

March 1995

# SECURITY CLEARANCES

## Consideration of Sexual Orientation in the Clearance Process







United States  
General Accounting Office  
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National Security and  
International Affairs Division

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The Honorable George E. Brown, Jr.  
Ranking Minority Member  
Committee on Science  
House of Representatives

The Honorable Ronald V. Dellums  
Ranking Minority Member  
Committee on National Security  
House of Representatives

In response to your request and that of the former Chairman, House Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary, we reviewed issues relating to how sexual orientation is treated in the security clearance process for federal civilian and contractor employees. Specific areas we reviewed included (1) whether clearances are currently being denied or revoked based on individuals' sexual orientation, (2) whether sexual orientation is being used as a criterion in granting or revoking security clearances, and (3) how concealment of sexual orientation affects the granting or revoking of security clearances. We performed our review at eight agencies that, except for the Central Intelligence Agency, accounted for over 95 percent of the security clearances granted to civilian and contractor employees during fiscal year 1993. As agreed, we did not review security clearances at the Central Intelligence Agency, Defense Intelligence Agency, or National Security Agency. Also, the scope of this work did not include military personnel; however, our prior work has addressed policies in that area.<sup>1</sup>

## Background

The federal government is charged with determining who can be entrusted with the nation's secrets. Currently, 52 federal agencies have granted personnel security clearances to over 206,000 civilian and contractor employees. The requirement for federal employees who handle classified information to be loyal and trustworthy was an outgrowth of a 1947 federal loyalty program, established by President Truman during a time of heightened feelings of national security over growing concerns about the

<sup>1</sup>Defense Force Management: DOD's Policy on Homosexuality (GAO/NSIAD-92-98, June 12, 1992); Defense Force Management: Statistics Related to DOD's Policy on Homosexuality (GAO/NSIAD-92-98S, June 12, 1992); and Homosexuals in the Military: Policies and Practices of Foreign Countries (GAO/NSIAD-93-215, June 25, 1993).

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communist threat.<sup>2</sup> Executive Order 10450 modified the loyalty program in 1953, requiring that any individual's employment be "clearly consistent with the interests of the national security," and for the first time included sexual perversion as a basis for removal from the federal service. Executive Order 10450, which provides the basic security standards for agencies to follow, has been amended several times through the years, most recently in 1974, but the security standards have remained basically the same. Appendix I contains the security standards in Executive Order 10450.

Federal agencies used the sexual perversion criteria in the early 1950s to categorize homosexuals as security risks and separate them from government service. Agencies could deny homosexual men and women employment because of their sexual orientation until 1975, when the Civil Service Commission issued guidelines prohibiting the government from denying employment on the basis of sexual orientation.<sup>3</sup> The guidelines, which further define the provisions of Executive Order 10450, resulted from court decisions requiring that persons not be disqualified from federal employment solely on the basis of homosexual conduct. Although the public policy change resulted in the restrictions against employment of homosexuals being lifted, the guidance for granting security clearances to homosexuals remained generally vague or restrictive until the early 1990s. Appendix II contains a synopsis of key court decisions pertaining to sexual orientation and the security clearance process.

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## Results in Brief

Until about 1991, when agencies began to change their security policies and practices regarding sexual orientation, there were a number of documented cases where defense civilian or contractor employees' security clearances were denied or revoked because of their sexual orientation. However, our review of various records at eight agencies and outreach to members of the homosexual community have not identified such cases since 1991. Since no overall database of such information exists, our work was based on judgmentally selected reviews of agencies' records and information solicited from parties involved in the process. We also recognize there is the possibility that some individuals who have

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<sup>2</sup>Executive Order 9835, "Prescribing Procedures for the Administration of an Employees Loyalty Program in the Executive Branch of the Government" (Mar. 21, 1947).

<sup>3</sup>The Civil Service Commission is now the Office of Personnel Management (OPM). As a result of legal actions, the Commission initially issued suitability guidelines for federal government employment in Federal Personnel Manual letter 731-3 (July 3, 1975). In May 1980, OPM issued a memorandum to heads of departments and independent establishments clarifying that personnel actions based on non-job-related conduct such as sexual orientation may be considered prohibited personnel practices under 5 U.S.C. 2302(b). The policy was reaffirmed in February 1994.

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experienced problems would be unwilling to come forward and discuss their cases. Notwithstanding these limitations, our work disclosed no evidence that sexual orientation has been used as a criterion in the security clearance process for federal civilian and contractor employees since 1991. However, some individuals we spoke with believed they were asked inappropriate questions during the clearance process.

Information we received from homosexuals, gay and lesbian groups, and attorneys who have experience with the security clearance process confirms that clearances have not been recently denied because of sexual orientation and that the number of problems experienced by homosexuals has diminished in recent years. In addition, our detailed review of selected security clearance denials, revocations, and suspensions during fiscal year 1993 showed that none were attributable to sexual orientation.

All eight agencies we reviewed told us that homosexuality is not a criterion in granting security clearances.<sup>4</sup> Six of the eight agencies have written policies and procedures that prohibit direct questions about an applicant's sexual orientation and the denial of a security clearance on the basis of sexual orientation alone. Although the other two agencies—DOD and the U.S. Secret Service—told us sexual orientation is not a criterion, they have not revised their written policies and procedures to reflect this position. Under their existing policies and procedures, investigators are authorized to pursue information regarding an applicant's homosexuality. Secret Service procedures require investigators to be alert to and thoroughly investigate allegations of homosexual conduct. DOD investigators can ask questions about sexual orientation once it has been established that an applicant is homosexual.

All of the agencies in our review indicated that concealment of any personal behavior that could result in exploitation, blackmail, or coercion is a security concern. However, the treatment of concealment as it relates to sexual orientation varies. Although most of the agencies have eliminated specific references to sexual orientation, DOD and FBI guidelines treat concealment as a security concern. At DOD, coworkers and family members must be informed of the applicant's sexual orientation, or the applicant is considered potentially vulnerable to blackmail or coercion and could be denied a clearance. DOD plans to eliminate this language in revised guidelines to be issued in early 1995.

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<sup>4</sup>The agencies we reviewed were the Department of Defense (DOD), the Departments of Energy and State, OPM, the U.S. Information Agency (USIA), the Federal Bureau of Investigation (FBI), the U.S. Secret Service, and the U.S. Customs Service.

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The FBI's investigative guidelines on sexual orientation require investigators to record admissions of sexual orientation for use in determining an applicant's vulnerability to compromise. The FBI explained that this requirement is intended to provide investigators precise guidance on how to handle sexual orientation, and that the guidelines also state that no inference of susceptibility to coercion is to be drawn based on sexual orientation. We believe the inclusion of the requirement in the investigative guidelines could be misinterpreted to suggest that a person is vulnerable to compromise only because of the individual's sexual orientation. In addition, none of the other agencies in our review have a similar requirement.

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## Problems Related to Sexual Orientation Appear to Be Declining

No central source of data exists that captures incidents where individuals believe their security clearance was denied or revoked because of their sexual orientation. Therefore, we reached out to individuals who believed their sexual orientation influenced the security clearance process. Specifically, we asked over 30 gay and lesbian publications throughout the United States to publish an article soliciting input from individuals who believe federal agencies denied or revoked their security clearances based on their sexual orientation between 1991 and 1994. We also contacted nine attorneys and one paralegal who represented individuals on gay rights issues. In addition, we talked with representatives from five gay rights organizations that represent federal employees and other professionals who might have sought a security clearance.

We recognize that some individuals who have experienced problems with the security clearance process might not be willing to contact us, but the information we received, and the individuals with whom we talked, generally indicated that in recent years (between 1991 and 1994) sexual orientation has not been used as a criterion for denying security clearances. The attorneys told us that they have had no sexual orientation cases associated with security clearances since 1992. The paralegal also had no cases, but said there is not parity between questions asked of homosexuals versus heterosexuals (e.g., homosexuals are often asked detailed questions about their sexual habits). The National Organization of Gay and Lesbian Scientists and Technical Professionals, Pasadena, California, believes that improvements have been made and the problems are not nearly as severe as in the past, but they are concerned that the process for obtaining clearances appears to take longer for homosexual than heterosexual employees. Appendix III identifies some of the major organizations we contacted.

Based on information from the above sources, we identified 25 cases where civilian or contractor employees believed their sexual orientation had an impact on their security clearance investigations. Nine of the 25 cases occurred after 1990: 3 in 1991, 5 in 1992, and 1 in 1993. None of these cases involved a denial, revocation, or suspension of a security clearance. However, the individuals believed that the investigation took longer than it should have or that the investigators asked unnecessary questions about the individuals' sexual behavior. No incidents were reported to us for January through November 1994.

Of the 16 cases that occurred before 1991, 8 clearances were revoked. Five of the eight individuals were defense contractor employees who either omitted disclosing homosexual activities to defense investigators, did not disclose their homosexuality to family members and coworkers (a defense personnel security requirement), or fraternized with foreign nationals.<sup>5</sup> The other three included one defense and two foreign service employees at the Department of State and USIA. Their clearances were revoked for medical health reasons, and fraternizing with foreign nationals and/or criminal behavior. The five defense contractor personnel appealed the revocation, and three of the clearances were reinstated.<sup>6</sup> Clearances were not revoked or denied for the other eight cases that occurred before 1991; however, the individuals believed they were asked inappropriate questions during the clearance process. In summary, for the eight cases we reviewed where a clearance was revoked, it appears that the individuals' clearances were not revoked because of sexual orientation, per se, but rather for the concealment of it.

## Selected Fiscal Year 1993 Case Review Shows Sexual Orientation Was Not a Factor in Denials, Revocations, or Suspensions

In addition to our outreach effort to homosexual individuals, we judgmentally selected and reviewed 129 cases where clearances were denied, revoked, or suspended. Our objective was to see if we could find any evidence that sexual orientation was a factor in these decisions. Our detailed review showed that no clearances were denied, revoked, or suspended because of sexual orientation. Also, a limited review of interviewee follow-up information showed similar results.

During fiscal year 1993, the eight agencies included in our study denied, revoked, or suspended security clearances for 2,526 individuals. We collected data from each agency on the reason for the adverse action and

<sup>5</sup>Fraternization is a relationship with a foreign national that involves close, romantic, or sexual ties.

<sup>6</sup>One of the three clearances was revoked by one agency but reinstated by another agency when the individual transferred.

reviewed 129 cases in detail to determine whether sexual orientation was a criterion in the clearance determination. Our detailed review showed that no clearances were denied, revoked, or suspended because of sexual orientation. In nine cases, sexual conduct—not sexual orientation—appeared to be a key factor in the adverse action. There was no indication that the individuals were homosexual or that sexual orientation was an issue. The other 120 clearances were denied, revoked, or suspended for a number of reasons, including alcohol and drug abuse, mental or medical health issues, and security violations.

Table 1 shows the number of denials, revocations, and suspensions by agency, and table 2 shows the reason for the adverse action as reported to us by each agency for the 129 cases we reviewed in detail.

**Table 1: Number of Security Clearances Denied, Revoked, or Suspended for Fiscal Year 1993**

Agency	Number
DOD	1,945 <sup>a</sup>
Energy	509
FBI	11
OPM	13
State	21
Secret Service	2
USIA	9
Customs	16
<b>Total</b>	<b>2,526</b>

<sup>a</sup>DOD records show that the Army, Navy, and Air Force accounted for 954 of the denials, revocations, and suspensions; Defense Mapping Agency (DMA) for 52; Defense Logistics Agency for 20; and 7 other defense organizations for 18. Civilians working for defense contractors accounted for the remaining 901.

**Table 2: Security Factors Cited by Agencies for the Cases Reviewed by GAO (Fiscal Year 1993)**

Security factors	Number of denials, revocations, and suspensions								Total
	Customs	DMA	Energy	FBI	OPM	Secret Service	State	USIA	
Alcohol/drug abuse		15					4		19
Counterintelligence/ national interest/falsification of information				3			1	1	5
Criminal/notorious conduct	4	8					7		19
Failure to update security forms	2								2
Falsification of information				2				3	5
Fraud/falsification/ financial matters	1	3						1	5
Falsification/mental or medical health/ alcohol/drugs		2		1		1			4
Falsification/security violation			1					1	
Integrity investigations	7								7
Mental/medical health	1	4					4	2	11
National interest/security violations				1					1
Refusal to submit to polygraph				1					1
Security violations	1			2			4	1	8
Termination/transfer/no clearance needed					13				13
Unusual conduct/sexual activity			6						6
Sexual misconduct		2				1			3
Sexual misconduct/drugs/ falsification		1							1
Financial matters		14					1		15
Unauthorized absence		3							3
<b>Total</b>	<b>16</b>	<b>52</b>	<b>6</b>	<b>11</b>	<b>13</b>	<b>2</b>	<b>21</b>	<b>8</b>	<b>129</b>

Note: We reviewed files at DMA because initially, more people from DMA contacted us than from the military services.

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## Investigative Quality Assurance Follow-Up Results

In an effort to ensure that investigators are asking appropriate questions and behaving in a professional manner, four of the eight agencies in our review (DOD, State, OPM, and USIA) send follow-up letters to randomly selected security clearance applicants and third parties who were interviewed during background investigations. As another means to determine if agencies use sexual orientation as a security factor, we examined a small, nonstatistical sample of 41 investigator follow-up letters from the 2,100 DOD, State, and USIA sent in 1993 and 1994. We also reviewed the summary results of an OPM project that included feedback from over 800 interviewees.<sup>7</sup> There was no indication on the follow-up responses we examined, or in OPM's project results, of any discrimination or inappropriate behavior—for example, failure to ask clear and direct questions on topics the interviewee would consider important to a security investigation—by the investigators.

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## Procedures at Two Agencies Do Not Reflect Stated Policies on Sexual Orientation

Excluding the Central Intelligence Agency, the eight agencies we reviewed accounted for over 95 percent of the security clearances granted to civilian and contractor employees during fiscal year 1993. All of the agencies told us that sexual orientation is not a criterion in granting security clearances. As shown in table 3, six of the eight agencies have written policies and procedures that prohibit direct questions about an applicant's sexual orientation and the denial of a security clearance on the basis of sexual orientation alone. Secret Service and DOD, however, have not yet revised their written policies and procedures to reflect this position. Under these two agencies' policies and procedures, investigators are authorized to pursue information regarding an applicant's homosexuality. Secret Service procedures require investigators to be alert to and thoroughly investigate allegations of homosexual conduct. DOD investigators can ask questions about sexual orientation once it has been established that an applicant is homosexual.

Secret Service officials told us they were not aware of the provision in their regulations and that they plan to revise their policies and procedures in the near future. DOD officials also told us they plan to revise their security manual. In commenting on our draft report, DOD noted that it has drafted revised adjudication guidelines and recently issued revised investigative procedures. However, we note that the guidelines and procedures may be inconsistent since the adjudication guidelines focus on sexual misconduct and the investigative procedures focus on orientation.

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<sup>7</sup>"Summary of Quality Control Reinterview Project" (Dec. 11, 1992).

**Table 3: Synopsis of Agency Investigative and Adjudicative Policies and Procedures on Sexual Orientation**

Agency	Sexual orientation policy	Investigative and adjudicative procedures
DOD	<p data-bbox="479 527 1015 583"><u>December 1993 Memorandum on Changes to Defense Investigative Manual—Sexual Conduct</u></p> <p data-bbox="479 590 1015 835">No investigations or inquiries will be conducted solely to determine a subject’s sexual orientation. Investigators are not to ask direct questions about sexual orientation unless credible, relevant information has been developed from other sources. Investigators should not ask questions unless the individual introduces the matter or it is developed through other sources.</p> <p data-bbox="479 869 1015 926"><u>DOD 5200.2-R, Personnel Security Program, January 1987</u></p> <p data-bbox="479 947 1015 1108">Family members and coworkers must be informed of an individual's sexual orientation. Concealment of sexual preference from an employer, coworkers, or family members could disqualify an individual from obtaining a security clearance.</p> <p data-bbox="479 1119 1015 1224">Note: This process appears to be inconsistent with DOD policy to not use sexual orientation as a security criterion, and to not ask questions about sexual orientation.</p>	<p data-bbox="1015 527 1549 583"><u>1993 Defense Investigative Service Manual for Personnel Security Investigations</u></p> <p data-bbox="1015 590 1549 856">These procedures are applicable to investigations of civilian and contractor personnel. Under certain circumstances (e.g., when sexual acts, conduct, or behavior include acts performed with a minor, involving coercion, force, or violence, or acts committed for money), investigators can expand an investigation, but investigations or inquiries will not be conducted solely to determine an individual's sexual orientation.</p> <p data-bbox="1015 869 1549 1087">Allegations of an individual's sexual conduct should be designed to elicit information that adjudicative authorities consider in accordance with clearance denial criteria. DOD’s current definition of “moral behavior” includes sexual conduct, which may or may not be technically illegal in any given jurisdiction. (Officials told us investigators no longer use this definition.)</p> <p data-bbox="1015 1119 1549 1176"><u>DOD 5200.2-R, Personnel Security Program, January 1987</u></p> <p data-bbox="1015 1197 1549 1381">These procedures are applicable to civilian personnel. Disqualifying factors: conduct or actions that increase the individual’s vulnerability to coercion or blackmail, including concealment of sexual preference from immediate family members, close associates, supervisors, or coworkers.</p> <p data-bbox="1015 1394 1549 1451"><u>Draft Adjudicative Guidelines for Determining Eligibility for Access to Classified Information</u></p> <p data-bbox="1015 1459 1549 1829">Note: These procedures will be applicable to civilian and contractor personnel and are scheduled to replace 5200.2-R. Sexual behavior is a security concern if it involves a criminal offense, indicates a personality or emotional disorder, subjects the individual to undue influence or coercion, or reflects lack of judgment or discretion. Conditions that signal security concern include sexual behavior that causes an individual to be vulnerable to undue influence or coercion. Defense officials told us that homosexual behavior could cause an individual to be vulnerable to undue influence or coercion.</p>

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Agency	Sexual orientation policy	Investigative and adjudicative procedures
DOD (cont.)		<p>1992 Directive 5220.6, Defense Industrial Personnel Security Clearance Review Program</p> <p>This directive implements Executive Order 10865, Safeguarding Classified Information Within Industry, which describes appeal procedures for contractor employees and contains security standards from DOD regulation 5200.2-R, which are applicable to contractor and civilian employees.</p>
Department of Energy	<p><u>1993 Adjudicative Guidelines for Determining Eligibility for Access to Classified Matter and/or Special Nuclear Material</u></p> <p>Engaging in homosexual activity is not cause for security concern unless there is a clear indication that such activity involved a criminal act or a lack of judgment or discretion. Individuals will not be subject to further security review merely due to the fact that they engage in homosexual activity.</p>	<p><u>1993 Adjudicative Guidelines for Determining Eligibility for Access to Classified Matter and/or Special Nuclear Material; and Title 10 Code of Federal Regulations, Part 710</u></p> <p>Note: OPM conducts investigations for the Department of Energy. Therefore, Energy has no investigative guidelines.</p> <p>Consensual sexual acts between adults, conducted in privacy, are not subject to security concern unless the adjudicator believes extenuating circumstances are involved.</p> <p>Derogatory information includes those cases in which the individual has engaged in unusual conduct or is subject to circumstances that tend to show the individual is not honest, reliable, and trustworthy, and there is no adequate evidence of rehabilitation or reformation or that furnish reason to believe the individual may be subject to coercion, influence, or pressure that may cause the individual to act contrary to the best interests of the national security.</p>
FBI	<p><u>Background Investigations Policy/Guidelines Regarding Sexual Orientation (Mar. 2, 1994)</u></p> <p>No person, as a condition of submitting an application for employment or as a condition of federal employment, may be asked to declare his or her sexual orientation or preference. Homosexuality does not create an inference of unsuitability for security clearance or access to sensitive information. (See also Department of Justice policy.)</p>	<p><u>Background Investigations Policy/Guidelines Regarding Sexual Orientation (Mar. 2, 1994)</u></p> <p>Note: Where an applicant/candidate volunteers information concerning his/her sexual orientation or preference during the course of a background investigation, it should be recorded for use in determining the person's vulnerability to compromise.</p> <p>Concealed matters in a person's life may be the basis for attempted pressure or influence and the concealment of the activity or conduct may be more important in determining trustworthiness than the conduct or activity itself.</p>

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Agency	Sexual orientation policy	Investigative and adjudicative procedures
OPM	<p>OPM adopted the Department of Justice's 1993 policy to not discriminate on the basis of sexual orientation.</p> <p><u>Department of Justice Statement of Policy With Respect to Nondiscrimination in Employment (Dec. 2, 1993)</u></p> <p>In the context of determining eligibility for security clearances or access to sensitive information, the Department may investigate and consider any matter that would reasonably subject the applicant or employee to coercion, but no inference concerning susceptibility to coercion may be raised solely on the basis of the race, color, religion, sex, national origin, disability, or sexual orientation of the applicant or employee.</p>	<p><u>Draft OPM Manual 732-1, Subchapter 5, Security Adjudication, and 736-1, Personnel Investigations</u></p> <p>Federal personnel investigators are not authorized to interview applicants or appointees concerning their sexual behavior or attitudes concerning sexual conduct in the absence of allegations or information indicating sexual behavior that would have a bearing on efficient service in the position in question, or would interfere with or prevent effective performance by the employing agency of its duties and responsibilities.</p> <p>Note: In commenting on a draft of this report, OPM indicated that subchapter 5 of Draft OPM Manual 732-1 has been abolished and chapter 736-1 will be retained until December 1994.</p> <p><u>April 1992 OPM Investigator's Handbook</u></p> <p>The handbook has no specific language regarding sexual orientation. Regarding personal conduct, investigators are instructed to ask: "Is there anything in your background or personal conduct that could result in exploitation, blackmail, or coercion?" If, during the course of the interview, the subject brings up any aspect of personal conduct that appears questionable, the investigator may ask direct questions and develop the basic facts and the extent to which they are known to others.</p> <p>Note: In commenting on a draft of this report, OPM indicated that the Investigator's Handbook is being revised and that the investigative procedures noted above are no longer accurate. OPM noted that its investigators are not authorized to question applicants or appointees concerning their sexual behavior or attitudes concerning sexual conduct, but are authorized to report information received that may be of value to an agency adjudicator as bearing on the individual's efficient service in a position or an agency's ability to perform its duties and responsibilities effectively.</p>

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Agency	Sexual orientation policy	Investigative and adjudicative procedures
Department of State	<p data-bbox="483 464 959 520"><u>Diplomatic Security Memorandum on Sexual Conduct Policy (Dec. 10, 1992)</u></p> <p data-bbox="483 541 959 598">Investigators will not pursue issues of sexual conduct.</p> <p data-bbox="483 619 959 699">One's sexual orientation, per se, does not constitute a basis for denial of security clearance.</p>	<p data-bbox="1016 464 1528 541"><u>1993 Policy Memorandum, 12 Foreign Affairs Manual 230, on Personnel Security, and Adjudicative Guidelines</u></p> <p data-bbox="1016 562 1528 779">Note: Allegations of potentially exploitable conduct will be referred to headquarters security personnel for review. Sexual conduct is a security concern if it involves a criminal offense, indicates a personality disorder, subjects the individual to undue influence or coercion, or reflects lack of judgment or discretion.</p>
Secret Service	<p data-bbox="483 789 984 951">Secret Service has no written policy, but according to Secret Service officials, investigators should not ask questions about sexual orientation. Officials told us they plan to publish written policies and procedures upon publication of Treasury Department guidelines.</p>	<p data-bbox="1016 789 1528 821"><u>1983 Secret Service Investigative Manual</u></p> <p data-bbox="1016 842 1528 1188">Note: Investigators must be alert to information concerning an applicant's homosexual conduct or sexual perversion(s). Allegations of homosexual conduct or sexual perversion must be completely investigated. The purpose of the investigation is to ascertain whether the individual's possible homosexual conduct or sexual perversions may be indicative of a personality disorder or make the individual subject to blackmail or coercion. This process appears to be inconsistent with Secret Service policy to not ask questions about sexual orientation.</p>
USIA	<p data-bbox="483 1199 1000 1276"><u>1993 USIA manuals on Conduct of the Background Investigation and Guidelines for Making Security Determinations</u></p> <p data-bbox="483 1287 1000 1451">Investigators are prohibited from inquiring into a subject's sexual orientation. Sexual conduct is of concern only to the extent that there is reason to believe the individual may be vulnerable to coercion or has violated laws or security and other federal regulations.</p>	<p data-bbox="1016 1199 1528 1276"><u>1993 USIA manuals on Conduct of the Background Investigation, and Guidelines for Making Security Determinations</u></p> <p data-bbox="1016 1287 1528 1451">Note: If a third party, during the course of the investigation, volunteers information about the individual being investigated, investigators are not to pursue the issue other than through routine questioning regarding the individual's character, reputation, and conduct.</p>
U.S. Customs Service	<p data-bbox="483 1461 911 1518">Follows OPM guidance to not ask direct questions on sexual orientation.</p>	<p data-bbox="1016 1461 1528 1493"><u>1985: Customs Policies and Procedures Manual</u></p> <p data-bbox="1016 1514 1528 1673">Note: The manual contains no specific language on sexual orientation with regard to granting or revoking security clearances. The Customs manual provides specific guidance with regard to suitability issues, but not security clearance issues, per se.</p>

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## Agencies' Policies and Procedures Differ on Concealment of Sexual Orientation

All the agencies in our review indicated that concealment of any personal behavior that could result in exploitation, blackmail, or coercion is a security concern. However, the treatment of concealment, as it relates to sexual orientation, varies.

Most of the agencies have eliminated references to concealment of sexual orientation, per se, as a security factor. However, under DOD adjudicative procedures, individuals can be denied a clearance if they conceal their homosexuality from their employer, family members, or coworkers.<sup>8</sup> Officials told us that individuals who fail to disclose their homosexuality could be subject to coercion or blackmail. This creates a dilemma for homosexual employees who do not wish to share their orientation with others. On the one hand, individuals need not volunteer information about their sexual orientation. On the other hand, if individuals do not volunteer the information, they could be denied a clearance for concealing their sexual orientation. DOD has drafted new adjudicative guidance that eliminates specific reference to concealment, and it intends to review its procedures by April 1995 to ensure that sexual orientation is not an issue in the investigation or adjudication of security clearances.

DOD officials told us that there were no recent examples where the concealment provision was used to deny or revoke a security clearance, but one of the attorneys we contacted referred us to three cases that occurred in the mid-1980s. In these cases, the security clearances were revoked but later reinstated through the appeals process. Secret Service investigative procedures are similar to DOD's in that investigators can pursue information related to concealment to ascertain whether an individual may be susceptible to blackmail or coercion.

The FBI's guidelines regarding the issue of sexual orientation in background investigations were established in March 1994. According to FBI officials, the guidelines are intended to prevent discrimination based on sexual orientation and were developed to implement the Attorney General's policy statement regarding nondiscrimination and to comply with a December 1993 court-approved settlement agreement on discrimination.<sup>9</sup> Although the guidelines are generally consistent with Justice and FBI policies regarding sexual orientation, the guidelines contain some language that could be misinterpreted.

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<sup>8</sup>In commenting on a draft of this report, DOD noted that its revised adjudication guidelines, developed in conjunction with the Intelligence Community, have deleted this provision.

<sup>9</sup>*Buttino v. FBI*, 801 F. Supp. 298 (1993).

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Specifically, the FBI guidelines on sexual orientation require investigators to inform applicants that the concealment of an activity or conduct may be more important in determining suitability and trustworthiness than the conduct or activity itself, that candor and forthrightness are significant considerations of FBI employment, and a lack of candor may disqualify the candidate from employment even when the underlying activity or conduct might not. The guidelines further require investigators to document the fact that the information about concealment and candor was provided to the applicant, and that it, together with the applicant's response, be appropriately recorded in the applicant's file.

The FBI guidelines on sexual orientation also require that investigators record admissions of sexual orientation for use in determining an applicant's vulnerability to compromise. FBI officials explained that this requirement is intended to provide investigators precise guidance on how to handle sexual orientation, and noted that the guidelines also state that no inference of susceptibility to coercion is to be drawn based on sexual orientation. We found no recent examples where the FBI has drawn such an inference. However, including this requirement in the investigative guidelines could be misinterpreted to suggest that a person is vulnerable to compromise only because of the individual's sexual orientation. In addition, none of the other agencies in our review have a similar requirement.

Specifically, with the exception of DOD, the agencies in our review have eliminated references to concealment of sexual orientation as a security concern, and DOD stated it intends to do so. For example, OPM's adjudicative procedures and investigator's handbook contain no specific references to concealment of sexual orientation. Similarly, the State Department's adjudicative guidelines focus on concealment of sexual conduct without regard to orientation. In commenting on our draft report, State indicated that security concerns raised by allegations relating to an individual's sexual conduct are directed toward other appropriate criteria, such as criminal conduct, mental/emotional health, vulnerability to foreign influence or coercion, or lack of judgment or discretion.

## No Clear Linkage Exists Between Sexual Orientation and Espionage

No one knows how many federal workers are homosexual or how many homosexuals hold security clearances, but sexual orientation seems to have little bearing on the motives behind acts of espionage. A 1991 study by the Defense Personnel Security Research Center<sup>10</sup> concluded there is little evidence to suggest that homosexuals are security risks.<sup>11</sup> Six of the center's 117 recorded espionage cases between 1945 and 1991 involved homosexuals. In these six cases, the study found that fear of having one's homosexuality disclosed was not the motive for disclosing the nation's secrets. Instead, the motives appeared to be the same as in most espionage cases: primarily money and secondarily resentment. All volunteered to provide national security information except one, who was recruited as an accomplice by a heterosexual friend.

According to another defense organization, the DOD Security Institute,<sup>12</sup> sexual orientation was an issue in one 1992 espionage case that involved a homosexual employee who sold national secrets to East German foreign intelligence agents. According to the Institute, homosexuality was just one of many emotional issues the East Germans used to manipulate the employee. The individual was also depressed, lonely, and had difficulty with interpersonal relations and other problems.

## Recommendations

We recommend that the

- Secretary of Defense direct the Assistant Secretary of Defense (Command, Control, Communications, and Intelligence) to modify DOD investigative and adjudicative procedures to be consistent with stated agency policies and to ensure that adjudication guidelines and investigative procedures are consistent by focusing only on conduct-related issues, rather than on sexual orientation;
- Secretary of the Treasury direct the Secret Service's Assistant Director for Investigations to modify the Service's investigative and adjudicative procedures to be consistent with stated agency policies; and

<sup>10</sup>The Defense Personnel Security Research Center, under the direction of the Assistant Secretary of Defense (Command, Control, Communications, and Intelligence), is a research organization that studies aspects of personnel security, including espionage. Its findings rest on the statistical analysis of quantitative data on a large number of variables or indicators.

<sup>11</sup>Defense Personnel Security Research and Education Center, "Homosexuality and Personnel Security," Theodore R. Sarbin (Sept. 1991, PERS-TR-91-008), p.28.

<sup>12</sup>The DOD Security Institute was established in 1986 by the Secretary of Defense to serve as the focal point for promoting activities supporting DOD security programs, particularly in the area of education and training. The institute provides security education and training to DOD military and civilian personnel as well as personnel from about 20 other federal agencies.

- Attorney General direct the Director, FBI, to revise that Bureau's investigative guidelines regarding sexual orientation to eliminate the requirement that admissions of sexual orientation be recorded for use in determining an applicant's vulnerability to compromise.

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## Agency Comments and Our Evaluation

The Departments of State and Energy, DOD, the Secret Service, OPM, USIA, and the Customs Service agreed with the information presented in a draft of this report. DOD and the Secret Service concurred with our recommendations. DOD has drafted adjudication guidelines that eliminate the requirement for an individual's family members to be informed about the individual's homosexuality and focus on conduct-related factors as a basis for security clearance actions. The Secret Service will determine procedures based on forthcoming Treasury Department guidelines. Several of the agencies provided technical corrections that have been incorporated in the report.

However, the Justice Department disagreed with our interpretation of the FBI's sexual orientation guidelines and with our recommendation that the FBI eliminate specific language in its guidelines regarding sexual orientation. According to Justice, FBI guidelines are consistent with Justice policy and the dictates of Executive Order 10450. Justice maintained that FBI guidelines limit consideration of sexual orientation to circumstances in which sexual orientation could reasonably be thought to raise an issue of susceptibility to coercion. Justice provided no examples of what these circumstances might be.

Justice stated that the FBI had agreed to issue a letter to its field staff reaffirming and clarifying the investigations policy regarding sexual orientation. The FBI's December 1994 letter deals primarily with guidelines for follow-up interviews with applicants when a third party provides information about a potential vulnerability. The letter states that applicants should (1) not be asked to declare a sexual orientation and should be reassured that the only potential issue is susceptibility to coercion, (2) be told that another person provided information about a potential susceptibility, and (3) be asked whether, in fact, there is a vulnerability that was not previously disclosed.

We eliminated references in our draft report contrasting FBI guidelines and Justice policy. In addition, we have clarified language in our draft report regarding the FBI requirement that investigators record admissions of

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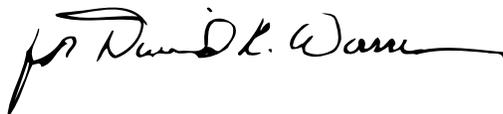
sexual orientation for use in determining applicants' vulnerability to compromise.

Our detailed comments supplementing those in the report text appear at the end of appendixes V through XI.

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To accomplish our objectives, we reviewed current investigative and adjudicative policies, procedures, and practices at eight agencies. Collectively, these agencies accounted for over 95 percent of the security clearances granted to civilian and contractor employees during fiscal year 1993. In addition, we obtained data on the number of security clearances that were denied, revoked, or suspended during fiscal year 1993 and reviewed a sample in detail to determine the reason for the adverse action. We also solicited input from homosexuals, attorneys, and representatives of gay and lesbian groups who had experience with the federal security clearance process. We conducted our review between August 1993 and November 1994 in accordance with generally accepted government auditing standards. Our scope and methodology is described in detail in appendix III.

We are sending copies of this report to the Chairmen, House Committees on National Security, Appropriations, and Government Reform and Oversight and Senate Committees on Armed Services, Appropriations, and Government Affairs; the Secretaries of Defense, Energy, State, and the Treasury; the U.S. Attorney General; the Directors of the FBI, OPM, USIA, Secret Service, and Office of Management and Budget; and the Commissioner, U.S. Customs Service. We will also make copies available to others upon request. Please call me on (202) 512-8412 if you or your staff have any questions. Other major contributors are listed in appendix XII.



Donna M. Heivilin  
Director, Defense Management  
and NASA Issues

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**Abbreviations**

CIA	Central Intelligence Agency
DISCR	Defense Industrial Security Clearance Agency
DMA	Defense Mapping Agency
DOD	Department of Defense
FBI	Federal Bureau of Investigation
OPM	Office of Personnel Management
USIA	United States Information Agency

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# Executive Order 10450 (as amended, 1974) Security Requirements for Government Employment

WHEREAS the interests of the national security require that all persons privileged to be employed in the departments and agencies of the Government, shall be reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States; and

WHEREAS the American tradition that all persons should receive fair, impartial, and equitable treatment at the hands of the Government requires that all persons seeking the privilege of employment or privileged to be employed in the departments and agencies of the Government be adjudged by mutually consistent and no less than minimum standards and procedures among the departments and agencies governing the employment and retention in employment of persons in the Federal service:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including section 1753 of the Revised Statutes of the United States (5 U.S.C. 631); the Civil Service Act of 1883 (22 Stat. 403; 5 U.S.C. 632, et seq.); section 9A of the act of August 2, 1939, 53 Stat. 1148 (5 U.S.C. 118 j); and the act of August 26, 1950, 64 Stat. 476 (5 U.S.C. 22-1, et seq.), and as President of the United States, and deeming such action necessary in the best interests of the national security, it is hereby ordered as follows:

SEC. 1. In addition to the departments and agencies specified in the said act of August 26, 1950, and Executive Order No. 10237 of April 26, 1951, the provisions of that

act shall apply to all other departments and agencies of the Government.

SEC. 2. The head of each department and agency of the Government shall be responsible for establishing and maintaining within his department or agency an effective program to insure that the employment and retention in employment of any civilian office or employee within the department or agency is clearly consistent with the interests of the national security.

SEC. 3. (a) The appointment of each civilian officer or employee in any department or agency of the Government shall be made subject to investigation. The scope of the investigation shall be determined in the first instance according to the degree of adverse effect the occupant of the position sought to be filled could bring about, by virtue of the nature of the position, on the national security, but in no event shall the investigation include less than a national agency check (including a check of the fingerprint files of the Federal Bureau of Investigation), and written inquiries to appropriate local law enforcement agencies, former employers and supervisors, references, and schools attended by the person under investigation: *Provided*, that upon request of the head of the department or agency concerned, the Civil Service Commission may, in its discretion, authorize such less investigation as may meet the requirements of the national security with respect to per-diem, intermittent, temporary, or seasonal employees, or aliens employed outside the United States. Should there

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develop at any stage of investigation information indicating that the employment of any such person may not be clearly consistent with the interest of the national security, there shall be conducted with respect to such person a full field investigation, or such less investigation as shall be sufficient to enable the head of the department or agency concerned to determine whether retention of such person is clearly consistent with the interests of the national security.

(b) The head of any department or agency shall designate, or cause to be designated, any position within his department or agency the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security as a sensitive position. Any position so designated shall be filled or occupied only by a person with respect to whom a full field investigation has been conducted: *Provided* that a person occupying a sensitive position at the time it is designated as such may continue to occupy such position pending the completion of a full field investigation, subject to the other provisions of this order: *And provided further*, that in case of emergency a sensitive position may be filled for a limited period by a person with respect to whom a full field preappointment investigation has not been completed if the head of the department or agency concerned finds that such action is necessary in the national interest, which finding shall be made a part of the records of such department or agency.

SEC. 4. The head of each department and agency shall review, or cause to be reviewed, the cases of all civilian officers and employees with respect to whom there

has been conducted a full field investigation under Executive Order No. 9835 of March 21, 1947, and, after such further investigation as may be appropriate, shall readjudicate, or cause to be readjudicated, in accordance with the said act of August 26, 1950, such of those cases as have not been adjudicated under a security standard commensurate with that established under this order.

SEC. 5. Whenever there is developed or received by any department or agency information indicating that the retention in employment of any officer or employee of the Government may not be clearly consistent with the interests of the national security, such information shall be forwarded to the head of the employing department or agency or his representative, who, after such investigation as may be appropriate, shall review, or cause to be reviewed, and, where necessary, readjudicate, or cause to be readjudicated, in accordance with the said act of August 26, 1950, the case of such officer or employee.

SEC. 6. Should there develop at any stage of investigation information indicating that the employment of any officer or employee of the Government may not be clearly consistent with the interests of the national security, the head of the department or agency concerned or his representative shall immediately suspend the employment of the person involved if he deems such suspension necessary in the interests of the national security and, following such investigation and review as he deems necessary, the head of the department or agency concerned shall terminate the employment of such suspended officer or employee whenever he shall determine such

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termination necessary or advisable in the interests of the national security, in accordance with the said act of August 26, 1950.

SEC. 7. Any person whose employment is suspended or terminated under the authority granted to heads of departments and agencies by or in accordance with the said act of August 26, 1950, or pursuant to the said Executive Order No. 9835 or any other security or loyalty program relating to officers or employees of the Government, shall not be reinstated or restored to duty or reemployed in the same department or agency and shall not be reemployed in another department or agency, unless the head of the department or agency concerned finds that such reinstatement, restoration, or reemployment is clearly consistent with the interests of the national security, which finding shall be made a part of the record of such department or agency: *Provided*, that no person whose employment has been terminated under such authority thereafter may be employed by any other department or agency except after a determination by the Civil Service Commission that such person is eligible for such employment.

SEC. 8. (a) The investigations conducted pursuant to this order shall be designed to develop information as to whether the employment or retention in employment in the Federal service of the person being investigated is clearly consistent with the interests of the national security. Such information shall relate, but shall not be limited, to the following:

(1) Depending on the relation of the Government employment to the national security:

(i) Any behavior, activities, or associations which tend to show that the individual is not reliable or trustworthy.

(ii) Any deliberate misrepresentations, falsifications, or omissions of material facts.

(iii) Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, or sexual perversion.

(iv) Any illness, including any mental condition, of a nature which in the opinion of competent medical authority may cause significant defect in the judgment or reliability of the employee, with due regard to the transient or continuing effect of the illness and the medical findings in such case.

(v) Any facts which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of the national security.

(2) Commission of any act of sabotage, espionage treason, or sedition, or attempts thereat or preparation therefor, or conspiring with, or aiding or abetting, another to commit or attempt to commit any act of sabotage, espionage, treason, or sedition.

(3) Establishing or continuing a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, or revolutionist, or with an espionage or other secret agent or representative of a foreign nation, or any representative of a foreign nation whose interests may be inimical to the interests of the United States, or with any person who advocates the use of force or violence to overthrow the government of the United States or the alteration of the

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form of government of the United States by unconstitutional means.

(4) Advocacy of use of force or violence to overthrow the government of the United States, or of the alteration of the form of government of the United States by unconstitutional means.

(5) Knowing membership->with the specific intent of furthering the aims of, or adherence to and active participation in, any foreign or domestic organization, association, movement, group, or combination of persons (hereinafter referred to as organizations) which unlawfully advocates or practices the commission of acts of force or violence to prevent others from exercising their rights under the Constitution or laws of the United States or of any State, or which seeks to overthrow the government of the United States or any State or subdivision thereof by unlawful means.

(6) Intentional, unauthorized disclosure to any person of security information, or of other information disclosure of which is prohibited by law, or willful violation or disregard of security regulations.

(7) Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

(8) Refusal by the individual, upon the ground of constitutional privilege against self-incrimination, to testify before a congressional committee regarding charges of his alleged disloyalty or other misconduct.

(b) The investigation of persons entering or employed in the competitive service shall primarily be the responsibility of the Civil Service Commission, except in cases

in which the head of a department or agency assumes that responsibility pursuant to law or by agreement with the Commission. The Commission shall furnish a full investigative report to the department or agency concerned.

(c) The investigation of persons (including consultants, however employed), entering employment of, or employed by, the Government other than in the competitive service shall primarily be the responsibility of the employing department or agency.

Departments and agencies without investigative facilities may use the investigative facilities of the Civil Service Commission, and other departments and agencies may use such facilities under agreement with the Commission.

(d) There shall be referred promptly to the Federal Bureau of Investigation all investigations being conducted by any other agencies which develop information indicating that an individual may have been subjected to coercion, influence, or pressure to act contrary to the interests of the national security, or information relating to any of the matters described in subdivisions (2) through (8) of subsection (a) of the section.

In cases so referred to it, the Federal Bureau of Investigation shall make a full field investigation.

SEC. 9. (a) There shall be established and maintained in the Civil Service Commission a security investigations index covering all persons as to whom security investigations have been conducted by any department or agency of the Government under this order. The central index established and maintained by the Commission under Executive Order No. 9835 of March 21, 1947, shall be made a

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part of the security-investigations index. The security-investigations index shall contain the name of each person investigated, adequate identifying information concerning each such person, and a reference to each department and agency which has conducted an investigation concerning the person involved or has suspended or terminated the employment of such person under the authority granted to heads of departments and agencies by or in accordance with the said act of August 26, 1950.

(b) The heads of all departments and agencies shall furnish promptly to the Civil Service Commission information appropriate for the establishment and maintenance of the security-investigations index.

(c) The reports and other investigative material and information developed by investigation conducted pursuant to any statute, order, or program described in section 7 of this order shall remain the property of the investigative agencies conducting the investigations but may, subject to considerations of the national security, be retained by the department or agency concerned. Such reports and other investigative material and information shall be maintained in confidence, and no access shall be given thereto except with the consent of the investigative agency concerned, to other departments and agencies conducting security programs under the authority granted by or in accordance with the said act of August 26, 1950, as may be required for the efficient conduct of Government business.

SEC. 10. Nothing in this order shall be construed as eliminating or modifying in any way the requirement for any

investigation or any determination as to security which may be required by law.

SEC. 11. On and after the effective date of this order the Loyalty Review Board established by Executive Order No. 9835 of March 21, 1947, shall not accept agency findings for review, upon appeal or otherwise. Appeals pending before the Loyalty Review Board on such date shall be heard to final determination in accordance with the provisions of the said Executive Order No. 9835, as amended. Agency determinations favorable to the officer or employee concerned pending before the Loyalty Review Board on such date shall be acted upon by such Board, and whenever the Board is not in agreement with such favorable determination the case shall be remanded to the department or agency concerned for determination, in accordance with the standards and procedures established pursuant to this order. Cases pending before the regional loyalty boards of the Civil Service Commission on which hearings have not been initiated on such date shall be referred to the department or agency concerned. Cases being heard by regional loyalty boards on such date shall be heard to conclusion, and the determination of the board shall be forwarded to the head of the department or agency concerned: *Provided*, that if no specific department or agency is involved, the case shall be dismissed without prejudice to the applicant. Investigations pending in the Federal Bureau of Investigation or the Civil Service Commission on such date shall be completed, and the reports thereon shall be made to the appropriate department or agency.

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SEC. 12. Executive Order No. 9835 of March 21, 1947, as amended, is hereby revoked.

SEC. 13. The Attorney General is requested to render to the heads of departments and agencies such advice as may be requisite to enable them to establish and maintain an appropriate employee-security program.

SEC. 14. (a) The Civil Service Commission, with the continuing advice and collaboration of representatives of such departments and agencies as the National Security Council may designate, shall make a continuing study of the manner in which this order is being implemented by the departments and agencies of the Government for the purpose of determining:

(1) Deficiencies in the department and agency security programs established under this order which are inconsistent with the interests of, or directly or indirectly weaken the national security.

(2) Tendencies in such programs to deny to individual employees fair, impartial, and equitable treatment at the hands of the Government, or rights under the Constitution and laws of the United States or this order.

Information affecting any department or agency developed or received during the course of such continuing study shall be furnished immediately to the head of the department or agency concerned. The Civil Service Commission shall report to the National Security Council, at least semiannually, on the results of such study, shall recommend means to correct any such deficiencies or tendencies, and shall inform the National Security Council

immediately of any deficiency which is deemed to be of major importance.

(b) All departments and agencies of the Government are directed to cooperate with the Civil Service Commission to facilitate the accomplishment of the responsibilities assigned to it by subsection (a) of this section.

(c) To assist the Civil Service Commission in discharging its responsibilities under this order, the head of each department and agency shall, as soon as possible and in no event later than ninety days after receipt of the final investigative report on a civilian officer or employee subject to a full field investigation under the provisions of this order, advise the Commission as to the action taken with respect to such officer or employee. The information furnished by the hands of departments and agencies pursuant to this section shall be included in the reports which the Civil Service Commission is required to submit to the National Security Council in accordance with subsection (a) of this section. Such reports shall set forth any deficiencies on the part of the heads of departments and agencies in taking timely action under this order, and shall mention specifically any instances of noncompliance with this subsection.

SEC. 15. This order shall become effective thirty days after the date hereof.

DWIGHT D. EISENHOWER

THE WHITE HOUSE,  
*April 27, 1953.*

# Synopsis of Legal Decisions Affecting the Employment and Security Rights of Homosexual Employees

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Litigation has, in large part, exemplified the struggle to erase the link between homosexuality and trustworthiness. It has also driven the development of current public policy on sexual orientation in the security clearance process. Some landmark cases are summarized below.

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Norton v. Macy (417 F. 2d 1161 (D.C. Cir. 1969))

The plaintiff engaged in homosexual conduct and was fired on grounds of “immorality.” The court ruled that alleged or proven immoral conduct is not grounds for separation from public employment unless it can be shown that such behavior has demonstrable effects on job performance. The court found that the notion that the federal government could enforce the majority’s conventional codes of conduct in the private lives of its employees was inconsistent with the elementary concepts of liberty, privacy, and diversity.

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Society for Individual Rights, Inc., v. Hampton, 63 F.R.D. 399 (N.D. Cal. 1973)

An organization of homosexual individuals and a discharged Civil Service Commission employee brought action to challenge the Commission’s policy of excluding individuals who have engaged in homosexual conduct from government employment. The court found that the Commission could discharge a person for immoral behavior only if the behavior impaired the efficiency of the service, and that the Commission had not met this standard. The court ordered reinstatement of the employee. The Civil Service Commission amended its regulations in 1976 and 1977 so that no person could be denied federal employment on the basis of sexual orientation.

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High Tech Gays v. DISCO, 668 F. Supp. 1361 (N.D. Cal. 1987), Cert. Denied, 895 F. 2d 563, 570-74 (1990)

The case was filed in 1984 on behalf of an organization of Silicon Valley, California, employees known as High Tech Gays. Three members of the group had been denied security clearances because of Department of Defense procedures that, at that time, allowed security investigations to be expanded when prospective employees were identified as homosexual. The court found the policy to be prejudicial based on the unwarranted claim that homosexual men and women were emotionally unstable and, therefore, potential targets for blackmail.

The Ninth Circuit Court of Appeals reversed the decision. The court argued that heightened or strict scrutiny could be applied only to government actions that discriminated against persons based on such things as race, gender, alienage, or national origin. Further, the opinion indicated that to be perceived as a suspect or quasi-suspect class,

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**Appendix II**  
**Synopsis of Legal Decisions Affecting the**  
**Employment and Security Rights of**  
**Homosexual Employees**

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homosexuals must meet three criteria: (1) have suffered a history of discrimination, (2) exhibit obvious or immutable characteristics that define them as a discrete class, and (3) show that they are a minority or politically powerless. The court held that the first criterion was met, but the second and third were not.

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

In 1982, John Doe, an employee of the Central Intelligence Agency (CIA), voluntarily told an agency security officer that he was a homosexual. The CIA conducted an investigation that included a polygraph examination designed to uncover whether Doe had disclosed classified information. Doe passed the test but was dismissed from the agency as a national security risk. The decision enabled Doe to appeal to federal courts, but was silent regarding the treatment of homosexuals as a suspect class.

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**Buttino v. FBI, No.**  
**C-90-1639 SBA N.D. Cal.**  
**(1992)**

The plaintiff was employed as a special agent with the Federal Bureau of Investigation (FBI). In August 1988, the FBI received an undated, handwritten letter stating that the plaintiff engaged in homosexual activity. The FBI then initiated an administrative inquiry regarding the plaintiff that resulted in the FBI's revoking the plaintiff's security clearance. The plaintiff brought action against the FBI and its director alleging deprivation of constitutional rights.

In 1994, under the terms of a settlement agreement, the FBI established guidelines for conducting background investigations, employment determinations, and security clearance adjudications intended to prevent discrimination based on sexual orientation.

# Scope and Methodology

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To determine if sexual orientation is considered as a security factor in the security clearance process, we obtained policy memorandums and investigative and adjudicative policies and procedures from 31 departments and agencies. However, we focused our review on the policies and procedures of eight departments and agencies that have investigative authority or grant large numbers of security clearances. Except for the CIA, this represents over 95 percent of the security clearances granted to civilian and contractor employees during fiscal year 1993.

Our review did not include security clearances for military personnel; clearances at the CIA, Defense Intelligence Agency, or National Security Agency; or cases involving access to sensitive compartmented information.

We excluded cases related to suitability for employment. The investigative procedures for determining suitability are similar to those for granting access to classified information. However, suitability designations are based on the potential for damage to the efficiency of government service, while security designations are based on the potential for risk to the national security.

To obtain information on security investigative processes, we conducted our review at agencies that have investigative authority. To obtain data on security clearance denials and revocations, we contacted and reviewed records at agencies that grant large numbers (over 300) of security clearances. We were unable to statistically sample records from all agencies because there is no central security database and most agencies do not categorize their records by the reason for a security revocation or denial. Our initial attempt to sample security records at DOD did not provide useful information since about 80 percent of the clearances are for military personnel and civilian and military personnel records are merged. We also reached out to members of the homosexual community to identify individual cases between 1991 and 1994 where individuals believed their sexual orientation had affected the security clearance process.

To determine if sexual orientation was reported as a cause for security clearance denials, revocations, and suspensions, we examined 129 security files and/or case summaries at 8 departments and agencies. We reviewed files for all fiscal year 1993 denials, revocations, and suspensions at the Defense Mapping Agency, Office of Personnel Management (OPM), Department of State, and U.S. Information Agency (USIA). This included

52 files at the Defense Mapping Agency, 13 files at OPM, 21 files at the Department of State, and 9 files at USIA. Of the Department of Energy's 509 revocations, denials, and suspensions, we reviewed 6 security files that were in a category we believed most likely to include instances of sexual misconduct. The FBI provided us with a case-by-case summary describing the rationale for their revocations, denials, and suspensions. We examined copies of 14 suspension letters provided to us by the U.S. Customs Service.

To identify recent instances where homosexual civilian and contractor employees believed they were denied or revoked security clearances because of their sexual orientation, we contacted local and national gay and lesbian organizations and publications throughout the United States, including the National Organization of Gay and Lesbian Scientists and Technical Professionals, Inc., Pasadena, California; The Federal Globe, Washington, D.C.; American Alliance for Rights and Responsibilities, Washington, D.C.; The Village Voice, New York, New York; Texas Triangle, Austin, Texas; Bay Area Reporter, San Francisco, California; Metroline, Hartford, Connecticut; the State Department's American Foreign Service Association, Washington, D.C.; Gay and Lesbians in Foreign Affairs Agencies, Department of State, Washington, D.C.; The Washington Blade, Washington, D.C.; Baltimore Alternative, Baltimore, Maryland; Southern Voice, Atlanta, Georgia; The Weekly News, Miami, Florida; Alabama Forum, Birmingham, Alabama; Dallas Voice, Dallas, Texas; Out Front, Denver, Colorado; Orange County Blade, Laguna Beach, California; and the Baltimore Gay Paper, Baltimore, Maryland.

We spoke with and obtained information from 10 experts and attorneys who specialize in gay rights security issues; examined 41 1992 and 1993 investigator follow-up quality assurance letters; and examined pertinent laws and regulations. We also interviewed and obtained information from officials at headquarters offices of the Departments of Defense (DOD), Energy, Justice, and State; Office of Personnel Management; U.S. Customs Service; U.S. Secret Service; U.S. Marshals Service; USIA; the FBI; the Defense Investigative Service; the Department of Defense's Directorate for Industrial Security Review; and the Defense Manpower Data Center, Monterey, California.

# Civilian and Contractor Employee Concerns Regarding Sexual Orientation Discrimination (1976-94)

Table IV.1 summarizes individuals' concerns regarding the impact of sexual orientation in the security clearance process. Individuals contacted us as a result of our publications asking for information from those who believed federal agencies had denied or revoked clearances based on sexual orientation. Some individuals referred us to specific or other individuals' cases that we followed up on. We also reviewed security files with individuals' permission and discussed some specific cases and general concerns with agency officials. The far right column shows how the agencies defined or currently use the appropriate security standard relating to the cases.

**Table IV.1: Individuals' Concerns About the Impact of Sexual Orientation in the Security Clearance Process**

Agency	Date problem occurred	Description of concern	Agency's comments
Air Force	1992	The employee's clearance was being updated. The employee believed the investigator used the employee's sexual orientation to make the employee feel uncomfortable during the interview process and fearful of being dismissed from the agency. A clearance was granted.	According to the Defense Investigative Service, an investigation can be expanded to determine if the employee is vulnerable to coercion and/or blackmail. If investigators have developed credible information, they may ask questions about the employee's sexual orientation.
Army	1988-91	The employee believes that sexual orientation was responsible for a polygraph during a security upgrade. A clearance was granted.	If the employee denies allegations, investigators can ask the employee to be polygraphed. A polygraph is voluntary and not used in isolation. Before 1993, however, sexual orientation, that is, homosexuality, could trigger the use of a polygraph.
	1987	The employee believes the investigator focused on the employee's homosexuality by asking detailed questions about the frequency and nature of the employee's sexual habits. The investigator then asked the employee to dinner. The employee's security clearance was administratively terminated.	An investigation can also be expanded if investigators determine that sexual conduct, which has occurred within the past 10 years, offers the potential for influence, duress, or exploitation; when the conduct is a crime; or when the employee is cohabitating with another unmarried person.
Defense Mapping Agency	1982	The employee believes sexual orientation was responsible for inappropriate, personal questions being asked when a clearance was obtained in 1982. A clearance was granted.	If an investigation is expanded, the investigator may ask questions about the individual's sexual orientation.

(continued)

**Appendix IV  
Civilian and Contractor Employee Concerns  
Regarding Sexual Orientation  
Discrimination (1976-94)**

Agency	Date problem occurred	Description of concern	Agency's comments
Navy	1991	The employee, a defense contractor, believes the investigator asked unnecessary detailed questions about sexual partners during the investigation because the employee informed the investigator of membership in a local gay/lesbian organization. The employee felt intimidated by the small, locked room where the investigation was conducted. A security clearance was granted.	If an investigation is expanded, the investigator may ask questions about the individual's sexual orientation.
	1992	The defense contractor employee believed the investigator asked improper questions during a security clearance update.	
National Security Agency	1987	The employee was an overseas defense contractor. The employee believes sexual orientation discrimination occurred because coworkers informed security officials that the employee was fraternizing with foreign nationals. According to the employee, investigators asked graphic questions about the employee's sexual habits. The clearance was revoked.	If an investigation is expanded, the investigator may ask questions about the individual's sexual orientation.
Directorate for Industrial Security Clearance Review (DISCR)	1992	The employee, a defense contractor, believes investigators asked improper, detailed questions regarding sexual habits during a security clearance update. The clearance was administratively suspended, but the clearance was reinstated based on recommendations by DISCR.	<p>Note: These defense contractor cases were identified to us by individuals familiar with the cases, not the subject of the investigations. DISCR is now known as the Defense Office of Hearings and Appeals.</p> <p>The Defense Investigative Service performs background investigations for the Department of Defense (DOD) civilian and contractor employees. Defense agencies adjudicate and make security clearance decisions for civilian and contractor employees. DISCR reviews contractor employee appeals, but civilian employees appeal through the defense agency or service.</p> <p>Until 1993, DOD considered homosexuality as sexual misconduct or deviant sexual behavior indicative of a personality disorder. In 1993, Defense Investigative Service regulations and DISCR regulations were modified.</p>
	1987	The contractor employee did not inform investigators about homosexual activities. After appealing the case, a clearance was granted.	
	1989	The contractor employee was advised of an unfavorable security action because of homosexual and other activities. The employer, coworkers, and others—except the employee's spouse—were not aware of the activities. DISCR believed the employee's failure to disclose this information reflected poor judgment, unreliability, and information reflected poor judgment, unreliability, and untrustworthiness. A clearance was not granted.	

(continued)

**Appendix IV  
Civilian and Contractor Employee Concerns  
Regarding Sexual Orientation  
Discrimination (1976-94)**

Agency	Date problem occurred	Description of concern	Agency's comments
DISCR (cont.)	1987	Investigators considered the contractor employee subject to coercion and influence based on the employee's homosexual activities. Supervisors and work associates were not aware of the employee's homosexual activities. The employee's security clearance was granted on appeal.	
Commerce	1981	The employee, assigned overseas, claimed that the investigation was delayed. The employee's assignment to Saudi Arabia was canceled when agency officials determined the employee was homosexual. The employee retained employment through litigation. The clearance was retained.	At one time, Commerce maintained a list of countries where homosexuality was acceptable, not acceptable, or not encouraged. It no longer does so. Commerce is more concerned about the impact an individual's behavior might have on that person's ability to be trustworthy.
Energy	1992	The employee believes the investigator focused on the employee's homosexuality, but did not address other issues such as the employee's being the victim of child abuse or the employee's alcoholism. The employee believes that sexual orientation was used as a reason for being audiotaped during an interview in January 1993. A clearance was granted.	OPM conducts security investigations for the Department of Energy. In adjudicating clearances, Energy requires mandatory, audiotaped interviews of all employees, regardless of their sexual orientation.
Justice	1992	The employee was required to sign a statement confirming the employee's homosexuality. The employee believes the investigator focused on the employee's homosexuality. Investigators also interviewed the employee's mother. A clearance was granted.	Department of Justice investigations are conducted by FBI investigators. According to FBI officials, sexual orientation, per se, has never been a disqualifying factor in adjudicating trustworthiness for a security clearance. Prior to March 1994, allegations concerning sexual orientation could cause an investigation to determine whether the conduct would cause vulnerability to coercion or influence.
	1991	The employee listed membership in a gay/lesbian organization on the security questionnaire. After the initial interview was completed, the investigator called the employee to set a time to ask questions about the employee's alternative lifestyle. The employee believed the additional interview was inappropriate. A clearance was granted.	The FBI requires a signed, sworn statement whenever an employee is interviewed to resolve issues or allegations that may affect their trustworthiness. Such issues can include unreported arrests, sexual misconduct or notoriety (whether heterosexual or homosexual), or drug abuse.

(continued)

**Appendix IV  
Civilian and Contractor Employee Concerns  
Regarding Sexual Orientation  
Discrimination (1976-94)**

<b>Agency</b>	<b>Date problem occurred</b>	<b>Description of concern</b>	<b>Agency's comments</b>
Justice (cont.)			<p>Family members are interviewed when the investigation does not resolve whether the individual's sexual orientation is concealed, which may be the basis for attempted pressure or influence, and the subject of the security adjudication indicates that family members are aware of the sexual orientation. FBI investigators are not, however, to ask specifically about the employee's sexual orientation or conduct. Rather, the interview should focus on the individual's knowledge of susceptibility to compromise.</p> <p>FBI investigators can expand an investigation and may need to reinterview the subject when there are unresolved questions of trustworthiness or suitability. However, as of March 1994, investigators may not ask individuals to declare their sexual orientation or preference or ask persons being interviewed to discuss intimate sexual acts. Prior to March 1994, FBI investigators had no written instructions, although FBI officials told us the unwritten investigative guidelines were the same.</p>
OPM	1990	The individual accepted a job at the agency. The individual believed the investigator asked intimidating questions.	OPM's Investigator's Handbook is being revised. Investigators are not authorized to question applicants or appointees concerning their sexual behavior or attitudes concerning sexual conduct.
Health and Human Services	1991	The employee believes the investigator asked detailed, embarrassing questions about the employee's sex life. A clearance was granted.	OPM performs investigations for Health and Human Services employees.
State	1985	The employee claims State revoked a security clearance because of the employee's sexual orientation, and the fact that the employee had sex with a minor almost 10 years ago should be forgiven.	State Department officials believe sexual orientation was not a key issue in any of these cases. According to State, other issues surfaced, including unreported travel, falsification of information, sexual relations with subordinates, and fraternization with foreign nationals. Heterosexual or homosexual behavior with foreign nationals will prompt a security investigation; however, State will permit cohabitation with foreign nationals as long as security officials are aware.

(continued)

**Appendix IV  
Civilian and Contractor Employee Concerns  
Regarding Sexual Orientation  
Discrimination (1976-94)**

<b>Agency</b>	<b>Date problem occurred</b>	<b>Description of concern</b>	<b>Agency's comments</b>
State (cont.)	1992	Security officials threatened to revoke the employee's (a foreign service officer) security clearance upon receipt of a letter alleging the employee had a homosexual affair. Security officials called the employee to appear as a source for a fraud investigation. Upon arriving at the meeting, however, security officials announced the investigation was about the employee's lifestyle. Investigators told the employee that any allegation of homosexuality will prompt an investigation. A clearance was granted.	<p>Until 1992, State security personnel asked individuals to appear as witnesses or sources for information to ensure the individuals would attend the meeting. State officials told us they used this procedure to protect individuals' privacy if they were at post. According to State officials, this practice has been discontinued.</p> <p>In 1992, State curtailed the practice allowing investigators (with the employee's permission) to contact a family member selected by the employee to verify that the family member was aware of the employee's sexual orientation.</p>
	1989	Security officials asked the foreign service employee to appear as a source for a fraud investigation. Upon arriving at the meeting, however, security officials announced the investigation was about the employee's lifestyle. Security officials told the employee that family members must be informed of the employee's homosexuality to prevent the employee from being subject to coercion or blackmail. The employee informed family members and retained a security clearance.	<p>State's current (December 1992) policy is not to ask questions regarding sexual conduct during the preappointment or periodic update investigation process. If an individual volunteers information, the investigator may ask if family, friends, and associates are aware of the individual's lifestyle, but the individual is not required to inform family members.</p> <p>State requires its investigators to follow up on substantive allegations that the employee is involved in illegal or exploitable sexual conduct. Sexual misconduct is a security concern if it involves a criminal offense, indicates a personality disorder, or subjects the individual to blackmail or coercion.</p>
	1993	The foreign service employee issued a visa to a foreign national companion; this prompted a security investigation that the employee believes was unfair because a heterosexual issued a visa to a foreign national family member with no repercussions. A clearance was retained.	
USIA	1976	The employee believes sexual orientation was responsible for difficulty in obtaining a security clearance in 1976, but the employee eventually got the clearance.	<p>Investigative procedures have changed much since 1976. USIA policy is not to ask about sexual orientation unless it involves foreign service in a country that forbids homosexual behavior.</p>
	1984	The employee's clearance was revoked because of unauthorized travel to and possible fraternization with foreign nationals in an eastern bloc country. The employee left the agency and was rehired by another agency.	<p>Concealment, regardless of sexual orientation, is the only issue that concerns USIA security personnel as it pertains to applicable laws and policies in foreign countries.</p> <p>USIA's current 1993 adjudicative policies and procedures provide that investigators should not ask about sexual orientation.</p>

(continued)

**Appendix IV  
Civilian and Contractor Employee Concerns  
Regarding Sexual Orientation  
Discrimination (1976-94)**

<b>Agency</b>	<b>Date problem occurred</b>	<b>Description of concern</b>	<b>Agency's comments</b>
USIA (cont.)	1986	The employee transferred from another agency. The employee believes investigators asked detailed, invasive questions about the employee's sexual behavior. A clearance was granted.	However, if the subject volunteers this information, investigators are expected to follow up with questions regarding the individual's vulnerability to coercion because of sexual activity.
	1989	A coworker denounced the employee, a foreign service officer, as a security risk because of the employee's homosexuality. At the same time, the employee was undergoing a security review. The employee believes investigators asked detailed, invasive questions about the employee's sexual lifestyle. The security clearance was retained.	

Note: We did not include cases involving employment issues or sensitive compartmented information clearances since these issues were beyond the scope of our review.

# 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

Mr. Henry L. Hinton  
Assistant Comptroller General  
National Security and International  
Affairs Division  
U.S. General Accounting Office  
Washington, D.C. 20548

ASSISTANT SECRETARY OF DEFENSE

WASHINGTON, D.C. 20301-3040

November 1, 1994

Dear Mr. Hinton:

This is the Department of Defense (DoD) response to the General Accounting Office (GAO) draft report, "SECURITY CLEARANCES: Consideration of Sexual Orientation in the Clearance Process," dated September 21, 1994 (GAO Code 709036/OSD Case 9790). The DoD concurs with the report.

As the GAO correctly reported, the DoD does not deny or revoke security clearances based solely on sexual orientation. Rather, the issues of concealment, coercion, and conduct constitute the principal factors involved in the adjudication of sexual behavior issues, both heterosexual as well as homosexual, for a security clearance. Current DoD adjudication guidelines contained in DoD 5200.2-R require that a subject advise immediate family members of his or her homosexual orientation in order to preclude the possibility of blackmail or coercion. Revised DoD adjudication guidelines, which were developed in conjunction with the Intelligence Community, have deleted that provision. The revised common adjudication guideline involving sexual behavior also makes no mention of sexual orientation, but rather focuses on conduct-related factors as the basis for denial or revocation of a security clearance.

The DoD has also recently revised its investigative policy in the Defense Investigative Service (DIS) Manual for Personnel Security Investigations, DIS-20-1-M relating to sexual orientation, to ensure compliance with the President's "don't ask, don't tell" policy. The DIS guidance to its investigators clearly states that sexual orientation, in itself, is not a security concern and no investigations or inquiries will be conducted solely to determine a subject's sexual orientation. Those changes in investigative policy should be sufficient to preclude inappropriate inquiry into one's sexual orientation without the proper basis. If a credible allegation arises during the investigation regarding homosexual orientation, then only limited inquiries of the subject may be conducted in order to determine the possibility of coercion or concealment. Once it has been determined that concealment or coercion issues are not present, the inquiry must be terminated. It is important to

**Appendix V**  
**Comments From the Department of Defense**

understand that similar inquiries are made of heterosexual subjects when issues of sexual conduct arise during the course of the investigation which raise the possibility of coercion or concealment, such as adultery or involvement with minors, foreign nationals, or subordinates.

The revised DoD common adjudication guidelines should be implemented by January 1995. Appropriate changes to the DIS investigative manual have already been accomplished during the implementation of the President's "don't ask, don't tell" policy. By April 1995, the DoD will conduct a review of its procedures to ensure that sexual orientation is not an issue in either investigations or adjudication of a security clearance. In addition, under the auspices of the Security Policy Board, the DoD will play a principal role in the development of a personnel security executive order, pursuant to the FY 1995 Intelligence Authorization Act. A priority issue of the order will be to articulate the policy of the Administration that sexual orientation shall not be the basis for denial or revocation of a security clearance.

The detailed DoD comments on the report recommendations are enclosed. The DoD appreciates the opportunity to comment on the GAO draft report.

Sincerely,



Emmett Paige, Jr.

Enclosure

Appendix V  
Comments From the Department of Defense

GAO DRAFT REPORT - DATED SEPTEMBER 21, 1994  
(GAO CODE 709036) OSD CASE 9790

"SECURITY CLEARANCES: CONSIDERATION OF SEXUAL  
ORIENTATION IN THE CLEARANCE PROCESS"

DEPARTMENT OF DEFENSE COMMENTS ON THE GAO RECOMMENDATIONS

\* \* \* \* \*

- o **RECOMMENDATION 1:** The GAO recommended that the Secretary of Defense direct the Assistant Secretary of Defense (Command, Control, Communications and Intelligence) to modify the investigative and adjudicative procedures to be consistent with stated agency policies. (pp. 14-15/GAO Draft Report)

**DoD Response:** Concur. The DoD has recently developed revised common adjudication guidelines, contained in DoD 5200.2-R, to help ensure that adjudicative procedures followed are consistent with established policies. The prior guidelines required that an individual advise immediate family members of his or her homosexual orientation to preclude the possibility of blackmail or coercion. That provision has been deleted in the revised guidelines. In addition, the revised guidelines do not mention sexual orientation, but instead focus on conduct-related factors as the basis for security clearance action. Implementation of the revised guidelines will occur by January 1995.

Also, to ensure compliance with the President's "don't ask, don't tell" policy, significant revisions have been made to the Defense Investigative Service (DIS) Manual for Personnel Security Investigations relating to sexual orientation procedures. Although those changes should be sufficient to preclude inappropriate inquiry, by April 1995, the DoD will conduct a review of its procedures to ensure that sexual orientation is not an issue in either investigations or adjudication of a security clearance.

- o **RECOMMENDATION 2:** The GAO recommended that the Secretary of the Treasury direct the Secret Service Assistant Director for Investigations to modify the investigative and adjudicative procedures to be consistent with stated agency policies. (pp. 14-15/GAO Draft Report)

**DoD Response:** The DoD defers comment to the Secretary of the Treasury.

Enclosure

Now on p. 15.

See comment 1.

Now on p. 15.

Now on p. 16.

- **RECOMMENDATION 3:** The GAO recommended that the Attorney General direct the Director, Federal Bureau of Investigations to eliminate specific language in the agency guidelines that explicitly targets sexual orientation in the security clearance process. (pp. 14-15/GAO Draft Report)
- DoD Response:** The DoD defers comment to the Attorney General.

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The following are GAO's comment on DOD's letter dated November 1, 1994.

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## GAO Comment

1. DOD has taken steps to ensure that sexual orientation is not considered a determining factor in the security clearance process. It has drafted revised adjudication guidelines and recently issued revised investigative procedures. DOD believes the recent changes to its investigative procedures should be sufficient to preclude inappropriate inquiry into one's sexual orientation. However, we are concerned that DOD's investigative procedures could be inconsistent with its adjudication guidelines. The investigative procedures currently require investigators to follow up on credible allegations of homosexuality, while its adjudication guidelines focus on sexual misconduct, not sexual orientation. Thus, to be consistent, it would seem appropriate that in the area of sexual orientation, DOD's investigative procedures should mirror its adjudication guidelines. DOD indicated that by April 1995, it will conduct a review of its investigative procedures to ensure sexual orientation is not an issue in the clearance process.

# Comments From the Department of State

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



United States Department of State

Washington, D.C. 20520

OCT 17 1994

Dear Mr. Conahan:

We are pleased, on behalf of the Chief Financial Officer, to provide the Department of State comments on your draft report, "SECURITY CLEARANCES: Consideration of Sexual Orientation in the Clearance Process," GAO/NSIAD-94-259, GAO Job Code 709036.

If you have any questions concerning this response, please call Mr. Gary H. Gower, DS/DSS/I/PSS, at 663-0158.

Sincerely,

  
Carolyn S. Lowengart  
Director  
Management Policy

Enclosure:  
As stated.

cc:  
GAO/NSIAD - Ms. Mead  
State/DS/DSS/I/PSS - Mr. Gower

Mr. Frank C. Conahan,  
Assistant Comptroller General,  
National Security and International Affairs,  
U.S. General Accounting Office.

**GAO DRAFT REPORT: SECURITY CLEARANCES:**  
Consideration of Sexual Orientation in the Clearance Process  
GAO/NSIAD-94-259, GAO Job Code 709036

The Department of State is pleased that the agencies included in this review have all adopted the position that sexual orientation is not an adjudicative criterion in granting or revoking security clearances. We note that the lack of recommendations for State reflects positive findings, as State was an early leader in considering sexual orientation, per se, irrelevant to security clearance.

State has held since the early 1980s that sexual orientation is not a valid adjudicative criterion. Also, since 1992, State has not required individuals to inform family members of their sexual orientation. At that time, we changed our investigative policy to instruct field investigators not to ask about sexual conduct or orientation in the context of preemployment investigations or periodic reinvestigations. Any security concerns raised by allegations relating to an individual's sexual conduct are addressed by a specially trained staff sensitive to the privacy concerns of individuals, and directed towards other appropriate criteria, such as criminal conduct, mental/emotional health, vulnerability to foreign influence or coercion, or lack of judgment or discretion.

We do note two inaccuracies in the report's Appendix III, Civilian and Contractor Employee Concerns Regarding Sexual Orientation Discrimination (1976-1994). The inaccuracies involve statements on page 27 under the "Agencies' Comments" column.

The first involves the comment, "Family members can be investigated by security personnel with the employee's permission." It should read, **"In 1992, the Department curtailed a practice allowing investigators (with the employee's permission) to contact a family member selected by the employee to verify that the family member was aware of the employee's sexual orientation."**

The second involves the comment, "State's current (December 1992) policy is to not pursue issues of sexual conduct during the investigative process." It should read, **"State's current (December 1992) policy is to not ask questions regarding sexual conduct during the preappointment or periodic update investigation process."**

Appendix III also has a minor format problem. The comments State submitted were intended to address all of the complaints generally, but State's comments are juxtaposed with specific employee complaints. As a result, some of State's comments are not related to the adjacent complaint, and some complaints appear to have no Agency response. As readers of the report could be confused by this mismatch of information, we recommend that the "Agencies' Comments" be preceded by the caveat: **"Agencies' comments are not formatted to relate directly to the adjacent description of employee concern, but rather to all of the employee concerns listed in the aggregate."**

Now App.IV  
on pp. 35-36.  
See comment 1.

Now on p. 36.  
See comment 1.

Now on p. 38.  
See comment 1.

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**Appendix VI**  
**Comments From the Department of State**

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The following are GAO's comment on the Department of State's letter dated October 17, 1994.

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**GAO Comment**

1. The technical corrections suggested by State were incorporated in our final report.

# Comments From the U.S. Secret Service



DIRECTOR

DEPARTMENT OF THE TREASURY  
UNITED STATES SECRET SERVICE  
WASHINGTON, D.C. 20223  
September 29, 1994

Mr. Frank C. Conahan  
Assistant Comptroller General  
National Security & International  
Affairs Division  
General Accounting Office  
441 G Street, N.W., Room 5155  
Washington, D.C. 20548

Dear Mr. Conahan:

Reference is made to GAO Draft Report, dated 9/21/94, on the treatment of federal civilian and contractor homosexual employees in the security clearance process.

Treasury Department guidelines regarding this subject will be published within 60-180 days. Based on this forthcoming guidance, the Secret Service will determine procedures applicable to this Agency.

The policy of the Secret Service is to employ people with the highest degree of integrity. This Agency has in the past, and will continue to hire the best qualified applicant.

Sincerely,

  
Eljay B. Bowron

# Comments From the Office of Personnel Management



OFFICE OF THE DIRECTOR

UNITED STATES  
OFFICE OF PERSONNEL MANAGEMENT

WASHINGTON, D.C. 20415

NOV 9 1994

Mr. Frank A. Conahan  
Assistant Comptroller General  
United States General Accounting Office  
Washington, DC 20548

Dear Mr. Conahan:

Thank you for the opportunity to comment on your draft report on the treatment of federal civilian and contractor homosexual employees in the security clearance process (GAO Code 709036). I am pleased that your work disclosed no evidence that sexual orientation is used as a criterion in the security clearance process. I would like to bring to your attention some minor points regarding the report.

The Office of Personnel Management (OPM) has long taken the position that discrimination on the basis of sexual orientation, as well as other non-job-related conduct, is contrary to the merit principles and may be considered a prohibited personnel practice.

Your draft report states on page 2 that the Civil Service Commission "issued guidelines prohibiting the government from denying employment on the basis of sexual orientation" and that the policy was "reissued by the Office of Personnel Management in 1980." More correctly stated, OPM issued a memorandum to heads of departments and independent establishments in May 1980 clarifying that personnel actions based on non-job-related conduct such as sexual orientation may be considered prohibited personnel practices under 5 U.S.C. Section 2302(b).

I reaffirmed this policy in a February 1994 memorandum for heads of departments and independent establishments describing the various avenues of redress available to Federal employees who may have been discriminated against for non-job-related conduct, including sexual orientation.

Table 3 in the draft report, summarizing agency investigative and adjudicative policies and procedures on sexual orientation, contains two references to OPM policy which should be changed. It is no longer accurate to cite subchapter 5 of "Draft OPM Manual 732-1" as authority, since that chapter of the Federal Personnel Manual was recently abolished (although chapter 736-1 was provisionally retained until December 1994). In addition, the reference to the OPM's Investigator's Handbook is not entirely accurate and should be deleted as the Handbook is being revised.

CON 131-64-4  
July 1988

Now on p.2.  
See comment 1.

Now on p.11.  
See comment 1.

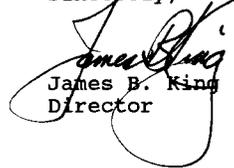
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**Appendix VIII  
Comments From the Office of Personnel  
Management**

(2)

Our Investigators are not authorized to question applicants or appointees concerning their sexual behavior or attitudes concerning sexual conduct, but are authorized to report information received which may be of value to an agency adjudicator as bearing on the individual's efficient service in a position or an agency's ability to perform its duties and responsibilities effectively.

Sincerely,



James B. King  
Director

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**Appendix VIII  
Comments From the Office of Personnel  
Management**

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The following are GAO's comment on OPM's letter dated November 9, 1994.

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**GAO Comment**

1. The technical corrections suggested by OPM were incorporated in our final report.

# Comments From the U.S. Customs Service

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



**THE COMMISSIONER OF CUSTOMS**

October 17, 1994

WASHINGTON, D.C.

Mr. Frank C. Conahan  
Assistant Comptroller General  
United States General Accounting Office  
Washington, D.C. 20548

Dear Mr. Conahan:

With reference to your draft report concerning the treatment of federal civilian and contractor homosexual employees in the security clearance process (GAO code 709036), we offer the following comments.

We feel the report is informative and is presented in an effective manner. The report was conclusive, insofar as significant data was provided which supports the contention that individuals are not discriminated against in the federal clearance process, on the basis of their sexual orientation, nor is sexual orientation a criterion for granting or denying security clearances.

As the report indicates, the U.S. Customs Service does not use sexual orientation as a basis for denying or revoking security clearances. However, regarding the issue of concealment, Customs position is similar to that of other agencies mentioned in the report. It is our contention that if an individual does not openly acknowledge or admit their homosexuality, the individual could be more vulnerable to bribery, blackmail, etc. Therefore, concealment of an individual's sexual orientation could be a security factor in the granting of a security clearance. We agree that the issue is not the behavior itself, but rather the behavior as it relates to the individual's honesty/integrity/trustworthiness and judgment, and the potential risk for blackmail or coercion.

We would like to make an additional comment regarding the statement contained on page 13 of the report, which states that "sexual orientation seems to have little bearing on the motives behind acts of espionage." Although fear of homosexuality being disclosed was not a motive in the six espionage cases studied, we maintain that it could be a matter of concern for those employees located in critical border locations, who are subject to daily temptation and pressure to "look the other way."

REPORT SMUGGLING TO UNITED STATES CUSTOMS SERVICE 1-800-BE-ALERT

Now on p. 13.  
See comment 1.

Now on p. 15.  
See comment 2.

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**Appendix IX**  
**Comments From the U.S. Customs Service**

- 2 -

We wish to conclude by stating that Federal agencies are responsible for, and/or obligated to protect not only national security interests, but the interests and/or mission of their respective agency and its employees as well. In addition, being granted a security clearance is not a guaranteed right. As when determining an individual's employment suitability, the individual's honesty/integrity, trustworthiness and loyalty are security factors as well, and therefore, must be clearly established before granting the individual access to highly sensitive classified information.

We appreciate the opportunity to review your report and provide our comments. Should you have any questions, please contact Linda Anderson, Director, Security Programs Division at (202) 634-2128.

Sincerely,



George J. Weise  
Commissioner

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The following are GAO's comments on the U.S. Customs Service's letter dated October 17, 1994.

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## **GAO Comments**

1. We believe that the Customs Service's statement on concealment is inconsistent with its policy that no individual may be asked to declare his or her sexual orientation or preference and that no inference concerning susceptibility to coercion may be raised solely on the basis of sexual orientation. This issue, as it pertains to the Justice Department and the FBI, is discussed in-depth on pp. 13-15 of our report.
2. With regard to the Customs Service's concern about vulnerability to espionage, we note that, historically, the chief motivating factor in espionage cases is pure monetary greed.

# Comments From the U.S. Information Agency

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

Now App. IV  
on pp. 36-37.  
See comment 1.

Now on p. 7.  
See comment 1.

**United States  
Information  
Agency**

Washington, D.C. 20547

Office of the Director



October 20, 1994

The Honorable Frank C. Conahan  
Assistant Comptroller General  
U.S. General Accounting Office

Dear Mr. Conahan:

Thank you for the opportunity to comment on GAO's draft report concerning treatment of federal civilian and contractor homosexual employees in the security clearance process.

With respect to Appendix III, "Civilian and Contractor Employee Concerns Regarding Sexual Orientation Discrimination," USIA's comments are more accurately stated as follows:

Sexual orientation is not a concern and will not be raised by the investigator. This differs from the policy prior to 1993, which was to ask candidates for the Foreign Service, but not the domestic service, if they had ever engaged in homosexual activity.

USIA's current policy prohibits inquiry into an individual's sexual orientation. However, if the individual volunteers information about his or her sexual conduct, the nature of such conduct will be pursued only to the extent necessary to determine whether the individual may be vulnerable to coercion, or has violated laws or security and/or other federal regulations as a result of that conduct.

With respect to Table 2: "Security Clearance Denials, Revocations, and Suspensions (Fiscal Year 1993)," most of the eight USIA cases cited fall into different categories than those listed. According to our Security Office, there was one case in the Counterintelligence/national interest/falsification of information category; three cases in the Falsification of information category; one case in the Fraud/falsification/financial matters category; two cases in the Mental/ medical health category; and one case in the Security violations category. The GAO representative reviewed a ninth case, which involved the denial of a special Sensitive Compartmented Information (SCI) clearance by the CIA. We understand that SCI cases were excluded from this GAO report.

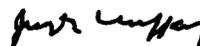
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Appendix X  
Comments From the U.S. Information  
Agency

- 2 -

I hope this information is helpful. We appreciate very much the opportunity for comment on your report in the draft stage.

Sincerely,



Joseph Duffey  
Director

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The following are GAO's comment on USIA's letter dated October 20, 1994.

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**GAO Comment**

1. The technical corrections suggested by USIA were incorporated in our final report.

# Comments From the Department of Justice

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



**U.S. Department of Justice**

Office of Policy Development

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Office of the Assistant Attorney General

Washington, D.C. 20530

December 2, 1994

Donna M. Heivilin  
Director, Defense Management and NASA Issues  
National Security and International Affairs Division  
U.S. General Accounting Office  
Washington, DC 20548

Dear Ms. Heivilin:

Thank you for the opportunity to comment on the September 21, 1994 Draft Report of the General Accounting Office (GAO) entitled "Security Clearances: Consideration of Sexual Orientation in the Clearance Process." The Department has reviewed the draft report, and we have only a few comments.

The draft report reviews how the issue of sexual orientation is treated in the security clearance process for federal civilian and contractor employees. The report reviews practices of eight agencies, which do not include the Department of Justice. The report does, however, refer to the Department's nondiscrimination in employment policy, issued by the Attorney General on December 2, 1993, which states:

The Department of Justice does not discriminate on the basis of race, color, religion, sex, national origin, disability or sexual orientation. . . . In the context of determining eligibility for security clearances or access to sensitive information, the Department may investigate and consider any matter that would reasonably subject the applicant or employee to coercion; but no inference concerning susceptibility to coercion may be raised solely on the basis of the race, color, religion, sex, national origin, disability or sexual orientation of the applicant or employee.

The Department's policy authorizes inquiry into any matter -- including both heterosexual and homosexual conduct -- that raises questions concerning a person's judgment or that might reasonably subject a person to coercion. Under the Department's policy, however, no inference concerning judgment, susceptibility to coercion, or any other criterion for access to classified information may be raised solely on the basis of sexual

Now on p. 11.

**Appendix XI**  
**Comments From the Department of Justice**

Now on p. 3.

orientation, and no relevance is ascribed to whether particular sexual conduct is homosexual or heterosexual.

See comment 1.

The draft report touches on Department policy in its review of the Federal Bureau of Investigation's investigative guidelines. The draft report states the FBI's guidelines "appear to be at odds with Department of Justice policy which states that no inference concerning susceptibility to coercion may be raised solely on the basis of the sexual orientation of the applicant or employee."

We think that this conclusion is not warranted. The FBI was involved from the outset in developing the Department's nondiscrimination in employment policy. The FBI's guidelines were developed in consultation with other components of the Department with the goal of effectuating the Department's nondiscrimination policy while also meeting the requirements of Executive Order 10450. We believe that the FBI's guidelines fully meet this goal, and that the Bureau has taken a strong step forward in this policy area.

See comment 2.

The FBI's guidelines carefully cabin the consideration of sexual orientation to circumstances in which sexual orientation could reasonably be thought to raise an issue of susceptibility to coercion. Furthermore, they make clear that no inference as to susceptibility to coercion is to be drawn based on sexual orientation, and, moreover, that to the extent sexual conduct has any bearing on the suitability and trustworthiness determinations, no distinction is to be drawn based on whether the conduct is homosexual or heterosexual.

See comment 3.

The FBI's guidelines also make clear that an applicant has no obligation to reveal his or her sexual orientation; rather, the applicant is asked only whether he or she is concealing any activity or conduct that reasonably may subject him or her to influence, pressure, coercion, or compromise. If the applicant does not believe that he or she is susceptible to coercion, a "no" answer to this question would be truthful and appropriate, and would raise no issue of suitability.

See comment 4.

Similarly, the FBI guidelines also specify that third parties will not be directly asked about an applicant's sexual orientation, although they may be asked whether they are aware of anything in the applicant's background that might be the basis of attempted influence or coercion. Where third parties provide information indicating a potential issue of susceptibility to coercion, the FBI guidelines allow for a follow-up interview of the applicant. The FBI has agreed to issue a letter to the field that will reaffirm and clarify that the applicant in such a follow-up interview should be reassured that the only potential issue for investigation is susceptibility to coercion.

Because the FBI's guidelines make clear that sexual orientation is itself irrelevant in determining a person's

**Appendix XI**  
**Comments From the Department of Justice**

suitability for employment, and because they carefully limit inquiry to circumstances that raise reasonable concerns about susceptibility to coercion, we believe that the guidelines are fully consistent with this Department's policy of and commitment to nondiscrimination in employment on the basis of sexual orientation. The FBI's letter to the field should buttress the FBI guidelines, which issued in March of 1994, and the training that accompanied their issuance.

Now on p. 13.

We therefore suggest that the draft report be amended to delete the sentence on page 13 that reads, "These guidelines appear to be at odds with Department of Justice policy which states that no inference concerning susceptibility to coercion may be raised solely on the basis of the sexual orientation of the applicant or employee." For the same reasons, we would suggest that the report delete the recommendation, made at pp.14-15, that the Attorney General direct the Director of the FBI to eliminate specific language in that agency's guidelines that explicitly targets sexual orientation in the security clearance process. Although the FBI guidelines do contain specific guidance on the subject of the treatment of sexual orientation in the security clearance process, that guidance is consistent with Department policy and the dictates of Executive Order 10450.

Now on p. 16.

See comment 5.

Thank you for the opportunity to comment on the draft report.

Sincerely,



Eleanor D. Acheson  
Assistant Attorney General  
Office of Policy Development

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The following are GAO's comments on the Department of Justice's letter dated December 2, 1994.

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## GAO Comments

1. We eliminated references in the report contrasting FBI guidelines on sexual orientation with Justice policy and clarified our report to specifically identify sections of the guidelines that raise questions. (See comments 2 and 3.)

2. The FBI's guidelines provide no examples where sexual orientation could reasonably be thought to raise an issue of susceptibility to coercion. Rather, the guidelines address instances where sexual conduct (e.g., a sexual relationship with a subordinate employee, date rape, or public lewd behavior) is relevant to suitability or trustworthiness.

Moreover, the requirement that volunteered information on an individual's orientation be recorded for use in determining the individual's vulnerability to compromise constitutes different treatment than that of heterosexual applicants. The FBI guidelines on sexual orientation require the assessment of a homosexual applicant's vulnerability to compromise solely on the basis of sexual orientation without any indication that there has been behavior or conduct that would warrant further assessment. A similar assessment is not required of heterosexual employees without an indication that there has been behavior or conduct that could make an applicant vulnerable to blackmail or coercion. Further, with the exception of DOD, which has said it intends to, the other agencies in our review have eliminated references to concealment of sexual orientation as a security concern.

3. Applicants have no obligation to reveal their orientation because, according to Justice policy, individuals may not be asked to declare their orientation.

4. The FBI's December 1994 letter to its field staff deals primarily with guidelines for follow-up interviews with applicants when a third party provides information about a potential vulnerability.

5. See comments 2 and 3.

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