08-INTEL-10
July 13, 2008

Inspector General
United States Department of Defense

DEPUTY INSPECTOR GENERAL FOR INTELLIGENCE

Review of the Case of Mr. David Tenenbaum Department of the Army Employee

INSPECTOR GENERAL
DEPARTMENT OF DEFENSE
400 ARMY NAVY DRIVE
ARLINGTON, VIRGINIA 22202-4704

July 13, 2008

MEMORANDUM FOR COMMANDING GENERAL, ARMY MATERIEL COMMAND

SUBJECT: Report on the Review of the Case of Mr. David Tenenbaum, Department of the Army Employee (Report No. 08-INTEL-10)

This is our final report on our review of the case of Mr. David Tenenbaum as requested by Senator Levin. We considered comments to a draft of this report from the Commanding General, Army Materiel Command and Director, Defense Security Service in preparing the final report. Although not required, should you choose to provide comments to the final report, please do so by September 20, 2008.

We appreciate the courtesies extended to the staff. Should you have any questions, please contact me at (703) 604-8800 (DSN 664-8800). See Appendix G for the report distribution.

Patricia A. Brannin
Deputy Inspector General
for Intelligence

Department of Defense Office of Inspector General

Report No. 08-INTEL-10 **July 13, 2008**
(Project No. D2006-DINT01-0238.000)

Review of the Case of Mr. David Tenenbaum, Department of the Army Employee

Executive Summary

Background. From July 22, 1992, to February 13, 1997, a series of espionage allegations, investigative activity, and two Federal Bureau of Investigation (FBI) preliminary inquiries were conducted to determine whether Mr. David Tenenbaum, an engineer with the U.S. Army Tank-Automotive and Armaments Command (TACOM), was spying for Israel. These events resulted in Mr. Tenenbaum taking a polygraph examination, wherein it was alleged that he admitted to making disclosures of classified information to the Israeli government over a 10-year period. This led to a FBI criminal investigation beginning in February 1997 culminating in February 1998 when the U.S. Attorney declined prosecution because of insufficient evidence to meet the burden of proof at trial.

Mr. Tenenbaum brought two legal actions associated with this matter in the U.S. District Court for the Eastern District of Michigan. In the first action (initiated in October 1998) Mr. Tenenbaum alleged he was subjected to disparate treatment by Army and Defense Investigative Service employees. The district court dismissed the case in September 2002, because the defendants would not be able to disclose the actual reasons or motivations for their actions without revealing state secrets. In the second action (initiated January 2000) Mr. Tenenbaum alleged civil rights violations under Title VII of the Civil Rights Act of 1964 by the Department of the Army. The district court dismissed the case in October 2000 based upon the non-justiciability of security clearance remedies regarding the alleged civil rights violations.

Mr. Tenenbaum lost his access to classified information in 1997 and his personnel security clearance was revoked in February 2000 based on allegations that were found to be unsubstantiated. In 2003, Mr. Tenenbaum's personnel security clearance was restored and upgraded

In a March 14, 2006 letter, Senator Carl Levin requested the Office of Inspector General, DoD, to conduct an independent review of the case of David Tenenbaum "who lost his security clearance in 1997 as a result of unsubstantiated allegations that he was spying for Israel. Mr. Tenenbaum alleges that he was singled out for unfair treatment - including an unwarranted investigation, a fabricated confession, and extended harassment of himself and his family - because of his religion."

Observations. Mr. Tenenbaum was the subject of inappropriate treatment by Department of the Army and Defense Investigative Service officials. Defense Investigative Service and Army officials failed to follow established policies and procedures for accepting and for conducting personnel security investigations and for investigating counterintelligence

allegations. The personnel security investigation was improperly used as a ruse for a counterintelligence investigation. (Observation A)

We found that Mr. Tenenbaum's religion was a factor in the decision that resulted in the inappropriate continuation of the Personnel Security Investigation to upgrade Mr. Tenenbaum's security clearance. The October 1996 briefing to Mr. Tenenbaum's supervisor and other TACOM leadership included a disavowed policy statement, "Host Nation [Israel] is known to try to exploit nationalist and religious tendencies." It was well known that Mr. Tenenbaum was Jewish, lived his religious beliefs and by his actions appeared to have a close affinity for Israel. But for Mr. Tenenbaum's religion, the investigations would likely have taken a different course. We believe that Mr. Tenenbaum was subjected to unusual and unwelcome scrutiny because of his faith and ethnic background, a practice that would undoubtedly fit a definition of discrimination, whether actionable or not. (Observation B)

Procedurally, the polygraph was generally performed in accordance with applicable guidance. However, the premise that the polygraph was being performed as part of a personnel security investigation and not a counterintelligence investigation was inappropriate. The polygraph may have included questions and probing regarding religious beliefs and affiliations. Because the polygraph interview was neither audio-recorded nor observed, and was not finalized with a sworn statement, we were unable to resolve Mr. Tenenbaum's allegation that statements attributed to him during the Defense Investigative Service polygraph examination were fabricated. However, we note that the U.S. Army Personnel Security Appeals Board ultimately increased the level of Mr. Tenenbaum's clearance. Such action suggests that Mr. Tenenbaum did not improperly disclose classified material. (Observation C)

In 2000, after the FBI concluded its extensive investigation after prosecution was declined, the Army Central Personnel Security Clearance Facility revoked Mr. Tenenbaum's personnel security clearance because of alleged security concerns. The U.S. Army Central Personnel Security Clearance Facility followed DoD procedures during the subsequent personnel security clearance decision-making and adjudication process, not only restoring Mr. Tenenbaum's secret personnel security clearance, but also increasing the level of trust given to him through a top secret personnel security clearance. This process, including Mr. Tenenbaum's opportunities to rebut the allegations surrounding him, took from February 1999 to April 2003. (Observation D)

Mr. Tenenbaum's allegation that he and his family were subjected to extended harassment also relates to the 1997 criminal investigation conducted by the Federal Bureau of Investigation. Because issues regarding the actions of the FBI fall outside of the jurisdiction of the OIG, DoD, we express no opinion on this matter.

Management Comments and Evaluation Response. We provided a draft of this report to the Defense Security Service (formerly the Defense Investigative Service) and the Army Material Command. Since 2005, the Defense Security Service no longer has responsibility for personnel security investigations for DoD civilian employees; therefore we have removed them as an addressee on this report. Currently the Office of Personnel Management conducts the investigations for DoD. Because of the age of the actions, we see no reason to provide the Office of Personnel Management a copy of this report or to request their comments. The Army Material Command stated that any assessment of discrimination should be made using Title VII instead of Title V, which we had used in

our draft report. We agree. A summary of the Army Material Command comments are included at Appendix F along with our response to those comments.

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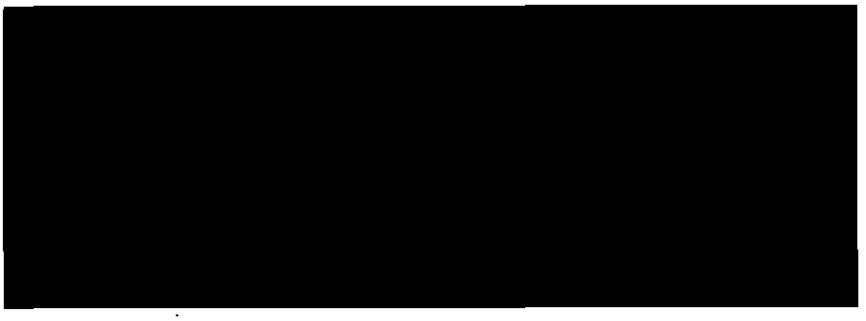
Background

From July 22, 1992 to February 14, 1997, six Subversion and Espionage Directed Against the U.S. Army (SAEDA) allegations, investigative activity, and two Federal Bureau of Investigation (FBI) preliminary inquiries were conducted to determine whether Mr. David Tenenbaum, hereafter referred to as the Complainant, an engineer with the U.S. Army Tank-Automotive and Armaments Command (TACOM) was spying for Israel. In particular, some TACOM employees suspected that the Complainant was providing classified or sensitive U.S. Government information to unauthorized officials of the Israeli government or other Israeli citizens.

Beginning in December 1996, in response to a request from the Complainant's first-line supervisor to upgrade the Complainant's personnel security clearance, the Defense Investigative Service (DIS) conducted a personnel security investigation (PSI) of the Complainant. On February 3, 1997, during the Complainant's Subject interview with DIS investigators, he allegedly made several admissions concerning his official and personal activities. On February 13, 1997, the Complainant consented to a DIS polygraph examination. During the polygraph examination, the Complainant allegedly admitted making unauthorized disclosures of classified information to the Israeli government over a 10-year period.

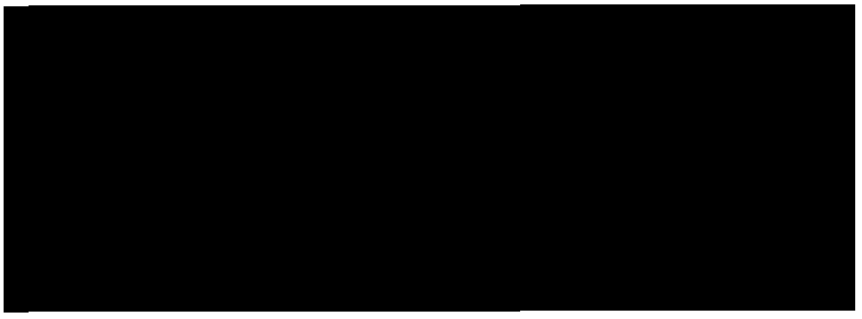
Based upon the DIS polygraph results, TACOM officials took action to suspend the Complainant's access to classified information and placed him on administrative leave with pay. On February 21, 1997, TACOM officials initiated action to revoke the Complainant's secret personnel security clearance.

On February 3, 1998, the United States Attorney for the Eastern District of Michigan notified the FBI that:



EOUSA Originated Information

On April 1, 1998, the FBI notified the Commanding General of TACOM that:



FBI Originated Information

[redacted] FBI Originated Information

Notwithstanding the decision of the U.S. Attorney, the U.S. Army Central Personnel Security Clearance Facility (CCF) reviewed the Complainant's case and based upon adverse information regarding security concerns about the Complainant's trustworthiness, reliability and judgment, revoked his personnel security clearance in February 2000. The Complainant appealed the CCF action, and his personnel security clearance was reinstated in April 2003.

The Complainant brought two legal actions associated with this matter in the U.S. District Court for the Eastern District of Michigan. The first action, initiated in October 1998 and alleging federal and state constitutional violations by Army and DIS employees, was dismissed in September 2002, on the basis that the defendants would not be able to disclose the actual reasons or motivations for their actions without revealing state secrets. Then Attorney General, Mr. John Ashcroft, and Deputy Secretary of Defense, Mr. Paul Wolfowitz, submitted affidavits in the case stating that disclosing the information would risk harming the national defense. The second action, initiated in January 2000 and alleging civil rights violations by the Department of the Army, was dismissed in October 2000 because the denial of security clearance is non justiciable.

In a March 14, 2006 letter, Senator Carl Levin requested the Office of the Inspector General (OIG), DoD, conduct an independent review of the case of the Complainant, an employee of TACOM in Detroit "who lost his security clearance in 1997 as a result of unsubstantiated allegations that he was spying for Israel. [The Complainant] alleges that he was singled out for unfair treatment - including an unwarranted investigation, a fabricated confession, and extended harassment of himself and his family - because of his religion." A copy of the letter is at Appendix B.

Objective

At the request of Senator Levin, we reviewed the allegations made by the Complainant specifically related to "unwarranted investigation, a fabricated confession, and extended harassment of himself and his family – because of his religion." See Appendix A for a discussion of the scope, scope limitations, and methodology.

Introduction

Complainant's Duties

The Complainant has worked as an engineer for TACOM since 1984. He was originally hired in the Armor Group, Survivability Division, which was responsible for designing and developing safer combat and tactical vehicles. The Complainant's self-described job responsibilities were to find the best armor/survivability systems and technology available from the most efficient source whether from the United States or another country. Much of his work was international in nature. His formal position description specifies that he:

> Maintains liaison with other Government engineering, research and development agencies, user commands, Program Executive Offices, industry and professional groups to coordinate in-house contractual programs and to exchange technical programs within area of expertise. Personally makes presentations and briefings of major importance to Command upper management and elements of higher authority. Prepares reports, presentations, papers on results of studies. Represents the United States on survivability aspects of combat vehicle systems as technical project officer, co-chairperson, member of the United States' delegation to discharge [Army] obligations for unilateral, bilateral, and mutual agreements.

Pursuant to his position description, the Complainant has worked with foreign liaisons from Canada, France, Germany, Israel, Italy, the Netherlands, Singapore, Sweden, Switzerland and the United Kingdom. Because of the Complainant's fluency in Hebrew he became his office's logical choice for projects involving Israel and would often interact with Israeli Liaison Officers.

In 1995, the Complainant submitted a proposal for the Light Armor Survivability System (LASS) project (Appendix C). This was to be a cooperative program between the United States, Germany and Israel. The purpose of the proposed effort was to upgrade the armor and protection on the Army's light armored combat vehicles such as the High Mobility Multipurpose Wheeled Vehicle (HMMWV or Humvee). The Complainant met with an Israeli official and a research contractor to discuss the proposed joint project although the proposal had not yet been approved by TACOM or Army Materiel Command (AMC) officials. Throughout his tenure at TACOM, the Complainant's duties required him to hold a personnel security clearance at a secret level.

Background of TACOM Actions

On January 9, 1996, the Complainant's first-line supervisor was notified by the TACOM Director of Intelligence and Counterintelligence (DIC) office that his PSI (i.e., his NACI [National Agency Check with Inquiries]) would expire on February 2, 1996 and that he would need to submit paperwork for a periodic

reinvestigation.[1] This action was required because the Complainant was read-on (i.e., had access) to three special access programs (SAPs).[2] On March 14, 1996, a TACOM SAP security manager contacted the Complainant via email notifying him of the periodic reinvestigation requirement and requesting that he complete the required paperwork for the periodic reinvestigation. The Complainant stated in his deposition that "he didn't quite understand [the e-mail]." Between February and November 1996, the Complainant did not provide the requested paperwork despite several requests to do so by the TACOM DIC office. The Complainant was "administratively debriefed" from the SAPs on November 1, 1996 and signed the non-disclosure forms on November 12, 1996.

The alleged religious discrimination against the Complainant began after the TACOM Associate Director for Research, the Complainant's first-line supervisor, signed a request for a personnel security clearance upgrade and its attendant investigation This clearance review became a pretext for an espionage investigation after the October 21, 1996 meeting.

On October 21, 1996, the TACOM DIC and members of the 902nd Military Intelligence (MI) Group briefed the TACOM leadership and the FBI[3] concerning the Complainant. The briefing focused on espionage "indicators," derogatory information, questionable activities, contact with officials of the Israeli government,[4] and future courses of action with regard to the Complainant.

To put this briefing in context, prior to this meeting, the DIC was advised by a 902nd MI Group special agent that the 902nd MI Group component responsible for SAP believed the Complainant may have compromised three SAPs to the Israelis. The special agent also advised that this allegation would be briefed to the Program Executive Office Ground Combat Systems and possibly to the Vice Chief of Staff of the Army.[5] At the request of the DIC for further information, the 902nd MI Group provided an unsigned draft memorandum dated October 11, 1996. The memorandum summarized information within the several SAEDA reports made

[1] This notification was sent by the TACOM DIC via email to several TACOM addressees. The email provided TACOM managers an informal summary of the results of a security assistance visit conducted by the TACOM DIC and other TACOM officials in December 1995. The Complainant was one of four TACOM employees identified during the assistance visit who needed a periodic reinvestigation to maintain their personnel security clearance and access to classified information.

[2] Paragraph 1-317 of AR 380-67 defines "periodic reinvestigation" as "[a]n investigation conducted every 5 years for the purpose of updating a previously completed background or special background investigation on persons occupying positions referred to in paragraphs 3-700 through 3-711 [of AR 380-67]. The scope will consist of a personal interview, NAC, [local agency checks], credit bureau checks, employment records, employment references and developed character references and will normally not exceed the most recent 5-year period." Access to SCI requires a periodic reinvestigation every 5 years. (AR 380-67, paragraph 3-702).

[3] A signed list of attendees does not include the FBI; yet in a sworn deposition, the lead FBI special agent stated that he was at the October 21, 1996 meeting.

[4] We did not find any evidence that Israeli Liaison Officers were illegally or unlawfully at TACOM. The Department of the Army Foreign Disclosure Officer who was responsible for certifying Israeli Liaison Officers testified that he approved the Israeli Liaison Officer and an Israeli Ministry of Defense Official to come to TACOM.

[5] This information was conveyed to the DIC by one of the 902nd MI Group special agents who had debriefed the Complainant in January 1996 regarding the Complainant's foreign travel in May-June 1995.

on the Complainant from 1992 to 1996 and also noted that the FBI had recently closed a preliminary inquiry on the Complainant.

At the conclusion of its inquiry, the FBI lead investigator sent correspondence to FBI headquarters stating:

[redacted]

FBI Originated Information

The 902nd MI Group unsigned memorandum stated:

[redacted]

Army Originated Information

On October 21, 1996, TACOM management and other Army officials were briefed on the allegations involving the Complainant. Attending this meeting were: The Director, Army Tank Automotive Research Development Engineering Center and the Deputy to the TACOM Commander (both members of the Senior Executive Service), the Complainant's first-line supervisor, representatives from Program Executive Office Ground Combat Systems, the TACOM DIC, a TACOM SAP security specialist, 902nd MI Group special agents, a representative from the INSCOM and the Chief of Administrative Law at TACOM. No DIS representatives attended. An FBI agent was also in attendance. Separate presentations were given during this meeting by a 902nd MI Group special agent and the TACOM DIC. The 902nd MI Group presentation addressed:

- Allegations from a 1992 SAEDA report that the Complainant made travel arrangements separately and that he avoided contact with U.S. representatives while in Israel to speak more freely with Israeli counterparts. (902nd MI Group representatives had previously provided this information to the TACOM Office of the DIC who deemed the information to be unsubstantiated and of no significance; however, they would monitor the situation).

- Allegations from a 1994 SAEDA report that the Complainant had a close and personal relationship with an Israeli Liaison Officer, wherein the

[redacted]

Army Originated Information

Complainant provided information beyond the scope of data exchange agreements. That the Complainant assisted the Israeli Liaison Officer beyond his job description and was generally ignored as a security risk by superiors.

- Allegations from a 1996 SAEDA report that the Complainant had unreported foreign contact. That the Complainant made travel arrangements separately. That the Complainant listed as point of contact for official visits an Israeli Ministry of Defense official, to both the research contractor and TACOM.

- Allegations that the Complainant hosted a meeting at TACOM between an Israeli Ministry of Defense official and the research contractor, to facilitate a cooperative research and development project with Israel concerning LASS.

- A summary that the Complainant had access to three special access programs. The summary continues under the heading "Numerous CI [counterintelligence] concerns," that the Complainant was evasive during routine travel debriefing, facilitating a data exchange agreement, repeatedly requesting to work in and/or travel to Israel in the SEEP [Scientist and Engineer Exchange Program[7]], and leave in conjunction with official travel to Israel.

- A bullet that states "Indicators of Espionage."

- A bullet that states "No current investigation."

As shown above, there were security concerns regarding the Complainant. It should be noted that the first two SAEDA reports were generated by co-workers who recanted or greatly "softened" their initial allegations when questioned by authorities. In fact, in 1994 the reporting was characterized as "exaggerated" by FBI and 902nd MI Group investigators, nevertheless, verbiage from these SAEDA reports still appears on the October 21, 1996, briefing slides without footnotes to indicate whether SAEDA reports were recanted or "softened." Further, the LASS meeting was coordinated with the office of the TACOM DIC and AMC who sent a representative.

The October 21, 1996 meeting also included a briefing from the TACOM DIC. The first part of the TACOM DIC's presentation addressed extracts from Army regulations applicable to SAP access, SAEDA reporting requirements, security clearance eligibility, and clearance suspension/revocation actions. In the second

[7] SEEP, also called Engineer and Scientist Exchange Program (ESEP), is a DoD effort to promote international cooperation in military research, development, and acquisition through the exchange of defense scientists and engineers. A prerequisite for establishing the program is a formal international agreement, a Memorandum of Understanding, with each participant nation. Currently, DoD has SEEP agreements with Australia, Canada, Egypt, France, Germany, Greece, Israel, Japan, Norway, Portugal, the Republic of Korea, Singapore, Sweden, Spain, the Netherlands, and the United Kingdom. The primary goals of SEEP are to first, broaden perspectives in research and development techniques and methods. Second, to form a cadre of internationally experienced professionals to enhance research and development programs. Third, gain insight into foreign research and development methods, organizational structures, procedures, production, logistics, testing, and management systems. Fourth, cultivate future international cooperative endeavors. Fifth, to avoid duplication of research efforts among allied nations.

part of his presentation, the TACOM DIC listed alleged actions by the Complainant that raised security concerns, the delay in updating the paperwork necessary for his periodic reinvestigation, and provided an assessment of the security concerns.[8] In particular, the TACOM DIC pointed out that the Complainant traveled to Israel for both official and personal reasons and noted that:

> Host nation is known to try to exploit nationalistic and religious tendencies.

The TACOM DIC also stated in his presentation:

- Subject's behavior, actions, and statements fit classic profile that warrants increased security concerns
- At best – an unwitting accomplice
- At worst – he may be knowingly assisting a foreign government

Additionally, the TACOM DIC's presentation raised the following considerations to management in response to the security concerns:

- Debrief from SAP?
- Continue with [periodic reinvestigation] for Top Secret Clearance?
- Suspend access?
- Send [derogatory] report to the CCF?
- Reassign to less sensitive position?
- Cancel/postpone upcoming travel to Israel?
- Recommend Army [counterintelligence] or FBI reopen case?

Finally, the TACOM DIC presented the following five possible courses of action to the TACOM management officials:

[8] The TACOM DIC's briefing was classified. We reviewed the entire briefing, and the summary presented herein reflects the unclassified portions of the briefing.

OPTIONS	ADVANTAGES	DISADVANTAGES
Do nothing	• Doesn't alert subject • Benefit of Doubt	• Doesn't solve problem
Increase Supervisor Monitoring	• Allows us to observe • Doesn't tip hand	• Very difficult to do • Does not stop Access
Debrief from SAP	• Eliminates SAP access • Partial billet scrub	• Minimal Impact • May tip hand • Does not stop collateral access
Suspend Access pending Reinvestigation	• Temporarily ends access to classified & SAP	• Affects Duties/Job • Tips hand
Reassign to other duties	• Eliminates access	• Affects individual/Organization • Have to answer "why"

Thereafter, according to the TACOM DIC: As a result of this briefing, it was determined that the Complainant would be debriefed from all SAP Programs because his background investigations were over five years old and he did not need SAP access to do his current job. It was also agreed that his SSBI [i.e., the Complainant's personnel security investigation] would still go forward.

Prior to attending this briefing, the TACOM managers had not been aware of any of the allegations involving the Complainant. Following the meeting, the first-line supervisor recalled in his deposition that he was advised not to convey any details of the investigation to the Complainant until the investigation was completed. Thus, the decision was made to debrief the Complainant from all SAPs.

The decision to debrief the Complainant from all SAPs was also influenced by the Complainant's delayed submission of security forms needed for continued SAP access.

Almost concurrently with the Complainant being "read-off" from the SAPs, the first-line supervisor took action to expedite the personnel security investigation for a top secret personnel security clearance and SAP access. The first-line supervisor not only proceeded with the top secret personnel security clearance upgrade, as agreed at the October 21, 1996 meeting, but also indicated on the personnel form that the clearance was for the Complainant to have SAP access.

On November 8, 1996, the Complainant's first-line supervisor sent a memorandum requesting a personnel security upgrade for the Complainant. The first-line supervisor requested "expeditious processing" of the request to:

[redacted] Army Originated Information

[redacted] Army Originated Information

During his deposition, the first-line supervisor explained his motivation for requesting the DIS investigation as follows:

[redacted] Army Originated Information

Further, the first-line supervisor testified that he thought that the accusations against the Complainant "would be found to be without substance, and I needed the employee to be working on the programs."

In November 1996, the TACOM DIC and TACOM DIC security officer met with the DIS special agent in charge, Detroit Field Office, to brief the special agent in charge on the Complainant, including the October 21, 1996 TACOM meeting. The TACOM DIC security officer testified that the TACOM DIC wanted to ensure that the DIS investigators conducting the personnel security investigation were aware of the derogatory information developed by the 902nd MI Group. During the meeting, the TACOM DIC security officer believed the issue of a polygraph examination for the Complainant "may have been discussed."

The DIS Detroit Field Office received the Complainant's SSBI paperwork on or about December 3, 1996 and began the PSI.[9] The assigned DIS investigator, since October or November 1996, had some prior knowledge of the Complainant, based on information provided by the Detroit Field Office special agent in charge. Further, the DIS investigator, on December 19, 1996, talked to the FBI lead special agent who indicated the FBI had opened a preliminary inquiry on the Complainant in November 1996 to interview the Complainant.

As also discussed at the October 21, 1996 meeting, action was taken to cancel/postpone the Complainant's upcoming travel to Israel. Upon obtaining information about a planned trip to Israel, on November 27, 1996, the TACOM DIC e-mailed the Complainant's first-line supervisor recommending that the Complainant's travel to Israel be delayed.

On December 11, 1996, the Complainant's first-line supervisor told the Complainant (via e-mail) that he had rescinded his prior approval for the Complainant's travel to Israel and that further review of the proposed travel would occur in mid/late February 1997.[10]

[9] One DIS investigator was assigned to do the PSI. A second DIS investigator, who had recent experience with a prior potential CI case in 1993, assisted the assigned DIS investigator.

[10] The TACOM DIC stated to OIG investigators that TACOM management was not permitted to share with the Complainant the personnel security clearance concerns or issues that had surfaced about him, based upon guidance from the 902nd MI Group.

DIS and FBI Investigations

On January 17, 1997, the TACOM DIC held a meeting with representatives from the FBI, 902nd MI Group, and DIS.[11] The TACOM DIC and TACOM DIC security officer were excused from the meeting room "so that an exchange of information/ideas could take place between DIS, 902nd MI Group, and FBI." During this follow-on discussion, the FBI was "apprised of the various espionage indicators developed by DIS through the ongoing background investigation of the Complainant." However, the FBI opted to await the outcome of the DIS investigation before conducting a full investigation. Further, the FBI recommended that the Complainant's Subject interview by DIS be conducted as soon as possible after January 24, 1997. The FBI would neither restrict the kind of questions asked by DIS, nor specify questions to be asked. The FBI hoped the DIS Subject interview would be conducted "in such a way that the Complainant would volunteer for [a] polygraph."[12]

Also on January 17, 1997, DIS investigators telephonically spoke with the DIS Detroit office SAC and a DIS specialist to apprise them of the developments of the TACOM meeting earlier that day. During this conversation, the DIS CI specialist instructed the DIS investigators "to follow any guidance given by FBI" but cautioned them "above all, do not conduct any lead that would exceed those logical for CI issue in [a special background investigation].[13]

DIS investigators telephonically briefed a DIS regional polygraph examiner on January 21, 1997.[14] As a result of this briefing, the DIS investigators were advised by the Polygraph Division, DIS headquarters, that DoD regulations generally prohibit the immediate polygraph of a subject upon termination of the Subject interview and also that an additional policy letter directs that subjects will be given a reasonable period of time to seek legal counsel after agreeing to undergo a polygraph. However, subject to regional DIS chain of command approval, the DIS investigators were advised that a polygraph could be conducted in the Complainant's case within one to two days after the Subject interview.

On January 22, 1997, the TACOM DIC provided an 8-page sworn statement to DIS investigators, referencing the SAEDA reports on the Complainant, outlining

[11] The DIS representatives were told that they were coming to take the TACOM DIC's sworn statement; however, the sworn statement was not prepared.

[12] A summary of this meeting sent by the FBI lead special agent to FBI headquarters on January 23, 1997 stated: The DIS investigation confirmed FBI investigation that there are many lapses in supervision and chain of command reporting with the civilian employee population at TACOM. The Complainant's supervisor has given him open authority to represent TACOM interests in selling the results of U.S. Army Research and Development efforts. The Complainant is extremely skillful at seeking approval for all his actions from various supervisors, depending on the situation and who he believes will sponsor his requests without questioning. Further, the FBI lead special agent reported: The two DIS investigators plan a non-threatening interview of the Complainant on or about 01/27/1997. They also anticipate requesting a DIS polygraph specialist/operator to travel from their headquarters and be at the ready to administer a polygraph examination to the Complainant at the conclusion of the interview. The Complainant would have to give consent before the polygraph examination could be administered, but DIS investigators are confident he will acquest. (sic).

[13] According to one of the DIS investigators, the DIS CI specialist was acting only in an advisory capacity. The CI specialist was not conducting a concurrent investigation.

[14] This polygraph examiner would conduct the Complainant's polygraph examination on February 13, 1997.

the TACOM DIC's concerns regarding the Complainant's actions, and providing a chronology of significant interactions between the TACOM DIC and the Complainant during 1995-1996. This statement was provided in conjunction with the DIS PSI. The TACOM DIC's sworn statement concluded as follows:

a. Subject is knowledgeable about security issues through 902nd MI Group foreign travel pre and post briefings, SAEDA training (Dec 1995), Meeting with [the TACOM DIC] (Jul 1996), and signing of SF 312 [Classified Information Nondisclosure Agreement] (10 May 1995).

b. Subject's behavior, actions, and statements fit a classic profile that warrants increased security concerns.

c. At best – an unwitting accomplice. At worst – he may be knowingly assisting a foreign government which is known to exploit nationalistic and religious tendencies.

d. I also felt he had natural religious and ethnic sympathies which the Israelis could try to exploit.

On February 3, 1997, the two DIS investigators conducted a six-hour Subject interview of the Complainant for his PSI. Although required by DIS policy, the DIS investigators did not take a sworn statement. One of the DIS investigators characterized the interview as a standard interview covering routine SSBI issues except for matters which the investigators had been previously aware that raised concerns about the Complainant's travels, associations with other persons, and his intentions. During the interview lunch break, the DIS investigators updated the FBI lead special agent and also received information from the TACOM DIC regarding AR [Army Regulation] 380-10.[15] At no time during the interview did the DIS investigators inform the Complainant that he was suspected of espionage or making false statements. Because this was deemed a non-custodial interview, the DIS investigators did not advise the Complainant of his Constitutional rights in accordance with Miranda v Arizona. The Complainant, however, was provided a Privacy Act advisement and false statement advisement under 18 U.S.C 1001. The DIS investigator, during his deposition, characterized the DIS investigation as follows:

[redacted] DSS Originated Information

Further, the DIS investigator acknowledged that sometime in late January or early February 1997 there was an understanding between DIS and the FBI that after DIS conducted the interview of the Complainant and his polygraph examination that

[15] AR 380-10, "Technology Transfer, Disclosure of Information and Contacts with Foreign Representatives," December 30, 1994.

the FBI would assume jurisdiction over the case. The DIS investigator further testified that the FBI stated they were not going to take the case until after the Complainant had been afforded an opportunity for a polygraph examination. The DIS PSI report of investigation, consistent with standard procedure, did not contain any recommendations or opinions.

During the DIS interview of the Complainant, the DIS investigators believed the Complainant may have lied to them in some of his responses to their questions. DIS investigators further believed that, notwithstanding the Complainant's denials during the interview, there were continuing questions regarding his contacts with certain individuals. During the course of the DIS interview, the Complainant agreed to take a polygraph examination.

During his deposition, the Complainant, at great length, disputed many of the statements attributed to him by the DIS investigators within the DIS report of investigation. In response to questions about specific statements in the DIS interview summary, the Complainant characterized many of the statements as lies, incorrect statements, statements taken out of context, or statements that he never made. At one point, the Complainant stated "[m]uch of this report is made up." Also, with respect to the polygraph examination matter, the Complainant testified:

> They were pointing out these ridiculous things which were totally not true and at one point, they said to me well, would you take a polygraph? I said do I have a choice? And they said well, the best case is if you don't, you're going to lose your security clearance, we're going to go to jail, worst case basis. I said gee, I guess I really don't have much choice and I said that very sarcastically. They said okay, we're going to call, make an appointment for a polygraph.

The Polygraph

The FBI lead special agent was briefed on the Complainant's DIS interview on February 4, 1997. At this briefing, the lead special agent said he would request FBI headquarters to authorize a full FBI investigation based on the DIS findings.[16] The FBI lead special agent also stated that DIS should conduct the polygraph examination; however, a second DIS interview should be planned if the Complainant rescinds his consent to the polygraph examination.[17] Further, the FBI lead special agent requested that DIS hold in abeyance all other PSI leads pending the polygraph examination. On February 4, 1997, DIS headquarters was advised of the Complainant's interview and preparations began to obtain DIS headquarters approval of the polygraph examination.[18]

The polygraph examination request was approved the next day by the Director of the DoD Polygraph Institute on February 5, 1997. The bottom of the first page of the request form has the written annotation "Espionage/false stmt." The examination date was scheduled for February 13, 1997. The polygraph examiner

[16] The request to FBI headquarters is submitted on February 6, 1997.

[17] With respect to the Complainant's polygraph examination on February 13, 1997, the FBI lead special agent testified at his deposition that using a polygraph was not his idea; however, he had recommended to the DIS investigators that they conduct a polygraph examination.

[18] A "Request for Polygraph Examination," dated February 3, 1997, was submitted by one of the DIS investigators.

met with the DIS investigators the day before the examination and was given a complete set of all documents possessed to date by the DIS investigators. With respect to this meeting, one of the DIS investigators testified during his deposition that the DIS investigators did not direct the polygraph examiner to test the Complainant specifically on allegations of espionage or false swearing.[19] The polygraph examiner also testified at his deposition that he was advised by the DIS investigators that the FBI was going to conduct a criminal investigation on the Complainant at some point. The examiner, however, had no contact with the FBI before the polygraph examination. Additionally, the polygraph examiner testified at his deposition that he may have discussed the Complainant's case with a DIS CI specialist before conducting the polygraph examination; however, he did not discuss the case with the TACOM DIC, anyone from the 902nd MI Group, or AMC. Further, the polygraph examiner testified he did not review any information regarding any SAPs the Complainant may have been working on because the polygraph examiner was not authorized to have that information.[20]

The Complainant arrived at the Detroit DIS office at about 0830 on February 13, 1997 for the polygraph examination. In the DIS office before the examination, the Complainant signed two DIS forms: a "DIS Rights Warning/Waiver Certificate,"[21] and a "Polygraph Examination Statement of Consent."[22] On the "DIS Rights Warning/Waiver Certificate" (which the Complainant believed he signed first), the Complainant saw a statement on the form indicating the DIS investigator wanted to ask him questions about suspected/accused offenses of espionage and false swearing. During his deposition, the Complainant testified his reaction to the form was:

> . . . and I was extremely taken a back (sic) at this point. I'm like wait a second, I thought you said to me this is just to alleviate some security concerns, some derogatory information, of some sort, and it was going to be a simple type of polygraph. They said, oh, well, it is but we have to put something down for the polygraph, just some reasons. It doesn't mean that is what's going on here, we just want to alleviate some security concerns.

The Complainant further testified that:

> I think I had an out-of-body experience here and I'm like all of a sudden extremely nervous because nobody ever mentioned to me espionage and I don't know what the heck false swearing was.

The Complainant testified, at that point, he thought the DIS investigators would believe he was guilty if he stated he wasn't sure he wanted to do the polygraph. When asked during the deposition whether he understood his rights, the

[19] The polygraph examiner testified at his deposition that the espionage and false swearing allegations originated from DIS headquarters.

[20] The polygraph examiner first testified at his deposition that he became aware of the names of the SAP programs because he learned (after the examination) that the Complainant had told him the names during the polygraph examination. One of the DIS investigators testified in his deposition that the DIS polygraph examiner may, in fact, have had information from their Report of Investigation regarding the SAP programs that the Complainant was read on to prior to the polygraph examination.

[21] DIS Form 183.

[22] DIS Form 186

Complainant stated:

> When I read the rights I was in a daze. I don't know what I understood or didn't understand. All I know is that I felt that there's no way I can leave at this point.

The Complainant also testified:

> If someone had been honest with me up front and said we suspect you of being a spy or of false swearing, I would have turned around and left at that very moment, taken the chance I would have gotten arrested because at least then I would have had an opportunity to do something about it, but no one was up front with me at all. I was misled through this whole process, which is basically what it says in what I read to you about what [redacted] said because you're supposed to be let know beforehand with enough time as to what you're going to be polygraphed on.[23]

The Complainant signed the second form, "Polygraph Examination Statement of Consent," after making several pen and ink changes[24] to the document. Also, the Complainant had brought a tape recorder with him and asked the polygraph examiner if he could record the examination. The polygraph examiner answered that the Complainant would not be allowed to tape record the polygraph examination.

The polygraph examination lasted for about six and one half hours. It was conducted without anyone else present except the polygraph examiner and the Complainant. No other person monitored the examination and it was not recorded.

According to the Complainant's deposition testimony, during the questioning, the polygraph examiner had a document with secret cover sheets on it in front of him. As the Complainant would respond, the polygraph examiner would shake his head, look at the document and then tell the Complainant he wasn't being truthful. The Complainant further alleged that the examiner told him he was lying because he could see it by looking in the Complainant's eyes and that the examiner told him a story about another case he had worked and that the examiner told him, "I've done other Jews before and I've gotten them to confess too." The Complainant also alleged that the examiner raised his voice and was yelling at him "about being Jewish, religious aspect."[25]

Additionally, during his deposition, the Complainant provided the following testimony about questions he claimed the polygraph examiner had asked him about SAP programs:

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[23] Earlier during his deposition, the Complainant described an article he found written by an attorney named [redacted] that discusses polygraph examination procedures and tactics.

[24] On each form the Complainant underlines the word "administrative," in the phrase that states that anything he says or does during the polygraph examination can be used against him in any administrative, judicial or military proceedings. The Complainant writes in "(Security Clearance) defining administrative."

[25] The DIS polygraph examiner, in his deposition, denied referring to the Complainant as a Jew; accusing the Complainant of spying for Israel; yelling at the Complainant; telling the Complainant he could tell he was lying; or doing anything during the test phase that excited the Complainant.

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> And he brought up the SAP program that I had access to that I had been read off in November and I said oh, you're read on to the SAP programs too? He said yeah, you can talk to me about those, you can talk to me about anything. I said so you're cleared, okay, not that I remember anything about the SAP programs. I think I remembered one or two names, maybe three, and if I'm correct the names I think you asked are they classified, too, and I don't think they are because I've seen them in some of the documents you've given us in discovery.[26]

During a point in the polygraph examination, the examiner suggested that they take a break. At that time the Complainant spoke by telephone with a Rabbi in New York and was advised to get a lawyer and leave the examination. After the Complainant returned from the break, he terminated the polygraph examination and declined to execute a sworn statement.

The polygraph examiner concluded the Complainant was deceptive regarding the question of whether the Complainant had without authority disclosed classified information. The examiner also stated the Complainant admitted to the inadvertent disclosure of classified information.[27]

The polygraph examiner verbally conveyed his conclusions to the FBI lead special agent sometime shortly after the polygraph examination ended.[28] Also following the polygraph examination, the polygraph examiner talked to the DIS investigators and discussed the question of why the Complainant allegedly shared information with the Israelis. The polygraph examiner stated he didn't believe it was for money but rather that the Complainant believed the Army should share the information with Israel because of the Complainant's religious beliefs. Thereafter, one of the DIS investigators transcribed the polygraph examiner's handwritten notes of the examination to create the certified results of interview. After this document was created, the DIS polygraph examiner destroyed his notes.

During his deposition, the Complainant, disputed most of the statements attributed to him by the DIS polygraph examiner within the examiner's report of the polygraph examination. The Complainant cited numerous misstatements contained within the polygraph examiner's report that, in the Complainant's opinion, could only be explained as purposeful lying. Further, the Complainant testified that the polygraph examiner "called me a spy, he called me a liar." In particular, the Complainant described the events after he returned from the break as follows:

> And he was just horrendous and I remember going back up after the break to the room and he said so are you going to sign, are you going to write out your confession and I said no. I said I haven't changed my mind. He said who did you speak to, did you speak to anybody during the break. And I said I made a

[26] The DIS polygraph examiner testified in his deposition that the Complainant did not ask him if he was cleared for SAPs and that the Complainant may have assumed that the DIS polygraph examiner had proper SAP access.

[27] According to the polygraph examiner, the Complainant made one admission about unreported contacts with an Israeli official during the pretest part of the polygraph examination.

[28] The FBI lead special agent testified that the DIS polygrapher told him that the Complainant said he had inadvertently provided classified information from three Army SAPs to Israeli officials.

couple of telephone calls. He said I want to know who you spoke to, tell me who you spoke to, tell it to me now.

I said why do I have to tell you that. He said you tell me who you spoke to. I'm thinking I have to tell him who I spoke to or I'm not getting out of here. I told him I spoke to a Rabbi friend of mine in New York and he said what's his name, what's the Rabbi's name, and I'm like [redacted] He starts taking the notes really quickly.

He asked me also about being Jewish, the religious aspect. I don't remember the exact questions, maybe how you feel about Israel, as a Jew how do you feel about Israel. Also I found out later you're not allowed to ask those questions in a polygraph too.

The guy was downright—it was one of the most horrendous experiences of my life. I'm being accused of something I didn't do then reading about it afterwards that I said this. It doesn't even make sense, the final accusation that I read about in the search warrant, I admitted—this is their position, not me, I didn't admit to anything—it says I admitted to inadvertently passing on class [sic?] information over a ten year period. Basically, every program I ever worked on with every Israeli Liaison Officer, and then some I met over ten years. It makes no sense.

On February 14, 1997, the FBI lead special agent briefly interviewed the Complainant and was surprised by some of the Complainant's responses to questions as well as the Complainant's body language, gestures and facial expressions.[29] Based on these observations, the FBI lead special agent had some concerns about the information he had been given by the DIS polygraph examiner and reported to his superiors that he wanted to verify some information before executing a search warrant. For example, the FBI lead special agent was uncertain about exactly what the Complainant's classified access was. The FBI lead special agent wanted to have as many facts available so that the search warrant could be very specific.

On February 14, 1997, the FBI began a full criminal investigation of the Complainant, which included 24 hour surveillance of his home and his family and seizure of his work computer. On February 15, 1997, several FBI special agents, after obtaining a search warrant from a federal magistrate, searched the Complainant's home and seized various materials and documents.[30]

Administrative Actions

Shortly after the polygraph examination, the Complainant's access to classified information was suspended by TACOM, and he was placed on paid administrative leave. On February 21, 1997, the TACOM DIC sent a derogatory report to the

[29] At his deposition, the FBI lead special agent testified that the Complainant told him he had not done anything wrong. Asked whether he believed the Complainant, the FBI lead special agent testified: I'm going to be real blunt about this. No offense [the Complainant]. I believed him but I also believed that there was an intelligence operation at work here and I think he was an unwitting pawn in a far bigger, very wide ranging intelligence scheme.

[30] The affidavit for the search warrant, the search warrant and a return to warrant were not filed under seal. As a result, the espionage allegations against the Complainant quickly became public knowledge. The FBI lead special agent testified that this action was inadvertent and he took responsibility for it.

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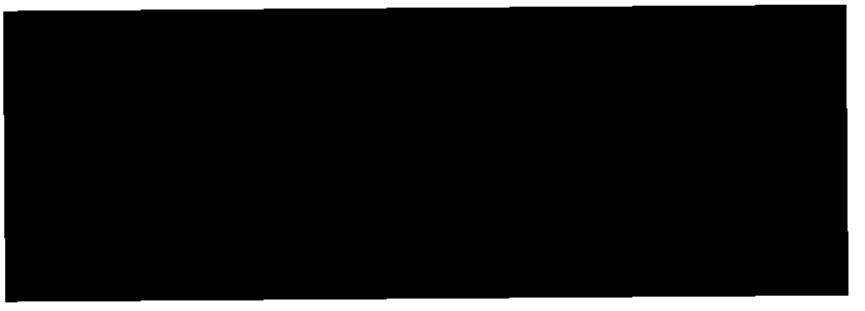
CCF to begin the security clearance revocation process. On March 3, 1997, the CCF agreed with the TACOM local decision to suspend the Complainant's access to classified information.

The FBI investigation was completed in late 1997 or early 1998. On February 3, 1998, the United States Attorney for the Eastern District of Michigan notified the FBI that:



EOUSA Originated Information

In May 1998, the Complainant returned to work at TACOM. On February 5, 1999, almost one year exactly from the closure of the FBI investigation, the CCF advised the Complainant of its intent to revoke his personnel security clearance. The Complainant responded on October 7, 1999. On February 4, 2000, the CCF revoked the Complainant's personnel security clearance.

On August 8, 2001, after a personal appearance by the Complainant, the Defense Officer of Hearings and Appeals recommended to the U.S. Army Personnel Security Appeals Board (PSAB) that the revocation action be sustained and stated:

> In light of all the circumstances presented by the record in this personal appearance case, it is not clearly consistent with the interests of national security to restore a security clearance for Appellant, or to permit him employment in sensitive duties. Accordingly, I recommend to the United States Army Personnel Security Appeals Board (PSAB) that the [CCF Letter of Denial] previously issued be sustained.

The PSAB reviewed the matter and reinstated the Complainant's eligibility for a personnel security clearance on April 10, 2003. The board's memorandum to the Complainant stated: "You are advised, however, to avoid the appearance or evidence of any behavior or activity described in paragraph 2-200, AR 380-67 since future problems will be difficult to mitigate."

DIS CI Country Profile of Israel

In October 1995, DIS developed and published a CI open source country profile on Israel. The open source country profile, which described Israel as a non-traditional adversary in the world of espionage, was circulated by DIS with a memorandum noting similar intelligence threats from other close U.S. allies. The open source country profile stated:

> The strong ethnic ties to Israel present in the United States coupled with aggressive and extremely competent intelligence personnel has resulted in a very productive collection effort. Published reports have identified the collection of

> scientific intelligence in the United States and other developed countries as the third highest priority of Israeli Intelligence after information on its Arab neighbors and information on secret U.S. policies or decisions relating to Israel.

However, in a January 29, 1996 letter to the National Director of the Anti-Defamation League of B'nai B'rith regarding concerns over the country profile, the then Assistant Secretary of Defense for Command, Control, Communications and Intelligence, on behalf of the Deputy Secretary of Defense, denounced the open source CI country profile. The letter stated:

> Dr. John P. White, Deputy Secretary of Defense, asked that I respond to your concerns regarding the preparation and distribution of a memorandum on DoD letterhead referencing purported intelligence activities by the government of Israel. I want to stress that the content of this document does not reflect the official position of the DoD. While we object to the document in general, singling out ethnicity as a matter of counterintelligence vulnerability is particularly repugnant to the Department.

Observation A: TACOM Submission and DIS Acceptance of the Complainant's Personnel Security Clearance Upgrade

TACOM should not have submitted and DIS should not have accepted the request to upgrade the Complainant's personnel security clearance because:

- TACOM and DIS leadership were aware of possibly credible derogatory information that, if validated, would disqualify the Complainant from obtaining a personnel security clearance upgrade.
- TACOM and DIS were both aware that the FBI had an ongoing CI preliminary inquiry that would, if validated, disqualify the Complainant from obtaining a personnel security clearance upgrade.

Nevertheless, DIS accepted the request to do a PSI and in coordination with the 902nd MI Group and the FBI treated the case as a potential CI matter.

Standards

DoD Regulation 5200.2, "Personnel Security Program," January 1995

This regulation applies to DoD civilian, military and contractor personnel and contains the policies and procedures governing the issuance, denial and revocation of DoD security clearances for access to classified information. It also prescribes the investigative scope as well as the adjudicative standards and criteria which are necessary for access determination or employment. The regulation indicates that the DIS provides a single, centrally directed personnel security investigative service to conduct PSIs with the 50 states. It establishes the policy and procedures to ensure that acceptance and retention of personnel with access to classified information is clearly consistent with the interests of national security. Specifically:

- Paragraph C2.1.2., Clearance and Sensitive Position Standard. The personnel security standard that must be applied to determine whether a person is eligible for access to classified information or assignment to sensitive duties is whether, based on all available information, the person's loyalty, reliability, and trustworthiness are such that entrusting the person with classified information or assigning the person to sensitive duties is clearly consistent with the interests of national security.

- Paragraph C3.7.1., General. DoD policy prohibits unauthorized and unnecessary investigations.

- Paragraph C3.7.2., Allegations Related to Disqualification. Whenever questionable behavior patterns develop, derogatory information is discovered, or inconsistencies arise related to the disqualification criteria outlined in paragraph C2.2.1. that could have an adverse impact on an individual's security status, a Special Investigative Inquiry, psychiatric, drug or alcohol evaluation, as appropriate, may be requested to resolve all relevant issues in doubt. If it is essential that additional relevant personal data is required from the investigative subject, and the subject fails to furnish the required data, the subject's existing security clearance or assignment to sensitive duties shall be terminated in accordance with paragraph C8.2.2. of this Regulation.

- Paragraph C5.1.3., Criteria for Requesting Investigations. Authorized requesters shall use the tables set forth in Appendix 3 of the regulation to determine the type of investigation that shall be requested to meet the investigative requirement of the specific position or duty concerned.

- Appendix AP9.10., Referral. A case may require premature closing at any time after receipt of the DD Form 1879 by the investigative Component if the information accompanying the request, or that which is later developed, is outside DIS jurisdiction. For example, alleged violations of law, a CI matter, or actual coercion/influence in a hostage situation must be referred to the appropriate Agency, and DIS involvement terminated. The requester will be informed by letter or endorsement to the DD Form 1879 of the information developed that, due to jurisdictional consideration, the case was referred to (fill in appropriate address) and that the DIS case is closed. The Agency to which referral was made and Personnel Investigations Center will be furnished with the results of all investigations conducted under DIS auspices. DIS, however, has an interest in the referral Agency's actions, but no information should be solicited from that Agency.

Defense Investigative Service "Manual for Personnel Security Investigations," January 1993

This manual provides staff direction, operational and investigative policy, and procedural guidance used by the DIS in the conduct of personnel security investigations, specifically:

- Paragraph 2-1. If DIS determines that the investigative responsibility is that of another agency, or if adverse security information develops during a PSI involving espionage, sabotage, treason, sedition, or serious current suitability information of a criminal nature, the matter will immediately be referred to the appropriate investigative agency.

- Paragraph 5-4e. In some cases, the agent may have unfavorable information about the Subject before the interview begins. In order for Subject to intelligently respond to questions on such matters, Subject must be informed of the allegations against him/her in the most specific terms possible.

- Paragraph 5-6d. It is DIS policy that all Subjects who are interviewed for the purpose of resolving unfavorable information and who provide substantive potentially disqualifying information or contradict information of record be asked to furnish a signed, sworn statement.

Army Regulation 380-67, "Personnel Security Program," September 9, 1988

This regulation implements the DoD and Department of the Army Personnel Security program and takes precedence over all other Army issuances affecting these programs. It contains the policies and procedures for access to classified information and assignment in a sensitive position. The regulation also prescribes the investigative scope and adjudicative standards and criteria that are necessary prerequisites for such access or employment. It also includes due process procedures for appealing adverse administrative actions.

Army Regulation 381-20, "The Army Counterintelligence Program," December 15, 1993

This regulation establishes authority and responsibility for the Army CI Program, and includes guidance on the conduct of and jurisdiction over CI investigations, operations, collection, analysis, and production. Specifically, paragraph 4-5d states that when Army interests are involved, but subject jurisdiction rests with another agency [in this case the FBI], Army CI may request a joint investigation. Otherwise, activity will normally consist of liaison with the primary agency, providing assistance as required and authorized.

The 1979 FBI/DoD Memorandum of Understanding: Agreement Governing the Conduct of Defense Department Counterintelligence Activities in Conjunction with the FBI and the 1996 Supplement

The 1979 FBI/DoD Memorandum of Understanding (MOU): "Agreement Governing the Conduct of Defense Department Counterintelligence Activities in Conjunction with the FBI," and the1996 supplement to the Memorandum of Understanding: "Coordination of Counterintelligence Matters Between FBI & DoD," states that the FBI maintains exclusive investigative jurisdiction over federal civilian employees in CI matters. The only exceptions to this rule are that the Army and any other DoD agency, unless such agency is prohibited by a DoD regulation, may conduct a CI investigation into a civilian if the FBI: (1) waives its investigative jurisdiction, or (2) officially authorizes assistance in an FBI CI investigation. Additionally, the FBI generally has no investigative interest in screening or suitability matters, or typical violations of security procedures or regulations.

Background

From at least July 1992 to February 1997, the Complainant was scrutinized by CI representatives. The scrutiny began on July 22, 1992, with a SAEDA report from the 902nd MI Group, based on information from a co-worker of the Complainant's. The scrutiny continued with more SAEDA reporting, two FBI preliminary inquiries, and a DIS Subject interview and polygraph, all of which preceded a FBI criminal investigation.

Personnel Security Investigation. A PSI is any investigation required for the purpose of determining the eligibility of DoD military and civilian personnel, contractor employees, consultants, and other persons affiliated with DoD, for access to classified information, acceptance or retention in the Armed Forces, assignment or retention in sensitive duties, or other designated duties requiring such investigation. PSIs include investigations of affiliations with subversive organizations or suitability information conducted for the purpose of making personnel security determinations. The PSI begins with a personnel security questionnaire, completed by the individual seeking a personnel security clearance, an update, or upgrade to an existing clearance. The questionnaire provides the names of agencies that possess records for the Subject of the PSI and the names of persons who are knowledgeable about the Subject's employment, credit, and personal life. The investigation culminates in the Subject interview, where information is obtained that only the Subject can provide. The Subject interview affords the Subject an opportunity to explain, clarify, refute, or otherwise provide information pertinent to the PSI.

Counterintelligence Investigation. CI investigations are conducted to prove or disprove an allegation of espionage or other intelligence activities, such as sabotage, assassination, or other national security crimes conducted by or on behalf of a foreign government, organization or person, or international terrorists. CI investigations may establish the elements of proof for prosecution or administrative actions, provide a basis for CI operations, or validate the suitability of personnel for access to classified information. CI investigations are conducted against individuals or groups for committing major security violations, as well as failure to follow DoD directives governing reporting contacts with foreign citizens and out-of-channel requests for defense information. CI investigations provide military commanders and policymakers with information used to eliminate security vulnerabilities and otherwise improve the security posture of threatened interests.

Inappropriate Personnel Security Clearance Upgrade Request

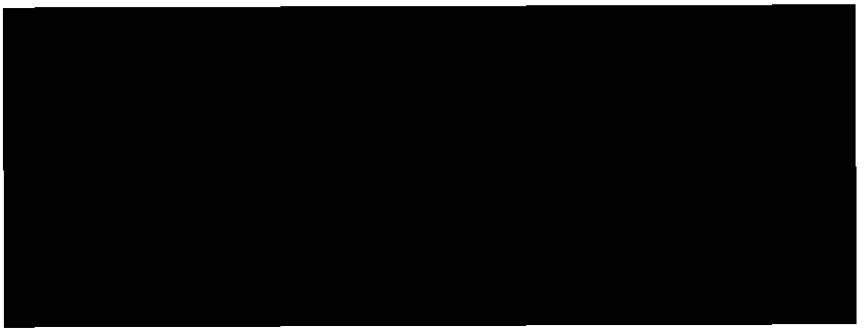
TACOM should not have submitted the request to upgrade the Complainant's personnel security clearance. The Complainant's supervisor was well aware of security concerns regarding the Complainant and a completed FBI preliminary inquiry; yet submitted the Complainant for a personnel security clearance upgrade. On October 21, 1996, the TACOM leadership, including the Complainant's first-level supervisor, was briefed by the TACOM DIC and members of the 902nd MI Group concerning an on-going security concerns that focused on espionage "indicators," derogatory information, questionable activities, contact with officials of the Israeli government, and future courses of action with regard to the Complainant.

DoD Regulation 5200.2, "Personnel Security Program," January 1987, paragraphs C2.1.2., C3.7.1., C3.7.2., and C5.1.3. as outlined above, provide the reasons this personnel security clearance upgrade request should not have been referred to DIS. TACOM leadership was aware through a briefing with the TACOM DIC and members of the 902nd MI Group that the Complainant may fail to meet the standards and thus not qualify for an upgrade to his personnel security clearance in the interests of national security.

When doubts arise, there are other venues to resolve them, not to upgrade the personnel security clearance and hope that the Complainant can "clear himself" in the process. None of the tables in Appendix 3, DoD Regulation 5200.2, describe "clearing one's name" as an appropriate reason to conduct an investigation to upgrade one's personnel security clearance.

DIS Acceptance of Personnel Security Clearance Upgrade Request

DIS should not have accepted the request to upgrade the Complainant's personnel security clearance. Based on our review of documentation, the FBI never relinquished its investigative jurisdiction over the Complainant; however, they encouraged the continuation of the PSI. Also, the 902nd MI Group did not open a formal investigation of the Complainant. In a February 19, 1997 memorandum, the DIS Director states:



DSS Originated Information

In this case the FBI was already conducting its second preliminary inquiry of the Complainant, and there was no evidence that the FBI relinquished investigative authority to the DIS: If CI or espionage suspicions exist, then DIS loses jurisdiction and the case is referred elsewhere. DIS should not have expanded the CI investigation with an alleged "routine" PSI to investigate/resolve the CI issues.

DIS was aware of possible derogatory information that would, if validated, disqualify the Complainant for a personnel security clearance upgrade. The supervisor of the DIS investigators who conducted the Subject interview of the Complainant made them aware of the existence of adverse information concerning the Complainant, that the information was of a classified nature, and that the single scope background investigation would logically have to delve into that information in order to bring that particular issue to resolution. He learned of this information from the TACOM DIC, and the information was known prior to the formal request for the Complainant's personnel security clearance upgrade.

DSS Originated Information

Per DoD and Army issuances[32] and the 1979 FBI/DoD MOU on coordinating CI matters, the FBI maintains exclusive investigative jurisdiction over federal civilian employees in CI matters, with few exceptions. The only exceptions to this rule are that the Army and any other DoD agency, unless such agency is prohibited by a DoD regulation, may conduct a CI investigation of a civilian if the FBI: (1) waives its investigative jurisdiction, or (2) officially authorizes assistance in an FBI CI investigation. Under the terms of the MOU, the DIS, under the attendant circumstances, was prohibited from investigating [the Complainant]. The FBI had already established its investigative jurisdiction and was in the process of conducting its second preliminary inquiry of the Complainant prior to any DIS involvement.

During a January 17, 1997 meeting of the FBI, DIS, and the 902nd MI Group, the FBI recommended that DIS conduct a Subject interview of the Complainant as soon as possible. DIS investigators state that the FBI was hoping that the interview would be conducted in such a way that the Complainant would volunteer for a polygraph. The FBI also recommended that polygraph support be immediately available upon termination of the Subject interview, provided that the Complainant agreed to undergo a polygraph examination.[33]

DIS accepted the request to do a PSI and, in coordination with the 902nd MI Group and the FBI, treated the case as a CI matter, as requested. DIS has responsibility for PSIs, not CI/espionage investigations; therefore, DIS should not have agreed to perform the subsequent polygraph as a potential CI matter. Any CI matter should have been resolved prior to DIS commencing a PSI.

Conclusion

TACOM was aware of possible derogatory information, on-going security concerns, and that the FBI had completed CI preliminary inquiry. This information should have resulted in the termination of the personnel security clearance upgrade for the Complainant until those issues had been resolved. Additionally, DIS should not have accepted the request from TACOM because they knew or should have known of the CI issues and the FBI's involvement prior to the submission of the request. Finally because CI and espionage suspicions existed and the FBI was already conducting a preliminary inquiry, DIS had no jurisdiction in the case. DIS should not have expanded the PSI to an investigation to resolve the CI issues.

[32] Army Regulation 380-67, "Personnel Security Program," September 9, 1988, paragraph 2-401 b and c; Army Regulation 381-20, "The Army Counterintelligence Program, " December 15, 1993, paragraph 4-5 (d); and DoD Regulation 5200.2, paragraph C2.4.2.2 and C2.4.2.3 [2-401 b and c].

[33] DoD regulations generally prohibit the immediate polygraph of a Subject upon termination of the Subject interview. There are exceptions, but generally they involve short, non-confrontational, Subject interviews. Additionally, all Subjects should be given a reasonable period of time to seek legal counsel after agreeing to undergo a polygraph.

Observation B: The Role of Religion in the Case Decision-making

The Complainant's religion and ethnicity was a factor or indicator in the decision to continue the inappropriate PSI (see Observation A), which in turn led to the other actions described in Observations C and D. TACOM managers and supervisors reached agreement to Subject the Complainant to an espionage investigation under the guise of a PSI for a personnel security clearance upgrade. The DIS polygraph in support of the PSI may have included prohibited questions.

Complainant's religion is Orthodox Judaism.[34] Adherents of Orthodox Judaism, among other things, strictly follow traditional Jewish beliefs and practices, including daily worship; dietary laws; traditional prayers and ceremonies; observance of the Jewish calendar, the Sabbath, and holidays; and wearing of ritual clothing. Throughout his tenure at TACOM, the Complainant's religious convictions were well known by his supervisors and co-workers. The Complainant often spoke Hebrew; would not eat in non-Kosher restaurants; wore a kippah/yarmulke; and was devout in his faith in every respect. TACOM management provided reasonable accommodation for the Complainant's religion by adjusting his work schedule to allow him to leave work early on Fridays, in preparation for celebrating the Sabbath.[35] Based on the record, it appears that it was well known within TACOM that the Complainant was a practicing Orthodox Jew.

His job involved working with foreign liaisons from a number of countries including Israel. Because of the Complainant's knowledge of Hebrew, he became his office's logical choice for projects involving Israel and would often interact with Israeli Liaison Officers. Also, from September 1993 to January 1994, the Complainant attended the Kollel Institute of Greater Detroit. This was a fully-funded opportunity for the Complainant to prepare for a developmental assignment with the Israeli government.

In the October 21, 1996 meeting, the TACOM DIC, the 902nd MI Group and TACOM's leadership, including the Complainant's supervisor, discussed various indicators that the Complainant might be engaging in espionage. The meeting occurred because of unsolicited classified information that was communicated to TACOM from the 902nd MI Group. Primarily the indicators were:

- five classified SAEDA reports that had been filed with the 902nd MI Group against the Complainant;

[34] Also described as "Observant" or "Traditional" Judaism.

[35] In this regard, one of Complainant's former supervisors (until 1994) had testified during his deposition that some of Complainant's co-workers had questioned the reasons for his early departure on Fridays. The former supervisor believed the co-workers were generally unfamiliar with the Orthodox Judaism requirements and therefore he discussed the matter with them.

- The Complainant's frequent travel to Israel (during which he allegedly attempted to avoid U.S. Government personnel and have unmonitored conversations with Israeli officials);

- The Complainant's repeatedly expressed desire to collaborate with the Israeli Government;

- The Complainant's frequent interactions with Israeli officials, which were considered by some beyond his duties.

- The Complainant had access to three SAPs and was over 7 months late in submitting the reinvestigation forms for his secret periodic reinvestigation update.

We believe that for most, if not all, TACOM leadership, this meeting was the first they had been told of the security concerns raised by the Complainants actions. Two of the SAEDA reports had been reviewed by the FBI and 902nd MI Group in 1994 and found the allegations were greatly softened or recanted. This information was not on the briefing slides and we do not know if that information was discussed during the meeting. However, that information was in the October 11, 1996 letter provided by the 902nd MI Group to the TACOM DIC. Although there was "no smoking gun" as stated by the 902nd MI Group, the concerns were raised and it would have been inappropriate for the command not to do a proper inquiry into the concerns.

Included in the October 21, 1996 briefing was a footnote of the fact that "Host nation [Israel] is known to try to exploit nationalistic and religious tendencies." This is consistent with an October 1995 DIS developed and published CI open source country profile on Israel. The open source country profile, which described Israel as a non-traditional adversary in the world of espionage, was circulated by DIS with a memorandum noting similar intelligence threats from other close U.S. allies. The open source country profile stated:

> The strong ethnic ties to Israel present in the United States coupled with aggressive and extremely competent intelligence personnel has resulted in a very productive collection effort. Published reports have identified the collection of scientific intelligence in the United States and other developed countries as the third highest priority of Israeli Intelligence after information on its Arab neighbors and information on secret U.S. policies or decisions relating to Israel.

However, in a January 29, 1996, letter to the National Director of the Anti-Defamation League of B'nai B'rith regarding concerns over the country profile, the then Assistant Secretary of Defense for Command, Control, Communications and Intelligence, on behalf of the Deputy Secretary of Defense, disavowed the open source CI country profile. The letter stated:

> ... I want to stress that the content of this document does not reflect the official position of the DoD. While we object to the document in general, singling out ethnicity as a matter of counterintelligence vulnerability is particularly repugnant to the Department.

The October meeting was a key decision point in this case. It is this meeting where the decision was made to continue with the personnel security investigation upgrade as a pretext for a CI investigation. However, the only documentation of this meeting is the briefing slides. We have no record of the discussion during the meeting.

The TACOM DIC in his testimony to IG staff in July 2007 stated when questioned about the footnote in the briefing:

> I was talking about how not – how the Israeli government exploits for their purposes, not necessarily automatically that an individual with that nationality or cultural background would be doing it on his own.

Those interviewed or deposed in the various investigations and civil litigation have indicated that religion played a roll in the decision regarding the Complainant. Whether it was the Complainant's personal practice of his faith or the intelligence community assessment that Israel might attempt to exploit any practitioner of that faith in furtherance of its intelligence collections efforts is impossible to dissect twelve years after the initial actions. Furthermore, the records make no distinctions between purely religions beliefs and practices or a general affinity for the State of Israel. It does appear to be clear, however, that had the Complainant not been a practitioner of Orthodox Judaism, he would not have been subject to such intense and protracted scrutiny.

Conclusion

The decision to continue with the personnel security investigation at the October 21, 1996 meeting set a chain of events in motion that would have an adverse impact on any DoD employee. We believe that in this case the Complainant's religion and ethnicity was a factor in that decision. As stated in the response to the 1995 DIS CI Country Profile, the Assistant Secretary of Defense for Command, Control, Communications and Intelligence stated (in January 1996) that singling out ethnicity as a matter of counterintelligence vulnerability is particularly repugnant to the Department. But for the Complainant's religion, the investigations would likely have taken a different course. Therefore, we believe he was subjected to closer and more protracted scrutiny because of his religion and ethnicity. This unusual and unwelcome scrutiny because of his faith and ethnic background would undoubtedly fit a definition of discrimination, whether actionable or not.

Observation C: Review of the Polygraph

The polygraph was generally performed in accordance with applicable guidance. Specifically, the pre-test, in-test, and post-test phases were conducted, as required. However, the Complainant was told that the polygraph was being performed as part of a PSI and not a CI investigation. This was not inappropriate. In addition, the alleged use of prohibited questions and probing regarding religious belief and affiliations, if true may have violated DoD policy.

Standards

DoD Directive 5210-48, "Department of Defense Polygraph Program," December 24, 1984

Governs the use of the polygraph within the Department of Defense, including the selection, training, and supervision of polygraph examiners; the procurement and testing of equipment; and the reporting of data related to polygraph activities. It is DoD policy to administer polygraph examinations only as authorized, and in the manner prescribed by this Directive and DoD Regulation 5210.48, "Department of Defense Polygraph Program," January 1985. DoD Components shall ensure that, in implementing this Directive and DoD Regulation 5210.48, adequate safeguards are provided for the protection of the rights and privacy of individuals considered for or subjected to polygraph examination.

Paragraph 4.4, states that no relevant question may be asked during the polygraph examination that has not been reviewed with the examinee before the examination. Moreover, all questions asked concerning the matter at issue, other than technical questions necessary to the polygraph technique, must have a special relevance to the subject of the inquiry. The probing of a person's thoughts or beliefs and questions about conduct that has no security implication or is not directly relevant to an investigation are prohibited (such as religious belief and affiliations, beliefs and opinions regarding racial matters, and political beliefs and affiliations of a lawful nature).

DoD Regulation 5210.48, "Department of Defense Polygraph Program," January 1985

Provides guidance and establishes controls governing the use of the polygraph to ensure an equitable balance between the need of the Government to secure and verify investigative information and the recognition and preservation of the rights of the individual. It specifies the circumstances under which the polygraph may or shall be used, prescribes procedures for conducting polygraph examinations and, establishes standards for the selection, training and supervision of DoD polygraph examiners.

Defense Investigative Service Manual 20-1, "Personnel Security Investigations," January 1993

Chapter 9 of the DIS PSI Manual outlines the authority, responsibilities, and instruction for use of the polygraph within DIS.

Background

Based on the February 3, 1997 Subject interview, the DIS investigators asked the Complainant if he would consent to a polygraph to clear up some apparent inconsistencies. However, the Complainant stated in his depositions that when he arrived for the polygraph he was confused about the purpose of the examination and felt he had no choice but to submit to the polygraph. Nevertheless, he signed the consent form and the rights waiver after making pen and ink changes.

The Polygraph as an Investigative Tool

The polygraph includes three phases:

- [redacted]
- [redacted]
- [redacted]

The polygraph as an investigative tool is appropriate for the DIS in its conduct of PSIs.

[redacted]

b(7)(E)

Conduct of Complainant Polygraph

[redacted]

Certified Results of Interview

The polygrapher asserted in the Certified Results of Interview that the Complainant "made admissions regarding the unauthorized disclosure of classified defense information."

It should be noted that the Complainant denies any admission of passing classified information. Because the hand scribed notes used by the polygrapher in preparation of the Certified Results of Interview no longer exist, corroboration of either the Complainant's assertions or the polygrapher's assertions is not possible.

However, based on an FBI teletype of the polygrapher's results, the polygrapher's alleged belief of the motivation for the alleged unauthorized disclosure of classified defense information to the Israelis was:

[redacted] FBI Originated Information

[redacted]

The teletype further stated that the Complainant's priorities in his life are:

[redacted]

These statements might lead one to conclude that questions concerning religion were asked. It should be noted that the polygrapher's Certified Results of Interview did not discuss the Complainant's religious beliefs and priorities.

Misrepresentation of the Purpose of the Polygraph

The Complainant was led to believe that the polygraph was being given as part of the PSI for the upgrade to his personnel security clearance. Use of the polygraph to clarify issues found during a PSI is appropriate. However, as stated in Observation A, the DIS, in coordination with the 902nd MI Group and the FBI, treated the case as a potential CI matter.

Even when the Complainant signed and initialed the "DIS Rights Warning/Waiver Certificate" and the "Polygraph Examination Statement of Consent," just prior to being administered the polygraph examination, the Complainant was still of the belief that the purpose of the polygraph was to clear up "security concerns"[39] as part of the PSI to upgrade his personnel security clearance. On each form he underlines the word "administrative," in the phrase that states that anything he says or does during the polygraph examination can be used against him in any administrative, judicial or military proceedings. The Complainant writes in "(Security Clearance) defining administrative."

Prohibited Questions

We found no evidence that the Complainant's religion was pertinent or necessary to the polygraph examination, nor was the Complainant's religion of special relevance to his suitability for a personnel security clearance upgrade.

To address the prohibited question issue, and out of an abundance of caution regarding the polygraph administered to the Complainant, we referred an Interrogatory to the former DoD Polygraph Institute, now renamed the Defense Agency for Credibility Assessment (DACA).[40] In response to this Interrogatory, DACA states:

[39] The Complainant states that he was told by the DIS investigators that administrative proceedings were in the context of his clearance. We can't corroborate whether this occurred or not because the DIS investigators who conducted the Subject interview did not execute a sworn statement, even though the circumstances as outlined in the DIS PSI manual require them to do so.

[40] The mission of DACA is to: Qualify DoD personnel for careers as psycho-physiological detection of deception examiners; provide continuous research in psycho-physiological detection and credibility assessment methods; manage the psycho-physiological detection continuing education certification program for federal agencies; and manage the Quality Assurance Program that develops, implements, and provides oversight of psycho-physiological detection standards for the federal polygraph programs.

b(6)

> DACA curriculum, DoD and federal polygraph procedure require that religion not be addressed by the examiner unless religion has a direct bearing on the investigation. Additionally, religion may be addressed by federal agencies if the examinee introduces the subject as an element of the investigation. In contemporary investigations involving the Global War on Terrorism, religion often becomes a key element in those investigations. To be able to conduct these investigations, federal investigators must be able to inquire into the role religion may have had in the commission of an offense.

Questions regarding religious belief and affiliations are allowable in certain circumstances for a CI investigation, but not for a PSI. Determining whether the Complainant's investigation was a PSI or CI[41] is critical because each applies different rules.

Examination of polygraph standards within the context of a PSI:

- DIS Manual 20-1, Chapter 7, paragraph 7-5(k) - "Prohibited Questioning," states:

> The following areas shall not normally be inquired into: religious beliefs and affiliations, beliefs and opinions of racial matters, political beliefs or affiliations of a nonsubversive nature, opinion on the constitutionality or wisdom of legislative policies, and affiliation with unions or subversive organizations.

The use of the words "shall not" makes the bar on inquiring into religious belief and affiliations absolute. If the rule were permissive, the authority would have written "may not." This interpretation is reinforced by the words "Prohibited Questioning" in the title of the paragraph. However, we are left with either the awkward, or sloppy, use of the word normally[42] in the citation.

- Working within the context of a PSI, we see that interviews of any type, including a polygraph interview, cannot include inquiries into religious belief and affiliations. DoD Regulation 5210.48, paragraph C2.1.3.1., states:

> All questions asked concerning the matter at issue, except for technical questions necessary to the polygraph technique during a polygraph examination, must be of a special relevance to the subject matter of the particular investigation. Questions probing a person's thoughts or beliefs that are not related directly to the investigation are prohibited. Subject matters that should not be probed include religious and racial beliefs

[41] Each investigation is explained Observation A.

[42] "Normally" does not define an exception allowing for selective asking of questions regarding an individual's religious beliefs and affiliations. Normally is defined as "a rule; regularly; according to rule, general custom" in Black's Law Dictionary (5th ed. 1951) at 1208. So the word "normally" refers to the rule of higher authority governing personnel security investigations, rules that are established by the DIS administrative chain of authority. If that authority had established an exception, then inquiries into religious beliefs and affiliations would have been permitted.

> and affiliations, political beliefs and affiliations of a lawful nature, and opinions regarding the constitutionality of legislative policies.

In examining both the PSI polygraph and the FBI teletype report describing that polygraph, the questions must be asked whether the:

- references to religion in the polygraph of the Complainant were technical [and] necessary to the polygraph technique
- references to religion in the polygraph of the Complainant were of special relevance to his suitability for an increase in security clearance and directly related to determining that suitability

As stated above, in the February 18, 1997 teletype, the lead FBI investigator states that the polygrapher said of the Complainant:

For the polygrapher to convey such opinions to the FBI lead special agent, following the polygraph, suggests that religious belief and priorities may have been discussed during the polygraph examination process. During his deposition, the DIS polygrapher stated:

> Question: This was the first and only polygraph examination where you actually discussed and made comments about a person's Jewish background; is that a fair statement? Answer: It's probably a fair statement. We talked about it, yeah."

However, "talking about it" or an opinion does not necessarily mean that inappropriate questioning was done.

Conclusion

Generally the polygraph procedures were followed by DIS, as attested to by the DACA. However, the DIS should not have administered a CI polygraph, nor given the Complainant the impression that he was being polygraphed as part of a PSI. Also, although DIS policy was not to record polygraphs, the lack of an observer or other verification of the examination, including a sworn statement resulted in a "he said/he said" situation. However, we note that U.S. Army PSAB ultimately increased the level of the Complainant's personnel security clearance (Observation D). Such action suggests that the Complainant did not improperly disclose classified material.

Observation D: Review of the Adjudication Process for Clearances

Based on a review of available documentation, the U.S. Army Central Personnel Security Clearance Facility (CCF)[43] followed the proper adjudication process regarding the Complainant. However, TACOM did not adhere to Army guidance requiring timely notification to the CCF on possible credible derogatory information. Following the FBI investigation, the Complainant's personnel security clearance was revoked and later reinstated through the appeal process.

Standards

Executive Order No. 12968, "Access to Classified Information," August 2, 1995

This executive order establishes standards and procedures to govern access to classified information that would be binding on all departments, agencies, and offices of the Executive Branch. The law requires uniform minimum standards to ensure that employees in the Executive Branch whose access to classified information was threatened with denial or termination be advised and given an adequate opportunity to respond to any adverse information before a final agency decision. Conference Committee Report language accompanying the legislation indicated that its purpose was to provide a procedure that would not base security determinations on inaccurate or unreliable information because of the effect on the careers and livelihoods of the individuals concerned and of the possibility of depriving the Government of the services of valuable employees.

DoD Regulation 5200.2, "Personnel Security Program," January 1987

This regulation applies to DoD civilian, military and contractor personnel and contains the policies and procedures governing the issuance, denial, and revocation of DoD personnel security clearances for access to classified information. It also prescribes the investigative scope as well as the adjudicative standards and criteria which are necessary for access determination or employment

Army Regulation 380-67, "Personnel Security Program," September 9, 1988

This regulation implements the DoD and Department of the Army Personnel Security program and takes precedence over all other departmental issuances affecting these programs. It contains the policies and procedures for access to classified information and assignment in a sensitive position. It also prescribes

[43]The U.S. Army Central Personnel Security Clearance Facility, located at Fort Meade, Maryland, is one of eight such commands within the DoD tasked with adjudicating DoD employee's personnel security clearances. Each case is to be judged on its own merits. The final determination as to whether a personnel security clearance should be granted or denied is the responsibility of the specific DoD agency requesting the clearance.

the investigative scope and adjudicative standards and criteria that are necessary prerequisites for such access or employment.

It also includes due process procedures for appealing adverse administrative actions. Paragraph 8-101b(1), states that when the commander learns of credible derogatory information on a member of his or her command, the commander will immediately notify CCF.

Adjudication Process

The DoD established the personnel security program to ensure that granting Federal employees, military personnel, contractor employees, and other affiliated persons access to classified information is clearly consistent with the interests of national security. The DoD has a multi-step process to grant or revoke security clearances. Specifically, the personnel security clearance process includes a personnel security clearance request, an investigation, adjudication, appeals, and periodic reinvestigations.

Notification to the U.S. Army Central Personnel Clearance Facility

On February 21, 1997, based on the results of the February 13, 1997 polygraph, TACOM officials forwarded DA Form 5248-R, "Report of Unfavorable Information for Security Determination," to CCF to begin the revocation process of the Complainant's personnel security clearance.

On March 3, 1997, the CCF agreed with the TACOM local decision to suspend the Complainant's access to classified information pending investigative results. By September 1997, the FBI criminal investigation was closed due to lack of evidence.

TACOM officials did not adhere to Army guidance requiring timely notification of credible derogatory information. Prior to the February 1997 notification to the CCF, TACOM officials were cognizant of SAEDA reporting concerning the Complainant, beginning in 1992; and that a FBI preliminary inquiry in 1996 had been open and closed.

Chronology of Complainant's Adjudication and Appeals

Based on a review of available documentation, the CCF followed the proper adjudication process regarding the Complainant. Specifically, the CCF followed all the procedures required before a security clearance can be denied or revoked, to include the following:

- a written statement of reasons detailing why access authorization may be denied or revoked;
- an opportunity to reply to the statement of reasons in writing;

- an opportunity to appear personally and present evidence;
- the right to be represented by counsel; and
- a written notice of the final decision.

On February 5, 1999, the CCF issued a Letter of Intent to Deny Security Clearance, detailing security concerns and allegations. The CCF made a preliminary decision to revoke the Complainant's personnel security clearance. The Complainant answered the Letter of Intent to Deny Security Clearance on October 7, 1999. On February 4, 2000, because of adverse information regarding security concerns about the Complainant's trustworthiness, reliability or judgment, CCF revoked his personnel security clearance, issued the Complainant a Letter of Denial, and offered him an opportunity to appeal directly to the U.S. Army PSAB or to request a personal appearance before an Administrative Judge from the Defense Office of Hearings and Appeals (DOHA).

On August 8, 2001, based on a personal appearance by the Complainant, the DOHA Administrative Judge stated:

> In light of the circumstances presented by the record in this personal appearance case, it is not clearly consistent with the interests of national security to restore a security clearance for [the Complainant], or to permit him employment in sensitive duties. Accordingly, I recommend to the United States Army Personnel Security Appeals Board that the Letter of Denial previously issued be sustained.

But on April 10, 2003, based on the facts as they stood in the Complainant's dossier, the U.S. Army Personnel Security Appeals Board reinstated the Complainant's eligibility for a personnel security clearance.

Conclusion

The CCF followed the proper adjudication process regarding the Complainant. We did note that TACOM did not adhere to Army guidance requiring timely notification to CCF on credible derogatory information. In the end the Complainant had his personnel security clearance reinstated following the appropriate process.

Appendix A. Scope and Methodology

We reviewed the issues in Senator Levin's request concerning the Complainant's case. Specifically, we reviewed Executive orders, statutes, interagency agreements, and DoD policies and procedures governing CI and personnel security investigations, as well as EEO guidelines.

We reviewed 27 depositions ranging from August 1999 to October 2001, of officials associated with the case, as well as the Complainant and his wife, who were all deposed by Complainant's counsel. We conducted six sworn interviews and forwarded 18 administrative interrogatories or data calls. We received responses to 16 interrogatories or data calls. We performed this review from August 2006 to July 2008, in accordance with the Presidents Council on Integrity and Efficiency "Quality Standards for Federal Offices of Inspector General."

We reviewed the August 8, 2001, DOHA file, the recommended decision of the Administrative Judge, together with a redacted copy of the decision, a transcript of the Complainant's personal appearance, and materials submitted as part of the personal appearance process. We also reviewed the CCF dossier.

We reviewed the EEO complaint records of TACOM and the 902nd MI Group, covering the period 1992 to 2004.

We reviewed relevant classified and unclassified records, including records relating to the affidavits of former Deputy Secretary of Defense Mr. Paul Wolfowitz and former Attorney General Mr. John Ashcroft, and relating to discovery response submissions from the DoD and the Department of Justice.

Limitation to Scope. With this case being 10 years old, some of the key officials involved in the case have retired and were unreachable. Because the DoD PSI mission moved to the Office of Personnel Management in 2005, we forwarded interrogatories to the former DIS investigators, who are now employed by the Office of Personnel Management, through the Office of Personnel Management's Office of General Counsel; however, in their responses they requested that we refer to their civil depositions.

The scope of the evaluation was limited to a review of the actions of DoD agencies involved with the Complainant's case. The FBI was the lead investigative agency in the Complainant's case. We did not review the actions taken by the Department of Justice or the FBI Accordingly, we were unable to perform a comprehensive review of the state secrets documents related to the case dismissal. We did request an un-redacted version of FBI case documentation and the appendixes prepared in support of former Attorney General Mr. John Ashcroft's affidavit in civil litigation related to this matter. Although we did not receive the FBI case documentation, we did receive a five-page case summary from the FBI. Additionally, our review should not be construed as commenting on the judicial decisions rendered in the Complainant's civil litigation

Use of Technical Assistance. We received technical reviews on the conduct of the Complainant's polygraph from polygraph officials of the Office the Deputy Inspector General for Investigations, Office of the DoD Inspector General, and the DACA (formerly the DoD Polygraph Institute). Specifically, they examined the polygraph chart, scoring, and questions, as well as the polygraph chapter of the DIS PSI Manual. We also received technical assistance from the Director, OIG DoD Equal Employment Opportunity Office.

Appendix B. Letter from Senator Levin

United States Senate
COMMITTEE ON ARMED SERVICES
WASHINGTON, DC 20510-6050

March 14, 2006

Mr. Thomas F. Gimble
Acting Inspector General
Department of Defense
400 Army-Navy Drive
Arlington, Virginia 22202-4704

Dear Mr. Gimble:

I am writing to request that you conduct an independent review of the case of David Tenenbaum, an employee of the Tank and Automotive Command in Detroit who lost his security clearance in 1997 as a result of unsubstantiated allegations that he was spying for Israel.

Mr. Tenenbaum was investigated by the Defense Criminal Investigative Service and the Federal Bureau of Investigation for alleged security violations in 1996 and 1997. In early 1998, the Department of Justice closed the investigation on the basis of lack of evidence, without bringing any charges. In 2003, Mr. Tenenbaum's security clearance was restored.

Mr. Tenenbaum alleges that he was singled out for unfair treatment – including an unwarranted investigation, a fabricated confession, and extended harassment of himself and his family – because of his religion. According to Mr. Tenenbaum, the accusations against him were made without any basis in fact by a narrow circle of TACOM employees who believed that his being Jewish posed a security risk.

On September 30, 2002, Mr. Tenenbaum's lawsuit against these individuals was dismissed on the basis that the defendants would not be able to disclose the actual reasons or motivations for their actions without revealing state secrets. Attorney General Ashcroft and Deputy Secretary of Defense Wolfowitz both submitted affidavits in the case, stating that the disclosure of the information at

issue would risk harming the national defense. The judge's ruling has now been affirmed on appeal.

As a result, there has been no independent determination of the validity of Mr. Tenenbaum's allegations.

I believe that these allegations are serious enough that they must be addressed on the merits. If true, they indicate illegal discrimination and an abuse of power on the part of those who made the accusations and fabricated the confession.

The Department of Defense Inspector General has both the authority and the capability needed to thoroughly examine this matter without the disclosure of any classified information. I ask that you do so, and do so promptly, given the length of time that has already elapsed since these events took place. The extensive discovery record compiled in the course of Mr. Tenenbaum's lawsuit should provide a documentary basis from which to commence your review.

Thank you for your attention to this matter.

Sincerely,

Carl Levin
Ranking Member

Appendix C. Light Armor Survivability Systems

In 1995, the Complainant became an advocate for Light Armor Survivability Systems (LASS). Light armor currently in use in Afghanistan and Iraq is subject to penetration by bullets, shrapnel and other weapons. From around the war fighting community in the mid to late 1990s, the Complainant gathered professional opinions regarding the vulnerabilities of the U.S. Army's lightly-armored vehicles. After consideration of the value his office could provide to TACOM's efforts in this force structure area of concern, the Complainant proposed a Joint Agreement with the governments of Israel and Germany to study the means available to harden their respective forces against the actual and perceived weaknesses of lightly-armored vehicles. This was initiated to prevent development of conditions which would require ad hoc, battlefield solutions requiring a soldier's use of scrap metal, discarded lumber and extra clothing.

By the early 1990s, the Army was planning to replace the lightly-armored M-551A1 Sheridan tank with the M-1 Abrams tank. This force structure shift was occurring during a period of recognition that future operations would be restrictive and urban in nature.[44] Beginning in the mid-1970s, the Army had recognized the fragility of using heavy armor in support of air-deployed infantry. Light infantry anti-tank weapons were considered ill-suited to fend off the armored threat of the Warsaw Pact armies.[45]

Within the war fighter community, the problems presented by the transition from the heavy armor to lightly armored vehicles better suited to restricted, urban theatres was organized, in part as Military Operations on Urbanized Terrain (MOUT). By the early 1990s, individuals within the Armor community were discussing the lessons learned during the armor battles of Hue (1968), Suez (1973) and Panama (1989). The issues of relevance to the Armor community fell into three categories: (1) the need for light armor for the fight in urbanized areas; (2) the need for a combined arms orientation in MOUT, and (3) the need for a common doctrine on how to fight in MOUT.

For the Complainant, the Army's strategic weakness in answering threats to the new, lightly-armored force lay in its engineering processes. An unarmored High-Mobility Multipurpose Wheeled Vehicle (HMMWV - more commonly referred to as the Humvee) designed for rear echelon deployment in a Cold War fight transitions poorly to a MOUT in which the threat is asymmetric and deployed 360 degrees around either offensive or defensive American units. Hence, the need to "up armor" unarmored elements of the force structure.

The Complainant proposed the LASS program at TACOM to develop the tools necessary to predict, as a means of engineering modeling, the Behind Armor Debris which results from the successful deployment of an overmatching threat, such as a high velocity, large caliber Anti-Personnel round, a mine, a Rocket-

[44] *See generally*, Major Alan M. Mosher, U.S. Army, *Light Armor MOUT Doctrine: Imperative Change or Business as Usual?* (accepted as a monograph by the School of Advanced Military Studies, United States Army Command and General Staff College, Fort Leavenworth, Kansas)(First Term, AY93-94).

[45] *Armored Gun System to Give Light Units Anti-armor Punch*, ARMY (July 1987) at 52-55.

Propelled Grenade, or an Improvised Explosive Device. The Complainant was working, by the late 1990s, on mapping the threat of secondary shrapnel generated by attacks such as those currently facing American and allied forces in the Iraq and Afghanistan theatres of operation today.

So the goal of the LASS program as proposed by the Complainant was to determine what could be done externally and internally to the U.S. Army's light armored combat vehicles to reduce the impact of Behind Armor Debris and increase the safety and survivability of deployed forces. The program was conceived as a joint effort by the United States, the Federal Republic of Germany, and the State of Israel using the services of a contractor. As executed, the program included only the United States, Israel, and a research contractor. The deliverable was a computational model capable of receiving and analyzing data from ballistic testing to assess the impact of Behind Armor Debris. The Humvee was chosen as the test subject.

Appendix D. Case Timeline

December 10, 1984, the Complainant begins working at TACOM.

January 8, 1985, the Complainant is granted an interim secret personnel security clearance.

June 19, 1985, the Complainant's interim secret personnel security clearance extended.

February 13, 1991, CCF issues a Department of the Army Form 873 (and TACOM issues an U.S. Army Materiel Command (AMC) Form 1209 - Request for Security Clearance), based on a periodic reinvestigation and granting the Complainant a secret personnel security clearance.

July 22, 1992, TACOM nominates the Complainant for the SEEP. The Complainant's SEEP nomination was for him to be sent to Israel to work with the Israelis and learn about combat vehicle technology. A co-worker files a SAEDA report with the 902nd MI Group.

September 16, 1992, the Complainant's first line supervisor requests, via AMC Form 1209, an upgrade of the Complainant's personnel security clearance from secret to top secret to support Strategic Defense Command. An investigative package was submitted; however, the Complainant was on long term training leave preparing for a position overseas in the SEEP. The request was subsequently canceled because the Complainant was going to be on long term training away from TACOM and following that would probably be assigned to a multi-year overseas assignment and would probably not have a need to access U.S. top secret information on that assignment.

January 1994, TACOM again nominates the Complainant as TACOM's SEEP representative to Israel. His SEEP application was not approved.

January 14, 1994, meeting held between representatives of the FBI, 902nd MI Group, and TACOM to discuss the disposition of a co-worker's SAEDA report. The FBI stated that when questioned, the co-worker softened his original report, therefore they could not open a full investigation on the Complainant.

March 17, 1994, a second SAEDA report is filed by another co-worker.

March 9, 1995, AMC Form 1297 received requesting the Complainant attend the 15th International Symposium on Ballistics in Israel from May 21-24, 1995. The Complainant to discuss corrosion issues in Israeli water tankers and the possibility of joint programs in areas of computer modeling.

May 10, 1995, the Complainant signs a non-disclosure agreement for classified material.

May 17, 1995, the Complainant receives a foreign travel briefing from the 902nd MI Group.

May 16 - June 6, 1995, the Complainant travels with co-workers to a conference in Israel.

January 23, 1996, 902nd MI Group Special Agents conduct a foreign travel debriefing of the Complainant (concerning his May 1995 trip to Israel) - wherein they stated the Complainant was being evasive about his lodging (the Complainant did not stay in the same hotel as the rest of the conference attendees), who he spoke to and what he spoke to them about. The result of that debriefing was a SAEDA report.

February 2, 1996 - the Complainant's five year re-investigation expires. Although the re-investigation period is longer for a secret personnel security clearance, the Complainant was read-on to at least one SAP making the reinvestigation timeframe five years.

April 22, 1996, a third SAEDA report was prepared by the 902nd MI Group. Also in April 1996, a Department of the Army Foreign Disclosure Desk Officer, has a conversation with a 902nd MI Group Special Agent that began as small talk, following an unrelated meeting. The Special Agent was conveying to the foreign disclosure desk officer that he had debriefed a TACOM employee (which occurred in January 1996) who was evasive and uncooperative about a recent trip to Israel (the trip actually occurred in May 1995). The foreign disclosure desk officer told the Special Agent that based on a previous message he had received that there was some derogatory information on the Complainant going back to the 1991-1992 time frame. It is also surmised that the Special Agent used this information as the basis for generating the January 1996 SAEDA report.

May 17, 1996, AMC returns LASS proposal (See Appendix C for a discussion of LASS), with numerous comments. Proposal was unacceptable as currently written.

May 28, 1996, TACOM receives visit request from Israel for July 2, 1996, for Cooperation on Research Activities on light armor, requesting the Complainant specifically as point of contact.

May 1996 - September 1996, the FBI conducts its first preliminary inquiry of the Complainant.

July 2, 1996, the Complainant hosted a visit from an Israeli Ministry of Defense representative and representatives of a research contractor pertaining to the LASS project.

July 16, 1996, the Complainant meets with TACOM officials to discuss multi-lateral agreement between Israel, Germany and the U.S. on LASS.

July 25, 1996, a fourth SAEDA report was prepared by the 902nd MI Group. This report addressed the July 2, 1996 meeting about LASS.

August 1996, the Complainant prepares a foreign travel request listing proposed travel dates to Israel from November 29, 1996 to December 31, 1996. His request stated that he would be on official business representing the U.S. Army at a conference in Israel until December 15, 1996, and then he would be on annual leave in Israel from December 16, 1996 through December 27, 1996. He listed the same point of contact both for official business and annual leave.

August 2, 1996, a fifth SAEDA report was prepared by the 902nd MI Group.

August 26, 1996, TACOM receives AMC Form 1297, for the Complainant to travel to Israel from November 29 to December 30, 1996. Trip never took place.

September 11, 1996, the Complainant's position is upgraded from non-critical sensitive to critical sensitive on the Complainant's supervisor's request. The Complainant was told by his supervisor that he might need an upgraded personnel security clearance to benefit our survivability effort. The TACOM DIC would later state in his January 22, 1997, sworn statement that, "At this point his chain of command was not aware about my personal misgivings. As a result, my directorate sent him the investigative paperwork to upgrade his clearance from secret to top secret."

September/October 1996, the 902nd MI Group raises concerns with AMC that the Complainant had compromised three SAPs (probably to the Israelis). The 716th MI Battalion, 902nd MI Group, which supports the TACOM SAPs is preparing to brief the Program Executive Officer for Ground Combat Systems, and was considering going to the Vice-Chief of Staff of the Army, with the information. The AMC subsequently contacts the TACOM DIC to convey this information about the Complainant.

October 11, 1996, the TACOM DIC the TACOM Special Access Program Oversight Officer, bring emerging security issue to the TACOM Special Access Program Security Representative.

October 17, 1996, the TACOM Chief of Staff signs memorandum requesting travel vouchers to resolve questions regarding lodging locations during foreign travel, which was predicated on the Complainant's alleged inability to recall where he resided during his last trip to Israel.

October 21, 1996, the 902nd MI Group and the TACOM DIC brief that the Complainant was accused of being involved in espionage activities to 902nd MI Group Special Agents, the FBI and TACOM management. Issues that came up during the briefing labeled the Complainant a security risk. A 902nd MI Group Special Agent's February 2, 2000 deposition states that the meeting at TACOM was based on an upcoming Special Access Program Oversight Committee meeting to discuss the Complainant compromising a TACOM special access program. The 716th MI Battalion, 902nd MI Group, stated that they were going to brief the Program Executive Officer at TACOM that the Complainant had comprised a special access program. A Special Agent from the 716th MI Battalion was supposed to brief; however, he does not come to the briefing. He does, however, send an unsigned memorandum dated October 11, 1996 stating that "there is no substantive evidence to indicate any unauthorized disclosure on the part of [the Complainant]; moreover, his in (sic) not currently the subject of Army CI investigation." The memorandum also states that the 902nd MI Group had asked DIS to review the Complainant's personnel security clearance.

October 22, 1996, a sixth SAEDA report was prepared by the 902nd MI Group based on reporting by the TACOM DIC that the Complainant was to meet with a foreign national during an upcoming LASS conference.

November 1, 1996, the Complainant is "administratively debriefed" from all special access programs.

November 8, 1996, the Complainant's first line supervisor requests "expeditious" processing a personnel security clearance upgrade for the Complainant. He does this because he believes the single scope background investigation to upgrade the Complainant's personnel security clearance from secret to top secret was to help the Complainant "clear his name." The memorandum states that, "The Complainant's unique knowledge and skills are mission essential and make continued access imperative to mission accomplishment."

November 11, 1996, a letter addressed to the Complainant from the Scientific Director, Israeli Defense Forces, was intercepted. The letter discusses the possibility that the Complainant will be changing the dates of his travel to Israel and suggests that the Complainant will not be traveling to Israel until January 1997. The letter also cautions the Complainant to clear his travel through official U.S. Army channels inasmuch as he will be visiting the Ordinance Corps of the Israeli Defense Forces in Israel. Furthermore, the letter makes reference to individuals who are associated with the research contractor in San Antonio, Texas. Additionally, the letter makes reference to a previous Israeli Liaison Officer to TACOM.

November 12, 1996, the Complainant is debriefed from the production and research and development armor programs and the signature management program.

November 1996, FBI opens a second preliminary investigation on the Complainant specifically for the purpose of interviewing the Complainant to find out the truth of previous SAEDA reporting.

December 3, 1996, DIS receives the Complainant's single scope background investigation package, to include the Complainant's Standard Form 86 and supporting documentation, at their Detroit office.

January 9, 1997, at the request of DIS investigators, the TACOM CI team leader and the TACOM DIC met with them to answer questions related to the Complainant's PSI. The Complainant's first line supervisor recommended the meeting.

January 17, 1997, a meeting is held at the office of the TACOM DIC. Attendees are invited by the TACOM DIC. In attendance were representatives from the FBI, the 902nd MI Group, and the DIS. The meeting focused on the TACOM DIC being in possession of a visit request that the Complainant was traveling to a location to do something that was believed to be unauthorized. A DIS investigator states that he was not aware of the purpose of the meeting in advance and informed the TACOM DIC that he was not to conduct any additional "collection efforts" on the Complainant unless he cleared it with the DIS first. The reason that the DIS investigators went to the TACOM DIC's office was to obtain his sworn statement, which they asked him to prepare as part of the Complainant's PSI because of bold statements/accusations he concerning the Complainant in a previous interview. However, the TACOM DIC had taken the liberty to get the three investigative agencies together at one time to brief them.

January 22, 1997, at the request of DIS investigators conducting the Complainant's PSI, the TACOM DIC executes a sworn statement regarding statement he made to the investigators on January 9, 1997.

January 23, 1997, the FBI lead investigator, as part of a second preliminary inquiry into the Complainant, writes a memo concluding that there was insufficient evidence developed during the inquiry to link the Complainant with espionage activities on behalf of the Israelis.

February 3, 1997, the Complainant was Subject interviewed by DIS investigators for six hours as part of his PSI. The DIS investigators requested that the Complainant submit to a polygraph examination for: Admission that he violated foreign disclosure regulations by meeting with foreign representatives without advance approval; numerous unlisted family and close associates in host country and unlisted education, employment and activities; and denial of any unauthorized disclosures and denial of any contact with or approaches by foreign intelligence agencies/officers.

February 11, 1997, DIS polygrapher arrives in Michigan to prepare for the Complainant's polygraph.

February 13, 1997, the Complainant is polygraphed.

February 14, 1997, the Commanding General, TACOM, was briefed on significant information developed during the PSI. A seventh SAEDA report is filed.

February 19, 1997, DIS report of investigation was provided to Chief of Administrative Law, TACOM.

February 21, 1997, the TACOM DIC signs a 2-page document (DA Form 5248-R - Derogatory Report) which was forwarded to CCF in accordance with AR 380-67, "Personnel Security Program," dated September 9, 1988.

September 8, 1997, Assistant U.S. Attorney, U.S. Attorney's Office, Eastern District of Michigan, Detroit Michigan, advised that the FBI investigation of alleged espionage activities on the part of the Complainant had reached a logical conclusion and no evidence was developed to support the allegation.

Appendix E. Defense Security Service Comments

DEFENSE SECURITY SERVICE
1340 Braddock Place
Alexandria, VA 22314-1561

JAN 1 0 2008

MEMORANDUM FOR INSPECTOR GENERAL, DEPARTMENT OF DEFENSE

SUBJECT: Defense Security Service (DSS) Comments to Draft DoDIG Report, RE: David Tenenbaum, Department of Army Employee (Project No. D2006-DINT01-0238.000)

I appreciate the opportunity to respond on behalf of DSS to the draft DoDIG report identified in the subject line.

It is important to note at the outset, and as recounted in the draft DoDIG report, that the DoD personnel security investigation (PSI) function was transferred to the U.S. Office of Personnel Management (OPM) in February 2005. Since that transfer of function, which also resulted in the transfer of all DSS personnel security investigators to OPM, DSS has not performed personnel security investigations.

I am encouraged to read in the draft report that it was not a weakness in DSS policies in place at the time that led to what the draft report characterizes as an inappropriate counterintelligence investigation. DSS is committed to ensuring that its work in support of national security does not violate the rights of American citizens.

Given the passage of nearly a decade from the incident and the 2005 transfer of the PSI function, I have no other comment on the draft report. I do recommend you forward a copy of the final report to OPM.

I close by stressing that I do not tolerate illegal discrimination or harassment in DSS operations, and I have published clear policies on this no-tolerance policy since I arrived at DSS in May, 2006.

Thank you again for the opportunity to review this draft report.

Kathleen M. Watson
Director

Appendix F. Summary of Army Materiel Command Comments

On February 29, 2008 the Army Material Command (AMC) provided comments to a draft of this report. Because the comments are voluminous and classified, we have not appended them to this report. They are available upon request with the proper security clearance. We have summarized their comments and our responses below.

Army Materiel Command Comment.

[redacted]

Review Response.

DoDIG has statutory authority to investigate claims. The Inspector General Act permits Inspectors General to "conduct . . . investigations relating to the . . . operations" of an executive department and "provide a means for keeping the head of the establishment and Congress fully and currently informed about problems and deficiencies relating to . . . operations." The Act does not limit this broad authority by prohibiting Inspectors General from investigating discrimination or equal employment opportunity claims, which qualify as "problems . . . relating to" DoD's operations. Indeed, numerous federal cases discuss Inspector General investigations of discrimination claims.

DoD Directive 5106.01, "Inspector General of the Department of Defense," April 13, 2006, does not limit this statutory authority, either. To the contrary, DoD Directive 5106.01 permits the DoDIG to "[r]eceive and investigate . . . complaints or information concerning . . . [a]lleged violations of laws, rules, or regulations," which presumably include equal employment opportunity laws and the Constitution's Free Exercise and Equal Protection Clauses, *see* U.S. Const., amend I, XIV. Under the directive the DoDIG can investigate alleged "abuse[s] of authority," which presumably includes employment discrimination. These provisions permit the DoDIG to investigate TACOM's alleged religious discrimination.

Army Materiel Command Comment.

[redacted]

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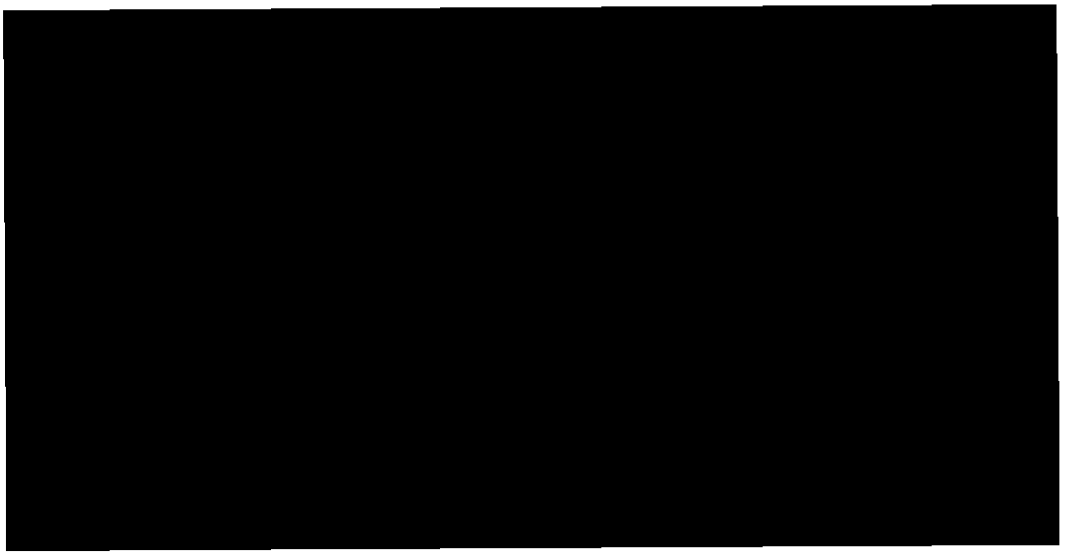

Review Response.

Decision-making based on religion often exists side-by-side with other factors, and discrimination nonetheless exists. Once religion is identified as a factor in the decision-making, one then looks for evidence that the reviewed action would have taken place regardless of the religious factors. Here, we found insufficient evidence of a regular security clearance decision-making process and a regular counter-intelligence investigative process.

As of the October 21, 1996 briefings, five SAEDA reports and one FBI preliminary inquiry had been conducted, with the FBI coming to the conclusion that "allegations against [the Complainant] remain so sketchy . . . ." In fact, through our review of the classified record, we discovered that the October 21, 1996 meeting was allegedly called because a representative of the 902nd MI Group stated that he was going to go to the SAP Oversight Committee and possibly the Vice Chief of Staff of the Army with information that the Complainant compromised three SAPs. However, based on our review of the evidence, not only was that information not provided or discussed to the TACOM leadership assembled at the October 21, 1996 meeting, it does not appear anywhere subsequent to the meeting. In fact,10 days prior to the October 21, 1996 meeting, the same 902nd MI Group special agent who made the assertion of SAP compromise sent an unsigned memorandum to the TACOM DIC and did not include reference to the alleged compromise. This is of particular concern because were it not for the allegation of SAP compromise, a very serious concern indeed, all indications are that the October 21, 1996 meeting might not have taken place because the information provided during the briefing[46] was already known by the authorized CI investigative agencies who had concluded inquiries into the allegations. The information was also known by the TACOM DIC Security Chief However, TACOM leadership was not aware of the information.

[46] It should be noted that of the first two SAEDA reports, the FBI had characterized the reporting as exaggerated and the sources of the two SAEDA reports "softened" or recanted their original report.

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It is questionable for TACOM to allow the Complainant's application for a top secret personnel security clearance upgrade to proceed despite its decision to limit his access to classified information, prohibit him from traveling outside of the Continental US, bar him from interacting with foreign government officials, and ultimately suspend his security clearance. If security concerns about the Complainant were sufficient to trigger such precautionary steps, it is inappropriate to proffer the Complainant as a candidate for a higher clearance level. In our opinion, the SSBI was being used as a substitute for a counterintelligence investigation. A CI investigation or inquiry would have been a more appropriate course of action; the FBI still retained jurisdiction of this counterintelligence matter.

The October 21, 1996 meeting and its aftermath raise several concerns. First, TACOM leadership and the Director of Intelligence and Counterintelligence proceeded with a single scope background investigation to upgrade the Complainant's personnel security clearance despite their alleged security concerns that led them to take preventative measures against him. Second, it seems that the single scope background investigation was being used as a substitute for a CI investigation. A CI investigation would have been a more appropriate course of action in light of the alleged security concerns that the group identified. Third, these actions were clearly not in the best interest of national security.

The TACOM DIC Security Chief was also present at a July 1996 briefing that generated two SAEDA reports; however, he did not file such a report. In fact, the TACOM DIC alleged that the Complainant made a comment to him during a face-to-face meeting that clearly, if true, fell within the reporting requirements for subversion and espionage directed against the US Army; however, he chose not to report it.

Army Materiel Command Comment.

[redacted]

Review Response.

We agree.

Army Materiel Command Comment.

[redacted]

Review Response.

AMC correctly points out that the standards set forth in Title VII (§ 717) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16, determine whether a particular

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decision is discriminatory and illegal. However, to act within DoD Regulations, one must limit one's consideration to espionage indicators and not rely on religion or ethnicity.

Army Materiel Command Comment.

Review Response.

According to testimony, the TACOM DIC did brief the supervisor of the DIS special agents assigned to the Complainant's investigation shortly after the October 21, 1996 meeting about his concerns and the DIS Director stated in the February 19, 1997 memo highlighted in observation A above that DIS was contacted by the 902nd MI Group in November 1996 and asked to treat the case as a CI matter. Further, a DIS chronology of events states that the DIS was in contact with the FBI and had discussions concerning the Complainant taking a polygraph examination.

According to the 1979 memorandum of understanding between the FBI and the DoD and the November 18, 1996 supplement thereto concerning "coordination" of CI matters between the FBI and DoD, the 902nd MI Group is authorized by departmental regulation to conduct counterintelligence activities. It does not list DIS as such an agency. The 902nd MI Group properly coordinated with the FBI, who in turn took jurisdiction of this case and did not relinquish that jurisdiction throughout. The memorandum of understanding was followed and the FBI had proper jurisdiction. Therefore, under this scenario, we saw a few options that could have taken place. The first option would have been to wait until the FBI relinquished their jurisdiction then discuss other options available with the 902nd MI Group if the command still sees a CI risk. The second option, which goes back to February 1996, would have been to read the Complainant off of SAPs because he failed to submit the paperwork required for his periodic reinvestigation and further access to special access programs. The third option would have been to report derogatory information to the CCF once it became known, as required by Army regulation.

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Army Materiel Command Comment.

[redacted]

Evaluation Response.

We have an extensive classified record which was acquired from the agencies associated with this case to include the 902nd MI Group, the US Army Central Personnel Security Facility, and the DIS. The classified record allowed us to review documentation that would not be considered by the Equal Employment Opportunity Commission. While we agree that there was a great deal of information that should remain properly safeguarded and should not be revealed into the public domain – both then and now -- for a number of reasons, the classified information was extremely helpful in allowing us to accurately discern the actions of the investigative agencies associated with this case in a much more detailed way than the unclassified record alone.

We had documentation that began as far back as the initial 1992 SAEDA report and continued through to the completion of the FBI investigation. We have the five SAEDA reports which was the basis for the 902nd MI Group's portion of the October 21, 1996 briefing. However, what we also had was classified documentation from a 1994 meeting between the 902nd MI Group, the TACOM DIC Security Chief, and the FBI wherein it detailed the re-interview of the sources of the first two SAEDA reports. During this meeting it was stated that the sources reporting was exaggerated and in one instance, most of the report was recanted. Although AMC states that TACOM was surprised by the allegations that it heard on October 21, 1996, the TACOM DIC Security Chief, a subordinate of the TACOM DIC, was aware of allegations concerning the Complainant over two years prior to the October 21, 1996 meeting, and knew that at least two of the SAEDA reports were exaggerated those allegations to be false and "exaggerated."

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Appendix G. Report Distribution

Office of the Secretary of Defense

Under Secretary of Defense for Intelligence
General Counsel of the Department of Defense

Department of the Army

Secretary of the Army
General Counsel, Department of the Army
Deputy Chief of Staff for Intelligence, G-2
Inspector General, Department of the Army
Commanding General, U.S. Army Materiel Command
Commanding General, U.S. Army Intelligence and Security Command

Other Defense Organizations

Director, Defense Security Service

Congressional Committees and Subcommittees, Chairman and Ranking Minority Member

Senate Subcommittee on Defense, Committee on Appropriations
Senate Committee on Armed Services
Senate Committee on Homeland Security and Governmental Affairs
Senate Subcommittee on Oversight and Government Management, the Federal Workforce, and the District of Columbia; Committee on Homeland Security and Government Affairs
Senate Select Committee on Intelligence
House Subcommittee on Defense, Committee on Appropriations
House Committee on Armed Services
House Committee on Oversight and Government Reform
House Subcommittee on National Security and Foreign Affairs; Committee on Oversight and Government Reform
House Subcommittee on Federal Workforce, Postal Service, and the District of Columbia; Committee on Oversight and Government Reform
House Permanent Select Committee on Intelligence


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