such personal data. There must be a better determination whether this process is effective in predicting which individuals should have access to classified information. The fact that extensive reports about individuals are prepared does not mean that the reports contain accurate, fair and complete information or that the reports can serve as a useful predictor of behavior.

/s/ Elaine Mittleman

Elaine Mittleman, Esq.

2040 Arch Drive

Falls Church, VA 22043

(703) 734-0482

elainemittleman@msn.com

Panel hears pleas to change security clearance system

By J. Jennings Moss
THE WASHINGTON TIMES

Federal employees and government contractors yesterday urged Congress to create a centralized system for granting security clearances, complaining that the current system tramples due process rights.

Security officers have either denied security clearances or revoked existing ones because the holder has reported agency corruption, had different political views from superiors or was a homosexual, lawmakers were told.

"Files have been created about me which are damaging and must be corrected, rumors have been spread about me which must be squelched. When do I get my chance for a hearing?" asked a tearful Elaine Mittleman, who was fired from the Treasury Department in 1981 and who subsequently was denied a security clearance.

Ms. Mittleman was one of five persons who testified before a joint meeting of the House subcommittees on civil service and civil and constitutional rights.

The subcommittee intends to hold at least two more hearings on security clearances in the coming weeks, and it plans to bring in representatives from employee associations and the administration to testify, congressional staff members said.

"If nothing else, the proposed order served to mobilize civil servants, contractor employees, unions, government contractors and Republican and Democratic members of Congress to take a serious and sustained look at the personnel security clearance system of this country," said Rep. Gerry Sikorski, the Minnesota Democrat who heads the civil service subcommittee.

Rep. Don Edwards, the California Democrat who chairs the civil and constitutional rights subcommittee, said more than 3 million people have security clearances and a half million people apply for clearances each year.

The five persons who testified yesterday were:

• Ms. Mittleman, who originally worked for the Chrysler Loan Guarantee staff of Treasury, said she was fired because she complained about the car manufacturer's reported failure to submit reports and because her superiors thought she leaked information to the press. When she tried to get a job in 1982 with the

Commerce Department that required a clearance, Ms. Mittleman said two unidentified sources spoke to security officers and told lies that she was never given the opportunity to refute.

Ms. Mittleman said her cousin is Vice President Dan Quayle and that she discussed her problem with him in 1983 when he was a senator from Indiana. "He suggested I get a job in the private sector," she said.

Now a lawyer in private practice, Ms. Mittleman has been representing Dr. Eric Foretich in his efforts against his ex-wife, Dr. Elizabeth Morgan, to gain custody of their daughter Hilary.

• John H. Hnatio, an Energy Department employee who works in technology transfer, said energy officials threatened to revoke his clearance in 1983. He was responsible for reviewing the effectiveness of security at the department's nuclear weapons facilities. Mr. Hnatio said his team found security to be "woefully inadequate" and discovered a "potentially disastrous situation involving nuclear weapons." Neither problem was corrected, he said.

"If there is one thing that I have learned from this experience, it is that DOE officials were perfectly willing to abuse the personnel security process to punish me for doing nothing more than being honest and doing my job as a public servant," Mr. Hnatio said.

• Wayne E. Baker, a manufacturing engineer employed by Rockwell International Corp. at the Rocky Flats nuclear weapons plant in Golden, Colo., said he has been threatened with the loss of his security clearance since January. Mr. Baker said he and two co-workers have been targeted because they exposed fraud within Rockwell.

• Robert M. Beattie Jr., a firefighter with Boeing Military Airplane Co. in Wichita, Kan., said his clearance to work on the new Air Force One was revoked because he reported safety problems with the fire detection system and because he was an active Democrat.

• Lloyd A. Leifer, a consultant with Autometric Inc., said he was denied a security clearance with the Defense Department solely because he is a homosexual. Mr. Leifer said everyone at work knew of his sexual preference and he could therefore not be blackmailed.



Photo by Kevin T. Gilbert The Washington Times

the administration, but views herself as "an American first."

goal is to serve the president. Chao said. "I want to be the secretary — a good secretary — and my objective is to have a process where people can bring all sorts of ideas and views to the table. I want to bring about solutions to the most challenging problems facing the administration."

remains about the low number of Asian-Americans in the federal workforce, particularly in high-level positions. They are a small percentage of the total federal workforce.

of 100 SES employees in the federal government are Asian, of which that one-half are technicians," said Samuel Mok, the department comptroller. "The department has seen an upward trend in the number of Asian-Americans in high-level positions," Mr. Mok said.

In the last decade, the military has made better progress in recruiting Asians. Ten years ago, there were only a few Asian generals and admirals, but today there are many more.

Mr. Mok said.

U.S. Civil Rights Commissioner Sherwin Chan said discrimination does exist in the federal government.

"Over the last 12 months, the Civil Rights Commission has conducted three Asian civil rights round-table conferences which found many Asian discrimination problems," Mr. Chan said.

"Less than [one-tenth of 1 percent], less than 20 people, of Asian-Americans are in government management positions," Mr. Chan said. "It's a two-way street. Asians must join the mainstream and be willing to face competition and act like Americans. . . . Do as the Romans. They have to be more politically oriented and get more muscle in the system."

"Asians are becoming more politically active," Mr. Mok said. "But if we all scream, we still won't be as loud as blacks and Hispanics. We're such a small population comparatively."

The Washington Post

1150 15TH STREET, N. W.

WASHINGTON, D. C. 20071

(202) 334-6000

JOSEPH LAITIN
OMBUDESMAN
334-7587

March 20, 1987

Dear Ms Mittleman,

By coincidence, I was Assistant Secretary of the Treasury/Public Affairs, at the time you were employed, which puts me in a rather awkward situation in responding to your letter of March 17, 1987. On the basis of the "Report of Investigation" that you enclosed, and your highlighted paragraph, I would say that there is a question that can be-raised about the whole report. In the first place, it says the Times received a "verbatim" report of the meeting, but it does not say you were taking the proceedings down in shorthand, but only taking "notes", which is hardly a verbatim copy. Furthermore, it says the Secretary of the Treasury provided "direct intervention" to prevent the Times from using it. This is utterly ridiculous. For one thing, I would have known about it, and secondly, I cannot perceive the Times responding to a request of this kind, nor can I perceive of a member of the cabinet making such a request, and the chief public affairs person not knowing about it. So it raises a question of credibility for the entire report.

I do not know what recourse you have but you are an attorney and surely there must be some process which would permit you to have this report expunged or to have this Mr. Driggs (who is unknown to me) retract his statements. More than this, I cannot do.

Sincerely,



Elaine J. Mittleman
2040 Arch Drive
Falls Church, VA 22043

CC: Warren Brown

The New York Times

WASHINGTON BUREAU
1000 CONNECTICUT AVE N W
WASHINGTON DC 20036
(202) 862-0300

BILL KOVACH
Washington Editor

May 24, 1985

Ms. Elaine Mittleman
Attorney At Law
2040 Arch Drive
Falls Church VA 22043

Dear Ms. Mittleman:

I am very sorry to learn of your problem. More than that I am frustrated with this new bit of evidence that our government seems to see the press as an enemy and that government files should be kept on a worker who might be in touch with news organizations. After you have received this letter, I hope you'll give me a call so we can discuss whether or not there is a story that can usefully be done on your situation.

As to your request, I'm not sure I can do what you ask but I may be able to do something else that will help you. Let me explain for it may seem little enough for you to ask. We do get requests like this from time-to-time--more often during this administration with its efforts to close off public contact with government officials outside of officially cleared channels. The problem is this. In order to gain and hold confidence of various sources, it is important that we keep their names in confidence. As you say, we do not reveal sources. We do not reveal them positively--or negatively. If we start down the road of saying: No, that person is not a source--we have taken the first step toward identifying sources for if there are only three sources of a bit of information and we rule out two of them we have by negative means revealed our source.

I don't understand why you can't challenge Mr. Driggs' entry in your file. It would seem to me he would have to substantiate such an allegation. I am confident he can't. I was the editor here at the time of the Chrysler Bailout and I have consulted with John Lee, the Business and Financial Editor who handled the story in New York, and we can both say with confidence that the Secretary of the Treasury did not intercede to

block publication of any minutes of a Loan Guarantee Board meeting. If we had gotten such minutes from you or anyone else, we would have considered their publication and I can assure you we received none. I would be willing to write a letter to that effect to the Office of Personnel Management if you think it would help.

I'm sorry I can't do more but given the treatment you have received, I am sure you understand why we must have firm lines we do not cross to protect sources of bona fide public information.

Sincerely,



Bill Kovach
Washington Editor