Testimony by Angela Canterbury, Director of Public Policy, Project On Government Oversight, before the Senate Homeland Security and Governmental Affairs Subcommittee on Efficiency and Effectiveness of Federal Programs and the Federal Workforce on "Safeguarding Our Nation's Secrets: Examining the National Security Workforce" November 20, 2013

Chairman Tester, Ranking Member Portman, and Members of the Subcommittee, thank you for your oversight of the national security workforce and for inviting me to testify today.

I am the Director of Public Policy at the Project On Government Oversight (POGO). Founded in 1981, POGO is a nonpartisan independent watchdog that champions good government reforms. POGO's investigations into corruption, misconduct, and conflicts of interest achieve a more effective, accountable, open, and ethical federal government. Therefore, POGO has a keen interest in ensuring a proper balance in government between national security and other protections for our constitutional democracy. While we believe the government has a long way to go in order to strike the right balance, this hearing is a very welcome step in that direction.

Today I also am speaking as a member of the steering committee of the Make It Safe Coalition, a nonpartisan, trans-ideological network of organizations dedicated to strengthening protections for public and private sector whistleblowers. More than 400 groups have endorsed our efforts to strengthen whistleblower legislation, on behalf of millions of Americans.[1] Our coalition is deeply concerned with the current threats in the name of national security to civil service rights, whistleblower protections, and taxpayer accountability.

Indeed, national security claims threaten to engulf our government, and with cruel irony, make us less safe. In August of this year, a devastating court decision stripped federal employees in national security sensitive positions of their right to appeal an adverse personnel action—setting the stage to also strip due process rights for actions that are discriminatory or in retaliation for whistleblowing. The deeply flawed decision in *Kaplan v. Conyers, Northover and MSPB* (*Conyers*)[2] arms agencies with sweeping power not granted by the President or Congress. This affects untold numbers of civil servants, because the Office of Personnel Management (OPM) doesn't know how many national security sensitive positions there are. We only know from the government's brief in *Conyers* that there are at least half a million workers in positions labeled as

[1] Open letter from Project On Government Oversight et al., to President Barack Obama and Members of the 111th Congress, regarding strong and comprehensive whistleblower rights, September 23, 2011. www.makeitsafecampaign.org/wp-content/uploads/2013/11/WPA-Sign-On-Letter.pdf (Downloaded November 15, 2013)

[2] *Kaplan v. Conyers*, No. 2011-3207, (Fed. Cir. August 20, 2013). http://www.cafc.uscourts.gov/images/stories/opinions-orders/11-3207.opinion.8-19-2013.1.pdf (Downloaded November 14, 2013)

national security sensitive at the Department of Defense (DoD) alone.[3] There also has been a jaw-dropping lack of oversight of the seemingly arbitrary and overused designation of national security sensitive positions.

What is a National Security Sensitive Position?

The authority for designating positions as national security sensitive was created decades ago by Executive Order 10450 issued by President Eisenhower and is still in effect, as amended.[4] People who hold a national security sensitive position may or may not have access to classified information. Our concern here is with the latter, since that category of national security sensitive positions, called noncritical-sensitive, were at issue in *Conyers.*[5] Security clearance holders have long had different rights and procedures from other civil servants.[6] This Subcommittee and others have been delving into the many problems with security clearances in other hearings and legislation.

E.O. 10450 states:

> The head of any department or agency shall designate, or cause to be designated, any position within his department or agency the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security as a sensitive position.[7]

While the head of an agency designates, the E.O. delegates the responsibility of determining the scope of national security sensitive positions to OPM. OPM's regulations define national security sensitive positions as:

> (1) Those positions that involve activities of the Government that are concerned with the protection of the nation from foreign aggression or espionage, including development of defense plans or policies, intelligence or counterintelligence activities, and related activities concerned with the preservation of the military strength of the United States; and
> (2) Positions that require regular use of, or access to, classified information. Procedures and guidance provided in OPM issuances apply.[8]

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[3] *Kaplan v. Conyers*, Initial Brief for Director, Office of Personnel Management, November 23, 2011, p. 4, n. 7. http://mspbwatch.files.wordpress.com/2012/08/berryv-conyers-initialbriefforopm.pdf (Downloaded November 14, 2013) (Hereinafter *Kaplan v. Conyers* Initial Brief for OPM Director)

[4] 5 U.S.C. § 7311("Loyalty and striking") http://www.gpo.gov/fdsys/pkg/USCODE-2011-title5/html/USCODE-2011-title5-partIII-subpartF-chap73-subchapII-sec7311.htm (Downloaded November 14, 2013) (Hereinafter 5 U.S.C. § 7311("Loyalty and striking"))

[5] National security positions are categorized as "noncritical-sensitive," "critical-sensitive," or "special-sensitive," based on the degree of harm that a person in the position could cause to national security. *Code of Federal Regulations*, Title 5, § 732.201(a). http://www.gpo.gov/fdsys/granule/CFR-2012-title5-vol2/CFR-2012-title5-vol2-sec732-201/content-detail.html (Downloaded November 14, 2013)

[6] *Department of the Navy v. Egan*, 484 U.S. 518 (1988). (Hereinafter *Department of the Navy v. Egan*)

[7] 5 U.S.C. § 7311("Loyalty and striking")

[8] 5 USC § 732.102(a) http://www.gpo.gov/fdsys/pkg/CFR-2012-title5-vol2/pdf/CFR-2012-title5-vol2-part732.pdf (Downloaded November 14, 2013)

However, OPM has failed to appropriately oversee the use of these designations by agencies. With no real checks and balances, the agencies have been applying the designation extremely broadly to include low-level positions with no real national security implications. In fact, for many years, federal agencies such as DoD and the Department of Homeland Security have been allowed to label virtually any position as national security sensitive. It is hard to grasp the scope of the proliferation of these positions, since again, OPM doesn't even know how many there are. This is especially troubling given that Executive Order 10450 gives OPM primary oversight and reporting responsibilities for agency national security sensitive designations. Yet, when POGO sent a Freedom of Information Act request for reports from the past 10 years on agency use of the designations—reports that are mandated by Section 14 of the E.O.—OPM said there were no responsive records.[9] So it seems that for years OPM has allowed the agencies unfettered discretion without conducting its oversight and reporting responsibilities.[10]

As the Government Accountability Project pointed out, giving agencies such broad discretion invites abuse:

> To illustrate the unreliability of these judgment calls, in a pending Whistleblower Protection Act case, *MacLean v. DHS* (Fed. Cir. No. 2011-3231), the agency contends that a whistleblower significantly undermined aviation security by exposing and successfully challenging government orders to eliminate all Air Marshal coverage for planes targeted by a confirmed, more ambitious 2003 rerun of 9/11. Those subjective judgment calls are not always credible, or even rational. An objective, tangible nexus is a prerequisite to respect constitutional restrictions on vague or overbroad restrictions of liberty.[11]

Indeed, the E.O.'s definition of personnel who may have "material adverse effect on the national security" must have objective, credible boundaries. Naturally, the vast majority of civilian positions that fit an acceptably narrow definition are held by security clearance holders with access to classified information. We also acknowledge a need for additional security screening for a very limited number of civilian positions with very specific national security responsibilities but no access to classified information.

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[9] "The Office of Personnel Management shall report to the National Security Council, at least semiannually, on the results of such study, shall recommend means to correct any such deficiencies or tendencies, and shall inform the National Security Council immediately of any deficiency which is deemed to be of major importance." Executive Order 10450, *Code of Federal Regulations*, Title 3. (1949-1953) http://www.archives.gov/federal-register/codification/executive-order/10450.html (Downloaded November 14, 2013) (Hereinafter Executive Order 10450)

[10] Letter from Angela Canterbury, Project On Government Oversight, to Trina Porter, U.S. Office of Personnel Management-FOIA Requester Service Center, about national security sensitive positions, July 1, 2013. http://www.pogo.org/our-work/letters/2013/pogos-foia-request-to-opm.html; Letter from Trina Porter, U.S. Office of Personnel Management-FOIA Requester Service Center, to Angela Canterbury, Project On Government Oversight, regarding a July 2, 2013, FOIA request, September 10, 2013. http://www.pogoarchives.org/m/ns/us_opm_20130910.pdf .

[11] Comments from Thomas Devine, Government Accountability Project, to Kimberly Holden, U.S. Office of Personnel Management, regarding Proposed Rule on Designation of National Security Positions in the Competitive Service, and Related Matters, June 27, 2013. http://www.whistleblower.org/storage/documents/comments_on_sensitive_jobs_rule.pdf (Downloaded November 14, 2013)

Even so, extensive background checks should never be a predicate for denying due process rights for discriminatory personnel actions. Quite the opposite—Congress gave civil service and whistleblower protections to this critical workforce because it did not want a corrupt spoils system and did want accountability for waste, fraud, and abuse. Sometimes the investigation process itself is used as a form of retaliation for whistleblowing. Workers in national security sensitive positions without security clearances had for years been able to challenge adverse personnel actions at the Merit Systems Protection Board (MSPB)—but not anymore.

An Activist Court Decision Strips Civil Service Rights and Whistleblower Protections from National Security Positions

In *Kaplan v. Conyers, Northover and MSPB*, the United States Court of Appeals for the Federal Circuit held that federal agencies have unlimited discretion to take adverse actions pertaining to the eligibility to occupy a national security position without review by the MSPB. This greatly expands the Supreme Court decision in *Department of the Navy v. Egan*, which for decades has only applied to security clearances.[12] *Conyers* effectively wipes out civil service due process rights and whistleblower protections for anyone in a national security sensitive position.

Now, if an agency fires a national security sensitive employee for having made a legally protected whistleblower disclosure or because of that employee's race or religion, the employee likely will not be able to seek justice from the Merit Systems Protection Board and will have no other recourse. While the Majority said in footnotes that the decision was based on DoD regulations and rules and is not based on WPA claims, there are few who believe those footnotes provide any safeguards for the otherwise sweeping decision.[13] It is only a matter of time before the precedent is applied to whistleblowers and federal employees outside of DoD. As was noted from the bench at oral argument, after the *Egan* decision removed due process review of security clearance actions, it was inevitable that Board review of whistleblower retaliation was canceled in *Hesse v. Department of State*.[14]

Because the decision is so broad, it flouts the congressional intent of the Civil Service Reform Act of 1978, as well as the Whistleblower Protection Act of 1989 and the recently passed and strongly bipartisan Whistleblower Protection Enhancement Act of 2012—reforms POGO and the Make It Safe Coalition fought for years to enact. *Conyers* guts the landmark 1978 law and sets the stage to render the WPEA unenforceable. This will significantly reduce accountability while significantly expanding the boundaries and power of the national security state—throwing waste, fraud, and abuse of power deep into the shadows.

Since 1883 the federal workforce has been protected from the tyranny of politics with crucial safeguards for a non-partisan, professional workforce based on merit. Civil service employees are public servants whose tenure does not depend on the results of the last election—these

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[12] *Department of the Navy v. Egan;* 484 U.S.C. 518 (1988)
[13] *Kaplan v. Conyers.* p. 4 fn.3, and pp.32-33 fn 16. http://www.cafc.uscourts.gov/images/stories/opinions-orders/11-3207.opinion.8-19-2013.1.pdf (Downloaded November 14, 2013)
[14] *Hesse v. Department of State*, 217 F.3d 1372, 1377-80 (Fed. Cir. 2000), *cert. denied*, http://scholar.google.com/scholar_case?case=16102872784414756 87&hl=en&as_sdt=6&as_vis=1&oi=scholarr (Downloaded November 15, 2013)

federal employees serve the taxpayers, not political agendas. If the recent IRS scandal teaches us anything, it is the importance of a federal workforce that takes no action that may in any way even be *perceived* to be motivated by partisanship. The very reason we have these protections from unjust termination is to ensure that our federal workforce is insulated from political interference, and that no federal employee ever feels compelled to act in a partisan manner for fear of being fired.

Likewise, the law protects federal workers from retaliation when they expose waste, fraud, abuse, and other wrongdoing. Congress recently strengthened the rights and procedures available to whistleblowers which, in turn, will make the government work better for the American people.[15] It is well-known that these guardians of the public trust and safety save countless lives and billions of taxpayer dollars. However, left unaddressed, *Conyers* could strip statutory protections for whistleblowers who make legal disclosures.

Circuit Judge Timothy B. Dyk in his dissent stated:

> [W]hile the majority purports to reserve the issue, the rights of these employees under Title VII and the Whistleblower Protection Act will be affected as well, as the Board has made clear that extending *Egan* would 'preclude Board and judicial review of alleged unlawful discrimination, whistleblower retaliation, and a whole host of other constitutional and statutory violations.[16]

The Special Counsel Carolyn Lerner, head of the independent agency charged with protecting federal whistleblowers, issued the following press statement following the *Conyers* decision:

> Having filed an amicus brief in this case, we are disappointed in the outcome. This decision poses a significant threat to whistleblower protections for hundreds of thousands of federal employees in sensitive positions and may chill civil servants from blowing the whistle. OSC looks forward to working with Congress to strengthen existing whistleblower protections for all civil servants, including employees in sensitive positions.[17]

This Subcommittee and other Members of Congress have also raised concerns about the decision. In September, Senator Charles Grassley wrote President Obama urging him to clarify *Conyers*:

> [F]ederal employees will be left in limbo, with no certainty about whether disclosing information about waste, fraud, and abuse will be protected or not. The chilling effect of

[15] 112th U.S. Congress, "Whistleblower Protection Enhancement Act of 2012" (S. 743), Introduced April 6, 2011, by Senator Daniel Akaka. http://www.gpo.gov/fdsys/pkg/BILLS-112s743enr/pdf/BILLS-112s743enr.pdf (Downloaded November 14, 2013)
[16] *Kaplan v. Conyers*, p. 27.
[17] Statement of the Office of Special Counsel in response to ruling on *Kaplan v. Conyers*, August 21, 2013. http://www.osc.gov/documents/press/2013/pr13_06.pdf (Downloaded November 15, 2013)

> such uncertainty would be devastating and would certainly discourage whistleblowers from reporting wrongdoing.[18]

While we similarly encourage the President to clarify due process rights in the wake of *Conyers*, we think that administrative action will likely fall short of real protections for civil servants. Indeed, thus far, the Administration has failed on this front.

Why the Proposed Rule Does Not Rein In National Security Sensitive Designations

The executive branch has shown little interest in limiting national security designations or providing due process to those who hold such positions. In 2010, OPM finally renewed its oversight on national security sensitive positions and issued a proposed rule pursuant to its authority and responsibilities under E.O. 10450.[19] It is our understanding that what ensued was essentially a turf battle between OPM and the Director of National Intelligence (DNI), both of which claimed jurisdiction over the boundaries for these positions. OPM's 2010 proposed rule was never finalized.

Meanwhile, the Obama Administration brought the appeal that guts the review of personnel actions for national security sensitive positions. We were told that DoD won the debate with OPM and the Department of Justice (DOJ), and the government then petitioned the Federal Circuit for an appeal of the MSPB decisions in favor of Rhonda Conyers, a low-level accountant, and Devon Haughton Northover, a commissary stocker—neither of whom had a credible national security role. The government argued that the MSPB should not have review over their adverse personnel actions, even though Conyers and Northover did not have access to classified information, and absent adequate justifications for the national security sensitive designations for these civil servants.[20]

That appeal resulted in a decision in favor of the government in 2012. Constitutional law expert Lou Fisher wrote in *The National Law Journal*:

> On August 17, in *Berry v. Conyers*, the U.S. Court of Appeals for the Federal Circuit substantially broadened presidential power, minimized the judiciary's role in national security, largely ignored congressional policy for the civil service, and misread the Supreme Court's decision in *Department of the Navy v. Egan* (1988). As a result, hundreds of thousands of federal employees are now more vulnerable to arbitrary

[18] Letter from Senator Chuck Grassley to President Obama, regarding concerns about the implications of *Kaplan v. Conyers* for whistleblowers, September 3, 2013, p. 3. http://www.grassley.senate.gov/judiciary/upload/Whistleblowers-09-03-13-letter-to-WH-Kaplan-Berry-v-Conyers-protections.pdf (Downloaded November 14, 2013)

[19] "Designation of National Security Positions," Proposed Rule, 5 CFR Part 732 (December 14, 2010). http://www.gpo.gov/fdsys/pkg/FR-2010-12-14/pdf/2010-31373.pdf (Downloaded November 14, 2013)

[20] *Hereinafter Kaplan v. Conyers Initial Brief for OPM Director.*

> dismissals and downgrades, including employees who exercise their whistleblower rights to disclose agency waste and corruption.[21]

Conyers, Northover, and the MSPB then sought a rehearing of the appeal en banc at the Federal Circuit. The day after the Court agreed to an en banc review, President Obama issued a directive for OPM and DNI to conduct rulemaking on national security sensitive positions.[22] It likely signaled to the Court that "oversight" for these positions was well in hand.

However, the proposed OPM/DNI rule[23] actually does nothing to reassure us that the Obama Administration plans to rein in the practically unlimited discretion afforded to agencies to designate national security sensitive positions, improve the deficient oversight, or protect the critical rights for whistleblowers and the civil service mandated by Congress.

The proposed rule does not sufficiently implement the following mandate in E.O. 10450:

> WHEREAS the American tradition that all persons should receive fair, impartial, and equitable treatment at the hands of the Government requires that all persons seeking the privilege of employment or privileged to be employed in the departments and agencies of the Government be adjudged by mutually consistent and no less than minimum standards and procedures among the departments and agencies governing the employment and retention in employment of persons in the Federal service. [24]

That is why we are grateful, Chairman Tester and Ranking Member Portman, for this hearing and for your letter in September asking OPM and DNI to postpone the rulemaking on the designation of national security positions in the competitive service.[25]

We agree that to finalize this rulemaking at this time is ill-advised, and may have damaging consequences to our government's operations. Because the proposed rule was issued prior to *Conyers*, it does not address the decision or speak sufficiently to the subsequent stripping of due process and appeal rights for employees in these positions.

We also are deeply concerned that the proposed rule does nothing to rein in the almost unbridled power of agencies to designate virtually any civil service position as national security sensitive.

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[21] Louis Fisher, "Enlarging executive power: Federal Circuit ruling puts many federal employees at risk," *National Law Journal*, September 10, 2012, p. 47. http://www.loufisher.org/docs/ep/bercon.pdf (Downloaded November 14, 2013)

[22] Memorandum from President Barack Obama, Office of the President, regarding rulemaking concerning the standards for designating positions in the competitive service as national security sensitive and related matters, January 31, 2013. http://www.gpo.gov/fdsys/pkg/FR-2013-01-31/html/2013-02306.htm (Downloaded November 14, 2013)

[23] "Designation of National Security Positions in the Competitive Service, and Related Matters," Proposed Rule, 5 CFR Part 732 (May 28, 2013) http://www.gpo.gov/fdsys/pkg/FR-2013-05-28/html/2013-12556.htm (Downloaded November 14, 2013)

[24] Executive Order 10450

[25] Letter from Senator Jon Tester and Senator Rob Portman, to the Honorable James R. Clapper, Director of National Intelligence, and Elaine Kaplan, U.S. Office of Personnel Management, regarding the national security workforce, September 25, 2013. http://www.scribd.com/doc/171015145/Tester-and-Portman-s-Letter-Re-National-Security-Workforce (Downloaded November 14, 2013)

Given the already expansive use of these designations, we would hope that any rulemaking would limit their use. Instead, the proposed rule is poised to expand the use of the designation to overly broad categories of positions such as senior managers in undefined key programs and fact-finding positions.

We hope that this hearing will yield information that Congress needs and OPM and DNI ought to provide before proceeding with rulemaking on national security sensitive positions. POGO posed several questions to OPM and DNI in our comments on the proposed rule.[26] We think far more needs to be known about the scope and costs,[27] policy impacts, due process, and oversight of national security sensitive positions. What will it cost to reinvestigate all personnel based on the sweeping definition of the designation? Shouldn't we fix the security clearance process first? If the background investigation process for security clearances is broken, as the Government Accountability Office reports,[28] then it is broken for national security sensitive positions as well.[29]

Congress Must Act

We would welcome a directive from President Obama clarifying access to the MSPB for national security sensitive position holders; and for OPM and DNI to curb the expansive use of these designations. However, we believe that ultimately Congress must reassert the rights it previously provided.

There is a simple legislative fix that would reverse the harmful effects of the activist court decision and reaffirm the long-standing congressional mandate for due process rights for civil servants who do not have access to classified information.

Simply clarify that: An employee appealing an action arising from an eligibility determination for a position that does not require a security clearance or access to classified information may not be denied Merit Systems Protection Board review of the merits of the underlying eligibility determination.

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[26] Letter from Angela Canterbury, Project On Government Oversight, to the Honorable James R. Clapper, Director of National intelligence, and Elaine Kaplan, U.S. Office of Personnel Management, regarding Designation of National Security Positions in the Competitive Service, and Related Matters, June 27, 2013. http://www.pogo.org/our-work/letters/2013/pogo-submits-comments-opm-odni-designation-20130627.html

[27] U.S. Office of Personnel Management, "Investigations Reimbursable Billing Rates for Fiscal Year (FY) 2013," September 14, 2012. http://www.opm.gov/investigations/background-investigations/federal-investigations-notices/2012/fin12-07.pdf (Downloaded November 14, 2013)

[28] Testimony of Brenda S. Farrell, Government Accountability Office, "Personnel Security Clearances: Opportunities Exist to Improve Quality Throughout the Process," November 13, 2013. http://www.gao.gov/assets/660/658960.pdf (Downloaded November 14, 2013)

[29] Letter from Elaine Kaplan, U.S. Office of Personnel Management, to the Honorable William D. Spencer, regarding OPM advisory opinions, March 31, 2010. http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=533263&version=534765&application=ACROBAT (Downloaded November 14, 2013).

Delegate Eleanor Holmes Norton (D-DC) has already introduced a bill with seven cosponsors that would do just that.[30] Delegate Holmes Norton stated in her Dear Colleague:

> Stripping employees whose work does not involve classified matters of the right of review of an agency decision that removes them from their job opens entirely new avenues for unreviewable, arbitrary action or retaliation by an agency head and, in addition, makes a mockery of whistleblower protections enacted in the 112th Congress. My bill would stop the use of "national security" to repeal a vital component of civil service protection and of due process.[31]

I urge you to champion this legislative reform.

Two American Governments

This hearing on the national security workforce is particularly timely given the range of issues raised by the disclosures of National Security Agency contractor Edward Snowden. Though this hearing is specifically addressing national security sensitive positions, I also urge the Subcommittee to consider the broader context of the growing national security state. In the wake of the Snowden disclosures, some in Congress have focused on stemming high-risk security clearances and unauthorized leaks of classified information. However, as you consider reforms in those and other areas, we caution you to also guard against overreactions that will make matters worse. Excessive secrecy undermines our democracy and threatens our national security by making it harder to protect our legitimate secrets. There must be more balance.

In spite of several achievements in open government, secrecy in the name of national security has escalated in the Obama Administration. Regarding openness, President Obama recently admitted, "There are a handful of issues, mostly around national security, where people have legitimate questions where they're still concerned about whether or not we have all the information we need."[32] We are indeed concerned, Mr. President. [33]

In addition to the ramifications of the *Conyers* decision, evidence for the growing national security state is disturbing: The number of people cleared for access to classified information reached a record high in 2012, soaring to more than 4.9 million.[34] The Associated Press did an

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[30] 113th U.S. Congress, "To amend chapter 77 of title 5, United States Code, to clarify certain due process rights of Federal employees serving in sensitive positions, and for other purposes," (H.R. 3278), Introduced October 8, 2013, by Delegate Eleanor Holmes Norton. http://www.gpo.gov/fdsys/pkg/BILLS-113hr3278ih/pdf/BILLS-113hr3278ih.pdf (Downloaded November 14, 2013)

[31] Dear Colleague letter from Representative Eleanor Holmes Norton, to House of Representative Democrats, regarding cosponsoring a bill to clarify certain due process rights of federal employees serving in sensitive positions, September 11, 2013.

[32] President Barack Obama, "President Obama Participates in a Fireside Hangout on Google+" YouTube video, 35:12, posted by "whitehouse," February 14, 2013. (Downloaded March 4, 2013)

[33] Testimony of Angela Canterbury, Director of Public Policy, Project On Government Oversight, before the House Committee on Oversight and Government Reform on "Transparency and Accountability," March 13, 2013. http://www.pogo.org/our-work/testimony/2013/testimony-angela-canterbury.html

[34] Office of the Director of National Intelligence, 2012 Report on Security Clearance Determinations, January 2013, p. 3.

analysis earlier this year and found agency use of national security exemptions to the Freedom of Information Act are increasing from 3,805 times in 2009 to 5,223 times in 2012.[35] According to OpenTheGovernment.org's Secrecy Report 2013, "since 9/11, the number of secrecy orders[36] in effect has continually climbed and the number of new secrecy orders per year has outstripped the number of orders rescinded."[37] The Public Interest Declassification Board reported that approximately 20 million four-drawer filing cabinets could be filled with the amount of classified data accumulated every 18 months by just one intelligence agency—it would take two million employees to manually review that information.[38] And, despite some progress on declassification, *Secrecy News* reported that "a December 2013 deadline set by President Obama himself (in 2009) for declassification and public release of the backlog of 25 year old historically valuable records will not be met."[39] When this much information is shielded from public scrutiny, our nation's true secrets are put needlessly at risk and we neglect the public's right to know.

Conclusion

It's time for Congress to be far less deferential to this Administration and others on claims of national security that undermine our liberties and cloak wrongdoing. Congress must assert its constitutional powers to restore the balance between the branches of government. You can begin by reining in the nearly unbridled power of the agencies to misuse national security labels and make whole swaths of our government hidden and unaccountable. If the disastrous *Conyers* decision is allowed to stand, countless whistleblowers will be silenced and the civil service will be in peril. The consequences for our nation are too great for inaction.

Thank you again for inviting me to testify today. POGO and the Make It Safe Coalition pledge to continue to work with you to fulfill the promise of a government that is truly open and accountable to the American people.

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http://www.dni.gov/files/documents/2012%20Report%20on%20Security%20Clearance%20Determinations%20Final.pdf (Downloaded November 14, 2013)

[35] Jack Gillum and Ted Bridis, "US Citing Security to Censor More Public Records," Associated Press, March 11, 2013. http://bigstory.ap.org/article/us-citing-security-censor-more-public-records (Downloaded November 14, 2013)

[36] These secrecy orders prevent the disclosure of inventions and technology based on a claim of a possible national security threat by a federal agency.

[37] OpenTheGovernment.org, *Secrecy Report 2013*, September 2013, p. 30. http://www.openthegovernment.org/sites/default/files/Secrecy Report 2013 Final.pdf (Downloaded November 14, 2013)

[38] Public Interest Declassification Board, *Transforming the Security Classification System*, November 2012, p. 17. http://www.archives.gov/declassification/pidb/recommendations/transforming-classification.pdf (Downloaded November 14, 2013)

[39] Federation of American Scientists Project on Government Secrecy, "DoD IG Report on Overclassification Misses the Mark," *Secrecy News*, October 24, 2013. http://www.fas.org/sgp/news/secrecy/2013/10/102413.html (Downloaded November 14, 2013)