



September 21, 2011

Dear Colleagues at JPL,

As you know from the August 25 e-mail from JPL Deputy Director Eugene Tattini, JPL/Caltech has resumed HSPD12 credentialing and the associated investigations. The e-mail suggests that 25% of employees are yet to be badged. Some of those employees have been waiting until the lawsuit was resolved, either anticipating a better process or simply biding time.¹ Many of them have contacted former plaintiffs in the lawsuit with questions about the process and for guidance on how to proceed. We address some of those questions below.

Is the employee still required to sign the SF85 authorization for release of personal information?

Apparently. The employee is still required to fill out Standard Form 85, which includes the authorization. The authorization language in the current SF85 is the same as it was in 2007, so the authorization remains unlimited; by signing, you authorize anyone who has any information about you to turn that information over to the government. You may want to ask your supervisor to provide full documentation for all stages of the badging process well in advance of your being required to sign anything so you can read the materials carefully.

What happens to employees who do not sign the SF85 authorization? In 2007, Caltech policy was that any employee who did not sign the SF85 authorization was considered to have voluntarily resigned. The alternatives we suggested at the time (arrangements to work at Campus, etc.) were rejected. We do not know Caltech's current thinking on this matter.

Will NASA still use the suitability matrix? The criteria for "passing" the background investigation may be somewhat less onerous than they were four years ago. In 2007, JPL and NASA published² as official policy the Office of Personnel Management "Issues Characterization Chart," which JPL said would be used to determine each employee's "suitability" to work at JPL (or any other NASA facility). The chart, also known as the "suitability matrix" <http://hspd12jpl.org/files/Suitability_Matrix.pdf>, includes a wide range of highly personal criteria (such as sexual practices, financial history, and political activity). We consider the chart to be a return to the McCarthy era; our lawsuit kept a spotlight on it, and, as a result, NASA subsequently disavowed the suitability matrix and now claims to rely on more general criteria <http://hspd12jpl.org/files/decision_making_guide.pdf>. Nevertheless, the process is still obscure, and those judged "unsuitable" are afforded no meaningful appeal process.

What is the investigation like? According to NASA's published procedures,³ the minimum required investigation is a search of government databases and an examination of questionnaires completed by your references. If either of these steps turns up anything that the investigators deem suspicious, they

¹ See www.hspd12jpl.org for more information about the four-year battle to mitigate the overly intrusive background investigations required by the badging process.

² JPL posted the chart to JPL's official HSPD12 website; NASA published it in the Desk Guide for Suitability and Security Clearance Processing (Version 2, SREF-3000-0003, available at <<http://www.hspd12jpl.org/files/SuitabilitySecurityDeskGuide.pdf>>). The NASA handbook remained in effect until early 2010.

³ This was the published procedure in 2007 (NASA Interim Directive 1600.1, apparently still in effect).



are required to probe more deeply. They use the open-ended SF85 authorization to gather additional personal information from a variety of sources, some of which may be anonymous. That information is turned over to a NASA adjudicator (probably in the NASA Management Office at JPL), who may decide that the employee is “unsuitable.”

What is the appeals process for those deemed unsuitable? According to NASA's published procedures,³ those who want to appeal an “unsuitable” determination must make their case in writing within 10 days of being notified that access is denied. The appeal is then evaluated by a three-person panel of NASA employees, one of whom is a NASA attorney. We believe this process is unfair because it is controlled by the same people who have already judged the employee unfavorably. Due to old federal case law [*Navy v. Egan*, 484 U.S. 518 (1988)], it may not be possible to challenge the result in court. If an employee does mount a challenge in court, he or she might be in the position of Haiping Su, a NASA Ames Research Center contract employee who was denied access to Ames after being accused of being a “security risk.” Su went through several polygraph examinations and other interviews; however, he was not able to respond to specific accusations *because he was never told what they were*. His debarment happened shortly after his HSPD12 credentialing. Su’s case remains unresolved; the government has successfully shielded the underlying facts by invoking national security. Su continues to be employed by the University of California and continues to work on NASA-funded tasks, but from an off-site location.

What is Caltech’s role if an employee is judged unsuitable? NASA can deny access to the JPL facilities, but they cannot terminate our employment; Caltech, not NASA, is our employer. NASA’s reasons for debarring the employee should not be revealed to Caltech; therefore, Caltech could choose to find a suitable off-lab position for the employee or let the employee resign in lieu of involuntary termination. We do not know whether or not they would be willing to do so.

What are the plaintiffs going to do? The decision to sign the SF85 authorization is highly personal. Some plaintiffs have already left JPL, in part over this issue, and some will leave JPL rather than sign.

Is there any chance of further legal action? The legal action we filed in August 2007 is completed. Thanks to our very capable attorneys, we explored all reasonable legal options to stop the overly intrusive background investigations. Until an employee is actually “harmed” by the process, it is likely that no further action can be taken in the courts.

Other than the lawsuit, are there other avenues for relief? We have attempted to open any door that might offer relief in this matter, including the following.

- We had conversations with and wrote letters to NASA officials encouraging them to follow the DOE and NSF policies. At their FFRDCs, employees who do not need a security clearance are not required to get “Smart” badges, and thus are not required to sign the authorization or to undergo the open-ended background investigations.
- We asked various congresspersons and senators, both in writing and in person, to critically examine the HSPD12 process, and to pursue legislation protecting low-risk employees against overly intrusive investigations.
- We attempted to correct the record on inaccurate and misleading information about the process. For example, in his testimony to the Supreme Court, Acting Solicitor General Neal Katyal said that



with the badge, JPL employees could easily get within six feet of the shuttle as it is being fueled and readied for launch. We encouraged NASA, the Department of Justice, and congressional representatives to conduct investigations to determine who in NASA supplied this obviously false information to DOJ. We also wrote to Presidential Science Advisor John Holdren, the DOJ and NASA Inspectors General, and Senate Judiciary Committee Chair Patrick Leahy on this matter.

Those who choose to remain at JPL may want to continue to work in a concerted fashion to give employees a voice in the resolution of workplace issues. We encourage JPLers to make every effort to communicate via line management channels; however, we recognize that a union may also be an effective way to ensure that employees have a voice in these matters.

This has been a long and arduous process. We are grateful that the overwhelming majority of our JPL colleagues have conducted themselves with the greatest dignity and respect during the entire process, often in the face of less praiseworthy behavior on the part of some Caltech managers. Many of you have directly supported us, and for that you have our profound appreciation.

Sincerely,

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Bruce Banerdt

Scott Maxwell

Dennis V. Byrnes

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