Testimony of
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before the
House Oversight and Government Reform Committee

"Examining the Executive Branch Reform Act of 2007
and the
Whistleblower Protection Enhancement Act of 2007"

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Chairman Waxman, Ranking Member Davis, and other members of the committee, thank you for inviting me to testify today in support of H.R. ____, the "Whistleblower Protection Enhancement Act of 2007." I am Nick Schwellenbach with the Project On Government Oversight (POGO), an independent nonprofit that investigates and exposes corruption and other misconduct in order to achieve a more accountable federal government. I am also on the steering committee of OpenTheGovernment.org, a bi-partisan coalition of organizations that seeks to reduce excessive government secrecy and supports whistleblower protections.

During POGO's 25-year history, we have worked with whistleblowers and government officials to shed light on government activities and systemic problems that harm the public. During that period, we estimate that the organization's work with whistleblowers has resulted in $80 billion in savings to the taxpayer.

In recent years, our organization's accomplishments include improving security standards at the nation's nuclear facilities, strengthening protections against government contractor waste and fraud, preventing cases of excessive government secrecy, recovering millions of dollars in unpaid fees for drilling on federal land, and helping to eliminate wasteful spending. Without exception, our organization's accomplishments would not have been possible without the assistance and expert guidance of government insiders and whistleblowers.

First, I would like to congratulate the committee's bi-partisan efforts to put teeth into the Whistleblower Protection Act (WPA). Your efforts are an inspiration to all of Congress and are laying the groundwork for effective government accountability. This is an important hearing,

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and whistleblower protections need to be greatly improved if the Executive Branch—regardless of who is in the White House—is to be held accountable by the Legislative Branch, as our nation's founders intended.

While whistleblower protections are commonly viewed as rights for federal employees, they are more than that. Whistleblower protections also protect Congress' rights—the right to know the actions of the Executive Branch, to oversee implementation of law, and to fulfill its constitutional obligations as a separate and co-equal branch of government.

Since 9/11, many Americans have recognized that whistleblowers are crucial to our nation's security, safety, and success. Meanwhile, the number of government employees raising concerns and seeking protection from retaliation by their bosses has dramatically increased.

According to a 2004 study by the Government Accountability Office (GAO), civilian whistleblowers have come forward in greater numbers since 9/11 – almost 50% more have sought protection annually from one key whistleblower protection agency, the U.S. Office of Special Counsel (OSC). According to that report, "officials stated that the large increase was prompted, in part, by the terrorist events of September 11, 2001, after which the agency received more cases involving allegations of substantial and specific dangers to public health and safety and national security concerns."[1]

These brave, conscientious federal employees mistakenly believed that a safe harbor existed for them and that the issues they raised would be addressed.

Under Assault: Communication with Congress

The free flow of information from government employees to Congress enables the Congress to fulfill its duty of overseeing the Executive Branch. Congress' right to information from the Executive Branch is recognized as "clear and unassailable"[2]: The Supreme Court has called that right "inherent" in legislative oversight or investigations and "essential" to Congress' function as a legislative body.[3]

In fact, Congress has a long history of successfully rooting out waste, fraud, and abuse in the Executive Branch by receiving whistleblower disclosures. But the Executive Branch has been increasingly aggressive in asserting that Congress does not have the right to receive information,

[1] GAO, "U.S. OSC: Strategy for Reducing Persistent Backlog of Cases Should be Provided to Congress," March 2004. http://www.gao.gov/new.items/d0436.pdf
Retrieved April 27, 2005.

[2] CRS, Memorandum, "Agency Prohibiting a Federal Officer from Providing Accurate Cost Information to the United States Congress," April 26, 2004.
http://www.pogo.org/m/gp/wbr2005/AppendixD.pdf

[3] CRS, Memorandum, "Agency Prohibiting a Federal Officer from Providing Accurate Cost Information to the United States Congress," April 26, 2004.
http://www.pogo.org/m/gp/wbr2005/AppendixD.pdf

particularly disclosures made outside of official channels. Hundreds of years of experience have shown that government agencies seek to hide rather than address their shortcomings.

Particularly in the realm of national security, the Executive Branch has argued that it has exclusive control over classified information and that its employees may not provide this information to Congress without approval. For example, the Clinton-era Office of Legal Counsel in the Justice Department maintained that a Senate bill to give intelligence community whistleblowers the right to directly disclose wrongdoing to Congress was "unconstitutional because it would deprive the President of the opportunity to determine how, when, and under what circumstances certain classified information should be disclosed to Members of Congress—no matter how such a disclosure might affect his ability to perform his constitutionally assigned duties."[4]

Recently, however, the Executive has gone even further by advancing the constitutionally questionable unitary executive doctrine. This doctrine argues for aggressive Executive interpretation of what the law is and for sole Executive authority over many areas where Congress also shares constitutional responsibility. The Executive has also articulated a dangerously expansive and overreaching interpretation of executive privilege, a doctrine which the Executive Branch invokes to resist Congressional requests for documents. Although the Bush Administration has been the first to explicitly cite the unitary executive doctrine by name -- which it has done dozens of times in signing statements and other documents—it has expanded on a trend that was greatly advanced by prior Administrations. As former Bush Administration official James F. Blumstein wrote in a *Duke Law Review* article, the Clinton administration accepted and perfected "the Unitarian premises of the Reagan and Bush Administrations."[5]

The Constitutional basis for Congress' authority to access Executive Branch information is rooted explicitly and implicitly in Article I provisions, which grant to Congress: the power of the purse; the power to organize the Executive Branch; the power to make all laws for "carrying into Execution" Congress' own enumerated powers as well as those of the Executive; the power to confirm officers of the United States; the power of investigation and inquiry; and the impeachment and removal power. There are numerous laws Congress has passed and the President has signed which only augment Congress' authority to receive and request information from the Executive Branch.

In 2003 and 2004, a highly publicized and troubling event concerned the silencing of the Centers for Medicare and Medicaid Services Chief Actuary Richard S. Foster on the cost of the Medicare prescription drug plan. According to the GAO, Thomas A. Scully, the former Administrator of the Centers for Medicare and Medicaid Services, threatened "to terminate his [Foster's] employment if Mr. Foster provided various cost estimates of the then-pending prescription drug

[4] Deputy Assistant Attorney General Randolph Moss. "Whistleblower Protections for Classified Information." Written Statement Before the U.S. House of Representatives Permanent Select Committee on Intelligence. May 20, 1998. Available at: http://www.usdoj.gov/olc/whistle_housetestimony_olc.htm . Retrieved January 15, 2007.

[5] James F. Blumstein. "Regulatory Review by the Executive Office of the President: An Overview and Policy Analysis of Current Issues." Duke Law Journal. Vol. 51, No. 851. December, 2001. pg. 874.

legislation to members of Congress and their staff." Both the Congressional Research Service (CRS) and the GAO issued legal opinions finding that the effort to silence Foster was an unlawful violation of the Lloyd-La Follette Act of 1912, which was passed by Congress in response to executive order "gag rules" from Presidents Theodore Roosevelt and Howard Taft.[6]

A May 2004 memo by Justice Department Office of Legal Counsel (OLC) defends the attempt to muzzle Foster arguing that virtually all information could be withheld from Congress based on executive privilege and the unitary executive. The OLC made this argument without any authoritative legal citations. The latest version of the Congressional Oversight Manual, produced by several CRS experts, states that:

> In OLC's view, under the precepts of executive privilege and the unitary executive, Congress may not bypass the procedures the President establishes to authorize disclosure to Congress of classified, privileged, or even non-privileged information by vesting lower-level officers or employees with a right to disclose such information without presidential authorization. Thus, OLC has declared that, "right of disclosure" statutes "unconstitutionally limit the ability of the President and his appointees to supervise and control the work of subordinate officers and employees of the Executive Branch."[7]

Increasingly in this Administration, secrecy has been used to prevent Congress from keeping the Executive accountable. According to a *New York Times* article:

> In Congress, where objections to secrecy usually come from the party opposed to the president, the complaints are bipartisan. Senator Patrick J. Leahy, the Vermont Democrat first elected in 1974, said, "Since I've been here, I have never known an administration that is more difficult to get information from." Senator Charles E. Grassley, Republican of Iowa, said things were getting worse, and "it seems like in the last month or two I've been running into more and more stonewalls."[8]

In order to assert its unassailable right to oversee the government, Congress has, since 1988, approved provisions in annual appropriations bills that prohibit managers from silencing government whistleblowers. Known as "anti-gag statutes," the provisions prohibit government agencies from spending funds to prevent employees from public communication, including with Congress. For example, agencies are not allowed to spend funds to force employees to sign

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[6] GAO, "Department of Health and Human Services – Chief Actuary's Communications with Congress B-302911," September 7, 2004. http://www.gao.gov/decisions/appro/302911.htm
Retrieved October 6, 2004; and CRS, "Memorandum: Agency Prohibiting a Federal Officer from Providing Accurate Cost Information to the United States Congress," April 26, 2004.

[7] Frederick M. Kaiser, Walter J. Oleszek, Morton Rosenberg and Todd B. Tatelman. Congressional Oversight Manual. CRS. January 3, 2007: pg. 45. Available at: http://www.fas.org/sgp/crs/misc/RL30240.pdf .

[8] Adam Clymer. "Government Openness at Issue As Bush Holds On to Records," *New York Times*. January 3, 2003. Available at: http://foi.missouri.edu/bushinfopolicies/govtopenness.html Retrieved January 11, 2007.

nondisclosure agreements, unless those agreements include information on employee free speech rights. These free speech rights are protected under both the WPA and the Lloyd-La Follette Act. But these protections have not gone far enough.

Despite the clarity of the WPA and Lloyd-La Follette and the courts' interpretation of congressional powers, several extraordinary abuses have taken place in recent years. One example concerned the Office of Management and Budget's (OMB) response to an investigation by Senator Grassley into a Department of Energy program to compensate nuclear workers who became ill as a result of the production and testing of nuclear weapons. According to Al Kamen's February 6, 2004, "In the Loop" column in *The Washington Post*, Beverly Cook, an assistant secretary in the Department, issued an email to employees that stated:

"No information is to be given to OMB, the press *or to congressional offices* without my direct approval regardless of the subject matter."[9] (emphasis added)

This email violated the free speech rights of government employees to communicate with Congress and the public. Unfortunately, the "anti-gag statute" is subject to annual approval by the Congress. Whistleblower advocates have warned that the statute's year-to-year existence makes the protections it provides fleeting. Nor has this statute ever been enforced.

Recently, many air marshals at the Federal Air Marshal Service have told us about a troubling trend of management retaliating against them for their communication with Congress. One air marshal, P. Jeffrey Black, made disclosures which sparked a major House Judiciary Committee investigation last year.

We are, however, pleased that the legislation before you permanently makes agency policies to silence employee communication with Congress illegal. But more should be done to ensure enforcement.

Retaliation Against Whistleblowers: Limited Recourse

One person challenging the bureaucracy of an entire government agency is a David-versus-Goliath struggle. In terms of raw power, the agency holds all the cards. Time and again, employers have abused this power to silence whistleblowers.

Over the years, Congress has authorized, in a piecemeal fashion, a variety of whistleblower "protection" programs throughout the federal government including for national and homeland security employees. However, many of these provisions only authorize investigations to determine whether a whistleblower's allegations are true or not. They do not create sustainable mechanisms for overturning retaliation against whistleblowers or for disciplining managers who have sought to silence truth-tellers. The clear message sent to government employees is that wrongdoers in positions of power are unassailable and whistleblowing is quixotic at best.

[9] Al Kamen, "Buck Slips," *Washington Post*, February 6, 2004. p A23.
http://www.washingtonpost.com/ac2/wp-dyn/A17168-2004Feb5?language=printer

This view was confirmed in a 1993 study by the federal MSPB, the government agency which hears WPA (WPA) claims. That study was the most recent by the agency to assess what motivates employees to blow the whistle. In response to the question about "why observers chose not to report illegal or wasteful activities," three of the top four reasons concerned fear of retaliation.[10]

Typical Forms of Retaliation
Take away job duties so that the employee is marginalized.
Take away an employee's national security clearance so that he or she is effectively fired.
Blacklist an employee so that he or she is unable to find gainful employment.
Conduct retaliatory investigations in order to divert attention from the waste, fraud, or abuse the whistleblower is trying to expose.
Question a whistleblower's mental health, professional competence, or honesty.
Set the whistleblower up by giving impossible assignments or seeking to entrap him or her.
Reassign an employee geographically so he or she is unable to do the job.

In more recent studies, the MSPB has found that retaliation against federal employees has remained a significant problem. In the Board's most recent survey in 2000, seven percent (or one out of 14) of all federal employees responded that they had been retaliated against in the previous two years for "Making a disclosure concerning health and safety dangers, unlawful behavior, and/or fraud, waste, and abuse." According to the survey, retaliation rates quickly escalate when formal disclosures are made. Fully 44% of survey respondents who made a formal disclosure experienced retaliation, compared to just 4% that had not made a formal disclosure.[11]

The recourse for whistleblowers experiencing retaliation is severely limited. For example, many of the investigations authorized by Congress are conducted by the agency under investigation, which institutionally has little incentive to acknowledge whistleblower complaints. Inspectors General (IG) within each agency are most often called upon to conduct these investigations. *The Art of Anonymous Activism*, a how-to book for whistleblowers, outlines the shortcomings of IGs:

"While the IG touts itself as independent, that is not really the case. At small agencies, the agency head appoints the IG. For larger agencies, the IG is nominated by the President and confirmed by the Senate. The IG reports to the head of the agency and serves at the pleasure of

[10] MSPB Report, "Whistleblowing in the Federal Government: An Update," October 1993.

[11] MSPB Report, "The Federal Workforce for the 21st Century: Results of the Merit Principles Survey 2000," September 2003.

the President. In other words, if an IG is upsetting the Administration's apple cart, he or she can be instantly removed.

"The IG's performance appraisal comes from the agency head, who also controls issuance of awards and financial bonuses to the IG. As a consequence, many IG offices are quite political in the selection of cases for investigation and the manner in which its findings are cast."[12]

In addition, it is not unusual for the employee who has reported misconduct to be exposed and to even become the target of an investigation conducted by an IG or other agency official. In some cases, management starts an investigation in order to discredit and harass employees who are deemed troublesome.

More importantly, such investigations fail to provide whistleblowers with a hearing by a truly independent court or administrative body that can hold agencies accountable for retaliation. Time and again, whistleblower attorneys and advocates have found that verifying a whistleblower's allegations is not enough: Managers who retaliate against whistleblowers may continue to do so unless ordered to stop.

Broken: The WPA

Originally passed in 1989, the WPA (WPA) was intended to provide a mechanism for civil service employees to challenge retaliation and disclose waste, fraud, and abuse. The WPA, unlike many other whistleblower provisions, allows employees to seek intervention by an outside independent agency, the OSC; access to an administrative legal proceeding to hear their case at the MSPB; and, ultimately, access to a court to hear appeals of the case.

Despite the rights the Act provides on paper, it has suffered from a series of crippling judicial rulings that are inconsistent with Congressional intent and the clear language of the Act. The Federal Circuit Court of Appeals currently is the only court that can hear an appeal from MSPB. Yet, the Court's rulings have rendered the Act useless, producing a dismal record of failure for whistleblowers and making the law a black hole.

The Federal Circuit's stranglehold on WPA cases is inconsistent with all circuits review afforded under other federal whistleblower protection statutes, such as the Sarbanes-Oxley law which covers employees at publicly-traded companies. It is also inconsistent with the normal appellate option available to employees alleging other forms of discrimination. Research by the Government Accountability Project documents that only two whistleblower cases have prevailed on the merits before this court since 1994, compared to 177 cases that have lost.

Congress has revisited hostile Federal Circuit rulings three times. As Senator Charles Grassley (R-IA), one of the deans of whistleblower protection in Congress, has said: "This is also three

[12] *The Art of Anonymous Activism*, published by the Government Accountability Project, Public Employees for Environmental Responsibility, and Project On Government Oversight, 2002, p. 20.

strikes for the Federal Circuit's monopoly authority to interpret, and repeatedly veto, this law. It is time to end the broken record syndrome."[13]

More significantly, the Act has failed because the agencies tasked with implementing the promise of whistleblower protections – the OSC and the MSPB – have been utter failures since their founding. Although periodically a whistleblower has been helped and supported by the system, the overwhelming majority of whistleblowers have not been.

In recent years, the head of the OSC himself has come under increasing scrutiny for allegedly retaliating against whistleblowers inside the agency and violating a host of prohibited personnel practices which he is tasked with enforcing. The Office of Personnel Management (OPM) Inspector General is currently investigating these allegations. However, political appointees at the OSC have repeatedly attempted to intimidate witnesses and interfere with the independence of the OPM investigation. I have here a letter from our attorney, Debra Katz, as well as emails from OSC managers to its staff, both of which I ask to be introduced into the record. Katz represents POGO, GAP, other groups, and OSC employees in a complaint which has been filed with the President's Council on Integrity and Efficiency.

The administrative legal proceedings of the MSPB have simply not provided whistleblowers a fair chance to challenge unethical retaliation. We defer to our colleague Tom Devine from GAP to speak more in depth on this issue.

The bill will also undo the crippling judicial decisions and provide for judicial review by all circuits, thus ending the Federal Circuit Court's decades-long monopoly and ensuring that vigorous judicial opinions are rendered from U.S. District Courts nationwide. We're also are pleased that the legislation takes some steps toward addressing the myriad problems underlying MSPB's and OSC's failure. We look forward to further documenting and understanding these problems and working with the Committee on the reauthorization for both agencies which is due this year.

Separate But Unequal: FBI Whistleblowers

Since the creation of whistleblower protections in the 1978 Civil Service Reform Act, the Federal Bureau of Investigation (FBI) has operated under a situation which can only be called separate and unequal. The Bureau persuaded Congress to exempt it from protections extended to all other civil service employees. However, Congress did require the Attorney General "to prescribe regulations to ensure that such [whistleblower] reprisal not be taken," and required the President of the United States to enforce those regulations.[14] Congress also mandated that FBI whistleblower protections be "consistent with the applicable provisions of" the WPA.[15]

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[13] "Senators Try to Curb Federal Circuit," *Legal Times*, September 3, 2001, p. 6.

[14] 28 C.F.R §27 Regulations for Whistleblower Protection for FBI Employees.
http://www.fas.org/sgp/news/1999/11/fbiwhist.html
Retrieved April 27, 2005.

[15] Title 5 U.S. Code Section 2303, "Prohibited Personnel Practices in the Federal Bureau of Investigation."

The FBI managed to disregard Congress' order until 1997. In April 1997, because of the highly-publicized case of FBI crime-lab whistleblower Dr. Frederic Whitehurst, President Bill Clinton issued a "Memorandum for the Attorney General" which directed that the Attorney General "establish appropriate processes" to implement the WPA for FBI employees.[16]

However, the regulations, which were finalized in 1999, failed to meet the standards provided under the WPA. While FBI whistleblowers were afforded the right to have their alleged reprisals investigated by the FBI Office of Professional Responsibility and to appeal their reprisal cases to the Deputy Attorney General, other significant rights were left out.[17] FBI whistleblowers were not given the right other civil service employees have for an independent third party such as the MSPB or the courts to hear and adjudicate their appeal, or even for the OSC to investigate and prosecute. They also were not afforded the right to have their cases investigated by the Department of Justice's Inspector General (DOJ IG), unless the Deputy Attorney General or Attorney General approved.[18]

Left Behind: Intelligence Agencies

Employees working at intelligence agencies have been excluded from protections under the WPA, including "the Central Intelligence Agency, Defense Intelligence Agency, National Security Agency, and certain other intelligence agencies excluded by the President."[19]

Through the Intelligence Community WPA of 1998, Congress asserted that it had the right to receive classified information from whistleblowers working for intelligence agencies in the case of "serious or flagrant" problems. However, Congress failed to provide legal protections for the whistleblower. In 2006, Acting Defense Department Inspector General Thomas Gimble called the Intelligence Community WPA a "misnomer" in testimony before this Committee's National Security Subcommittee. The Act basically only allows an Inspector General to investigate whistleblower retaliation. This option was already available prior to the Act and, as a result, the protections are an empty promise at best.

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[16] Testimony of Stephen M. Kohn, attorney for Dr. Frederick Whitehurst before the Senate Judiciary Committee, May 12, 1997. http://www.globalsecurity.org/security/library/congress/1997_h/h970513w.htm
Retrieved April 26, 2005.

[17] 28 C.F.R §27 Regulations for Whistleblower Protection for FBI Employees.
http://www.fas.org/sgp/news/1999/11/fbiwhist.html
Retrieved April 27, 2005.

[18] Department of Justice Inspector General Special Report, "A Review of the FBI's Response to John Roberts' Statements on 60 Minutes ," February 2003. http://www.usdoj.gov/oig/special/0302/index.htm
Retrieved October 1, 2004.

[19] OSC, "The Role of the U.S. OSC," http://www.osc.gov/documents/pubs/oscrole.pdf
Retrieved April 27, 2005.

This bill now before you would create a legal remedy for intelligence community whistleblowers for the first time.

Left Behind: Baggage Screeners

Also denied protections are the 45,000 Transportation Security Administration (TSA) airport baggage screeners, comprising one-fourth of the Department of Homeland Security's total personnel. Post-9/11, the public and Congress were justifiably concerned about the quality of our baggage screening process. When TSA was moved into the Department of Homeland Security, leaders in Congress believed that the screeners it employs would receive protections under the WPA.[20]

However, due to an unforeseen loophole, the full promise of these protections has not yet been met. Prior to moving into the Department of Homeland Security, TSA reached an agreement that allows for an independent investigation and report of findings to be conducted by the OSC.[21] This agreement allows the OSC to make non-binding recommendations to the TSA for ending retaliation. This agreement is hollow. Unlike under the WPA, neither the OSC nor the screeners are able to go to the MSPB or the court to have the investigative findings enforced.

On May 6, 2004, the OSC urged the MSPB to extend WPA protections to airport screeners, arguing that the 2002 Homeland Security Act was the controlling legal authority rather than the 2001 law creating the Transportation Security Administration. Special Counsel Scott Bloch stated: "When Congress created the Department of Homeland Security, they made it clear that whistleblower protection is an integral part of protecting homeland security. Providing full whistleblower protections to screeners will help ensure that Congress's goals in establishing DHS are realized."[22] The Board disagreed in an August 2004 ruling, saying that "Board jurisdiction over Screeners... is not found in the HSA [Homeland Security Act]."[23] As a result,

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[20] Jason Peckenpaugh, "Homeland Security employees will retain whistleblower rights," Govexec.com, November 20, 2002.
http://www.govexec.com/dailyfed/1102/112002p1.htm
Retrieved April 27, 2005.

[21] "Memorandum of Understanding Between the U. S. OSC (OSC) and the Transportation Security Administration (TSA) Regarding Whistleblower Protections for TSA Security Screeners," May 28, 2002.
http://www.osc.gov/documents/tsa/tsa_mou.htm
Retrieved April 27, 2005.

[22] U.S. OSC, "OSC Files Friend of Court Brief Supporting Full Whistleblower Protections for Transportation Security Administration Screeners," May 24, 2004.
http://www.osc.gov/documents/press/2004/pr04_08.htm
Retrieved October 1, 2004.

[23] MSPB ruling, *Schott, Jiggetts, Younger v. Department of Homeland Security*, August 12, 2004.
http://www.mspb.gov/decisions/2004/schott_dc030807w1.html
Retrieved April 27, 2005.

only Congress can take action to extend to screeners the same protections that all other Department of Homeland Security employees enjoy.

Your bill extends protections to TSA screeners, FBI, and intelligence agency employees—true post-9/11 reforms long overdue.

Left Behind: Government Contractor Employees

Spending on government contractors has doubled in recent years, going from $219 billion in 2000 to roughly $382 billion in 2005.[24] A recent *New York Times* article noted: "They [contractors] sit next to federal employees at nearly every agency; far more people work under contracts than are directly employed by the government."[25] In Iraq, Katrina-devastated communities, and on the U.S. borders, contractors have become an extension of the government's reach and power.

Yet, the activities of these contractors are largely shielded from public scrutiny because citizens and journalists are deprived of the ability to use the Freedom of Information Act to learn more about the activities these companies conduct under the auspices of the government. In fact, citizens are largely unable to determine who the contractors hire as subcontractors and for what prices. A variety of scandals have raised important questions for the Congress and the public about the accountability frameworks which protect the taxpayer from contractor profiteering and other illegal or unethical activities. Contractor scandals have plagued almost every major front of government spending -- from the Abu Ghraib prison scandal[26], to the bribing of Representative Randall "Duke" Cunningham by defense contractor MZM[27], to the numerous cases of contractor overcharging on Katrina reconstruction projects. Many of these scandals likely would not have come to light without the courageous efforts of conscientious individuals who stepped forward.

As these experiences have shown, government contractors have a significant capacity to impact U.S. national and homeland security. Providing contractor employees with whistleblower rights makes sense and will ensure that they have some tools to challenge intimidation and harassment. POGO is extremely pleased to note that the legislation provides the first meaningful whistleblower protections to employees of government contractors.

National Security Clearance Retaliation

Revocation of an employee's national security clearance has become the weapon of choice for those managers who retaliate. An employee whose security clearance is yanked can be fired

[24] Federal Procurement Data System "Trending Analysis Report Since Fiscal Year 2000" http://www.fpdsng.com/downloads/top_requests/FPDSNG5YearViewOnTotals.xls

[25] http://www.nytimes.com/2007/02/04/washington/04contract.html

[26] http://www4.army.mil/ocpa/reports/ar15-6/index.html

[27] [http://pogoblog.typepad.com/pogo/files/uscnnghm112805plea.pdf

without recourse. The 2002 story of whistleblower Linda Lewis illustrates how unaccountable and unfair the process for addressing security clearance retaliation has become. According to the Government Accountability Project:

> Lewis is not allowed to appear before the judges who will make a decision on her clearance. A single USDA official will decide how much, if any, of her defense is to be allowed into the official record for review by the unidentified judges. Rounding out this Kafkaesque scenario, Lewis is required to present her defense in writing before she learns the details of the charges – if they are ever revealed to her.[28]

The Department of Defense Inspector General deserves credit for a new initiative launched in January of 2005 that recognizes the problem of national security clearance retaliation. The initiative allows the IG to investigate this kind of retaliation and make recommendations to the Department of Defense Secretary.[29]

We are pleased that this legislation directs the GAO to conduct a study on revocation of security clearances.

Executive Weapon Against Accountability: The State Secrets Privilege

An area of particular concern that this bill addresses is the increased unqualified and unchecked use of the state secrets privilege in cases involving whistleblowers. The state secrets privilege may be invoked by the Executive Branch in legal proceedings to assert that information must be protected for national security reasons. Courts have been overly deferential to the Executive Branch in matters of national security and when the Executive asserts state secrets, cases are almost always immediately shut down. It is a *de facto* "get of jail free" card. Fortunately, the abuse of the state secrets privilege to hide government wrongdoing is beginning to receive more critical attention.

Congress' own separation of powers expert at the Law Library of Congress, Louis Fisher, recently published a book on the subject and on the precedent-setting *U.S. v. Reynolds* case.[30] He explains that, in 1953, the Supreme Court upheld the right of the government to withhold from three widows the accident report about a B-29 crash that killed their husbands. The government claimed there was secret information in the report and the Court, without reviewing it, agreed it

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[28] Martin Edwin Andersen, "Rally for USDA National Security Whistleblower Linda Lewis," Government Accountability Project, June 18, 2002. http://www.whistleblower.org/article.php?did=207&scid=80 Retrieved April 27, 2005.

[29] Miles, Donna, "DoD Expands Existing Whistleblower Protections," American Forces Informative Service, April 18, 2005.
http://www.defenselink.mil/news/Apr2005/20050418_649.html
Retrieved April 27, 2005.

[30] Louis Fisher. *In the Name of National Security: Unchecked Presidential Power and the* Reynolds *Case*. Lawrence: University Press of Kansas, 2006.

should be withheld. Fifty years later the report surfaced on a website—it had no secret information.

In addition, several national security whistleblowers whose cases have been publicized in recent years—notably that of former FBI translator and National Security Whistleblowers Coalition founder Sibel Edmonds—were essentially stymied by the government's invocation of the state secrets privilege.

Though there are some difficulties in quantifying use of the state secrets privilege, the most thorough count was made last year by University of Texas-El Paso government professor and National Security Whistleblower Coalition senior advisor William Weaver and Reporters Committee for Freedom of the Press legal fellow Susan Burgess.

According to their analysis last year, in the half-century since *Reynolds*, the state secrets privilege has been successfully asserted by the executive branch 67 times, with some 15 additional assertions by the present administration currently under court review. Only in 15 of those cases did federal courts insist upon *in camera* inspection (where the judge reviews the documents in question in his private quarters) of the underlying documents which the executive claimed were state secrets. Before 2006, the courts rejected the government's assertion only four times, and those rejections were based on procedural grounds rather than a substantive review of the Executive's claim. Twice last year, federal courts rejected the government's assertion based on a substantive analysis.

Even Wake Forest University Law Professor Robert M. Chesney, who disputes the claim that use of the state secrets privilege is increasing, concludes that reforms to how courts deal with assertions of the privilege may be appropriate, particularly "where the legality of government conduct is itself in issue"[31]–exactly the kind of cases whistleblowers, such as Sibel Edmonds, bring to court.

Louis Fisher cites John Henry Wigmore, who, in his classic 1940 treatise on evidence, recognized that a state secrets privilege exists. However, when Wigmore asked who should determine the necessity for secrecy – the executive or the judiciary – he concluded it must be the court:

> Shall every subordinate in the department have access to the secret, and not the presiding officer of justice? Cannot the constitutionally coordinate body of government share the confidence? . . . The truth cannot be escaped that a Court which abdicates its inherent function of determining the facts upon which the admissibility of evidence depends will furnish to bureaucratic officials too ample opportunities for abusing the privilege . . . Both principle and policy demand that the determination of the privilege shall be for the Court.[32]

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[31] Robert M. Chesney. "State Secrets and the Limits of National Security Litigation." *George Washington Law Review*. 2007. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=946676 .

[32] John Henry Wigmore. *Treatise on the Anglo-American System of Evidence in Trials at Common Law*. 1940.

There are tools courts can utilize to independently review Executive Branch assertions of state secrets. Meredith Fuchs, the National Security Archive's General Counsel, has suggested several, including utilizing the so-called "Vaughn Index," *in camera* inspections of documents by the judge, and the use of a "Special Master"–someone skilled in classification of national security documents.

In *Vaughn v. Rosen*, according to Fuchs, the *Vaughn* court required the government to detail its secrecy claims by requiring it to: 1) submit a "relatively detailed analysis" of the material withheld; 2) that the analysis be provided "in manageable segments"; and 3) that the analysis include "an indexing system [that] would subdivide the document under consideration into manageable parts cross-referenced to the relevant portion of the Government's justification."

Fuchs wrote that "These measures would, in the court's view, ensure 'adequate adversary testing' by providing opposing counsel access to the information included in the agency's detailed and indexed justification and by in camera inspection, guided by the detailed affidavit and using special masters appointed by the court whenever the burden proved to be especially onerous."[33]

The bill's language, which requires a ruling in favor of the employee when the state secrets privilege is invoked and an employee's concerns have been substantiated by an agency's Inspector General, is a positive step. But it should not prevent courts from seeking to independently review the assertion of state secrets. The reality is that, despite the high quality work by many Offices of Inspector General, the integrity of OIG investigations are sometimes compromised. A case in point: The scandalous reign of NASA IG Robert Cobb. Among numerous improprieties, Department of Housing and Urban Development investigators found that:

> ...Cobb lunched, drank, played golf and traveled with former NASA Administrator Sean O'Keefe, another White House appointee. E-mails from Cobb showed he frequently consulted with top NASA officials on investigations, raising questions about his independence.
>
> ...HUD investigators heard testimony from other witnesses that suggested O'Keefe's and Cobb's association went beyond the traditional arm's-length relationship between agency heads and inspectors general. E-mail traffic between Cobb, O'Keefe and former NASA General Counsel Paul Pastorek indicated Cobb consulted with them on audits and investigations.[34]

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[33] Meredith Fuchs. "Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy." *Administrative Law Review*. Vol. 58. No. 1. Winter 2006.

[34] Michael Cabbage. "Complaints fuel probe of NASA inspector." *Orlando Sentinel*. November 20, 2006. http://www.mercurynews.com/mld/mercurynews/news/politics/16057238.htm

An executive branch agency should not be able to dismiss a claim in one step based on any assertion of privilege, but should request and obtain special procedures from the court in order to protect classified or secret information.

State secrets privilege abuses add to the list of tools the Executive Branch has at its disposal for silencing whistleblowers and avoiding accountability. This tool cannot be a blank check. Congress and the Courts have a responsibility to ensure that it is not.

Chairman Waxman, Ranking Member Davis and members of the Committee, thank you for the opportunity to present POGO's views on the legislation before you. This legislation is arevolutionary step forward for the rights of government and contractor truth tellers and for Congress.