Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

U.S. Department of Justice

Civil Division

Deputy Assistant Attorney General

Washington, D.C. 20530

October 11, 1983

REFERENCE

MEMORANDUM

TO : See Attached List

FROM : Richard K. Willard
Deputy Assistant Attorney General
Civil Division

SUBJECT : Testimony Regarding Polygraph

Attached is a revised version of my proposed testimony for October 19, 1983. This is the same version that is being circulated by our Office of Legislative Affairs for formal clearance. I am sending each of you an advance copy because time is short.

Feel free to call or send me any major or minor comments you may have. I do not plan to schedule another meeting to discuss this testimony except as necessary to resolve disagreements.

Attachment

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Britt Snider
Department of Defense

STAT

Central Intelligence Agency

STAT

Central Intelligence Agency

STAT

Central Intelligence Agency

Paul Thompson
National Security Council

Ken deGraffenreid
National Security Council

Steve Garfinkel
General Services Administration

Joe Morris
Office of Personnel Management

John Burke
State Department

Jordan Luke
Treasury Department

James Culpepper
Energy Department

STAT

National Security Agency

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

STATEMENT

OF

RICHARD K. WILLARD

DEPUTY ASSISTANT ATTORNEY GENERAL

U.S. DEPARTMENT OF JUSTICE

BEFORE

THE

LEGISLATION AND NATIONAL SECURITY SUBCOMMITTEE

OF THE

COMMITTEE ON GOVERNMENT OPERATIONS

U.S. HOUSE OF REPRESENTATIVES

CONCERNING

PRESIDENTIAL DIRECTIVE ON

SAFEGUARDING NATIONAL SECURITY INFORMATION

AND

POLYGRAPH EXAMINATIONS OF FEDERAL EMPLOYEES

OCTOBER 19, 1983

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Mister Chairman, I appreciate the opportunity to appear before this Committee to describe the background and purpose of President Reagan's recent directive on safeguarding national security information. In addition, I will undertake to describe this Administration's views concerning polygraph examinations of federal employees.

Since the days of the Founding Fathers, we have recognized the need to protect military and diplomatic secrets. This need is even more acute today because of the dangerous world in which we live, including the ever-present threat of nuclear war.

Our adversaries employ highly efficient intelligence services, which use overt and covert means to gather information concerning American military capabilities, diplomatic intentions, and our own intelligence efforts. The security of this nation and the peace of the world depend in large part on our ability to keep certain kinds of this information secret.

Our task is complicated by the fact that we have a tradition of free speech and a form of government that depends upon an informed electorate. Unnecessary secrecy is contrary to our most fundamental values.

The protection of information that must be kept secret in the interest of national security is an important constitutional responsibility of the President. Since at least 1940, Presidents have protected this information through Executive orders providing for a system of classification. In a number of civil and criminal

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

statutes, Congress has recognized the President's authority to adopt such Executive orders.

The present Executive Order on Classification was issued by President Reagan in 1982. It limits the use of classification to information that "reasonably could be expected to cause damage to the national security" if released without proper authorization. This Executive Order also prohibits the use of classification to conceal violations of law, inefficiency or administrative error, or to prevent embarrassment to a government agency or employee.

The unauthorized disclosure of classified information has been specifically prohibited by each of the Executive orders on this subject. Such disclosures also violate numerous more general standards of conduct for government employees based on statutes and regulations. Moreover, in virtually all cases the unauthorized disclosure of classified information potentially violates one or more federal criminal statutes.

Notwithstanding the clear illegality of this practice, unauthorized disclosures of classified information appear in the media with startling frequency. President Reagan has expressed his personal concern about this serious problem in a memorandum for federal employees dated August 30, 1983. The President's memorandum includes the following statements:

> "Recent unauthorized disclosures of classified information concerning our diplomatic, military, and intelligence activities threaten our ability to carry out national security policy. . . . [These] disclosures are so harmful to our national security that I wish to

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

underscore to each of you the seriousness with which I view them.

> "The unauthorized disclosure of our Nation's classified information by those entrusted with its protection is improper, unethical, and plain wrong . . .
>
> "The American people have placed a special trust and confidence in each of us to protect their property with which we are entrusted, including classified information . . .
>
> * * *
>
> " . . . As servants of the people, we in the Federal Government must understand the duty we have to those who place their trust in us. I ask each of you to join me in redoubling our efforts to protect that trust."

A copy of the complete memorandum is attached to my statement as Exhibit A.

Presidential Directive on

Safeguarding National Security Information

In addition to reminding federal employees of their personal responsibilities, the President has issued a directive that requires a number of additional steps to be taken to protect against unlawful disclosures of classified information. A copy of the text of that directive, known as National Security Decision Directive 84, or NSDD-84, is attached as Exhibit B to my statement. In summary, NSDD 84 provides:

-- additional restrictions upon government employees who are entrusted with access to classified information,

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

and upon government agencies that originate or handle classified information;

-- a more efficient approach to investigating unauthorized disclosures, including additional use of polygraph examinations under carefully controlled circumstances; and

-- mandatory administrative sanctions for employees found to have knowingly disclosed classified information with authorization, or who refuse to cooperate with an investigation.

Implementation of NSDD-84 has required a careful review of security regulations and practices throughout the government. A number of changes are being made as a result of this review.

A significant aspect of implementing NSDD-84 has been the development of two new nondisclosure agreement forms for government-wide use. One of these forms is a classified information nondisclosure agreement, which has been promulgated by the Information Security Oversight Office as Standard Form 189. */. This form does not include a provision for prepublication review.

The other form is a nondisclosure agreement to be signed as a condition of access to Sensitive Compartmented Information, or SCI. This agreement was promulgated by the Director of Central

*/ 48 Fed. Reg. 40,849 (Sep,. 9, 1983).

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Intelligence on August 30, 1983, as a replacement for Form 4193, which had been adopted in 1981. Both versions of this form contain provisions for prepublication review, but we believe the new form will provide the government with an enhanced ability to safeguard classified information. A copy of the new SCI nondisclosure agreement is attached as Exhibit C to my statement.

Prepublication review agreements have been used at CIA for a number of years, and in 1980 the Supreme Court approved their use in Snepp v. United States. */ The sole purpose of prepublication review is to permit deletion of classified information before it is made public. This program does not permit the government to censor material because it is embarrassing or critical. Earlier this month, the United States Court of Appeals for the District of Columbia Circuit issued an opinion upholding the manner in which CIA conducted its prepublication review of a former employee's magazine article. **/

*/ 444 U.S. 507 (1980) (per curiam).

**/ McGehee v. Casey, No. 81-2233 (D.C. Cir., Oct. 4, 1983).

The Department of Justice has determined that the two new nondisclosure agreements adopted to implement NSDD-84 would be enforceable in civil litigation initiated by the United States. The Department has also issued regulations for its prepublication review program. Copies of these documents are attached as Exhibits D and E to my statement.

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Use of the Polygraph in Safeguarding National Security Information

NSDD-84 was based upon the recommendations of an interdepartmental group convened by the Attorney General. I served as chairman of this group, which also included representatives designated by the Secretaries of State, the Treasury, Defense, Energy, and the Director of Central Intelligence. Copies of the report of this group, which is unclassified, have been furnished to the Committee.

Our report found a number of deficiencies in the system by which the government investigated unauthorized disclosures of classified information appearing in the media. We concluded that this system was "so ineffectual as to perpetuate the notion that the government can do nothing to stop leaks of classified information."

NSDD-84 includes a number of steps to streamline the reporting and investigation of unauthorized disclosures. Among other things, it clarifies FBI's investigative authority to include cases in which administrative sanctions may be sought instead of criminal prosecution.

Our report considered the question of polygraph use and concluded as follows:

> "The polygraph can be a useful tool in leak investigations under certain circumstances. It should be used selectively and its results considered within the context of a complete investigation. The polygraph should not be used for dragnet-type screening of a large

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

number of suspects or as a substitute for logical investigation by conventional means. It is most helpful when conventional investigative approaches have identified a small number of individuals, one of whom is fairly certain to be culpable, but there is no other way to resolve the case. A polygraph examination in this situation can be limited to the unauthorized disclosure that is being investigated and should not include questions about life style that many employees would find offensive. Moreover, polygraph results should not be relied upon to the exclusion of other information obtained during an investigation."

The provision in NSDD-84 that is based upon the foregoing recommendation requires government agencies with employees having access to classified information to revise their regulations as necessary so that employees could be required to submit to polygraph examinations, when appropriate, in administrative investigations of unauthorized disclosures of classified information. The Directive provides further that:

-- Agency regulations must, as a minimum, permit the agency to decide that appropriate adverse consequences will follow an employee's refusal to cooperate with a polygraph examination that is limited in scope to the circumstances of the unauthorized disclosure under investigation.

-- Agency regulations may provide that only the agency head, or his delegate, is empowered to order an employee to submit to a polygraph examination.

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

-- Results of polygraph examinations should not be relied upon to the exclusion of other information obtained during investigations.

Government agencies have substantial discretion in deciding how to implement this aspect of NSDD-84, subject to constitutional and statutory constraints. The policies of some agencies--including CIA, NSA, and the Department of Justice--already satisfy the requirements of NSDD-84. The Office of Personnel Management has issued a letter clarifying its policies as being consistent with NSDD-84. The Department of Defense has proposed a comprehensive revision in its polygraph regulation that would, among other things, satisfy the requirements of NSDD-84. Implementing regulations in other agencies are currently being prepared.

Another way in which the polygraph can be used to prevent unauthorized disclosures of classified information was not addressed in NSDD-84 or the study leading up to it. I am referring to its use in the periodic or aperiodic screening of government employees with access to certain kinds of sensitive classified information to determine whether they have disclosed such information either to foreign agents or to others not authorized to receive it.

Our major intelligence agencies--CIA and NSA--currently use polygraph examinations to screen candidates for employment and periodically thereafter. The proposed new Department of Defense regulation would provide for some additional uses of the poly-

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

graph. This proposal has caused some controversey, and a rider to the current authorization act contains a moratorium on any changes in Department of Defense policy regarding the polygraph until April 15, 1984. The stated purpose of the moratorium contained in the Defense authorization act was to permit congressional hearings upon this subject before new policies were implemented in that Department.

The balance of my statement will address some general questions regarding the polygraph, with particular emphasis on its use in connection with federal employment.

Polygraph Accuracy

Although referred to as a "lie detector," the polygraph itself does not detect lies. The polygraph is an instrument that measures a variety of physiological responses of an individual undergoing questioning. These measurements assist the polygraph examiner in forming an opinion as to whether the individual has given truthful or deceptive answers to particular questions.

There are two basic categories of polygraph use: investigations of misconduct or other specific issues, and generalized screening. Generalized screening includes pre-employment testing to verify the accuracy of information provided in connection with the application for employment. Screening can also be used in the post-employment context, on either a periodic or aperiodic basis, in an attempt to determine

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

continuing compliance with particular standards of conduct or other conditions of employment or access to information.

Numerous scientific studies have attempted to quantify the accuracy of polygraph examinations. It is important to recognize that there are substantial differences in the methodology of these studies. In addition, there are differences in the skills of particular polygraph examiners and in the types of inquiries they are asked to undertake. For these reasons, among others, the results of the studies have varied considerably.

The overwhelming majority of studies show accuracy rates for polygraph examinations within the range of 70 to 95 percent. This is obviously a wide variation, but it reflects an overwhelming scientific consensus on one point: polygraph examinations produce statistically significant indications of deception and nondeception. Or, to put it another way, even the most critical studies show that polygraph examinations are more likely to be accurate than not, and most studies show a much greater degree of accuracy.

Obviously, the distinction between 70 and 95 per cent accuracy is likely to make a significant difference in the way we wish to use the polygraph technique. For the reasons that follow, we believe the relevant accuracy rate is closer to 95 percent than 70 percent.

-- First, "field" studies--most of which involve subjects who are suspected of real crimes--show a higher

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

accuracy rate than laboratory studies. We believe this indicates greater accuracy of the polygraph in "real-life" situations, where the subject has a keener appreciation of the consequences of deception and is thus more likely to display physiological symptoms.

-- Second, studies with more highly trained and experienced examiners show a higher accuracy rate than those using students or academics. Since government polygraph examiners generally have a high level of training and experience, we believe they are likely to have a high accuracy rate.

-- Third, studies using field polygraph instruments, which carefully measure three or more physiological reactions, show a higher accuracy rate than those using laboratory equipment and more limited measurements. Government polygraph examinations thus are likely to have the higher accuracy rates.

It is important to recognize that no one can credibly claim a 100 percent accuracy rate for any of the polygraph techniques. The possibility of error is always present. Knowing this, all federal polygraph programs require a second evaluation of every set of polygraph charts by a senior polygraph examiner, and no report of deception or truthfulness is made without agreement on the charts.

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

When the examiner cannot reach a conclusion or the reviewer disagrees, the result is reported as "inconclusive." This call of "inconclusive" is a vital aspect of the quality control program, and reduces the risk that the results of any particular examination will be erroneous. When possible, additional examinations are scheduled to resolve the issue. However, there are always a few people who do not test well and a number of topics which are not suitable for resolution by polygraph testing. Thus some inconclusive results are inevitable, as well as necessary to avoid erroneous calls.

Many experimental studies do not take into account the possibility of inconclusive results and require an evaluation of truthfulness or deception in each case. This is yet another reason that we believe the actual error rate in government-administered polygraph examinations is considerably lower than some laboratory studies would suggest.

For purposes of policy analysis, it is important to recognize that there are two types of possible error in a polygraph examiner's evaluation.

One type of error is the "false negative;" that is, a deceptive subject who is found by the examiner to be truthful. False negatives can be a significant problem if polygraph examination results are given undue weight or are used to replace other investigatory techniques that are more reliable. However, if the polygraph is used as an additional means of investigation,

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

and its results taken in the context of all available information, then the "false negative" problem does not provide a substantial reason to avoid polygraph use.

The other type of error is the "false positive," in which a truthful person is found to be deceptive. For the reasons explained above, we believe that the actual "false positive" rate in government-administered polygraph examinations is quite small. Nevertheless, even this small possibility is a basis for serious concern because we have a deep-seated aversion to any procedure that produces false incrimination. In deciding what circumstances warrant polygraph usage in the government, our continuing concern is to eliminate or at least minimize the possibility that an individual will be treated unfairly as a result of a "false positive" polygraph examination.

The fact that polygraph examinations can produce "false positives" is not--in itself--a sufficient basis to renounce their use. Virtually all investigative techniques can also produce false positives. For example, the background investigation" is a basic screening device for most important government jobs and security clearances. This investigation includes interviews with neighbors, associates, landlords, and references. Checks are made of police, credit bureau and academic records. Obviously, a certain percentage of these interviews or record checks produce "false positives"--derogatory information that is untrue or distorted. Yet we continue to use these investigative techniques

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

because they generally provide reliable information and we have no better alternatives.

The same kind of analysis applies to many scientific tests, such as blood tests, breathanalyzers, voiceprints, fiber analysis, and urinalysis. The degree of accuracy for these techniques may vary, but in each case there is some potential for an erroneous incriminating result, or "false positive." Yet such tests are regularly used for a variety of purposes, including evidence to support criminal prosecution.

One other question relating to polygraph accuracy is the possibility of countermeasures or attempts to "beat the machine." The techniques commonly used as countermeasures are known, and a well trained examiner is capable of detecting their use. Nevertheless, it may be possible for a subject to use undetected countermeasures, which would lead to a "false negative" result. This is yet another reason that the polygraph technique should not be used as a substitute for conventional means of investigation or its results given undue weight. Yet, as with the case of "false negatives" generally, it provides no basis for avoiding polygraph use altogether.

Most studies of polygraph accuracy deal with its use in investigating particular instances of criminal misconduct (or a laboratory approximation thereof). However, it would appear that similar results would obtain in screening situations, at least where the nature of the inquiry bears upon prior misconduct or

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

falsified information provided in personal history statements, which would appear to the subject to be equally serious.

The foregoing discussion has related solely to the accuracy of polygraph examinations for purposes of assessing the truthfulness or deception of an individual's response to particular questions. However, this analysis overlooks two other ways in which the polygraph technique has substantial utility.

One major benefit of polygraph use is in enhancing the ability to obtain information from the subject. Experience has shown that subjects quite often confess, or volunteer additional information, in connection with a polygraph examination. This phenomenon may actually produce information that is more useful in terms of the purpose of the examination than the examiner's assessment of the subject's physiological responses.

An additional benefit of polygraph use is its deterrent effect upon certain kinds of misconduct that can be difficult to detect through other means. Employees who know they are subject to polygraph examinations may be more likely to refrain from such misconduct. In addition, use of the polygraph in pre-employment screening serves to deter applicants who do not meet standards of suitability for employment.

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Role of the Polygraph Examiner

Notwithstanding the potential accuracy of the polygraph technique, its reliability in particular cases is largely dependent upon the ability and integrity of the particular examiner. The opinion of an incompetent or dishonest polygraph examiner can be worthless or even deliberately misleading. Any polygraph program requires careful attention to the examiners who are used.

In real-life situations, the polygraph examiner knows the identity of the subject and is generally familiar with the subject matter of the inquiry. This background assists the examiner in formulating questions to be used in the examination and in evaluating the subject's responses, thus increasing the accuracy and utility of the technique. However, it also affords an opportunity for the examiner's conscious or subconscious biases to influence the results of the examination.

In this regard, the polygraph is unlike many investigative techniques that can be applied anonymously, such as fingerprint analysis or blood tests. However, it is no different from interrogation, physical surveillance or other investigative techniques that require knowledge of the matter under investigation. Thus the possibility of examiner bias is not a problem unique to the polygraph.

More importantly, polygraph programs in the federal government are conducted pursuant to high standards that assure a

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

greater degree of examiner competence and objectivity than is necessarily prevalent in the private sector.

Polygraph examiners employed by the federal government are carefully selected, trained and supervised. Results of examinations are always reviewed by supervisors as an additional safeguard. In most federal polygraph programs, current employees who fail to pass an examination are permitted a second examination by a different examiner.

Privacy and the Polygraph

Apart from issues relating to its accuracy, there are also questions raised as to whether use of the polygraph involves an unwarranted invasion of personal privacy. Some critics fear that polygraph examinations will be used to probe the subject's religious and political beliefs or attitudes toward labor unions. Concern is also expressed that employees will be questioned about personal matters in which the government has no legitimate interest.

These privacy concerns are important and must be addressed. Current programs for polygraphing federal applicants or employees include safeguards to ensure that improper and irrelevant questioning does not occur. We believe these safeguards are essential.

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

-- First, certain kinds of questioning must be prohibited in all situations. This prohibition includes such matters as religious and political beliefs protected by the First Amendment, as well as attitudes towards labor unions.

-- Second, questioning about the subject's personal life must be limited to matters that are clearly relevant to the purpose of the examination.

-- Third, all questions relevant to the purpose of the examination must be reviewed in advance with the subject. This procedure permits the subject to object if he believes an improper question is to be included in the examination.

-- Fourth, technical or control questions, which are necessary to the conduct of the examination, should be constructed to avoid embarrassing, degrading or unnecessarily intrusive matters.

-- Fifth, sufficient records must be maintained to permit monitoring and supervision of polygraph examinations to ensure compliance with these safeguards.

By observing the foregoing safeguards, we believe that privacy objections to use of the polygraph are minimized. In this regard, it is important to recognize that the polygraph technique is not the only type of investigative technique that could result

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

in unwarranted invasions of personal privacy. Conventional investigative techniques--such as interviews with neighbors, friends and associates--can be used in an abusive manner. For privacy purposes, the most important safeguard is a limitation on the scope of the investigation. Denial of the use of particular investigative techniques, such as the polygraph, does not address the real problem of deciding what topics of inquiry constitute an unwarranted invasion of privacy.

Another privacy-related objection to polygraph use is that the technique relies upon self-incrimination. Apart from the legal issue, which is discussed later, the phenomenon of potential self-incrimination is not a valid basis for objecting to government use of the polygraph. Most government screening and investigation is conducted on the basis of information supplied by the individual. For example, applicants for security clearances fill out extensive background information forms, which are signed under threat of criminal penalties for any false statement. The polygraph examination is simply another way of obtaining, and verifying, the same kind of information.

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Legal Issues Regarding the Polygraph

In 1923, the United States Court of Appeals for the District of Columbia Circuit held that the polygraph technique was not sufficiently accepted in the scientific community as to be admissible evidence in a criminal trial. For many years this decision, Frye v. United States, 1/ was the leading case on the

1/ 293 F. 1013 (D.C. Cir. 1923).

admissibility of polygraph examination results. However, the authority of this decision has been undermined in recent years by increasing scientific documentation of the polygraph technique and changes in the law of evidence.

All of the scientific studies referred to previously were performed after 1923, and this body of knowledge was obviously unavailable to the Frye court. Indeed, a number of courts and commentators have been favorably impressed with the currently available scientific documentation of the polygraph technique. 2

2/ See, e.g., United States v. DeBetham, 470 F.2d 1367 (9th Cir. 1972) (per curiam), cert. denied, 412 US 907 (1973); United States v. Wainwright, 413 F.2d 796 (10th Cir. 1969), cert denied, 396 US. 1009.

Some commentators have also expressed the view that the legal theory of the Frye decision is inconsistent with the new Federal Rules of Evidence. 3/

3/ See, e.g., 22 C. Wright & K. Graham, Federal Practice and Procedure § 5169 (1978).

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

There has never been a Supreme Court ruling on the admissibility of polygraph evidence in federal court. The Courts of Appeals are divided on the issue. Some adhere to the Frye decision and have a per se rule of excluding polygraph evidence. 4/

4/ See, e.g., United States v. Clark, 598 F.2d 994 (5th Cir. 1979).

In a number of other circuits, the decision whether to admit polygraph evidence is left to the discretion of the trial judge. 5/

5/ See, e.g., United States v. Glover, 596 F.2d 857, 867 (9th Cir. 1979), cert. denied, 444 U.S. 857; United States v. Kampiles, 609 F.2d 1233, 1244 (7th Cir. 1979), cert. denied, 446 U.S. 954.

The state courts are similarly divided on the question of admitting polygraph results into evidence. Many states do not permit polygraph evidence to be admitted for any purpose, but a number of other states allow polygraph evidence under limited circumstances. 6/ It is fairly common for polygraph results to be admitted pursuant to a stipulation of the parties. 7/ In at least one state, polygraph evidence is generally admissible on the same basis as any other scientific evidence. 8/

6/ See State v. Dean, 103 Wis. 2d 228, 307 N.W. 2d 628, 646 nn. 17 & 18 (1981) and cases cited therein.

7/ See Annot., 53 A.L.R. 3d 1005 (1973 & Supp. 1983), and cases cited therein.

8/ State v. Dorsey, 88 N.M. 184, 539 P.2d 204 (1975). See also Commonwealth v. A Juvenile 365 Mass. 421, 313 N.E. 2d 120 (1974)(court has discretion to admit polygraph evidence).

The Justice Department has traditionally opposed the use of polygraph examination results in criminal trials as evidence of

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

the guilt or innocence of the accused. 9/ Use of polygraph

9/

evidence in a criminal trial involves a number of considerations that do not apply to its use as an investigatory technique. Among these considerations are the following:

-- First, a guilty subject may be able to use undetected countermeasures, thus causing the examination to produce false evidence of innocence. As with other "false negatives," this problem is of less concern when the polygraph is used in an investigation and is cumulative to other investigative techniques.

-- Second, there is a substantial likelihood that a jury would give undue weight to polygraph examination results. This phenomenon could ultimately displace the jury's function in cases where polygraph evidence is received on the ultimate issue of guilt or innocence. 10/

10/ See, e.g., United States v. Stromberg, 179 F. Supp. 278, 280 (S.D.N.Y. 1959); F.R. Evid 704.

-- Third, attempts to introduce polygraph evidence could greatly increase the length of criminal trials in order to accommodate the necessary expert testimony on each side of the issue.

-- Fourth, polygraph examinations given to defendants by "friendly" examiners may be more likely to produce exonerating results, including false negatives. In this

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

situation there is no risk that detection will have adverse consequences to the subject, since unfavorable results need never be known to anyone except defense counsel. Indeed, a defendant could be examined by a number of polygraphers until he passes a test, and then seek to use the one favorable examination as evidence of innocence.

-- Fifth, because of Fifth Amendment considerations, the prosecution cannot obtain polygraph evidence without the consent of the accused. The Fifth Amendment may also prevent use of polygraph results in cases where the accused chooses not to testify. Therefore, polygraph evidence is likely to be a one-sided weapon in criminal trials, available mostly to defendants and not to prosecutors.

The foregoing concerns apply only to use of polygraph evidence in a trial, primarily a criminal trial. The same considerations do not apply to use of the polygraph as an investigatory technique.

The Justice Department has traditionally supported use of the polygraph as an adjunct to the normal interview and interrogation process in certain kinds of matters within its investigative jurisdiction.

> ". . . with proper ethics by the polygraph examiner and tight administrative control by the user agency, there is no question but that the polygraph can be a valuable investigative aid to supplement interrogation in selected criminal and national security cases. Interrogation is a

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

basic tool of any investigative agency and the FBI considers the polygraph technique a thorough and specialized interview procedure in which a skillful interrogator is attempting to simply ascertain the truthful facts from a consenting individual regarding a matter in which we have jurisdiction.

"In some instances suspects will admit deception and furnish confession and or signed statements. In most instances valuable new information or investigative direction is developed as a result of the examination and followup interrogation." 11/

11/ The Use of Polygraphs and Similar Devices by Federal Agencies, Hearings Before the House Committee on Government Operations, 93d Cong., 2d Sess. (1974), at p. 419.

The fact that polygraph evidence is not admissible in a criminal trial does not preclude its use as an investigative technique. 12/ Indeed, an investigative file will typically contain a large amount of hearsay and other information that is not admissible evidence.

12/ See, e.g., People v. Lara, 528 P2d 365, 12 Cal. 3d 903, 117 Cal. Rptr. 549 (1974).

Confessions and other evidence obtained as a result of polygraph examinations are also generally admissible, so long as the examination is not conducted in a manner that violates the subject's right to counsel or privilege against compulsory self incrimination. The Supreme Court has specifically held that statements made during a polygraph examination can be admissible, even if the results of the examination are not. 13/

13/ Wyrick v. Fields, 103 S.Ct. 394,396 (1982) (per curiam).

An important caveat applies to the foregoing discussion of the law pertaining to admissibility of polygraph evidence in

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

court: in every case the examination must be taken voluntarily. The Supreme Court has indicated that the government cannot require a criminal suspect to submit to a polygraph examination. 15/

15/ Schmerber v. California, 384 U.S. 757, 764 (1966) (dictum) (unlike blood test, polygraph examination elicits testimonial response); South Dakota v. Neville, 51 U.S.L.W. 4148, 4151 n.12 (Feb. 22, 1983) (dictum).

This limitation is a consequence of the Fifth Amendment's prohibition of compulsory self-incrimination. A criminal suspect may not be required to answer questions--with or without the polygraph.

Outside the criminal context, however, a different rule applies. A public employee can be required to answer questions or sign affidavits relating to his fitness to perform public duties. So long as the information thereby obtained is not be used against the employee in a criminal proceeding, he can be fired for refusing to answer questions. 16/ For this reason we believe

16/ See, e.g., Lefkowitz v. Turley, 414 U.S. 70, 84 (1974); Sanitation Men v. Commissioner, 392 U.S. 280, 285 (1968).

there is no valid Fifth Amendment objection to requiring a government employee suspected of misconduct to take a polygraph examination, provided that there is a recognition that the results cannot be used against the employee in a criminal proceeding. 17/

17/ Memorandum of Larry A. Hammond, Acting Assistant Attorney General, Office of Legal Counsel, Feb. 22, 1980, at 8-12.

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Not all uses of the polygraph in administrative investigations of misconduct require that the results be excluded from evidence in a criminal trial. The basic rule is that "statements obtained under threat of removal from office" may not be used in a criminal trial. */ However, the examination is

*/ Garrity v. New Jersey, 385 U.S. 493, 500 (1967).

regarded as involuntary for Fifth Amendment purposes, if the employee's refusal may be considered for a variety of purposes--including as an adverse inference in disciplinary proceedings, or as a basis for reassignment or denial of access to classified information. */ Only if the employee can be

*/ Lekfowitz v. Cunningham, 431 U.S. ___, 908 n.5 (1977); Baxter v. Palmigiano, 425 U.S. 308, ___ (1976); Hoover v. Knight, 678 F.2d 578 (5th Cir. 1982); United States v. Indorato, 628 F.2d 711, 716 (1st Cir.), cert. denied, 449 U.S. 1016 (1980).

discharged or demoted solely for refusal to take a polygraph examination, are the results of such examination inadmissible as evidence in a criminal proceeding.

Where the polygraph is used for screening purposes and not in an investigation of suspected misconduct, there is ordinarily no Fifth Amendment problem. In such circumstances, the polygraph examination is a condition of employment or access to classified information. The subject's consent to be examined is regarded as voluntary in the constitutional sense, just as in providing answers on an application for employment or for a security

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

clearance. However, care must be taken if an employee reveals information concerning a federal crime in the course of a screening examination that is required as a condition of continuing employment.

Positive authority to use the polygraph in screening for employment or access to classified information is derived from a variety of sources. At bottom are the President's responsibilities under article II of the Constitution as Chief Executive, Commander-in-Chief, and the principal instrument of United States foreign policy. In Executive Order 10450, as amended, the President has assigned to the head of each department and agency the responsibility to "insure that the employment and retention in employment of any civilian officer or employee within the department or agency is clearly consistent with the interests of national security." In Executive Order 12356, the President required that a person can be eligible for access to classified information only if a "determination of trustworthiness has been made by agency heads or designated officials."

In addition to these general authorities, there are specific provisions in statutes and executive orders that authorize personnel security measures for intelligence agencies and for the protection of intelligence sources and methods. */

*/ See, e.g., 50 U.S.C. §§ 403(c),(d),(g); 831-33; E.O. 12333, §§ 1.5(g),(h), 1.8(h), 1.12(b)(10).

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Apart from the temporary limitation contained in the current Department of Defense authorization act, 18/ there is no statute

18/ Pub.L. No. ____, § 1218, 98th Cong., 1st Sess.

that expressly limits the power of the federal government to require employees or prospective employees to submit to polygraph examinations. Legislation to this effect has been proposed from time to time but never enacted. 19/

19/ See, e.g., § 2156, 92d Cong., 1st Sess. (1971); H.Rep. No. 94-795, 94th Cong., 2d Sess. 46 (1976).

In 1968, the Civil Service Commission issued instructions on polygraph use as a screening device for the competitive service, which remains in effect today under the authority of the Office of Personnel Management. 20/ These instructions generally prohibit

20/ Federal Personnel Manual, Chapter 736, appendix D.

use of the polygraph to screen applicants for and appointees to the competitive service. However, agencies with a highly sensitive intelligence or counterintelligence mission directly affecting the national security, are permitted to use the polygraph for personnel screening after complying with certain standards set forth in the instructions. The OPM instructions do not apply to use of the polygraph in investigations of suspected misconduct by agency employees, including unauthorized disclosures of classified information. 21/

21/ FMP Letter ____________, (Oct. ___, 1983)

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

General standards of conduct for federal employees permit discharge or discipline for refusal to cooperate with investigations of suspected misconduct. 22/ This authority also

22/ See e.g., 5 C.F.R. 735.201 a(c), 735.201 a(f), 735.209.

supports requiring government employees to submit to polygraph examinations in appropriate circumstances. 23/ As noted above,

23/ See Memorandum of Larry A. Hammond, supra note ____, at ____.

exercise of this authority can cause the results of the examination to be inadmissible in criminal proceedings.

In our view, an employee who refuses an order to take a polygraph examination in an appropriate case may be subject to a range of administrative sanctions to include removal, as well as lesser forms of discipline, such as a letter of reprimand or suspension without pay. The appropriateness of any sanction for refusal to comply with an order to take a polygraph examination would obviously depend upon the circumstaances of the case, including the reason given by the employee for refusing the order.

We are not aware of any litigtion in which an employee has challenged the power of a federal agency to require a polygraph examination in connection with an administrative investigation of suspected misconduct. There have been a number of cases in state courts on this issue, many dealing with policemen suspected of misconduct. Most courts to consider the issue have upheld the

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

authority of a governmental agency to discharge an employee who refused to submit to a polygraph examination. 24/

24/ See, e.g. Seattle Police Officers Guild v. City of Seattle, 494 P.2d 485 (Wash. 1972) (permitting discharge); Farmer v. City of Fort Lauderdale, 427 So.2d 187 (Fla. 1983) (not permitting discharge); Annot., 15 A.L.R. 4th 1207 (1982), and cases cited therein. See also Gulden v. McCorkle, 680 F.2d 1070 (5th Cir. 1982), cert. denied, 103 S.Ct. 1194 (1983) (permitting discharge).

The Merit Systems Protection Board has held that polygraph examination results can be admitted into evidence in administrative proceedings to determine whether a federal agency has cause to discharge an employee, provided that a proper foundation is laid. 25/ However, the Board has also held that

25/ Meier v. Department of the Interior, 3 MSPB 341, 344-46 (1980). See also Flores v. Department of Labor, 82 FMSR ¶ 5407 (Sep. 13, 1982).

it would not draw an adverse inference of guilt from an accused employee's refusal to volunteer for a polygraph examination. 25a/

25a/ Meier v. Department of the Interior, 3 MSPB 341, 344 (1980). But cf. South Dakota v. Neville, 51 U.S.L.W. 4148 (Feb. 22, 1983) (refusal to take mandatory blood alcohol test is admissible evidence in criminal trial).

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Administration Policy on Polygraph Use

This Administration is opposed to indiscriminate use of the polygraph by the federal government. Many employees and potential employees view the prospect of polygraph examinations as offensive and unwelcome. In a small but cognizable percentage of cases, polygraph examination results are inaccurate. For these reasons, we do not believe the polygraph should be used as a screening device for government employment generally or as a routine technique for conducting investigations.

However, there are certain situations where the disadvantages of the polygraph are outweighed by specific and significant governmental interests that are served by the use of this technique. Particularly in the area of national security, we have for many years recognized that polygraph examinations have a proper role.

Specifically, it is the position of this Administration that the polygraph examinations can be properly and lawfully given to federal employees or applicants in the following situations:

-- first, as a condition of employment with or assignment to CIA and NSA, and for positions in other agencies that entail equally sensitive responsibilities directly affecting national security;

-- second, as a condition of access to highly sensitive categories of classified

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

information which are likely to be of extraordinary interest to hostile intelligence services;

-- third, to investigate serious criminal cases, where the employee voluntarily consents to the examination after an opportunity to consult with counsel; and

-- fourth, to investigate serious administrative misconduct cases under limited circumstances.

The following summary of Administration policy is not intended to suggest that the polygraph must be used in any particular situation. Decisions on the extent of polygraph use should be made by the head of the employing agency, taking into consideration a variety of circumstances. By outlining situations where the polygraph may be appropriately used, however, I do NOT mean to state that this Administration opposes any other use of the polygraph for federal employees or applicants within the United States. I have not attempted to address the use of polygraph examinations in other contexts, such as for contractors, foreign nationals, informants, or non-employee criminal suspects.

(1) <u>As a Condition of Employment</u>

Certain jobs are so sensitive that the federal government should leave no stone unturned in assuring that only trustworthy candidates are hired. Even if use of the polygraph

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

may unfairly screen out some candidates who are actually qualified, we view it as more important to avoid hiring candidates who may pose a risk to national security. One noted polygraph critic has conceded:

> "There is evidence that the polygraph lie test does better at detecting liars than it does in identifying the truthful. This is an important reason for advocating banning of polygraph testing of employees or job applicants in the private sector. However, for special high security situations, where it is clearly more important to screen out undesirable applicants than to give a fair employment opportunity to all applicants, then this bias against the truthful subject may not be regarded as such an important defect." 25/

25/ Statement of David T. Lykken, Hearings before the Subcommittee on Oversight of the Permanent Select Committee of Intelligence, p. 164.

This analysis supports the longstanding practice of our largest intelligence agencies -- CIA and NSA -- in using polygraph examinations as part of their overall program of screening candidates for employment or assignment. To the extent some examination results are "false positives," we regard this inequity as outweighed by the importance of assuring the suitability of individuals who are hired at these agencies.

A major by-product of this process is that applicants will volunteer additional useful information in connection with the polygraph examination. 26/ This additional information will

26/ Even critics recognize the utility of this aspect of using polygraph examiations in pre-employment screening. *See* Lykken, *supra* note 25.

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

necessarily improve the overall effectiveness of the employment screening process. Indeed, CIA and NSA have found that the great majority of their decisions not to employ individuals because of security concerns are derived from information obtained in connection with the polygraph examinations. 27/ Without the

27/ [cite]

polygraph, most of these individuals would have been hired. Indeed, use of the polygraph probably deters many unsuitable candidates from applying in the first place.

However, CIA and NSA do not have a monopoly on sensitive jobs affecting national security. Therefore, we believe that the polygraph could also be properly used by other agencies to screen candidates for employment or assignment to jobs that are equally sensitive as those at CIA and NSA. This is a decision that must be made by the agency head, taking into account the overall security needs of the agency or component in question. Use of the polygraph to screen candidates for employment in the competitive service should also be consistent with the 1968 Civil Service Commission instructions contained in Appendix D to Chapter 736 of the Federal Personnel Manual.

It is important that use of the polygraph in pre-employment screening not be permitted to substitute for other measures such as the background investigation. In addition, polygraph examination results should not be given undue weight, but considered in the context of all available information. These

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

conditions diminish the risk associated with "false negative" results. The polygraph examiner's conclusion simply provides an additional safeguard to ensure the accuracy of information otherwise provided by the applicant or obtained through background investigation.

Use of the polygraph as a screening device for this small number of highly sensitive jobs is fair to the applicant, who has a choice of whether or not to apply. CIA and NSA advise applicants that polygraph examinations are a condition of being hired and retained in such jobs. We believe similar warnings should be given for all jobs where polygraph examinations are a condition of employment or assignment. Potential employees who object to being polygraphed can avoid its use by not applying for these jobs. In practice, only a minute fraction of government jobs will be foreclosed to such persons.

Agencies that use polygraph examinations for pre-employment screening also use such examinations from time-to-time thereafter. Such post-employment examinations are part of an effort to ensure that employees continue to meet standards for employment and access to classified information. Applicants for employment or assignment to these agencies are advised that submitting to such polygraph examinations will be a condition of continuing employment. If such notice is provided in advance, then we believe use of the polygraph for post-employment screening by these agencies is equally justified as its use for pre-employment screening.

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Of course, current employees have a greater stake in keeping their jobs than applicants have in obtaining them in the first place. For this reason, CIA and NSA take great care to assure accuracy in evaluating examinations of current employees. It is extremely rare for an employee to be discharged solely on the basis of the polygraph examiner's assessment of deception. However, this possible outcome is justified by the national interest in assuring the reliability of individuals in these jobs.

(2) As a Condition of Access to Information

The preceding category concerned polygraph examinations given as a condition of employment in certain sensitive jobs, with the scope of the examination potentially covering any matter that is legitimately related to eligibility for that employment. In contrast, this second category concerns polygraph examinations given as a condition of access to certain categories of highly sensitive classified information that is of extraordinary interest to hostile intelligence services. Such examinations would be limited in scope to "counterintelligence-type" questions.

Included among these categories is information concerning certain intelligence sources and methods, as well as communications security or cryptographic techniques and highly advanced research and development programs.

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Executive Order 12356, §4.2, authorizes certain agency heads to create Special Access Programs to control access, distribution, and protection of such information.

While we do not believe that all persons who are given access to Special Access Program information need be polygraphed as a condition of their access, there may be certain Special Access Programs, or elements of such programs, that require the extraordinary precaution of a polygraph examination in the interests of protecting the national security. In these situations, we believe it would be appropriate for agency heads to require a counterintelligence-type polygraph examination as a condition of granting or continuing access to classified information within the Special Access Program concerned. The criterion for designating programs for this purpose would be a finding that the information is likely to be of extraordinary interest to hostile intelligence services and its continued proteciton is critical to U.S. national security interests.

Polygraph examinations administered for this purpose would be limited to determining whether the employee is acting on behalf of a foreign power or has otherwise improperly safeguarded classified information. Questions about the employee's lifestyle would not be permitted. A listing of the kinds of questions that would be asked under this program is continued in Appendix B to the proposed Department of Defense polygraph program regulation.

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Such examinations, given for the purpose of determining continuing access, need not be given to all covered employees but could instead be given on an aperiodic basis to randomly-selected employees within the designated programs.

Additional safeguards in this program would include the following:

-- No adverse personnel action could be taken solely on the basis of a polygraph examiner's assessment of deception.

-- The only consequence of refusal to take a polygraph examination for this purpose would be denial of access to classified information in Special Access Programs.

We believe there is ample justification for such limited use of the polygraph as a condition of initial or continuing access to designated Special Access Programs. Under these circumstances, the polygraph examinations would be narrowly targeted at the specific dangers that justified the establishment of the Special Access Programs in the first place. The consequences of an employee's refusal to be examined for this purpose would be limited to a denial of access to particularly sensitive classified information.

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Some transitional arrangements should be made if polygraph examinations are to be required of employees with current access to information in designated Special Access Programs. Most of these employees were not hired for or assigned to their current positions with an understanding that polygraph examinations would be a condition of employment or assignment. We believe that such employees who object to being polygraphed should be transferred or reassigned to other government jobs with no loss in grade or pay. (Of course, this guarantee would not preclude removal or demotion for reasons other than the refusal to be polygraphed.)

In the future, no government employee would be involuntarily assigned to a job requiring access to information for which the polygraph is a condition of access, unless this requirement was made known at the time the individual entered into employment.

(3) Criminal Investigations

Polygraph examinations of federal employees should continue to be used in criminal investigations on the same terms as in the past. That is, the agency with criminal investigative jurisdiction may ask the employee to consent to an examination after an opportunity to consult with legal counsel. Use of the polygraph technique should be limited to the small portion of cases where it can make an appropriate contribution. An example would be a situation where there is a direct conflict of credibility among a small number of suspects and there is no other means to resolve the case.

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Use of the polygraph for criminal investigative purposes cannot violate the employee's Fifth Amendment privilege against compulsory self-incrimination. Therefore, an employee's refusal to consent to a polygraph examination for these purposes cannot form the basis of an adverse personnel action that would result in loss of employment or any other substantial economic deprivation.

(4) In Administrative Investigations

The polygraph may be used in administrative investigations of suspected misconduct on the same consensual basis as it is used in criminal investigations, as described above. However, the Fifth Amendment does not prevent an agency from requiring an employee to submit to a polygraph examination related to his fitness for continuing employment. In situations where there is no apparent violation of criminal law or where the agency with criminal prosecutive authority has decided for other reasons that no prosecution will be undertaken, an employee can be required to submit to a polygraph examination in an appropriate case and disciplined or discharged for refusal.

The extent to which employees will be requested or required to submit to polygraph examinations in such administrative investigations is a matter for the sound discretion of the agency head. The decision should be made on the basis of the facts and circumstances of each case. However, the following minimum criteria should be met in each case:

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

-- The suspected misconduct must be a serious offense affecting national security or the integrity of the employee's official conduct.

-- Other means of investigation must have produced a substantial objective basis for seeking to examine the employee.

-- There must be no other reasonable means of resolving the matter.

Of course, examinations given for this purpose should be limited to the circumstances of the suspected misconduct and thus would not include irrelevant questions about the employee's personal life or other matters. The results of the polygraph examination cannot be conclusive of the matter under investigation but instead should be considered in the context of all other available information.

An employee who is requested to take a polygraph examination in an administrative investigation of suspected misconduct should be advised of the potential consequences of refusal. For most federal employees, refusal of a request to be examined for such purposes should not be considered as evidence to support an adverse personnel action based upon a conclusion that the employee

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

is guilty of the suspected misconduct. However, agency heads may draw an adverse inference of culpability in this situation for political appointees and other members of the excepted service.

In this regard, it should be noted that the following are not considerd to be adverse personnel actions requiring specific evidence of misconduct:

-- denial of access to classified information generally, or to particular categories;

-- transfer or reassignment to another job at the same grade and pay; or

-- denial of requests for promotion, transfer, or reassignment.

An employee's refusal of a request to be polygraphed in an investigation of suspected misconduct may be taken into account in any of the foregoing determinations. However, such refusal should not be conclusive of any of these determinations.

In certain cases, agency heads or their delegates may also order--not simply request--an employee to take a polygraph examination in connection with an administrative investigation of misconduct. Refusal of such an order can itself form the basis for administrative sanctions without requiring any assessment of culpability for the misconduct being investigated. In such situations, the employee is discharged or disciplined for

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

insubordination or impeding the conduct of an official investigation.

The power to order an employee to submit to a polygraph examination in this situation should be used only in rare cases where polygraph examinations are not understood to be a condition of employment. A major concern in this regard is that information acquired in a polygraph examination to which an employee suspected of criminal misconduct is ordered to submit, and the fruits of that information, cannot be used as evidence in a criminal prosecution. Thus, the order to be examined is tantamount to a grant of "use" immunity, which should only be made in consultation with the appropriate criminal prosecutive authority.

In general, we believe the power to order a polygraph examination under these circumstances, and to discharge employees for refusal, should be limited to the following:

-- employees of CIA, NSA, and others who are advised that polygraph examinations are a condition of employment;
-- political appointees;
-- other members of the excepted service.

This authority would not extend to members of the competitive service, or the uniformed services.

We believe that the foregoing policy on use of the polygraph in administrative investigations reflects a reasonable balancing

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6

of competing interests. Use of the polygraph is limited to a small number of cases where the government's interest in resolving the matter outweighs the disadvantages of using the technique. The risk of a "false positive" result would be minimized, because the examination result alone could not form the basis for any adverse action. For most federal employees, the consequences of refusing to be examined are limited so as not to involve loss of employment or demotion.

Approved For Release 2007/10/19 : CIA-RDP85B01152R000200130008-6