

June 27, 2013

Elaine Kaplan, Acting Director
Director, U.S. Office of Personnel Management
Washington, DC 20415

James R. Clapper, Director
Office of the Director of National Intelligence
Washington, DC 20511

Re: Designation of National Security Positions in the Competitive Service, and Related Matters (RIN 3206-AM73)

We respectfully submit these comments to express our deep concern with this rulemaking and to object to its premature commencement and conclusion of the public comment period. We strongly urge you to suspend your proposed rulemaking on the designation of national security positions in the competitive service.

Founded in 1981, the Project On Government Oversight (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. As such, we have a very strong interest in how government policies affect federal workers, whistleblowers, and our national security. We believe that our efforts to keep the nation safe must be held in balance with other interests such as constitutional rights, government accountability, the people's right to know, whistleblower protections, and a nonpartisan federal workforce with protections for civil servants. We believe the proposed rule, combined with the inextricably interrelated *Berry v. Conyers and Northover*, does not strike the right balance between national security and other public interests.

The commencement of rulemaking on national security sensitive positions at this time is premature and may significantly damage essential protections in our federal workforce and government operations. A recent court decision, now on appeal, puts civil service and whistleblower protections at risk by denying federal employees in "sensitive" positions the right to appeal a termination or demotion to the Merit Systems Protection Board (MSPB). It is bad policy to proceed with the rulemaking before the U.S. Court of Appeals for the Federal Circuit decides *Berry v. Conyers*. The June 27 deadline for public comment denies the public the opportunity to comment on how the rule might be responsive to the highly relevant *Conyers* decision.

The timing of the proposed rule ahead of the *Conyers* decision may be an intentional signal to the Court in support of the government's flawed arguments in the case. However, this does nothing to reassure the public that the Obama Administration plans to rein in the practically unlimited discretion afforded to agencies, improve the deficient oversight, or protect critical rights for whistleblowers and the civil service mandated by Congress.

For well over a century, our federal workforce has been protected from the tyranny of politics with crucial protections. Civil service employees are professionals whose tenure does not depend on the results of the last election—these federal employees serve the public, not political bosses. These protections from unjust termination 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 come forward to when they witness waste, fraud, abuse, and other wrongdoing. Congress recently strengthened the rights and procedures available to whistleblower which, in turn, will make the government work better for the American people. It is a well-known fact that these guardians of the public trust and safety save countless lives and billions of taxpayer dollars. However, should the Federal Circuit affirm the August 2012 *Conyers* decision that federal employees in positions designated as “sensitive” do not have access to the MSPB, whistleblowers who make legal disclosures will have no protections. This dangerous and likely scenario is completely ignored in the proposed rule.

Such a decision on *Conyers* would deny whistleblowers in sensitive positions protections against retaliation and would gut due process and appeals rights of the civil service. Such a decision would flout the congressional intent of the Civil Service Reform Act, as well as the Whistleblower Protection Act, and the recently passed and strongly bipartisan Whistleblower Protection Enhancement Act—reforms strongly supported by the Obama Administration. Indeed, absent any legislative or administrative response, such a decision would have far-reaching and disastrous consequences for our government.

We are concerned that the proposed rule grants the agencies the authority to adjudicate and determine eligibility for national security positions without sufficient oversight. Depending upon *Conyers*, the lack of any due process or appeals rights in the rule could prove extremely problematic. Right now, if an agency fires an employee after having made a legally protected whistleblower disclosure or because of that employee's race or religion, using the determination of ineligibility for a national security sensitive position as a pretext, the employee can seek justice from the Merit Systems Protection Board. However, if the government wins its arguments in *Conyers*, such an employee would have no place to appeal these prohibited personnel practices. This proposed rule not only offers no due process rights or procedures that may be needed if the government wins the case, but also offers no other independent review or oversight of the agency's determination. This lack of accountability invites abuse.

We do, however, agree that rulemaking on the use of national security sensitive positions is in order—but only after the anticipated ruling in *Conyers*. We have deep concerns with the agencies’ almost unbridled power to designate virtually any civil service position as “sensitive.” We have concerns about the lack of information available regarding the scope and use of these designations in the name of national security. We recently learned that Office of Personnel Management (OPM) does not keep information on the number of positions at the agencies. It seems that the agency responsible for federal workforce issues and promulgating this rule ought to know how many sensitive positions there are throughout the government. We do know from a government brief in *Conyers* that there are at least 500,000 such positions at the Department of Defense alone. Given the expansive use of these designations, we would hope that any rulemaking would significantly reduce the number of positions the government considers national security sensitive. But rather than narrowing the types of positions that can be designated national security sensitive, the proposed rule uses extremely broad descriptions of a range of positions, allowing the agencies to comfortably continue to designate commissary stockers and low-level accountants.

In addition, in this constrained fiscal environment, every effort should be taken to reduce the estimated cost burden of implementing the proposed rule. The newly required investigations and the reinvestigation of hundreds of thousands of federal workers and contractors could conservatively cost hundreds of millions of taxpayer dollars—since the Office of Personnel Management (OPM) charges up to \$4,399 for national security sensitive investigations.¹ In addition, much greater oversight is needed to prevent agencies from inappropriate and expansive designations in the name of national security.

We request that the Office of the Director of National Intelligence (ODNI) or OPM provide the following information before you close the public comment period or finalize the rule:

1. What is current number of sensitive positions throughout the government?
2. Specifically, how will this rule influence the number of national security sensitive positions?
3. What is the estimated cost that will be incurred by the government in implementing the proposed rule, including the estimated cost involved in investigating and re-investigating individuals for national security sensitive positions?
4. What reporting and oversight mechanisms does OPM recommend for improving the efficiencies, effectiveness, and accountability in agency national security designations?

We urge the ODNI and OPM to provide more complete information before proceeding with the rulemaking. We believe the rule as drafted does not address the concerns we have raised. Any proposed rule must be responsive to these issues and, very likely, to the anticipated Federal

¹ <http://www.opm.gov/investigations/background-investigations/federal-investigations-notices/2012/fin12-07.pdf>

Circuit ruling in *Conyers*. The public should not be denied an opportunity to submit comments responsive to that decision.

If ODNI and OPM choose to conclude the public comment period and/or issue the final rule in advance of the *Conyers* decision, the Obama Administration will show a lack of interest in the intent of Congress, the integrity of the civil service, the rights of whistleblowers, and government accountability.

Sincerely,

Angela Canterbury
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Project On Government Oversight (POGO)

cc: Kimberly Holden, Deputy Associate Director for Recruitment and Hiring, U.S. Office of Personnel Management