

**Testimony of Mandy Smithberger, Director of the Center for Defense Information
Project On Government Oversight
For the Senate Appropriations Committee, Legislative Branch Subcommittee
May 1, 2020**

Thank you Chairman Hyde-Smith, Ranking Member Murphy, and members of the Committee for allowing me to provide testimony on behalf of the Project On Government Oversight (POGO) and Demand Progress on strengthening Congress's capacity to oversee the executive branch. POGO and Demand Progress are nonprofit organizations focused on strengthening the legislative branch's ability to legislate and conduct oversight. We respectfully request that your committee provide the personal office staff of members on key committees with the clearances they need to properly support those Members of Congress in their review of information the executive branch has deemed classified, and to report on the provision of those clearances. Accordingly, our request impacts the operations of the Office of Senate Security.

It is essential that key Senate staff have access to Top Secret/Sensitive Compartmented Information (TS/SCI) to strengthen the Senate's oversight of traditional national security matters such as the spending and operations of the military and the intelligence community, as well as emerging concerns such as election security and cyber threats. The Senate Appropriations Defense Subcommittee; Senate Appropriations Subcommittee on State, Foreign Operations, and Related Programs; Senate Armed Services Committee; Senate Committee on Foreign Relations; and Senate Committee on Homeland Security and Governmental Affairs all play pivotal roles in overseeing our national security. While senators are entitled to access classified information by virtue of the constitutional offices they hold and do not need security clearances, they must largely rely on their personal office staff to sift through reams of information and to brief them on issues. Those staff often do not hold sufficient clearances to access certain sensitive information, thereby undermining the support they can provide and weakening Congress's ability to legislate or conduct effective oversight.

The need for Congress to improve its own access to this information has become more apparent in light of the executive branch's over-classification of information, and, in some cases, weaponization of the classification system to avoid accountability.¹ From 2007 to 2017, the amount of information designated TS or TS/SCI more than tripled.² Over-classification has

¹ Jared Keller, "Almost every US metric for the war in Afghanistan 'is now classified or nonexistent,' so obviously things are going swimmingly," *Task and Purpose*, April 25, 2019. <https://taskandpurpose.com/sigar-metric-afghansitan-war>

² National Archives and Records Administration, Information Security Oversight Office, *2017 Report to the President* (May 31, 2018), 45. <https://www.archives.gov/files/isoo/reports/2017-annual-report.pdf>

become such a problem that even the vice chairman of the Joint Chiefs of Staff, General John Hyten, complained that it has become “unbelievably ridiculous.”³

In POGO’s congressional oversight manual, former Representative Mickey Edwards (R-OK) challenged the executive branch’s assertion that it should control Congress’s access to information. “There is no authority in the executive branch to tell Congress who can or cannot have the information it seeks,” he said.⁴ While Congress codified some executive branch authority to limit access to sensitive information in the National Security Act of 1947, those provisions have, over time, been broadened to an unwarranted degree, and Congress must challenge these limits if it is to maintain its ability to conduct effective oversight.⁵ Another limit that has to be challenged comes from a Senate entity: The director of the Office of Senate Security declines to process clearances on the basis of a 30-year-old security manual even though nothing in that manual gives that office the authority to control senators’ access to information.

As of April 2019, 637 Senate staff have active security clearances, with 353 having secret or top secret clearances and 284 having TS/SCI clearances.⁶ Only 37 senators have staff with the clearances necessary to access SCI materials.⁷ By comparison, approximately 1.2 million executive branch employees and contractors hold top secret clearances.⁸ It’s likely that more than 100,000 executive branch employees and contractors hold TS/SCI clearances, not counting foreign officials who are “in access.”⁹ But it’s not just minimal staffing that’s hobbling Congress’s ability to oversee classified information. The legislative branch receives

³ Aaron Mehta, “‘Unbelievably ridiculous,’ Four-star general seeks to clean up Pentagon’s classification process,” *Defense News*, January 29, 2020. <https://www.defensenews.com/pentagon/2020/01/29/unbelievably-ridiculous-four-star-general-seeks-to-clean-up-pentagons-classification-process/>

⁴ Project On Government Oversight, *The Art of Congressional Oversight: A User’s Guide to Doing It Right*. 2nd ed. (United States: Project On Government Oversight, 2015), 8. <http://www.pogoarchives.org/m/coi/pogo-the-art-of-congressional-oversight-handbook.pdf>

⁵ The National Security Act of 1947 applies to statutorily defined “covert action,” but not to intelligence collection, counter-intelligence matters, or other national security issues. Moreover, a separate provision of the act that requires the Director of National Intelligence to protect “sources and methods” has been significantly expanded beyond its originally limited scope.

⁶ Daniel Schuman and Mandy Smithberger, Demand Progress and the Project On Government Oversight, *A Primer on Congressional Staff Clearances: Which Staff Can Obtain Security Clearances, at What Levels, and Who Decides?* (February 5, 2020), 9. https://docs.pogo.org/report/2020/A_Primer_on_Congressional_Staff_Clearances_2020-02-05.pdf This is the most recent data available.

⁷ Daniel Schuman and Mandy Smithberger, Demand Progress and the Project On Government Oversight, *A Primer on Congressional Staff Clearances*, 9 [see note 6].

⁸ Office of the Director of National Intelligence, *Fiscal Year 2017 Annual Report on Security Clearance Determinations* (August 2018), 4. <https://www.dni.gov/files/NCSC/documents/features/20180827-security-clearance-determinations.pdf>

⁹ Office of the Director of National Intelligence, *Fiscal Year 2017 Annual Report on Security Clearance Determinations*, 4 [see note 8].

approximately 0.7% of the non-defense discretionary federal budget—approximately \$5 billion—to oversee the entire federal government.¹⁰ By contrast, this year the intelligence community alone requested \$85 billion, or more than 16 times all the money spent on the legislative branch.¹¹ This significant disparity in both resources and people with access puts Congress in an inherently weak position when it comes to effectively conducting oversight.

The Senate has appropriately provided other special clearances. Personal office staff who serve senators with equities in the Department of Energy, either through committee assignment or nuclear equities in the senator’s state, are eligible to receive a “Q” clearance.¹² That clearance allows access to nuclear weapon design and manufacture information.¹³

Critics of expanding staff access to classified information have argued that rather than increasing congressional access to highly sensitive information, Congress should combat over-classification. While we support efforts to reduce the overall amount of classification,¹⁴ these efforts do not negate the need for Congress to stand its ground in the face of the executive branch’s assertion that it has the sole authority to determine who should be able to oversee its operations.¹⁵

¹⁰ Office of Management and Budget, *Table 25-1. Federal Budget by Agency and Account, FY 2021 President’s Budget Policy*, 18. https://www.whitehouse.gov/wp-content/uploads/2020/02/25-1_fy21.pdf; First Branch Forecast, “The Undermining of Congress,” February 17, 2020. <https://firstbranchforecast.com/2020/02/17/the-undermining-of-congress/#more-2121>

¹¹ Department of Defense, “Department of Defense Releases 2021 Military Intelligence Program Budget Request,” February 11, 2020. <https://www.defense.gov/Newsroom/Releases/Release/Article/2080605/department-of-defense-releases-2021-military-intelligence-program-budget-request/>; Office of the Director of National Intelligence, “DNI Releases FY 2021 Budget Request Figure for the National Intelligence Program,” February 11, 2020. <https://www.dni.gov/index.php/newsroom/press-releases/item/2097-a-dni-releases-fy-2021-budget-request-figure-for-the-national-intelligence-program>

¹² Daniel Schuman and Mandy Smithberger, *Demand Progress and the Project On Government Oversight, A Primer on Congressional Staff Clearances*, 7 [see note 6].

¹³ Federation of American Scientists, *DOE Classification and Security* (February 6, 1996). <https://fas.org/sgp/classdoe.htm>

¹⁴ For examples of how Congress can reform its oversight of intelligence matters, see R Street, Demand Progress, FreedomWorks, and Electronic Frontier Foundation, *Strengthening Congressional Oversight of the Intelligence Community* (September 13, 2016), 2-3. https://www.eff.org/files/2016/09/13/strengthening_congressional_oversight_of_the_ic_white_paper_sept_2016.pdf; see also Nate Jones, “‘There’s classified, and then there’s classified’: Tangible Steps to Fix the Classification and Declassification System,” Statement for the Public Interest Declassification Board, National Security Archive, December 6, 2016. <https://transforming-classification.blogs.archives.gov/2016/12/06/theres-classified-and-then-theres-classified-tangible-steps-to-fix-the-classification-and-declassification-system-by-nate-jones-national-security-archive/>

¹⁵ For example, then-House Government Operations Committee Chair Jack Brooks (D-TX) considered the executive branch’s authority on clearances to be an improper violation of separation of powers, and he initiated a mirror process to approve or deny clearances for staff of his committee, conducted through the then-General Accounting Office.

Providing select Senate staff TS/SCI clearances will not necessarily give them unfettered access to classified information. The granting of a TS/SCI clearance addresses an administrative hurdle—the determination that a person can be entrusted with this information—but it works hand-in-glove with the demonstration of a need to know and it would not improperly infringe on the executive branch’s classification powers. The entity that holds the classified information must still make the determination that the staff have a need to know for them to access each SCI component, and the staffers must sign nondisclosure agreements. This need-to-know determination will ensure that information is available only to those who have an actual need for it.

The costs of implementing this reform are likely to be minimal. The Congressional Budget Office scored a similar amendment offered last year in the Senate as having “no budgetary impact.” The costs of clearances for congressional staff are borne by the agency granting the clearance, not Congress.¹⁶ We anticipate that there would be some funding needed for the legislative branch to maintain records of nondisclosure agreements, store classified documents, and track individuals granted clearance, and we urge the committee to increase funds for the Office of Senate Security accordingly. Additionally, as most of the personal office staff of the relevant committees likely already have TS clearances, providing additional access to SCI should not be burdensome.

The cost of not implementing this reform, however, is significant. Without adequately credentialed staff, Congress cannot ensure that we have an executive branch that operates effectively and ethically to protect our country, and in compliance with its constitutional responsibilities. While every committee is under-resourced, most of them work in areas where civil society can access information to help fill in the gaps. Civil society cannot do that for committees that oversee classified programs. Too often, Congress is instead forced to rely on leaks to the press to learn when national security agencies waste money, violate citizens’ constitutional rights, or abuse their power.

The Senate has previously recognized the need for enhanced access, and has provided designees with TS/SCI clearances for members of the Senate Select Committee on Intelligence. Consequently, the Senate has been able to engage in more robust oversight. The success of this designee system merits further expansion to personal staff so that nearly every senator will have someone to help them to inform their votes on the most sensitive national security matters, including decisions about whether to authorize the use of military force or whether a declaration of a national emergency is necessary.

To make sure that our most sensitive national security information is properly protected, we urge the committee to increase counterintelligence training for all congressional staff who receive security clearances to help prevent the occurrence of improper leaks. This training should be akin

¹⁶ Daniel Schuman and Mandy Smithberger, Demand Progress and the Project On Government Oversight, *A Primer on Congressional Staff Clearances*, 7 [see note 6].

to that provided by intelligence agencies to their own personnel. In addition, the Senate should expand its reporting on the time it takes to receive a clearance to include an accounting of the number of staff who hold clearances and the level at which they hold it. This would put the Senate in line with executive branch practices.

In our experience, congressional staff take significant care to properly safeguard sensitive information, even documents that have pseudo-classifications like “For Official Use Only,” also known as Controlled Unclassified Information (CUI). If staff mishandle this information, they should be held to the same standards and subject to the same punishment as executive branch employees, including criminal prosecution.

Granting staff sufficient clearance also provides for additional resilience in emergencies, like the COVID-19 pandemic, when senators may be scattered throughout the country and must rely on staff located in DC to review materials that are only available in the Capitol complex. Although this circumstance recurs regularly for a short time when members are back in the district, it becomes a significant problem when members will be gone for an extended time due to an emergency—a time they most need someone who is cleared to review information on their behalf.

We must modernize how Congress conducts oversight, and that must include responsibly expanding its access to classified information. Years of executive overreach by Democratic and Republican administrations have severely diminished Congress’s power. Congress must reassert itself as a coequal branch fully able to perform its oversight duties.