

[A Short Primer on Security Clearances](#)

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The latest debate coming out of the White House involves the issue of staff members and security clearances. Most jobs in the national security arena (whether working directly for the federal government, including the White House, or a federal contractor) require some form of security clearance because of the need to handle classified information.

It is also worth noting that employment in the White House (as in other federal agencies), as well as access to the White House complex, certain areas within the complex, and regular access to the personal vicinity of the President, may also require separate suitability determinations.¹ In the case of the White House, such determinations are typically made by the White House Personnel Security Office on the basis of information submitted prior to entry on duty and often as part of a background investigation.

While the law and regulations around the security clearance process are somewhat arcane, the intent of these rules is to ensure that classified information is accessible only to trusted individuals.

This short paper provides a very simplified primer on how clearances are issued, examines the memorandum issued by White House Chief of Staff John Kelly on February 16, 2018, and provides key items to watch going forward.

Background

Like many things with the federal government, getting a security clearance begins with paper and forms.

[Step 1 – Paperwork](#)

- After accepting an offer of an employment, a prospective employee will complete a Standard Form 86 (SF-86) questionnaire.²
- It will ask, among other things, about the employee's citizenship, residence history, educational background, employment history, family (including foreign relatives), friends, foreign connections, travel, criminal history, mental health treatment, civil court

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¹ See Michelle D. Christensen, *Security Clearance Process: Answers to Frequently Asked Questions* at 2, Congressional Research Service (Oct. 7, 2016), available online at <<https://fas.org/sgp/crs/secretcy/R43216.pdf>>.

² *Id.* at 6.

actions, alcohol-related incidents, drug use, misuse of computer systems, subversive activities, and other potential vulnerabilities in an employee's background.³

- The primary purpose of providing this information is to allow the government to assess whether the employee is trustworthy and whether anything in his or her past could make him or her vulnerable to coercion or otherwise likely to provide classified information to individuals not authorized to receive it.⁴
- Once an employee has submitted their SF-86 form, government investigators will review the form and, if information is missing or unclear, ask follow-up questions.
 - Follow-up is fairly routine, and oftentimes investigators will update (or ask a potential employee to update) the responses to an SF-86 based on answers in the interview notes.

Step 2 – Background Investigation

- The background investigation is an effort to verify the information provided in an employee's SF-86 and to assess whether the employee left anything of importance out of the SF-86, or whether anything in that form requires additional review or scrutiny.
- The investigators assigned will vary depending on which department or agency is seeking to hire: Defense, State, FBI, and certain other agencies often handle background investigations for their employees.⁵
 - The FBI and a division of the Office of Personnel Management (OPM), the National Background Investigations Bureau (NBIB), conduct checks for other departments and agencies, including for the Justice Department and the White House.⁶
- The investigation involves, among other things, reviewing public and other records, including financial records, like credits reports; interviewing friends, family, colleagues, and the candidate for employment; and for many positions, a polygraph examination.⁷
 - The specific polygraph requirements may vary from agency to agency, but as a general matter there are two types of polygraphs – a counterintelligence (short-form) and a lifestyle (long-form) polygraph.
- The time to complete the investigation can take routinely anywhere from a number of months to over a year, particularly given the major existing backlog in clearances and new procedures put in place following the Snowden disclosures.⁸

³ See Office of Personnel Management, *Questionnaire for National Security Positions, Standard Form 86*, available online at <https://www.opm.gov/forms/pdf_fill/sf86-non508.pdf>; see also *Security Clearance Process*, ante n.1 at 9.

⁴ See *Security Clearance Process*, ante n.1 at 1.

⁵ *Id.* at 7-8.

⁶ *Id.*

⁷ *Id.* at 6, 10.

⁸ *Id.* at 9.

Step 2.a. – Interim Clearances

- An interim security clearance can be granted based on the partial completion of the background investigation after the SF-86 is submitted.⁹
 - Interim clearances can be issued for all levels of potential clearances, including Confidential, Secret, Top Secret.
 - In some cases, individuals granted an Interim Top Secret clearance may also be eligible for access to Top Secret/Sensitive Compartmented Information (TS/SCI).
- Whether an individual receives an interim clearance is often dependent on the government’s specific need for the particular individual in the particular position and that person’s immediate need for access to classified information to do their job.
- Interim clearances may be granted in a few weeks (or less) after submission of a completed SF-86.
- There is no automatic right to an interim clearance (or, for that matter, to a final clearance).
- And, even if an interim clearance is granted, the full background investigation must be completed before an individual can receive a final security clearance.¹⁰
 - If it is determined that an individual is not eligible for a final security clearance pursuant to the adjudication process described below, it is generally inappropriate (and highly unusual) to maintain such an individual’s interim access.

Step 3 – Adjudication

- After an investigation is completed, a report with the results of the investigation are provided to an adjudicating official.
- The adjudicating official, upon review of the background investigation report, will typically make the final determination as to whether the individual ought to be granted a clearance.¹¹

⁹ See, e.g., State Department, *All About Security Clearances*, available online at <<https://www.state.gov/m/ds/clearances/c10978.htm>> (“In exceptional circumstances, the hiring office may request an interim security clearance. The Office of Personnel Security and Suitability may be able to grant an interim security clearance within a few weeks after the individuals has submitted a complete security package.”); c.f. also Defense Security Service, *Interim Clearances for Industrial Personnel Clearance Applicants*, available online at <http://www.dss.mil/psmo-i/indus_psmo-i_interim.html> (“All applicants for a personnel security clearance submitted by a cleared contractor will be routinely considered for an interim eligibility....An interim eligibility will permit the individual to have access to most of the classified information needed to perform his or her duties. The interim eligibility will generally remain in effect until an investigation is completed, at which time the applicant is considered for a final eligibility.”)

¹⁰ *Id.*

¹¹ See *Security Clearance Process*, ante n.1 at 6.

- Sometimes the adjudicating official may have additional questions or direct that the background investigation be reopened to address additional matters.
 - While this is not typical, it is also not an unheard-of turn of events.
- In some cases, the adjudicating official may provide their recommendation to an ultimate decision maker who determines whether to grant an individual a security clearance.
 - In such cases, it would still be unusual to have a significant deviation from an adjudicator’s recommendation on the question whether a final clearance ought be granted.
- The adjudicating agency and standards for a clearance at the Confidential, Secret, or Top Secret level will often be different than the agency and standards used to adjudicate requests for access to Sensitive Compartmented Information (SCI) or Special Access Programs (SAPs).¹²
- While security clearances are typically issued by a department or agency based on the results of the background investigation and a favorably completed adjudication process, the President is generally understood—at least within the Executive Branch—to have final authority to accept or reject the results of such investigations and adjudications and to make the ultimate determination on a range of security clearance-related matters, likely including the granting of clearances for key individuals, such as key White House staff, although this view is not free from doubt.¹³

Step 4 – Adjudication Results and Access to Classified Information

- If all goes well, the investigation and adjudication find no disqualifying issues, and the candidate will be granted a security clearance at the Confidential, Secret, or Top Secret level.
 - The level of clearance will, as noted above, depend on the requirements of an individual’s prospective job.
- On the other hand, if investigators or adjudicators have concerns that cannot be resolved to their satisfaction, a clearance will generally not be issued.
 - In most cases, the failure to obtain a clearance will mean the individual will be unable to start their job and be terminated or be placed in a position that does not require access to classified information.

¹² *Id.* at 2-3, 9-10 & n.11-12, 49.

¹³ See *Security Clearance Process* at 4 (noting that Executive Order 13,467 relating to suitability and access to classified information explicitly does not apply by its terms to the President, the Vice President, and certain employees of the President and Vice President); see also, e.g., Jennifer K. Elsea, *The Protection of Classified Information: The Legal Framework*, Congressional Research Service (May 18, 2017) at 1-2 & n.7, available online at <<https://fas.org/sgp/crs/secretary/RS21900.pdf>>, (highlighting the views of the Executive Branch on security clearance matters, including the plenary power of the President, but also describing Congressional efforts to constrain Presidential authority in this area, including with respect to security clearances).

- It goes without saying that a person who is unable to review classified information due to a failed security clearance process may be significantly limited in seeking to serve a national security-related position or a position that requires access to such data.
 - There are certain limited opportunities for individuals to appeal the denial of a security clearance.
 - If a security clearance is granted, prior to receiving access to classified information, individuals are required to attend a security indoctrination session which provides information about the level of classified information to be provided as well as the rules and procedures surrounding the review, use, and dissemination of such classified material and potential counterintelligence threats, among other things.
 - Following the indoctrination briefing session, and prior to receiving access to classified information, individuals are also required to sign standard government non-disclosure agreements with specific and detailed requirements.¹⁴
 - Depending on the level of access granted, these non-disclosure agreements may include, among other things, a lifetime bar on the disclosure of classified information outside of an appropriate government-related context and a lifetime pre-publication review requirement related to written work in areas covered by the individual's access to classified material.
 - In addition, as part of the process of accessing highly classified information, individuals often consent to government review of their activities on a going-forward basis, including the monitoring of certain communications, to prevent the intentional or unintentional disclosure of classified information to individuals not entitled to receive such information.
 - Individuals with access to Sensitive Compartmented Information or Special Access Programs may, on an individual basis, be provided with separate indoctrinations (including separate non-disclosure agreements) for access to particular categories—or compartments—of particularly sensitive information.
 - These compartments are typically designated by a codeword that itself may be classified either alone or with reference to the specific topic that it covers; typically such compartments have an unclassified multi-letter designator that can be used to describe whether an individual has access to certain information.
 - Access to particular information, whether compartmented or otherwise restricted, may often be controlled by the originated agency.

Step 5 – Periodic Reinvestigation

- Even once a final clearance is granted, individuals with access to classified information are required to go through a periodic reinvestigation to evaluate their continued suitability for access to classified information.¹⁵

¹⁴ *Id.* at 1.

¹⁵ *Id.* at 6-7.

- This periodic reinvestigation is typically required to take place every five years although backlogs have resulted in delays here.¹⁶
- In addition, if concerns arise during the time an individual has access to classified information, relevant employing or investigative agencies may conduct a review outside the normal periodic reinvestigation process to determine whether an individual remains in eligible for continued access to classified information.
 - If the concerns are serious enough, an individual's access to classified information (or certain categories or compartments of classified information) may be suspended pending resolution of the review.

Memorandum from White House Chief of Staff John Kelly

- On February 16, 2018, in response to concerns about the White House security clearance process and, in particular, the number of individuals with interim security clearances and the potential of such individuals to have access to highly classified information, White House Chief of Staff John Kelly issued a memorandum highlighting certain changes to the security clearance process for White House employees.
 - The Kelly memorandum was driven, in part, by public concerns about individuals thought to have access to the President's Daily Brief (PDB), a daily product provided by the Intelligence Community to the President, certain key cabinet officials, and, typically, a highly limited number of senior White House staff with critical need for access to such information.
 - The information contained in the PDB is typically understood to contain some of the most highly classified and compartmented information within the government, often including information related to the sources and methods of intelligence collection.
 - Such information could include material that, if obtained by individuals not entitled to access or a foreign government or non-state actor, might reveal the specific method by which the United States government obtained the information or the individual that provided it.
- Key highlights of the Kelly memorandum include:
 - A review of White House staff clearances and the relevant levels of such clearances, as well as appropriate reductions to the overall number of clearances and the level of going-forward clearances to better correspond to the job responsibilities of cleared staff.¹⁷
 - A requirement that all new White House clearance requests require approval from the Chief of Staff's office.¹⁸

¹⁶ *Id.*

¹⁷ See The White House, *Memorandum of John F. Kelly to Donald F. McGahn, II, et al. re: Improvements to the Clearance Process*, at 1 (Feb. 16, 2018), available online at <<https://assets.documentcloud.org/documents/4380658/Read-Kelly-s-memo-of-proposed-changes-to-White.pdf>>.

¹⁸ *Id.*

- Changes to the hiring process to ensure that all White House staff go through a vetting process, including submission of an SF-86 and a suitability questionnaire, as well as suitability determination by the White House Personnel Security Office before being onboarded and granted access to the White House complex.¹⁹
- Termination—as of September 2017—of the granting of new interim security clearances “absent extraordinary circumstances and [the Chief of Staff’s] explicit approval.”²⁰
- A review of pending background investigations and adjudications, including the time such investigations and adjudications have been pending; a return to “complete and fulsome” background investigations by the FBI; creating benchmarks for completion of investigations; reforms to speed up the adjudication process; and a review of interim clearances for purposes of achieving final adjudication and grant of final clearances.²¹
- In an effort to “improve accountability while maintaining the critical objectivity necessary for the process to continue functioning without political interference,” direction to the White House Counsel, National Security Advisor, and the Deputy Chief of Staff for Operations, for the careful consideration and implementation, as appropriate, of the following actions:
 - Development and implementation of written protocols for the review of security files and work with the FBI to develop best practices.²²
 - Formalization of the delivery and notification process and updating of memorandum of understanding between the White House and the FBI regarding background investigations.²³
 - Background investigations for White House Commissioned officers (e.g., Special Assistants to the President, Deputy Assistants to the President, and Assistants to the President) are to be flagged for the FBI and to be hand-delivered to the White House Counsel after completion.²⁴
 - Any information deemed by the FBI to be “significantly derogatory” is to be orally briefed to the White House Counsel and the White House Counsel is to deliver the background investigations to the White House Personnel Security Office for adjudication.²⁵
 - Work with the FBI to ensure significantly derogatory information is reported to the White House soon after discovery in the field with a goal of a 48-hour turnaround from discovery of such information on senior staff to reporting of such information to the White House.²⁶

¹⁹ *Id.* at 2.

²⁰ *Id.*

²¹ *Id.* at 1-2.

²² *Id.* at 3.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 3-4.

²⁶ *Id.* at 4.

- Continued close work with the Personnel Security Office to ensure “timely recommendations of the highest quality that are free from political interference or considerations,” including creation of a formal process between the White House Counsel’s Office and the White House Personnel Security Office on suitability and clearance reviews as well as creation of a record of those who require access to contents of background investigation.²⁷
 - For future interim clearances, a single 180-day initial interim clearance with a single 90-day extension option available only if “no significant derogatory information that would call into question whether interim status is appropriate has been discovered in the [background investigation].”²⁸
 - Effective February 23, 2018, discontinue any Top Secret or SCI-level clearances for individuals whose investigations or adjudications have been pending since June 1, 2017 or before.²⁹
 - Similar reviews are to be conducted monthly going forward for long-outstanding adjudications.³⁰
 - Limiting of access to certain highly classified information for individuals with interim clearances absent Chief of Staff’s office approval, to be granted “only in the most compelling circumstances.”³¹
- Status reports to the Chief of Staff at least monthly on all pending White House background investigations and adjudications.³²
 - Creation of a White House working group along with key agency heads and lawyers to study the clearance process and to harmonize and modernize standards across the Executive Branch.³³
 - Specifically, the working group is likely to address issues raised in the memorandum including the fact that “[d]ifferent agencies have different standards” and the fact that “in the past, credible and substantiated reports of past domestic abuse—even physical abuse—were not considered automatic disqualifiers for suitability for employment or a security clearance.”³⁴
 - Per the Kelly memorandum, this “needs to be revisited” and “[g]enerally, our treatment of behavior that has traditionally may not have been disqualifying should be modernized.”³⁵

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 5.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

Key Items to Watch

- Whether any individuals have their Top Secret or SCI-level clearances discontinued on February 23, 2018 or during follow-on monthly reviews.
 - Whether any such individuals maintain employment with the White House and, if so, whether such individuals job responsibilities are modified to limit the need for access to classified information.
- Whether any individuals with interim clearances maintain (or obtain) access to highly classified information—such as that contained in the Presidential Daily Brief or other National Security Council-controlled information—under a determination by the Chief of Staff office’s that the “most compelling circumstances” exist.
 - And, if so, what such compelling circumstances may be in each individual case.
- Whether any new interim clearances granted and whether any such clearances, if granted, are extended beyond 180 days.
- Whether the new 48-hour turnaround time from discovery to reporting of significantly derogatory information on senior White House staff is met, and if such reports are made, what action, if any, is taken with respect to such individuals.
- Whether the changes to the security clearance process are able to simultaneously increase speed and accountability while maintaining the “the highest standards of quality” and the “critical objectivity necessary for the process to continue functioning without political interference.”
- Whether and how Executive Branch security clearance standards are harmonized and modernized.