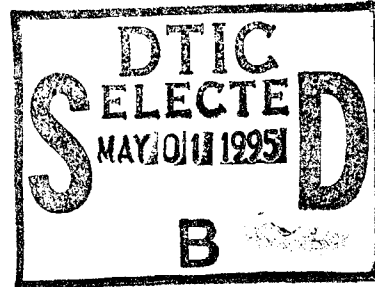


PERSEREC



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September 1993



DUE PROCESS FOR ADVERSE PERSONNEL SECURITY DETERMINATIONS IN THE DEPARTMENT OF DEFENSE

**James A. Riedel
Kent S. Crawford**

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This study was undertaken to assess the advisability of establishing an independent board or boards for the appeal of adverse personnel security determinations in the Department of Defense. Current appeal procedures are described and assessed. Alternatives for more independent appeal procedures are presented, including their advantages and disadvantages relative to current procedures. Adoption of component-level appeal boards is recommended to achieve more independent due process. The report also provides specific recommendations for improving the fairness of appeal procedures.			
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Prepared by

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Foreword

A 1992 General Accounting Office (GAO) report recommended that DoD consider establishing an independent board or boards for the appeal of adverse personnel security determinations. In response, the Deputy Assistant Secretary of Defense (Counterintelligence and Security Countermeasures) tasked PERSEREC in December 1992 to undertake a formal study to assess the advisability of the GAO recommendation.

The following areas were beyond the scope of this tasking:

- (a) An analysis of the case law related to appeals of adverse personnel security determinations.
- (b) The entitlement of defense contractor and government employees to a an oral hearing and related due process protections.
- (c) The appropriateness of the decision rules and criteria used in personnel security determinations.
- (d) The quality of the decisions under alternative appeal structures.

Alternatives for more independent appeal procedures are presented, including their advantages and disadvantages relative to current DoD procedures. Adoption of component appeal boards is recommended to achieve more independent due process. The report also provides a set of specific recommendations for improving the fairness of appeal procedures.

We would like to thank the organizations and individuals who provided valuable assistance in gathering information for this report. Personnel at each of the participating organizations gave generously of their time to answer our questions. They also went to considerable effort to respond accurately and completely to our requests for personnel and organizational data.

ROGER P. DENK
Director

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Executive Summary

The Defense Personnel Security Research Center (PERSEREC) was tasked by the Deputy Assistant Secretary of Defense (Counterintelligence and Security Countermeasures) to undertake a formal study of Department of Defense (DoD) due process associated with the denial or revocation of eligibility for a security clearance and Sensitive Compartmented Information (SCI) access. Special Access Programs and the National Security Agency (NSA) were not included in the study. This tasking was in response to a 1992 General Accounting Office (GAO) report which recommended that DoD consider establishing an independent board or boards for the appeal of adverse personnel security determinations.

The study aimed to: (1) describe the structure and functioning of due process procedures for adverse personnel security determinations in DoD; (2) assess their fairness, efficiency, timeliness, and consistency with established policies; (3) identify alternatives for more independent due process, considering the advantages and disadvantages of each; and (4) provide recommendations for improvement.

Interviews were conducted and data were gathered from organizations responsible for handling appeals of adverse personnel security determinations for both security clearances and SCI access eligibility. Defense agencies were not included since they will lose authority to handle such appeals due to the implementation of Defense Management Report Decision (DMRD) 986. The organizations included, however, account for over 90% of DoD personnel security determinations.

DoD components have implemented appeal procedures that are consistent with the requirements of executive orders as well as DoD and Director of Central Intelligence (DCI) policies. The estimated FY92 cost of processing appeals of adverse personnel security determinations in DoD was approximately \$6.9 million. Results indicated that appellants are given a reasonable chance to rebut allegations and correct their case record. In FY92, at the first appeal level, approximately 40% of the appeals resulted in an overturn of the original adverse determination. Between 13 and 19 percent were overturned at the second appeal level, depending on the type of determination.

Three alternative structures to the current system were identified. It was recommended that DoD implement the first alternative, which creates appeal boards corresponding to five of the six adjudication authorities in DoD (excluding NSA): Army, Navy, Air Force, Washington Headquarters Services (WHS), and Defense Intelligence Agency (DIA). This alternative would not change appeal procedures for employees of defense contractors. Appeals for SCI access and security clearance eligibility would be consolidated under the appropriate component appeal board. All

military and civilian appeals of adverse personnel security determinations in the services, WHS, and DIA would be handled by the appropriate board.

This alternative would increase the perceived and actual freedom of decision-makers to decide each case on its merits. The boards would be more independent of the clearance processing function. Also, a board with three members representing different headquarter elements would be less susceptible to potential command influence to decide a case one way or the other. This increased independence would be achieved without taking away authority of the services, WHS, and DIA to make final security determinations for their own personnel.

This alternative would provide a unified system for handling appeals for SCI access and security clearance eligibility in the components. This consolidation of functions is consistent with DMRD 986, which consolidated SCI and security clearance adjudications at the component level. It also complements current efforts to develop common SCI access and security clearance eligibility adjudication criteria.

Additional funds would not be needed to adopt component appeal boards. Our cost data suggest that the cost per case for boards is approximately the same as that for appeals to a single headquarters authority through a chain of command. Also, previous experience suggests that appeal boards can complete cases as quickly or more quickly than a single headquarters authority through a chain of command.

Specific recommendations required to implement component appeal boards also were presented. The recommended changes could help improve the uniformity and timeliness of appeal procedures across the components in DoD. One recommendation would require First Letters or Letters of Intent, with reasons for the adverse administrative action, to be issued to all DoD personnel and defense contractor employees any time an adverse SCI access eligibility determination has been made. This recommendation, which would require a change in DCI Directive 1/14, was reviewed and approved by the DCI Forum in July 1993.

DoD contractor employees are currently entitled to a hearing before an administrative judge. Whether all DoD personnel appealing an adverse security clearance or SCI access eligibility determination should also be given this entitlement is not a decision which can be justified or discounted solely on the cost or timeliness criteria considered in this report. Lacking mandate from the courts, the decision should be based on the due process philosophy and objectives of the executive branch. An assessment of this philosophy was beyond the scope of this report.

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Introduction

Background

In 1989, 1990 and 1992 the House Post Office and Civil Service Committee and the House Judiciary Committee held hearings that raised questions concerning the fairness of due process procedures for the denial and revocation of security clearances in the Department of Defense (DoD). One of the recommendations of a 1992 General Accounting Office (GAO) report was that DoD consider establishing an independent board or boards for the appeal of adverse security clearance determinations.

An April 6, 1992 letter to GAO from the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence (ASD(C3I)) addressed the report's recommendations and stated that the merits of creating an independent board to hear appeals would be examined as part of an ongoing study of consolidation of adjudication within DoD. In order to meet this commitment, PERSEREC was tasked to undertake a formal study of DoD due process associated with the denial or revocation of eligibility for a security clearance and Sensitive Compartmented Information (SCI) access.

For purposes of this study, due process was defined as the appeal rights afforded individuals who have received an adverse security clearance or SCI access eligibility determination. Due process within the National Security Agency (NSA) and for Special Access Programs (SAP) was not a part of this study. The study aimed to:

- (a) describe the structure and functioning of due process procedures for adverse personnel security determinations in DoD;
- (b) assess their fairness, efficiency, timeliness, and consistency with established policies;
- (c) identify alternatives for more independent due process, considering the advantages and disadvantages of each; and
- (d) provide recommendations for improvement, including a specific recommendation whether to establish an independent appeals board or boards, as suggested by the GAO.

The purpose of this report is to present the study's findings and recommendations. The report offers three alternative structures for handling adverse personnel security determinations. It provides a recommendation for more independent due process without taking away authority of the services, Washington

Headquarters Services (WHS), and Defense Intelligence Agency (DIA) to make final personnel security determinations for their own personnel. Finally, additional recommendations are offered to improve procedures for handling appeals of adverse personnel security determinations.

Authority and Policy

There are two basic categories of personnel security eligibility determinations within DoD. The first category is generally referred to as a security clearance and includes determinations at the confidential, secret, and top secret classification levels. The second includes determinations for eligibility for access to SCI. Due process procedures in these two categories flow from two separate lines of authority.

Security Clearances

Three executive orders provide the authority for DoD security clearance determinations. Executive Order 10450, *Security Requirements for Government Employment*, serves as the authority for security investigations and personnel security determinations on DoD employees. The Order grants department or agency heads authority to suspend or terminate the employment of a person if it is deemed that doing so is necessary to the interests of national security. The Order sets forth the requirement that all persons should receive fair, impartial, and equitable treatment at the hands of the government. It directs that the standards used in making personnel security determinations on employees and applicants for employment should be mutually consistent among the departments and agencies of the federal government. The Order is silent, however, on the subject of specific individual rights to appeal adverse personnel security determinations.

Executive Order 10865, *Safeguarding Classified Information Within Industry*, authorizes the heads of departments (e.g., the Secretary of Defense) or their designees to grant industrial contractor employees access to classified information. It outlines specific due process procedures, including an oral hearing, when denial or revocation of access is being considered.

Executive Order 12356, *National Security Information*, is the most recent order and prescribes a system for classifying, declassifying, and safeguarding national security information. It stipulates that a person is eligible for access to classified information only if a determination of trustworthiness has been made by an agency head or designated official. The Order does not address the subject of individual rights to appeal an adverse trustworthiness determination.

The DoD *Personnel Security Program Regulation* (5200.2-R) (January 1987), implements personnel security requirements of these executive orders for Defense Department personnel. The DoD 5200.2-R outlines personnel security policies and

procedures, including procedures for handling adverse personnel security determinations. This regulation stipulates that no adverse administrative action shall be taken unless a person has been given the following:

- a. A written statement of the reasons why the adverse administrative action is being taken.
- b. An opportunity to reply in writing.
- c. A written response stating the reasons for the final determination. The time of the response shall not exceed 60 days from the date of receipt of the written reply, provided no additional investigative action is necessary. If a final response cannot be completed within 60 days, the subject must be given a written explanation of the reasons for the delay. In any case, the final decision must be completed in 90 or fewer days.
- d. An opportunity to appeal to a higher level of authority designated by the component concerned.

This procedure does not limit or affect the responsibility and powers of the Secretary of Defense to find that a person is unsuitable for entrance or retention in the Armed Forces, or is ineligible for a security clearance or assignment to sensitive duties, if the national security so requires. DoD 5200.2-R, which is currently under revision, is implemented by component-specific regulations and instructions.

The due process requirements of Executive Order 10865 are implemented by DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, January 1992. This directive stipulates that no adverse security clearance decision will be made without first providing the applicant with the following:

- a. Notice of specific reasons for the proposed action.
- b. An opportunity to respond to the reasons.
- c. Notice of the right to a hearing and the opportunity to cross-examine persons providing information adverse to the applicant.
- d. Opportunity to present evidence on his or her own behalf, or to be represented by counsel or personal representative.
- e. Written notice of the final clearance decision.
- f. Notice of appeal procedures.

SCI Access Eligibility

Executive Order 12333, *United States Intelligence Activities*, defines the duties and responsibilities for executing the national intelligence effort. This Order provides the authority for DoD SCI access eligibility determinations of government and contractor personnel. With regard to personnel security, the Director of Central Intelligence (DCI) is responsible for ensuring the establishment of common access eligibility standards. Senior Officials of the Intelligence Community (SOICs), including those in DoD, are tasked with protecting intelligence sources and methods. This includes the conduct of personnel security investigations and adjudications for applicants, employees, and contractors.

The DCI implements the personnel security requirements of Executive Order 12333 by DCI Directive (DCID) 1/14, *Personnel Security Standards and Procedures Governing Eligibility for Access to Sensitive Compartmented Information*, April 1992. Like the DoD 5200.2-R, DCID 1/14 (Annex B Appeals) has specific requirements for appeals of adverse personnel security determinations. This directive stipulates the following procedure for the denial or revocation of access to SCI:

- a. Persons will be notified of a denial or revocation. They will be informed that they may request a statement of reasons for the denial or revocation. Persons also will be informed that they may be afforded an opportunity to appeal, whenever the Determination Authority of any entity deems such action to be clearly consistent with the interests of the national security.
- b. Any person who is given notification and afforded an opportunity to appeal may submit a written appeal to the Determination Authority within 45 days of the date on which the person is notified of the reasons for the denial or revocation.
- c. After further review of the case in light of the written appeal, the person will be notified of the decision of the Determination Authority.
- d. If the Determination Authority reaffirms a denial or revocation, the person may, within 30 days, request a final review of the case. In that event, the SOIC or designee, will personally review the case, and will inform the person of the decision, which will be final and unreviewable.

For DoD, C-5105.21-M-1, *Sensitive Compartmented Information (SCI) Security Manual, Administrative Security*, outlines the process for granting eligibility for access to SCI. Again, component policies further implement SCI personnel security procedures.

Four points merit attention regarding current policy governing due process for appeals of adverse security clearance and SCI access determinations:

- a. Policy requiring due process for DoD civilians and military originates with DoD and DCI regulations, not higher level executive orders. Policy requiring due process for employees of defense contractors originates with Executive Order 10865.
- b. Applicants for a security clearance are provided with a written statement of reasons before their clearance is denied or revoked. Applicants for SCI access eligibility are given the opportunity to request the reasons after their access eligibility has been denied or revoked. For SCI cases the reasons for the adverse administrative action will only be provided if the Determination Authority deems that doing so is clearly consistent with the interests of national security.
- c. Defense contractor employees applying for a security clearance are provided the right to a hearing and the opportunity to cross-examine persons providing information adverse to the applicant. Defense contractor employees applying for SCI access are not entitled to these due process protections.
- d. All applicants for a security clearance are entitled to some measure of due process. Applicants for SCI access, however, may be afforded an opportunity to appeal an adverse personnel security determination only when a Determination Authority deems such action to be clearly consistent with the interests of the national security.

Due Process and Personnel Security

In the context of personnel security, due process has come to mean that final denial or revocation of a security clearance or SCI access eligibility will not occur until the individual being considered is given a fair opportunity to challenge the decision. There are two facets to due process: substantive and procedural.

Substantive due process rights are enumerated in the first, fifth, and fourteenth amendments to the Constitution. These amendments guarantee that persons shall not be deprived of life, liberty, or property without due process of law. For the DoD personnel security program, this means that formal decision rules or criteria must be used in making security clearance and SCI access eligibility determinations. The DoD 5200.2-R and the DCID 1/14 set forth the formal rules and criteria employed in DoD. The courts generally have upheld the right of the executive branch to employ them in making security clearance and SCI access eligibility determinations.

Procedural due process rights are covered in the fourth, fifth, sixth and eighth amendments to the Constitution. These amendments protect individual privacy and other social rights. In cases involving adverse personnel security clearance actions, the courts have stated that substantive due process rights must not be taken away by any arbitrary, discriminatory, or capricious system. Discussion or analysis of the case law related to substantive and procedural due process is beyond the scope of this study. A 1988 PERSEREC report, *Due Process in Matters of Clearance Denial and Revocation*, provides an analysis of the case law related to due process for adverse personnel security determinations. Of interest to the present inquiry is the extent to which the DoD, with its multiplicity of appeal procedures, is treating people fairly in the denial or revocation of a security clearance or SCI access eligibility.

The fairness of these appeal procedures can be judged, in part, by the degree to which they permit decision-makers the freedom to decide a case on its merits, free of undue influence by interested parties. Decision-makers should be independent, free of pressure from either superiors or subordinates to decide a case in a particular way. An administrative relationship to other interested parties does not necessarily mean that a decision-maker's independence will be compromised. Of greater concern are situations in which superiors or subordinates may bias a decision-maker's consideration of the merits of a case.

For example, if a superior can direct or pressure a decision-maker to decide a case in a particular way, independence is lost. Likewise, if a subordinate can argue a particular point of view because of ready access to a decision-maker, independence is compromised unless an appellant has similar access. The decision must follow from personnel security criteria and the facts of the case.

As a practical matter, independence requires that decision-makers decide cases having little or no contact with interested parties. This means that a competent case record must be maintained. This documentation focuses the decision-maker on the unfiltered facts of a case, free from bias which may come from informal discussions of the case. Also, this documentation assures that all the facts bearing on the decision are on record. Thus, the decision can be independently reviewed for correctness and fairness. Good documentation also provides greater assurance that all individuals or classes of individuals are treated the same.

Fairness also can be judged by the extent to which individuals have an opportunity to rebut allegations and correct the factual record. Fair appeal procedures will inform individuals of their appeal rights and responsibilities. These procedures will also make available to individuals a clear and complete record of the facts and criteria being used by the decision-maker. Adequate time must be provided to make corrections and rebut allegations. Also, the appellate authority must complete the case in a reasonable period of time. While oral hearings might be

used for these purposes, a written procedure also provides an opportunity to rebut allegations and correct the factual record.

Finally, from a DoD perspective, one aspect of fairness is the degree to which people in different components or subgroups receive the same due process protections. Equal treatment should be of particular concern given the multiplicity of appeal procedures within DoD.

Fair appeal procedures are not only good for individual rights, but also for security. Fair adjudication and appeal procedures ensure that personnel security determinations are based on accepted standards. When bias creeps into decision making, standards may not be followed. This may lead to affirmative personnel security determinations which should have been adverse. Or just the opposite; individuals who meet the standards might receive an adverse determination. The first error increases security risk and the second error is wasteful because new personnel may have to be recruited and trained to perform specific functions.

Additionally, a fair appeals system may cost less and be more timely than a system that is not fair. With a fair system there are no secrets concerning the basis of a personnel security determination. Therefore, in most cases decisions can be made at lower organizational levels.

Methodology

Definition of Due Process

For the purposes of this study, due process was defined as those steps or appeal procedures administered by the government to assure that individuals are treated fairly once an adverse personnel security determination has been made. This definition follows from the requirements governing appeals of adverse personnel security determinations enumerated in executive orders and DoD regulations. The goals of this analysis included describing the various appeal procedures in DoD and comparing them in terms of their output, cost, timeliness, consistency with policy, and fairness.

The variety of procedures for appealing adverse personnel security determinations in DoD presents a challenge for a comparative analysis. Appeal procedures for both security clearance and SCI access determinations provide for a two-level review of appealed adverse determinations. For SCI access, both levels of review occur after access eligibility has been denied or revoked. For security clearances, the first level occurs before, and the second level after, the actual denial or revocation. Despite this difference in timing, the first level of review serves the same function for both types of appeals. Individuals are provided an opportunity to

correct errors in their case record or submit information which could mitigate the issues of security concern.

A commonly accepted definition of due process in DoD suggests that an appeal starts after the notification of a denial or revocation. A flaw in this definition is that it fails to acknowledge that a significant amount of due process occurs in the first level of review for security clearances. Had this definition been accepted for this study, the true cost of appeals of adverse security clearance determinations would have been under-estimated because this entire first level of review would not have been included in the analysis. The result would have been an under-estimate of the cost of handling appeals of adverse personnel security determinations in DoD.

An additional result would have been a faulty comparison of the cost of handling SCI access and security clearance appeals. Only the costs of the second level of review would have been counted for security clearances while the cost of two levels of review would have been counted for SCI access. Since many cases are settled at the first level, this comparison would have incorrectly suggested that the cost of handling SCI appeals is more than the cost of handling security clearance appeals. It also would have resulted in a faulty comparison of the number of decisions that are overturned for the different types of determinations.

In order to perform meaningful comparative analyses, it was necessary to describe the various DoD appeal procedures in common terms. The appellate procedures of interest to this analysis were redefined according to a two-level process. This redefinition of appeal procedures enabled their comparison in terms of output, cost, and timeliness.

At the first level of appeal (level 1), responses to Letters (notifications) of Intent (LOI) to deny or revoke security clearances for DoD personnel and responses to Statements of Reason (SOR) for defense contractor employees, were equated with responses to Letters of Denial or Revocation (LOD) for SCI access eligibility. At the second level of appeal (level 2), responses to LODs for a security clearance were equated with responses to notifications of the disposition of a first-level SCI appeal.

Comparison Criteria

Output

Consistent with the redefinition of appellate procedures discussed above, three outputs of the level 1 appeal were defined as First Letters, First-level Appeal Decisions, and a Second Letters. First Letters refer to the number of LOIs and DISCR SORs issued for a security clearance and the number of LODs for SCI access eligibility. Level 1 Appeal Decisions refer to reviews and determinations which either affirm or overturn the first adverse personnel security determination. Second

Letters refer to the number of LODs for a security clearance plus the number of notifications of the disposition of first-level SCI appeals. The outputs of level 2 were defined as Second-level Appeal Decisions. These decisions either affirm or overturn level 1 Appeal Decisions.

Cost

This comparison criterion was defined as the FY92 total dollar cost and cost per case required to provide due process for appealed adverse personnel security determinations. Included are costs for facility personnel, component-provided support personnel, non-personnel support, and facilities.

Cost and cost-per-case comparisons across different types of determinations (military and civilian security clearance, defense contractor security clearance, and SCI access eligibility) should be made with care. The appeal procedures for these different types of determinations are governed by different policy requirements. For example, the cost of appeals of adverse security clearance determinations for defense contractor employees is driven by Executive Order 10865. This Order entitles these employees to a hearing. Therefore, it is reasonable to expect that DISCR's cost per case would be higher than that for the components.

Despite these limitations for comparative analyses, the cost data can be used to estimate the cost to DoD of providing appeals for different types of determinations. They also can be used to predict the cost of alternative structures for handling appeals of adverse personnel security determinations in DoD.

Timeliness

Timeliness was defined as the median number of days required to complete the processing of appeals of adverse determinations for a DoD security clearance and SCI access eligibility. This measure does not include the number of days required to complete the investigation and adjudication of the case. This timeliness statistic was used to estimate the number of days required to complete an appeal at level 1 and level 2, respectively. The median number of days required to complete a case appealed through both levels was estimated by adding together the median number of days required at level 1 and level 2.

A median is defined as the point at or below which exactly 50 percent of the cases fall. The median was used as a measure of central tendency, rather than a simple average. The median is less susceptible to error from extreme cases in estimating the typical number of days required to complete the processing of an adverse case.

The timeliness estimates reported in this study must be interpreted with care. They should not be used to evaluate the timeliness performance of appellate authorities because the estimates reflect time required by both an appellant and the appellate authority. By regulation appellants are given time to prepare their case. The estimates also reflect the particular requirements and procedures of the different appellate authorities. These estimates do provide, however, a reasonable estimate of the time required for a typical appeal to be completed. Therefore, the estimates can be used to predict how much time alternative structures to the current system might require to complete appeals.

Consistency with Policy

This comparison criterion for appeals of adverse security clearance determinations for government personnel was defined as the extent to which the due process conforms with the four requirements in the DoD 5200.2-R. For defense contractor employees, this criterion was defined as the extent to which the appeals procedures at DISCR conform with requirements of DoD Directive 5220.6. For appeals of adverse SCI access eligibility determinations, this criterion was defined as the extent to which the due process conforms requirements in the DCID 1/14, Annex B. The specific requirements for each of these regulations were previously summarized in the Authority and Policy section of this report.

Fairness

The fairness criterion was defined as the degree to which an appeal procedure permits decision-makers the freedom to decide a case on its merits, free of influence by interested parties. An indicator of this freedom is the extent to which decision-makers are independent from both superiors or subordinates, freeing them from pressure to decide a case in a particular way. This means that decision-makers should be able to make a judgement with little or no contact with interested parties.

Fairness can also be judged by the extent to which a competent case record is maintained. This documentation focuses the decision-maker on the unfiltered facts of a case, free from bias which may come from informal discussions of the case. This documentation also assures that all of the facts bearing on the decision are on record. Thus, the decision can be independently reviewed for correctness and fairness. Good documentation also provides assurance that all individuals or classes of individuals are treated the same.

Additionally, fairness can be judged by the extent to which individuals have an opportunity to rebut allegations and correct the factual record. Fair appeal procedures will inform individuals of their appeal rights and responsibilities. These procedures will also make available to individuals a clear and complete record of the facts and criteria being used by the decision-maker. Adequate time must be

provided to make corrections and rebut allegations. Also, the appellate authority must complete the case in a reasonable period of time.

Finally, from a DoD perspective, fairness can be judged by the degree to which people in different components or subgroups receive the same due process protections. Equal treatment should be of particular concern given the multiplicity of appeal procedures within DoD. For example, it is of interest whether people receive the same: type of information in the First Letter (e.g., LOI) notifying them of an adverse determination; amount of time to respond; opportunity to present mitigating information on their own behalf, or to be represented; and type of information in notifications of the final appeal decisions (e.g., Letter of Denial or Revocation (LOD)).

Summary of Comparison Criteria

Output

- First Letter
- First-level Appeal Decision
- Second Letter
- Second-level Appeal Decision

Cost

- FY92 Total Dollars for Due Process
- FY92 Cost per Case for Due Process

Timeliness

- Median Number of Days To Complete Level 1 and Level 2 Appeals

Consistency with Policy

- Security Clearance Appeals for Government Personnel Conform with DoD 5200.2-R
- Security Clearance Appeals for Defense Contractor Employees Conform with DoD 5220.6
- SCI Access Appeals Conform with DCID 1/14 Annex B

Fairness

- Independence of Decision-maker
- Maintenance of Competent Case Record
- Opportunity to Rebut Allegations and Correct Record
- Notification of Appeal Rights
- Adequate Time to Respond
- Timely Decision
- Equal Due Process Protections Throughout DoD

Data Requirements

Information was gathered regarding the structure and functioning of the DoD authorities providing due process for appeals of adverse personnel security determinations. This included information relevant to regulatory requirements, organization and management, operations, and planned changes. This information was gathered using structured interviews.

In addition to the interviews, each authority was asked to provide data concerning the number and disposition of appeals completed during FY91 and FY92. Cases currently pending were not reported. These data were collected for both level 1 and level 2 appeals.

Appeal authorities also were asked to provide data concerning the personnel resources utilized to process appeals.¹ Respondents were asked to estimate the average number of hours expended per month (or the percentage of time) by individuals processing appeals during FY92. Individual rank and grade information also was provided.

Data Collection

Information and data were collected from the organizations listed in the box on the next page. Defense agencies were not included since they will lose authority to handle appeals of adverse personnel security determinations due to the implementation of Defense Management Report Decision (DMRD) 986.² Therefore, output and cost estimates presented in this report do not include these agencies. The organizations included in the data collection, however, account for over 90% of the FY91 and FY92 DoD personnel security determinations.³

Interviews were completed in December 1992. Data forms were distributed and completed between December 1992 and March 1993. It should be noted that cost and output records are maintained with different degrees of accuracy across the components. Both cost and output data for LOIs were estimated by the components. Similarly, cost data for both security clearance and SCI access appeals were estimated by the components. Other output data were taken from records routinely maintained by the appeal authorities. The estimates, given that they were aggregated across components by type of determination, have an acceptable level of accuracy for output and cost comparisons.

DISCR provided the most accurate cost data since good financial records for the operation of this organization were made available. Also, DISCR is almost entirely dedicated to the due process function. Other appellate functions, however, are part of adjudicative or other headquarter functions, and accurate financial records for the appeals function are not maintained separately.

Organizations Providing Information and Data

Security Clearances for DoD Military and Civilian Personnel

Office of the Chief of Naval Operations (OP-09N2)
Department of Navy Central Adjudication Facility
Department of Air Force Chief of Security Police (AF/SPI)
Headquarters Air Force Intelligence Support Agency (INS)
Office of the Secretary of the Air Force (SAF-AA)
Department of Army, Office of the Deputy Chief of Staff for Intelligence (DAMI-CIS)
Army Central Personnel Security Clearance Facility
Washington Headquarters Services, Directorate for Personnel and Security

Defense Contractor Security Clearances

Directorate for Industrial Security Clearance Review

SCI Access Eligibility

Office of Naval Intelligence
Naval Security Group Command Headquarters (GH)
Headquarters Air Force Intelligence Support Agency (INS)
Department of the Army, Office of the Deputy Chief of Staff for Intelligence (DAMI-CIS)
Army Central Personnel Security Clearance Facility
Defense Intelligence Agency, Office for Counterintelligence and Security (DAC)

Current System Description and Assessment

Description

Appeals procedures across DoD are essentially similar for government employees, military personnel, and defense contractor employees. Also, the procedures are basically similar for appeals of adverse security clearance and SCI access eligibility determinations. Individuals are provided reasons for an adverse personnel security determination, an opportunity to present mitigating information and have the decision reviewed, and a chance to appeal the decision. Only defense contractor employees have a right to a hearing and the opportunity to cross-examine persons providing information adverse to the applicant.

A detailed description by component of the appeal procedures for DoD military and civilian applicants for a security clearance is provided in Appendix A. Appeal procedures at DISCR for defense contractor applicants for a security clearance are presented in Appendix B. Appeal procedures by component for applicants for

SCI access eligibility are shown in Appendix C. A summary of the key steps in these procedures is presented in Table 1.

Table 1

Key Steps in DoD Appeal Procedures for Adverse
Personnel Security Determinations

Type of Determination	Appeal Level	
	Level 1	Level 2
Military or Civilian Security Clearance	• First Letter (Letter of Intent) • Appeal by Applicant • Review of Appeal by Clearance Facility • First-level Appeal Decision • Second Letter (Letter of Denial/Revocation or Clearance)	• Appeal by Applicant • Review by Appeal Authority • Second-level Decision and Notification
Defense Contractor Security Clearance	• First Letter (Statement of Reason) • Appeal by Applicant • Initial Review of Appeal by DISCR • Hearing or Administrative Judge Review • First-level Appeal Decision with Written Determination • Second Letter (Letter of Denial/Revocation or Clearance)	• Appeal by Applicant or DISCR • Review by Appeal Board • Second-level Decision with Written Determination and Notification
SCI Access Eligibility ⁴	• First Letter (Letter of Denial/Revocation With or Without Statement of Reasons) • Appeal by Applicant • Statement of Reasons If Not Provided in First Letter • Review by Clearance Facility • Review by Appeal Authority • First-level Appeal Decision • Second Letter-Notification of Decision	• Appeal by Applicant • Review by Second-level Appeal Authority • Second-level Decision and Notification

There are a number of key differences across the different groups that should be noted. These are summarized in the box below.

Key Differences in Appeal Procedures Across Components

Military or Civilian Clearance

- The Navy is the only component that uses a board to review level 2 appeals.
- The Navy and WHS do not automatically suspend access upon issuance of a First Letter (i.e., LOI).
- Some components (e.g., the Navy) allow new mitigating information to be reviewed by the level 2 appeal authority. Other components (e.g., the Army) require that such new information first be adjudicated by the clearance facility.
- There is variability across the components with regard to the amount of time allowed to respond to the First Letter (i.e., LOI).
- There is variability across the components with regard to the amount of time allowed to respond to the Second Letter (i.e., LOD).

Defense Contractor Security Clearance

- Defense contractor employees are the only personnel given the opportunity to request a hearing, be represented by counsel, and cross-examine persons providing information adverse to the applicant.
- Defense contractor employees are the only personnel who appeal to administrative judges.
- DISCR provides very thorough and professional written notifications of personnel security determinations at level 1 (hearing or administrative judge review) and level 2 (appeal board review). These notifications are more complete than those provided to DoD military and civilian applicants appealing an adverse security clearance or SCI access eligibility determination.

SCI Access Eligibility

- LOIs with a statement of reasons are not issued except by the Army. Other components use the LOD to notify applicants of an adverse determination.
- Some clearance facilities issue a statement of reasons with the LOD.
- The Navy is the only component that uses a board to review level 1 appeals.

Output

Table 2 summarizes the disposition of FY92 appeals of adverse determinations for a DoD security clearance and SCI access eligibility. The table reveals several trends. For all types of determinations at level 1, nearly one-half of the recipients respond with an appeal to the First Letter. It can also be seen that roughly 40% of these replies lead to an overturn of the original determination presented in the First Letter. Therefore, the original adverse determination is overturned at the first level of appeal for roughly 20% (i.e., one-half times 40%) of the recipients of the First Letter.

Table 2

Disposition of FY92 Appeals of Adverse Determinations for a
DoD Security Clearance and SCI Access Eligibility

Type of Determination	Level 1				Level 2	
	First Letter ⁵	Number of First Letters Appealed (%)	Number of Appeals In Which Original Determination was Overturned (%)	Second Letter ⁶	Number of Second Letters Appealed (%)	Number of Appeals In Which First-level Appeal Decision was Overturned (%)
Military or Civilian Security Clearance	7076	3524 (49.8%)	1440 (40.9%)	4833	436 (9.0%)	84 (19.3%)
Defense Contractor Security Clearance	1591	735 (46.2%)	333 (45.3%)	402	210 (28.6%) ⁷	28 (13.3%)
Air Force, Navy, and DIA SCI Access Eligibility ⁸	449	231 (51.4%)	88 (38.1%)	135	73 (54.1%)	14 (19.2%)

For security clearances for military and civilian personnel, about 9% of the appellants appeal the Second Letter. For defense contractor employees, about 29% of the cases are appealed to level 2 by either the applicant or DISCR. For SCI access eligibility, about one-half of the appellants appeal the Second Letter. The original determination is overturned for approximately 13% to 19% of those who reply to second letter, depending on the type of determination. Therefore, the First-level Appeal Decision or original determination is overturned for approximately 2% to 10% of the recipients of the Second Letter, depending on the type of determination (e.g., for the higher percentage, $54.1\% \times 19.2\% = 10\%$ for SCI access eligibility determinations).

Combining both levels of appeal, approximately 22% of the recipients of a First Letter have the adverse personnel security determination overturned during the appeals process, regardless of the type of determination. Conversely, for 78% of the recipients, the original adverse personnel security determination is sustained.

Cost

The total estimated FY92 cost of processing appeals of adverse determinations for DoD security clearances, SCI access eligibilities, and defense contractor security clearances was approximately \$6.9M. Appendix D presents the cost by type of determination and level of appeal. A description of the method for calculating the cost estimates can be found in Appendix E.

Table 3 presents the FY92 cost per case of processing appeals of adverse determinations for a DoD security clearance and SCI access eligibility. The cost per case estimates also are presented by appeal level. It can be seen that the total cost per case for level 1, level 2, and both levels combined, varies as a function of the type of determination. For a DoD security clearance the cost per case for level 1 and level 2 combined is \$914, for a defense contractor security clearance \$9,354, and for a SCI access eligibility \$2,063.

Table 3

FY92 Cost Per Case of Processing Appeals of Adverse Determinations for a
DoD Security Clearance and SCI Access Eligibility

Type of Determination	Level 1 (\$)	Level 2 (\$)	Level 1 plus Level 2 (\$)
Military or Civilian Security Clearance	370 ⁹	544	914
Defense Contractor Security Clearance	5,459	3,895	9,354
Decided with Hearing	6,483		
Decided without Hearing	3,992		
Air Force, Navy, and DIA SCI Access Eligibility ¹⁰	1,173	890	2,063

It also can be seen that the cost per case for defense contractor cases decided with a hearing is \$6,483 and for those without a hearing (i.e., review by administrative law judge) is \$3,992. If these cases go to the Appeal Board, \$3,895 must be added to cover the cost per case of this second-level review.

With regard to a security clearance, the cost per case for defense contractor employees is higher than for government military and civilian personnel by \$5,089 at level 1 and \$3,351 at level 2. These differences reflect the higher cost associated with the due process requirements of Executive Order 10865. These include providing defense contractor employees the right to a hearing, use of administrative judges, and very complete documentation of personnel security determinations. Component cost per case is lower because the due process requirements for DoD military and civilian personnel are not as extensive.

Timeliness

Table 4 presents the median number of days required to complete appeals of adverse determinations for a DoD security clearance and SCI access eligibility. To complete the entire process takes approximately 220 days for government security clearances and 305 days for SCI access eligibilities. For defense contractor security clearances, the time required to complete the process is 426 days for cases with a hearing and 434 days for cases without a hearing. With regard to appeals of adverse security clearance determinations, the median time for defense contractor employees is longer than for DoD military and civilian personnel by approximately 121 days at level 1, 89 days at level 2, and 210 days for both levels combined. The longer time

required to process appeals by defense contractor employees is a direct result of the more extensive DISCR appeal procedures.

Table 4

Median¹¹ Days to Complete Processing of Appeals of Adverse Determinations
for a DoD Security Clearance and SCI Access Eligibility

Type of Determination	Number of Cases	Level 1 (Median)	Level 2 (Median)	Total (Median)
Military or Civilian Security Clearance	58	101	119	220
Defense Contractor Security Clearance				
Cases with Hearing	30	218	208	426
Cases without Hearing	30	226	208	434
Air Force, Navy, and DIA SCI Access Eligibility ¹²	55	203	102	305

Consistency With Policy

An assessment was made of the extent to which component appeal procedures for adverse personnel security determinations adhere to policy requirements. The specific requirements are enumerated in the Authority and Policy section of this report. Regarding security clearances for DoD civilians and military, we found that all components adhere to the requirements of DoD 5200.2-R. For security clearances for defense contractor employees, we found that the requirements of DoD Directive 5220.6 are all being met. With regard to SCI access eligibility, we found that the requirements of DCID 1/14 are being met.

The only exception to SCI policy was found with Army. Since the Army issues LOIs to SCI personnel, the first-level appeal occurs prior to the actual issuance of the LOD. The second-level appeal is then made to the SOIC designee. Strict interpretation of the DCID 1/14 would require that there be two appeals after the issuance of the LOD. Our assessment is that the Army process meets the intent of the DCID 1/14 in that there are two levels of review, with the second occurring independent of the clearance facility.

Fairness

In cases involving adverse personnel security clearance actions, the courts have stated that substantive due process rights must not be taken away by any system that allows or promotes arbitrary, discriminatory, or capricious decision making. Of interest to the present inquiry is the extent to which the DoD, with its multiplicity of appeal procedures, is treating individuals fairly in the denial or revocation of a security clearance or SCI access eligibility.

It should be noted that initial personnel security determinations in DoD are made by individuals who are specially trained for this function. These adjudicators apply specific eligibility criteria and adjudicative guidelines in making their determinations. Also, before any formal adverse determination is made, there are at least two levels of supervisory review and approval within the clearance facility. Therefore, the clearance processing system for making these initial personnel security determinations is neither arbitrary or capricious.

Where applicants are notified before their security clearance or SCI access eligibility is denied or revoked, individuals can rebut allegations and correct factual errors in their case record before a decision is made, avoiding unnecessary delays and wasted effort in the appeals process. This practice also affirms the fairness of the process because applicants are assumed to be "innocent" until they have been heard. The fact that this step in the appeal process is performed by the same organization that made the initial adjudication is not unfair to applicants because later they have an opportunity to appeal an adverse decision to an independent decision-maker.

Once an initial adverse determination has been made by the clearance facility, there are specific administrative appeal procedures for an applicant who desires to have his or her case reconsidered. All components have appeal procedures which meet the due process protections stipulated in governing executive orders and DoD regulations.

While the letter of these regulatory requirements is being met, it was of interest to assess how effectively the requirements are being met for the different types of determinations. It was beyond the scope of this study to collect data to test directly for bias in specific appeal decisions. We did collect data, however, to assess the extent to which the design of the various appeal processes protect bias from entering into personnel security determinations. The following areas were examined to gauge the fairness of the current appeal procedures: independence of decision-makers; maintenance of a competent case record; opportunity to rebut allegations and correct the case record; notification of appeal rights; adequate time to respond; a timely decision; and equal due process protections throughout DoD.

Independence of Decision-makers

Independence can be judged by the degree to which appeal procedures permit decision-makers the freedom to decide a case on its merits, free of undue influence by interested parties. For appeals by defense contractor employees, the adjudicators, administrative judges, and members of the appeals board function independently. The appeal board militates against bias, especially from superior authority, because it has three members. The legal staff at DISCR is highly trained and cognizant of its responsibility to decide cases without bias. The director of DISCR has administrative responsibility for these functions but is not directly involved in substantive matters related to specific cases.

For handling appeals of adverse security clearance determinations by government personnel, the Navy's PSAB offers considerable independence for decision-makers due to the way the board is structured and appeals are processed. The Secretary of the Navy delegates authority to the PSAB to decide appeals. The president of the appeals board has functional responsibilities as a senior manager at the Naval Criminal Investigative Service (NCIS), the headquarters organization which oversees the Department of Navy Central Adjudication Facility (DON CAF). The two additional members of the PSAB come from outside the NCIS.

Several aspects of the appeal process and board structure protect decision-makers from undue influence from either superiors or from those responsible for the initial adverse determination. First, the director of DON CAF does not report to the president of the PSAB. Second, the board has three members representing different communities within the Navy. These members are free to exercise independent judgement since no member is subordinate to another. Third, cases are decided based on the facts in a written record. No oral testimony is heard, from either representatives of the DON CAF or the applicant. Fourth, cases are decided by majority vote, and PSAB members vote secretly.

WHS, Army, and Air Force procedures for handling appeals of adverse security clearance determinations for government personnel also meet regulatory requirements. In these components appeals are decided by an individual, sometimes in the headquarters organization which oversees the adjudication function. This individual is the final appeal authority even though recommendations are provided by subordinates. The use of an appeal board, similar to the Navy's PSAB, would increase the independence of appeal decision-makers since no board member would be subordinate to another. Use of appeal boards by these components also would increase the perceived fairness of appeal procedures and the uniformity of these procedures across DoD.

DIA, Army, and Air Force procedures for handling appeals of adverse SCI access eligibility determinations meet regulatory requirements. One drawback is that

appeals are decided by an individual, often in the headquarters organization which oversees the adjudication function. This individual is the final appeal authority, although recommendations are provided by subordinates. For the reasons stated above, adoption of appeal boards would increase the independence of appeal decision-makers who handle SCI cases. The Navy is the only component that uses such boards for SCI cases.

Quality of Notifications

The quality of notifications can be judged by the extent to which individuals are provided a clear and complete record of facts and criteria being used by the decision-maker. For government personnel, level 1 notifications (i.e., Letters of Intent (LOIs) and Letters of Denial or Revocation (LODs)) provide reasonable documentation of the facts and basis for adverse security clearance determinations. Level 2 notifications indicate whether an applicant's appeal was successful or not. Little or no information is provided to appellants documenting how mitigating information was viewed or explaining the specific rationale for the final decision.

For defense contractor employees, SORs document the facts and criteria used in making the decision. In addition, administrative judges' and appeal board determinations clearly explain how mitigating information influenced the decision. Both hearings and case reviews by administrative judges are very well-documented. The rationale for final determinations is clearly explained and the documentation is more complete than that provided by the components.

With the exception of Army, when an adverse SCI access eligibility determination is made, applicants are notified that their eligibility has been denied or revoked before they are given an opportunity to correct the record. The Army provides applicants with the reasons for an adverse action before denying or revoking access. The Army procedure is preferable to that of the other components because complete information is provided to applicants early in the process. Also, in components where applicants for SCI access eligibility request a statement of reasons after the denial or revocation, the appeal is delayed and may be seen as unfair by the applicant. These negative consequences outweigh the small savings in time or money which may result from not providing the reasons to applicants before taking action to deny or revoke access eligibility.

For adverse SCI access eligibility determinations, components should consider providing a LOI with the reasons for the adverse determination. At the same time the LOI is issued, the applicant's access to classified information should be suspended. This practice would assure that all applicants receive the reasons for an adverse determination, allowing them to correct their case record early in the process. This practice also would eliminate the risk of having unqualified applicants with access to classified information when their eligibility is under review. This risk could

be significant since the original adverse personnel security determination is sustained for 78% of the recipients of a LOI. If the applicant's case is decided affirmatively, access eligibility would be reinstated.

Opportunity to Rebut Allegations and Correct Case Record

Appellants, regardless of the type of determination, are given a reasonable opportunity to rebut allegations and correct their case record. Approximately 40% of the appeals result in adverse determinations being overturned at level 1. Between 13% and 19% are overturned at level 2. These statistics suggest that mitigating information provided by appellants is considered in appeal decisions.

Defense contractor employees have a better opportunity than government personnel to rebut allegations and correct their case record. Defense contractor employees have a right to an oral hearing and the opportunity to cross-examine persons providing information adverse to the applicant. They also have the opportunity to present evidence on their own behalf, or be represented by counsel or personal representative.

With the previously noted exception of the Army, persons appealing an adverse determination for SCI access eligibility have no opportunity to rebut allegations and correct their case record before their access eligibility is denied or revoked. This opportunity is provided after access eligibility has been denied or revoked. This practice may undermine the perceived fairness of the SCI access eligibility appeal process.

Notification of Appeal Rights

Appellants, regardless of the type of determination, are provided adequate information concerning their appeal rights and responsibilities. They are informed as to the time within which they must file an appeal, how to get investigative records, and to whom appeals must be addressed.

Adequate Time to Respond

Regardless of the type of determination, appellants are provided with enough time to respond to notifications from the appellate authorities. Authorities grant time extensions, when requested.

Timely Decision

While every effort should be made to complete appeal determinations quickly, applicants must be given adequate time to respond to notifications and prepare their case. In addition appeal authorities need time to acquire additional information,

prepare cases for review, review cases, and prepare documentation and correspondence. Given the requirements of both applicant and appellant authority, appeals of adverse security clearance determinations for government personnel are handled in a reasonable period of time.

It takes approximately 102 days longer to complete level 1 appeals of adverse determinations for SCI access eligibility than security clearance determinations. Data gathered in this study suggest that less time would be required to complete appeals for SCI access eligibility if the previously mentioned suggestion were adopted to issue LOIs with the reasons for the adverse determination before denying or revoking access eligibility. The impact of this recommendation would be considerable since a large proportion of appeals and overturns occur at the first level of appeal.

More time is required to complete appeals by defense contractor employees than for appeals by government personnel or those appealing an adverse SCI access eligibility determination. The timeliness data for defense contractor appeals are not directly comparable to these other groups, however. First, DISCR must schedule and conduct hearings in locations accessible to applicants. Second, DISCR documents cases more completely than other appellate authorities. Third, DISCR conducts a very thorough review and provides the most complete documentation to applicants of all appellate authorities at the second level of appeal.

To the extent possible, DISCR should reduce the time required to complete appeals. The median time required to complete the typical case, appealed to the second level, is approximately 14 months. This length of time has negative impact when applicants have had their access suspended pending a decision by the appeal board or when an applicant is not given interim access pending a decision. This waiting time places a burden on the applicant in the field. It is also costly to DoD in terms of lost productive time due to wasted labor while the applicant is waiting for a disposition.

Equal Due Process Protections Throughout DoD

To the greatest extent possible, all personnel employed by DoD should receive equal due process protections for having an adverse personnel security determination reconsidered. Executive Order 10865 requires that defense contractor employees receive specific due process protections, such as a right to a hearing. Some of these protections are not required by Executive Order 10450 which covers DoD military and civilian personnel. Despite the fact that DoD is conforming with policy, the system may be viewed as unfair from the perspective of DoD personnel, who receive fewer protections.

The large number of appellate authorities in DoD increases the potential for unequal treatment of applicants throughout the department. Two examples are the

amount of time given to appeal an adverse determination and the amount of time given to appellate authorities to complete cases.

For level 1 appeals there are differing time deadlines imposed on appellants, depending on the type of determination. With the exception of Army, SCI applicants have 45 days to appeal a LOD. For appeals of adverse security clearance determinations, applicants have anywhere from 15 to 60 days, depending on the component. Defense contractor employees have 20 days to respond to an SOR. For all types of determinations, applicants may request an extension if additional time is needed to obtain records.

For second level appeals the DoD 5200.2-R imposes no deadline on applicants for responding to a LOD. The DCID 1/14 (Annex B) requires that applicants submit their second-level appeal within 30 days of being notified of the disposition of the first-level appeal. Defense contractor employees are required to submit second-level appeals within 15 days of the clearance decision.

Appellate authorities are not required to complete processing appeals of adverse SCI access eligibility determinations within a specified period of time. The same is true for completing appeals of adverse security clearance determinations by defense contractor employees. While the DoD 5200.2R requires that responses to LOIs be completed by appellate authorities in fewer than 60 days, there are no time limits regarding completion of responses to a LOD.

It can be seen that across DoD there is a variety of deadlines imposed on appellants for level 1 and level 2 appeals; the justification for these differences is unclear. Additionally, there are no deadlines for completing appeals imposed on some appellate authorities. These variations increase the potential for unequal treatment of applicants across DoD.

Another area of concern stemming from the large number of appellate authorities pertains to the levels of knowledge, skill and ability of personnel who handle appeals. Different components provide varying degrees of training for personnel assigned to handle appeals. Therefore, these personnel may have differing levels of knowledge or skill in performing this function. Also, decision-makers across the components may interpret personnel security criteria and guidelines differently. Many components handle appeals with part-time personnel who may not have the training and experience possessed by full-time personnel in other components performing the same function. Consolidation of some of these appellate authorities and attention to the training provided to those who handle appeals should help to reduce the potential for unequal treatment of applicants appealing adverse personnel security determinations in DoD.

Strengths and Weaknesses

Strengths

- a. Appeal procedures for adverse personnel security determinations in DoD components conform with DoD, DCI and component policy requirements.
- b. Individuals are being given a fair opportunity to challenge adverse personnel security decisions. Appellants are provided with enough time to respond to notifications from appellate authorities and mitigating information provided by appellants results in a significant number of initial adverse personnel security determinations being overturned.
- c. Components have the authority to handle adverse personnel security determinations. This is consistent with policy that assigns components the responsibility for implementing a personnel security program. Components can design and modify their due process procedures as needed to support their programs.
- d. The cost of processing adverse personnel security determinations appears reasonable given policy requirements.

Weaknesses

- a. In some components appeal procedures could be re-structured to give decision-makers greater independence. Instead of using a single individual as the appellate authority, a board structure would provide greater protection for decision-makers from potential undue influence by either superiors or those responsible for the original adverse determination.
- b. There is potential for unequal treatment of applicants appealing adverse personnel security determinations in DoD. The quality of notifications is uneven across different types of determinations. Time deadlines imposed on appellants vary by type of determination and component. In addition, different components provide varying degrees of training for personnel assigned to handle appeals. Finally, unlike individuals appealing an adverse security clearance determination, those appealing an adverse SCI access eligibility determination cannot rebut allegations or correct factual errors prior to the denial or revocation of their access eligibility.

- c. Despite the fact that DoD is conforming with applicable executive orders, current appeal procedures for handling adverse personnel security determinations may be viewed as unfair by DoD civilian personnel because they receive fewer due process protections than defense contractor employees.

Alternatives to Current System

This section identifies three possible alternatives to the current system: component appeal boards, DoD appeal board, and DISCR hearings for DoD civilians. These alternatives are described, along with their advantages and disadvantages. In creating these alternatives an attempt was made to keep as many of the strengths of the current system as possible while reducing its weaknesses. Detailed cost analyses are only provided for the third alternative, DISCR hearings for DoD civilians, since the first two alternatives should not result in increased or decreased costs to DoD.

Since DoD currently has the structures in place to handle similar administrative and judicial matters, the alternative of placing authority for handling appeals outside DoD was not considered a feasible option. Also, providing hearings for military personnel at DISCR was not considered a realistic option. This practice is inconsistent with current military procedures which provide these personnel due process through the military chain of command. In addition, providing hearings for personnel appealing adverse SCI access determinations was not considered since Executive Order 10865 does not address hearings for defense contractor employees appealing SCI access eligibility determinations. Finally, because of the requirements of this Executive Order, alternatives were not considered which would reduce due process protections afforded defense contractor employees.

Component Appeal Boards

This alternative creates appeal boards corresponding to five of the six adjudication authorities in DoD (excluding NSA): Army, Navy, Air Force, WHS, and DIA. DISCR appeal procedures for employees of defense contractors would not be changed. Appeals for SCI access and security clearance eligibility would be consolidated under the appropriate component appeal board. All military and civilian appeals of adverse personnel security determinations in the services, WHS, and DIA would be handled by these boards.

Under WHS, a board would handle all appeals of adverse security clearance determinations for itself and the components for which it adjudicates security clearances. Likewise, DIA would have a board to handle SCI access eligibility appeals for itself and the components for which it adjudicates SCI access eligibility.

The structure and operation of the boards could be modeled on the Navy's Personnel Security Appeal Board (PSAB). For example, each board could have the following characteristics.

- a. Two members would come from outside the headquarters that has oversight responsibility for the adjudication facility.
- b. The board would be comprised of three members at the minimum military grade of 05/06 or civilian grade of GM/GS 14/15.
- c. One of the three members would be a permanent board member and serve as board president. This person would have knowledge and experience in the field of security or related disciplines.
- d. The composition of the board would change to reflect the status of the appellant. For example, if the appellant were a senior civilian executive, a senior executive would serve as a member of the board for that case. Likewise, board members would be drawn from the SCI community, a particular service or defense agency as individual cases warrant.
- e. Neither a representative nor an individual with direct oversight responsibility for the component adjudication function would serve as a member of the board or would be allowed to meet with board members to discuss a particular case.
- f. Appeals would be decided by majority vote.

Similar to the procedure currently used by the Army, LOIs would be issued following adverse security clearance and SCI access determinations. Except for defense contractor employees, issuance of a LOI would mandate suspension of access to classified information. Defense contractor employees should be excluded from this requirement since their employment would probably be terminated prior to completion of the appeals process. Government personnel would not be terminated solely for security reasons until their appeal was completed. Also, security clearance access would not be suspended in cases where denial or revocation of SCI access eligibility is being considered, but the individual is still eligible for a security clearance.

Individuals who respond to a LOI, but do not have the original determination overturned, would receive a LOD. All individuals receiving a LOD would have 30 days to appeal to their component appeal board; extensions could be granted when appropriate. Authority for making final security clearance and SCI access determinations would be delegated to the board. The board's decisions, therefore, would be final and not appealable.

When an opportunity to appeal is granted, the DCID 1/14 stipulates that there will be two levels of review after issuance of a LOD. We believe that the aforementioned procedures meet the intent, if not the letter, of this requirement.

Component appeal boards are a natural outgrowth of DMRD 986 which consolidated DoD adjudicative functions. With this alternative, services, WHS, and DIA would retain the authority to make final security determinations for their own personnel. Board members, drawn from the component or a particular subgroup within the component, would be in the best position to weigh the importance of adverse information because of their appreciation for the context within which appellants function. The change also would complement current efforts to unify SCI access and security clearance eligibility adjudication criteria as well as the interpretation of these criteria.

Additional funds would not be needed to operate component appeal boards. The cost data in this study suggest that cost per case for boards is approximately the same as or lower than that for appeals to a single headquarters authority through a chain of command. For security clearances, the level 2 cost per case for the Navy which uses a board is \$513. This cost for Air Force, WHS, and Army combined, which do not use boards, is \$682. Similarly for appeals of adverse SCI access determinations, the level 1 cost per case for the Navy which uses boards is \$770. This cost per case for the Air Force and DIA combined, who do not use boards, is \$1462. The Army was excluded from this analysis because they do not process SCI cases in the same manner as other SCI appellate authorities (see endnote 8).

Also, previous experience suggests that appeal boards can complete cases as quickly or more quickly than a single headquarters authority through a chain of command. For security clearances, the Navy, which uses a board, typically requires 70 days to complete a level 2 appeal. This figure for Air Force, WHS, and Army combined, which do not use boards, is 127 days. Similarly for appeals of adverse SCI access determinations, the median number of days required by the Navy to complete a level 1 appeal is 181. The median number of days required by the Air Force and DIA combined, which do not use boards, is 256. The Army was excluded from this analysis of SCI cases for the reason stated above.

Finally, the data in this study show no significant differences in overturn rates between components with appeal boards and those without boards. For security clearances, the Navy had an overturn rate for level 2 appeals of 42%. This percentage for the Air Force, WHS, and Army combined was 40%. Similarly for SCI, the overturn rate for level 1 appeals for the Navy was 41%. This percentage for Air Force and DIA combined was 34%. Again, the Army was excluded from this analysis of SCI cases for the reason stated above.

It is likely that this alternative system would be viewed as more fair than the current system. First, appeal procedures would be more consistent across the components. Second, all DoD personnel would receive a LOI with specific reasons documenting the adverse determination. This is important because the government has the responsibility to inform individuals of the specific reasons for any governmental actions taken which might affect their employment. Third, a board would be more independent of the adjudicative function than currently is the case in some of the components. Multiple decision-makers would be less susceptible to undue influence by interested parties to decide a case in a particular way.

However, this alternative has some disadvantages. First, with multiple boards the potential remains for some procedural inconsistency within DoD in handling adverse determinations. Noteworthy are the different procedures that would remain for DoD civilians and for civilians employed by defense contractors. Second, with more than one board, the workload for each would be small and board members would be part-time. It would be less efficient to train part-time staff than full-time board members on a single DoD board. Also, components with a review process that follows the chain of command already have knowledgeable personnel in the chain. With a board, there likely would be additional training required for board members who lack security experience. Third, unless the components staffed the boards with lawyers, it is unlikely that this alternative would appreciably improve the quality of case records documenting the rationale for appeal decisions.

DoD Appeal Board

This alternative creates a single board for second-level appeals of adverse security clearance and SCI access eligibility determinations by all DoD military and civilian personnel. This permanent board could have military and civilian representatives including, when appropriate, representatives of the SOICs. DISCR would continue to handle appeals of adverse security clearance determinations by defense contractor employees. Also, the new LOI procedure associated with the previous alternative would also apply to this alternative.

The structure and operation of a single board could be similar to the structure and operations of the component boards previously discussed. Another approach would be to limit the board to reviewing initial decisions with regard to material legal errors identified by the appealing party. This would in effect enable the components to keep control of the decision as to whether an employee constituted a security risk, as long as pertinent regulatory standards and procedures were properly applied.

Depending upon its function, the board could be operated under the authority of ASD(C3I) or the Defense Legal Services Agency (DLSA). ASD(C3I), given its role in security policy, would be a reasonable choice. DLSA, however, is currently set up

to handle appellate functions and would be a natural choice, especially if the function of the board is to review personnel security determinations for material legal errors.

A single board would have sufficient workload to justify full-time and well-trained staff. Documentation of appeal decisions would likely improve over the current system or the multiple board alternative. This would provide greater due process protection and an improved audit trail for the independent review and evaluation of decisions. As with component appeal boards, our data suggest that additional funds would not be required to operate a DoD appeal board nor would additional time be required to complete final determinations.

It is likely that this alternative would be viewed as more equitable than either the current system or the multiple board alternative. First, all DoD personnel appealing adverse personnel security determinations would be treated the same since there would be one appeal board. Second, the appeal function would be independent of component adjudicative functions.

A chief disadvantage of the alternative is that the services, WHS, DIA, and service SOICs would lose the authority to make final security determinations for their own personnel. This loss for the SOICs is contrary to Executive Order 12333. This loss of authority also runs counter to DMRD 986 where the decision was made to give responsibility for making these decisions to the services, WHS, DIA, and service SOICs. Also, with this alternative there would be different appeal procedures for DoD civilians and civilian contractors. Finally, this alternative would require clearance facilities to coordinate procedures to enable the board to have comparable case summaries from each of the components. While the result would be a standardized DoD approach for informing individuals of an intent to deny or revoke a security clearance or SCI access eligibility, additional training would be required to implement this change.

This board could be limited to handling cases in which DoD civilians appeal an adverse security clearance determination. This would mitigate the disadvantage that services, WHS, DIA, and service SOICs would lose the authority to make final security determinations for their own personnel. However, this variation would further fractionate the DoD appeals, expanding rather streamlining the process. An additional appeal board would be added for DoD civilians appealing adverse security clearance determinations. The services and DIA would still have to handle DoD civilian appeals of adverse SCI access eligibility determinations as well as military appeals of both adverse security clearance and SCI access eligibility determinations.

Hearings Before Administrative Judge for DoD Civilians

This alternative entitles DoD civilians, for whom a security clearance has been denied or revoked, to a hearing before an administrative judge. Component

adjudication facilities would continue to process responses to First Letters (LOIs) and to issue Second Letters (LODs). Rather than making a second-level appeal to their component, civilian employees instead would be entitled to a hearing before a DISCR administrative judge and a final review by the DISCR Appeal Board.

Table 5 summarizes the increased costs of providing DISCR due process for DoD civilian employees receiving a letter of denial or revocation for a security clearance. It can be seen that it would cost approximately \$.8M annually to provide civilians the opportunity to appeal a component clearance denial or revocation to DISCR for a hearing or review by an administrative judge, including a final review by the DISCR Appeal Board. These estimates are based on FY92 dollars and appeal rates.

Table 5

Increased Costs of Providing Hearing for DoD Civilians Appealing
a Letter of Denial or Revocation for a Security Clearance

Level	Cost per Case Increase ¹³ (\$)	Expected Appeals ¹⁴ (Number)	Cost Increase (\$)
Hearing	4,915	135	.664M
Appeal Board	3,895	39	.152M
Total			.816M

The chief advantages of this alternative are that DoD civilian appellants would be entitled to a hearing before a DISCR administrative judge and be offered greater due process protections. All DoD civilians would be treated the same and would be afforded due process protections more like those given to defense contractor employees. Documentation of appeal decisions would improve. Also, this alternative might be viewed as more equitable than the current system because the appeal function would independent of DoD adjudicative functions.

This alternative has three primary disadvantages. First, it would cost additional funds to offer these due process protections for DoD civilian employees. Not included in the estimate in Table 5 are the additional costs which would be incurred to handle cases for personnel overseas. Second, the typical DoD civilian case would require an estimated 103 additional days for a hearing or review by an administrative judge and another 208 days if the case went to the Appeal Board.

Thus, over 310 days could be added to the time required to complete an appeal. This delay would adversely impact organizations in the field if appellants could not be utilized productively or replaced until all appeal procedures were completed. The extent of the impact on field operations is difficult to predict. The cost of wasted labor could easily reach \$2.2M annually.¹⁵ Third, the services and WHS would lose the authority to make final decisions for civilians who appeal adverse security clearance determinations.

Another disadvantage is that this alternative would create two systems for handling appeals of adverse personnel security determinations. One system would handle appeals of adverse SCI access eligibility determinations for military and civilian personnel, along with appeals of adverse security clearance determinations for military personnel. The other system would handle appeals of adverse security clearance determinations for DoD civilians and employees of defense contractors. Therefore, this alternative would fractionate appeal procedures, resulting in a less streamlined system. Also, there would be minimal potential for improved efficiency in the components through this restructuring of appellate functions. This fractionation could be avoided if military and SCI personnel were afforded the same due process protections provided by this alternative to government civilians and defense contractor employees. However, this would increase the cost of this alternative.¹⁶

One way to reduce the cost of this alternative would be to make hearings available to DoD civilians only when a case presented a genuine issue as to a material fact. This would provide a hearing when the need for confrontation and cross-examination is most important. If this procedure were also applied to defense contractor employees, there would be additional cost savings and the due process protections would be more equitable for both of these groups. A disadvantage of applying this procedure to defense contractor employees would be that it eliminates a procedural entitlement that they have had for more than three decades. Executive Order 10865 would have to be revised to implement this change.

Another way to reduce the cost of this alternative would be for the adjudication function of DISCR (located in Columbus, Ohio) to process responses to SORs by defense contractor employees. If the original determination were sustained, then the case could be appealed to DISCR Arlington for a hearing or review by an administrative judge. These appellants would still be entitled to a final review by the DISCR Appeal Board and would continue to maintain access until completion of a hearing or review by an administrative judge. This change would not decrease any due process protections for employees of defense contractors and would be expected to save approximately \$.7M annually.¹⁷ If this alternative were implemented the change would create similar due process procedures for DoD civilians and defense contractor employees.

Conclusion and Recommendations

Even though the current system is functioning adequately, DoD should consider implementing an alternative that gives decision-makers greater independence. It is recommended that DoD implement the first alternative, component appeal boards. The benefits of this alternative outweigh the limited costs of its implementation.

This alternative increases the perceived and actual freedom of decision-makers to decide each case on its merits. The boards would be more independent of the clearance processing function. Also, a board with three members would be less susceptible to potential command influence to decide a case one way or the other. This increased independence would be achieved without taking away authority of the services, WHS, and DIA to make final security determinations for their own personnel. This alternative is consistent with current Navy plans to implement a single component level appeal board to handle appeals of both adverse security clearance and SCI access determinations.

This alternative would provide a unified system for handling appeals for SCI access and security clearance eligibility in the components. This consolidation of functions is consistent with DMRD 986. The boards would operate under the aegis of component heads who have final authority to make personnel security determinations. This alternative also complements current efforts to develop common SCI access and security clearance eligibility adjudication criteria.

Additional funds would not be needed to adopt component appeal boards. Our cost data suggest that the cost per case for boards is approximately the same or lower as that for appeals to a single headquarters authority through a chain of command. Also, the Navy's experience shows that the use of appeal boards could even decrease the time required to complete final determinations. Therefore, this alternative would not impact field operations, contrary to the expected negative impact of the alternative above where DoD civilians would be processed by DISCR.

The disadvantage that part-time board members may have less knowledge and expertise than full-time board members could be addressed through training. The Department of Defense Security Institute could be tasked to develop local training for board members, such as a correspondence course or desk guide. The Navy's experience with appeal boards, for both security clearances and SCI access eligibility, suggests that part-time board members perform effectively even though they have limited personnel security experience.

Whether to entitle DoD civilians to a hearing before an administrative judge is not a decision which can be justified or discounted solely on the cost or timeliness criteria considered in this report. Lacking mandate from the courts, the decision

should be based on the due process philosophy and objectives of the executive branch. An assessment of this philosophy was beyond the scope of this report.

Clearly, entitlement to a hearing would cost DoD money and increase the time required to complete final determinations. Also, this study presents no data to suggest that this entitlement would likely yield a different outcome in some portion of the DoD civilian cases. It seems reasonable to expect that it would affect the outcome in a small number of borderline cases.

The advantages of a single DoD appeal board are outweighed by taking away authority to make final determinations from the services, WHS, and DIA. The current system delegates authority to the services, WHS, and DIA to make these determinations. Therefore, authority to handle appeal procedures should be similarly delegated. At some future time, should clearance processing functions in DoD be centralized, it would be appropriate also to centralize the appellate functions.

Specific recommendations required to implement the first alternative are listed below. These recommendations require specific changes to the DoD 5200.2-R and, where SCI access eligibility is involved, changes to the DCID 1/14.

Recommendation 1. Require each component with a clearance facility to establish a single appeal board for handling appeals of adverse security clearance and SCI access eligibility determinations. The structure and operation of these boards are discussed earlier in this report. Prohibit any direct contact between either an appellant or a representative of the clearance facility and members of the board on the substantive matters of a particular case.

Rationale. This will achieve more uniform appeal procedures across DoD for government personnel. It will enhance the independence and fairness of DoD appeal procedures.

Recommendation 2. Require individuals to acknowledge receipt of the First Letter or LOI. This acknowledgement form, indicating whether the individual intends to respond to the LOI, must be returned within 7 days of receiving the First Letter. If responding to the LOI, individuals must file their appeal within 30 days of receiving the First Letter. The local command or organization can grant individuals an extension of up to 30 additional days to obtain necessary investigative records by notifying the appropriate clearance facility. Any additional extensions should be granted by the clearance facility.

Rationale. This will ensure uniform LOI response time frames across the components and potentially reduce the time required to issue a LOD to the approximately 50% of individuals who do not respond to LOIs.

Recommendation 3. Require adjudicative authorities to either direct or strongly recommend that local officials suspend an individual's access to classified information upon receipt by the command or organization of an LOI. This suspension would not apply to defense contractor employees or to Top Secret or Secret access in cases where SCI access is being denied or revoked but security clearance eligibility is not affected.

Rationale. Seventy-eight percent of individuals who receive a LOI ultimately have their clearance or SCI access eligibility denied or revoked, or the case is administratively closed. Allowing an individual who has received a LOI to keep access to classified information pending resolution of an LOI appeal or until receipt of a LOD may create an unacceptable security risk. Unlike government personnel, defense contractor employees could be terminated prior to completion of the appeals process. Therefore, defense contractor employees should be excluded from this requirement.

Recommendation 4. Require First Letters or LOIs, with reasons for the adverse administrative action, to be issued to all DoD personnel and defense contractor employees any time an adverse SCI access eligibility determination has been made.

Rationale. Each service has a single clearance facility for making all personnel security determinations. A single board within each component would be handling both SCI access eligibility and security clearance appeals. Implementing identical LOI procedures for both types of cases would facilitate case processing and efficiency without a negative impact on security. It would also increase the fairness of the system.

Recommendation 5. Require that First Letters or LOIs, Second Letters or LODs, and final notifications from appeal boards contain common elements. These letters should inform individuals of the facts and criteria used in making a personnel security determination. Also, final notifications should explain how mitigating information influenced the determination.

Rationale. The perceived and actual fairness of the DoD appeal system depends, in part, on the extent to which individuals understand why an adverse determination is being made. Individuals cannot reasonably appeal a decision if they do not understand the basis for the decision. Standardized elements also would help to ensure that individuals across all DoD components are treated equally.

Recommendation 6. Require that clearance facilities review all new information introduced by the appellant in the appeal after a LOD has been sent to the individual. The facility would either grant the security clearance or the SCI access eligibility, or within 3 working days, inform the appeal board in writing why

the information does not change the original determination. The board would consider this input in deciding the appeal.

Rationale. The situation described above is handled differently across the components. Board members should understand how all potentially mitigating information is viewed by the clearance facility.

Recommendation 7. Require that individuals be given 15 days to appeal a Second Letter or LOD from a clearance facility. The local command or organization may grant a 30 day extension for the preparation of the appeal. Additional extensions may only be granted by the appellate authority.

Rationale. Fifteen days is enough time to file an appeal to the Second Letter or LOD, especially since the time-consuming tasks of obtaining investigative records and preparing the case are usually completed during the first-level appeal. This deadline eliminates delays caused by individuals who are slow to respond to the Second Letter or LOD.

Recommendation 8. Require that DISCR and each component appeal board provide to the applicant a written decision within 60 days of receiving the written appeal to the LOD. If a final response cannot be completed with 60 days, the subject should be given a written explanation of the reasons for the delay.

Rationale. There are currently no time limits placed on appellate authorities for completion of the second level appeal. Specific time limits would improve the fairness of the appeal procedures. If appeals were completed in less time, resources of field operating units would be saved in situations where individuals cannot be employed or replaced until all appeal procedures are completed.

Recommendation 9. Require that component appeal boards convene at least every 30 days unless there are no cases pending.

Rationale. This will ensure timely responses to individual appeals and reduce excessive non-productive time for appellants who have had their security clearance or SCI access eligibility denied or revoked.

Recommendation 10. Require that DISCR Columbus process initial responses to SORs by employees of defense contractors independent of whether or not hearings are provided for government civilian employees.

Rationale. This change will save DoD approximately \$.7M annually without any reduction in the due process protections for employees of defense contractors.

Endnotes

1. Data collection forms are available upon request.
 2. Defense Management Report Decision (DMRD) 986 was issued by the Deputy Secretary of Defense on December 11, 1992. This Decision directed the consolidation of DoD adjudicative operations under seven authorities. Previously these functions had been performed by eighteen separate DoD facilities, excluding the National Security Agency. The estimated savings of this consolidation was \$800,000 in FY94 and \$3.1 million in FY95 with a total savings of \$21.9 million through FY99. A 1991 PERSEREC report, *Consolidation of Personnel Security Adjudication in DoD*, examines the benefits of increased consolidation of DoD adjudication facilities.
 3. An October 1991 report, *Consolidation of Personnel Security Adjudication in DoD*, reported that DoD adjudication facilities performed a total of 396.09 work years of adjudication and adjudication support in FY90. The organizations included in present study performed 361.92, or 91.4% of these work years. The defense agency organizations not included performed 34.18, or 8.6%, of these work years.
 4. Army does not follow this procedure for appeals of adverse SCI access eligibility determinations. Instead, Army employs the procedure described for processing appeals of adverse military or civilian security clearance determinations. Army uses the same process for both types of determinations.
 5. For security clearance determinations, a First Letter serves as notification that the adjudicative authority will deny or revoke an individual's clearance eligibility unless compelling mitigating information is provided. For SCI access eligibility determinations, a First Letter serves as notification that an individual's access eligibility has been denied or revoked.
 6. For security clearance determinations, a Second Letter serves as notification that an individual's clearance eligibility has been denied or revoked. For SCI access eligibility determinations, a Second Letter serves as notification of the outcome of the first level of appeal. Some individuals who receive a First Letter and do not appeal or who appeal but do not get the original determination overturned do not receive a Second Letter. The reason is that these individuals leave DoD and/or the clearance facility loses jurisdiction. These cases are administratively closed without a Second Letter. Therefore, the actual number of Second Letters (4833) is less than the number one might expect (5636) if the number of Second Letters was estimated by subtracting the number of appeals in which the original determination was overturned (1440) from the number of First Letters (7076).
- For security clearances for military and civilian personnel, the number of Second Letters (4833) can exceed the number of First Letters appealed (3524) because Second Letters are sent to individuals who do not respond to First Letters as well as those individuals who respond to the First Letters but who do not get the original determination overturned.
7. Since both DISCR and the appellant can appeal a case to level 2, this percentage (28.6%) represents the number of Second Letters appealed (210) divided the number of First Letters appealed (735). Theoretically all level 1 appeals can be appealed to level 2, even if the original adverse determination is overturned at level 1.
 8. Army data were not included since doing so would have distorted the overall results for DoD SCI access eligibility determinations. Unlike other SCI adjudicative authorities, the Army processes adverse SCI cases the same as adverse clearance eligibility determinations (i.e., a Letter of Intent (LOI) to deny/revoke SCI access eligibility precedes any denial/revocation action). In FY92, Army issued an estimated 2,329 LOIs for SCI access eligibility, 42.7% of the recipients replied, and 28.7% of these

replies resulted in the original determination being overturned. In the same period, Army issued 567 Letters of Denial/Revocation for SCI access eligibility, 4.8% of the recipients appealed, and 37.0% of these appeals resulted in the original determination being overturned.

9. Air Force resource data for level 1 appeals were not available. Therefore, this \$370 level 1 cost per case figure does not reflect Air Force resource or output data.

10. Army data were not included (see endnote 7). In FY92 Army costs per case for processing adverse determinations for SCI access eligibility were \$333 for level 1, \$778 for level 2, and \$1,111 for both levels combined.

11. A median is defined as the point at or below which exactly 50 percent of the cases fall. For example, for the military or civilian security clearances sampled in this study, 220 or fewer days were required to completely process 50 percent of the cases. The median was used as a measure of central tendency, rather than a simple average. The median is less susceptible to error in estimating the typical number of days required to complete the processing of an adverse case.

It should be noted that there is considerable variation around the medians reported in Table 4. These variations not only reflect the performance of the appeal authority, but also the time required by appellants to prepare their case.

12. Army timeliness data were not included since doing so would have distorted the overall results for DoD SCI access eligibility determinations (see endnote 8).

13. The cost per case increases shown in this table are different from those reported on page 18 of the report (i.e., \$5,089 for level 1 and \$3,351 for level 2). Under this alternative, components would still incur the cost of a level 1 appeal. The component level 2 appeal would be replaced by the appeal to DISCR. Thus, the cost increase for the hearing or administrative judge review by DISCR would be the cost per case of the DISCR level 1 appeal (\$5459) minus the cost per case of the component level 2 appeal (\$544) or \$4915. Since the appeal to the DISCR Appeal Board would not replace any existing procedures, the \$3895 cost per case for a DISCR level 2 appeal was used as the cost per case increase. See Table 3.

14. In order to project the increased costs, it was necessary to estimate the expected number of appeals to DISCR by DoD civilian employees. This involved a three step process. First, we estimated the total number of expected hearings and reviews by DISCR administrative judges by using the actual appeal data for FY92. The best estimate of the number of military and civilian personnel who would appeal to DISCR would be the number that appealed LODs to the components in FY92. As shown in Table 2 in the report, 436 or 9% of the 4833 individuals who received a Second Letter (i.e., LOD) appealed the decision to the component. Therefore, 436 was used as the expected number of appeals to DISCR for a hearing or review by an administrative judge.

Second, since this alternative would entitle appellants to appeal the decision of an administrative judge, we needed to estimate how many of the above 436 cases could potentially be appealed to the DISCR Appeal Board. Component data were not relevant to this estimate since the 436 cases described above represent the final level of appeal within the components. Therefore, DISCR data from Table 2 were used to make the estimate. Of the 735 DISCR cases that were appealed at level 1, 210 cases were appealed to the DISCR Appeal Board. Thus, 28.6% (210 divided 735) of the DISCR level 1 cases ended up as DISCR level 2 cases. Using this percentage we estimated that 28.6%, or 125 of the 436 expected level 1 appeals to DISCR, would be appealed to the Appeal Board.

Third, we needed to estimate the number of the 436 hearings or administrative judge reviews and 125 Appeal Board cases that would be filed by civilian personnel. The *Defense Almanac* for September/October 1992 reported that DoD civilians comprise approximately 21% of the total DoD population in FY92 if reserves are included. Almanac data also indicated that for the Navy and Air Force combined, approximately 25% of the personnel are civilian. In the current study, the Navy and Air Force combined reported that approximately 37% of their level 2 appeals for a security clearance were from civilians.

A ratio comparison was used to compute the estimated proportion of component appeals to DISCR that would be from civilians. It was reasoned that if 37% of the appeals for the Navy and Air Force are civilian and 25% of these component's personnel are civilian, then 31% of the total DoD appeals would be civilian given that 21% of the total DoD population is civilian ($.37 \times .21$ divided by $.25 = .31$). Thus, the expected number of appeals to DISCR for a hearing or review by an administrative judge for DoD civilians was 135 ($436 \times .31$) and to the Appeal Board was 39 ($125 \times .31$).

15. This cost estimate was based on the following assumptions. First, the daily cost of labor was estimated at \$200. This rate is equivalent to the cost of the pay and fringe benefits for a GS-7 step 5 government civilian, including a general and administrative overhead rate of 50%. Second, it was assumed that, on average, applicants could be utilized productively for 50% of the time while awaiting a final appeal determination. Third, with this alternative it was estimated that the typical DoD civilian case would require an estimated 103 additional days for a level 1 DISCR hearing or review by an administrative judge, and 208 days for a DISCR Appeal Board review at level 2.

The additional days required by the DISCR process used in this analysis are different than those reported on page 18 in the report (i.e., 121 days at level 1 and 89 days at level 2). Under this alternative, components would still require the time to process a level 1 appeal (i.e., 101 days). The level 2 component appeal would be replaced by the appeal to DISCR. Thus, the additional days required for this alternative would be the days required for DISCR level 1 appeal (222) minus the days required for a level 2 component appeal (119) or a difference of 103 days. Since the appeal to the DISCR Appeal Board would not replace any existing component procedures, the 208 days required for a DISCR level 2 appeal was used as the additional days required for this appeal. See Table 4.

The cost (\$1,390,500 or \$1.4M) of wasted labor to the field due to delays associated with level 1 DISCR hearing was estimated by multiplying the expected number of appeals (135) at level 1, the number of additional days (103) required by the DISCR process over the existing system for level 2, and cost per day (\$200). The product of these three figures (\$2,781,000) was divided by 2, to account for the assumption that applicants would likely be utilized productively 50% of the time.

The cost (\$811,200 or \$.8M) of wasted labor to the field due to delays associated with level 2 appeals was estimated by multiplying the expected number of appeals (39) at level 2, the number of additional days (208) required by the DISCR process, and the cost per day (\$200). The product (\$1,622,400) was divided by 2, to account for the assumption that applicants would likely be utilized productively 50% of the time.

The total cost (\$2.2M) of wasted labor to the field due to delays associated with providing DISCR appeal procedures was determined by summing the DISCR level 1 cost for a hearing or review by an administrative judge (\$1.4M) and the DISCR Appeal Board level 2 cost (\$.8M).

16. While not originally included as part of this alternative, DISCR could handle all appeals of adverse personnel security determinations for DoD. This would reduce fractionation and create an identical appeal system for all DoD personnel. The projected cost of handling appeals of adverse

security clearance determinations for military personnel would be an additional \$1.8M annually (\$1.5M for level 1 hearings or administrative law judge reviews and \$.3M for level 2 Appeal Board reviews). This estimate is based on the same cost per case increases shown in Table 5 and expected appeals of 301 at level 1 and 86 at level 2. Using the same rationale outlined in endnote 15, the projected total cost to the field of wasted labor would be \$4.9M annually.

The additional costs for handling appeals of adverse SCI access eligibility determinations for military personnel, government civilians, and defense contractor employees would be \$.5M (\$.4M for level 1 hearings or administrative law judge reviews and \$.1M for level 2 Appeal Board reviews). This estimate is based on the same cost per case increases shown in Table 5 and expected appeals of 73 at level 1 and 21 at level 2. Again, using the same rationale outlined in endnote 15, the projected total cost to the field of wasted labor would be \$1.2M annually.

17. This estimated annual savings of \$.7M is based on the assumption DISCR Columbus would overturn approximately two-thirds of original determinations that are currently overturned by DISCR Arlington (i.e., 333) during the level 1 hearings and administrative law judge reviews. This overturn rate by DISCR Columbus would reduce the number hearings and administrative law judge reviews by approximately 222 annually (.67 X 333). This assumption is realistic since the components currently overturn about the same percentage of cases during their first level of appeal as DISCR does during level 1 hearings and reviews by administrative judges.

The cost savings of eliminating 222 hearings or reviews by administrative judges annually were computed by the following six step procedure. First, the DISCR cost per case for writing SORs (\$1,354) was calculated by dividing the total cost of processing SORs by DISCR (\$995,000) by the number of responses to SORs (735). Second, the cost per case for adjudicating responses to SORs by DISCR Columbus (\$258) was estimated by taking two-thirds of the cost currently required by component facilities (\$370) to both write and adjudicate responses to LOIs. Third, the cost per case for both writing and adjudicating SORs (\$1,612) was determined by adding the cost per case for writing SORs (\$1,354) to the cost per case for adjudicating SORs (\$258). Fourth, the cost per case savings (\$3,847) was determined by subtracting the cost of per case for writing and adjudicating SORs (\$1,612) from the level 1 cost per case of processing appeals at DISCR (\$5,459). Fifth, the gross cost savings (\$854,000) was a product of the number of cases where DISCR Columbus would be expected to overturn the original determination (222) and the cost savings per case (\$3,847). Sixth, the net cost savings (\$722,000) was determined by subtracting from the gross savings (\$854,000), the cost (\$132,000) of adjudicating the 513 cases in which the original determination was not expected to be overturned. This \$132,000 was determined by multiplying the cost per case of adjudicating the cases (\$258) in which the original determination was not overturned and the number of expected cases (735 minus 222 or 513) in this category.

List of Appendixes

- A. Security Clearance Appeal Procedures (DoD Military and Civilians)
- B. Security Clearance Appeal Procedures (Defense Contractor Employees)
- C. SCI Access Eligibility Appeal Procedures (DoD Military, Civilians, and Defense Contractor Employees)
- D. FY92 Cost of Processing Appeals of Adverse Determinations for a DoD Security Clearance and SCI Access Eligibility (\$ in Thousands)
- E. Method for Calculating Cost Estimates

APPENDIX A
Security Clearance Appeal Procedures
(DoD Military and Civilians)

ARMY (Reference: AR 380-67)

Level 1

1. When denial of revocation of a security clearance is considered appropriate, the Army Central Personnel Security Clearance Facility (CCF) forwards a letter of intent (LOI) through the command security manager to the individual.

a. The LOI outlines the derogatory information and explains the proposed action.

b. The LOI offers the person a chance to reply in writing within 60 days in order to provide an explanation, rebuttal, or mitigation for the adverse information.

c. The LOI directs suspension of access to classified information.

2. The local commander ensures that the person acknowledges receipt of the LOI and is counseled on the seriousness of the proposed action.

3. If individuals choose to respond, they must address each issue raised in CCF's LOI and must forward the response to CCF through the representative of the local commander who provided the LOI. The LOI must be endorsed by at least one commander and must provide a commander's recommendation on whether the person's clearance should be denied, revoked, or restored. The individual can request an extension to the 60-day time limit if required to obtain relevant information.

4. CCF reviews mitigating information, if any, provided in response to the LOI and makes a final decision within 60 days. This 60-day period can be extended to 90 days by notifying the individual in writing.

5. CCF notifies the individual in writing via the command security manager of its final decision. If the decision is a denial or revocation of a clearance, this final letter of determination states that if the person intends to appeal, the appeal must be submitted to the Department of the Army, Office of the Deputy Chief of Staff for Intelligence, Security Countermeasures Division (DAMI-CIS).

a. The individual must acknowledge receipt of the letter.

b. Any appeal must be submitted to DAMI-CIS.

Level 2

1. If an individual chooses to appeal, it must be submitted in writing within 60 days to DAMI-CIS. The individual can request an extension of this deadline.

a. The appeal letter must be sent, at a minimum, through the immediate commander, who must make comment on the case and make a recommendation.

b. The individual cannot provide new mitigating information that was not included in any previous response to the LOI. If new information is sent, DAMI-CIS forwards the case to CCF for an initial review. If CCF does not change its original determination, the individual is notified and still has the right to appeal the adverse decision to DAMI-CIS.

2. A GS-13/14 civilian at DAMI-CIS initially reviews the case, including the appeal, a complete dossier from CCF, and any other relevant information. The individual can request additional assistance and information (e.g., legal, medical) as required.

a. A summary of the case is prepared, including relevant adverse information, mitigating information, adjudicative criteria.

b. A draft letter is prepared, which, if approved, can be sent to the individual via the local command.

3. The case and case summary are consecutively reviewed by a supervisor and Division Chief prior to submission to the Director. Any differing perspectives are discussed and evaluated by the participants. Any unresolved differences of opinion remain documented in the file until the final decision is made.

4. The case with recommendations is then forwarded to the Director, Counterintelligence and Security Countermeasures (DAMI-CI), who makes the final decision. This individual can confer with the previous two reviewers as required.

5. A letter is then sent to the individual via the local command presenting the appeal decision. This decision is final and no further appeal is authorized.

NAVY (References: OPNAVINST 5510.1H CH-1: OPNAVNOTE 5510 of 18 September 1991: SOP, Navy Department PSAB)

Level 1

1. When denial or revocation of a security clearance is being contemplated, the Department of Navy Central Adjudication Facility (DON CAF) will issue a letter of intent (LOI) to deny to deny or revoke a security clearance to the individual concerned.

a. The LOI is sent via the individual's command.

b. The LOI advises the individual of the proposed action, the reasons for the action, and of the option to respond in writing to the LOI disqualifying information.

c. The individual must acknowledge receipt of the LOI, return the acknowledgement form, indicating whether or not he/she intends to respond, and requesting an extension to the 15 days if required.

d. Based on its review of the information in the LOI, the command can choose to suspend access pending a final decision by DON CAF.

2. The individual has 15 days to prepare and submit a written response to the LOI. The command can grant the recipient up to a 45-day extension to gather relevant information and prepare the response. Any additional extension must be made by DON CAF.

3. DON CAF adjudicates the response to the LOI within 10 days of receipt and notifies the individual via his or her command of the decision.

a. If a favorable determination is made, the individual will be notified immediately by message or mail.

b. If an unfavorable determination is made, DON CAF will notify the individual in writing, citing all factors which were successfully mitigated by the individual's response to the LOI and what unfavorable factors still dictate denial or revocation.

c. In unfavorable cases, the letter of notification will inform the recipient of the right to appeal the decision to the Personnel Security Appeals Board (PSAB).

Level 2

1. If an individual chooses to appeal, it must be submitted in writing to the PSAB via the command within 15 days. The command can extend this to 30 days. Additional extensions must come from the Executive Secretary of the PSAB.

2. The PSAB meets every 30 days. It is comprised of three members. Members are, at the minimum, in the military grade of 0-6 or civilian grade of GM/GS-14. One member must have a security-oriented background and serve as President of the Board. At least one member is in the military grade of 0-6. When necessary, the composition of the Board accommodates special circumstances by inclusion of one member reflecting the status of the appellant (e.g., one member will be of Senior Executive Service (SES) grade when an SES employee submits an appeal or one member will be from the Marine Corps when an employee of the Marine Corps submits an appeal).

a. The President of the PSAB is currently an additional duty assignment of the Assistant to the Chief of Naval Operations for Information and Personnel Security (OP-09N2).

b. The military and civilian members of the PSAB are appointed as principal or alternate members by OP-09N. There is an Executive Secretary assigned to process all appeals through to final disposition.

3. Upon receipt of an appeal, the Executive Secretary performs the following actions.

a. Validates the appeal to insure that all prior steps have been taken in the due process function, i.e., Letter of Intent to Deny/Revoke Clearance (LOI) was issued, member responded to DON CAF, DON CAF reviewed response, and Letter of Notification of Denial/Revocation of Clearance (LON) was issued.

b. Orders complete case file from central files and requests all DON CAF records.

c. Schedules appeal (pending availability of complete file with enough lead time for preparation of appeal package).

d. Upon receipt of complete case file, assembles appeals packages, including the LOI, Rebuttal (with endorsement, if present), LON, and appeal (with endorsement). Each case is assigned to a PSAB member to brief.

4. The Executive Secretary and clerk make two copies of each case file. The original is assigned to the PSAB member who will brief the case; copies go to the other two members. All cases are distributed to board members at least 10 days prior to the convening of the PSAB to ensure adequate time for review and study.

5. On the day of the PSAB, the President briefs the members on personnel security issues of interest or pertinence to the board. The President then usually briefs the first case. The President and the board members then alternate briefing cases until all are reviewed and decided upon. Each case is discussed in detail after it has been briefed. Since all cases have been reviewed in advance, members are familiar with the issues and discussions center around the disqualifying factors in the case and mitigation of those disqualifying factors.

6. After all discussion is completed, the members vote secretly to "deny" the appeal or "grant" a clearance based upon the merits of the appeal and related circumstances (such as passage of time, mitigation by proof of error, time, or other common sense factors). The Executive Secretary "announces" the results of the board members' ballots and records the results. The President may ask the Executive Secretary to record specific language to be used in the final letter to the appellant. Some cases may be remanded back to the command for an endorsement. Some cases may be remanded back to the DON CAF for re-adjudication based upon "new information." Some cases may be remanded back to the appellant for missing items.

7. Upon completion of the review of all cases, the President "adjourns" the board. The Executive Secretary prepares final letters for notification of the appellant of the results of the PSAB; via the appellant's command. Each letter sustaining the DON CAF revocation/denial will include the reasons. All final letters are signed by the President of the PSAB and sent to the individual within 3 working days of the PSAB meeting.

AIR FORCE (Reference: AFR 205-32)

Level 1

1. When the Central Adjudicative Division of the Directorate of Security and Communications Management, Assistant Chief of Staff Intelligence (AF/INSB), makes an initial decision to revoke or deny clearance eligibility, a written notice of intent must be sent to the individual.

a. The notice is as detailed and comprehensive as protection of sources and national security allow.

b. The individual must acknowledge receipt by return endorsement.

2. The individual then has 60 days within which to submit statements or documents to refute, correct or mitigate the issues raised in the LOI.

3. Upon receipt of the response or rebuttal to the LOI, AF/INSB reviews the complete case file and makes a final decision.

a. The individual is provided written notification of any denial or revocation action to include the final reasons for the action.

b. The individual is advised of his/her right to appeal the decision to the Administrative Assistant to the Secretary of the Air Force (SAF/AA).

Level 2

1. The individual may submit a written appeal to the SAF/AA via AF/INSB within 90 days from the date of denial or revocation. No new mitigating information is allowed to be introduced into the appeal. This information should have been included in the response to the LOI.

2. The Director of AF/INSB periodically convenes a Security Review Panel (SRP) to review appealed cases. The panel consists of three persons at the GM-15 or O-6 level representing various directorates of the Air Staff.

a. Subject matter experts (e.g., clinical psychologist, physician) or included when required.

b. Senior adjudicative personnel from AF/INSB attend panel meeting to answer questions about the case(s).

c. New board members are usually appointed for each meeting of the SRP.

3. The SRP provides a written recommendation to SAF/AA for consideration in the final appeal decision.

4. The Deputy Assistant in the Office of the Administrative Assistant to the Secretary of the Air Force reviews the case file provided by AF/INSB and the written recommendation provided by the SRP and makes a final decision on the appeal.

a. The individual is notified of this decision in writing.

b. The decision is final and no further appeal is authorized.

Washington Headquarters Services (Reference: AI NO.23)

Level 1

1. When the Security Division, within the Directorate for Personnel and Security (P&S), makes an a determination that it is in the national interest to deny or revoke a security clearance, the individual is sent an initial statement of reasons.

a. The individual must acknowledge receipt of the letter.

b. The individual is given the opportunity to reply in writing within 30 days to the Director, P&S.

c. Extensions to this time limit can be requested.

2. Responses to the statement of reasons are reviewed by the Personnel Security Division.

3. If the initial unfavorable determination is not changed, the Director, P&S, provides a written response to the individual.

a. The individual must acknowledge receipt of the letter.

b. The reply must respond directly to any rebuttal or mitigating information provided by the individual and states the final reasons for the unfavorable action.

c. The individual is told that he/she may appeal the determination in writing to the Director, Washington Headquarters Services (WHS).

Level 2

1. If the individual chooses to appeal, it must be submitted in writing to the Director, WHS, within 10 days.

2. The Director, WHS, reviews the appeal along with all relevant case information provide by the Personnel Security Division.

3. A letter, signed by the Director, WHS, is then sent to the individual presenting the appeal decision. This decision is final and no further appeal is authorized.

APPENDIX B
Security Clearance Appeal Procedures
(Defense Contractor Employees)

DIRECTORATE FOR INDUSTRIAL SECURITY CLEARANCE REVIEW (DISCR)
(Reference: DoD Directive 5220.6, enclosure 3)

Level 1

1. When the Defense Industrial Security Clearance Office (DISCO) cannot affirmatively find that it is clearly consistent with the national interest to grant or continue a security clearance for an applicant, the case shall be promptly referred to the DISCR.
2. Upon referral the DISCR shall make a prompt determination whether to grant or continue a security clearance, issue a statement of reasons (SOR) as to why it is not clearly consistent with the national interest to do so, or take interim actions, including but not limited to:
 - a. Direct further investigation.
 - b. Propound written interrogatories to the applicant or other persons with relevant information.
 - c. Requiring the applicant to undergo a medical evaluation by a DoD Psychiatric Consultant.
 - d. Interviewing the applicant.
3. An unfavorable clearance decision shall not be made unless the applicant has been provided with a written SOR that shall be as detailed and comprehensive as the national security permits. A letter of instruction with the SOR shall explain that the applicant or Department Counsel may request a hearing. It shall also explain the adverse consequences for failure to respond to the SOR within the prescribed time frame.
4. The applicant must submit a detailed written answer to the SOR under oath or affirmation that shall admit or deny each listed allegation. A general denial or other similar answer is insufficient. To be entitled to a hearing, the applicant must specifically request a hearing in his or her answer. The answer must be received by the DISCR within 20 days from receipt of the SOR. Requests for an extension of time to file an answer may be submitted to the Director, DISCR, or designee, who in turn may grant the extension only upon a showing of good cause.

5. If the applicant does not file a timely and responsive answer to the SOR, the Director, DISCR, or designee, may discontinue processing the case, deny issuance of the requested security clearance, and direct the DISCO to revoke any security clearance held by the applicant.
6. Should review of the applicant's answer to the SOR indicate that allegations are unfounded, or evidence is insufficient for further processing, Department Counsel shall take such action as appropriate under the circumstances, including but not limited to withdrawal of the SOR and transmittal to the Director for notification of the DISCO for appropriate action.
7. If the applicant has not requested a hearing with his or her answer to the SOR and Department Counsel has not requested a hearing within 20 days of receipt of the applicant's answer, the case shall be assigned to an Administrative Judge for a clearance decision based on the written record. Department Counsel shall provide the applicant with a copy of all relevant and material information that could be adduced at a hearing. The applicant shall have 30 days from receipt of the information in which to submit a documentary response setting forth objections, rebuttal, extenuation, mitigation, or explanation, as appropriate.
8. If a hearing is requested by the applicant or Department Counsel, the case shall be assigned to an Administrative Judge for a clearance decision based on the hearing record. Following issuance of a notice of hearing by the Administrative Judge, or designee, the applicant shall appear in person with or without counsel or a personal representative at a time and place designated by the notice of hearing. The applicant shall have a reasonable time to prepare his or her case. The applicant shall be notified at least 15 days in advance of the time and place of the hearing, which generally shall be held at a location in the United States within a metropolitan area near the applicant's place of employment or residence. A continuance may be granted by the Administrative Judge only for good cause. Hearings may be held outside of the United States in NATO cases, or in other cases upon a finding of good cause by the Director, DISCR, or designee.
9. The Administrative Judge may require a prehearing conference.
10. The Administrative Judge may rule on questions on procedure, discovery, and evidence and shall conduct all proceedings in a fair, timely, and orderly manner.
11. Discovery by the applicant is limited to non-privileged documents and materials subject to control by the DISCR. Discovery by Department Counsel after issuance of an SOR may be granted by the Administrative Judge only upon a showing of good cause.

12. A hearing shall be open except when the applicant requests that it be closed, or when the Administrative Judge determines that there is a need to protect classified information or there is other good cause for keeping the proceeding closed. No inference shall be drawn as to the merits of a case on the basis of a request that the hearing be closed.
13. As far in advance as practical, Department Counsel and the applicant shall serve one another with a copy of any pleading, proposed documentary evidence, or other written communication to be submitted to the Administrative Judge.
14. Department Counsel is responsible for presenting witnesses and other evidence to establish facts alleged in the SOR that have been controverted.
15. The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.
16. Witnesses shall be subject to cross-examination.
17. The SOR may be amended at the hearing by the Administrative Judge on his or her own motion, or upon motion by Department Counsel or the applicant, so as to render it in conformity with the evidence admitted or for other good cause. When such amendments are made, the Administrative Judge may grant either party's request for such additional time as the Administrative Judge may deem appropriate for further preparation or other good cause.
18. The Administrative Judge hearing the case shall notify the applicant and all witnesses testifying that 18 U.S.C. 1001 (reference (c)) is applicable.
19. The Federal Rules of Evidence (28 U.S.C. 101 et seq. (reference (d))) shall serve as a guide. Relevant and material evidence may be received subject to rebuttal, and technical rule of evidence may be relaxed, except as otherwise provided herein, to permit the development of a full and complete record.
20. Official records or evidence compiled or created in the regular course of business, other than DoD personnel background reports of investigation (ROI), may be received and considered by the Administrative Judge without authenticating witnesses, provided that such information has been furnished by an Investigative agency pursuant to its responsibilities in connection with assisting the Secretary of Defense, or the Department or Agency head concerned, to safeguard classified Information within industry under E.O. 10865 (enclosure 1). A ROI may be received with an authenticating witness provided it otherwise admissible under the Federal Rules of Evidence (28 U.S.C. 101 et seq. (reference (d))).

21. Records that cannot be inspected by the applicant because they are classified may be received and considered by the Administrative Judge, provided the GC, DoD, has:

a. Made a preliminary determination that such evidence appears to be relevant and material.

b. Determined that failure to receive and consider such evidence would be substantially harmful to the national security.

22. A written or oral statement adverse to the applicant on a controverted issue may be received and considered by the Administrative Judge without affording an opportunity to cross-examine the person making the statement orally, or in writing when justified by the circumstances, only in either of the following circumstances:

a. If the head of the Department or Agency supplying the statement certifies that the person who furnished the information is a confidential informant who has been engaged in obtaining intelligence information for the Government and that disclosure of his or her identity would be substantially harmful to the national interest; or

b. If the GC, DoD, has determined the statement concerned appears to be relevant, material, and reliable; failure to receive and consider the statement would be substantially harmful to the national security; and the person who furnished the information cannot appear to testify due to the following:

(1) Death, severe illness, or similar cause, in which case the identity of the person and the information to be considered shall be made available to the applicant; or

(2) Some other cause determined by the Secretary of Defense, or when appropriate by the Department or Agency head, to be good and sufficient.

23. Whenever evidence is received under items 21. or 22., above, the applicant shall be furnished with as comprehensive and detailed a summary of the information as the national security permits. The Administrative Judge and Appeal Board may make a clearance decision either favorable or unfavorable to the applicant based on such evidence after giving appropriate consideration to the fact that the applicant did not have an opportunity to confront such evidence, but any final determination adverse to the applicant shall be made only by the Secretary of Defense, or the Department or Agency head, based on a personal review of the case record.

24. A verbatim transcript shall be made of the hearing. The applicant shall be furnished one copy of the transcript, less the exhibits, without cost.

25. The Administrative Judge shall make a written clearance decision in a timely manner setting forth pertinent findings of fact, policies, and conclusions as to the allegations in the SOR, and whether it is clearly consistent with the national interest to grant or continue a security clearance for the applicant. The applicant and Department Counsel shall each be provided a copy of the clearance decision. In cases in which evidence is received under items 21. and 22., above, the Administrative Judge's written clearance decision may require deletions in the interest of national security.

26. If the Administrative Judge decides that it is clearly consistent with the national interest for the applicant to be granted or to retain a security clearance, the DISCO shall be so notified by the Director, DISCR, or designee, when the clearance decision becomes final in accordance with item 9, below (see Level 2).

27. If the Administrative Judge decides that it is not clearly consistent with the national interest for the applicant to be granted or to retain a security clearance, the Director, DISCR, or designee, shall expeditiously notify the DISCO, which shall in turn notify the applicant's employer of the denial or revocation of the applicant's security clearance. The letter forwarding the Administrative Judge's clearance decision to the applicant shall advise the applicant that these actions are being taken, and that the applicant may appeal the Administrative Judge's clearance decision.

Level 2

1. The applicant or Department Counsel may appeal the Administrative Judge's clearance decision by filing a written notice of appeal with the Appeal Board within 15 days after the date of the Administrative Judge's clearance decision. A notice of appeal received after 15 days from the date of the clearance decision shall not be accepted by the Appeal Board, or designated Board Member, except for good cause. A notice of cross appeal may be filed with the Appeal Board within 10 days of receipt of the notice of appeal. An untimely cross appeal shall not be accepted by the Appeal Board, or designated Board Member, except for good cause.

2. Upon receipt of a notice of appeal, the Appeal Board shall be provided the case record. No new evidence shall be received or considered by the Appeal Board.

3. After filing a timely notice of appeal, a written appeal brief must be received by the Appeal Board within 45 days from the date of the Administrative Judge's clearance decision. The appeal brief must state the specific issue or issues being raised, and cite specific portions of the case record supporting any alleged error. A written reply brief, if any, must be filed within 20 days from receipt of the appeal brief. A copy of any brief filed must be served upon the applicant or Department Counsel, as appropriate.

4. Requests for extension of time for submission of briefs may be submitted to the Appeal Board or designated Board Member. A copy of any request for extension of time must be served on the opposing party at the time of submission. The Appeal Board, or designated Board Member, shall be responsible for controlling the Appeal Board's docket, and may enter an order dismissing an appeal in an appropriate case or vacate such an order upon a showing of good cause.

5. The Appeal Board shall address the material issues raised by the parties to determine whether harmful error occurred. Its scope of review shall be to determine whether or not:

a. The Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record. In making this review, the Appeal Board shall give deference to the credibility determinations of the Administrative Judge:

b. The Administrative Judge adhered to the procedures required by E.O. 10865 and DoD Directive 5220.6; or

c. The Administrative Judge's rulings or conclusions are arbitrary, capricious, or contrary to law.

6. The Appeal Board shall issue a written clearance decision addressing the material issues raised on appeal. The Appeal Board shall have authority to:

a. Affirm the decision of the Administrative Judge;

b. Remand the case to an Administrative Judge to correct identified error. If the case is remanded, the Appeal Board shall specify the action to be taken on remand; or

c. Reverse the decision of the Administrative Judge if correction of identified error mandates such action.

7. A copy of the Appeal Board's written clearance decision shall be provided to the parties. In cases in which evidence was received under items 21. and 22., above (see Level 1), the Appeal Board's clearance decision may require deletions in the interest of national security.

8. Upon remand, the case file shall be assigned to an Administrative Judge for correction of error(s) in accordance with the Appeal Board's clearance decision. The assigned Administrative Judge shall make a new clearance decision in the case after correcting the error(s) identified by the Appeal Board. The Administrative Judge's clearance decision after remand shall be provided to the parties. The clearance decision after remand may be appealed pursuant to Level 2 items 1 to 8., above.

9. A clearance decision shall be considered final when:

- a. A security clearance is granted or continued pursuant to item 2., above;
- b. No timely notice of appeal is filed;
- c. No timely appeal brief is filed after a notice of appeal has been filed;
- d. The appeal has been withdrawn;
- e. When the Appeal Board affirms or reverses Administrative Judge's clearance decision; or
- f. When a decision has been made by the Secretary of Defense, or the Department or Agency head, under item 23., above (see Level 1).

The Director, DISCR, or designee, shall notify the DISCO of all final clearance decisions.

10. An applicant whose security clearance has been finally denied or revoked by the DISCR is barred from reapplication for 1 year from the date of the initial unfavorable clearance decision.

APPENDIX C
SCI Access Eligibility Appeal Procedures
(DoD Military, Civilians and Defense Contractor Employees)

ARMY (Reference: AR 380-67)

Level 1

1. When denial or revocation of SCI access eligibility is considered appropriate, the Army Central Personnel Security Clearance Facility (CCF) forwards a letter of intent (LOI) through the command security manager to the individual.
 - a. The LOI outlines the adverse information and explains the proposed action.
 - b. The LOI offers the person a chance to reply in writing within 60 days in order to provide an explanation, rebuttal, or mitigation for the adverse information.
 - c. The LOI directs suspension of access to classified information. If the LOI addresses SCI access only, access to collateral information may continue.
2. The local commander ensures that the person acknowledges receipt of the LOI and is counseled on the seriousness of the proposed action.
3. If individuals choose to respond, they must address each issue raised in CCF's LOI and must forward the response to CCF through the representative of the local commander who provided the LOI. The LOI must be endorsed by at least one commander and must provide a commander's recommendation on whether the person's clearance should be denied, revoked, or restored. The individual can request an extension to the 60-day time limit if required to obtain relevant information.
4. CCF reviews mitigating information, if any, provided in response to the LOI and makes a final decision within 60 days. This 60-day period can be extended to 90 days by notifying the individual in writing.
5. CCF notifies the individual in writing via the command security manager of its final decision. If the decision is a denial or revocation, this final letter of determination states that if the person intends to appeal, the appeal must be submitted to the Department of the Army, Office of the Deputy Chief of Staff for Intelligence, Security Countermeasures Division (DAMI-CIS).
 - a. The individual must acknowledge receipt of the letter.
 - b. Any appeal must be submitted to DAMI-CIS.

Level 2

1. If an individual chooses to appeal, it must be submitted in writing within 60 days to DAMI-CIS. The individual can request an extension of this deadline.

a. The appeal letter must be sent, at a minimum, through the immediate commander, who must make comment on the case and make a recommendation.

b. The individual cannot provide new mitigating information that was not included in any previous response to the LOI. If new information is sent, DAMI-CIS forwards the case to CCF for an initial review. If CCF does not change its original determination, the individual is notified and still has the right to appeal the adverse decision to DAMI-CIS.

2. A GS-13/14 civilian at DAMI-CIS initially reviews the case, including the appeal, a complete dossier from CCF, and any other relevant information. The individual can request additional assistance and information (e.g., legal, medical) as required.

a. A summary of the case is prepared, including relevant adverse information, mitigating information, adjudicative criteria.

b. A draft letter is prepared, which, if approved, can be sent to the individual via the local command.

3. The case and case summary are consecutively reviewed by a supervisor and Division Chief prior to submission to the Director. Any differing perspectives are discussed and evaluated by the participants. Any unresolved differences of opinion remain documented in the file until the final decision is made.

4. The case with recommendations is then forwarded to the Director, Counterintelligence and Security Countermeasures (DAMI-CI), who makes the final decision. This individual can confer with the previous two reviewers as required.

5. A letter is then sent to the individual via the local command presenting the appeal decision. This decision is final and no further appeal is authorized. DAMI-CI has the option to sustain the original decision to deny or revoke SCI access eligibility but also to direct CCF to grant or restore either a Top Secret or Secret clearance if the original CCF action was directed at both the individual's SCI access eligibility and clearance.

AIR FORCE (Reference: USAFINTEL 201-1)

Level 1

1. When the Personnel Security Division, Directorate of Security and Communications Management, Assistant Chief of Staff, Intelligence, (INSB), makes a determination to deny or revoke SCI access eligibility, the individual is notified through the immediate commander.
 - a. The individual must acknowledge receipt of the notice within 5 working days.
 - b. The notice includes reasons for the denial or revocation and explains how the person may request release of releasable portions of applicable investigative reports.
 - c. The notice also advises the individual that the decision may be appealed.
2. The individual has 45 days to file a written appeal. An extension may be requested. No command or special security officer recommendation is required.
3. The Assistant for Security and Communications Management (INS) adjudicates the first appeal.
 - a. INSB reviews the appeal to determine whether new information would change the original determination. INSB then forwards the case with a recommendation to INS.
 - b. INS makes the determination and the individual is notified in writing.
 - c. If the INS determination is still denial or revocation, the individual is advised that he/she has the right to appeal one last time.

Level 2

1. The individual has 30 days following the notification of the first-level appeal decision to appeal to the Assistant Chief of Staff, Intelligence (IN).
2. IN adjudicates the final appeal.
 - a. IN is provided with the entire case file including the appeal response.
 - b. The individual is notified of the IN decision in writing. This decision is final and no further appeals are authorized.

OFFICE OF NAVAL INTELLIGENCE (Reference: OPNAVINST 5529.1)

Level 1

1. When the Security Directorate, Office of Naval Intelligence, makes a determination to deny or revoke SCI access eligibility, the individual is notified by letter via the immediate commander or commanding officer.

a. The subject must acknowledge receipt of the letter within 10 days by returning an endorsement letter and indicating one of three choices: (1) I intend to appeal and only want a first level appeal; (2) I intend to appeal, and should the first level appeal be turned down, I want an automatic second level appeal; or (3) I do not intend to appeal.

b. The individual is told the reasons for the unfavorable action.

c. The individual is given 45 days within which to forward a written appeal. Extensions can be granted if required to obtain relevant records.

d. New or amplifying information which may explain, mitigate, or refute the information in the existing record can only be introduced by the subject during the first-level appeal.

2. The subject's case is appealed to a three member Access Review Board (ARB). The board is composed of three O6s or O6 selectees. When necessary, the ARB accommodates special circumstances by inclusion of one member reflecting the status of the appellant (e.g., one member will be from the Marine Corps when a Marine submits an appeal, one member will be a civilian when a civilian submits an appeal).

a. An O3 briefs the group on each case. This individual also manages all appeals.

b. The board discusses each case and then makes an open vote. A majority vote rules.

c. If the appellate has not requested an automatic second level appeal in the initial response, a letter is sent to the individual informing him/her of the decision of the ARB.

Level 2

1. The Chief of Staff, Office of Naval Intelligence, as the designee of the SOIC, reviews the second appeal.

a. This appeal is automatic if it was requested by the individual in the response to the letter of denial/revocation.

b. The Chief of Staff receives the entire case file and makes a decision on the appeal.

2. The individual is notified in writing of the outcome of and reasons for the decision.

a. This decision is final and unreviewable.

b. All cases, including those completed with only an ARB appeal, are reviewed by the staff judge advocate to ensure that there are no procedural defects or irregularities.

**NAVAL SECURITY GROUP COMMAND HEADQUARTERS (Reference:
OPNAVINST 5529.1)**

Level 1

1. When the Personnel Security Division at the Naval Security Group Command Headquarters (NAVSECGRU) makes a determination to deny or revoke SCI access eligibility, the individual is notified by message via the immediate commanding officer and special security officer

a. The subject is not given the reasons but is informed how a statement of reason(s) may be obtained.

b. The individual is given 45 days within which to forward a written appeal. Extensions can be granted if required to obtain relevant records.

c. New or amplifying information which may explain, mitigate, or refute the information in the existing record can only be introduced by the subject during this first level appeal.

2. The subject's case is appealed to a Access Review Board (ARB). The board is composed of not less than three members, who are drawn from available department heads, and at least two of whom are naval officers at the rank of Captain.

a. The Special Assistant for Security serves as a member and Executive Secretary for the ARB. This individual also records and implements all decisions of the board.

b. Board members review each case individually and meet as a group when it is deemed necessary by any board member.

c. Each member then votes on each case. A previous determination of SCI access ineligibility is affirmed unless a majority of the members determine that another action should be taken.

3. The individual is notified in writing of the boards decision. The individual is told that he/she can submit a second appeal to the Commander, NAVSECGRU.

Level 2

1. If the individual submits a second appeal, it must be forwarded within 30 days to NAVSECGRU.

2. The Deputy Commander, NAVSECGRU, adjudicates the second appeal. The Deputy receives the entire case file and makes a decision on the appeal.

3. The individual is notified in writing of the outcome of and reasons for the decision.

a. This decision is final and unreviewable.

b. All cases, including those completed with only an ARB appeal, are reviewed by the staff judge advocate to ensure that there are no procedural defects or irregularities.

DEFENSE INTELLIGENCE AGENCY (Reference: Manual No. 50-8)

Level 1

1. When the Central Clearance Group (CCG), Defense Intelligence Agency (DIA), makes a determination to deny or revoke SCI access eligibility, the individual is notified in writing. This letter is sent through the security office of the individual's agency.

a. Historically, individuals were not originally given a statement of reasons with the letter notifying them that their SCI access eligibility had been denied or revoked. The letter did advise individuals that they could request a statement of reasons, if desired. However, starting in late 1992, the notification of denial or revocation includes a statement or reasons.

b. The individual is given 45 days within which to submit a written appeal. Extensions can be granted to obtain relevant records.

c. The appeal is submitted to the Director, Office for Security and Counterintelligence (DPS).

2. CCG reviews any new material and the complete case is provided to DPS for an appeal decision.

a. The individual is notified and given the reasons for the decision by DPS.

b. If the original decision to deny or revoke access eligibility is confirmed, the individual is told that he/she may submit a final written appeal to the Director, DIA, within 30 days.

Level 2

1. The final appeal is reviewed by DAC and a staff summary of the case and current analysis together with pertinent enclosures is forwarded to the Director, DIA or the appropriate designee, for action.

2. The Director, DIA, makes a final review of the case.

a. The individual is notified in writing of the Director's decision.

b. The decision is final and not subject to further review.

APPENDIX D
FY92 Cost of Processing Appeals of Adverse Determinations for a
DoD Security Clearance and SCI Access Eligibility (\$ in Thousands)

Type of Determination	Level 1 (\$K)	Level 2 (\$K)	Total (\$K)
Civilian or Military Security Clearance	1,112 ¹	237	1,349
Defense Contractor Security Clearance	4,012	818	4,830
Air Force, Navy, and DIA SCI Access Eligibility ²	271	65	336
Army SCI Access Eligibility	331	21	352
TOTAL	5,726	1,141	6,867

¹ Air Force resource data for level 1 were not available and, therefore, are not reflected in this figure.

² Army data were not included in this row since doing so would have distorted the overall results for DoD SCI access eligibility determinations. Unlike other SCI adjudicative authorities, Army processes adverse SCI cases the same as adverse clearance eligibility determinations, not in a manner like other SCI adjudicative authorities (i.e., In the Army a Letter of Intent (LOI) to deny/revoke SCI access eligibility precedes any denial/revocation action).

APPENDIX E

Method for Calculating Cost Estimates

Cost estimates were calculated in two steps. First, the annual salary cost for military and civilian personnel by grade and rank was determined. Annual salary cost included direct labor, benefits, and general and administrative (G & A) expense. Second, the cost of processing appeals was estimated by computing the cost of full-time equivalent work years expended by individuals processing appeals. This estimate was computed by type of determination (military or civilian security clearance, defense contractor employee security clearance, and SCI access eligibility) and appeal level (level 1, level 2 and both levels combined).

Determining Annual Salary Cost

DoD civilian annual direct labor costs were taken from the General Schedule Annual Pay Scale (Effective January 1, 1993). For each grade, step 5 was selected. This direct labor cost was increased by 17.36% to reflect the cost of employee benefits paid by the government. Military annual salary costs were taken from the composite standard military annual rates and basic allowance for quarters rates. These rates were obtained from NAVCOMPTNOTE 7041 of 10 Dec 1990. The military rates were increased to reflect cost of living increases for FY91 (4.1%), FY92 (4.2%), and FY93 (3.7%).

A working assumption of this study was that there are no free resources within DoD. Appeal functions, except DISCR, are part of a larger organizational structure and are not managed as separate cost centers. The result is that costs for component-provided personnel support, non-personnel support, and facilities are treated as free resources since the unit is not directly paying for them. These costs are referred to as G & A expense.

The annual direct salary cost for DoD civilians was increased by 52% in all organizations except DISCR to account for G & A expense. This percentage was used previously to estimate this expense for some of the same organizations in this study. Please refer to *Consolidation of Personnel Security Adjudication in DoD* for definitions of the cost categories comprising G & A expense as well as a detailed description of the method for calculating the 52% G & A rate.

Since DISCR provided detailed financial data we were able to calculate a current G & A rate rather than using a previous estimate. DISCR reported a FY93 total budget of \$5,400,000. We added three types costs to the \$5,400,000 to account for support received by, but not paid for, by DISCR. First, we added \$255,432 to cover salaries for military personnel assigned to DISCR. This brought the total annual civilian and military salary costs to \$4,519,086 since DISCR's civilian annual salary costs were estimated to be \$4,263,654. Second, we added \$677,863 to the total

budget of \$5,400,000 to account for component-provided personnel support services provided to, but not paid for by, DISCR. For estimating purposes it was assumed that these costs amounted to approximately 15% of DISCR's \$4,519,086 annual salary costs. This is the same method used in *Consolidation of Personnel Security Adjudication in DoD* for determining the cost of component-provided personnel support.

Third, we added facility costs of \$138,463 to account for the cost of space in Columbus, OH (5225 square feet) occupied by DISCR employees at no cost to DISCR. The estimated facility cost was based on an annual cost per square foot of \$26.50. Non-personnel support costs, which include rent for space other than that in Columbus, were estimated at \$1,136,346. These costs were determined by subtracting the civilian annual salary of \$4,263,654 from the total budget of \$5,400,000.

The total cost (\$6,471,758) of DISCR operations, not including \$30,265 for military housing expenses, was estimated by summing annual salary costs for military and civilian personnel (\$4,519,086), component-provided personnel support (\$677,863), non-personnel support (\$1,136,346), and facilities (\$138,463). The G & A rate of 43% was determined by dividing total cost (\$6,471,758) by salary costs for military and civilian personnel (\$4,519,086). Therefore, the annual salary cost for DISCR personnel was increased by 43% to account for G & A expense.

Estimating the Cost of Processing Appeals

Each organization was asked to account for the personnel resources utilized to process appeals of adverse personnel security determinations during FY92 by estimating the average number of hours per month (or percentage of time) expended by individuals processing appeals. The grade or rank for each individual was provided. An accounting of personnel resources was provided separately for level 1 and level 2 appeals.

For both government personnel and defense contractor security clearance determinations, the cost of processing appeals at level 1 included all tasks from preparing and writing a First Letter (Letter of Intent or a Statement of Reasons) up to and including issuing the Second Letter (Letter of Denial or Revocation). The cost of processing appeals at level 2 included all tasks from processing replies to the Second Letter (Letter of Denial or Revocation) up to and including the second-level decision and issuing the final notification. For SCI access eligibility determinations, the cost of processing appeals at level 1 included all tasks from receiving a subject response to a First Letter (Letter of Denial or Revocation) up to and including issuing the Second Letter (i.e., Notification of Decision). The cost of processing appeals at level 2 included tasks from processing replies to the Second Letter up to and including the second-level decision and issuing the final notification.

The first step in estimating the cost of processing appeals was to determine the full-time equivalent (FTE) percentage of time expended on the different types of appeals for both level 1 and level 2. The number of hours per month expended by each individual on appeals was multiplied by 12, and the product divided by 1766, to determine the FTE value for the individual. In cases where an individual's expended time was reported as a percentage, this percentage was used as the individual's FTE.

The second step was to multiply each individual's FTE with the appropriate annual salary cost, including G & A, to determine the cost of that person's work effort. Dollar amounts were then summed for due process at level 1, level 2, and both levels combined. This procedure was completed for military or civilian security clearances, defense contractor security clearances, and SCI access eligibilities, separately and together.

It should be noted that DISCR provided an accounting of personnel resources expended on initial personnel security determinations and "other" activities. The cost of resources for making these initial determinations (i.e., adjudications performed at DISCR Columbus) was excluded from the DISCR's cost of doing business since this cost is not expended in direct support of the appellate function. The "other" costs were included in DISCR's operating cost because they directly support the appellate functions. These "other" costs are expended to pay for: training; administrative duties; attendance at meetings, briefings, and conferences; replies to Congressional inquiries; FOIA and Privacy Act requests; statistical reports; staff meetings; and scheduling. These costs were estimated to be \$1298K for FY92. They were added to the cost of level 1 and level 2 appeal functions in proportion to the number of cases at each level.

Estimating the Cost per Case of Processing Appeals

The cost per case of processing appeals was determined by dividing the cost of processing appeals (see Appendix D) by the number of appeals (see Table 2). Cost per case was calculated by type of determination (military and civilian security clearance, defense contractor security clearance, and SCI access eligibility) and appeal level (level 1, level 2 and both levels combined). In some instances, Army and Air Force data were excluded (see endnotes 8 and 9 to the report and footnotes 1 and 2 to Appendix D). For example, the cost of processing military or civilian security clearances at level 2 was \$237,000 and the number of appeals was 436. Therefore, the cost per case was \$544.