

116TH CONGRESS
1ST SESSION

S. 838

To protect integrity, fairness, and objectivity in decisions regarding access to classified information, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 14, 2019

Mr. WARNER (for himself and Ms. COLLINS) introduced the following bill; which was read twice and referred to the Select Committee on Intelligence

A BILL

To protect integrity, fairness, and objectivity in decisions regarding access to classified information, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. EXCLUSIVITY, CONSISTENCY, AND TRANS-**
4 **PARENCY IN SECURITY CLEARANCE PROCE-**
5 **DURES AND RIGHT TO APPEAL.**

6 (a) EXCLUSIVITY OF PROCEDURES.—Section 801 of
7 the National Security Act of 1947 (50 U.S.C. 3161) is
8 amended by adding at the end the following:

9 “(c) EXCLUSIVITY.—Except as provided in sub-
10 section (b) and subject to sections 801A and 801B, the

1 procedures established pursuant to subsection (a) shall be
 2 the exclusive procedures by which decisions about access
 3 to classified information are governed.”.

4 (b) TRANSPARENCY.—Such section is further amend-
 5 ed by adding at the end the following:

6 “(d) PUBLICATION.—

7 “(1) IN GENERAL.—Not later than 180 days
 8 after the date of the enactment of this subsection,
 9 the President shall publish in the Federal Register
 10 the procedures established pursuant to subsection
 11 (a).

12 “(2) UPDATES.—Whenever the President
 13 makes a revision to a procedure established pursuant
 14 to subsection (a), the President shall publish such
 15 revision in the Federal Register not later than 30
 16 days before the date on which the revision becomes
 17 effective.”.

18 (c) CONSISTENCY.—

19 (1) IN GENERAL.—Title VIII of the National
 20 Security Act of 1947 (50 U.S.C. 3161 et seq.) is
 21 amended by inserting after section 801 the fol-
 22 lowing:

23 **“SEC. 801A. DECISIONS RELATING TO ACCESS TO CLASSI-**
 24 **FIED INFORMATION.**

25 “(a) DEFINITIONS.—In this section:

1 “(1) AGENCY.—The term ‘agency’ has the
2 meaning given the term ‘Executive agency’ in section
3 105 of title 5, United States Code.

4 “(2) CLASSIFIED INFORMATION.—The term
5 ‘classified information’ includes sensitive compart-
6 mented information, restricted data, restricted han-
7 dling information, and other compartmented infor-
8 mation.

9 “(3) ELIGIBILITY FOR ACCESS TO CLASSIFIED
10 INFORMATION.—The term ‘eligibility for access to
11 classified information’ has the meaning given such
12 term in the procedures established pursuant to sec-
13 tion 801(a).

14 “(b) IN GENERAL.—Each head of an agency that
15 makes a determination for eligibility for access to classi-
16 fied information shall ensure that in making the deter-
17 mination, the head of the agency or any person acting on
18 behalf of the agency—

19 “(1) does not violate any right or protection en-
20 shrined in the Constitution of the United States, in-
21 cluding rights articulated in the First, Fifth, and
22 Fourteenth Amendments;

23 “(2) does not discriminate for or against an in-
24 dividual on the basis of race, color, religion, sex, na-
25 tional origin, age, or handicap;

1 “(3) is not carrying out retaliation for political
 2 activities or beliefs or a coercion or reprisal de-
 3 scribed in section 2302(b)(3) of title 5, United
 4 States Code; and

5 “(4) does not violate section 3001(j)(1) of the
 6 Intelligence Reform and Terrorism Prevention Act
 7 of 2004 (50 U.S.C. 3341(j)(1)).”.

8 (2) CLERICAL AMENDMENT.—The table of con-
 9 tents in the matter preceding section 2 of the Na-
 10 tional Security Act of 1947 (50 U.S.C. 3002) is
 11 amended by inserting after the item relating to sec-
 12 tion 801 the following:

“Sec. 801A. Decisions relating to access to classified information.”.

13 (d) RIGHT TO APPEAL.—

14 (1) IN GENERAL.—Such title, as amended by
 15 subsection (c), is further amended by inserting after
 16 section 801A the following:

17 **“SEC. 801B. RIGHT TO APPEAL.**

18 “(a) DEFINITIONS.—In this section:

19 “(1) AGENCY.—The term ‘agency’ has the
 20 meaning given the term ‘Executive agency’ in section
 21 105 of title 5, United States Code.

22 “(2) COVERED PERSON.—The term ‘covered
 23 person’ means a person, other than the President
 24 and Vice President, currently or formerly employed
 25 by, detailed to, assigned to, or issued an authorized

1 conditional offer of employment for a position that
2 requires access to classified information by an agen-
3 cy, including the following:

4 “(A) A member of the Armed Forces.

5 “(B) A civilian.

6 “(C) An expert or consultant to an agency.

7 “(D) Counsel or other representative re-
8 tained by a covered person.

9 “(E) Any other category of person who
10 acts for or on behalf of an agency as deter-
11 mined by the head of the agency.

12 “(3) ELIGIBILITY FOR ACCESS TO CLASSIFIED
13 INFORMATION.—The term ‘eligibility for access to
14 classified information’ has the meaning given such
15 term in the procedures established pursuant to sec-
16 tion 801(a).

17 “(4) NEED FOR ACCESS.—The term ‘need for
18 access’ has such meaning as the President may de-
19 fine in the procedures established pursuant to sec-
20 tion 801(a).

21 “(5) SECURITY EXECUTIVE AGENT.—The term
22 ‘Security Executive Agent’ means the Director of
23 National Intelligence acting as the Security Execu-
24 tive Agent in accordance with Executive Order
25 13467 (73 Fed. Reg. 38103; 50 U.S.C. 3161 note;

1 relating to reforming processes related to suitability
2 for government employment, fitness for contractor
3 employees, and eligibility for access to classified na-
4 tional security information), or as otherwise defined
5 in a subsequent provision of law.

6 “(b) AGENCY REVIEW.—

7 “(1) IN GENERAL.—Not later than 180 days
8 after the date of the enactment of this section, each
9 head of an agency shall, consistent with the interest
10 of national security, establish and make publicly
11 available a process by which a covered person to
12 whom eligibility for access to classified information
13 was denied or revoked by the agency can appeal that
14 denial or revocation within the agency.

15 “(2) ELEMENTS.—The process required by
16 paragraph (1) shall include the following:

17 “(A) In the case of a covered person to
18 whom eligibility for access to classified informa-
19 tion is denied or revoked by an agency, the fol-
20 lowing:

21 “(i) The head of the agency shall pro-
22 vide the covered person with a written—

23 “(I) detailed explanation of the
24 basis for the denial or revocation as
25 the head of the agency determines is

1 consistent with the interests of na-
2 tional security and as permitted by
3 other applicable provisions of law; and

4 “(II) notice of the right of the
5 covered person to a hearing and ap-
6 peal under this subsection.

7 “(ii) Not later than 30 days after re-
8 ceiving a request from the covered person
9 for copies of the documents that formed
10 the basis of the agency’s decision to revoke
11 or deny, including the investigative file, the
12 head of an agency shall provide to the cov-
13 ered person copies of such documents as—

14 “(I) the head of the agency de-
15 termines is consistent with the inter-
16 ests of national security; and

17 “(II) permitted by other applica-
18 ble provisions of law, including—

19 “(aa) section 552 of title 5,
20 United States Code (commonly
21 known as the ‘Freedom of Infor-
22 mation Act’);

23 “(bb) section 552a of such
24 title (commonly known as the
25 ‘Privacy Act of 1974’); and

1 “(cc) such other provisions
2 of law relating to the protection
3 of confidential sources and pri-
4 vacy of individuals.

5 “(iii)(I) The covered person shall have
6 the opportunity to retain counsel or other
7 representation at the covered person’s ex-
8 pense.

9 “(II) Upon the request of the covered
10 person, and a showing that the ability to
11 review classified information is essential to
12 the resolution of an appeal under this sub-
13 section, counsel or other representation re-
14 tained under this clause shall be considered
15 for access to classified information for the
16 limited purposes of such appeal.

17 “(iv)(I) The head of the agency shall
18 provide the covered person an opportunity,
19 at a point in the process determined by the
20 agency head—

21 “(aa) to appear personally before
22 an adjudicative or other authority,
23 other than the investigating entity,
24 and to present to such authority rel-
25 evant documents, materials, and infor-

1 mation, including evidence that past
2 problems relating to the denial or rev-
3 ocation have been overcome or suffi-
4 ciently mitigated; and

5 “(bb) to call and cross-examine
6 witnesses before such authority, un-
7 less the head of the agency determines
8 that calling and cross-examining wit-
9 nesses is not consistent with the inter-
10 ests of national security.

11 “(II) The head of the agency shall
12 make, as part of the security record of the
13 covered person, a written summary, tran-
14 script, or recording of any appearance
15 under item (aa) of subclause (I) or calling
16 or cross-examining of witnesses under item
17 (bb) of such subclause.

18 “(v) On or before the date that is 30
19 days after the date on which the covered
20 person receives copies of documents under
21 clause (ii), the covered person may request
22 a hearing of the decision to deny or revoke
23 by filing a written appeal with the head of
24 the agency.

1 “(B) A requirement that each review of a
2 decision under this subsection is completed on
3 average not later than 180 days after the date
4 on which a hearing is requested under subpara-
5 graph (A)(v).

6 “(3) AGENCY REVIEW PANELS.—

7 “(A) IN GENERAL.—Each head of an
8 agency shall establish an independent panel to
9 hear and review appeals under this subsection.

10 “(B) MEMBERSHIP.—

11 “(i) COMPOSITION.—Each inde-
12 pendent panel established by the head of
13 an agency under subparagraph (A) shall be
14 composed of at least three employees of the
15 agency selected by the head, two of whom
16 shall not be members of the security field.

17 “(ii) TERMS.—A term of service on an
18 independent panel established by the head
19 of an agency under subparagraph (A) shall
20 not exceed 2 years.

21 “(C) DECISIONS.—

22 “(i) WRITTEN.—Each decision of a
23 panel established under subparagraph (A)
24 shall be in writing and contain a justifica-
25 tion of the decision.

1 “(ii) CONSISTENCY.—Each head of an
2 agency that establishes a panel under sub-
3 paragraph (A) shall ensure that each deci-
4 sion of the panel is consistent with the in-
5 terests of national security and applicable
6 provisions of law.

7 “(iii) FINALITY.—Each decision of a
8 panel established under subparagraph (A)
9 shall be final but subject to appeal and re-
10 view under subsection (c).

11 “(D) ACCESS TO CLASSIFIED INFORMA-
12 TION.—The head of an agency that establishes
13 a panel under subparagraph (A) shall afford ac-
14 cess to classified information to the members of
15 the panel as the head determines—

16 “(i) necessary for the panel to hear
17 and review an appeal under this sub-
18 section; and

19 “(ii) consistent with the interests of
20 national security.

21 “(4) CORRECTIVE ACTION.—

22 “(A) IN GENERAL.—If, in the course of
23 proceedings under this subsection, the head of
24 an agency or a panel established by the head
25 under paragraph (3) decides that a covered per-

son’s eligibility for access to classified information was improperly denied or revoked by the agency, the agency shall take corrective action to return the covered person, as nearly as practicable and reasonable, to the position such covered person would have held had the improper denial or revocation not occurred.

“(B) COMPENSATION.—Corrective action under subparagraph (A) may include compensation, in an amount not to exceed \$300,000, for any loss of wages or benefits suffered, or expenses otherwise incurred, by reason of such improper denial or revocation.

“(5) PUBLICATION OF DECISIONS.—

“(A) IN GENERAL.—Each head of an agency shall publish each final decision on an appeal under this subsection.

“(B) REQUIREMENTS.—In order to ensure transparency, oversight by Congress, and meaningful information for those who need to understand how the clearance process works, each publication under subparagraph (A) shall be—

“(i) made in a manner that is consistent with section 552 of title 5, United States Code, as amended by the Electronic

Freedom of Information Act Amendments
of 1996 (Public Law 104–231);

“(ii) published to explain the facts of
the case, redacting as appropriate personal
identifiable information or sensitive pro-
gram information; and

“(iii) made available on a website that
is searchable by members of the public.

“(6) PUBLICATION OF PROCESSES.—Each head
of an agency shall publish in the Federal Register
the process established by the head pursuant to
paragraph (1).

“(c) HIGHER LEVEL REVIEW.—

“(1) PANEL.—

“(A) ESTABLISHMENT.—Not later than
180 days after the date of the enactment of this
section, the Security Executive Agent shall es-
tablish a panel to review decisions made on ap-
peals pursuant to the processes established
under subsection (b).

“(B) SCOPE OF REVIEW AND JURISDIC-
TION.—The panel established under subpara-
graph (A) shall review such decisions only—

“(i) as they relate to violations of sec-
tion 801A(b); or

1 “(ii) to the extent to which an agency
2 properly conducted a review of an appeal
3 under subsection (b).

4 “(C) COMPOSITION.—The panel estab-
5 lished pursuant to subparagraph (A) shall be
6 composed of three individuals selected by the
7 Security Executive Agent for purposes of the
8 panel, of whom at least one shall be an attor-
9 ney.

10 “(2) APPEALS AND TIMELINESS.—

11 “(A) APPEALS.—

12 “(i) INITIATION.—On or before the
13 date that is 30 days after the date on
14 which a covered person receives a written
15 decision on an appeal under subsection (b),
16 the covered person may initiate oversight
17 of that decision by filing a written appeal
18 with the Security Executive Agent.

19 “(ii) FILING.—A written appeal filed
20 under clause (i) relating to a decision of an
21 agency shall be filed in such form, in such
22 manner, and containing such information
23 as the Security Executive Agent may re-
24 quire, including—

25 “(I) a description of—

1 “(aa) any alleged violations
2 of section 801A(b) relating to the
3 denial or revocation of the cov-
4 ered person’s eligibility for access
5 to classified information; and

6 “(bb) any allegations of how
7 the decision may have been the
8 result of the agency failing to
9 properly conduct a review under
10 subsection (b); and

11 “(II) supporting materials and
12 information for the allegations de-
13 scribed under subclause (I).

14 “(B) TIMELINESS.—The Security Execu-
15 tive Agent shall ensure that, on average, review
16 of each appeal filed under this subsection is
17 completed not later than 180 days after the
18 date on which the appeal is filed.

19 “(3) DECISIONS AND REMANDS.—

20 “(A) IN GENERAL.—If, in the course of re-
21 viewing under this subsection a decision of an
22 agency under subsection (b), the panel estab-
23 lished under paragraph (1) decides that there is
24 sufficient evidence of a violation of section
25 801A(b) to merit a new hearing or decides that

1 the decision of the agency was the result of an
2 improperly conducted review under subsection
3 (b), the panel shall vacate the decision made
4 under subsection (b) and remand to the agency
5 by which the covered person shall be eligible for
6 a new appeal under subsection (b).

7 “(B) WRITTEN DECISIONS.—Each decision
8 of the panel established under paragraph (1)
9 shall be in writing and contain a justification of
10 the decision.

11 “(C) CONSISTENCY.—The panel under
12 paragraph (1) shall ensure that each decision of
13 the panel is consistent with the interests of na-
14 tional security and applicable provisions of law.

15 “(D) FINALITY.—

16 “(i) IN GENERAL.—Except as pro-
17 vided in clause (ii), each decision of the
18 panel established under paragraph (1)
19 shall be final.

20 “(ii) OVERTURN.—The Security Exec-
21 utive Agent may overturn a decision of the
22 panel if, not later than 30 days after the
23 date on which the panel issues the deci-
24 sion, the Security Executive Agent person-

1 ally exercises the authority granted by this
2 clause to overturn such decision.

3 “(E) NATURE OF REMANDS.—In remand-
4 ing a decision under subparagraph (A), the
5 panel established under paragraph (1) may not
6 direct an outcome of any further appeal under
7 subsection (b).

8 “(F) NOTICE OF DECISIONS.—For each
9 decision of the panel established under para-
10 graph (1) regarding a covered person, the Secu-
11 rity Executive Agent shall provide the covered
12 person with a written notice of the decision that
13 includes a detailed description of the reasons
14 for the decision, consistent with the interests of
15 national security and applicable provisions of
16 law.

17 “(4) REPRESENTATION BY COUNSEL.—

18 “(A) IN GENERAL.—The Security Execu-
19 tive Agent shall ensure that, under this sub-
20 section, a covered person appealing a decision
21 under subsection (b) has an opportunity to re-
22 tain counsel or other representation at the cov-
23 ered person’s expense.

24 “(B) ACCESS TO CLASSIFIED INFORMA-
25 TION.—

1 “(i) IN GENERAL.—Upon the request
 2 of the covered person, and a showing that
 3 the ability to review classified information
 4 is essential to the resolution of an appeal
 5 under this subsection, the Security Execu-
 6 tive Agent shall ensure the counsel or
 7 other representation retained under this
 8 paragraph is considered for access to clas-
 9 sified information for the limited purposes
 10 of such appeal.

11 “(ii) EXTENT OF ACCESS.—Counsel
 12 or another representative who is cleared
 13 for access under this subparagraph may be
 14 afforded access to relevant classified mate-
 15 rials to the extent consistent with the in-
 16 terests of national security.

17 “(iii) WRONGFUL DENIAL OF AC-
 18 CESS.—Wrongful denial of access of rel-
 19 evant materials to a counsel or other rep-
 20 resentative who is cleared for access under
 21 this subparagraph shall be reviewed, and
 22 remedied where necessary, by the panel es-
 23 tablished under paragraph (1).

24 “(5) ACCESS TO DOCUMENTS AND EMPLOY-

25 EES.—

1 “(A) AFFORDING ACCESS TO MEMBERS OF
2 PANEL.—The Security Executive Agent shall
3 afford access to classified information to the
4 members of the panel established under para-
5 graph (1)(A) as the Security Executive Agent
6 determines—

7 “(i) necessary for the panel to review
8 a decision described in such paragraph;
9 and

10 “(ii) consistent with the interests of
11 national security.

12 “(B) AGENCY COMPLIANCE WITH RE-
13 QUESTS OF PANEL.—Each head of an agency
14 shall comply with each request by the panel for
15 a document and each request by the panel for
16 access to employees of the agency necessary for
17 the review of an appeal under this subsection,
18 to the degree that doing so is, as determined by
19 the head of the agency and permitted by appli-
20 cable provisions of law, consistent with the in-
21 terests of national security.

22 “(6) PUBLICATION OF DECISIONS.—

23 “(A) IN GENERAL.—For each final deci-
24 sion on an appeal under this subsection, the
25 head of the agency with respect to which the

1 appeal pertains and the Security Executive
2 Agency shall each publish the decision.

3 “(B) REQUIREMENTS.—In order to ensure
4 transparency, oversight by Congress, and mean-
5 ingful information for those who need to under-
6 stand how the clearance process works, each
7 publication under subparagraph (A) shall be—

8 “(i) made in a manner that is con-
9 sistent with section 552 of title 5, United
10 States Code;

11 “(ii) published in an appropriately re-
12 dacted form, the facts of the appeal; and

13 “(iii) made available on a website that
14 is searchable by members of the public.

15 “(d) PERIOD OF TIME FOR THE RIGHT TO AP-
16 PEAL.—

17 “(1) IN GENERAL.—Except as provided in para-
18 graph (2), any covered person who has been the sub-
19 ject of a decision made by the head of an agency to
20 deny or revoke eligibility for access to classified in-
21 formation shall retain all rights to appeal under this
22 section until the conclusion of the appeal process
23 under this section.

24 “(2) WAIVER OF RIGHTS.—

1 “(A) PERSONS.—Any covered person may
2 voluntarily waive the covered person’s right to
3 appeal under this section and such waiver shall
4 be conclusive.

5 “(B) AGENCIES.—The head of an agency
6 may not require a covered person to waive the
7 covered person’s right to appeal under this sec-
8 tion for any reason.

9 “(e) RELATIONSHIP TO SUITABILITY.—No person
10 may use a determination of suitability under part 731 of
11 title 5, Code of Federal Regulations, or successor regula-
12 tion, for the purpose of denying a covered person the re-
13 view proceedings of this section where there has been a
14 denial or revocation of eligibility for access to classified
15 information.

16 “(f) PRESERVATION OF ROLES AND RESPONSIBIL-
17 ITIES UNDER EXECUTIVE ORDER 10865 AND OF THE DE-
18 FENSE OFFICE OF HEARINGS AND APPEALS.—Nothing in
19 this section shall be construed to diminish or otherwise
20 affect the procedures in effect on the day before the date
21 of the enactment of this Act for denial and revocation pro-
22 cedures provided to individuals by Executive Order 10865
23 (50 U.S.C. 3161 note; relating to safeguarding classified
24 information within industry), or successor order, including
25 those administered through the Defense Office of Hear-

1 ings and Appeals of the Department of Defense under De-
2 partment of Defense Directive 5220.6, or successor direc-
3 tive.”.

4 (2) CLERICAL AMENDMENT.—The table of con-
5 tents in the matter preceding section 2 of the Na-
6 tional Security Act of 1947 (50 U.S.C. 3002), as
7 amended by subsection (c), is further amended by
8 inserting after the item relating to section 801A the
9 following:

“Sec. 801B. Right to appeal.”.

○