

GAO

Report to the Honorable
Patricia Schroeder, House of
Representatives

March 1996

INTELLIGENCE AGENCIES

Personnel Practices at CIA, NSA, and DIA Compared With Those of Other Agencies





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

**National Security and
International Affairs Division**

B-258884

March 11, 1996

The Honorable Patricia Schroeder
House of Representatives

Dear Mrs. Schroeder:

We have completed the review you requested on selected personnel practices at the Central Intelligence Agency, the National Security Agency, and the Defense Intelligence Agency.

As agreed with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 7 days after its issue date. At that time, we will send copies to appropriate congressional committees and to individual Members of Congress who represent large numbers of intelligence agency employees. We will also send copies to the Director of Central Intelligence, the Secretary of Defense, the Director of the National Security Agency, the Director of the Defense Intelligence Agency, the Chairman of the Merit Systems Protection Board, the Chairman of the Equal Employment Opportunity Commission, and the Director of the Office of Management and Budget. Copies will also be made available to others upon request.

Please contact me on (202) 512-3504 if you or your staff have any questions concerning this report. Major contributors to this report are listed in appendix IV.

Sincerely yours,

A handwritten signature in cursive script that reads 'Richard Davis'.

Richard Davis
Director, National Security
Analysis

Executive Summary

Purpose

Intelligence agencies employ thousands of people who, for reasons of national security, are not covered by certain federal personnel statutory protections. Concerned that intelligence agency employees do not have the same protections afforded other federal employees, the Civil Service Subcommittee of the former House Committee on the Post Office and Civil Service and Representative Patricia Schroeder requested GAO to review selected personnel practices at the Central Intelligence Agency (CIA), the National Security Agency (NSA), and the Defense Intelligence Agency (DIA). Specifically, GAO compared equal employment opportunity (EEO) and adverse action practices at these agencies with those of other federal agencies and determined whether employee protections at these three intelligence agencies could be standardized with the protections offered by other federal agencies.

Background

EEO programs are programs designed to prevent discrimination in the workplace. Federal law, including title VII of the Civil Rights Act of 1964 and the Equal Pay Act, require that federal agencies have EEO programs. The Equal Employment Opportunity Commission is a separate agency that oversees EEO policies throughout the federal government. The Equal Employment Opportunity Commission also holds hearings on employee discrimination complaints and decides on appeals from federal employees with EEO complaints against their agencies.

Adverse actions are actions taken by an agency that adversely affect an employee, including suspension or removal. The 5 U.S.C. 7513 provides most federal employees with various protections when they are subject to adverse actions. The Merit Systems Protection Board is a separate agency created to, among other functions, hear and decide on federal employee appeals of adverse actions taken by their agencies.

Congress has exempted the CIA, NSA and DIA from a number of statutes that regulate and control the personnel practices of other federal agencies. The legislative histories of these exemptions indicate that the intelligence agencies are treated differently primarily for reasons of national security. Also, the directors of all three agencies have authorities to summarily remove employees.

Results in Brief

The CIA, NSA, and DIA have EEO practices similar to those of other federal agencies with respect to management, planning, reporting, complaint processing, and affirmative action. In contrast, adverse action practices at

the intelligence agencies vary by agency and type of employee. The internal procedures (and associated employee protections) at NSA and DIA are similar to those of other federal agencies. Although NSA and DIA have statutory authorities to summarily remove employees in national security cases, these agencies' implementing regulations include some basic employee protections. The internal adverse action regulations at CIA also include some employee protections, but the CIA Director can waive all employee protections and summarily remove employees at any time. The external appeals procedures at intelligence agencies differ from the procedures at other federal agencies in that most employees (all but NSA and DIA military veterans) cannot appeal adverse actions to the Merit Systems Protection Board.

GAO's review indicated that with the retention of summary removal authorities, these intelligence agencies could follow standard federal practices, including the right to appeal adverse actions to the Merit Systems Protection Board, without undue risk to national security. GAO recognizes that Congress is currently studying reforms to these standard federal practices, and GAO has testified that some of these practices have shortcomings. However, GAO sees no justification for treating employees at these intelligence agencies differently from employees at other federal agencies except in rare national security cases.

Principal Findings

EEO Practices Are Similar to Those at Other Agencies

CIA, NSA and DIA have practices for EEO management, planning, and reporting that are very similar to those at other federal agencies. These agencies generally follow Equal Employment Opportunity Commission guidelines for managing and planning their EEO programs. Intelligence agencies also provide the Equal Employment Opportunity Commission with standard EEO statistical reports that, unlike the reports of other agencies, exclude information on total agency workforce levels because this information is classified.

EEO complaint processing at CIA, NSA, and DIA is similar to the processing at other federal agencies, with internal investigations and an external hearing by or appeals to the Equal Employment Opportunity Commission. Like other federal employees, CIA, NSA, and DIA employees with EEO complaints may also pursue their concerns through civil actions in U.S. courts. In

hearings or appeals to the Equal Employment Opportunity Commission or the courts, judges and attorneys are provided security clearances as needed. CIA and NSA take longer than other federal agencies to process employee EEO complaints, while DIA takes less time. These agencies, when compared with other federal agencies, have substantially fewer EEO complaints per 1,000 employees, but the number of complaints is increasing much faster than complaints in the federal workforce as a whole.

Like other federal agencies, CIA, NSA, and DIA have broad EEO goals for workforce diversity and have developed programs to assist in achieving these goals. Despite these efforts, minorities and women are still underrepresented in these agencies' workforces when compared with their representation in the federal workforce as a whole. The leadership at these three intelligence agencies has publicly recognized these diversity problems and has pledged to correct them.

Adverse Action Practices or Regulations, Except for External Appeals, Are Similar to Those of Other Agencies

The internal regulations and practices for adverse action at NSA and DIA are very similar to those of other federal agencies. NSA and DIA regulations entitle employees to (1) receive advance notice of proposed actions, (2) reply to charges, (3) have representation, and (4) receive a final written decision. Further, GAO's review of 40 NSA and DIA case files from 1993 and 1994 indicated that these agencies complied with their regulations. These agencies have statutory authority to summarily remove employees in national security cases. But even in such cases (which have never occurred), agency regulations still provide some basic employee protections.

CIA internal regulations for adverse actions are similar to the procedures of other federal agencies in providing employees with some protections. However, these protections can be waived because CIA regulations provide the director with carte blanche authority to remove employees. According to the CIA's regulations, the director's decisions to remove employees are not limited by any law, they do not have to be based on national security, and the director is not accountable to anyone for such decisions. GAO could not determine what protections CIA employees are actually afforded, or how often the director has exercised his carte blanche authority to remove employees, because CIA would not allow GAO to review case files.

All employees at CIA and most employees at NSA and DIA have no right to appeal adverse actions externally to the Merit Systems Protection Board.

At NSA and DIA, only military veterans (making up approximately 21 percent and 32 percent of these agencies' respective civilian workforces) can appeal adverse actions to the Merit Systems Protection Board because this right is derived from the Veterans Preference Act. There is no national security rationale for the different treatment of veterans and nonveterans by the different agencies. The Merit System Protection Board, in reviewing adverse action decisions by federal agencies (including NSA and DIA actions against veterans), reviews agency procedures but does not review the substance of security clearance determinations, which are frequently a reason that these agencies remove employees.

Congress Could Grant Standard Federal Protections to Employees at These Agencies Without Undue Risk to National Security

For many years, NSA and DIA have served as examples that intelligence agencies can operate under standard adverse action practices. Regarding internal adverse action practices, all NSA and DIA employees enjoy the same protections as other federal employees. Regarding external appeals of adverse actions, a substantial number of NSA and DIA employees (veterans) enjoy appeal rights to the Merit Systems Protection Board just like other federal employees. Further, GAO found that very few adverse action cases involve sensitive information. Specifically, in recent NSA and DIA adverse actions reviewed by GAO, 39 of 40 case files (or 98 percent) contained no classified national security information. Moreover, while NSA and DIA can remove employees using their summary removal authorities to prevent the Merit Systems Protection Board from reviewing a veteran's appeal, these agencies have never elected to do so.

GAO sees no reason why the NSA and DIA experiences would not be applicable to CIA as well. Regarding internal removal practices, aside from the director's carte blanche removal authority, CIA regulations are similar to those of other agencies. Regarding external appeals, employees at NSA and DIA (like CIA employees) have access to highly classified information. Thus, CIA employee appeals would not appear to be more of a risk to national security than current appeals by NSA and DIA veterans.

If CIA, NSA, and DIA employees were granted standard federal protections against adverse actions, the agencies could still take several steps to protect national security information. First, the agencies could continue current procedures to keep classified information out of adverse action case files. All three agencies have experience preparing case files for external appeals in adverse action and/or EEO cases. In a recent EEO court case, CIA's preparation of documents about case officers demonstrates that

information on sensitive intelligence operations can be converted into unclassified publicly available documents. Second, where classified information cannot be avoided, the agencies could provide security clearances to Merit System Protection Board administrative judges and employee attorneys in adverse action appeals. All three agencies have experience dealing with judges and attorneys who have security clearances in EEO appeals to the Equal Employment Opportunity Commission and in court cases. Therefore, providing employees with rights to appeal to the Merit Systems Protection Board would present no more risk to national security than do current employee appeals to the Equal Employment Opportunity Commission.

Recognizing that risks could still arise, GAO believes that agencies would need to preserve their current summary removal authorities. Because these removal authorities are not subject to external appeal, the agencies could use them to minimize national security risks in highly sensitive cases. At NSA and DIA, these special authorities have been used judiciously. CIA did not allow GAO to review case files, so GAO cannot make judgments on the frequency or propriety of cases where the director's summary removal authority was used. CIA officials stated that this authority has sometimes been used in cases not related to national security, such as reductions in force.

Recommendations

This report contains no recommendations.

Agency Comments and GAO's Evaluation

In commenting on a draft of this report, the Department of Defense (DOD) concurred with GAO conclusions about NSA and DIA regarding EEO issues. CIA's comments did not address the draft report's treatment of EEO issues.

Regarding adverse actions, CIA and DOD did not concur with GAO's conclusion that Merit Systems Protection Board appeal rights could be extended to all intelligence agency employees. CIA and DOD stated that GAO did not adequately consider the national security risks associated with such a change in policy. GAO disagrees because the report lays out a tiered process in which, depending on the level of risk involved, the agencies themselves would determine what precautionary steps would be most appropriate. In addition, GAO clearly acknowledges that there may be national security cases in which summary removal, without appeal, will be appropriate.

CIA and DOD also stated that GAO underestimated the administrative costs of allowing appeals to the Merit Systems Protection Board. GAO agrees that there will be some additional administrative costs involved. GAO has previously testified that the federal redress process, because of its complexity, is inefficient, expensive, and time-consuming. However, Congress provided the intelligence agencies with exemptions to standard federal policies based on national security considerations, not to streamline administrative procedures. Congress is currently studying the federal redress process and to the extent that the process is reformed, cost as well as administrative burdens may be reduced. Any changes made in intelligence agency practices should be consistent with changes Congress may make to reduce costs and time for the redress process for other federal employees.

The Equal Employment Opportunity Commission had no comments on GAO's findings regarding the intelligence agencies, but disagreed with GAO's previous testimony about shortcomings in the federal redress process. The Merit Systems Protection Board elected not to provide comments.

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Abbreviations

| | |
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| CIA | Central Intelligence Agency |
| DCI | Director of Central Intelligence |
| DIA | Defense Intelligence Agency |
| DOD | Department of Defense |
| EEO | Equal Employment Opportunity |
| EEOC | Equal Employment Opportunity Commission |
| GAO | General Accounting Office |
| MSPB | Merit Systems Protection Board |
| NSA | National Security Agency |
| OPM | Office of Personnel Management |

Introduction

Intelligence is the collection, integration, analysis, production, and dissemination of information on foreign entities. Such entities include governments, nongovernmental organizations, or individuals. Some of the best intelligence information comes from sensitive sources and methods. To protect these sources and methods and ensure the continued availability of the information to the United States, most intelligence is classified and carefully controlled on a “need-to-know” basis. Due to the sensitive nature of their work, intelligence agencies classify information on the size of their budget and workforce.

Background on Intelligence Agencies We Reviewed

The Central Intelligence Agency (CIA) is an independent agency created by the National Security Act of 1947. CIA’s mission is to collect, analyze, produce, and disseminate foreign intelligence. CIA researches, develops, and procures technical systems for gathering intelligence and conducts clandestine operations as authorized by the President. CIA’s finished intelligence products are generally designed to support national-level policy deliberations. CIA has a broader mission to coordinate all intelligence activities of the U.S. government. CIA is headed by the Director of Central Intelligence (DCI) who, in addition to managing CIA’s operations, has broad authority to manage all U.S. intelligence activities. Other than setting governmentwide security clearance standards for intelligence employees, the DCI generally does not get involved in personnel management issues at the other intelligence agencies. Almost 100 percent of the CIA workforce is civilian.

The National Security Agency (NSA) is a combat support agency within the Department of Defense (DOD) established by presidential directive in 1952. NSA has two separate missions: signals intelligence and communications security. For signals intelligence, NSA manages all U.S. signal collection and processing and produces signals intelligence in accordance with DOD and DCI priorities. For communications security, NSA provides leadership, products, and services to U.S. agencies that need to protect their information and communication systems from foreign exploitation. NSA is headed by a three-star flag officer, who reports to the Secretary of Defense. About 80 percent of the NSA workforce is civilian.

The Defense Intelligence Agency (DIA) is a combat support agency within DOD established by DOD directive in 1961. DIA’s mission is to satisfy the requirements of DOD for foreign military and military-related intelligence. DIA coordinates the collection and production of all defense intelligence activities and operates education and training programs for military and

civilian personnel involved in defense intelligence. DIA also provides intelligence to non-defense organizations such as CIA, the National Security Council, and the State Department. DIA is headed by a three-star flag officer, who reports to the Secretary of Defense and the Chairman of the Joint Chiefs of Staff. About 70 percent of the DIA workforce is civilian.

Congress has exempted these three intelligence agencies from a number of statutes that regulate the personnel practices of other federal agencies and provide their employees with certain protections and rights. In addition, the Directors of CIA, NSA, and DIA have statutory authority to summarily remove employees. The language and legislative histories of laws exempting the agencies' employees from protections and rights afforded other federal employees indicate that these intelligence agencies are treated differently primarily for reasons of national security.

Equal Employment Opportunity

Equal employment opportunity (EEO) is a policy, implemented through laws and personnel regulations, intended to prevent workplace discrimination on the basis of race, color, religion, sex, national origin, age, or physical limitation. EEO practices are also intended to overcome the historic underrepresentation of minorities and women in the workforce through affirmative action programs.

The Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, requires federal agencies to develop and implement EEO programs. Further requirements were laid out in Executive Order 12067. The EEO offices in federal agencies manage the agencies' EEO complaints. For example, employees may file complaints alleging that they were mistreated or denied promotions on account of race or gender. These offices also help implement agency affirmative action programs. For example, EEO offices track the number of minority or women employees who are recruited and promoted.

The Office of Personnel Management (OPM) plays a role in EEO programs by overseeing and assisting agencies in their affirmative action recruitment efforts. OPM's role is secondary to that of the Equal Employment Opportunity Commission.

Equal Employment Opportunity Commission

The Equal Employment Opportunity Commission (EEOC) is an independent federal agency responsible for coordinating all executive branch EEO programs and activities. Executive Order 12067 made EEOC responsible for

providing agencies with guidance on their affirmative employment programs. EEOC has issued several management directives that contain policy statements, procedures, and reporting requirements for federal agencies to follow when establishing and managing their EEO programs. EEOC has also provided agencies with guidance relating to processing employment discrimination complaints.

In addition to overseeing EEO policies and practices for the executive branch of government, the EEOC also hears appeals from employees that have complaints against their agencies. EEOC can hold hearings on individual discrimination cases before an agency final decision on a complaint and/or review the agency decision on appeal from the employee. Federal employees who wish to file EEO discrimination complaints may also pursue their case through civil actions in U.S. district courts after pursuing their administrative remedies.

Adverse Actions

Adverse actions are personnel actions taken by an agency that adversely affect an employee, such as reduction in grade or pay, suspension, and removal. By statute and regulations prescribed by OPM, most agencies may take adverse actions against employees only when justified to promote the efficiency of the federal service.

Removal is the most serious type of adverse action and, except for egregious misconduct, usually occurs after a progression of other lesser disciplinary actions are unsuccessful in improving the employee conduct. For example, if an NSA guard leaves a guard post without authority, the first offense could result in a 30-day suspension, but the second offense could result in removal. Given that holding a security clearance is a mandatory condition of employment at intelligence agencies, the denial or revocation of a clearance is also grounds for removal.

Merit Systems Protection Board

The Merit Systems Protection Board (MSPB) is an independent agency that serves as the guardian of the federal merit system principles—rules of conduct for federal agencies. MSPB’s mission is to ensure that (1) federal employees are protected against abuses by their agencies’ management, (2) executive branch agencies make employment decisions in accordance with merit system principles, and (3) federal merit systems are kept free of prohibited personnel practices. MSPB is headed by a bipartisan Board made up of three members, appointed by the President, with the advice and consent of the Senate. Each member serves a single 7-year term.

Similar to the EEOC, the MSPB hears and decides upon federal employee appeals of adverse actions taken by their agencies. A number of personnel actions can be appealed to the MSPB, but the vast majority of appeals to MSPB are agency adverse actions involving reductions in grade or pay, suspensions of more than 14 days, and removals. MSPB can also hear so called “mixed cases,” which are adverse action cases where an employee has alleged discrimination. If the employee is dissatisfied with the MSPB decision in a mixed case, he or she can ask EEOC to review MSPB’s decision.

Once an initial decision of an MSPB administrative judge has become final or the Board has issued a final decision on a petition for review, an employee can appeal the final decision to the U.S. Court of Appeals for the Federal Circuit or, in mixed cases involving allegations of discrimination, file a civil action in the appropriate U.S. district court.

Objectives, Scope, and Methodology

We initiated our review at the request of the Chairman of the Civil Service Subcommittee of the former House Committee on the Post Office and Civil Service. The Committee was concerned that employees at CIA, NSA, and DIA do not have the same protections as other federal employees. The 104th Congress reorganized the committee structure, abolishing the House Committee on Post Office and Civil Service. We continued our review for Representative Patricia Schroeder, who was a signatory on the original request letter. Our objectives were to

- compare EEO practices at CIA, NSA, and DIA with those of other federal agencies;
- compare adverse action practices at CIA, NSA, and DIA with those of other federal agencies; and
- determine whether adverse action practices at CIA, NSA, and DIA could be standardized with those of other federal agencies without undue risk to national security.

Our scope was limited to civilian tenured personnel at these three agencies. We did not consider military personnel, senior executives, or civilian personnel serving probationary periods or temporary appointments. We did not look at other federal agencies in the intelligence community such as the Central Imagery Office, the National Reconnaissance Office, the Department of State, the Department of Energy, or the intelligence organizations of each military service. We also did not look at other agencies that have some of the same personnel-related statutory exemptions as intelligence agencies. Our

primary purpose was to compare CIA, NSA, and DIA with other federal agencies, rather than conduct a detailed examination of the effectiveness of each agency's personnel practices. We did not attempt to determine the merits of individual EEO or adverse action cases. Finally, our work was not aimed at evaluating or endorsing the policies, practices or procedures of EEOC or MSPB in handling employee complaints.

To compare the EEO practices of these intelligence agencies with those of other federal agencies, we reviewed appropriate statutes and guidance from EEOC and OPM. We compared these requirements with intelligence agency practices by reviewing EEO-related agency regulations. We did not directly evaluate non-intelligence agency practices. We examined statistical reports on complaint processing and workforce profile to compare intelligence agency practices with those of other federal agencies. We accepted agency EEO statistics as reported to EEOC and did not conduct independent reliability assessments on this data. We reviewed selected court cases where employees had sued the intelligence agencies for discrimination to examine how intelligence agency cases are handled in court proceedings. In addition, we met with EEO officials from each agency to discuss the full range of their programs. We also met with EEOC officials to get their views on intelligence agency programs to determine how these agencies compare with programs administered by other agencies.

To compare the adverse action practices of these intelligence agencies with those of other federal agencies, we identified and reviewed appropriate regulations and statutes. We then compared these governmentwide requirements to intelligence agency requirements by reviewing agency adverse action regulations. We did not directly evaluate non-intelligence agency practices. At NSA and DIA we conducted detailed reviews of all available adverse action case files from 1993 and 1994. We reviewed these 40 case files to determine whether NSA and DIA were following their own adverse action procedures. At MSPB we conducted detailed reviews of all available case files on CIA, NSA, and DIA employee appeals. We reviewed these 14 cases (dating from 1989 to 1994) to examine how intelligence agency cases are handled in the MSPB appeal process. In addition, we met with personnel and legal officials from each agency to discuss their procedures as well as specific adverse action cases. We also met with MSPB officials to get their views on intelligence agency adverse action appeals.

To determine whether adverse action practices at CIA, NSA, and DIA could be standardized with those of other agencies, we performed a number of audit tasks. In our reviews at NSA, DIA, and MSPB (discussed previously) we examined case files to determine the extent to which these files contained classified or declassified information. We also examined publicly available EEO court case files to determine the types of information present and whether intelligence agencies were able to remove classified information from personnel related documents. We also reviewed these intelligence agencies' summary removal authorities. Finally, we met with personnel and legal officials from CIA, NSA, DIA, EEOC, and MSPB. In these meetings, we discussed the unique requirements of intelligence agencies, focusing on potential risks to national security and ways to minimize them.

Our work was impaired by a lack of full cooperation by CIA officials. These officials denied us pertinent documents and other information related to our review. Most significantly, CIA officials would not allow us to review case files, which made it impossible for us to determine the extent to which CIA follows its own regulations. In contrast, NSA and DIA officials cooperated fully with our review, providing us with complete copies of their regulations and allowing us to review case files.

We performed our review from October 1994 to November 1995 in accordance with generally accepted government auditing standards. These standards require that we consider work done by other auditors, so we coordinated our review with the DOD Inspector General. DOD Inspector General staff had performed two reviews (one of them simultaneous to our review) on EEO practices at NSA; these reviews were completed in April 1994 and September 1995.

Comments from CIA, DOD, and EEOC on a draft of this report and our evaluation of them are presented in appendixes I, II, and III, respectively. A summary of their relevant comments appears at the end of chapters 2, 3, and 4. MSPB declined to provide any comments on our report.

EEO Practices Are Similar to Those of Other Federal Agencies

CIA, NSA, and DIA have EEO practices similar to those of other federal agencies. These agencies are generally subject to governmentwide mandates related to EEO and generally follow EEOC regulations for EEO program management, planning, and reporting. EEO discrimination complaints are processed just like in other federal agencies, with procedures that involve internal investigations and possible external proceedings by EEOC and U.S. district courts. During fiscal years 1992 through 1994, the average time to process a complaint at DIA was faster than the federal average. While processing times at CIA and NSA were consistently slower than the federal average, these agencies have recently made significant strides in decreasing their processing times. These agencies have relatively few EEO complaints compared with other federal agencies, but characteristic with the rest of the federal government, the number of complaints filed is rising. These intelligence agencies have programs to increase the representation of minorities and women, but the results of such programs lag behind the federal workforce as a whole. CIA, NSA, and DIA directors have pledged to improve their workforce diversity.

EEO Mandates Generally Apply to Intelligence Agencies

CIA, NSA, and DIA are generally subject to the same EEO legislation and executive orders as other federal agencies. Specifically, these agencies must follow (1) title VII of the Civil Rights Act of 1964, (2) the Equal Pay Act, (3) the Age Discrimination in Employment Act, (4) the Rehabilitation Act of 1973, (5) the Civil Rights Act of 1991, and (6) Executive Order 11478. Taken together, these provisions prohibit discrimination in employment based on race, color, religion, sex, national origin, age, or physical limitation. They require affirmative programs to promote equal opportunity and identify and eliminate discriminatory practices and policies.

NSA and DIA also operate under DOD's EEO mandates. For example, DOD Directive 1440.1, "The DOD Civilian Equal Employment Opportunity Program," requires NSA and DIA to develop and implement affirmative action programs so that minorities, women, and disabled individuals are represented in the workforce as specified in EEOC and OPM guidelines.¹ The directive also requires NSA and DIA to develop procedures and implement affirmative action programs for women, minorities, disabled individuals, and disabled veterans. NSA and DIA are also required to develop a Federal Equal Opportunity Recruitment Program for minorities and women and a comparable special recruitment program for disabled individuals.

¹In 5 C.F.R. 720, OPM sets forth the regulations implementing 5 U.S.C. 7201, which requires each agency to establish an equal opportunity recruitment program.

Although CIA, NSA, and DIA generally are subject to the same EEO laws and requirements as other federal agencies, it has yet to be resolved whether their summary removal authorities would preclude EEO-based challenges in the federal courts, EEOC, or MSPB. In a case challenging the way the DCI used his summary removal authority, the United States Supreme Court found that Congress meant to commit individual employee discharges to the director's discretion and his decisions could not be reviewed by the courts pursuant to an appeal under the Administrative Procedure Act.² Nevertheless, the Court also found that federal courts could review constitutional challenges to the director's use of this authority. Moreover, because the Administrative Procedure Act is not an EEO statute, it is not clear what the Court would do if presented with a challenge to the director's summary removal authority under an EEO statute.³

Intelligence Agencies Follow EEOC Directives on EEO Management, Planning, and Reporting

EEOC management directives provide broad guidance to the federal agencies for managing their EEO programs. EEOC Directive 110 mirrors 29 C.F.R. part 1614, which establishes the broad framework for EEO programs administered by federal agencies. In addition, EEOC Management Directive 714 contains some requirements for federal agency affirmative employment program management.

CIA, NSA, and DIA generally follow these EEOC directives for managing their EEO programs. For example, these intelligence agencies have

- established EEO staff positions,
- created EEO offices that report directly to the agency director,
- ensured that minority and female representation is considered in all agency staffing and promotion actions, and
- placed an emphasis on EEO hiring.

These intelligence agencies have also developed regulations that formally incorporate EEOC Directive 110 provisions in administrative manuals. For example, DIA's Civilian Personnel Manual 22-23 states that, in performing their civilian personnel management duties, DIA officials will not discriminate on the basis of age, race, sex, national origin, marital status, or religious preference.

According to EEOC officials, CIA, NSA, and DIA also follow the planning and reporting provisions of EEOC Management Directive 714. Directive 714

²Webster v. Doe, 486 U.S. 592, 600 (1988).

³The Directors of NSA and DIA have similar authority, as discussed in further detail in chapter 3.

requires each agency to analyze the current status of its affirmative employment program elements and address such segments as workforce composition, recruiting, hiring, promotions, and removals. Agencies are to compare the representation of EEO groups for various occupational and grade/pay categories in the agency's workforce with the representation of the same occupational groups in the appropriate civilian labor force. On the basis of their analyses, agencies are to take steps to address barriers and problems that restrict equal employment opportunities.

In addition, EEOC officials stated that these three intelligence agencies generally (1) prepare the required plans in accordance with requirements and (2) maintain current files on annual and multiyear plans. EEOC officials also stated that CIA, NSA, and DIA file their annual analysis of workforce reports and diversity profile reports in a timely manner. The only difference between these intelligence agencies and other federal agencies is that intelligence agencies omit classified information on total agency workforce. However, workforce diversity data is reported to EEOC annually as a percentage of the total agency workforce.

EEO Complaint Process Similar to Processes at Other Federal Agencies, but Slower at CIA and NSA

Complaint Process Similar

CIA, NSA, and DIA have developed systems for processing discrimination complaints that are largely consistent with EEOC Directive 110 and 29 C.F.R. part 1614. An aggrieved employee has the right to file a formal discrimination complaint against the agency after first consulting with an EEO counselor. The EEO agency counselor then has 30 to 90 days to conduct informal counseling and attempt to resolve the issue during the precomplaint counseling phase. If attempts at informal resolution fail, the aggrieved individual may then proceed to file a formal complaint in writing with the agency. If the agency accepts the complaint, it is assigned to an investigator who is responsible for gathering information and investigating the merits of the complaint. As per 29 C.F.R. part 1614, the agency is

required to conduct a complete and fair investigation of the complaint within 180-days after the formal complaint is filed—unless both parties agree in writing to extend the period.⁴

After the investigation is completed, these agencies will issue a final decision based on the merits of the complaint, unless the employee first requests a hearing before an EEOC administrative judge. In this case, the administrative judge will issue findings of fact and conclusions of law, which the agency may reject or modify in making its final decision. Like other federal employees, an intelligence agency employee who is dissatisfied with the agency’s final decision may appeal this decision to EEOC.⁵

EEOC officials stated that EEO appeals from intelligence employees are like the rest of the federal government, except for measures taken to protect classified information. To protect national security information, EEOC administrative judges, as well as attorneys for employees, must have security clearances to review national security information that may be relevant to each case.

Like other federal employees, CIA, NSA, and DIA employees who wish to file EEO discrimination complaints may do so through civil actions in U.S. district courts after exhausting administrative remedies. Complainants can skip directly to district court if stages of the appeals process are not completed in a timely manner.

Complaint Processing at CIA and NSA Slower Than at Other Federal Agencies

EEOC compiles statistics on EEO complaint processing throughout the federal government. Federal EEO discrimination complaints can be closed through four methods: (1) dismissals, (2) withdrawals, (3) settlements, and (4) merit decisions (which are agency final decisions). EEOC calculates the average processing time for closing formal EEO discrimination complaints by dividing the total number of days that lapsed until a discrimination case was closed (for all closed cases), by the total number of cases closed by the agency (using any one of the four resolution methods). The complaint processing data does not include the time expended by EEOC to process appeals of agency final decisions.

⁴29 C.F.R. part 1614 became effective in October 1992. It established time frames that allow federal agencies up to 270 days to complete the EEO discrimination investigation and issue agency final decisions when EEOC hearings are not involved.

⁵Under this latter scenario, when an EEOC hearing is requested by the complainant, the entire process is allowed to take up to 450 days.

Our review of complaint processing statistics, as reported by these three intelligence agencies to EEOC, showed that DIA’s processing of EEO complaints is faster than the average of other federal agencies. In contrast, CIA’s and NSA’s processing of EEO complaints was consistently slower than at other federal agencies. However, all three agencies substantially reduced their processing times in fiscal year 1994—at a time when processing time for other federal agencies showed only a moderate decline. Table 2.1 lists the average number of days reported by the CIA, NSA, and DIA to process and close formal EEO discrimination complaints from fiscal years 1992 to 1994.

Table 2.1: Comparison of Average Number of Days to Process and Close Discrimination Complaints (fiscal years 1992-94)

| Fiscal year | All reporting federal agencies | CIA | NSA | DIA |
|-------------|--------------------------------|-----|-----|-----|
| 1992 | 349 | 468 | 900 | 272 |
| 1993 | 366 | 472 | 966 | 345 |
| 1994 | 356 | 369 | 573 | 267 |

NSA’s processing times were the worst of the three intelligence agencies, particularly in fiscal years 1992 and 1993. In April 1994, the DOD Office of Inspector General issued a report that focused on the adequacy of NSA’s discrimination complaint process for resolving allegations of race and sex discrimination. The Inspector General’s report concluded that, although the agency has reduced the number of days needed to finalize a discrimination case, the average time to complete a case was still well over the maximum 270 days allowed.

The Director of NSA’s EEO office told us that NSA has implemented several initiatives since the Inspector General’s 1994 report designed to reduce complaint processing time and improve the management of EEO functions.

Number of EEO Complaints Relatively Low but Increasing

Compared with other federal agencies, CIA, NSA, and DIA have relatively few EEO complaints. For the federal workforce, from fiscal years 1992 to 1994, there were six to eight EEO complaints per 1,000 employees. Comparing this rate with that of the CIA, NSA, and DIA, we find that these intelligence agencies had a substantially lower number of complaints per 1,000 employees during this period. Since workforce data for the intelligence agencies is classified, we cannot publish these comparative rates in this report.

Although the number of complaints is relatively low at CIA, NSA, and DIA, the numbers have increased dramatically since fiscal year 1992. The number of formal EEO complaints filed against CIA, NSA, and DIA had increased by 185 percent from fiscal years 1992 to 1994. The number of EEO discrimination complaints filed against the federal sector, as a whole, is also increasing. Governmentwide, the number of discrimination complaints filed against federal agencies increased by 29 percent during this same time frame. Table 2.2 shows the increase in EEO discrimination complaints filed in federal agencies, as well as CIA, NSA, and DIA, during fiscal years 1992 through 1994.

Table 2.2: Number of EEO Discrimination Cases Filed (fiscal years 1992-94)

| Agency | Fiscal years | | |
|--------------------------------|--------------|--------|--------|
| | 1992 | 1993 | 1994 |
| CIA | 16 | 29 | 55 |
| NSA | 15 | 23 | 39 |
| DIA | 9 | 7 | 20 |
| All reporting federal agencies | 19,106 | 22,327 | 24,592 |

EEOC officials stated that it would be difficult to identify the reason for the lower rates or increasing complaints and that the number of complaints is not indicative of the quality of a program. A well-run program could result in a high number of complaints because the program informed employees of their rights and demonstrated that employees who had legitimate complaints could obtain redress. However, it is possible that a poorly run program could result in a high number of complaints because the program failed to reduce discriminatory behavior by managers. Per EEOC, part of the increase in the number of complaints may be due to publicity regarding new statutes and a number of successful, high-profile cases involving federal employees. For example, a highly publicized class action suit was initiated in 1992 against the CIA by nine female case officers, who were provided relief in a 1995 settlement.

Another potential factor for increased complaints is individual initiatives taken by these agencies to publicize their discriminations complaints programs. EEOC cited the following examples of intelligence agency initiatives to publicize their complaint processing program that may have encouraged employees to come forward with allegations of discrimination. During fiscal year 1992, DIA developed a quarterly EEO newsletter to increase the awareness of the discrimination complaints program. During fiscal year 1993, DIA restructured the EEO complaint process and began

placing posters of EEO counselors throughout the agency. In fiscal year 1994, NSA issued agencywide memoranda concerning prohibitions against reprisal and sexual harassment, explaining the employee's right to file a complaint. According to EEOC, the increased numbers may also represent employees who had been discriminated against in the past but had not filed because they were afraid of reprisals or perceived an environment that discouraged them from filing complaints.

Intelligence Agencies Have Workforce Diversity Programs, but Results Lag Behind Other Agencies

Intelligence Agency Goals, Programs, and Recruiting Efforts

Like other federal agencies, CIA, NSA, and DIA have established broad EEO goals for achieving workforce diversity. For example, DIA has established numerous goals, such as improving minority representation at all levels in the agency, promoting women and minorities at a rate at least equal to their representation in the workforce, and proactively recruiting minority employees.

Special oversight programs have been implemented by CIA, NSA, and DIA to assist in meeting affirmative action diversity goals. For example, promotion panels at the agencies include minority and women representatives. The DOD Inspector General reported that NSA has been conscientious concerning the makeup of its promotion boards. The duties of the promotion boards and the required composition—membership is to include women and minority representatives—are prescribed in NSA regulations. The requirement for board membership also applies to higher level promotions.

For recruiting new minority employees, CIA, NSA, and DIA have special college scholarship programs. At the behest of Congress, each of the intelligence agencies has initiated special scholarship programs to improve workforce diversity in critical skill categories. Such programs are

to be used by each of the intelligence agencies to improve diversity and attract highly qualified applicants.

Diversity Results Lag Behind Other Agencies

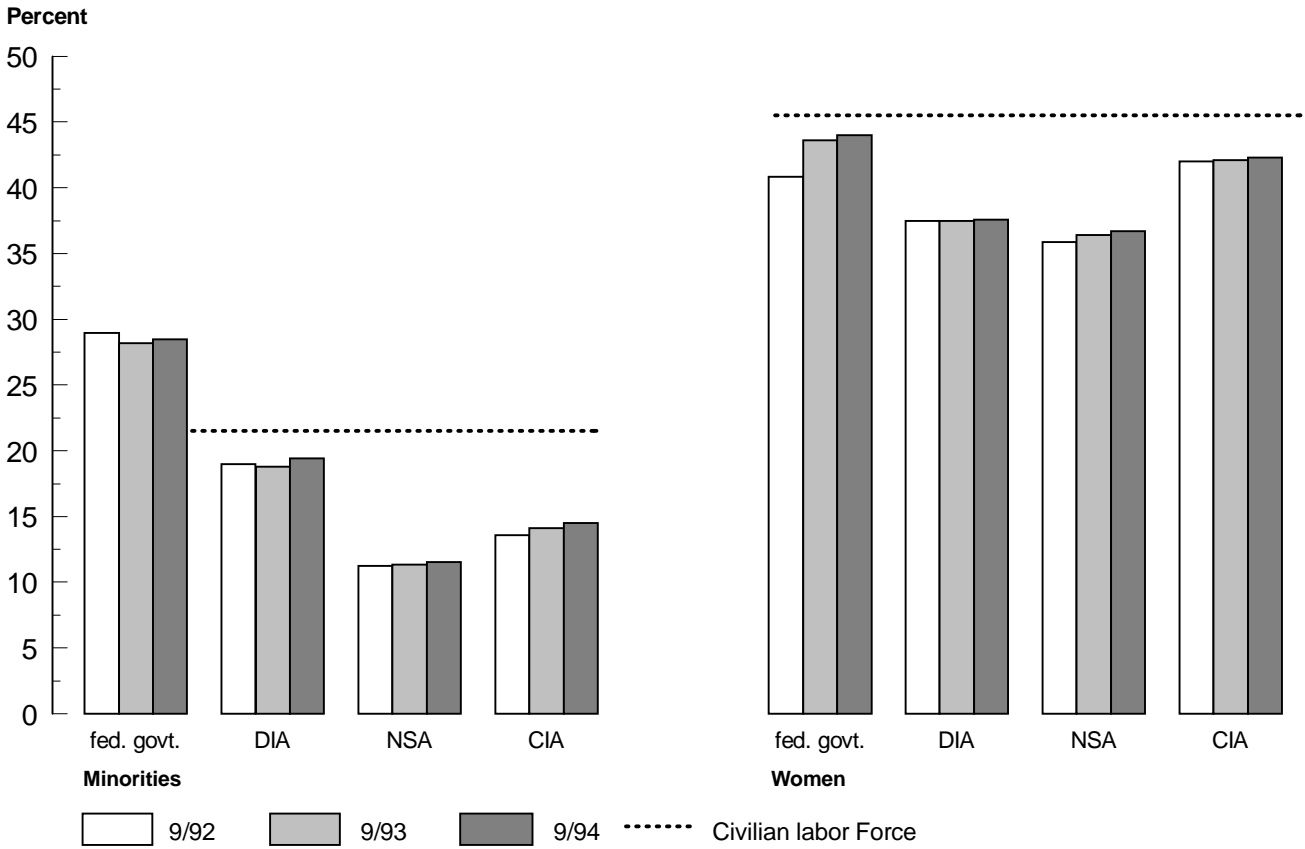
OPM and EEOC adopted the civilian labor force as the standard for measuring diversity within the federal government.⁶ The 1990 civilian labor force, based on 1990 census data, has remained the federal standard for EEO representation since 1990. The civilian labor force was 21.8 percent minority and 45.7 percent women. Minority groups in the civilian labor force are further broken down with African-Americans at 10.3 percent, Hispanics at 8.1 percent, Asian-Pacifics at 2.8 percent, and Native Americans at 0.6 percent.

For women and minority representation, CIA, NSA, and DIA were below the civilian labor force standard and the federal workforce percentages during fiscal years 1992 through 1994. In terms of individual minority categories, these agencies had mixed success in meeting the civilian labor force representation rate for African-Americans during fiscal years 1992 through 1994. For Hispanic, Asian-Pacifics, and Native American representation, CIA, NSA, and DIA were below the civilian labor force standard. Figures 2.1, 2.2, and 2.3 compare workforce diversity for EEO categories at the intelligence agencies with diversity in the federal workforce and the civilian labor force.

⁶While the term “civilian labor force” is in common usage for federal EEO issues, the actual statistics used are “civilian availability data.” The civilian availability data represents adjustments made to the civilian labor force to reflect differences between the general workforce and the federal workforce. OPM, the Census Bureau and EEOC work jointly to make these adjustments and create the civilian availability data.

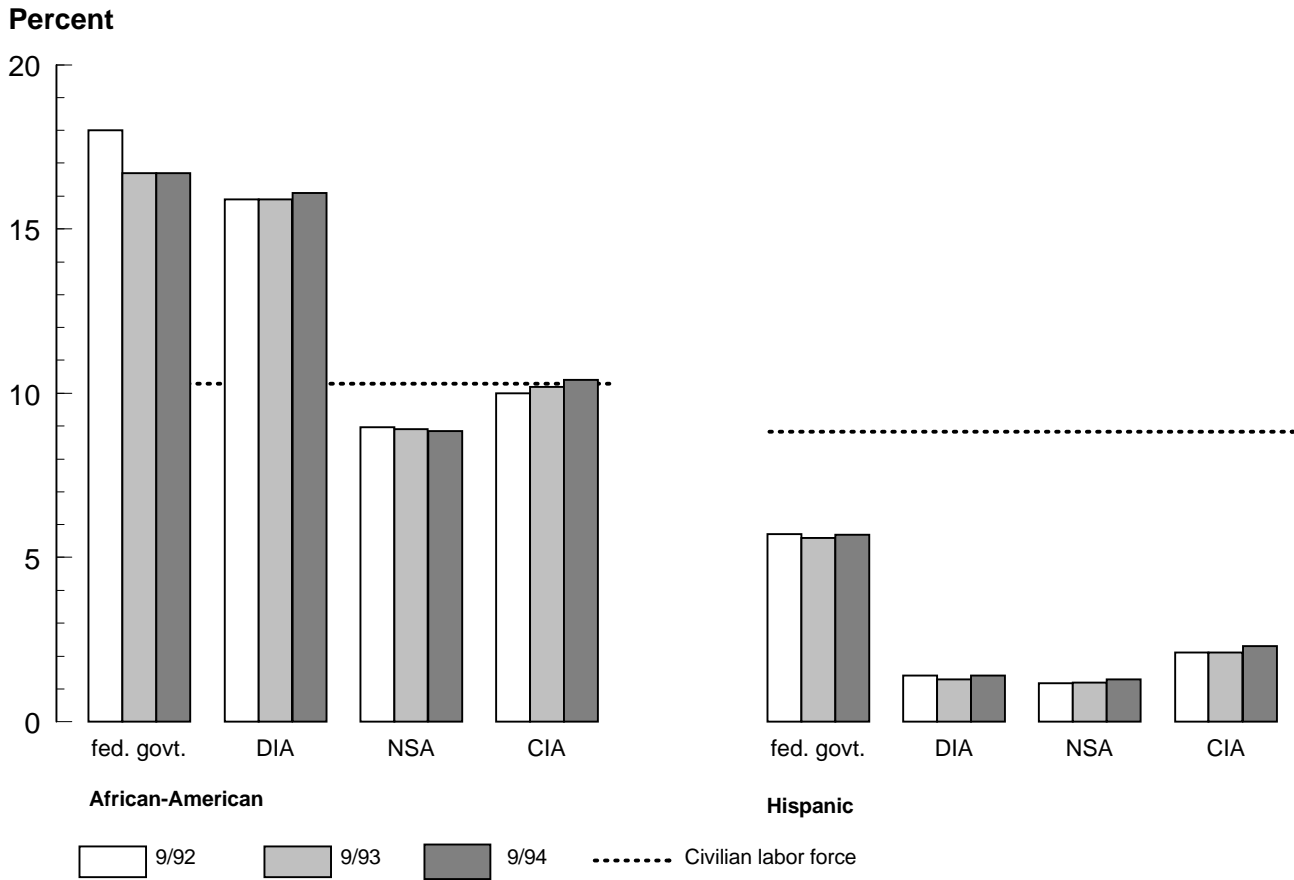
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Figure 2.1: Percentages of Minorities and Women in Three Intelligence Agencies Compared With Percentages in the Federal Workforce and the Civilian Labor Force (fiscal years 1992-94)



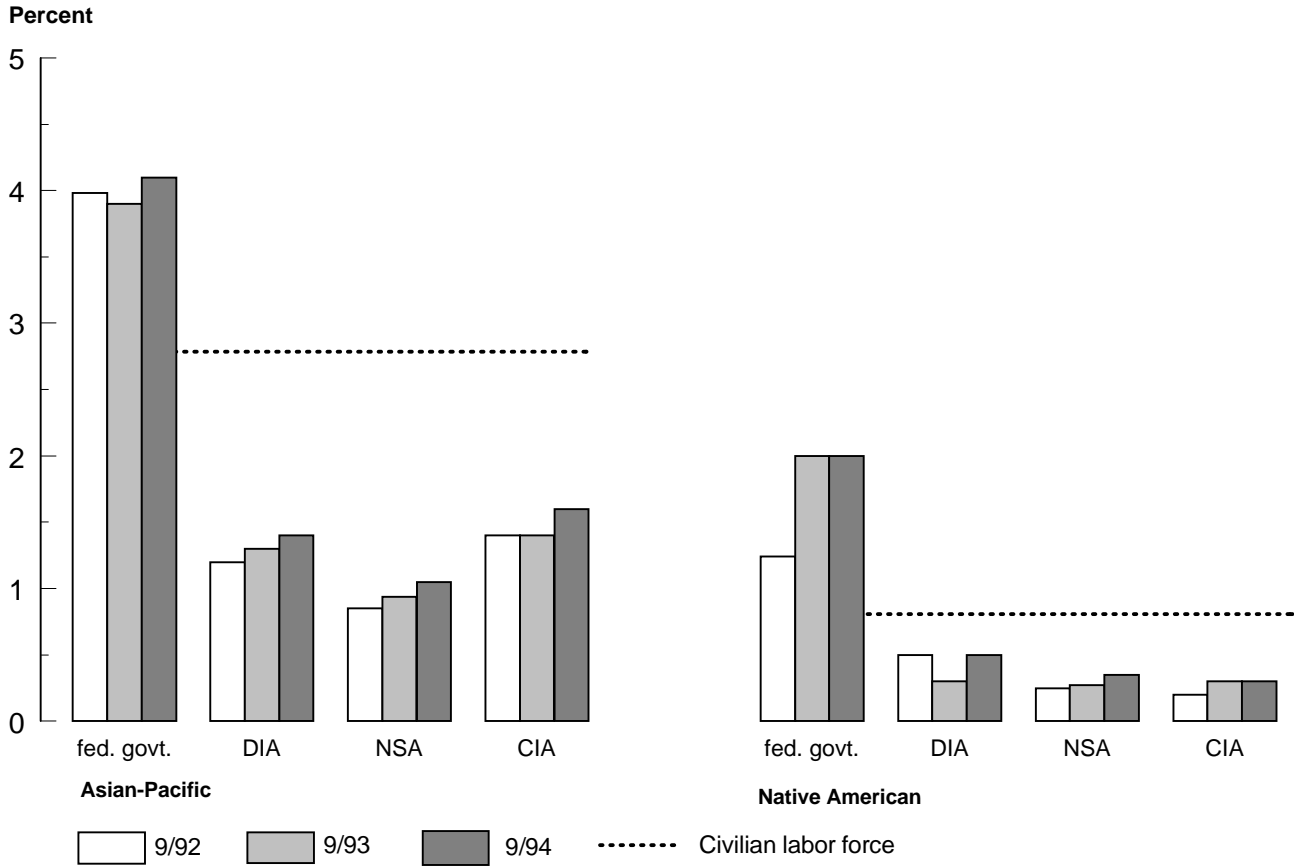
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Figure 2.2: Percentages of African-Americans and Hispanics in Three Intelligence Agencies Compared With Percentages in the Federal Workforce and the Civilian Labor Force (fiscal years 1992-94)



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Figure 2.3: Percentages of Asian-Pacifics and Native Americans in Three Intelligence Agencies Compared With Percentages in the Federal Workforce and the Civilian Labor Force (fiscal years 1992-94)



Agency Directors Pledge Improvements

In public statements made in congressional hearings, the directors of each of the intelligence agencies acknowledged their agencies' workforce diversity shortcomings.⁷ These officials stated that problems with recruitment, promotion, and retention of minorities and women continue to plague the work environment of intelligence agencies. Further, these officials also pledged improvements in the diversity of their workforces and related efforts in moving their respective agencies closer to the civilian labor force guidelines in every category.

Agency Comments

In commenting on a draft of this report, DOD concurred with our discussion of EEO practices at NSA and DIA. CIA comments did not address EEO issues. EEOC officials clarified comments we attributed to them, and we made revisions as appropriate.

⁷CIA, NSA, and DIA directors testified in a public hearing on September 20, 1994, before the House Permanent Select Committee on Intelligence.

Adverse Action Regulations, Except for External Appeals, Are Similar to Those of Other Federal Agencies

Although the intelligence agencies are exempt from key adverse action statutes, their regulations (at CIA) and actual practices (at NSA and DIA) are similar to those of other federal agencies in many ways. The internal regulations at NSA and DIA are almost identical to standard federal regulations. Further, our review of case files indicates that NSA and DIA are closely following their regulations. NSA and DIA have statutory authority to summarily remove employees in national security cases, but agency implementing regulations still provide employees with basic protections. The internal CIA regulations we were given access to are similar to those in other agencies and provide some employee protections. However, the Director of CIA has carte blanche authority to waive all protections and summarily remove CIA employees. With respect to external appeals, only military veteran employees at NSA and DIA can appeal to MSPB.¹ No employees at CIA can appeal to MSPB. There is no national security rationale for the different treatment of veterans and nonveterans at the different agencies.

Intelligence Agencies Have Legal Exemptions From Federal Practices

Personnel at CIA, NSA, and DIA are exempt from key statutory provisions that provide federal employees with certain protections in the course of agency adverse actions. Specifically, all CIA employees and NSA and DIA non-veteran employees are exempt from the provisions of 5 U.S.C. 7511-7513 covering suspensions (for more than 14 days), removals, and other actions. Therefore, employees at these agencies have no statutory right to adverse action procedural protections including an advance written notice; the opportunity to reply; the right to representation; a final written decision; and, most importantly, an external appeal to the MSPB.

NSA and DIA Internal Practices Are Almost Identical to Those of Other Agencies

Adverse Actions at NSA and DIA

NSA and DIA initiate adverse actions when employees have violated some workplace standard or rule. Agency administrative and personnel

¹The term “military veteran employees,” refers to employees who were given preferences under the Veterans Preference Act of 1944. These employees, also known as Preference Eligible, will be referred to as veterans in the remainder of this report.

regulations generally prescribe the acceptable employee code of conduct and identify specific infractions that could lead to adverse actions or other sanctions against the employee. Agencies consider a number of factors in initiating adverse actions. For example, DIA suspension actions must consider (1) repetition of offense, (2) seriousness of offense, (3) short-term or long-term impact of offense, (4) effect of penalty on the employee and other DIA employees, (5) effect on workload, (6) consistency of penalty with similar offenses, and (7) specific sanctions required by laws and regulations.

During calendar years 1992 through 1994, NSA and DIA initiated adverse actions against 60 employees. Of these cases, 5 involved suspensions of more than 14 days, 34 involved removals, and 21 cases involved a resignation or retirement in lieu of an adverse action. In the latter 21 cases, which were technically not adverse actions, the employee either resigned or retired before or during adverse action proceedings. CIA did not provide data on its adverse actions.

NSA and DIA Regulations and Practices Include Standard Employee Protections

While NSA and DIA are exempt from 5 U.S.C. 7511-7513, they have incorporated the same employee protections into agency personnel regulations governing adverse actions. Written in language that is almost identical to 5 U.S.C. 7513, these regulations entitle employees to (1) advance notice, (2) an opportunity to reply, (3) legal representation, and (4) a written final decision. Our review of 40 case files from 1993 and 1994 at these agencies showed that NSA and DIA closely complied with their regulations.

In addition, NSA and DIA adverse action decisions were fully supported by backup documentation. This documentation not only supported the agency position on the facts of the case but also indicated that procedural steps had been followed. For example, NSA and DIA case files had clear documentation to prove delivery of key documents to the employee (including copies signed by employees, registered mail receipts, and memos to the file). In several NSA cases, there were statements, signed by the employees, stating that they had reviewed their official case file on the specific adverse action.

NSA and DIA appeared to have accommodated employees in many instances. For example, NSA and DIA provided employees with extensions (up to 30 days) to reply to agency charges. NSA and DIA considered documents that were submitted late. For disability cases, both agencies

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sought alternative positions or disability retirement for the employees. In addition, NSA and DIA have alcohol treatment or referral programs, which were offered to employees in several cases.

**NSA and DIA Summary
Removal Procedures Also
Include Employee
Protections**

NSA and DIA have statutory authorities to summarily remove employees when national security concerns arise in the course of adverse actions. First, the directors of these agencies can remove employees whenever (1) the action is in the interest of the United States and (2) procedures prescribed in other provisions of law (i.e., their normal removal procedures) cannot be invoked consistent with the national security.² The directors' decision is final and not subject to external appeal to MSPB.³ Second, NSA and DIA (as well as other agencies)⁴ have statutory authority to suspend and remove employees under 5 U.S.C. 7532.⁵ This authority is to be invoked only when necessary in the interest of national security. The decisions of the NSA and DIA directors under 5 U.S.C. 7532 are final and may not be appealed.

Under NSA and DIA regulations that implement their directors' summary removals and 5 U.S.C. 7532 removals, employees still have procedural protections similar to those enjoyed by other federal employees under 5 U.S.C. 7513. Employees must be provided (a) a written statement of the charges, (b) an opportunity to reply, and (c) a written decision. In addition, under NSA and DIA director removals, employees can review documentation relevant to their case. NSA and DIA have never used these authorities to suspend or remove employees.

²These authorities for NSA and DIA are contained in 50 U.S.C. 833 and 10 U.S.C. 1604(e), respectively.

³Under 10 U.S.C. 1604(e), the DIA director's summary removal decisions can be appealed to the Secretary of Defense.

⁴A number of other agencies are covered by this provision.

⁵5 U.S.C. 7531 originally gave this authority to the Secretary of Defense. Pursuant to 5 U.S.C. 7531(9), NSA and DIA were given this authority in May 1988 by presidential designation.

CIA Internal Regulations Are Similar to Other Agencies, Except for DCI's Carte Blanche Authority

CIA Removal Regulations Offer Some Employee Protections

The CIA's internal adverse action regulations provide employee protections similar to those offered by other federal agencies, at least in cases of removal.⁶ The CIA personnel regulation calls for employees to get advance notice of a proposed removal, at least 10 days to reply, and final notice of a decision provided by the Director of Personnel (but not necessarily in writing). Notably absent from the CIA regulation is the right to representation provided to other federal employees by 5 U.S.C. 7513(b)(3). CIA officials told us, however, that employees do have the right to counsel and that many employees hire attorneys in such cases. CIA regulations also include the right to an internal appeal, which allows employees to submit their appeals in a sealed envelope to be opened only by the DCI.

We did not review CIA case files (as discussed on p. 15), so we were unable to verify the extent to which CIA actually provides employees with any of the protections noted in its personnel regulations. We were also unable to verify whether employees are allowed representation by attorneys in adverse action proceedings.

Employee Protections Waived Under DCI's Carte Blanche Authority

The DCI has statutory authority to remove CIA employees whenever he or she believes it necessary or advisable in the interest of the United States. The DCI's decisions are generally not reviewable outside the agency. Under the CIA implementing regulation, the DCI has carte blanche authority to remove employees and can override any employee protections. A section of the regulation on "termination without procedures" lays out this broad authority.⁷

⁶While CIA officials allowed us to review their entire regulation on removing employees, they did not allow us to fully review their regulations on other types of adverse actions, such as suspensions. The limited information we saw on suspensions made no reference to employee protections similar to those in 5 U.S.C. 7513.

⁷According to the CIA's personnel manual, the DCI authority to remove employees can be delegated to lower level CIA officials as well.

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“Pursuant to statutory authority, an employee may be terminated at any time without regard to any procedural steps set forth in this regulation or elsewhere when the DCI, at his discretion, deems it necessary and advisable in the interest of the United States.”

According to the regulation, such “interests of the United States” do not have to be related to national security. Further, the regulation states that the DCI’s removal authority is not constricted, limited, affected, or otherwise controlled by any of the procedures set forth in the regulation or any other regulation, document, or law. The regulation also states that the DCI’s authority abrogates any interest or privileges of any employee that might otherwise be created or established by this regulation or any other regulation, document, or law.

The CIA’s personnel regulation also exempts the DCI from accountability for any removal decision. Under the regulation, the DCI’s decision to remove an employee is entirely discretionary, and the reasons for the decision can be withheld from anyone. The CIA regulation specifically states

“Notwithstanding any provision of this regulation, or any other regulation, document, or law, the DCI need not provide to anyone the reasons for such termination if he decides not to do so. Any decision not to provide the reasons for termination is entirely discretionary, and a national security basis for such a decision is not required.”

We did not review case files (as discussed on p. 15), so we could not determine the extent to which the DCI’s carte blanche authority has been used to override employee protections enumerated in CIA personnel regulations.

**Comparison With NSA and
DIA Authorities**

NSA and DIA personnel regulations do not provide the carte blanche removal authority that CIA regulations confer on the DCI. As discussed, both NSA and DIA directors have statutory authorities to summarily remove employees, but these agencies’ implementing regulations provide for some employee protections. In addition, the NSA and DIA summary removal authorities, unlike the CIA’s authority, are linked to national security.

Most Employees Have No External Appeal to MSPB

Appeals to MSPB

Per 5 U.S.C. 7511-7513, most federal employees can appeal agency adverse actions to MSPB. Appealable actions include suspensions of more than 14 days and removals. In such appeals, employees have a right to a hearing and representation by an attorney or other representative, in accordance with MSPB regulations.

NSA and DIA Veterans' Appeals

Most employees at NSA and DIA have no right to appeal adverse actions to MSPB. However, pursuant to the Veteran's Preference Act, veterans (who make up approximately 21 percent and 32 percent of NSA and DIA civilian workforces) are entitled to appeal adverse actions to MSPB. According to NSA and DIA regulations, when a final decision notice is issued to an NSA or DIA veteran on a matter appealable to the MSPB, the veteran must be provided (1) notice of the time frame for appeal and the address of the appropriate MSPB office, (2) a copy of MSPB regulations, (3) an MSPB appeal form, and (4) notice of appealable rights to a grievance procedure.

Based upon our review of related legislative history and our discussions with agency officials, there are no national security reasons for the distinction between veteran and nonveteran employees at NSA and DIA. That is, veteran appeals to MSPB present the same risk to national security as nonveteran appeals. According to DOD, the differentiation stems from the Veteran's Preference Act of 1944 and is thus based upon the debt this nation owes its veterans and is not based on any conventional national security analysis.

No CIA Employee Appeals to MSPB

Regardless of whether they are veterans, CIA employees have no general right to appeal adverse actions to MSPB. However, this lack of jurisdiction has not stopped CIA employees from filing appeals in at least three cases in the last 6 years. MSPB has initially entertained these cases and requested CIA cooperation. CIA has uniformly responded that the DCI is neither required, nor prepared, to have MSPB review agency decisions. In these three cases, MSPB held that it lacked jurisdiction to hear the appeal and affirmed the CIA decisions.

Again, our review of related legislative history and our discussions with officials from CIA, NSA, and DIA did not yield any convincing rationale why veteran appeals to MSPB should be treated differently based on whether the veteran works at CIA, NSA, or DIA. CIA legal staff told us simply that CIA is exempt from the Veterans Preference Act of 1944 and, for reasons of national security, CIA employees can only appeal decisions to the DCI. However, NSA and DIA officials asserted that adverse action appeals at all three agencies raise equal risks to national security because each agency deals with very sensitive information.

MSPB Review Limited

The MSPB does entertain appeals from NSA and DIA veterans but generally will not review agency determinations revoking security clearances. Since security clearances are a mandatory condition of employment, loss of a clearance can result in suspension or removal. In a case involving a civilian Navy employee removed from his job when the Navy denied him a security clearance, the U.S. Supreme Court found that the denial of a clearance was not an enumerated adverse action subject to MSPB review.⁸ The Court stated that grant or denial of a security clearance is a sensitive and inherently discretionary decision that MSPB was not qualified to judge. In these types of cases, which can also include the revocation of security clearances by nonintelligence agencies, the MSPB generally can only determine whether the employee was granted appropriate procedural protections.

Agency Comments and Our Evaluation

CIA stated that, in removal decisions, the DCI is accountable to several parties. First, the DCI is accountable to the President and Congress. Second, the DCI is accountable to the Inspector General and the President's Intelligence Oversight Board, which might review employee complaints of unfair removal. Our report accurately quotes the CIA regulation which clearly indicates that the DCI is accountable to no one for removals. We cannot verify CIA statements that it provides removal information to these other parties because CIA did not provide us with access to case files or other corroborating evidence.

DOD stated that NSA and DIA, despite exemptions from standard practices regarding adverse actions, have attempted to mirror the intent of the legislation to the maximum extent consistent with national security. DOD further stated that NSA and DIA adequately protect employee rights as compared to the protections offered by the MSPB.

⁸Department of the Navy v. Egan, 484 U.S. 518 (1988).

Congress Could Grant Intelligence Employees Standard Federal Protections Without Undue Risk to National Security

Adverse action protections for employees at CIA, NSA, and DIA could be standardized with those of the rest of the federal government without presenting an undue threat to national security. For many years, a substantial number of NSA and DIA employees (i.e., veterans) have had the same statutory adverse action protections as other federal employees. In recent adverse actions at NSA and DIA, almost no case files contained national security information. If CIA, NSA, and DIA employees were granted standard federal adverse action protections, these agencies could protect national security information by removing classified information from case files and, in cases where that is not possible, by providing security clearances to MSPB administrative judges and employee attorneys. Where neither of these steps would be adequate to protect national security information, these intelligence agencies could use their existing authorities to summarily remove employees. These authorities are not reviewable outside the agencies, so there would be no risk of disclosure of classified information.

NSA and DIA Illustrate That Intelligence Employees Can Have Standard Federal Protections

NSA and DIA experiences demonstrate that intelligence agencies can provide their employees with standard protections against adverse actions. As discussed in chapter 3, NSA and DIA adverse action practices are very similar to those of other federal agencies. The internal practices at NSA and DIA are almost identical to those laid out for the rest of the federal government in 5 U.S.C. 7513. Veterans at NSA and DIA (who make up approximately 21 and 32 percent of their respective civilian workforces), have the same external appeal rights as other federal employees. While officials from NSA and DIA told us that veteran appeals to MSPB were a risk to national security, these agencies have never used their summary removal authorities to prevent a veteran appeal from going to MSPB.

Further, the House Committee on Post Office and Civil Service, in a 1989 report discussing Civil Service Due Process Amendments, stated that it was not aware of any problems due to the additional procedural protections veterans receive under the Veterans' Preference Act of 1944. According to the committee report, "Permitting veterans in excepted service positions [such as employees at NSA and DIA] to appeal to the Merit Systems Protection Board when they face adverse actions has not crippled the ability of agencies excepted from the competitive service to function."

Applicability to CIA

Our review did not identify any reason why the NSA and DIA experiences would not be applicable to CIA as well. Regarding internal removal

practices, aside from the DCI's summary removal authority, the CIA regulations are not substantially different from those outlined in section 7513. Regarding external appeals, employees of all three agencies have access to classified information, the disclosure of which can do grave damage to our national security. CIA suggested that its employees have access to more sensitive information because of its clandestine operations and its higher percentage of employees under cover. In contrast, NSA and DIA officials said that, although individual cases would vary, the sensitivity of intelligence information was equivalent across the three agencies. In comparing its external adverse action practices with those at CIA, NSA wrote to us

“Certainly, disciplinary or performance based proceedings at both agencies raise equal risks to national security information and both agencies’ work involves obtaining foreign intelligence information from extraordinarily sensitive and fragile intelligence sources and methods.”

Recent NSA and DIA Cases Raise Few National Security Concerns

We reviewed recent NSA and DIA cases to determine whether they contained national security information. In doing so, we used an agency definition of “national security” as those activities that are directly related to the protection of the military, economic, and productive strength of the United States, including the protection of the government in domestic and foreign affairs, against espionage, sabotage, subversion, unauthorized disclosure of intelligence sources and methods, and any other illegal acts that adversely affect the national defense. If the information’s unauthorized disclosure could reasonably be expected to cause damage to the national security, it should be classified at the confidential level or higher, in accordance with Executive Order 12356.¹

We found that adverse action case files generally contained no national security information. We reviewed all available NSA and DIA adverse action cases for 1993 and 1994. Of these 40 cases, 39 cases (or 98 percent) contained no classified national security information.² Only one file, involving an employee removed for unsatisfactory performance, contained classified information. In this case file, the employee’s poor performance was documented in a memo that contained classified information.

¹Executive Order 12356 provides the basis for classifying national security information.

²Three additional NSA cases from this period were not available to review for a variety of reasons. NSA officials stated that one of these cases contained classified information, but we were unable to review the file to verify this.

The main reason that these files are void of classified material is that the nature of the cases do not involve intelligence sources and methods. The adverse actions were generally routine matters that any federal agency might handle. For example, adverse actions were initiated for a variety of reasons, including criminal misconduct, administrative misconduct, financial misconduct, drug abuse, unsatisfactory performance, and loss of security clearance. Depending on the nature of the adverse action, the case files generally consisted of the following types of routine unclassified documents: financial records, credit histories, medical evaluations, attendance documents, time cards, leave letters, performance appraisals, warning letters, work plans, police reports, criminal records, court documents, and reports of security investigations. Even in the “security” cases where the agency revoked an employee security clearance, the documentation (related to criminal matters) was not related to national security. That is, there were no cases where the employees were suspected of purposefully compromising national security information.

NSA and DIA officials stated that the lack of classified information was due to careful NSA and DIA efforts to remove classified information from the case files. NSA and DIA seek to avoid exposure of classified information by establishing, to the extent possible, an unclassified administrative record that narrowly focuses the agency defense to the employees conduct. Keeping national security information out of files even before the case goes to the deciding official enables the employee’s attorney and the MSPB administrative judge to see the same material the agency deciding official sees. According to these agencies, they must also ensure there is enough information in the file for the deciding official to make a defensible decision. If such steps do not eliminate the need for classified information to be used in the case, the agencies declassify such information in relevant agency records.

CIA would not allow us to review case files, so we can make no judgments on whether their adverse action cases contained classified national security information.

In response to our observations, officials from CIA, NSA, and DIA stated that all adverse action cases require that the agency establish how the employee’s misconduct affects the efficiency of the agency by matching performance or conduct standards against employee behavior. They stated that sensitive information often permeates employee position descriptions. Accordingly, they stated that such information must be protected from

public disclosure, regardless of whether or not the information is classified.

Our review indicated that the agencies have overstated the sensitivity of the information contained in the vast majority of adverse action cases. If the information was as sensitive as the agencies indicate, the agencies would be required to classify it in accordance with their own security procedures. Also, as discussed later, these agencies routinely release these types of personnel records to external forums (e.g., MSPB, EEOC, or the federal courts) in an unclassified form.

Agencies Could Remove Classified Information and Provide Security Clearances to Judges and Attorneys

Agencies Could Remove Classified Information From Case Files

If subject to standard federal practices, the agencies could continue to remove classified information from adverse action case files. As discussed previously, NSA and DIA assert that they have been very diligent and successful in keeping classified information out of adverse action case files.

CIA, NSA, and DIA already have experience preparing case files for external appeals in adverse action and/or EEO cases. In our review of case files at MSPB, we found that CIA, NSA and DIA had all been able to successfully support their case with documents at the unclassified level.³ Several of these documents were formerly classified, including employee position descriptions, records of investigations, and related memoranda.

In our review of EEO case files at federal courts, we found similar instances of declassified agency documents. For example, in one recent case, CIA declassified several secret documents. While some sections had been deleted from these documents, they still provide information on CIA case officers such as types of postings, typical duties, types of sources

³The CIA example was a retirement case. As discussed in chapter 3, CIA employees generally cannot appeal to MSPB in adverse action cases.

recruited, basis for performance appraisals, number of case officers in a typical CIA station, and the importance of cover assignments. Assuming that the CIA was careful in preparing these documents (since the files are publicly available), this example shows that information on employee performance in very sensitive intelligence operations can be converted to the unclassified level.

Agencies Could Provide Clearances to Judges and Attorneys

If intelligence agencies were subject to standard adverse action practices, they could also protect national security information by providing security clearances to MSPB administrative judges and employee attorneys. Agency officials have not provided any security clearances to MSPB administrative judges or shared classified information with them; however, they stated that this would be possible. MSPB officials noted that their Board members and administrative judges go through rigorous background checks as part of their nomination process.

The intelligence agencies already deal with administrative judges with security clearances in EEO cases. According to officials, both CIA and the Justice Department have processed security clearances for EEOC administrative judges. All the agencies have been able to work with EEOC administrative judges to conduct EEOC hearings while still protecting national security information.

Intelligence officials have also dealt with employee attorneys with security clearances in EEO cases. While NSA and DIA will not initiate security clearance actions solely for the purpose of employee representation, CIA officials said they maintain a list of cleared attorneys for their employees, and the agency will process a clearance for an employee attorney. To date, all of the agencies have been able to work with employee attorneys to conduct EEOC hearings while still protecting national security information.

A recent EEO court case demonstrates that intelligence agencies can provide employee attorneys with access to classified information and agency employees without undue risk to national security. In this class action case, CIA cleared several employee attorneys to the secret level and provided them with access to approximately 4,000 classified documents. In addition, CIA provided these attorneys with dedicated offices at CIA Headquarters and provided them with secure communications. For example, a special classified cable channel was established for privileged and classified communications between the attorneys and CIA employees worldwide.

Agencies Question Our Comparison of Adverse Action Cases to EEO Cases

Officials from CIA, NSA and DIA took issue with our comparison of adverse action cases with EEO cases, saying that EEO cases were not as sensitive and, therefore, created fewer risks to national security. We disagree with these comments because our review demonstrated that, while individual cases will vary, the same types of information may appear in both adverse action and EEO cases. For example, when a DIA employee filed an MSPB complaint for prohibited personnel practices (discrimination) and found out MSPB had no jurisdiction (because she was not a veteran), she withdrew her case to pursue it through EEO channels. That is, the same issue (based on the same evidence) could potentially be pursued through either MSPB or EEOC. In fact, in fiscal year 1994 (the most recent data available), 35.9 percent of EEOC cases involved adverse actions or performance and 27.3 percent of MSPB cases involved discrimination.

As further evidence, NSA expressed deep concerns over the possible release of classified information in some EEO cases when employees use performance appraisals and job descriptions to make the point that they should have received a benefit that went to another. In such cases, an appeal to MSPB will present no more risk to national security than do current appeals to EEOC.

Where Risks Remain, Agencies Could Use Their Summary Removal Authorities

National Security Risks Could Still Exist in Some Cases

Some national security risks could remain even after case files have been declassified and judges and attorneys have received security clearances. In declassifying documents for MSPB, there is still some risk of public disclosure of sensitive information as the parties advance their cases. For example, in a recent veteran's appeal to MSPB, NSA officials told us that some significant national security information was improperly disclosed through an inadvertent error.

In clearing judges and attorneys for access to classified information, there may also be remaining risks. According to the agencies, people who do not regularly deal with classified information often do not appreciate the reasons that specific information is classified or the steps necessary to

ensure that such information is not inadvertently disclosed. We found evidence of this in our review of an EEO class action case involving CIA. An undercover case officer alleged that the class action attorney “carelessly used the words ‘agency’ and ‘station’ on the open telephone line” in the country where she was actively operating.

Also, according to the agencies, employee attorneys may perceive it as being in their interest to publicly disclose the information to use it for leverage against the agencies. The government’s authority to prosecute such a disclosure of classified information is of little solace once an intelligence source or method is lost. Moreover, the government might not pursue such a prosecution for fear that more classified information will be revealed.

Further, there is a risk that an agency will forfeit its position to protect national security information. According to NSA, the risk of disclosing sensitive information must be accorded far greater weight than the merits of the case when negotiating settlements. There may be cases in which hearings would involve exposure of or unacceptable risk to national security information. The agency’s only option in these situations might be to settle the case on terms favorable to the employee. NSA officials told us that such a case is now in the administrative process.

NSA and DIA Could Use Summary Removal Authorities

If NSA and DIA employee appeals to MSPB still presented unacceptable risks to national security, these agencies could use their summary removal authorities (as discussed in chapter 3). To date, NSA and DIA have never used these authorities to suspend or remove employees. NSA and DIA officials cited three reasons why they have never used these authorities:

- They believe that employees should be given their basic due process rights whenever possible.
- They have been diligent in removing classified information from supporting documentation in adverse actions cases going to MSPB.
- Few employees (only veterans) can appeal to MSPB, which greatly reduces the need to use these summary authorities.

While these agency reasons imply that the issue of using these authorities has never come up, that is not the case. NSA and DIA officials said they have had cases (involving veterans eligible to appeal to MSPB) where their agency would have used its director’s summary removal authority if the employee had not chosen to resign. In at least one case, NSA officials, in

hindsight, told us they now regret that they did not use this authority. In all adverse actions against veterans, these agencies made a conscious decision to not use their summary removal authorities and accept some risk in allowing the employee to appeal to MSPB. NSA and DIA officials stated that they allowed these appeals to go to MSPB in order to provide the veterans with their right to appeal, as derived from the Veteran's Preference Act.

CIA Could Use Summary Removal Authority

If its employees had standard federal protections against adverse actions, CIA (like NSA and DIA) could prevent sensitive cases from reaching MSPB by using the DCI's summary removal authority (as discussed in chapter 3). CIA implementing regulations, unlike NSA and DIA regulations, do not guarantee any protections to employees, nor do they require a link to national security. CIA officials stated that this authority, although rarely used in recent years, has been used in cases not related to national security such as reductions in force. We did not review CIA case files (as discussed on p. 15) so we cannot make judgments on the frequency or propriety of cases where the director's summary removal authority was used.

Agencies Question Benefits and Costs of External Appeal to MSPB

Benefits of MSPB Appeal Questioned

In response to our conclusion that standard employee protections could be extended to intelligence agency employees, NSA officials questioned the benefits of providing MSPB appeals since most agency adverse actions are removals based on revocation of employee security clearances.⁴ Given that MSPB review of such cases is generally limited to verification that the agency followed its own regulations and given that NSA follows those regulations (both of which we verified), NSA officials said there would be little significance in appealing to MSPB. NSA wrote to us that "there is no reason to believe extending MSPB appeal rights to all NSA personnel would be more than mere eye wash for the employees."

⁴Of the 40 adverse action cases we reviewed, 33 were NSA cases and 17 of these (or 52 percent of NSA cases) involved revoking a security clearance as a reason for removal.

DIA officials also questioned the significance of providing MSPB appeals to all employees. While none of DIA's employee removals were explicitly based on revocation of security clearances, agency officials said that they could have used that justification to remove many of the employees. That is, in cases where employees were removed "for cause" related to criminal offenses (e.g., drug use or fraud), DIA could have also revoked their clearances and removed them for failure to meet a mandatory condition of employment.⁵ DIA personnel staff said it was administratively easier to remove employees "for cause" than to revoke their clearance. They added that if the employees had recourse to MSPB, DIA would change its administrative procedures to remove employees by revoking their clearances, since MSPB generally cannot review the substance of security clearance determinations. This new strategy might have worked only in cases where removal was closely related to clearance issues, which represents four of seven (or 57 percent) of the DIA adverse action cases we reviewed.

CIA officials questioned the value of MSPB appeals, given their current practices. According to CIA's interpretation, there does not have to be a link between the DCI's summary removal authority and national security. That is, the DCI's discretion can be exercised whenever he or she finds it in the generic "interests of the United States," as opposed to the more specific "national security interests of the United States." Thus, even if CIA employees could appeal adverse actions to MSPB, the DCI could effectively preclude these appeals by exercising the summary removal authority. For example, CIA officials told us that the DCI's summary removal authority has been used to implement reductions in force not related to national security issues.

Increased Administrative Costs

Given their view that external appeals to MSPB may have little or no real benefit for employees, officials from CIA, NSA, and DIA were also concerned about the added administrative costs to prepare for and participate in such appeals. Agency officials stated that the burden to respond to increased filings and the concomitant requirement to prepare agency files would be enormous. NSA and DIA officials were particularly concerned about the discovery process (in which employee attorneys can request large volumes of documentation), because it was impossible to predict in advance how much documentation will have to be declassified. NSA and DIA officials were also concerned about clearance processing times (now averaging

⁵The ability to hold a security clearance is a mandatory condition of employment at all the intelligence agencies.

205 days) for judges and attorneys and the time it would add to adverse action proceedings. Finally, agency officials were concerned about having to provide classified work space and storage facilities for judges and attorneys.⁶

Our observations from reviewing case files support these agency comments. For example, MSPB appeal cases require a substantial amount of additional preparation to defend the agency decision before the MSPB. In addition, we recently testified on the federal redress system, saying that because of the complexity of the system and the variety of the redress mechanisms, it is inefficient, expensive, and time-consuming.⁷ For example, an employee alleging discrimination (i.e., a “mixed case”) can “shop around” for the best decision by sequentially appealing agency decisions to an MSPB administrative judge, the MSPB three-member Board, EEOC, and the Office of the Special Counsel. At this point, an employee who is still unsatisfied with the outcome can file a civil action in the federal court system. This redress process can take years and cost an agency thousands of dollars for a single case.

However, Congress provided the intelligence agencies with their exemption from standard practices (e.g., MSPB appeals) based on national security considerations, rather than administrative efficiency (i.e., the ability to suspend or remove employees with minimal administrative effort). Congress is currently studying the federal redress system and to the extent that reform occurs, cost as well as administrative burdens may be reduced. Any changes made in intelligence agency practices should be consistent with changes Congress may make for all federal employees to reduce the costs and time of the current system.

Linking CIA’s Authority to National Security

If CIA, NSA, and DIA employees were to receive the same adverse action protections as employees at other federal agencies, we think the directors of the three intelligence agencies should retain their summary removal authorities so they can continue to handle internally removals that could potentially compromise national security information were appeals permitted outside the agency. Should Congress take this action, however, we do not think there would be a sound basis for the DCI continuing to exercise the summary removal authority in cases not involving national

⁶An MSPB spokesman, responding to our draft report, stated that MSPB could handle classified cases differently to reduce the administrative costs. For example, he said they could treat all classified cases as appellate cases and hear them in Washington. This would speed the process and reduce the number of MSPB judges who would require security clearances.

⁷Federal Employees Redress: An Opportunity for Reform (GAO/T-GGD-96-42, Nov. 29, 1995).

security concerns as has occurred in the past, for example to implement reductions-in-force.⁸

Our work has shown that there is no national security reason for the CIA being treated differently than NSA or DIA, and employees at all three agencies deal with highly sensitive intelligence information. Furthermore, it is clear that the unique missions of all three agencies relate to national security. Thus, if the DCI's statutory summary removal authority were amended to establish a link between exercise of the removal authority and national security, it would parallel the authorities currently provided the NSA and DIA directors.

Conclusion

If Congress wants to provide CIA, NSA, and DIA employees with standard protections against adverse actions that most other federal employees enjoy, it could do so without unduly compromising national security as long as the agencies maintain their summary removal authorities. To effectively ensure that CIA employees enjoy these protections, Congress could amend current legislation to explicitly link the CIA director's summary removal authorities to national security.

Agency Comments and Our Evaluation

CIA and DOD (responding for NSA and DIA) did not concur with our conclusion that MSPB appeal rights could be extended to all intelligence agency employees for two reasons.

First, CIA and DOD stated that our report did not adequately consider the national security risks associated with such a change in policy. The agencies stated that their extensive experience reveals that the likelihood of compromising classified information increases with any type of external proceeding. We disagree because our report explicitly discusses different types of risks to national security that could arise, including those related to external proceedings. In addition, our report lays out a tiered process where, depending on the level of risk involved, the agencies themselves would determine what precautionary steps would be most appropriate. Further, our report clearly acknowledges that there may still be some national security cases in which summary removal (without appeal) will be appropriate.

⁸As discussed previously, the DCI's statutory removal authority is not explicitly linked to national security, and the CIA's implementing regulation states directly that there need not be a national security reason for removal. Although the Supreme Court has suggested that the DCI's summary removal authority is linked to national security, neither it nor the lower federal courts have directly addressed this issue.

Second, CIA and DOD stated that our report underestimated the administrative costs of allowing appeals to the MSPB. While we never attempted to estimate these costs, we agree that there would be additional administrative burdens if Congress were to extend MSPB appeals to all intelligence employees. However, Congress provided these agencies with exemptions to standard federal policies based on national security considerations, not to achieve administrative efficiencies.

EEOC had no comments on our findings regarding intelligence agencies. However, it disagreed with our comments, based on previous GAO testimony, that aspects of the federal redress system are inefficient, time-consuming, and expensive. We would note that Congress and the executive branch are currently considering ways to make this process more efficient and effective and that our testimony did not recommend any abridgement of employees' rights. MSPB declined to provide comments on our report.

Comments From the Central Intelligence Agency

Note: GAO comments supplementing those in the report text appear at the end of this appendix.



CENTRAL INTELLIGENCE AGENCY
WASHINGTON, D.C. 20505
EXECUTIVE DIRECTOR

18 January 1996

Mr. Richard Davis
Director
National Security Analysis
International Affairs Division
U.S. General Accounting Office
Washington, D.C. 20548

Dear Mr. Davis:

Thank you for giving us the opportunity to review the draft copy of your report on selected personnel practices at CIA, NSA, and DIA. We have carefully reviewed the report and have noted several instances (listed below) where information is either incomplete or inaccurate. Moreover, we do not concur in your conclusions with respect to extending MSPB appeal rights to CIA employees or limiting the DCI's termination authority. We would be happy to discuss our comments and proposed changes with the drafters to ensure that the final report presents as balanced and thorough an examination of the issue as possible.

The report states that the Director of Central Intelligence is accountable to no one with respect to employment termination decisions (pg. 42). On the contrary, he is accountable to the highest levels of the executive and legislative branches--the President and the Congress. The statement in the report that such information can be withheld from Congress (pg. 42) is also inaccurate since the Agency does discuss employment termination decisions with the Intelligence Committees whenever we are asked. This policy is consistent with the intelligence oversight provisions contained in the National Security Act of 1947, as amended. Furthermore, employment termination decisions that involve alleged unlawful discrimination can be raised in an administrative and judicial process. In addition, employees who believe they have been treated unfairly

Now on p. 32.

Now on p. 32.

See comment 1.

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See comment 2.

regarding employment termination can raise this issue with the CIA's statutory Inspector General and the President's Intelligence Oversight Board. There are, in effect, several avenues of accountability.

Now on pp. 6, 43, and 45.

The report also inaccurately states that the DCI routinely exercises his "summary" removal authority (pgs. 8, 56, 58). The drafters of the report have confused the DCI's termination authority with the summary removal provisions of the CIA regulations. Every instance where CIA involuntarily separates an employee involves an exercise of the DCI's termination authority as set forth in the National Security Act of 1947, as amended. This authority is used to separate employees for performance reasons, suitability concerns, security reasons, or because the employee is excess to the needs of CIA. Exercise of this authority is not tantamount to summary removal. Only in extremely rare cases does the DCI choose not to apply the procedures set forth in our regulation for terminating employment, and summarily remove an employee. The report should be amended on the pages noted to clarify this point.

See comment 3.

Now on pp. 5, 36, and 45.

In the context of justifying the application of external procedures to CIA, the report states that all three agencies agree that CIA information is no more sensitive than that at NSA or DIA (pgs. 7, 47, 59). This statement is incomplete in terms of representing CIA's view on this matter. We did indicate to the GAO investigators that employees at all three agencies have access to classified information, the disclosure of which can do grave damage to our national security. In this sense, the sensitivity level of information does not differ among agencies. However, the type of classified information and the specific impact of an unauthorized disclosure does differ depending on the mission and functions of the particular agency involved. For example, much of CIA's work involves clandestine collection of intelligence overseas through human agents directed by CIA operations officers. The unauthorized disclosure of information related to such clandestine collection has led

See comment 4.

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See comment 5.

to agents being executed or imprisoned for life. Other distinctions include the fact that compared with NSA or DIA, CIA has a greater percentage of its employees under cover, and that this poses particular problems if they are called to testify about an adverse personnel action. Distinctions can logically be made regarding the level of protection to be provided to these different types of sensitive information. The varying degrees of sensitive information illustrate the difficulty of concluding categorically that the MSPB can hear most adverse action cases. CIA's procedures allow the Agency to consider such cases on their own merits, and provide the process that each case requires.

Now on p. 45.

The report states that there is no national security reason for CIA to be treated differently from NSA or DIA (pg. 59), and goes on to recommend that the DCI's separation authority be linked to national security concerns so that it parallels the authorities currently provided to the Directors of the NSA and DIA. If equality in employment termination authority between CIA, DIA, and NSA is the goal, this can be achieved by increasing the authority of DIA and NSA to terminate employment rather than decreasing the DCI's authority. Indeed, the Intelligence Community is currently examining this option. The report should note this alternative approach to achieving uniformity in employment termination authority.

See comment 6.

See comment 7.

The report also dramatically underestimates the national security costs associated with subjecting CIA to MSPB review of employment termination decisions or other adverse personnel action. In many cases, it will be extremely difficult, if not impossible, to segregate out classified information. Many of these cases will involve performance deficiencies in which the work of the individual will be at issue. Highly classified projects would have to be disclosed to MSPB judges and attorneys in the course of litigating these cases. In arguing that this can be done consistent with national security, the report draws a false analogy between EEO cases and employment termination cases

See pp. 38-40.

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for performance reasons. EEO cases usually do not involve as much classified information (as termination cases) since they are not necessarily linked to the employee's performance. Instead, they focus on disparate treatment, which can be litigated with a minimum of disclosure of classified information. Congress should be informed of CIA's view that providing MSPB review of employment termination decisions or other adverse actions would almost inevitably lead to disclosure of highly classified information to outside parties, and that this would significantly weaken our ability to protect this information. We strongly urge GAO to note CIA's judgment on this matter in the report.

See p. 40.

The report also underestimates and downplays the resources that would have to be expended if adverse personnel actions were subject to MSPB review. CIA recognizes that the inefficiencies, expense, and time consuming nature of the current MSPB system for review of adverse personnel actions were outside the scope of GAO's review. Nevertheless, these costs are a relevant consideration in determining whether to expand MSPB review to CIA adverse personnel actions. These costs are briefly mentioned at the end of the report (pg. 58), but we think they should be set forth in the introductory section of the report. Furthermore, the report erroneously concludes that if NSA, DIA, and CIA were subject to standard federal adverse practices, they would have the same administrative burden that other federal agencies now have (pgs. 58-59). The administrative burden of MSPB review would be far higher for NSA, CIA, or DIA since these agencies would have to clear attorneys and judges, provide for secure storage of classified information, and redact information so that it can be provided in an unclassified manner to the parties. The CIA already experiences these higher costs in processing EEO complaints and we anticipate that MSPB review of adverse personnel actions would lead to a far greater number of cases subject to outside review and impose a tremendous cost burden on CIA. Again, it is important that CIA's judgment on this matter be noted in the report.

Now on pp. 43-44.

See comment 8.

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The national security and administrative costs of extending MSPB review to CIA employment termination cases, and the multiple levels of accountability for employment termination decisions that already exist, argue for maintaining the DCI's existing statutory authorities for terminating employment. Indeed, as recently as 1992, Congress concurred in this judgment when, in the context of amending the CIA provisions in the National Security Act of 1947, as amended, it chose not to make any substantive changes in the DCI's termination authority.

See comment 9.

Finally, I want to express my disappointment with the statement in the report criticizing CIA's lack of full cooperation. As you are aware, GAO's access to materials controlled by the DCI is restricted by provisions of the National Security Act of 1947, the CIA Act of 1949, the GAO Act of 1980, and the Intelligence Oversight Act of 1980. The latter clearly vests oversight responsibilities in the Congressional Intelligence Committees. Nevertheless, the CIA decided to cooperate with GAO's review of EEO and personnel practices by providing you access to regulations and other information. GAO personnel conducting this review met repeatedly with Agency officials, were provided background briefings, and were given statistics on Agency employment figures that are closely held. The amount of cooperation was unprecedented given the lack of GAO jurisdiction in this area. Your criticism is unfair and I would ask that you consider removing it from the report.

See comment 10.

See comment 11.

Thank you for the opportunity to comment on this report. I look forward to reading the final report.

Sincerely,



Nora Slatkin
Executive Director

The following are GAO's comments on the Central Intelligence Agency's (CIA) letter dated January 18, 1996.

GAO Comments

1. Our report accurately quotes the CIA regulation that clearly indicates that the Director of Central Intelligence (DCI) is accountable to no one for removals. We cannot verify CIA statements that it provides such information to the President and Congress because CIA did not provide us with access to case files or other corroborating evidence.
2. The CIA removal regulations do not mention any procedures whereby employees who believe they have been removed unfairly may raise the issue to the Inspector General or the President's Intelligence Oversight Board. We cannot verify CIA statements that CIA employees have these redress avenues because CIA would not provide us with access to case files or other corroborating evidence.
3. We deleted any reference to CIA summary removals as "routine" in accordance with CIA's comments. However, we followed up with CIA officials on these comments, and they confirmed that in the past, the DCI's summary removal authority has been used to implement reductions in force not related to national security issues.
4. As CIA states, the sensitivity of classified information differs depending on the mission and functions of the particular agency involved. Even more important, the level of sensitivity varies with the duties of every individual, so a case-by-case analysis is most appropriate. For example, while some intelligence agency employees conduct clandestine operations at foreign locations, other employees man gaurdposts at headquarters. The access to sensitive information would vary greatly between these two types of positions. Furthermore, and contrary to CIA's comment that our report concludes "categorically" that the Merit Systems Protection Board (MSPB) can hear adverse action cases, our report lays out a tiered process where, depending on the level of risk involved in individual cases, the agencies themselves would determine what cautionary procedures would be most appropriate.
5. We modified the text to include CIA comments that CIA has more clandestine operations and a higher percentage of employees under cover than the National Security Agency (NSA) and the Defense Intelligence Agency (DIA). We acknowledge that some CIA activities, particularly clandestine collection operations, are extremely sensitive and dangerous.

However, based upon highly classified GAO work involving NSA and DIA and comments from these agencies on this report, we believe these agencies have some specialized programs that are equivalent to CIA in terms of sensitivity and danger.

6. We continue to believe that the CIA's summary removal authority should be linked to national security. This is not based on a goal that the CIA, NSA, and DIA should be treated equivalently. The summary removal authorities were conferred on CIA, as well as NSA and DIA, because of the sensitive national security work they perform. This is what differentiates them from most other federal agencies who do not possess this unusual authority and are governed by the laws that generally apply to federal employees, including those conferring appeal rights to independent tribunals such as MSPB. Accordingly, we see no basis for CIA employees being treated differently than other federal employees when national security is not at issue.

7. Our report fully recognizes the national security cost associated with MSPB reviews. Based on agency concerns, we included a section that specifically describes the types of national security risks involved. As mentioned in comment 4, our report lays out a tiered process where, depending on the level of risk involved, the agencies themselves would determine what cautionary procedures would be most appropriate. In addition, we clearly acknowledge that there may be some national security cases in which summary removal will be appropriate, with no outside review. Nevertheless, the later cases are probably rare. We are at a disadvantage commenting on the sensitivity of CIA cases because we were not afforded access to their case files; but our review of NSA and DIA cases showed that 98 percent of adverse action case files contained no classified material.

8. We modified our report to add additional examples of administrative costs that CIA, NSA, and DIA would incur to clear judges and attorneys, provide classified storage for judges and attorneys, and produce unclassified case files.

9. The legislative history of the 1992 amendments to the National Security Act of 1947, as amended, contains no substantive discussion of the DCI's termination authority. Thus, there is no indication that Congress debated this issue at all.

10. Government audit standards require that our audit reports include any factors that significantly limited the scope or conduct of our review. Without access to CIA's complete personnel regulations and agency case files, we were severely hampered in our efforts to compare CIA not only with other federal agencies, but with its sister intelligence agencies as well.

11. We disagree with CIA assertions that we lack jurisdiction to examine the topics covered in this report. Under the General Accounting Act of 1980, amending the Budget and Accounting Act of 1921, and the Legislative Reorganization Act of 1970, GAO has general audit authority over CIA activities. The General Accounting Office Act preserved the audit exemption set forth in the CIA Act of 1949 covering unvouchered CIA expenditures. It also added another provision that allows the President to exempt from audit unvouchered financial transactions about sensitive law enforcement investigations if an audit would expose the identifying details of an active investigation or endanger investigative or domestic intelligence sources involved in the investigation. It should be emphasized, however, that this new exemption only further limited our authority to audit CIA unvouchered expenditures. It did nothing to restrict our audit authority over vouchered expenditures. We think our audit of intelligence agency personnel practices falls within our general audit authority, and has nothing to do with auditing unvouchered expenditures. Regarding the Intelligence Oversight Act of 1980, while it does provide the intelligence committees with primary oversight over intelligence activities, it neither precludes other committees from examining intelligence issues related to their jurisdiction, nor, in any way, restricts our general audit authority. This is consistent with the Senate and House Rules describing the authority and scope of operations of the intelligence committees. Both state that other congressional committees can review intelligence activities that directly affect matters within their jurisdiction. We believe the House Civil Service Subcommittee, the requester for this report, clearly has authority to review intelligence agency personnel questions relating to the Equal Employment Opportunity (EEO) and adverse actions.

Comments From the Department of Defense

Note: GAO comments supplementing those in the report text appear at the end of this appendix.



COMMAND, CONTROL,
COMMUNICATIONS, AND
INTELLIGENCE

ASSISTANT SECRETARY OF DEFENSE
6000 DEFENSE PENTAGON
WASHINGTON, DC 20301-6000

February 2, 1996



Mr. Richard Davis
Director, National Security Analysis
National Security and International
Affairs Division
U.S. General Accounting Office
Washington, DC 20548

Dear Mr. Davis:

This is the Department of Defense (DoD) response to the General Accounting Office draft report, "INTELLIGENCE AGENCIES: Selected Personnel Practices at CIA, NSA, and DIA Compared to Other Agencies", dated December 5, 1995 (GAO Code 701048), OSD Case 1062. The Department partially concurs with the report issues.

The Department concurs with the GAO report conclusions regarding equal employment opportunity practices at Defense Intelligence Agency (DIA) and National Security Agency (NSA). However, contrary to the GAO report, the Department believes that both agencies adequately protect employee rights as compared to the protections afforded by the Merit System Protection Board (MSPB). In addition, it is the DoD position that a change of policy would not adequately consider the risks to sensitive or classified information likely in any litigation. Extensive experience by both NSA and DIA reveals that no matter how many precautions are taken to protect information or how improbable the introduction of classified or sensitive information, the likelihood of compromise is inextricably linked with any type of litigation. The basis for our conclusion is discussed in detailed below.

The GAO concludes that there is no national security rationale for the different treatment of veterans and non-veterans by the different agencies. Over the past 30 years, agencies with national security missions have been expressly and consistently excluded from statutes which could not be implemented in a manner consistent with national security requirements. These exclusions extend beyond MSPB appeal rights to the Federal Labor-Management Relations Act, the recent Hatch Act amendments, the Civil Service Due Process Amendments of 1990, and the Senior Executive Service authorities,



See comment 1.

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See comment 2.

among others. Despite these exclusions, for disciplinary and adverse action cases, NSA and DIA have continually developed regulations that mirror the intent of the legislation to the maximum extent consistent with national security. While the other statutory exclusions do not differentiate between veterans and non-veterans, it should be noted that the differentiation stems from Veteran's Preference Act of 1944 and is thus based upon the debt this nation owes to its veterans and is not based on any conventional national security analysis.

See comment 3.

The GAO further concludes that NSA and DIA could use summary removal authorities. The NSA and DIA have never used their summary removal authorities in large part because they believe that employees should be given their basic due process rights wherever possible. While it is true that summary removal authorities would continue to be an option, MSPB appeal rights cover more than removal. Examples include: suspensions of more than 14 days, reductions in grade or pay, and furloughs for 30 days or less. In fact, it is possible that subjecting such cases to external review, with the commensurate risk of disclosure, could result in increased use of summary removal rather than a less severe sanction. Recommend that the lack of summary authorities for the full range of adverse actions appealable to the MSPB be noted in the GAO report.

See comment 4.

See comment 5.

Lastly, the GAO concludes that agencies could provide security clearances to MSPB administrative judges and employee attorneys in adverse action appeals. The report greatly underestimates the costs and administrative burden that would be placed on NSA and DIA. It is the DoD position that while it is possible to provide clearances to judges, and employee attorneys, as there is no difference in the way that they are cleared as compared to other employees, it would take, on average, 205 days to process a security clearance under favorable circumstances. This would result in the extension of an adverse action procedure from a minimum of 30 days to an average of 235 days, greatly affecting the employee's basic right to a speedy process. Additionally, the agencies would have to provide for secure storage of classified information and expend considerable time redacting information. The agencies now spend considerable resources redacting information so that it can be provided in an unclassified manner. Even if the administrative judges and employee attorneys were cleared, NSA and DIA would still be required to continue, and, in fact, expand these efforts since the case records must be unclassified to the maximum extent possible to minimize the exposure of our classified information and the number of MSPB cases would increase. It is the

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position that the GAO report should be revised to include the full cost impact of providing clearances, secure storage facilities for judges and attorneys, and the additional document classification review that would result from expanded eligibility for MSPB appeals.

The Department of Defense is committed to providing all employees due process rights and protections. The NSA and DIA have a proven record of doing so. It is the DoD position that extending MSPB appeal rights to their employees would not only risk national security, but would afford little or no additional protection. We appreciate the opportunity to review the draft report and provide comments.

Sincerely,


Emmett Paige, Jr.

The following are GAO's comments on the Department of Defense's (DOD) letter dated February 2, 1996.

GAO Comments

1. We modified the text to expand upon the concerns expressed by DOD. Our report has a section that specifically describes the types of national security risks involved. We lay out a tiered process where, depending on the level of risk involved, the agencies themselves would determine what cautionary procedures would be most appropriate. In addition, we acknowledge that there may be some national security cases where summary removal would be appropriate, with no outside review. Nevertheless, we expect that the latter cases would be rare. Our review of NSA and DIA cases, found that 98 percent of adverse action case files contained no classified material.
2. We modified the text in light of DOD's comments. However, the key point, which DOD officials agreed with, is that nonveterans present no greater national security risk than veterans. Since NSA and DIA have a proven record of dealing with veteran appeals to MSPB, they could also do so for nonveterans. Along these lines, we believe CIA could also deal with appeals to MSPB.
3. DOD raises a legitimate point that the NSA and DIA directors' summary removal authority cannot be used for lesser sanctions, such as suspensions of less than 14 days, or reductions in pay or grade, or furlough for 30 days or less. We believe the agencies could still suspend employees under 5 U.S.C. 7532(a) without outside review, but this would not cover reductions in pay or grade, or furloughs, which are appealable to MSPB. If Congress were to extend MSPB appeal rights to intelligence agency personnel, this is one of the implementing details it would have to resolve, perhaps by expanding the directors' summary removal authorities to lesser sanctions, but only in rare national security cases.
4. While DOD is correct that the limitations of the directors' summary removal authority could lead to more severe sanctions, it could also lead to less severe sanctions. Actual cases from the period we reviewed (1993-94), indicate that it is not as large of a problem as DOD implies. For example, there were no reductions in grade or pay, or furloughs at NSA or DIA, and no suspensions at DIA. Regarding NSA suspensions, there were five suspensions greater than 14 days (i.e., potentially appealable to MSPB). In three of these five suspensions, NSA could have reduced the sanction slightly (by 1-6 days) to make the case exempt from MSPB review. The two

other suspensions (one was for 60 days and one was indefinite) were for serious offenses where removal would be fully justified under NSA regulations.

5. We modified the text to expand on DOD concerns about MSPB related administrative costs, which we agree are a legitimate concern. However, our key point remains that Congress provided the intelligence agencies with exemptions from standard personnel practices for reasons of national security. There is no evidence in the legislative histories of these exemptions to indicate that Congress provided the exemptions to minimize the administrative burden at these agencies. In addition, as noted in the report, these agencies already deal with such costs in MSPB cases (for veteran employees) and EEO cases before EEOC and the courts (for all employees).

Comments From the Equal Employment Opportunity Commission

Note: GAO comments supplementing those in the report text appear at the end of this appendix.



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

Office of
the Chairman

December 18, 1995

Richard Davis
Director, National Security Analysis
United States General Accounting Office
Washington, D. C. 20548

Dear Mr. Davis:

Recently your office issued a draft report entitled, "Intelligence Agencies: Selected Personnel Practices at CIA, NSA and DIA Compared to Other Agencies" and provided a copy to my office for comment. The Commission appreciates the opportunity to comment on the draft report. Although we have no comments on the findings concerning the intelligence agencies, we disagree with a number of statements made in the report concerning the Equal Employment Opportunity Commission (EEOC) and the Federal complaints processing system.

On pages 28 and 29 of your report, you note that the numbers of complaints at the CIA, NSA and DIA were low but have increased dramatically since fiscal year 1992. The report states that EEOC officials said lower complaint rates for some Federal agencies could be due to either an enlightened or repressive agency management. Furthermore, the report states that EEOC officials speculated that employees could be filing more complaints for any number of reasons including, for example, financial gain or career advancement during a period that these agencies are downsizing, or because of the 1991 Civil Rights Act which authorized monetary awards up to \$300,000 in compensatory damages.

We feel that you have mischaracterized our position. EEOC does not know the reason for this rise in complaints. However, in answer to the question of what EEOC believes may be the reason, we provided a number of possible explanations. We made a statement regarding the reasons for lower complaint rates for some Federal agencies. In reply to your query as to whether the quality of an agency complaint program can be judged by the number of complaints, our response was that the number of complaints is not indicative of the quality of a program. A well run program could result in a high number of complaints because the program informed employees of their rights and demonstrated that employees who had legitimate complaints could obtain redress.

Now on pp. 21-22.

See comment 1.

**Appendix III
Comments From the Equal Employment
Opportunity Commission**

However, it is possible that a poorly run program also could result in a high number of complaints because the program failed to reduce discriminatory behavior by managers.

EEOC cannot determine anyone's subjective motive in filing an EEO complaint. There is no evidence to support the contention that employees are filing complaints for promotional advancement. Part of the increase in the number of complaints filed may be due to publicity regarding new statutes and a number of successful high-profile cases involving Federal employees, as well as individual initiatives taken by these agencies to publicize their discrimination complaints program. For example, a highly publicized class action suit was initiated in 1992 against the CIA by nine female case officers, who were provided relief in a 1995 settlement.

The following are examples of intelligence agency initiatives to publicize their complaints processing program which may have encouraged employees to come forward with allegations of discrimination. During FY 1992, DIA developed a quarterly EEO newsletter to increase the awareness of the discrimination complaints program. During FY 1993, DIA restructured the EEO complaint process and began placing posters of EEO Counselors throughout the agency. Subsequent to a Department of Defense Inspector General's report that was critical of the agency's equal employment program, NSA issued agency-wide memoranda during FY 1994 concerning prohibitions against reprisal and sexual harassment, explaining the employee's right to file a discrimination complaint. The increased numbers may also represent employees who had been discriminated against in the past but had not filed because they were afraid of reprisal or perceived an environment that discouraged the filing of complaints.

I am more troubled, however, by GAO including in the draft of this particular report on intelligence agencies their position presented to Congress on November 29, 1995, that the current Federal redress system is inefficient, expensive and time-consuming. The draft report gives no evidence to sustain these assertions. In the past, I have expressed my strong disagreement with GAO's position on this issue. However, since GAO's position originally presented to Congress is, I believe, inappropriately included in this report, I am restating my views on the subject as presented to the Subcommittee on Civil Service on November 29, 1995.

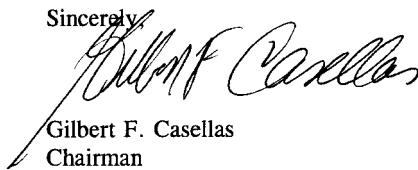
In my judgment, the current system works effectively to eliminate duplication of effort and unnecessary burdens in connection with the processing of civil rights complaints. EEOC's mission is the enforcement of civil rights laws. It also plays a primary role in the Federal discrimination complaints and appeals process. Thus, any abridgement of Federal employees' right to file individual complaints of discrimination would dramatically alter the fundamental civil rights protection provided by the 1972 amendments to the Civil Rights Act of 1964 and would afford Federal employees fewer civil rights protections than are afforded workers in the private sector.

See comment 2.

**Appendix III
Comments From the Equal Employment
Opportunity Commission**

Therefore, for all the reasons noted previously, we feel that there are several areas of the draft report that need to be revised. Thank you for the opportunity to comment on the draft report.

Sincerely,



Gilbert F. Casellas
Chairman

The following are GAO's comments on the Equal Employment Opportunity Commission's (EEOC) letter dated December 18, 1995.

GAO Comments

1. We modified the text to more accurately reflect EEOC's position and included the examples they cite.
2. We modified our report to add additional evidence. Our work related to EEOC and MSPB has surfaced a number of shortcomings with the federal redress process. For more details that support our position, see the full text of our testimony, Federal Employee Redress: An Opportunity for Reform (GAO/T-GGD-96-42, Nov. 29, 1995). The purpose of our testimony was not to recommend any abridgements of employees' rights that would result in fewer protections than are afforded workers in the private sector. Rather, at a time when civil service is undergoing renewed scrutiny by the executive branch and Congress, we suggested that the redress system, like other facets of civil service such as performance management and the retirement system, be studied to look for ways to make it more efficient and effective.

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Appendix IV
Major Contributors to This Report

Related GAO Products

Veterans' Preference: Data on Employment of Veterans (GAO/GGD-96-13, Feb. 1, 1996).

Military Equal Opportunity: Problems With Services' Complaint Systems Are Being Addressed by DOD (GAO/NSIAD-96-9, Jan. 26, 1996).

Federal Employee Redress: An Opportunity for Reform (GAO/T-GGD-96-42, Nov. 29, 1995).

Military Equal Opportunity: Certain Trends in Racial and Gender Data May Warrant Further Analysis (GAO/NSIAD-96-17, Nov. 17, 1995).

Equal Employment Opportunity: Women and Minority Representation at Interior, Agriculture, Navy, and State (GAO/GGD-95-211, Sept. 29, 1995).

Merit Systems Protection Board: Mission Performance, Employee Protections, and Working Environment (GAO/GGD-95-213, Aug. 15, 1995).

Equal Opportunity: DOD Studies on Discrimination in the Military (GAO/NSIAD-95-103, Apr. 7, 1995).

Background Investigations: Impediments to Consolidating Investigations and Adjudicative Functions (GAO/NSIAD-95-101, Mar. 24, 1995).

Security Clearances: Consideration of Sexual Orientation in the Clearance Process (GAO/NSIAD-95-21, Mar. 24, 1995).

Federal Affirmative Employment: Better Guidance Needed for Small Agencies (GAO/GGD-94-71, July 7, 1994).

Federal Personnel: The EEO Implications of Reductions-in-Force (GAO/T-GGD-94-87, Feb. 1, 1994).

EEOC: An Overview (GAO/T-HRD-93-30, July 27, 1993).

DOD Special Access Programs: Administrative Due Process Not Provided When Access Is Denied or Revoked (GAO/NSIAD-93-162, May 5, 1993).

Affirmative Employment: Assessing Progress of EEO Groups in Key Federal Jobs Can Be Improved (GAO/GGD-93-65, Mar. 8, 1993).

Related GAO Products

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

Federal Workforce: Agencies' Estimated Costs for Counseling and Processing Discrimination Complaints (GAO/GGD-92-64FS, Mar. 26, 1992).

Federal Workforce: Continuing Need for Federal Affirmative Employment (GAO/GGD-92-27BR, Nov. 27, 1991). Testimony on same topic (GAO/T-GGD-92-2, Oct. 23, 1991).

Due Process: Procedures for Unfavorable Suitability and Security Clearance Actions (GAO/NSIAD-90-97, Apr. 23, 1990).

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