

1 SAFEGUARDING OUR NATION'S SECRETS:
2 EXAMINING THE NATIONAL SECURITY WORKFORCE

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4 WEDNESDAY, NOVEMBER 20, 2013

5 United States Senate,
6 Committee on Homeland Security and Governmental Affairs,
7 Subcommittee on the Efficiency and Effectiveness
8 of Federal Programs and the Federal Workforce
9 Washington, D.C.

10 The Subcommittee met, pursuant to notice, at 2:01 p.m.,
11 in Room SD-342, Dirksen Senate Office Building, Hon. Jon
12 Tester, Chairman of the Subcommittee, presiding.

13 Present: Senators Tester and Portman.

14 OPENING STATEMENT OF SENATOR TESTER

15 Senator Tester. I will call to order this hearing of
16 the Subcommittee on Efficiency and Effectiveness of Federal
17 Programs and Federal Workforce. This afternoon's hearing is
18 entitled, Safeguarding our Nation's Secrets: Examining the
19 National Security Workforce.

20 I will say that Senator Portman is tied up. He is
21 going to be here a little bit late and he is going to have
22 to leave early, unfortunately. It is not because of the
23 importance of this issue. It is because we have got a
24 Defense authorization bill on the floor and that is keeping
25 a lot of the folks who wanted to be here today away. But we

1 will do our best to get as much good information as we can
2 on the record as we proceed through this so that they will
3 have the ability to make good decisions with good
4 information as those decisions arise.

5 From the significant disclosures of classified
6 information to the tragedy at the Washington Naval Yard, it
7 is abundantly clear to the American people that the Federal
8 Government is failing to properly vet the individuals who
9 are granted access to our nation's most sensitive
10 information and secure facilities.

11 And as we all see, there are real life consequences of
12 these failures. In looking at the lessons learned, it is
13 obvious that there is no single quick fix to such a broken
14 system. It is about incomplete, falsified, and ultimately,
15 background investigations and re-investigations. It is
16 about agencies improperly adjudicating which employees and
17 contractors should be granted a clearance, and it is about
18 pure volume.

19 Today there are nearly five million individuals with a
20 security clearance. You heard me right. Five million. And
21 there are no indications that number will decrease any time
22 soon. But it only takes one individual to slip through the
23 cracks, one individual who could do untold damage to our
24 national security by exposing sensitive information about
25 Government actions and programs.

1 One individual who, with no motive, with no warning,
2 could kill 12 men and women in a secure Government facility
3 on a random Monday morning. Now, we have got to get this
4 right because there literally is no margin for error. This
5 hearing will focus on the designation of positions in the
6 Federal Government as sensitive to the national security, as
7 well as the requirement for Government personnel to have
8 access to classified information.

9 Lacking appropriate guidance for such designations,
10 Federal agencies are currently relying on a patchwork of
11 Executive Orders, Federal regulations, and an Office of
12 Personnel Management position designation tool that was not
13 created to address security-related issues.

14 Meanwhile, OPM and the Office of Director of National
15 Intelligence are finalizing a rule they claim will provide
16 the update and guidance sought by the agencies and called
17 for by GAO and members of this Committee.

18 But others, including some of the witnesses that are
19 here today, have real concerns that the proposed guidance is
20 inadequate and that it could have negative and substantial
21 implications on taxpayers, national security, and Federal
22 employee rights.

23 These concerns are compounded by this summer's Kaplan
24 v. Conyers and Northover decision. This case involved two
25 Federal employees who lost their jobs when their employing

1 agency stripped them of their sensitive position status.
2 Because the Conyers decision denied these employees their
3 rights to due process through the Merit Systems Protection
4 Board, there is a real potential that tens of thousands of
5 employees across the Federal Government have just lost their
6 fundamental right to appeal a personnel decision, regardless
7 of what drove that decision.

8 With this in mind, Senator Portman and our Ranking
9 Member and I wrote a letter to ODNI and OPM in September
10 regarding their proposed rule. In that letter we said, and
11 I quote, From a fiscal and security perspective, far too
12 many questions remain unanswered about the implications of
13 this proposal, and due to the seriousness of the concerns we
14 share, we urge you to defer finalizing this rule until the
15 matter has been fully and publicly aired, and questions
16 about its true scope, including the estimated cost and
17 number of impacted Federal workers are answered. We are
18 here today to get some of those answers.

19 Now I would like to introduce our witnesses, and
20 Senator Portman has an opening statement. He can do that
21 when he gets here. But I want to introduce my witnesses to
22 the panel here today and we want to welcome them all. This
23 truly is a great panel of witnesses, very knowledgeable and
24 distinguished in your own right.

25 First we have Brian Prioletti, is Assistant Director of

1 Special Security Directorate in the Office of the Director
2 of National Intelligence. In that post, he is responsible
3 for leading oversight and reform efforts of the security
4 clearance process. Mr. Prioletti took the Assistant
5 Director position in this last May after more than three
6 decades in the CIA. He testified before the full Committee
7 on security clearance issues last month, and I want to thank
8 you for your service, Brian, and I want to thank you for
9 joining us again today.

10 Tim Curry is the Deputy Associate Director for
11 Partnership and Labor Relations in the Office of Personnel
12 Management. He is responsible for OPM's efforts to design
13 and promulgate Government-wide programs for labor and
14 employee relations. Prior to his current position, he
15 served as the Executive Director of the Labor, Management,
16 and Employees Relations at the Department of Defense. Tim,
17 thank you for being here and getting through the traffic to
18 be here.

19 Brenda Farrell is the Director of Defense Capabilities
20 at the management team in the Government Accounting Office,
21 a post that she has held since 2007. She is responsible for
22 GAO oversight of military and civilian personnel issues and
23 has worked extensively on the personnel security clearance
24 program. She testified before this Subcommittee in June
25 about the lack of clearly-defined policy and procedures

1 needed to consistently determine whether a position requires
2 a security clearance. It is good to have you back, Brenda,
3 and as with the previous two, we look forward to your
4 testimony.

5 David Borer is the General Counsel of The American
6 Federation of Government Employees. AFGE represents some
7 650,000 Federal employees, including tens of thousands who
8 currently occupy positions deemed sensitive to national
9 security. He is a veteran on labor relations issues and is
10 here today to discuss the impact of the proposed OPM/ODNI
11 rule and its impact on Federal employees. Welcome. We look
12 forward to what you have to say, David.

13 Finally, Angela Canterbury. Angela is the Director of
14 Public Policy for the Project on Government Oversight, or
15 POGO, where she has worked in that capacity since 2010.
16 Founded in 1981, POGO is a non-partisan, independent
17 watchdog that champions good Government efforts. In
18 particular, they have aggressively advocated for more
19 appropriate balance between national security and Civil
20 Service rights with similar protections and taxpayer
21 accountability. Angela's work focuses on advancing policies
22 that help stamp out corruption and promote Government
23 openness and accountability. She is here today to help us
24 understand how the OPM/ODNI rule might impact transparency
25 and whistle-blower rights. We welcome you, Angela, and I

1 want to thank you and everybody else for being here today.

2 It is customary that we swear all witnesses in who
3 appear before this Subcommittee. If you do not mind, I
4 would ask you to stand and raise your hand, right hand.
5 Raise your hand, please.

6 Do you swear the testimony you will give before this
7 Subcommittee will be the truth, the whole truth, and nothing
8 but the truth, so help you God?

9 Mr. Prioletti. I do.

10 Mr. Curry. I do.

11 Ms. Farrell. I do.

12 Mr. Borer. I do.

13 Ms. Canterbury. I do.

14 Senator Tester. Let the record reflect that the
15 witnesses answered in the affirmative.

16 With that, we will give each of you five minutes for
17 your oral testimony. Know that your entire written
18 testimony will be a part of the record. We will start with
19 you, Brian. If you want to proceed, please do.

1 TESTIMONY OF BRIAN PRIOLETTI, ASSISTANT DIRECTOR,
2 SPECIAL SECURITY DIRECTORATE, NATIONAL
3 COUNTERINTELLIGENCE EXECUTIVE, OFFICE OF THE
4 DIRECTOR OF NATIONAL INTELLIGENCE

5 Mr. Prioletti. Thank you, Senator. Chairman Tester,
6 Ranking Member Portman, and distinguished members of the
7 Subcommittee, thank you for inviting me here today to
8 discuss our proposed updates to the Federal Government's
9 position designation system.

10 Recently, the ODNI and OPM jointly proposed changes to
11 the existing regulations outlining the position designation
12 process. Through revisions, which include more detail than
13 previous regulations, are geared to ensure that a consistent
14 process is applied across the Government for designating
15 positions as sensitive or requiring a security clearance.

16 This foundational step helps ensure that individuals
17 are investigated at a level appropriate to the risks
18 inherent to the position they hold, thereby mitigating risks
19 to national security interests.

20 Our proposed rule for the designation of national
21 security positions was published in the Federal Register for
22 a 30-day public comment in May 2013 with comments due in
23 June. We are in the process of reviewing those comments and
24 working to finalize the proposed regulations by February
25 2014.

1 The events of September 11, 2001, drove a dramatic
2 increase in the number of positions requiring a security
3 clearance, a trend which has continued in recent years. Our
4 office reported this year that about 4.9 million Federal
5 Government and contractor employees either hold or have been
6 determined to be eligible to hold security clearances.

7 The potential risk to national security and costs
8 associated with this volume of cleared individuals
9 underscore the need for Executive Branch agencies to have a
10 uniform and consistent process to accurately designate the
11 sensitivity of a position based on the position duties and
12 the potential impact to national security, and ensure that
13 the individuals holding these positions are appropriately
14 investigated and adjudicated commensurate with that risk.

15 The concern with position designation is not a recent
16 phenomenon. Civilian positions within the Federal
17 Government have been designated as sensitive based on the
18 duties and responsibilities for over 60 years, when
19 Executive Order 10450 was first established--the requirement
20 for Federal employment process to consider national security
21 interests, and charged the heads of Federal departments and
22 agencies to establish effective programs to ensure that
23 employee hiring and retention is clearly consistent with the
24 interests of national security.

25 EO-10450 requires a position to be designated as

1 sensitive if the occupant of that position could, by virtue
2 of the nature of position, bring about a material adverse
3 effect on national security. Executive Order 12968, which
4 was issued in 1995, establishes a uniform Federal personnel
5 security program for individuals to have access to
6 classified information which only may be granted on the
7 basis of a demonstrated foreseeable need for that access.

8 12968 also makes agency heads responsible for
9 establishing and maintaining an effective program to ensure
10 that eligibility for access to classified information is
11 clearly consistent with the interests of national security.

12 The existing designation system requires revision to
13 align with other recently updated aspects of the clearance
14 reform effort, such as the revised Federal Investigative
15 Standards signed in December of 2012, and to ensure a common
16 understanding of Federal agencies as to how to designate
17 positions and ensure accurate and consistent position
18 designation across the U.S. Government.

19 Under EO-13467, the DNI, as Security Executive Agent,
20 and the Director of OPM, as the Suitability Executive Agent,
21 both have related roles to ensure that a uniform system for
22 position designation related to each, to their respective
23 populations of authority.

24 The proposed regulation is not designated to increase
25 or decrease the total number of national security-sensitive

1 positions within the Federal Government; but, rather, to
2 ensure that each position is designated accurately. The
3 intent is to issue national-level policy guidance to promote
4 consistency in designating positions and address changed
5 national security concerns post-9/11.

6 This approach will improve consistency and the level of
7 investigation performed for similar positions in other
8 agencies; thereby, promoting efficiency and facilitating
9 reciprocity. Additionally, the proposed regulations align
10 with the GAO recommendations in its July report entitled,
11 Security Clearances: Agencies Need a Clearly Defined Policy
12 for Determining Civilian Position Requirements.

13 In that report, the GAO noted the need for standardized
14 and clearly-defined policy for agencies to designate
15 positions as sensitive, or requiring a security clearance
16 and for existing position designation tool to be updated to
17 include such guidance.

18 The proposed regulations also incorporate the GAO's
19 recommendation that the Executive Branch agencies
20 periodically review and validate or revise designations of
21 existing positions. This guidance is expected to have
22 positive implications for both national security and Federal
23 workforce.

24 The proposed rule and revised position designation tool
25 will provide Executive Branch agencies with consistent

1 guidance and a concrete process to accurately re-assess the
2 sensitivity level assigned to the current positions, and
3 ensure future positions are designated accurately and
4 consistently.

5 The proposed rule will help guide agency heads in
6 designating a position as sensitive with respect to national
7 security, even if the position does not require access to
8 classified information. The enhanced guidance will
9 facilitate more uniform designations across agencies, which
10 are better aligned with the actual national security
11 implications and sensitivities inherent with the position.

12 This process is expected, in some cases, to result in a
13 re-designation of positions to a lower sensitivity level or
14 public trust designation, thereby reducing costs associated
15 with investigations and adjudications required for the
16 higher clearance levels.

17 Conversely, there may be instances in which a
18 sensitivity designation of a position increases, therefore
19 requiring more extensive background investigation, depending
20 upon that we designate its sensitivity level. If that
21 happens, the workforce can be assured that the change is
22 necessary, and based upon the measured execution of the
23 updated guidance deemed necessary to protect national
24 security interests.

25 The new regulations are intended to clarify the

1 position designation requirements and provide additional
2 details over the previous regulations in order to ensure
3 that positions are accurately designated in a manner that
4 appropriately mitigates the risk.

5 The Federal workforce will benefit from accurately
6 designated positions and that employees will not be required
7 to complete extensive background application paperwork or
8 undergo investigations for positions that do not warrant it.
9 Further, a consistent designation and investigative approach
10 promotes clearance reciprocity, and therefore, personnel
11 mobility between positions of equivalent position
12 designation or between agencies.

13 It is imperative that we develop a sound position
14 sensitivity designation process because the sensitivity
15 level of a position determines the complexity and cost of
16 the investigation conducted on the individual selected to
17 occupy its position.

18 ODNI and I will continue to work with OPM and other
19 Executive Branch agencies to ensure that position
20 designation policy and procedures include requirements for
21 agencies to conduct periodic reviews to validate the
22 accuracy of the existing position designations.

23 Thank you at this time for the opportunity to testify
24 and this concludes my statement.

25 [The prepared statement of Mr. Prioletti follows:]

1 Senator Tester. Thank you, Brian. Tim, you are up
2 next.

1 TESTIMONY OF TIM CURRY, DEPUTY ASSOCIATE DIRECTOR
2 FOR PARTNERSHIP AND LABOR RELATIONS, OFFICE OF
3 PERSONNEL MANAGEMENT

4 Mr. Curry. Thank you, Senator. Mr. Chairman, Ranking
5 Member Portman, and members of the Subcommittee. Thank you
6 for the invitation to testify on behalf of the Office of
7 Personnel Management on regulations affecting the
8 designation of positions in the Federal Government as
9 national security-sensitive, as well as the Kaplan versus
10 Conyers case.

11 The obligation to designate national security positions
12 is not a new authority. It is outlined in an Executive
13 Order which was published in 1953. Additionally, the Code
14 of Federal Regulations presently requires each agency to
15 follow established procedures to identify national security
16 positions.

17 In this vein, OPM and the Office of Director of
18 National International, ODNI, jointly proposed regulations
19 in May of this year regarding the designation of national
20 security positions in the competitive service. Similar
21 regulations have been in effect for over 20 years. The
22 proposed rule is one of a number of initiatives OPM and ODNI
23 have undertaken to simplify and streamline the system of
24 Federal Government investigative and adjudicative processes
25 to make them more efficient and equitable.

1 OPM originally proposed amendments on this issue in
2 December 2010, with a publication to the Federal Register.
3 Those proposed amendments were later withdrawn and reissued
4 in May 2013 by OPM and ODNI jointly, pursuant to a
5 Presidential Memorandum directing OPM and ODNI to issue
6 amended regulations.

7 The Presidential Memorandum recognizes responsibility
8 both agencies possess with respect to the relevant
9 rulemaking authority. The current proposed rule simply
10 reissues the 2010 proposal under joint authority with
11 technical modifications and clarifications, and provides the
12 public an opportunity to submit additional comments.

13 The purpose of the proposed rule, both as originally
14 published and as republished, is to clarify the requirements
15 and procedures agencies should observe when designating as
16 national security positions, positions in the competitive
17 service, positions in the excepted service where the
18 incumbent can be non-competitively converted to the
19 competitive service, and Senior Executive Service positions
20 filled by career appointment.

21 The proposed rule is not intended to increase or
22 decrease the number of positions designated as national
23 security-sensitive, but is intended to provide more specific
24 guidance to agencies in order to enhance the efficiency,
25 accuracy, and consistency with which agencies make position

1 designations. The older regulations provide only general
2 guidance. The newer proposed regulations are intended to
3 clarify the requirements and procedures agencies should
4 follow when designating national security positions by
5 providing more detail and concrete examples.

6 In addition, the newer proposed regulations will help
7 agencies correctly determine the specific level of
8 sensitivity for a position that is determined to affect
9 national security, which in turn will help determine the
10 type of background investigation that will be required.

11 Finally, the proposed rule addresses periodic re-
12 investigations in order to better coordinate the re-
13 investigation requirements for national security positions
14 with requirements already in place for security clearances.
15 This will help ensure that the same re-investigations can be
16 used for multiple purposes and prevent costly duplication of
17 effort.

18 The proposed rule was published in the Federal Register
19 on May 28, 2013, with a comment period that closed 30 days
20 later. OPM and ODNI are presently reviewing comments from
21 members of the public.

22 This Subcommittee also invited OPM to testify on a
23 separate topic, the Kaplan versus Conyers case. As you
24 know, the U.S. Court of Appeals for the Federal Circuit, in
25 a seven-three decision, held that the Merit Systems

1 Protection Board, or MSPB, lacks jurisdiction to review the
2 merits of Executive Branch risk determinations regarding
3 eligibility to hold national security-sensitive positions.

4 Conyers examined whether the MSPB, in reviewing an
5 appeal of an adverse personnel action against an employee,
6 may review the merits of the Department of Defense's
7 predictive judgment of national security risk. On appeal of
8 the MSPB decision, the Federal Circuit concluded that the
9 MSPB can review whether DoD's action is procedurally
10 correct, but cannot review whether DoD correctly exercised
11 its predictive judgment of national security risk.

12 The Federal Circuit held that Congress did not give the
13 MSPB this authority. The Federal Circuit based its decision
14 on long-standing precedent, specifically the Supreme Court's
15 1988 decision in Department of the Navy versus Egan, that
16 the MSPB, in reviewing an appeal of an adverse action cannot
17 review the merits of an agency decision to deny an employee
18 security clearance. The Federal Circuit held that Egan
19 controlled all such national security determinations, not
20 just those related to access to classified information.

21 Thank you again for the opportunity to testify and I
22 look forward to answering any questions you may have.

23 [The prepared statement of Mr. Curry follows:]

1 Senator Tester. Thank you, Tim. Brenda, you may
2 proceed.

1 TESTIMONY OF BRENDA FARRELL, DIRECTOR, DEFENSE
2 CAPABILITIES AND MANAGEMENT, GOVERNMENT
3 ACCOUNTABILITY OFFICE

4 Ms. Farrell. Chairman Tester, thank you for the
5 opportunity to be here today to discuss the requirements for
6 personnel to have access to classified information. As you
7 know, my testimony on the Government-wide security clearance
8 process before your Subcommittee this past June included a
9 discussion of our work on the steps that agencies use to
10 first determine whether a Federal civilian position requires
11 access to classified information. Today I am here to
12 elaborate on that process and report on the extent of
13 progress by the agencies in implementing our recommendations
14 and actions still needed.

15 Over the years, GAO has conducted a broad body of work
16 on security clearance issues that gives us a unique
17 historical perspective. My remarks today are based
18 primarily on our July 2012 report on defining policy and
19 guidance for national security positions. My main message
20 today is that actions are still needed to help ensure that a
21 sound requirements process is in place to determine whether
22 a position requires a security clearance for access to
23 classified information.

24 My written statement is divided into two parts. The
25 first addresses guidance to determine if a civilian position

1 requires a security clearance. In July 2012, we reported
2 that the DNI, as Security Executive Agent, had not provided
3 agencies clearly defined policy and procedures to
4 consistently determine if a position requires a clearance.
5 Absent such guidance, agencies are using an OPM tool to
6 determine the sensitivity and risk levels of positions,
7 which in turn informed the type of investigation needed.

8 The sensitivity level is based on the potential of an
9 occupant of a position to bring about a material, adverse
10 affect on national security. OPM audits, however, found
11 inconsistencies among agencies using this tool to determine
12 the proper sensitivity level.

13 For example, in an April 2012 audit, OPM assessed the
14 sensitivity level of 39 positions and its designations
15 differ from the agency in 26 of them. In our July 2012
16 report, we recommended that the DNI, in coordination with
17 OPM, issue clearly defined policy and procedures for Federal
18 agencies to follow when first determining if a position
19 requires a clearance.

20 ODNI concurred with our recommendation and has moved
21 forward with actions to address it. We found that in
22 January of this year, the President authorized the DNI and
23 OPM to jointly address revisions to the Federal regulations
24 that are intended to provide guidance for the designation of
25 national security positions.

1 We believe that the proposed regulation is a good step
2 toward meeting the intent of our recommendation. However,
3 implementation guidance still needs to be developed and the
4 proposed regulation recognizes that point.

5 The second part of my statement addresses the guidance
6 in place to periodically re-assess civilian positions that
7 require security clearance. We also reported in July 2012
8 that the DNI had not established such guidelines requiring
9 agencies to review existing positions.

10 Without such a requirement, agencies may be hiring or
11 budgeting for initial and periodic personnel security
12 clearance investigations using position descriptions and
13 security clearance requirements that do not reflect current
14 national security needs.

15 Further, since such reviews are not done consistently,
16 agencies cannot have assurances that they are keeping the
17 number of positions that require clearances to a minimum, as
18 required by Executive Order 12968. Moreover, conducting
19 background investigations is costly. We found the Federal
20 Government spent over \$1 billion to conduct background
21 investigations in fiscal year 2011.

22 We recommended in July 2012 that the DNI, in
23 coordination with OPM, issuance guidance to require agencies
24 to periodically re-assess the designation of all Federal
25 civilian positions. ODNI and OPM concurred with this

1 recommendation. The proposed regulations do not appear to
2 require a periodic re-assessment, as we have recommended.
3 We still believe that this needs to be done.

4 For more than a decade, GAO has emphasized the need to
5 build and monitor quality throughout the personnel security
6 clearance process to promote oversight and positive outcomes
7 such as maximizing the likelihood that individuals who are
8 security risks will be scrutinized more closely, the first
9 step to ensure that a sound process is in place to determine
10 whether or not positions need access to classified
11 information.

12 We will continue to monitor the outcome of the final
13 Federal regulation, as well as other agency actions to
14 address our remaining recommendations. Mr. Chairman, this
15 concludes my remarks. I will be happy to take questions
16 when you are ready.

17 [The prepared statement of Ms. Farrell follows:]

1 Senator Tester. Well, thank you, Brenda. I appreciate
2 your comments. David, you may proceed.

1 TESTIMONY OF DAVID BORER, GENERAL COUNSEL,
2 AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

3 Mr. Borer. Mr. Chairman, Senator Portman, and members
4 of the Subcommittee. On behalf of AFGE and the more than
5 650,000 Federal employees we represent, including tens of
6 thousands who occupy positions designated as sensitive, I
7 thank you for the opportunity to testify today.

8 AFGE has grave concerns about the recent decision
9 issued by the U.S. Court of Appeals for the Federal Circuit
10 in Kaplan v. Conyers, and about the proposed rules on the
11 designation of positions as national security-sensitive
12 issued jointly by OPM and ODNI.

13 The Conyers decision and the proposed regulations
14 strike at the heart of the merit system, which for decades
15 has been the foundation in the Federal Civil Service.
16 Conyers eliminated the right to a meaningful hearing before
17 the U.S. Merit Systems Protection Board.

18 The proposed regulations exacerbate this problem by
19 allowing agencies to pick and choose which employees will
20 have the right to due process before the MSPB. Conyers and
21 the proposed regulations are only the latest injustices
22 inflicted upon Federal workers.

23 Thanks to a three-year pay freeze, sequestration in
24 which over half of the Federal employees lost 30 percent of
25 their take-home pay for six weeks, and a 16-day furlough

1 with the shutdown, many were left unsure of how or when they
2 would be able to pay their bills. Some untold number fell
3 into debt or fell deeper into debt. That additional debt
4 now potentially exposes thousands of Federal employees to
5 unfair removal from so-called sensitive positions without so
6 much as a hearing before the MSPB.

7 To be clear, Conyers does not pertain to individuals
8 with security clearances. It is not a case about classified
9 information. The individuals in that litigation, Rhonda
10 Conyers and Devon Northover, were an accounting technician
11 and a grocery store clerk, respectively.

12 Both lost their eligibility because of a modest amount
13 of delinquent debt due to circumstances beyond their
14 control. They were penalized because of their credit
15 scores, and worse, they had to face the loss of their jobs.

16 This is deeply troubling to AFGE and it should be a
17 real concern for this Committee. The implication that
18 financial hardship equates to disloyalty, even for employees
19 with no access to classified information, is unsupported and
20 offensive. In fact, AFGE has found that the practice of
21 penalizing employees based on their credit scores has had a
22 disproportionate impact on employees, over 40 female
23 employees, and employees of color.

24 Conyers is an ill-founded extension of an earlier case
25 involving security clearances. In 1988, the Supreme Court

1 decided the Department of Navy v. Egan, holding that the
2 MSPB could not review the merits of a security clearance
3 determination in the course of adjudicating an adverse
4 action.

5 Later, in Conyers and Northover, the MSPB held that in
6 the absence of a security clearance, Egan did not apply. In
7 its Conyers' decision, the Federal Circuit opened the door
8 to arbitrary and unchecked Executive agency action. The
9 Conyers' ruling rejected the text, the structure, and the
10 history of the Civil Service Reform Act, along with the
11 plain language of Egan to hold that the MSPB may not review
12 the merits of an agency determination that an employee is
13 ineligible to hold a sensitive position.

14 The proposed regulations provide no real oversight for
15 agency position designation determinations. By contrast to
16 the rule proposed by OPM in 2010, these new rules fail to
17 direct the agencies that in order to designate a national
18 security position, they must make an affirmative
19 determination that the occupant of that position could cause
20 a material, adverse effect on national security through
21 neglect, action, or inaction.

22 In both Conyers and the--if both Conyers and the
23 proposed regulations are allowed to stand, Executive Branch
24 agencies will have the unreviewable power to deprive
25 hundreds of thousands of employees the protections that

1 Congress gave them in the CSRA. That, Senators, is likely
2 to be an irresistible invitation to abuse.

3 To counter this loss of due process rights, Delegate
4 Eleanor Holmes Norton introduced H.R.3278 to clarify that
5 workers or applicants are entitled to be heard by the MSPB
6 even if it implicates a sensitive position determination.
7 AFGE strongly urges introduction of a companion bill in the
8 Senate with the same bipartisan support shown in the House.

9 AFGE also looks forward to working with the members of
10 this Committee to restore fairness and common sense to the
11 due process protections and other rights that have
12 historically protected the Federal workforce. This
13 concludes my statement and I would be happy to respond to
14 any questions.

15 [The prepared statement of Mr. Borer follows:]

1 Senator Tester. Thank you for your statement, David.

2 Angela.

1 TESTIMONY OF ANGELA CANTERBURY, DIRECTOR OF PUBLIC
2 POLICY, PROJECT ON GOVERNMENT OVERSIGHT

3 Ms. Canterbury. Chairman Tester and Ranking Member
4 Portman, thank you very much for your oversight of the
5 national security workforce and for inviting me to testify
6 here today. I am speaking on behalf of POGO, but also on
7 behalf of the Make it Safe Coalition which represents more
8 than 50 groups and millions of Americans very concerned with
9 whistle-blower protections in both the public and the
10 private sector.

11 We are deeply concerned that the national security
12 claims here and throughout the Government really threaten to
13 engulf our Government and, with cruel irony, will make us
14 less safe. In August of this year, this Court decision in
15 Conyers stripped Federal employees in national security-
16 sensitive positions of their right to an appeal an adverse
17 action, setting the stage to also strip due process rights
18 for actions that are discriminatory or in retaliation for
19 whistle blowing.

20 This deeply-flawed decision in Kaplan v. Conyers armed
21 agencies with sweeping power that affects untold numbers of
22 civil servants, untold because OPM cannot say exactly how
23 many position-holders there are. The definition under the
24 Executive Order 10450 for personnel who may have material
25 adverse affect on national security must have objective,

1 credible boundaries.

2 Yet, in Conyers, the Government did not provide
3 adequate boundaries or justifications for national security-
4 sensitive designations. Indeed, Rhonda Conyers was an
5 accounting technician and David R. Northover was a
6 commissary stocker, and neither had any real credible
7 national security role.

8 While there is a need for additional screening for a
9 very limited number of civilian positions with specific
10 national security responsibilities but no access to
11 classified information, extensive background checks should
12 never be a predicate for denying due process rights. Quite
13 the opposite.

14 Congress gave the Civil Service and whistle-blower
15 protections to this critical workforce to foster
16 accountability for waste, fraud, and abuse. These workers
17 had, for years, been able to challenge adverse personnel
18 actions at the Merit Systems Protection Board, but not
19 anymore.

20 Now if an agency fires a national security-sensitive
21 employee for having made a legally protected whistle-blower
22 disclosure, or because of that employee's race or religion,
23 the employee likely will not be able to seek justice. It is
24 just a matter of time, as was noted from the bench in oral
25 arguments in Conyers after the Egan decision removed due

1 process rights for security clearance actions, it was
2 inevitable that the Board would do the same for whistle-
3 blower retaliation as it did in Hesse v. Department of
4 State.

5 Because Conyers is so broad, it flouts the
6 Congressional intent of the Civil Service Reform Act, as
7 well as the Whistle-Blower Protection Act, and the recently
8 passed and strongly bipartisan Whistle-Blower Protection
9 Enhancement Act, reforms that we worked for years to enact.

10 Of course, even before Conyers, there was a jaw-
11 dropping lack of oversight of these seemingly arbitrary and
12 overused designations. At the direction of the President,
13 OPM and DNI issued a joint proposed rule to clarify the
14 proper use. We agree, it is about time, but unfortunately,
15 it does nothing to assure us that the Obama Administration
16 plans to curb the practically unlimited discretion afforded
17 to agencies, improved, efficient oversight, or protect
18 critical rights for whistle-blowers and Civil Service.

19 In fact, the proposed rule is poised to expand the use
20 of these designations to overly-broad categories of
21 positions such as senior managers and undefined key programs
22 and fact-finding positions. Before a final rule, far more
23 needs to be known about the scope and cost, policy impacts,
24 due process protections, and oversight of these
25 designations.

1 We would welcome a directive from the President
2 clarifying access to the MSPB and for OPM and DNI to curb
3 the expansive use of these designations and conduct proper
4 oversight. However, we believe that ultimately Congress
5 must re-assert the rights it previously provided. We urge
6 you to advance an easy legislative fix. Simply clarify that
7 an employee appealing an action arising from an eligibility
8 determination for a position that does not require a
9 security clearance may not be denied MSPB review. This is
10 the Delegate Holmes Norton legislation that was mentioned.

11 We also urge you to consider the broader context of the
12 growing national security state. In the wake of the Snowden
13 disclosures, we caution you to guard against over-reactions.
14 Excessive secrecy undermines our democracy and threatens our
15 national security by making it harder for us to protect our
16 legitimate secrets.

17 The evidence for the growing national security state is
18 disturbing. As you mentioned, Chairman, we have almost five
19 million security clearance holders. Approximately 20
20 million four-drawer filing cabinets could be filled with the
21 amount of classified data accumulated every 18 months by
22 just one international agency, according to the GAO.

23 It is time for Congress to be far less deferential to
24 the Executive Branch on claims of national security. You
25 can begin by reining in the nearly unbridled power of

1 agencies to misuse national security labels and make whole
2 swaths of our Government hidden and accountable. We must be
3 able to hear from whistle-blowers.

4 Thank you again for inviting me to testify today and I
5 look forward to your questions.

6 [The prepared statement of Ms. Canterbury follows:]

1 Senator Tester. Well, thank you for your testimony,
2 Angela, and I thank all of you for your testimony. We will
3 get to the questions right now. Some of this is going to be
4 repetition from what some of the panelists said, but this is
5 for anybody who wants to answer it.

6 In terms of the Conyers decision, we are talking about
7 two Federal employees without a security clearance or any
8 need for access to classified information. One was an
9 accounting technician. I assume that is similar to a CPA
10 maybe, or not even at that level?

11 Mr. Borer. Lower level accounting.

12 Senator Tester. Lower level accounting for the Defense
13 Department, in that position for 20 years. One was a clerk
14 in a commissary, which indicates to me he probably ran a
15 cash register. Is that fairly accurate?

16 Mr. Borer. He was a grocery store clerk, essentially,
17 yeah. He ran a cash register.

18 Senator Tester. And stocked shelves?

19 Mr. Borer. Stocked shelves.

20 Senator Tester. And because of delinquent debts
21 brought about by a divorce of one and a death in the family
22 of another, they were stripped of their ability to hold a
23 Government position designated as sensitive to national
24 security. The designation is consistently and arbitrarily
25 applied to positions across Government as Angela just got

1 done saying.

2 They were subsequently stripped of their rights to
3 appeal these personnel decisions of the Merit Service
4 Protection Board, a basic right of Federal employees. There
5 are so many questions to be asked about this. I will just
6 start with the basic one and that is, can somebody explain
7 to me how these actions were carried out in the best
8 interest of our national security? Do you want to jump in
9 on that one? No? Okay.

10 So just let me ask you this. You have got a position
11 that is designated as sensitivity, and then you have a
12 person in that position that does not have any level of
13 security clearance. Correct so far? And yet, that person
14 is fired because they have accrued some debt beyond their
15 control. And that is deemed as being okay? That is the
16 first question. No? Anybody want to talk about that? Do
17 you want to tell me why that is okay?

18 Mr. Curry. Senator, as you may know, AFGE has filed an
19 appeal to the Supreme Court related to these issues and I
20 may be limited on what I can say about the case because the
21 Justice Department represents the Executive Branch on that.

22 Senator Tester. Sure.

23 Mr. Curry. But I guess the point I would make on this
24 is, one, that under Executive Order 10450, you know,
25 positions could have national security impact whether they

1 have access to classified information or not. And the
2 reason that we have--OPM went forward on challenging the
3 MSPB's decision on this is the Director of OPM has
4 authority, under the law, when it believes that MSPB has
5 rendered an erroneous decision, which is--an erroneous
6 interpretation of Civil Service law, rule, or regulation.

7 Senator Tester. Okay.

8 Mr. Curry. And so, when the Director sought
9 reconsideration from MSPB on this, the intent was to
10 preserve the Executive Branch's authority to make risk
11 determinations regarding national security positions.

12 Senator Tester. I got it. So, I mean, let me put it
13 on one hand. I get it where if you have got somebody that
14 has a high security clearance and they owe somebody some
15 money, that could possibly compromise what is going on.
16 These guys did not have a security clearance at all. They
17 were working in sensitive positions, but they did not have a
18 security clearance.

19 And it escapes me, it totally escapes me, and we are
20 going to get further down, because, I mean, you have got to
21 start here to get down into the real problems of this. It
22 escapes me how a grocery store clerk could be put at the
23 same level as somebody that is dealing in the Department of
24 Defense with really sensitive information, or in the CIA
25 with really sensitive information that owes somebody some

1 money.

2 I honest to God do not get it. First of all, I do not
3 get how you can have a person working in a position that is
4 deemed as sensitive and not have a security clearance. I do
5 not get that at all. And secondly, if they do not have the
6 security clearance, I do not understand why they can be
7 fired for that reason and not have any appeal rights. Fired
8 because they basically accrued debt.

9 Am I on a different level here? Does this make sense
10 to you guys?

11 Mr. Prioletti. Senator, I am not in a position to
12 determine what level you are on, but I can say to you--

13 Senator Tester. I will take that as a compliment.

14 Mr. Prioletti. --it was meant as a compliment, sir.

15 In this particular case, it is difficult for us to speak on
16 behalf of DoD, but as you mentioned, there are two points
17 here. One, in fact, they were in what were deemed at that
18 time sensitive positions.

19 Senator Tester. But they did not have a personal
20 clearance. They had not been vetted.

21 Mr. Prioletti. There is a difference between the
22 sensitive position and having a clearance, as we know, and
23 the reason that the position was considered sensitive is not
24 based upon whether they were going to have access to
25 classified information. It was, could the position cause

1 any type of adverse impact to national security. And in
2 this particular case, if you have access--hypothetically, if
3 you have access to a food supply, you could, in fact, have
4 an adverse affect to national security, if that food supply,
5 in this particular case, is DoD.

6 Senator Tester. Would you think the folks down in the
7 Dirksen Service Southern Buffet are in sensitive positions?
8 They have access to food. I eat, as you can tell, more
9 regularly than I should there.

10 Mr. Prioletti. Again, sir, I would not comment on that
11 last statement, for sure. The designations are done by the
12 individual organizations and I would leave that to the
13 appropriate organization to determine.

14 Senator Tester. Okay. So let us get back to where you
15 are going, and that is, you are laying down--ODNI and OPM
16 are laying down in concert, laying down some regulations
17 that agencies can follow, right? Once those regulations are
18 laid down, will you be able to tell me whether the folks
19 down in the server will be designated as sensitive
20 positions?

21 Mr. Prioletti. Once the regulation is enacted, sir,
22 what that regulation will do will provide you much clearer
23 guidance so that we have uniform consistency across the
24 determination factors, so that when you are making a
25 determination on a particular position, the guidelines and

1 the standards by which the position will be judged against
2 will be consistent across the U.S. Government.

3 Senator Tester. So regardless if you are working in
4 the FDA or the SBA, the same guidelines will apply, correct?

5 Mr. Prioletti. Well, sir, the CFR 1400 applies to the
6 competitive service. But the idea is to apply that
7 eventually across the U.S. Government for consistency.

8 Senator Tester. Just to get your point, I mean, once
9 you get the regulations down, they will apply across state--
10 every Federal agency equally, correct?

11 Mr. Prioletti. Yes, sir.

12 Senator Tester. Okay. So who is going to make sure
13 that the agency actually utilizes--and I do not want to pick
14 on you, Brian. Tim, you can answer, too. Who is going to
15 make sure that the agency actually utilizes the rules that
16 you promulgate?

17 Mr. Curry. Senator, you know, I echo Brian's remarks.
18 You know, the idea here is, the current rules at 5 CFR Part
19 732, they provide some very general guidelines, where the
20 proposed rule is providing concrete examples, more detail.

21 Senator Tester. Got you.

22 Mr. Curry. And so, the goal here is to allow for more
23 precision in making a position sensitivity designation. So
24 OPM and ODNI both have oversight roles that they can assess
25 how agencies are implementing these rules. We expect to

1 also develop implementing guidance and also update the
2 position designation tool which will also provide for more
3 consistency across the Government.

4 Senator Tester. Got you.

5 Mr. Curry. And what we are trying to minimize is
6 under-designation of positions where it might impact
7 national security and minimize over-designation of positions
8 which might increase costs.

9 Senator Tester. Okay. But who is going to--where is
10 the oversight of the agencies to use the rules that you are
11 putting down? Is it voluntary or is somebody--where is the
12 oversight coming from? That is the question. The question
13 is, you can put down the rules and if they decide not to use
14 them, you do not have rules, you do not have consistency,
15 you are not going to achieve the goals that I think you want
16 to achieve. So the question is, who has oversight?

17 Mr. Prioletti. Sir, oversight is a dual role in this
18 case. Both OPM from the suitability side and from the ODNI
19 from the security exec side.

20 Senator Tester. So you are going to be--I mean, pick
21 an agency. Department of Justice, CIA, DoD. You are going
22 to be providing oversight to see that they use those rules?

23 Mr. Prioletti. Yes, sir. That would be our
24 responsibility.

25 Senator Tester. And so, we have got--how many

1 sensitive positions do we have? I have got to be quiet
2 here. I will come back. Senator Portman.

3 Senator Portman. Thank you, Chairman. You will give
4 them time to think about that question.

5 Senator Tester. Exactly.

6 OPENING STATEMENT OF SENATOR PORTMAN

7 Senator Portman. Well, first, thanks for holding the
8 hearing. This is, as you all know, maybe our second hearing
9 we have held. There has also been a hearing at the full
10 Committee level on this same issue. I think we have
11 acknowledged there is a need for significant reform with
12 regard to the security clearance process.

13 This is not our last hearing, so we will continue to
14 work on this. We appreciate your being here and giving us
15 some input. Sorry I was a little late. This is kind of a
16 crazy time right now with the budget conference I am on and
17 so on. But I am pleased we have made a little progress,
18 even in the last couple of months.

19 We have a legislation that Senator Tester and I
20 introduced that actually passed called the SCORE Act, and it
21 gives some important oversight responsibilities on this to
22 the Inspector General at OPM, Mr. Curry, as I think you are
23 familiar with. We are actually working on additional
24 legislation now that we think will also be able to be moved
25 pretty quickly because this is bipartisan and I think it

1 makes the system more accountable and more efficient.

2 On the Defense Authorization Bill, which is on the
3 floor this week, we have got an amendment that asks GAO to
4 examine quality metrics and reciprocity as it pertains to
5 the process. And along those same lines, we asked OMB's
6 Performance Accountability Council to examine how we can
7 improve the processes for access to state and local law
8 enforcement records in the background investigation process.

9 That came out of the tragic incident at the Navy Yard
10 with Aaron Alexis. Some of you may have followed that.
11 That came up in one of our hearings. That again, better
12 access to state and local law enforcement records would have
13 been very helpful in that investigation, in the background
14 investigation for him, and it would be a way to shortcut
15 some of these investigations.

16 Today, as we have heard, we are focusing more broadly
17 on the question of who should have access to information,
18 how much information should be classified, how can we more
19 efficiently and effectively again go through the clearance
20 process. I have appreciated your testimony. I have had a
21 chance to hear from some of you and look at some of your
22 other testimony.

23 I am going to focus in on over-classification because I
24 think that is one of our issues here. Ultimately, we are
25 not going to be able to keep up with the clearance process

1 if we continue to classify so much information. And so, I
2 think we need to get back to kind of the root of the
3 problem. And then if we have time, I will also ask some
4 more questions along the lines the Chairman was asking.

5 But on over-classification or on classification, not to
6 have a bias here, we have had, in our Committee hearings,
7 and in the full Committee hearing, this consistent theme
8 come up that there is more information being classified. It
9 is a concern, one, because it is hard for people we
10 represent, our constituents, to have access to this
11 information to understand how the Government works and how
12 it is conducting itself.

13 And two, if everything is classified, sort of nothing
14 is classified, in my view. I mean, to the extent you are
15 not being careful about what you prioritize, it is tough to
16 protect information that really is of national security
17 importance.

18 I think, you know, not making that information
19 available to the public might be one reason the national
20 security sector sometimes is interested in classifying, even
21 when it might not have a national security implication. So
22 this Public Interest Declassification Board, the PIDB, which
23 was established by Congress back in 2000, has said that a
24 single intelligence agency classifies one petabyte of data
25 every 18 months. That is the equivalent of 20 million

1 filing cabinets filled with text, or approximately 13 years
2 of high-definition video.

3 So that is a single intelligence agency classifying
4 that much every year-and-a-half. And so, I guess volume
5 should not be the only indication, the only metric we use,
6 but that certainly seems like a lot of information that,
7 frankly, is very tough to keep up with.

8 So starting with this notion of how much should we be
9 keeping under lock and key, I have a couple questions. And
10 by the way, the cost of this is growing, too. From 2001 to
11 2011, that ten-year period, until a couple years ago, the
12 cost went from \$4.7 billion to \$13.6 billion a year. So
13 now, \$13.6--\$13.4--\$13.36 billion a year in simply costs
14 associated with storing this vast amount of information.

15 And by the way, that does not include the over \$1
16 billion needed every year just to clear the personnel
17 authorized to have contact with this information, or to work
18 with this material.

19 So maybe starting with ODNI, Mr. Prioletti, appreciate
20 your being here today because I think you probably have the
21 most expertise on the national security side to be able to
22 talk about this. Do you think we are classifying too much,
23 too little, and talk a little bit about what goes into the
24 decision-making process for information to be labeled
25 classified or sensitive?

1 Mr. Prioletti. Thank you, Senator. I think what we do
2 is classify what we feel is necessary at the time. I do not
3 believe I am in a position to say whether we over-classify
4 or not. The volume that you mentioned is epic, but there
5 are guidelines that are set specifically to determine what
6 information needs to be classified and that set of
7 guidelines are used to determine what information goes under
8 a classification or a non-classification status.

9 I think we are using those as judicially as possible.
10 The pace of business and the emerging threats environment
11 that we are working in necessitates that we look at
12 information on a daily basis and make that determination
13 using those guidelines that I referred to.

14 Senator Portman. And these new tools that we are
15 talking about, the new regulations and so on, is for
16 determining whether somebody has a position that should be
17 designated as sensitive. But you have also got tools that
18 you are using to try to determine whether something is
19 classified or not.

20 And do you believe that the kind of tools that you have
21 available to you are appropriate to make those decisions?

22 Mr. Prioletti. Yes, sir, I believe they are
23 appropriate, but they are evolutionary in nature and changed
24 to meet the changing environment in which we work in.

25 Senator Portman. So here is one of the other data

1 points we have from this PIDB, which is charged with looking
2 at, you know, how much classified information we have and
3 whether it is growing or not. They are the ones that have
4 indicated that it is growing so dramatically from \$4.7
5 billion to protect it, roughly 12 years ago, to over \$11
6 billion today.

7 But they say that it would take two millions employees
8 one year to review even one petabyte of information. And as
9 I have indicated, one petabyte of data is now being
10 collected every 18 months by a single intelligence agency.
11 So two millions employees one year to review it. So
12 obviously we do not have the workforce to review that
13 information. Is that a concern?

14 Mr. Prioletti. Sir, if you mean is there a concern
15 over the numbers that you just listed, or the lack of
16 personnel to do--

17 Senator Portman. Well, I mean, it is not practical. I
18 mean, I am sure you guys would like a bigger budget, but
19 there is not going to be two million employees to review
20 even this one petabyte we talked about. I guess, you know,
21 just give me a sense of whether ODNI is tackling this issue
22 of declassification and trying to ensure that we have the
23 classification of materials, but do not over-classify.

24 And if not, you know, how can this be justified? We
25 are not going to have the employees to be able to review

1 that. It will not be useful information. So what is ODNI's
2 latest effort on declassification?

3 Mr. Prioletti. Well, sir, what we do is we provide
4 that oversight and that guidance to the organizations, and
5 as I referred to the standards earlier before in one of your
6 earlier questions, that particular guidance is Executive
7 Order 13526, which lays out the standards for classifying
8 information, and basically that information is tied to two
9 areas.

10 It is tied to potential damage to national security in
11 the event of an unauthorized disclosure, and what would that
12 damage be to national security? And that is the overriding
13 guidance that is provided to organizations. The 13526 is
14 looked at on a periodic basis to see, is it valid? Is there
15 any need for change? And that is how we continue to provide
16 oversight to the organizations.

17 Senator Portman. Okay. Let me take you off the hot
18 seat for a minute and go to Brenda Farrell, if she would
19 comment on it, from a sort of oversight perspective, more
20 general perspective. Do you think it is a problem of over-
21 classification, and if so, do you think ODNI and others are
22 doing the right things to try to de-classify information so
23 it is more useful?

24 Ms. Farrell. GAO, as noted earlier, has looked at the
25 area of what is in place for classified material, but it has

1 been several years. We have just initiated work in this
2 area and I would be more than happy to have that team come
3 and explain the scope of that work to you or your staff if
4 you would like.

5 Senator Portman. And is GAO doing a specific research
6 project on this issue of classification?

7 Ms. Farrell. Yes.

8 Senator Portman. That would be terrific if you could
9 provide the Subcommittee with that and that may be the
10 subject of a future hearing.

11 Ms. Canterbury, you talked about it earlier. You
12 mentioned, as I recall, that you think that the Legislative
13 Branch provides too much deference to the Executive Branch
14 on classification. Can you tell us why you think that and
15 what you think ought to be done?

16 Ms. Canterbury. Well, I think it is on a range of
17 issues. I think classification is one of them. I think the
18 national security claim is being used in more and more
19 contexts now, and it sounds to me like the Executive Branch
20 itself is not conducting proper oversight. And I thank you
21 very much for this hearing because this is such a--and the
22 previous hearings that you have had in this area because I
23 think it has been long overdue.

24 So now, all of this Congressional attention in this
25 space, hopefully, will spur some action and create some

1 internal controls that are really lacking.

2 Senator Portman. Thank you. My time is over. I
3 appreciate you all being here today. And again, this is
4 just another hearing in our attempt to try to get at this
5 issue, not just of over-classification of material, but also
6 on the security clearance process and how do you make it
7 more efficient and more effective to avoid the problems we
8 saw at the Navy Yard. So thank you, Mr. Chairman.

9 Senator Tester. Thank you, Senator Portman. I
10 appreciate your work on this issue. I know you are busy.
11 Appreciate your being here while you can. So thank you.

12 I am going to go back to where I left off, and that
13 was, we were talking about sensitive positions. We were
14 talking about security clearances for people, both those
15 issues. How many--and this is for anybody and if more than
16 one of you want to answer, you can. How many sensitive
17 positions have been designated?

18 Mr. Curry. Senator, it is difficult to estimate the
19 number of sensitive positions across the Government, but I
20 would note that the number of sensitive positions does not
21 necessarily equate to the number of security clearances,
22 because not only our regulations are dealing with
23 competitive service employees. We also have excepted
24 service in the Federal Government. And, of course, security
25 clearances apply to excepted service employees as well as

1 contractors.

2 Senator Tester. I got it.

3 Mr. Curry. It is difficult to estimate that right now.

4 Senator Tester. David?

5 Mr. Borer. Mr. Chairman, yeah, it is impossible
6 probably to estimate, but under the proposed regulations,
7 virtually anybody in the entire--everybody in the Department
8 of Defense could be designated as holding a sensitive
9 position. So we are talking about hundreds of thousands of
10 employees who are being potentially denied MSPB rights.

11 Now, let me illuminate something based on what you said
12 earlier, that the Conyers and the regulations are so
13 insidious for two more reasons we have not discussed today.
14 One is that Conyers and Northover were both serving in their
15 positions for years before their position was suddenly re-
16 designated as a sensitive position.

17 And with that re-designation, they were suddenly
18 scrutinized for their credit ratings and, you know,
19 summarily brought before the agency and action was taken
20 that was later deemed unreviewable. So that is one thing
21 which--you know, fine public servants, long service, no
22 problem at all, it is invisible to the Government what their
23 credit looks like, who cares, and suddenly with this stroke
24 of a pen, they are hauled into this process.

25 Secondly, because it is unreviewable, we have not even

1 been told to this day what it was about Mr. Northover's or
2 Ms. Conyers' positions that merited this kind of treatment.
3 The Government, at some point in the Northover case, mumbled
4 something to the effect that, Well, he might be able to tell
5 how many sunglasses we were ordering. I fail to see, as I
6 am sure the Chairman does, how that is a security risk to
7 the nation, unless we are rolling out an amphibious assault
8 on the city of Seattle where the sun never shines.

9 Senator Tester. Go ahead, Brenda.

10 Ms. Farrell. Mr. Chairman, our work that we conducted
11 in 2011 and 2012 found that there was a lack of guidance to
12 help determine the sensitivity. The current 732 was in
13 place, but it was very broad. And, of course, in our work
14 at DoD and DHS, we repeatedly had officials tell us that the
15 definition was so broad that it could capture just about any
16 Federal position.

17 So the steps that had been taken to put some parameters
18 around that is much needed. It is not to say that by
19 itself, that Federal regulation can answer the mail, but it
20 is a start.

21 Senator Tester. You are talking about the one that was
22 initially put on the books, or are you talking about the one
23 that was presented in May of 2010?

24 Ms. Farrell. May of 2010, which does repeat quite a
25 bit of what was previously put on the books. The difference

1 is, some of the problems that we discovered in 2011 and 2012
2 was that the ODNI had not taken an active involvement with
3 OPM in this particular area, and that was due to their
4 evolving roles, that they both received a designation of the
5 ODNI as Security Executive Agent, and OPM as the Suitability
6 Agent in 2008.

7 So there was a while there, a period where they have
8 been determining exactly how their roles would interrelate.

9 Senator Tester. Okay. And I may not have the month
10 right, but I think it was May of 2010. Is that right? Or
11 is it December of 2010?

12 Mr. Curry. I can. Senator, the original regulation
13 was proposed in December 2010.

14 Senator Tester. Okay. Good enough.

15 Mr. Curry. And I would like to clarify a point--

16 Senator Tester. Go ahead.

17 Mr. Curry. --with regard to every position in DoD
18 being designated as sensitive. As we noted in the
19 explanation in the supplemental of that proposed rule in
20 December 2010, each position designation is going to be
21 based on a review of each individual position based on their
22 duties and nature of their work, not a broad class of the
23 employees across an agency based on their mission.

24 Senator Tester. And I do not--Mr. Borer can speak for
25 himself, but I am not sure that he said that. I think what

1 he said was if you could take each position and designate
2 it, you could literally designate the whole DoD.

3 Let me get to the rule of 2010, which--and I do not
4 want to put words in your mouth, Brenda--you said was not
5 adequate. Am I correct?

6 Ms. Farrell. Well, it did not have the involvement of
7 ODNI and ODNI is the security agent responsible for making
8 sure there is uniform policy, and now with the current
9 proposed regulation, it does acknowledge ODNI's role.

10 Senator Tester. So ODNI is involved now?

11 Ms. Farrell. Yes.

12 Senator Tester. Does that make the rule--have you seen
13 the rule, the February 14th, the rule that they were going
14 to get put in stone? Have you seen that rule?

15 Ms. Farrell. The current proposed regulation?

16 Senator Tester. Yes.

17 Ms. Farrell. Yes. And it does--

18 Senator Tester. Is that adequate?

19 Ms. Farrell. By itself, no. And the rule does note
20 that implementation guidelines are the responsibility of
21 ODNI with OPM--

22 Senator Tester. Right.

23 Ms. Farrell. --and that is definitely what will be
24 needed to make sure that there is the oversight you are
25 talking about, and quality controls in place for the

1 agencies to implement it.

2 Senator Tester. But ultimately in the end, is it
3 giving the agencies the kind of guidance they need to
4 develop some uniformity? Does it give them the metrics to
5 both determine which positions need to be designated as
6 sensitive? And I assume it deals with security clearances,
7 too?

8 Ms. Farrell. It provides more detail. Some of it is
9 very similar to the old rule in terms of the definition of
10 national security, national security positions under the old
11 rule.

12 Senator Tester. Was the old rule adequate as far as
13 that goes?

14 Ms. Farrell. Apparently not based on the work that we
15 conducted in 2011 and 2012 because it was so broad the
16 agencies had difficulty.

17 Senator Tester. So where are we heading here? Are we
18 heading here back to the same spot? I mean, the new rule is
19 very similar to the old rule and the old rule was not
20 adequate?

21 Ms. Farrell. Well, the new rule does expand on the
22 definition of national security positions. It includes some
23 of the key positions that were named, but then it tweaks it
24 and it expands much more so.

25 Senator Tester. Still not adequate?

1 Ms. Farrell. I do not know. I do not know because--

2 Senator Tester. I thought you said there were studies
3 that were done in 2010 and 2011 that said it was not
4 adequate.

5 Ms. Farrell. When we did our review that we issued
6 last year, we found that there was guidance not adequate to
7 help the agencies determine the suitability of positions.

8 Senator Tester. Okay.

9 Ms. Farrell. That did not include any proposed changes
10 because those were never implemented.

11 Senator Tester. Okay. David, you had something else?

12 Mr. Borer. Yes, Mr. Chairman. The new rule, the new
13 version of the rules that were published in 2010 omit key
14 provisions that talk about what the agencies have to do in
15 order to designate a position as a national security
16 position.

17 The 2010 rule would have required an affirmative
18 determination that the occupant could cause a material,
19 adverse effect on national security. That has been deleted.
20 So there is no direction, and certainly it will be easier
21 for the agencies if they do not have to make that hurdle.

22 Senator Tester. Okay.

23 Mr. Borer. As you talk about oversight, for our money,
24 the oversight that is required here is MSPB review on the
25 back end.

1 Senator Tester. Yeah, yeah, yeah. Tim, you want to
2 talk about that for a second? Why was that deleted?

3 Mr. Curry. Yes. Senator, OPM and ODNI, by these
4 regulations and by our implementing guidance, will provide
5 detail on uniformity and consistency across the Government.
6 But under the Executive Order 10450, each agency has had
7 responsibility to make the position designation.

8 So what we are trying to do is assist them in
9 exercising their authority by trying to ensure uniformity
10 across the Government.

11 Senator Tester. So why would material, adverse effect
12 be taken out of the rule?

13 Mr. Curry. No, sir, that is a requirement of the
14 Executive Order. This rule is implementing that Executive
15 Order.

16 Senator Tester. Okay. Getting back to the part about
17 different agencies, and you are right, the head makes that
18 call. Are they bound by anything other than just their
19 respect for you to utilize the rules that you put forth?

20 Mr. Curry. Well--

21 Senator Tester. The agencies, yeah.

22 Mr. Curry. For purposes of consistency, yes, they will
23 apply these rules, but they ultimately make the designation
24 themselves.

25 Senator Tester. So they--just to be clear, and this is

1 not picking on anybody here. To be clear, the agencies can
2 determine whether to use or whether to go their own way when
3 it comes to those designations?

4 Mr. Curry. No, no, sir.

5 Senator Tester. They have to use your rules?

6 Mr. Curry. They have to use our rules, but they make
7 the ultimate final decision when applying these rules.

8 Senator Tester. Okay.

9 Mr. Curry. And, Senator, just for clarification, when
10 they are applying these rules, they are in the best position
11 to look at the positions in their agencies, the nature of
12 those duties of that position, and determine the adverse
13 impact on national security if there is action, inaction, or
14 neglect to duty by the person in that job.

15 Senator Tester. Okay.

16 Mr. Borer. Mr. Chairman?

17 Senator Tester. Yes, sir.

18 Mr. Borer. Just so there is no misconception on the
19 part of the Committee about the consistency and the
20 integrity of this process, I would point out that in Ms.
21 Conyers' case, the agency reversed itself and cited,
22 expressly cited, the pending litigation as the reason why
23 they were going to drop the re-designation of her position.

24 And in Mr. Northover's case, he was later restored to
25 this position as a result of an unrelated EEO claim and has

1 since been promoted. So we can talk about consistency and
2 about applying rules and so forth. The reality is on a
3 ground level at these agencies, it does not happen. These
4 managers are manipulating the process.

5 Senator Tester. I hear you. Look, what I want to get
6 to is I want to make sure that--and I think that Angela
7 brought this up in her opening statement--cost oversight,
8 due process, all those things need to be handled. And I am
9 an open Government guy. I think the more transparent
10 Government is, the better Government works.

11 I also understand that there are people who want to do
12 a lot of harm to this country, so we have got to make sure
13 that the folks that really do have access to sensitive
14 information are properly vetted. Why we do not know how
15 many sensitive positions are classified within Government is
16 disturbing to me, and maybe I should not feel that way, but
17 I do.

18 I think that if we have got agencies out there that are
19 arbitrarily--and I know that was part of the goal for the
20 rule, is to get rid of the arbitrary nature of designations,
21 but if they can still do that and the only person that knows
22 that without a doubt are you guys, probably everybody at the
23 table, as a matter of fact.

24 But if they can arbitrarily do what they want as far as
25 determining which positions are sensitive, because they can

1 find something out there that would do that--I mean, the
2 example of food was a fine example because we all eat--why--
3 I guess the question is, are we going to end up with another
4 Snowden incident or another Naval Yard shooter incident,
5 because we have got so many of these things to do that folks
6 end up cutting corners in the process?

7 I do not mean to verbalize too much about this. Angela
8 brought it up. I mean, the fact is, we have got a situation
9 where we have got so many people out here with security
10 clearances that corners are being cut now to get those
11 clearances done.

12 And a person could deny that, but the proof is in the
13 pudding and look what happened with Alexis. So I guess
14 oversight by the Legislative Branch is something that I
15 think we ought to take back a lot of the power that we have
16 to make three equal branches of Government and hearings like
17 this help.

18 Any other suggestions that you might have, Angela, as
19 far as what we could do here to make sure that the rules
20 that ODNI and OPM are putting in place actually do what I
21 think you guys want them to do; and yet, does not break the
22 bank, protects due process of workers, and, you know--go
23 ahead.

24 Ms. Farrell. Thank you very much, Chairman. First and
25 most importantly, Congress is going to have to fix the law

1 and make sure that these civil servants and whistle-blowers
2 have access to review at the Merit Systems Protection Board.
3 That is an absolute first must.

4 Secondly, these positions need to be better understood
5 and categorized before a proposed rule, before a finalized
6 rule. It should have been done before the proposed rule, in
7 our estimation. I might suggest a process similar to that
8 with the analogous information.

9 We had all of these strange, secret markings that
10 proliferated. Right? And the agencies were just marking
11 things for official use only, secret but unclassified, and
12 so, the Obama Administration put together a process to try
13 to rein that in and have some rationale for information that
14 is not classified, but is controlled but unclassified.

15 And so, an inventory took place. I might recommend
16 something along those lines for these positions. If we
17 really want to get a handle on legitimate designations, then
18 tell us what those are. I mean, I am a little confused like
19 you. Like, if there is not a security clearance, then what
20 are the legitimate designations for national security? Tell
21 us, agencies, and then base a rule upon that designation.

22 Senator Tester. You are saying tell us what the
23 metrics are for determining the position?

24 Ms. Farrell. Yes, absolutely, and which positions you
25 are using now, and have a really good, thorough look at

1 whether or not those can be streamlined into very, very
2 narrow, very specific concrete categories so that the
3 agencies do not have wiggle room.

4 Then you need to have some oversight over that process.
5 OPM has not been doing its job. They were given
6 responsibility by President Eisenhower in Executive Order
7 10450 and they are supposed to be overseeing how the
8 agencies designate these.

9 I mean, what we have heard today is they are just
10 letting them do whatever, and after this rule, they also
11 will be completely deferential to the heads of these
12 agencies. They have no plans to go back and check whether
13 or not their rule will be applied properly.

14 Senator Tester. Okay. I will let you respond to that,
15 Tim.

16 Mr. Curry. Well, as I noted earlier, OPM and ODNI do
17 have the joint oversight rule with regard to these rules and
18 there will be oversight and assessment of how the agencies
19 are applying these rules. So I would respectfully disagree
20 with that.

21 Senator Tester. Okay. And excuse me for not knowing
22 this answer. Are there metrics within the rule?

23 Mr. Curry. Okay. I am consulting with my advisor.

24 Senator Tester. That is perfectly all right. I do the
25 same thing.

1 Mr. Curry. There are reporting requirements, so based
2 on the reporting requirements, we can learn information on
3 how they are implementing this, but there is no specific
4 metrics.

5 Senator Tester. So if there are not metrics in the
6 rule, do you have metrics to know that they are implementing
7 the rule in a way that it is intended?

8 Mr. Curry. Okay, sir. Just what we are proposing in
9 the rule is to comply with process efficiency requirements.
10 Additional data may be collected from agencies conducting
11 investigations or taking action under this part. These
12 collections will be identified in separate OPM guidance
13 issued as necessary under 5 CFR 732.103, which is our
14 current regulations which deal with national security
15 positions.

16 So there is an opportunity for us that we would collect
17 additional data.

18 Senator Tester. Okay. So do you feel confident that
19 what you have done with the rule and your ability to collect
20 additional data and you have the manpower to be able to
21 ensure that security clearances are given to those who only
22 absolutely need them?

23 Mr. Curry. Well, I would note that this rule is
24 unrelated to security clearances. It is only related to
25 position sensitivity designation, so I would have to defer

1 to Mr. Prioletti on security clearances.

2 Senator Tester. That is fine. Apply it to the
3 designation of the position.

4 Mr. Curry. Well, in addition to the rules and the
5 implementing guidance and the updates to the position
6 designation tool, those are tools that are going to help the
7 agencies in making those designations being consistent. You
8 know, there will be training that is offered by our Federal
9 Investigative Services and that training will be updated for
10 agencies to, again, assist agencies when they are making
11 those determinations.

12 Senator Tester. So putting that in Montana talk, do
13 you have the ability then to make sure that the positions
14 that are classified are positions that necessarily need to
15 be classified?

16 Mr. Curry. Sir, I cannot answer that question right
17 now. I think as we are developing implementing guidance,
18 those are kind of--

19 Senator Tester. Is that a goal? Is that a goal the
20 Department--I do not want to--

21 Mr. Curry. We certainly, as part of our oversight
22 responsibilities, would want to ensure that the proper
23 designations are being made.

24 Senator Tester. Okay. Brian, do you want to speak
25 about the security clearance angle for the same group of

1 questions as far as making sure that the folks who
2 absolutely need them get them and folks who do not, do not?

3 Mr. Prioletti. Right. I agree with what Mr. Curry had
4 mentioned. The CFR 1400 that we were originally talking
5 about here was, in fact, the position designation tool, not
6 a security clearance tool.

7 And if I may speak to what Angela mentioned earlier,
8 asking for more detail, that is exactly what the proposed
9 rule would do. It would provide more detail to the
10 organizations in terms of guidance on how to determine those
11 designations of the positions. And we believe that this
12 rule will get us a lot farther than we were in the past.

13 This is not new, sir. As we mentioned in our
14 testimony, all of us mentioned, designation of positions has
15 been going on since 1953 and it is an evolutionary process,
16 and I think we continue to build and make a better product
17 to address those issues.

18 Senator Tester. Got you. I want to talk about
19 security clearances for people, though. Okay? That is part
20 of the other part of this, because we have got five million
21 of them, 1.4 million top secret. Is there anything being
22 done in that realm to make sure that the people who need
23 them have them and the folks that do not need them do not
24 have them?

25 I do not know about you, but five million seems like a

1 heck of a lot of folks to have a security clearance, and 1.4
2 million top secret security clearances seems like a pile.
3 That is more than live in the State in Montana by about 40
4 percent. Can you give me an idea on, if there is any
5 metrics or any advice, any guidance that is being to
6 agencies on that?

7 Mr. Prioletti. Sir, we have existing guidance under
8 12968 and 13467 Executive Orders.

9 Senator Tester. How old are those rules?

10 Mr. Prioletti. 12968 was amended in 1995 and 13467
11 came out in 2008, so they are not quite as old as 10450.

12 Senator Tester. Right.

13 Mr. Prioletti. And those are the guidelines that are
14 given to all organizations to determine classification--
15 excuse me--to determine clearance-granting for individuals.
16 It includes your adjudicative guidelines, it includes your
17 investigative guidelines, and those are what are used by all
18 organizations to make a determination if a security
19 clearance is required for an individual or not.

20 Senator Tester. In your opinion, is that adequate?
21 Are we making sure that security clearances are going to
22 those who absolutely need that access to that information to
23 be able to do their jobs?

24 Mr. Prioletti. Yes, sir, I believe they are, because
25 they are continually reviewed and revisited to ensure that

1 they are meeting today's environment in which we work.

2 Senator Tester. Brenda, I want to get back to the
3 rules and codification of them. Do you think there is a
4 worth in codifying the guidance, the updated guidance along
5 with quality controls, periodic reviews, guidance beyond the
6 24 months proposed in the rule? Do you think codification
7 is a good thing in this case or do you think it is not
8 necessary?

9 Ms. Farrell. What we do see missing is the periodic
10 re-assessments. There will be a one-time assessment that
11 the agencies would be required to conduct within two years
12 after the rule is finalized. So that is still a missing
13 piece. We still do not know what the implementation
14 guidelines--which I agree, which should be developed after
15 the rule, but the implementation guidelines will be critical
16 in order to understand what the oversight will be and what
17 the quality controls will be.

18 The rule, the proposed rule is an improvement over the
19 current rule. The current rule, again, is so broad it is
20 subject to interpretation across the board. The proposed
21 rule does provide more information to help the agencies.
22 But again, by itself and without proper oversight, it is
23 still unknown whether this will increase the number of
24 clearances, decrease the number of clearances, or whether
25 there will be some other issues, as some of the panel

1 members have raised.

2 Senator Tester. Okay. Well, I think we will wrap this
3 up. I want to thank everybody for being a part of the
4 hearing. Look, I will just say this. If we are going to--
5 hopefully, we all have the same goals and I think they were
6 goals that set out that I think Angela put forth in her
7 opening statement, and if she did not do maybe somebody else
8 did that dealt with cost and due process and oversight and
9 all that stuff, over-classification.

10 If those are not the goals, then somebody has got to
11 tell me what the goals are, because those ought to be the
12 goals. I think the only way we are going to get to a
13 position where, number one, this does not break the bank and
14 that we can do a good job really classifying the positions
15 that need to be classified, is we really laser in and give
16 these agencies some directive and have oversight to make
17 sure that they are following your directives.

18 I am not sure that is going to happen, but I can tell
19 you that if it does not happen, these kind of sessions are
20 not going to stop; they are going to continue. These
21 Committee hearings and asking folks to be accountable for
22 what is going on are going to continue.

23 So I would just say that if there are ideas, either
24 from the private sector, non-profit sector, from the union
25 groups or from the agencies, that we can help you with to be

1 able to help you do your job to make sure that we are able
2 to achieve what we are trying to get here with truly having
3 positions that are designated sensitive that need to be
4 designated sensitive, and not because it is convenient to
5 designate them as sensitive for some other reason.

6 Or the same thing with security clearances, making sure
7 that the folks who have them need them and they are not just
8 handed out like candy at Halloween. I think it is really
9 going to be important. And so, I will offer, as Chairman of
10 this Committee, and I know Senator Portman will do his level
11 best, too, to make sure that we fix what I think is a very
12 serious problem that I talked about in my opening remarks.

13 I would just say that this will only get fixed if--you
14 always hear this in the Legislative Branch--if we work
15 together, and I mean between branches on this and with the
16 private sector.

17 So I just want to thank you all for being here. This
18 afternoon I am going to be introducing legislation, the
19 Clearance Accountability and Reform Enhancement Act, along
20 with Ranking Member Portman, McCaskill, and Johnson and
21 others to bring more accountability the security clearance
22 process. Hopefully that will help you do your job.

23 A key part of this legislation will require an updated
24 guidance to agencies, along with quality controls, from you
25 folks, OPM and ODNI, who will require periodic reviews and

1 guidance to ensure it is regularly updated to reflect our
2 current requirements.

3 I would say--I would argue, in fact, that there is a
4 lack of clear guidance that has led us down a path where we
5 now have five millions folks with security clearances and
6 access to our nation's most sensitive information and
7 facilities. Would you like to speak about that, Brian? Go
8 ahead.

9 Mr. Prioletti. Sir, if I may?

10 Senator Tester. Sure.

11 Mr. Prioletti. And I do not mean to interrupt.

12 Senator Tester. No.

13 Mr. Prioletti. I just wanted to clarify, we are very
14 sensitive to what you say about that number, and the five
15 million number that you are referring to covers both people
16 with security clearances as well as people eligible for
17 access. And being sensitive to that number, as you
18 mentioned, five million of anything is a lot.

19 Senator Tester. That is.

20 Mr. Prioletti. And because of that, recently, and
21 speak of the devil, as you mentioned, on Halloween, the DNI
22 signed an Executive Correspondence going out to all the
23 Government agencies stating that they are required to go
24 through their clearance lists, validate the numbers, come
25 back with the people who are being debriefed from their

1 clearances, and get back with us with that information.

2 Senator Tester. When will they get back to you with
3 that information?

4 Mr. Prioletti. They were given 90 days, sir.

5 Senator Tester. And you did it on Halloween, okay.
6 Well, my next question would be, if there are five million
7 that either have clearances or are eligible, how many have
8 clearances? And you will have that in about, what, 75 days
9 or so? Okay. That is good. Right?

10 Mr. Prioletti. Yes, sir.

11 Senator Tester. Would love to have that as soon as you
12 get it.

13 Anyway, I look forward to working with the folks that
14 are on this panel today and I want to express my
15 appreciation for you being here. I think it was a
16 worthwhile discussion about where we are and, potentially,
17 where we are going. And I look forward to working with my
18 colleagues on this Subcommittee and throughout the Senate to
19 get legislation on this done.

20 I am confident that in a time of hyper-partisanship
21 that we can act responsibly and put the partisanship aside
22 and build upon the passage of the SCORE Act and take further
23 steps to improve the security clearance process for the
24 security of this country.

25 And so, with that, I will say this record will remain

1 open for 15 days for any additional comments or questions
2 that might want to be submitted. Once again, thanks to the
3 panel for being here. This Committee meeting is adjourned.

4 [Whereupon, at 3:29 p.m., the hearing was adjourned.]