



Testimony  
of  
David K. Colapinto  
General Counsel, National Whistleblowers Center

Before the  
United States House of Representatives  
Committee on Oversight and Government Reform

May 14, 2009

Hearing on,  
“Protecting the Public from Waste, Fraud, and Abuse: H.R. 1507, the Whistleblower Protection  
Enhancement Act of 2009.”

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**Summary of Testimony of David K. Colapinto, General Counsel  
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Chairman Towns, Ranking Member Isa, and Honorable Members of the Committee, this is a one-page summary of my testimony in support of H.R. 1507, the Whistleblower Protection Enhancement Act of 2009.

(1) Employees who work in the intelligence agencies and at the Federal Bureau of Investigation (“FBI”) should be provided full access to courts and juries and the other reforms included in H.R. 1507 to combat whistleblower retaliation. Similar rights and court remedies currently exist for intelligence agency and FBI employees under civil rights statutes.

(2) There is no justification for treating employees at intelligence agencies and the FBI differently from employees at other federal agencies in regard to protections against retaliation for whistleblowing. As the General Accounting Office (“GAO”) found in 1996, providing national security employees with the standard protections against adverse actions enjoyed by most other federal employees poses no greater risk to national security.

(3) Also, as the GAO found in 1996, the intelligence agencies already have in place numerous safeguards within their EEO programs to protect against the disclosure of classified information, and are fully equipped to protect national security interests in employee cases that currently proceed to federal court and in jury trials.

(4) Administrative review of intelligence agency and FBI employee whistleblower cases, without providing for full court access, will be no more effective at encouraging employees at those agencies to report serious misconduct or fraud, or prevent retaliation, than what currently exists under the failed processes for Title 5 employees.

My full written testimony follows this summary. Thank you for giving me this opportunity to share the views of the National Whistleblowers Center on H.R. 1507.

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Chairman Towns, Ranking Member Isa, and Honorable Members of the Committee, thank you for inviting me to testify today in support of H.R. 1507, the Whistleblower Protection Enhancement Act of 2009. I am speaking today on behalf of the National Whistleblowers Center, a non-profit, non-partisan organization in Washington, D.C. with a 22-year history of protecting the right of individuals to speak out about wrongdoing in the workplace without fear of retaliation. Since 1988, the Center has supported whistleblowers in the courts and before Congress, achieving victories for environmental protection, nuclear safety, government ethics and corporate accountability. The National Whistleblowers Center supports extending whistleblower protections to all federal employees based on the model for protecting federal employees from discrimination and retaliation under the civil rights laws. For that reason, on behalf of the Center, we commend this Committee for passing H.R. 985 in the last Congress, and appreciate the efforts of Rep. Van Hollen and Rep. Platts who proposed those same provisions as part of the stimulus bill that passed the House of Representatives earlier this year.

The National Whistleblowers Center strongly supports the continuing efforts of this Committee to enact strong whistleblower protections for all federal employees, including those employees who work in the intelligence agencies and at the Federal Bureau of Investigation (“FBI”), based on the civil rights law model. We have some suggestions for improvements to H.R. 1507 to ensure that strong protections are enacted for all employees, particularly for employees who work in the area of national security and law enforcement. We look forward to working with you on this long overdue and vital piece of government reform legislation.

**I. BACKGROUND.**

Whistleblowers are the single most important resource for detecting and preventing fraud and misconduct. That was the finding of the three most recent studies on fraud and misconduct detection in private industry and in government.<sup>1</sup>

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<sup>1</sup> See 2007 PricewaterhouseCoopers (“PWC”) study, “Economic Crime: people, culture and controls.” [http://www.whistleblowers.org/storage/whistleblowers/documents/pwc\\_survey.pdf](http://www.whistleblowers.org/storage/whistleblowers/documents/pwc_survey.pdf); Ethics Resource Center (“ERC”), “National Government Ethics Survey” (2007), <http://whistleblowers.nonprofitsoapbox.com/storage/whistleblowers/documents/ethicsresourcecentersurvey.pdf>; Association of Certified Fraud Examiners (“ACFE”), “2008 Report To The Nation On Occupational Fraud & Abuse,”

There are three findings from these studies that are particularly relevant to considering enhancement of whistleblower anti-retaliation protections to FBI and intelligence agency employees, and federal employees generally, under H.R. 1507:

- misconduct and fraud is as common in government as the private sector;<sup>2</sup>
- most misconduct and fraud is reported by employees internally through the chain of command as opposed to being detected by other means, such as regular audits or law enforcement;<sup>3</sup> and
- strong protections against retaliation are essential to encourage reporting by employees.<sup>4</sup>

Numerous high profile examples of misconduct detected and reported by employees at the FBI and intelligence agencies have been widely reported over the years. In the federal government, serious misconduct takes many forms, all of which occur in the FBI and intelligence agencies, such as: lying to employees and stakeholders (including lying to Congress and the courts); putting one's own interests ahead of the organization's and conflicts of interest; safety violations; misuse of the organization's confidential information; internet abuse; misreporting of hours worked; other violations of law.<sup>5</sup>

Misconduct and fraud does not disappear at the FBI and intelligence agencies simply because these government agencies operate in more secrecy. Employees who work in the field of national security or at the FBI who observe these serious problems must be encouraged to report them through their agency chain of command, externally to Inspector Generals, and when appropriate to Congress, without fear of retaliation.

The published surveys and the case examples over the last 30 years demonstrate that the only way to achieve this goal is to enact strong protections for all federal employees by providing full court access. Notably, a similar finding was reached by the House Committee on Post Office and Civil Service in 1994 when it considered amendments to the WPA and stated:

The composite lesson to be learned from recent studies and the Committee's hearings is that the WPA is not working, because *it has not deterred managers*

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<http://whistleblowers.nonprofitsoapbox.com/storage/whistleblowers/documents/acfefraudreport.pdf>.

<sup>2</sup> ERC Survey, p. 4.

<sup>3</sup> ERC Survey, p. 8; PWC Survey, p. 10 (table 1.11); ACFE Report, p. 19.

<sup>4</sup> PWC Survey, p. 23; ACFE Report, p. 23.

<sup>5</sup> ERC Survey, p. 22-23.

*from trying to retaliate. That is not surprising when those who violate the merit system have nothing to lose.*<sup>6</sup>

The House had it right in 1994 when it proposed amending the WPA to include jury trials because the “WPA’s rights *have not met their promise on paper*, because the agencies responsible for the Act’s implementation *have been hostile*, or at least unwilling, *to enforce its mandate.*”<sup>7</sup> However, the federal agencies and federal management opposed the jury trial provisions of the 1994 amendments, and a compromise was reached to make improvements without affording full court access in whistleblower cases. Now once again, 15 years later, the same arguments are being made to support the same failed administrative and to oppose full court access for all employees.

## **II. CURRENT WHISTLEBLOWER PROTECTIONS FOR INTELLIGENCE AGENCY AND FBI EMPLOYEES.**

The current intelligence agency and FBI whistleblower provisions are a cruel hoax because they do not afford any meaningful protection to employees who blow the whistle. If the current system to protect against retaliation for whistleblowing is broken for Title 5 employees, it is virtually non-existent for employees at intelligence agencies and at the FBI.

The Intelligence Community Whistleblower Protection Act (ICWPA) provides employees of the intelligence community with a limited right to raise concerns to Congress or to the appropriate Inspector General (IG). If the employee wants to go to the intelligence committees of Congress he or she must obtain approval from the Director of the Agency. *See*, 50 U.S.C. §403q(d)(5).

Currently, under 50 U.S.C. §403q(e)(3) an intelligence agency IG does not have statutory authority to provide any remedy for whistleblower retaliation although an IG can receive complaints and investigate. There is only one known case where an intelligence agency IG has ordered relief to an employee for whistleblower retaliation under the ICWPA.

The FBI has its own statute, 5 U.S.C. §2303, in which FBI employees are supposed to have procedures that are consistent with the whistleblower rights for Title 5 civil servants. Only one FBI employee is known to have ever won a ruling from the DOJ confirming that whistleblower rights were violated. FBI whistleblower cases are reviewed by the DOJ where cases get bogged down in the bureaucracy and where there is no independent judicial review of decisions available.

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<sup>6</sup> H.R. Report No. 103-769, “ Reauthorization of the Office of Special Counsel,” 103<sup>rd</sup> Cong., 2d Sess., p. 13 (Sept. 30, 1994) (emphasis added) (Report on H.R. 2970, amending Title 5, U.S. Code, to provide for *de novo* judicial review in district court for federal employees in whistleblower cases).

<sup>7</sup> *Id.* (emphasis added).

Failure by Congress to enact strong whistleblower protections with full court access for all federal employees under H.R. 1507, particularly for national security and FBI employees, will nourish an ineffective system of preventing and addressing retaliation. It would also extend an already unlevel playing field where disparities exist under the current system that favor the agency. Under the ICWPA, Inspector Generals for the intelligence agencies operate in total secrecy and have no published decisions or public reports on whistleblower retaliation. In FBI cases decisions are not published by DOJ and there is no judicial review so only the agency knows what the precedents are, placing the employees and their counsel at a disadvantage. DOJ also refuses to publish statistics on how many cases are filed and decided even though the statute requires annual reporting to the President. 5 U.S.C. §2303. There exists no subpoena power in FBI retaliation cases, the agency controls all the witnesses and it is not unusual for supervisors or management employees to retire while the case is pending. The agency has access to these retired employees and retains the right to call them at a hearing to testify against the whistleblower, but the whistleblower cannot even take a deposition or interview these former employees before an administrative trial.

Simply providing for an administrative review of the IG determination on an intelligence employee's whistleblower retaliation claim is not a substitute for the full court access and *de novo* judicial review provisions set forth in HR 1507. Administrative review of prohibited personnel action findings by the intelligence community Inspector Generals, without providing for full court access and jury trials, would not provide employees with due process or rights anywhere comparable to what currently exists for all intelligence agency and FBI employees under EEO laws.

Under the current system, it has become standard for lawyers who represent federal employee whistleblowers to advise their clients that filing a whistleblower retaliation claim is futile given the failure rates through the administrative forums. Nothing is more demoralizing than telling a client that remaining silent or not fighting retaliation is the best legal option.

That will not change unless the option of full court access with jury trials is provided for all federal employees. Denying employees that right will result in experienced legal counsel advising against filing claims due to the futility and other adverse consequences from blowing the whistle.

H.R. 1507 would create "badly needed competition – a choice of fact-finding fora between existing remedies and civil actions providing for jury trials in U.S. District Court." That was the finding by the U.S. House of Representatives Committee on Post Office and Civil Service when it passed a bill to amend the WPA in 1994 that provided for full district court access and jury trials.<sup>8</sup>

There is no more risk to national security if intelligence agency and FBI employees are also afforded the right to pursue retaliation claims through the agency Inspector Generals and then seek full court access and a jury trial under the H.R. 1507 framework than currently exists

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<sup>8</sup> H.R. Report No. 103-769, "Reauthorization of the Office of Special Counsel," 103<sup>rd</sup> Cong., 2d Sess., p. 18 (Sept. 30, 1994).

when retaliation claims are filed under Title VII of the Civil Rights Act, and other EEO laws, that provide for federal court/jury trial review.

It is a sad fact that criminals and terrorists have been provided more rights in court than our intelligence agency and law enforcement officers who blow the whistle on serious misconduct and fraud.

Creating an administrative remedy for intelligence and FBI employees, without full court access to jury trials, betrays the trust placed in the men and women who are charged with helping to prevent the next 9/11. Intelligence agency and FBI employees deserve the best protections available that are modeled on laws proven to be effective, such as Title VII of the Civil Rights Act.

### III. EXISTING COURT ACCESS FOR INTELLIGENCE AGENCY AND FBI EMPLOYEES UNDER CIVIL RIGHTS AND OTHER LAWS.

Currently, under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000-e and 42 U.S.C. § 1981a, all federal employees, including those employed by national security agencies and the FBI, can take their employment cases into federal court to fully litigate claims of discrimination and retaliation with jury trials and compensatory damages.<sup>9</sup> In addition, federal employees at the FBI and all intelligence agencies have the right to file claims in federal court seeking damages for violations of the Privacy Act of 1974, 5 U.S.C. §552a(g), and for pre-enforcement injunctive relief against federal agencies that violate employees' constitutional rights.<sup>10</sup>

Title VII permits employees of the FBI, National Security Agency ("NSA"), Central Intelligence Agency ("CIA"), Defense Intelligence Agency ("DIA") and all other federal intelligence or law enforcement agencies excluded from the protections of the Civil Service Reform Act ("CSRA") and the Whistleblower Protection Act ("WPA") to bring Title VII discrimination and retaliation claims in federal court. This remedial scheme, which includes the right to a trial by jury in federal court, has already proven to be successful since the Civil Rights

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<sup>9</sup> Under *current* law federal employees can bypass the Merits Systems process and go directly to federal court with their Civil Service claims if they simply join the civil service issues with the Title VII complaint as a "mixed" case. Retaliation cases – whether under Title VII or under another federal law (such as the WPA) essentially adjudicate the same issues. *See Ikossi v. Department of Navy*, 516 F.3d 1037, 1042 (D.C. Cir. 2008) ("This holding [conferring federal court jurisdiction over mixed cases] also reflects the legislative history, which states that **'questions of the employee's inefficiency or misconduct, and discrimination by the employer, [are] two sides of the same question and must be considered together.'**") (emphasis added).

<sup>10</sup> *See, e.g., Weaver v. USIA*, 87 F.3d 1429, 1433-35 (D.C. Cir. 1996).

Act was amended in 1991, and it should also be adopted as the example for reforming the WPA.<sup>11</sup>

Litigating a whistleblower reprisal claim under the WPA is similar to a retaliation claim under Title VII. At issue in both types of cases is the federal employer's motive for retaliation when taking an adverse employment action. Where national security information is related to a case, the federal court has protective measures available to prevent disclosure of sensitive or classified information without imperiling the rights of the employees or the agencies to fully adjudicate these claims. For example, the federal courts have used pseudonyms and protective orders to protect national security interests in Title VII cases. Other protective measures that are available under the federal rules of civil procedure and federal rules of evidence, such as entering protective orders and the use of *in camera* proceedings, can be used to prevent the unauthorized disclosure of national security information on the public record.

#### **A. Title VII Jury Trials and Compensatory Damages Are Currently Available for National Security Employees.**

The Title VII cases involving FBI, CIA, DIA and NSA employees that have been adjudicated in federal court illustrate that all federal employees (including those employed in the areas of national security and law enforcement) can be afforded the right to litigate their whistleblower cases in federal court without risk of revealing classified or other sensitive intelligence information. Since these cases can be heard in federal court without releasing any intelligence information, employees from these agencies should be able to bring their whistleblower claims in federal court as well.

Although the number of discrimination and retaliation cases filed by national security employees per year under the civil rights and related statutes are limited and relatively small<sup>12</sup>

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<sup>11</sup> Employees at intelligence agencies and at the FBI have had the statutory right to file discrimination and retaliation claims in federal court under the civil rights statutes since 1964; however, it was in 1991 that federal employees were granted the right to seek a jury trial and compensatory damages because the preexisting remedies without access to juries were "not adequate to deter unlawful discrimination or to compensate victims of such discrimination." *See, e.g.,* H.R. Report 102-83, "Providing for the Consideration of H.R. 1 [the Civil Rights Act of 1991]," 102<sup>nd</sup> Cong. (June 3, 1991).

<sup>12</sup> According to the published statistics required by the No Fear Act, the "Number of Administrative Complaints for Each Agency Annually" for complaints of discrimination or retaliation under Title VII, the Age Discrimination in Employment Act and Rehabilitation Act for the CIA and the NSA, are as follows:

- CIA
  - 2003 → 13
  - 2004 → 14
  - 2005 → 21
  - 2006 → 12
  - 2007 → 24



compared with other agencies, there are still several reported cases where employees have brought their claims in federal court after exhausting remedies through the federal EEO administrative investigation and/or before the Equal Employment Opportunity Commission (“EEOC”).

In one case, a hearing-impaired former employee of the CIA, brought an action alleging that the CIA violated the Rehabilitation Act by failing to provide her with reasonable accommodations in light of her disability, and after a three-day jury trial, the plaintiff was awarded \$25,000 in compensatory damages.<sup>13</sup> In another case, the plaintiff brought a discrimination action pursuant to Title VII against the Director of the NSA. The plaintiff was granted a motion for an opportunity for discovery against the NSA, and although the NSA later won a motion for summary judgment dismissing the claim, the matter was fully litigated on the public record.<sup>14</sup>

Courts have also been able to successfully adjudicate cases that may contain classified or sensitive intelligence information by using pseudonyms. For example, when a retired program manager for the CIA sued the CIA for race and age discrimination the plaintiff’s real name was not used in the case and in order to preserve the security of American intelligence operations, one city identified in this litigation where classified operations took place was only identified as the “Main Location.”<sup>15</sup>

#### **B. Federal Employee Whistleblower and Title VII Cases Often Overlap.**

Since 1991, federal employees have been afforded the right, if they choose, to seek review of their discrimination and retaliation cases in U.S. district court, *de novo*, with a trial by jury and the right to seek an award of compensatory damages. In many cases, federal employees have achieved more success on their Title VII retaliation claims reviewed *de novo* in federal court than the administrative remedies available for whistleblower claims either through MSPB or other agencies as provided by the CSRA and WPA. Based on the history of federal court review of civil rights claims, the right to *de novo* review before federal court with a right to a jury trial and compensatory damages is essential to achieve effective oversight and to redress complaints of whistleblower retaliation by all federal employees. Federal employees who work in law enforcement sensitive agencies, who have some remedies available under the current

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- NSA
    - 2003 →30
    - 2004 →23
    - 2005 →32
    - 2007 →24

<sup>13</sup> *Szedlock v. Tenet*, 139, F. Supp. 2d 725, (E.D. VA 2001).

<sup>14</sup> *Fernandez v. Alexander*, U.S. Dist. LEXIS 60047 (Dist. MD 2006).

<sup>15</sup> *Peary v. Goss*, 365 F. Supp. 2d 713 (E.D. VA 2005).

version of the WPA, frequently allege retaliation or discrimination in violation of Title VII in addition to whistleblower retaliation in violation of the WPA.

Recent cases provide examples of where employees have brought claims under both Title VII and the WPA.

1. Jane Turner was a long-time FBI Special Agent who blew the whistle on the FBI's failure to investigate child abuse cases on an Indian reservation and she also disclosed theft by FBI agents of items from the World Trade Center ground zero site to the DOJ Inspector General. Turner filed a whistleblower complaint through the DOJ whistleblower procedures for FBI employees, 28 C.F.R. Part 27 and 5 U.S.C. 2303. However, after several years of languishing before the DOJ Office of Attorney Recruitment and Management ("OARM"), Turner's whistleblower complaint is still pending.

By contrast, Ms. Turner successfully appealed an adverse grant of summary judgment on a claim of retaliation under Title VII.<sup>16</sup> On remand Turner was permitted to go to trial by a jury and she prevailed by recovering \$300,000 in compensatory damages, other damages and attorneys fees and costs against the FBI for some of the adverse actions that were taken against her.

2. FBI counterterrorism expert Bassem Youssef has fought within the FBI to end discrimination against Arab Americans and to protect the American people from another terrorist attack. The recipient of the prestigious Director of Central Intelligence award for his successful undercover operations, Mr. Youssef has on many occasions called attention to the deficiencies in the FBI's counterterrorism division, e.g., on September 11, 2001, the FBI's top counterterrorism official did not know the difference between Shiite and Sunni Muslims.<sup>17</sup>

Mr. Youssef filed a Title VII claim of retaliation and discrimination on basis of national origin and a whistleblower claim under the statute for FBI employees (5 U.S.C. §2303). Both claims involve Mr. Youssef's disclosures to FBI Director Robert Mueller at a meeting with the Director and a member of Congress on June 28, 2002, in which Mr. Youssef expressed his concern that despite his expertise and qualifications as an FBI agent in the field of counterterrorism and fluency in Arabic, the FBI had not placed him into a position to utilize his skills in the fight against terrorism and that he believed he was being discriminated against on the basis of national origin.<sup>18</sup>

In Mr. Youssef's EEO/Title VII case and his WPA case, Mr. Youssef has been able to pursue his claim without risk of disclosure of classified information. The FBI has cleared all statements, affidavits, documents (such as personnel records) and redacted any classified information. Although Mr. Youssef has a security clearance and works as a Unit Chief in the

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<sup>16</sup> *Turner v. Gonzales*, 421 F.3d 688 (8<sup>th</sup> Cir. 2005).

<sup>17</sup> *Hearing on FBI Whistleblowers*, 110<sup>th</sup> Cong. (May 21, 2008) (written testimony of Stephen M. Kohn).

<sup>18</sup> *Youssef v. FBI*, 541 F.Supp.2d 121, 155-160 (D.D.C. 2008).

FBI's counterterrorism division, both cases are proceeding without the revelation of any classified information or the need for taking any other special measures beyond what is available in the Federal Rules of Civil Procedure.

3. Peter Brown, who was fired shortly after disclosing systemic breakdowns in quality assurance at the Savannah Customs Lab, brought a mixed case against his employer, the U.S. Department of Homeland Security ("DHS"), alleging whistleblower retaliation and retaliation for prior protected activity under Title VII. Before the Merit Systems Protection Board ("MSPB"), Mr. Brown was not successful on either claim. However, because Mr. Brown has the right to *de novo* review in federal court, he learned through discovery in the federal court action that DHS withheld documents that were responsive to his discovery requests served upon the agency in the MSPB case. Additionally, after Mr. Brown filed his federal court action following exhaustion from the MSPB, he learned that DHS destroyed the entire case file on his removal, including relevant notes that were never produced in the MSPB case.

The federal court granted a motion for sanctions against DHS for spoliation of evidence.<sup>19</sup> On the other hand, the MSPB failed to reopen Mr. Brown's case to reconsider the impact of the destruction of relevant documents material to Mr. Brown's removal case on the MSPB's decision.

Employees who work in the field of national security or at the FBI are able to overcome motions for summary judgment and have their Title VII retaliation claims successfully adjudicated in federal court without revealing any classified intelligence information or law enforcement sensitive information. Similarly, other federal employees routinely have whistleblower claims heard in federal court without revealing any sensitive intelligence or law enforcement information.

#### **IV. SAFEGUARDS FOR PROTECTION OF NATIONAL SECURITY INFORMATION UNDER EEO AND CIVIL RIGHTS LAWS.**

After conducting a comprehensive study the General Accounting Office (GAO) concluded there is "***no justification for treating employees***" at "***intelligence agencies differently from employees at other federal agencies***" in regard to protections against retaliatory discharge or other discriminatory actions.

On March 11, 1996 the National Security and International Affairs Division of the United States General Accounting Office released its comprehensive report, GAO/NSIAD-96-6, *Intelligence Agencies: Personnel Practices at the CIA, NSA and DIA Compared with Those of Other Agencies* (hereinafter, "GAO Report").<sup>20</sup> In this report, GAO "compared equal employment opportunity (EEO) and adverse action practices at these intelligence 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

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<sup>19</sup> *Brown v. Chertoff*, 563 F.Supp.2d 1372 (S.D. Ga. 2008).

<sup>20</sup> Excerpts from this GAO Report are attached to this testimony.

agencies.” GAO Report, pp. 2, 14. GAO performed a year long review “in accordance with generally accepted government auditing standards.” *Id.*, p. 15.

Based on the experiences in protecting CIA, NSA and DIA employees from retaliation when they engaged in protected activities under Title VII of the Civil Rights Act, the GAO concluded that: **“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.”** GAO Report, p. 45 (emphasis added).

In addition, the GAO also found that the internal review process for civil rights complaints (currently existing within the CIA, NSA and DIA) (which also exist in the FBI) provides intelligence agencies with ample opportunity to resolve national security related issues and declassify information that may be necessary for a case, including but not limited to the following:

- Information on “sensitive intelligence operations can be converted into unclassified publicly available documents.” GAO Report, p. 6.
- The GAO determined that these agencies’ experience with these EEO laws “demonstrate that intelligence agencies can provide their employees with standard protections against adverse actions.” *Id.*, p.35.
- GAO found that “adverse action files generally contain no national security information.” *Id.*, p. 36. Of the files reviewed by GAO, 98% of the adverse action files contained no such information. *Id.*
- “agencies could continue to remove classified information from adverse action case files . . . [agencies have been] very diligent and successful in keeping classified information out of adverse action case files...” *Id.*, p. 38.
- GAO also found that “the agencies have overstated the sensitivity of the information contained in the vast majority of adverse action cases.” *Id.*
- All three agencies “had been able to successfully support their case with the documents at the unclassified level.” *Id.*
- GAO reviewed case files at federal courts and found declassified and redacted documents that were capable of providing sufficient information to litigate EEO cases. *Id.*, pp. 38-39.
- “GAO sees no justification for treating employees at these intelligence agencies differently from employees at other federal agencies” except in extremely “rare” cases in which national security required that an employee be summarily dismissed. *Id.*, pp. 3, 45.

Under current law, any intelligence agency employee who alleges discrimination or retaliation for engaging in activities protected under Title VII and related laws is entitled to the following procedures and protections: (1) File an initial request for counseling within an agency in order to attempt to resolve an employment related retaliation claim; (2) If informal counseling cannot resolve the dispute within 30-90 days, the employee can file a formal complaint within the agency; (3) The agency must conduct a “complete and fair investigation of the complaint” within 180 days and issue a decision on the merits of the case. GAO Report, pp.18-19; 29 C.F.R. Part 1614 (“Federal Sector Equal Employment Opportunity”).

More significantly, after exhausting these administrative remedies, all employees at these intelligence agencies have the right to file a complaint *de novo* in United States District Court and have their civil rights case heard by a trial by jury, with the same rights and remedies shared by other employees covered under these laws. *Id.*

By objectively and fairly analyzing the existing EEO complaint processing that is currently in place within all intelligence agencies referenced in H.R. 1507, the GAO was able to conclude that covering these employees under standard civil service laws, including the Whistleblower Protection Act, would not cause undue risk to national security.<sup>21</sup> The procedures set forth in H.R. 1507 are consistent with the very procedures approved by the GAO for the adjudication of national security related whistleblower claims. To the extent that additional safeguards are necessary to implement the legislation consistent with the GAO findings, H.R. 1507 can be revised to require the intelligence agencies and the FBI to implement the same safeguarding procedures that already exist to process EEO complaints to process whistleblower claims in order to prevent disclosure of classified information that is harmful to national security.

## **V. PROVISIONS WITHIN H.R. 1507 THAT PROTECT NATIONAL SECURITY.**

### **A. Retaliation is the Issue Not the Validity of the Underlying Whistleblower Claim.**

Retaliation claims under H.R. 1507 will not require litigating the validity of the employee’s underlying whistleblower allegations just as retaliation claims under federal civil rights statutes (such as Title VII) do not require litigating the underlying claim of discrimination. The merits of the whistleblower allegations (i.e., whether the whistleblower’s claims are true or

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<sup>21</sup> The GAO based its conclusion, in part, on the fact that the agency heads of intelligence agencies retain summary removal authority to suspend or remove employees when necessary in the interests of national security. *See e.g.*, 5 U.S.C. §7532, 50 U.S.C. §833 and 10 U.S.C. §1604(e). Additionally, the Civil Rights Act of 1964 contains an express provision that makes an employer’s discharge of any individual for reasons of national security unreviewable. *See* 42 U.S.C. §2000e-2(g). Although rarely invoked, these provisions provide the intelligence agencies with more than adequate assurance that these agency employees can receive the same whistleblower retaliation protections, including full court access, that are proposed for Title 5 employees under H.R. 1507. *See* GAO Report, p. 45.

false, valid or invalid) are not determined in a retaliation claim. The statute requires only a good faith belief in making a protected disclosure and does not require proof of validity of the whistleblower's allegations to maintain a retaliation claim.

What is at issue in a retaliation case is whether an employee made a protected disclosure (i.e. a disclosure of violation of law, rule or regulation; substantial threat to public health and safety; gross waste or mismanagement; and abuse of authority) and once that is established there is no in-depth examination of the underlying merits of the whistleblower allegations in the retaliation case. The making of a protected disclosure element of the whistleblower cases can be litigated without undue risk of disclosure of classified information in the same manner that such information is handled under EEO processing procedures under current law at each of the intelligence agencies and the FBI. Other provisions within H.R. 1507 that are unique to whistleblower claims, such as the role of the Inspector General in investigating the case, also will assist in ensuring that classified information is not disclosed during the course of litigation in federal court in the event *de novo* review by the district court is requested by an employee.

## **B. Separation of Functions.**

The adjudication of the employment retaliation case and the investigation of the merits of the whistleblower disclosure are separate and independent functions. The issue in the retaliation case is whether employee has suffered retaliation in the form of an adverse personnel action, which is a totally separate inquiry from whether the employee is right or wrong on the merits of the disclosure. Once it is established that an employee lodged a whistleblower allegation with the appropriate officials within or outside the agency, the underlying merits of that disclosure are not at issue.

The two functions (i.e. protection of an employee from retaliation and the investigation into the merits of an underlying allegation of wrongdoing) would remain separate under H.R. 1507. The IG and law enforcement, when appropriate, have authority to investigate whether the whistleblower allegations are valid or have merit to warrant further administrative or law enforcement action. However, that inquiry is not mixed with the whistleblower retaliation claim alleging that an adverse personnel action was taken in retaliation for making a complaint.

## **C. IG Function In Intelligence Agency and FBI Cases Under H.R. 1507.**

H.R. 1507 ensures classified information will not be revealed at any stage during the whistleblower retaliation case, because the administrative phase of the case is determined by the Inspector General for each intelligence agency or the FBI (i.e., DOJ IG). The Inspector General for each agency is familiar with the agency they oversee and can assist in assuring that if the case is appealed to federal court the administrative record does not contain classified information. For example, Inspector General offices are capable of preparing redacted reports and the agencies are capable of reviewing those reports so the case can be decided and released without the risk of classified information being revealed. To the extent these specific safeguards need to be made clearer, the statutory language can be amended to include provisions requiring the Inspector General to ensure that no classified information is revealed in any decision by the Inspector General on a retaliation claim, or that other appropriate measures are taken to safeguard such information to protect national security interests.

## CONCLUSION

H.R. 1507 provides a framework that would extend to employees who work at intelligence agencies and at the FBI the same protections against whistleblower retaliation as other employees, including the right to seek full court access, without risking the revelation of classified information or harming national security. Full court access, including the right to a trial by jury, is the cornerstone of the H.R. 1507 reforms. Given the 18-year track record of providing similar federal court access and jury trials to intelligence agency and FBI employees under civil rights laws, retaliation claims (whether under Title VII or H.R. 1507) can be safely litigated in federal court without risking national security.

The National Whistleblowers Center suggests that H.R. 1507 be modified in two areas to strengthen the court access provisions for employees who work at intelligence agencies at the FBI. First, the bill should make clear that employees at intelligence agencies and the FBI can seek a trial by jury. Second, specific provisions can be added to the court access provisions to ensure that there are sufficient safeguards available to protect against the public disclosure of classified information, as currently exists under agency EEO programs.

Thank you for inviting me to share the views of the National Whistleblowers Center on H.R. 1507.

Respectfully submitted,



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United States General Accounting Office

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



G A O  
**75** years  
1921 - 1996

GAO/NSIAD-96-6



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# Executive Summary

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## 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.

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## 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.

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## 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.

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## Principal Findings

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### 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

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.

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## Recommendations

This report contains no recommendations.

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## 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.

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.

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.

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

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### 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.<sup>4</sup>

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.<sup>5</sup>

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.

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### 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.

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<sup>4</sup>29 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.

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

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

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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.

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## 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."

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## 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."

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## 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.<sup>1</sup>

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.<sup>2</sup> 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.

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<sup>1</sup>Executive Order 12356 provides the basis for classifying national security information.

<sup>2</sup>Three 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.

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.

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

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### 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.<sup>3</sup> 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

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<sup>3</sup>The 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.

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### 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.

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

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.

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## 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.

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## 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.

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<sup>8</sup>As 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.