

ISSUES SURROUNDING THE USE OF POLYGRAPHS

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY

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personnel policies are geared toward attaining the highest level of counterintelligence.

Thank you, Mr. Chairman. I look forward to answering any questions that you and the Committee may have.

Chairman HATCH. Mr. Zaid?

**STATEMENT OF MARK S. ZAID, ESQ., COUNSEL, LOBEL,
NOVINS AND LAMONT, WASHINGTON, D.C.**

Mr. ZAID. Thank you, Mr. Chairman. Distinguished members of the Committee, I appreciate the opportunity to appear before you. This is obviously an extremely important and timely topic in the wake of Agent Hanssen's arrest on espionage charges, but there's been a knee-jerk reaction that something more must be done to protect our National security interests. I agree with the sentiment, but the FBI has prematurely caved in to public pressure to expand its polygraph program in order to quell the flames of this more recent outcry. Yet, this will likely have the same effect as throwing gasoline on the embers of a dying fire.

For the last 2 years, I have represented unsuccessful applicants for Federal employment who have fallen victim to polygraph policies. Two lawsuits are pending against the FBI, DEA, and Secret Service. I also routinely represent or advise Federal employees and contractors who run into problems of security matters, which oftentimes involves polygraphs.

With my testimony, I wish to emphasize five key points. The Federal Government's use of polygraph examination is based more on a perception of insecurity on how best to address difficult security problems than one based on reason or logic. The policy has driven the science rather than the other way around. Each year, Federal agencies are accusing Americans falsely of crimes or of lying on various matters, and as many as 66 percent of those who are actually guilty of these acts go undetected.

Second, most Federal polygraph examinations are screening tests for applicants or for routine reinvestigations of current employees, yet there are no known studies that support the validity of these types of tests. Even the government's own experts have condemned the use of screening tests.

Third, there is a lack of standardization pertaining to the use of polygraph screening throughout the Federal Government. Depending upon the agency, polygraphers routinely have demonstrated abusive and threatening conduct which improperly stimulates a person's physiological responses, and there are very few, if any, legitimate avenues to seek redress against the polygraphers.

Four, though Attorney General John Ashcroft recently admitted that the false positive rate is 15 percent, there is little or no due process accorded applicants for Federal employment who have fallen victim. An inconclusive or unfavorable finding automatically results in your job offer being rescinded and these results will be disseminated to other agencies. In addition to concerns of false positive results, current Federal employees are prone to be victimized by retaliatory polygraph exams, and an inconclusive or unfavorable result very often will lead to career-ending damage for that employee, even though no guilt has ever surfaced or evidenced.

You'll often hear about the utility value. Nobody questions the utility value. People have confessed at polygraphs. The question is, is it the device that is doing it or the method of interrogation? I have got law enforcement clients who will tell me stories of how suspects will confess, persuaded to confess because of the use of a lie detector, but the lie detector was the police car antenna that some other officer honked the horn every time an answer was given and told the suspect they were lying, or a photocopying machine that had a piece of paper in it that said, "you are lying" once the print button was pushed.

Let me briefly address two agencies where some major problems are at. Mr. Smith referenced some of the problems at the CIA. There are at least 300 employees who have been in polygraph limbo since the Ames case who have only shown significant physiological responses but no evidence of wrongdoing has ever emerged. The FBI has taken these cases, most of the times with contempt, because there is very little information to investigate. But during this time, these people are not promoted and they are never given overseas assignments, and for people, especially within the Directorate of Operations, that is a career-ender for those individuals.

Sometime in 1997 or 1998, CIA polygraphers actually reported to the Justice Department's Public Integrity Section that they were instructed by CIA management to fail certain employees. They also revealed that they were taught how to sensitize examinees during pre-testing interviews so as to create the likelihood of false positives. As far as I know, these allegations have never been investigated.

There is also evidence that the CIA uses polygraphs as a means of retaliation against employees who file EEO complaints or grievances. Within one to 2 months of filing these complaints, these individuals all of a sudden have an acceleration of their routine security investigations, sometimes one or 2 years in advance of when they are scheduled, and as we all know, usually, it is 5 years. Most of the time, it is seven or 8 years.

The Secret Service has been the agency I have received the most complaints about. Their polygraphers have been abusive, hostile, arrogant, banged their fists on the table, slapped their thighs, and routinely yell or scream at examinees. They ask personal questions about marital infidelities and even sexual relations with animals.

Some key points, as the time runs out: Most agencies fail to tape record or audiotape polygraphs. That would protect both the session and the examinee, one would think. There is evidence of bias of polygraphers that affects the test. Mr. Smith mentioned the Aldrich Ames case and the fact that he passed two exams, which shows there was not much in the way of deterrent value. In the 1980's, about 30 Cubans defected to the United States to the CIA. All passed polygraph examinations, and it was later found out that they were all double agents for the Cuban government.

In closing, the late Senator Sam Irvin Jr. once stated that polygraph testing smacks of 20th century witchcraft. Dr. William Marsten, the Harvard psychologist who many consider to be the father of the modern polygraph, also created the popular comic book character Wonder Woman. It is no coincidence that her magic lasso requires those who feel its bind to tell the absolute truth. To dis-

cover if Robert Hanssens, other Robert Hanssens, exist within the Federal Government, we may as well put our faith in Wonder Woman's magic lasso as much as the polygraph. Thank you.

Chairman HATCH. Thank you, Mr. Zaid.

[The prepared statement and attachments of Mr. Zaid follow:]

STATEMENT OF MARK S. ZAID, ESQ.,¹ LOBEL, NOVINS AND LAMONT, WASHINGTON, DC

Mr. Chairman, distinguished members of the Committee, thank you for the opportunity to appear before you and offer my comments on issues surrounding the federal government's use of polygraphs. I applaud the Committee's interest in this topic.

This is, of course, an extremely important and timely topic. In the wake of the arrest of FBI Special Agent Robert Hanssen on espionage charges, there has been a knee-jerk reaction that something more must be done to better protect our national security interests. I fully agree with that sentiment. However, every time a spy is caught, or a lapse in security is detected, a public outcry for change erupts.² And each time this occurs there are those who lobby to expand the use of polygraph examinations as the means by which to expose those who would betray our nation, steal our secrets or commit crimes while a federal employee. We must not react so quickly to these understandable concerns. Unfortunately, the FBI has already caved in to public pressure and expanded its polygraph testing in order to quell the flames of this more recent outcry. Yet, expanding polygraph use is more akin to throwing gasoline on the embers of a dying fire. Even when assuming the utility of the device, the polygraph machine causes far greater harm to our country than we derive a benefit.

For nearly the last two years I have represented unsuccessful applicants for federal employment who have fallen victim to the government's polygraph policies. Presently, there are two lawsuits, which are the first of their kind, pending against the Federal Bureau of Investigation ("FBI"), the Drug Enforcement Administration and the United States Secret Service ("USSS") that challenges their use of pre-employment polygraph examinations.³ I also routinely represent or advise current federal employees or government contractors within the law enforcement, military and intelligence communities who encounter difficulties in security matters, which oftentimes involves polygraph examinations.

My testimony today will address the existing policy issues surrounding the use by the federal government of polygraphs for screening purposes, the manner in which federal agencies utilize the device and the consequences that arise from its use. I will also briefly summarize the legal issues in the two pending civil lawsuits. While I will not present detailed evidence regarding the science of the device, given that there are those far more qualified than I testifying on this aspect, I will cite to specific scientific studies where relevant.

OVERVIEW OF TESTIMONY

With my testimony, I wish to emphasize six key points. In listening to today's testimony, this Committee should not be under the mistaken impression that the

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²For example, following the Walker family espionage cases in 1985, Defense Secretary Caspar W. Weinberger appointed a commission to study the problem of protecting classified defense information against espionage. The commission recommended expanded use of the polygraph as a counterespionage tool. "*Defense Officials Urge Efforts to Counter Espionage*", Aviation Week and Space Technology, Dec. 2, 1985, at 24.

³See *Croddy et al. v. FBI et al.*, Civil Action No. 00-0651 (Mar. 15, 2000 D.D.C.)(EGS); *John Doe #6 et al. v. FBI et al.*, Civil Action No. 00-2440 (Oct. 11, 2000 D.D.C.)(EGS). The defendants have filed Motions to Dismiss in both cases, and the parties are awaiting the scheduling of oral arguments or a decision from the Court. Copies of the pleadings in these cases can be found at the following websites: www.nopolygraph.com, www.stopolygraph.com and www.antipolygraph.org. Additional information regarding polygraph policies can be found at www.jamesmadisonproject.org and www.fas.org/sgplothergovtpolygraphindex.html.

science will determine the outcome of the policy. Rather the current federal polygraph programs require a difficult policy examination of the unequal balance between harm and benefit. My key themes unequivocally tilt that balance against utilizing the device.

- The federal government's use of polygraph examinations is based more on a perception of insecurity on how best to address difficult security problems than one based on reason or logic. The policy has driven the science rather than the other way around. Even if one operated under the assumption that the polygraph protagonists' science is more accurate and that the device has a certain degree of utility, there is still ample room for abuse and error to occur, which it does. Each year federal agencies falsely accuse thousands of honest and trustworthy Americans of lying or having committed criminal acts. And many of those who are truly guilty of such offenses go undetected by the device. When considering this dispute as more a matter of policy, rather than debating the science or utility, one must conclude the polygraph causes more harm to our society than benefit.
- The overwhelming majority of federal polygraph examinations that are administered are screening tests either for applicants or are part of security reinvestigations for current employees. Yet, there are no known studies that support the validity of these types of tests. Indeed, even the government's own experts have condemned the use of screening tests.
- There is a lack of standardization pertaining to the use of polygraph screening examinations throughout the federal government. Depending upon the agency, polygraphers routinely have demonstrated abusive and threatening conduct which improperly stimulates an examinee's physiological responses. Moreover, there are no legitimate avenues available to challenge the conduct of a polygrapher. Oversight of polygraphers is not a high priority. Few agencies truly police the polygraph police.
- Though the government acknowledges the existence of false-positive rates as high as 15%, there is little or no due process accorded applicants for federal employment who have fallen victim to polygraph abuse. An inconclusive or unfavorable finding automatically results in the loss of a conditional job offer. Moreover, federal agencies will disseminate polygraph results to other federal, state or local agencies without hesitation thereby stigmatizing these individuals on a continuing basis.
- In addition to concerns of false-positive results, current federal employees are prone to be victimized by retaliatory polygraph examinations. Indeed, evidence exists that some agencies instruct their polygraphers to intentionally fail employees or generate false-positive results. An inconclusive or unfavorable polygraph result for an employee very often signifies career-ending damage, even though no collaborating evidence of their guilt may ever surface.
- There are alternative methods available other than polygraph examinations that will at least provide an examinee with a reasonable opportunity to respond to any allegations that arise from suspicious conduct.⁴

WHAT ACTUALLY IS A POLYGRAPH?

A modern polygraph machine measures respiration at two points on the body; on the upper chest (thoracic respiration), and on the abdomen (abdominal respiration). Movements of the body associated with breathing are recorded such that the rate and depth of inspiration and expiration can be measured. The polygraph machine also measures skin conductance or galvanic skin response. Electrodes attached to the subject's fingertip or palm of the hand indicate changes in the sweat gland activity in those areas. In addition, the polygraph measures increases in blood pressure and changes in the heart rate. This measurement, known as the cardiovascular measurement, is obtained by placing a standard blood pressure cuff on the subject's upper arm. Finally, the polygraph may also measure, by means of a plethysmograph, blood supply changes in the skin which occur as blood vessels in the skin of the finger constrict due to stimulation.

A polygraph examiner purports to interpret these readings while asking a series of questions. The examiner forms an opinion of the subject's truthfulness by allegedly comparing the physiological reactions to each set of questions. A number of ex-

⁴ It is beyond the scope of this hearing to truly and properly address this very important question, but some examples include having counterespionage experts train security investigators, requiring all employees to file detailed annual financial disclosures and the creation of databases that examine employees' personal foreign travel, foreign contacts and outside activities. Obviously, the necessary balance to ensure some adequate level of personal privacy must be taken into consideration, as well as precautions to prevent abuse and allow for challenges.

trinsic factors, however, affect polygraph validity. Because the examiner must formulate the questions, supplement the data with his own impression of the subject during the exam, and infer lies from a combination of the data and his impressions, the level of skill and training of the examiner will effect the reliability of the results. A polygraph examiner's interpretation of polygraph results is not, in fact, true evidence of conduct. It is merely the opinion of an individual with no knowledge about any of the facts surrounding the subject matter of the questions.

"The roots of the modern lie detector stretch back to antiquity. Like modern methods, early techniques to ferret out lies often relied on the behavior exhibited by liars—sweaty palms, dry mouth, shifting gaze, racing pulse. In China, for example, suspected liars were fed a handful of dry rice. If they could spit it out, the thinking went, they were telling the truth. If the rice stuck to their tongue, they must have something to hide."⁵

PAST CONGRESSIONAL POSITIONS AGAINST POLYGRAPH USE

This hearing, of course, is not the first time the Congress has directed its attention to polygraph policies. Congressional representatives and Committees have consistently derided the use of polygraph examinations. Some examples follow.

The late Senator Sam J. Ervin, Jr., once stated about polygraph testing that [t]he process smacks of 20th century witchcraft . . . The burden of proof should be on those who assert the efficacy of polygraph in predicting the behavior of prospective . . . employees. There have been practically no efforts to compile this proof . . . Why then do [employers] have such blind faith in these devices? In my opinion, it is directly related to the role of science and technology in our society—the cult of the 'expert'. There is an increasing belief that anything scientific must be more reliable and rational than the judgment of men . . . There is no necessity for these infringements of freedom and invasions of privacy; but even if there were a necessity for them, I believe that every citizen should answer like William Pitt: 'Necessity is the plea for every infringement of human liberty. It is the argument of tyrants; it is the creed of slaves.'⁶

In 1964, a subcommittee of the House Government Operations Committee concluded that there was no adequate evidence to establish the validity of the polygraph.⁷ In 1974, a House Committee chaired by Congressman Moorehead recommended that polygraph usage "be completely discontinued by all government agencies for all purposes."⁸ In 1979, the Oversight Subcommittee of the Select Committee on Intelligence of the U.S. House of Representatives was notified that polygraph testing was a central component of the preemployment screening process for applicants for positions in most federal law enforcement and intelligence agencies. Approximately 75% of those denied security clearances by the CIA or NSA resulted from the polygraph. Based in part on this information, the subcommittee urged the director of the CIA to institute research on "the accuracy of the polygraph in the pre-employment setting and to establish some level of confidence in the use of that technique."⁹ To date, no credible research supporting the use of preemployment polygraph screening has been published.

In November 1983, the Office of Technology Assessment issued a report entitled "Scientific Validity of Polygraph Testing: A Research Review and Evaluation". The report concluded that "the available research evidence does not establish the scientific validity of the polygraph test for personnel security screening" and that the "mathematical chance of incorrect identification of innocent persons as deceptive (false positives) is highest when the polygraph is used for screening purposes."¹⁰

Particularly in light of this report, additional hearings were held and The Employee Polygraph Protection Act of 1988, 29 U.S.C. §2001 .et seq, was ultimately enacted.¹¹ It generally prohibits the private sector from using polygraphs in pre-employment screening and sharply curtails the permissible uses of the polygraph in specific-incident investigations. Prior to the enactment of this legislation, it was estimated that a minimum of 400,000 truthful employees were wrongfully labeled deceptive and suffered adverse employment consequences each year. The federal gov-

⁵"New Facts about Shaving Revealed by Lie Detector!" "Are polygraph tests lying to us?", *Baltimore Sun*, November 3, 2000.

⁶Lykken, David T. *A Tremor in the Blood: Uses and Abuses of the Lie Detector* 213 (1998).

⁷See "Uses of Polygraphs as 'lie detectors' by federal agencies: Hearings Before a Subcommittee of the Committee on Government Operations, 88th Cong. (1964).

⁸Abram S. *The Complete Polygraph Handbook* (1989).

⁹Lykken, supra note 6 at 161.

¹⁰A copy of the report can be found at <http://www.nopolygraph.com/loststudy.htm>.

¹¹See Employee Polygraph Protection Act: Hearing on S.185 Before the Senate Committee on Labor and Human Resources, 100th Cong., 1st Sess. (1988).

ernment, however, exempted itself from the provisions prohibiting preemployment testing.

On September 29, 1997, Dr. Drew C. Richardson, a FBI Supervisory Special Agent, testified before the Senate Judiciary Committee and condemned the use of the polygraph machine. He testified, in part, that “[w]ithin the Bureau, polygraph examiners who have little or no understanding of the scientific principles underlying their practice, report to mid-level managers who are largely ignorant of polygraph matters. These mid-level managers in turn report to executives, who have real problems for which they seek needed solutions (e.g., the need to protect national security from the danger of espionage, and the need to hire employees with appropriate backgrounds). These executives are left unable to evaluate that polygraph is not a viable solution and do not comprehend that ignorance and mis-information are built into their own command structure.”¹²

Most recently, the FY2000 Intelligence Authorization Act asserted that “[p]olygraphing has been described as a ‘useful, if unreliable’ investigative tool.” The Senate Intelligence Committee instructed the Central Intelligence Agency (“CIA”) and FBI to assess “alternative technologies to the polygraph” and report back to the Committee within ninety days.¹³

THE FEDERAL GOVERNMENT’S USE OF POLYGRAPH SCREENING TESTS

The majority of those circumstances where a polygraph is utilized is in the screening of federal applicants for employment or a current federal employee. The questions will typically differ between applicants and current employees. The former will have to respond to lifestyle questions (drug usage, sexual activities), while the latter is predominantly limited to counterintelligence questions (unauthorized disclosure of classified information, contact with foreign personnel). Depending upon the agency, the format of the test will also differ.

There are no peer-reviewed scientifically accepted studies that demonstrate the validity of such screening tests. Even the government’s own experts agree on this point.¹⁴ Thus, unlike an investigation into a specific crime, there is no particular reason why a screening examination is being administered in that no specific allegation is being explored that has a perceived basis of merit. The tests are nothing more than fishing expeditions.¹⁵

Applicants For Federal Employment

Federal agencies use the polygraph machine in preemployment settings in order to indiscriminately weed out individuals and avoid the need to conduct an in-depth background investigation. This permits the agency to avoid spending time and resources on individuals they may possibly later seek to reject from employment.¹⁶ As a result, however, thousands of innocent individuals are falsely labeled drug users, drug dealers, terrorists and/or spies without any reasonable opportunity to ever clear their name.¹⁷ After receiving a false-positive reading that falls outside an

¹² See <http://antipolygraph.org/hearings/senat...richardson-statement.shtm>.

¹³ *Wash Post Nat. Weekly*, Aug. 2, 1999. The extent to which the CIA and FBI submitted a report is unknown. Additionally, The National Academy of Sciences, at the request of the Department of Energy, recently begun a 15 month review of current polygraph policies. See e. g., <http://www4.nas.edu/webr.nsf/MeetingDisplay2/BCSS-I-00-01-A?OpenDocument>.

¹⁴ Charles R. Honts, “Counterintelligence Scope Polygraph (CSP) Test Found to be Poor Discriminator”, *Forensic Reports*, 5:215–218 (1992); ———, “The Emperor’s New Clothes: Application of Polygraph Tests in the American Workplace”, *Forensic Reports*, 4:91–116 (1991); Barland, G.H. et al, “Studies of the Accuracy of Security Screening Polygraph Examinations”, Department of Defense Polygraph Institute, Fort McClellan, Alabama (1989).

¹⁵ As Spinoza, one of the greatest Western thinkers and philosophers, wrote more than 300 years ago in his famous treatise “*Ethica ordine geometrico demonstrata*” (otherwise known as “*Ethics*”)(1677): “He who would distinguish the false from the true, Must have an adequate idea of what is false and true.”

¹⁶ For example, the FBI has asserted in correspondence that the “polygraph is an effective investigative tool which can save many investigative man-hours, decrease the overall cost of investigations, and provide valuable investigative leads or information which could not otherwise be developed due to lack of evidence or other noteworthy information.” Copies on file with the author.

¹⁷ For example, according to an October 28, 1997, letter sent by Donald Kerr, the Assistant Director of the FBI’s Laboratory Division, to Senator Charles E. Grassley, between March 1994, and October 1997, “the FBI conducted approximately 16,200 preemployment polygraph examinations. Of those, 12,930 applicants (80 percent) passed and continued processing; 3,270 applicants (20 percent) were determined to be withholding pertinent information. When these individuals were interviewed about their unacceptable performance in the polygraph session, 1,170 (36 percent) admitted to withholding substantive information.” See <http://www.nopolygraph.com/kerr.pdf>. While the FBI’s definition of “substantive” is unknown, based on the above FBI figures up to 64 percent of those individuals (2,100) who were deemed deceptive by the polygraph exam-

agency's defined acceptable parameters, the applicant is simply left out in the cold while the agency continues to maintain the posture that the applicant is a liar. The applicant's conditional offer of employment is immediately rescinded.

Although applicants and employees will be told their polygraph results will be kept confidential, the information is often shared with other intelligence and law enforcement agencies, whether that be federal, state or local. Sharing is permitted through the routine use exception of the Privacy Act.¹⁸ Not only does this result in irreparable harm to these applicants, but it denies the federal government's access to qualified and capable employees. Yet when it suits the federal government's needs, an agency will not hesitate to overlook an otherwise deceptive polygraph reading or denounce the polygraph as unreliable.¹⁹

Current Federal Employees

The extent to which current federal employees are subject to polygraph testing, and the consequences from an inconclusive or deceptive reading, varies from agency to agency. Those agencies that do conduct polygraph testing of their employees, particularly from within the intelligence community, typically conduct routine counter-intelligence examinations every five years or so. Depending upon the results, employees may face adverse personnel actions, loss of their security clearance²⁰ or administrative limbo.

More detailed examples are below.

UTILITY VERSUS POLICY

In debating the need for the polygraph, you will often hear how successful the device has been in enticing examinees to confess to all sorts of crimes or acts. There is no significant dispute that use of the polygraph has indeed led to confessions. The question is what prompted the confession? The answer is that it is often not the polygraph as a device, but the method of interrogation that led to the confession. The perceived false notion that polygraph machines accurately detect lies can lead to the extraction of confessions from those who are either not that bright, as with many criminals, or who simply genuinely believe in the utility of the device. Law enforcement personnel throughout this country all have stories of how suspects have been persuaded to confess because of the use of a "lie-detector". Yet, the device was nothing more than a police car antenna (a law enforcement officer would honk the horn after the individual provided a "false" response) or a photocopying machine (which would print out a piece of paper that indicated the suspect was "lying").

The scientific community, as well as the government, admits to the existence of false-positives, identifying someone as guilty when they are really innocent, though the figures vary. Still, in announcing the FBI's intention to expand its polygraph program, Attorney General John Ashcroft admitted in a press conference that the false-positive rate is 15%.²¹ Yet, despite knowing that innocent persons will be falsely accused, no adequate protections exist in any agency to address this obvious problem. Moreover, the existence of false-negatives, i.e., guilty individuals who pass as innocent, significantly contributes to the failure of the government's polygraph poli-

iner may have been or were innocent of any wrongdoing. Yet, their FBI files, which are available to other governmental agencies, now reflect that they lied about a stigmatizing topic.

¹⁸ See 5 U.S.C. § 552a(b)(3).

¹⁹ On February 3, 1997, James K. Murphy, the Chief of the FBI's Laboratory's Polygraph Unit in Washington, D.C. and a FBI polygraph examiner since 1978, submitted a declaration to the United States Military Court, Mid-Atlantic Region, Norfolk, Virginia, in the case of *United States v. Ens Patrick J Jacobson*. USN. He stated that "[i]t is the policy of The Department of Justice to oppose all attempts by defense counsel to admit polygraph results as evidence and to refrain from seeking the admission of favorable examinations which may have been conducted during the investigatory stage of a case . . . The FBI uses the polygraph as an investigative tool and cautions that the results should not be relied upon to the exclusion of other evidence or knowledge obtained during the course of an investigation . . . This policy is based upon the fact that, a) the polygraph technique has not reached a level of acceptability within the relevant scientific community, b) scientific research has not been able to establish the true validity of polygraph testing in criminal applications, c) there is a lack of standardization within the polygraph community for training and for conducting polygraph examinations." See www.nopolygraph.com/murphy.pdf. The following year, the Department of Justice told the U.S. Supreme Court that polygraph evidence should be inadmissible because of its inaccuracy. *United States v. Scheffer*, 523 U.S. 303 (1998). Thus, a serious inconsistency exists between the government's use of polygraphs in criminal cases and its extensive use of polygraphs to make vital security and preemployment determinations.

²⁰ Which is governed by internal agency regulations and Executive Order 12,968, 60 Fed.Reg. 40245 (August 7, 1995)(establishing appellate framework to challenge denial of security clearances).

²¹ "Spy-Wary FBI Agrees to Polygraphs", *Los Angeles Times*, Mar. 2, 2001.

cies. Those who successfully generate a false negative response, of course, have avoided being caught. Yet, those who unfortunately generate a false-positive fall victim to an unending process of scrutiny when they have done nothing wrong.

Former FBI Special Agent Mark Mallah's experiences illustrate the problem. In January 1995, he was asked to undergo a polygraph test. The examination was a routine national security screening. Special Agent Mallah was not under suspicion at the time. However, following the examination, he was accused of "deception" with respect to the question on unauthorized contact with foreign officials. Two weeks later, he was instructed to report to Washington, D.C. where he underwent two additional consecutive days of polygraph examinations and lengthy interrogations. The polygraphers continually insisted that he was being deceptive, but Special Agent Mallah continually denied the accusations. He was then placed on administrative leave with pay pending further investigation.

The FBI conducted a major and intrusive investigation which included the raiding of his home and seizure of personal belongings. For a two month period, he was even placed under twenty four hour surveillance, seven days a week. The FBI interviewed numerous friends, acquaintances, former roommates, colleagues, and members of his family. The FBI even accused one of his friends of being an accomplice and administered a polygraph test, which the individual "passed". Special Agents showed up unannounced and surprised his wife at her place of work, and asked to interview her right then and there. When she was eventually interviewed, the FBI asked her to also take a polygraph, which she declined to do. The FBI asked both of Special Agent Mallah's brothers to take a polygraph test. One agreed, and he "passed." Another Special Agent told one of Special Agent Mallah's friends that there was "significant evidence" against him. This same agent told Special Agent Mallah's brother he was certain that he was guilty.

After five months of investigation, he returned to work as a Special Agent entrusted with a "top secret" clearance, a weapon and a badge. Yet, despite his reinstatement, the "problem" still existed. In October 1995, the FBI wrote that he was "the subject of a security reinvestigation involving your inability to resolve issues relating to your associations with foreign nationals . . . as well as your susceptibility to coercion as a result of your concealment of these matters." No specifics were ever provided, and Special Agent Mallah still denies to this day that these allegations had any merit. Finally, the investigation was terminated in September 1996, nearly two years after it began. The final outcome was a letter of censure and a two week suspension for a trivial administrative issue and a minor discrepancy in his FBI employment application. The letter of censure was silent about unauthorized contacts with foreign officials, which was the alleged national security issue that launched the investigation in the first place. Even though he had been finally exonerated, in disgust with what occurred, Special Agent Mallah voluntarily resigned from the FBI with a clean record.

CURRENT FEDERAL USE OF POLYGRAPH EXAMINATIONS

Polygraph examinations are administered throughout the federal government, primarily by those agencies within the law enforcement and intelligence communities. Those agencies that are more heavily utilizing the device now include the FBI, USSS, CIA, Drug Enforcement Administration, National Security Agency, Department of Energy, Department of Defense, Bureau of Alcohol, Tobacco and Firearms, Defense Security Service, and the U.S. Marshall's Service. Of course, polygraph use applies not only to federal employees, but also to independent contractors as well.

"The polygraph . . . has achieved a new status in the world of counterintelligence in the past five years. The CIA and the FBI have polygraphed at least 40,000 job applicants and employees in their search for drug users and would-be spies. According to intelligence and law enforcement officials, the polygraph has become the nation's number one tool for safeguarding national security against penetration by foreign agents."²²

Though polygraphers for federal agencies all receive the same initial training at the Department of Defense's Polygraph Institute, the manner by which a polygraph is administered will vary between agencies. Of course, the abuses that occur also vary between agencies. Some examples are detailed below.

Federal Bureau of Investigation

The FBI has had a long history with the polygraph. In the late 1930s, J. Edgar Hoover, the icon director of the FBI, frowned on its use because of a

²²"Spy Detection, Inc.; A Test Of Honesty? Check That", *Washington Post*, May 23, 1999, at B 1.

misidentification of a kidnapping suspect in Florida. It was generally prohibited after this episode for decades, except for use in limited circumstances. Throughout the tenures of different directors, the question of polygraphing current employees every five years on areas of espionage and sabotage routinely arose. Indeed, Judge William Webster considered expanding the program in 1978. The proposals were always rejected.²³ In the wake of the Aldrich Ames case, the current FBI Director, Louis Freeh, also rejected implementation of routine polygraph examinations of employees.²⁴

However, the FBI did modify its policy in March 1994, to polygraph any applicant for a full-time position with the FBI, no matter the individual's level of responsibility. The FBI's polygraph screening focuses exclusively on counterintelligence issues, the sale and/or use of illegal drugs, and the accuracy and completeness of information furnished by applicants in their employment applications. It has been estimated that approximately 20%–40% of all FBI employee candidates each year fail the polygraph examination, typically due to responses to the drug use question.²⁵

In the wake of the Hanssen case, the FBI has recently expanded its polygraph screening program. By Memorandum dated March 16, 2001, the FBI announced that beginning March 28, 2001, it would institute counterintelligence-focused polygraph examinations to employees who occupied certain assignments or occupations.²⁶ It was estimated that approximately 500 employees would be polygraphed over the next sixty days. *Id.* at 3. With respect to those employees who experience trouble with the polygraph, the Memorandum noted:

Experience has shown that most FBI employees taking the counterintelligence-focused polygraph examination successfully complete the test. However, there may be a very small number of employees whose tests are either inconclusive or are indicative of deception. Polygraph examiners will attempt to fully resolve all unexplained responses through the effective use of thorough preand post-test interviews. If, upon completion of a thorough examination, there is still an inconclusive or deceptive response, it will be considered "unexplained". Consistent with existing policy, no adverse action will be taken based upon the polygraph results alone. However, more extensive investigation will be initiated to resolve the unexplained test results.

Id. Those employees who refuse to take the test will be subjected to administrative actions which may include transfer, a finding of insubordination and disciplinary action or a reevaluation of the employee's security clearance. *Id.* at 3–4. Those who may encounter trouble with the FBI's polygraph will certainly take no comfort in knowing of the experiences of Special Agent Mallah. Nor are the FBI's assurances that no adverse actions will be taken based solely upon the polygraph results necessarily binding. The same assurances are falsely provided to applicants.

The FBI has noted in correspondence that it "uses the polygraph as an aid to investigation and considers it highly reliable when used by a competent and ethical examiner. It is one part of the screening process and is designed to address issues that may not be resolved by more traditional investigative methods."²⁷ Donald Kerr, the Assistant Director of the FBI's Laboratory Division, informed Senator Charles E. Grassley by letter dated October 28, 1997, that the polygraph "is not a substitute for, but merely one component of, a thorough and complete background investigation". Yet, an applicant who fails, or registers inconclusive during, a polygraph examination is automatically excluded from employment and their conditional employment offer is immediately rescinded.²⁸ No background investigation is conducted to

²³ FBI chief Freeh to explain polygraph dearth in wake of spy charges", *Knight Ridder Newspapers*, April 28, 2001.

²⁴ "Michael Kortan, an FBI spokesman, said FBI leaders worry that more polygraphs would generate more lawsuits and scores of agents would be placed in investigative limbo after 'false positive' readings—failing the polygraph out of nervousness when the person is telling the truth." *Id.*

²⁵ When the FBI implemented its polygraph program in 1994, that years' special agent class had already begun its training. It has been alleged that approximately half the class failed resulting in the FBI waiving the polygraph requirement until the next class.

²⁶ Copy on file with the author.

²⁷ *Id.*

²⁸ Problems with the FBI's polygraph examinations extends beyond new applicants. Many former FBI Special Agents, including those who had distinguished careers, have failed polygraph examinations when trying to either re-enter the FBI or attain a consulting arrangement. In solely considering the results of the polygraph machine to arrive at its suitability determination, the FBI literally accuses its former agents of having committed crimes while on duty with the FBI; acts that if true have still gone unpunished.

verify the information, nor is the applicant provided a formal opportunity to challenge the polygraph results.²⁹

Some of the specific concerns regarding the FBI's polygraph program includes:

- The FBI neither tape records or videotapes their examinations, thereby precluding examinees an opportunity to challenge the conduct of the polygrapher or identify potential errors in the examination.
- FBI polygraphers have demonstrated significant bias in their perceptions of applicants, which affects the manner in which the test is administered and the results achieved. For example, one FBI polygraph examiner, Special Agent H. L. Byford, stated in an e-mail dated August 6, 1999, that "if someone has smoked marijuana 15 times, he's done it 50 times . . . Those who have any doubts about how many times they used are going to fail. Those who are certain that they only tried it once or three times or five or whatever, will pass . . . I got to tell you though, if I was running the show, there would be no one in the FBI that ever used illegal drugs!" The FBI's present drug use policy allows marijuana use so long as it was not during the last three years or more than fifteen times, or if usage of any illegal drug(s) or combination of illegal drugs, other than marijuana, was not more than five times or during the last ten years.³⁰

I have included with my testimony copies of several sworn declarations executed by former FBI applicants who detail their ordeals at the hands of FBI polygraphers. See Exhibit "1".

Central Intelligence Agency

The call for the FBI to expand its polygraph program is often heard amidst statements that the CIA routinely polygraphs its employees. The intended message is that the CIA must then be more security conscience than the FBI, and that since the policy seems to be working over at the CIA, the FBI should follow suit. The fact, however, is that CIA's use of the polygraph is fraught with abuse and problems.

In the wake of the Aldrich Ames fiasco in 1994, the CIA vigorously implemented an intensive polygraph review. The result has been that in excess of 300 employees remain in polygraph limbo. These individuals registered a significant physiological response to a security question but there is little or no collaboration to support suspicion of wrongdoing. Many of these cases are referred to the FBI for further investigation where they are typically viewed with contempt, and accorded low priority because there is little to investigate. Yet, for the employees, this serves as the kiss of death to their career. No promotions will be granted, and no overseas assignments will be permitted. For a CIA employee within the Directorate of Operations, falling into this limbo is essentially the end of their career.³¹

Unfortunately, there is little that can be done to remedy this situation. The CIA makes it very difficult for these employees to retain legal counsel, and even more impossible for legal counsel to actually accomplish anything. The CIA will not release the governing regulations, primarily because it asserts the documents are classified. And even if counsel maintains a security clearance, the CIA will not permit access. On these types of issues, the CIA plays by its own rules.

²⁹ However, the FBI official policy, as set forth in various correspondence, is that "[a]ny applicant who does not successfully pass an initial polygraph examination may request to be afforded a second polygraph examination; however, certain criteria must be met." Copy of correspondence on file with author. While the criteria is not publicly known, the FBI policy on this issue is contained in a Buairtel dated May 1, 1995, captioned "Special Agent Selection System (SASS) Polygraph Policy". Although applicants to the FBI have been notified by letter that the "FBI's policy regarding additional polygraph examinations is consistent for all applicants", there is absolutely no rhyme or reason to the manner in which the FBI grants retests. It is essentially an arbitrary process.

³⁰ Another recent example of the influence of polygrapher bias involves David Tenenbaum, an engineer for the Army Tank and Automotive Command in Michigan. Tenenbaum, a devout Jew, became a suspect in 1996 of spying for Israel. Based on an alleged confession made during a polygraph examination, the FBI searched Tenenbaum's home but discovered nothing. It was later determined that the "confession" was "nothing more than the polygraph examiner's opinion. The polygrapher . . . had concluded that 'because of devout religious beliefs and his strong affinity towards Israel, he would have provided restricted information to the Israelis based on his belief that the U.S. government should freely share information with one of its closest allies.'" *Government facing charges of racism*, *San Jose Mercury News*, Oct. 13, 2000. Although no charges have ever been filed against Tenenbaum, his security clearance access was suspended.

³¹ Scientists employed at nuclear laboratories in the United States face similar problems in light of the Department of Energy's desire to expand polygraph testing in the wake of the Wen Ho Lee case. While failure of the test alone allegedly will not result in termination of the employee's position, the individual will be transferred to work on less sensitive projects—a transfer that effectively destroys the careers of most scientists.

Thus, it is not surprising that in 1997–98, CIA polygraphers reported to the Department of Justice’s Public Integrity Section that they were instructed by CIA management to “fail” certain employees. Additionally, they revealed that they were taught how to sensitize examinees during pre-testing interviews so as to create the likelihood of false positives. Notwithstanding these sensational allegations, there is no evidence either the CIA or Department of Justice ever conducted an investigation.

Yet, the CIA’s mistreatment of one of its former staff attorneys, Adam Ciralsky, provides further support for these allegations. The CIA fired Mr. Ciralsky and revoked his top-secret security clearance, in part, because he allegedly exhibited a “lack of candor” about relationships with associates who may have been tied to Israeli intelligence. Official CIA records, however, revealed that the CIA tried to manipulate Ciralsky’s polygraph tests so as to transform demonstrably “non-deceptive” results into “deceptive” results. A CIA memo, written two weeks before Ciralsky’s final polygraph, stated that CIA Director George Tenet “says this guy is outta here because of lack of candor . . . Subject is scheduled for [another] poly . . . Once that’s over, it looks like we’ll be waving goodbye to our friend.” Thus, official records indicated that the CIA were set to base Ciralsky’s dismissal on the outcome of a polygraph examination that he had yet to take. In fact, Ciralsky underwent and successfully completed counterintelligence polygraphs in 1993, 1996 and 1998, at which times his answers were consistently deemed to be “strongly non-deceptive.” Yet when Ciralsky submitted to CIA polygraph examinations in August and October 1997, he was accused of “deception” with regard to issues and events which predated, and hence were covered by, his earlier polygraphs.

Moreover, evidence exists that the CIA uses polygraph examinations as a means of retaliation against those employees who file EEO complaints or grievances. Within one to two months of filing such complaints, many employees have experienced a significant acceleration of their “routine” security reinvestigations, sometimes more than one to two years ahead of schedule. CIA employees typically will not face a periodic security reinvestigations until five years have passed, and because of budgetary and staff constraints many investigations do not occur until seven or ten years later.

United States Secret Service

Of all the agencies I have dealt with, I have received the most complaints concerning the conduct of USSS polygraphers. The stories I have been told have been genuinely consistent. The polygraphers have been abusive, hostile, arrogant, banged their fists on the tables or slapped their thighs and routinely yell or scream at examinees. Questions have been asked regarding marital infidelities and sexual relations with animals.³² I have included with my testimony copies of several sworn declarations executed by former USSS applicants who detail their ordeals at the hands of USSS polygraphers. See Exhibit “2”.

Although polygraph sessions are audiotaped, ostensibly in order to allow challenges to the manner in which examinations were conducted, the USSS steadfastly refuses to release the audiotapes, whether pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (a) or through the legal discovery process.

Examples Of Other Systemic Problems Associated With Polygraph Testing That Occur Throughout The Federal Government

Many of the problems associated with polygraph testing are not isolated at one particular agency. Rather, they are endemic of the culture that exists within the federal government. Beyond those already identified above, these problems include:

- Those agencies that administer multiple polygraph exams to an individual, whether an applicant or a current employee, sometimes utilize the same polygrapher. Oftentimes, even when a different polygrapher is utilized, the polygrapher is aware of the prior test results. This taints the objectivity of the examination.
- Polygraph examiners receive only 12–14 weeks of training from the Defense Department’s Polygraph Institute, yet are expected to become experts in understanding human physiological responses that scientists have been studying for years without fully unlocking the secrets. Sheila Reed, a former research psychologist at the Defense Department’s Polygraph Institute who was responsible for developing and standardizing the test format and operator’s manual currently used by several federal agencies, told the *National Journal* “that govern-

³²The American Polygraph Association condemns the use of personal and intrusive questions. It does not condone any type of inquiry into sexual preferences or activities. See <http://www.polygraph.org/apa5.htm>.

ment-trained examiners don't understand psychology, physiology, and electronics, and that their procedures are 'unethical'. In addition, she said, her preliminary research at the institute showed that polygraph examiners do have biases that can affect results."³³

- Applicants are often "tricked" into appeasing polygraphers' allegations of deception only to then be penalized by the agency for having "lied" on their applications. For example, agencies will require an applicant to state the specific number of times marijuana had been used. Given that oftentimes the usage occurred years before, it may be understandably difficult to come up with an exact number. If "deception" is indicated in response to a drug usage question, the polygrapher will persuade the applicant to admit to additional usage (which is not inconsistent with what the applicant told the recruiting agent). The applicant then loses his/her conditional offer of employment for "lying" on their application.
- The fact that individuals have failed polygraph examinations at one federal agency yet contemporaneously successfully passed a polygraph examination regarding the same issues at another agency.

THE POLYGRAPH'S FAILURE TO EXPOSE SPIES

Today, the outcry for increasing the use of polygraph examinations arises in the context of catching spies. Suspected spy Robert Hanssen was acknowledged never to have taken a polygraph examination during his entire FBI career. Yet, even if he had, the overwhelming likelihood is that this smooth operator would have passed. False-negative responses occur at a frequency far greater than false-positives. One of the most comprehensive studies conducted by the government of security screening polygraph examinations revealed a rate as high as 66%.³⁴

In 1986 and 1991, Aldrich Ames, the former CIA official turned-spy, convinced his polygraph examiners that the deceptive readings he was allegedly displaying were easily explained away. As a result, Ames "passed" his tests. While the Ames case is indicative of wide-ranging problems that can arise solely through examiner conduct, it more importantly reveals that the polygraph had little deterrent value, at least for Ames, who had started his spying in 1985.³⁵

Even worse, during the 1980s, approximately thirty Cubans who served as spies for the CIA passed extensive polygraph examinations. Following the subsequent defection of a Cuban intelligence officer and his debriefing, it was revealed that all of the CIA's "Cuban agents" were actually double-agents working for the Cuban Government. Each and every one of them had defeated the CIA's polygraph examinations.

In fact, it is a simple feat to defeat the polygraph, which undermines the entire purpose of utilizing it to determine the truth. The very persons most likely to be the subject of a polygraph examination can use any number of techniques to "truthfully" lie by using countermeasures. For those less skilled in the art of spycraft, various instructions on how to defeat the polygraph are publicly available in books and on the Internet.³⁶

LEGAL ISSUES SURROUNDING POLYGRAPH CHALLENGES

The controversy surrounding polygraph reliability is not a subject unknown to the courts of this land. From the Supreme Court's decision upholding a blanket ban on the admissibility of polygraph evidence in military courts because "there is simply no consensus that polygraph evidence is reliable," *United States v. Scheffer*, 523 U.S. 303, 309 (1998), to the Ninth Circuit Court of Appeals decrying that the polygraph machine has developed the "misleading reputation as a 'truth teller,'" *United States v. Marshall*, 526 F.2d 1349, 1360 (9th Cir.), cert. denied, 426 U.S. 923 (1976), step by step courts have limited the use of this alleged scientific device.

Surprisingly, in the wake of statutory prohibitions regarding the use of the polygraph as a screening device and continuing examples of its fallibility, federal agencies have increased their use of the device. The majority of applicants who are

³³"Polarized Over Polygraphs", *National Journal*, Sept. 9, 2000, at 2801.

³⁴Barland, G.H. et al, "Studies of the Accuracy of Security Screening Polygraph Examinations" (Department of Defense Polygraph Institute, Fort McClellan, Alabama, 1989) at iii. The 1983 report issued by the Office of Technology Assessment noted false-negative results approaching 30%.

³⁵See e.g. David Wise, *Nightmover* 146-47,210-211 (1995); Tim Weiner et al., *Betrayal* 89-91 (1995).

³⁶For example, for \$47.45 you can order "How to Sting the Polygraph" written by Douglas William, a former police polygrapher, which instructs you on ways to beat the polygraph. See <http://www.polygraph.com/>.

branded as liars by pre-employment polygraphs are invariably victimized by questions regarding drug usage. The events in question, i.e., incidents of marijuana being smoked, typically occurred years before the examination, often more than a decade earlier. Recalling the exact number of times is almost farcical, unless perhaps the applicant only used the substance once or twice on memorable occasions.

The fact that so many years have gone by significantly impacts upon the polygraph's reliability. *United States v. Demma*, 523 F.2d 981, 987 (9th Cir. 1975)(en banc) ("probative value of the [polygraph] evidence diminished by the lapse of time between the occurrence of the events and the taking of the test"). Of course, there is little difficulty for an applicant to recall the fact that they never used illegal narcotics even once in their life; a confession many government polygraphers seem to have trouble accepting based on their own personal biases.

As I mentioned above, the governments' polygraphers often have little sophisticated training and their professionalism ranges across the board. Some scream at applicants, pound their fists, ask inappropriate questions about sexual deviance, marital affairs and mental instability. Others may level accusations of lying, or even lie themselves in order to extract false confessions. Innocent victims of the polygraph are common, particularly because "[m]ultiple variables may influence the results of a polygraph test, including the motivation of the subject, his physical and mental condition, the competence, integrity, and attitude of the operator, the wording of the relevant questions, the appropriateness of the control questions, and the interpretation of the resulting graph." *United States v. Givens*, 767 F.2d 574, 585 (9th Cir. 1985). The bottom line is that "the polygraph test in fact relies upon a highly subjective, inexact correlation of physiological factors having only a debatable relationship to dishonesty as such. The device detects lies at a rate only somewhat better than chance." *U.S. v. Piccinonna*, 885 F.2d 1529, 1542 (11th Cir. 1989).

Applicants for federal employment

The two lawsuits that are now pending seek injunctive, declaratory and monetary relief for eleven plaintiffs pursuant to the Administrative Procedure Act, 5 U.S.C. § 701 et seq., the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, and the Fifth Amendment to the Constitution of the United States. The first Complaint was filed on behalf of seven individuals on March 15, 2000. The second Complaint was filed for four individuals on October 11, 2000. Both complaints assert that the government is violating the plaintiffs' due process and privacy rights, as well as disregarding applicable agency regulations in rescinding employment offers based solely on polygraph results. The claims can be summarized as follows:

- Applicants who "fail" polygraph tests are effectively stigmatized and precluded from obtaining federal employment in their chosen career field.
- The plaintiffs have lost out on other federal employment opportunities because of prior false-positive results.
- No due process protections exist to enable examinees to challenge false-positive polygraph results.
- Federal agencies will unhesitatingly disseminate polygraph results to other agencies due to the routine use exception within the Privacy Act. In any event, the applications for law enforcement or intelligence positions at most federal agencies require admitting whether the applicant had previously sat for a polygraph examinations, and the results.
- Applicants are questioned on personal matters unrelated to the work they would perform if hired.

At this early stage in the litigation, the government has asserted the extreme position that applicants have no constitutional protections, that agency decisions to use polygraphs and then base suitability decisions upon the results are within their unchallengeable discretion and that the only available relief exists through amending personnel records through the Privacy Act or reporting the alleged misconduct to the Office of Special Counsel. Unfortunately, these latter two suggested remedies offer nothing of the sort.³⁷

³⁷The Privacy Act does not permit challenging agency actions or "opinions", and the government is taking the position that polygraph results are nothing more than the "opinion" of the polygrapher. The Office of Special Counsel does not have jurisdiction to hear claims against many of the agencies that utilize polygraph examinations, such as the FBI, CIA or NSA, and it has yet to accept for investigation even one polygraph complaint.

The government's Motions to Dismiss both lawsuits have now been fully briefed, and the plaintiffs are awaiting the scheduling of oral arguments or a decision from the Court.³⁸

CONCLUSION

No matter the science that may tend to support it, no matter the perceived utility that may be derived from it, the fact of the matter is that the use of polygraphs by the federal government consistently leads to false accusations of wrongdoing against innocent persons, and no adequate protections exist to prevent this from occurring. Moreover, the device routinely fails to identify those individuals who truly are committing criminal acts.

If the government truly wants to expose spies from within its ranks, it may wish to consider another creation of Dr. William M. Marston, the Harvard psychologist who many consider to be the father of the modern lie detector and the first to realize its commercial possibilities in the 1920s.³⁹ Marston, under his pseudonym "Charles Moulton", is probably more famous for having created the popular comic book character Wonder Woman. It is no coincidence that her magic lasso requires those who feel its bind to tell the absolute truth. To discover if other Robert Philip Hanssens exist among its ranks, the federal government may as well put its faith in Wonder Woman's magic lasso than to rely on the accuracy of the polygraph. Both are derived from notions of science fiction.

Our judicial system is designed to free ten guilty people in order to protect one innocent person from being punished. Continuing use of the polygraph stands that very principle on its head, and disgraces the honor and loyalties of many otherwise trustworthy and dedicated Americans. The utilization of polygraph examinations for screening purposes should, therefore, be stopped.

³⁸Time, unfortunately, did not permit a full legal analysis into issues surrounding use of the polygraph throughout the United States. Upon request, I would be more than willing to provide the Committee a detailed legal analysis of legal challenges asserted in the state and federal court systems, as well as an analysis of federal regulations governing polygraph examinations.

³⁹In 1915, Marston devised a primitive lie detector based on blood pressure. He was one of the first to realize the lie detector's commercial possibilities. In 1938, *Look* magazine described how Marston sometimes used his lie detection techniques in marital counseling. He also showed up in full-page ads testifying to the close shave offered by Gillette razors: "New Facts about Shaving Revealed by Lie Detector!" "Are polygraph tests lying to us?", *Baltimore Sun*, November 3, 2000.

EXHIBIT "1"



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ERIC CRODDY et al.,

Plaintiffs

v.

Civil Action No. 00-0651 (EGS)

FEDERAL BUREAU OF
INVESTIGATION et al.,

Defendants

DECLARATION OF ERIC CRODDY

The undersigned hereby declares as follows:

1. I am a person over eighteen (18) years of age and competent to testify. I make this Declaration on personal knowledge. This Declaration is submitted in support of the plaintiffs' Opposition to Defendants' Motion to Dismiss and Cross-Motion for Discovery.
2. I am a plaintiff in this matter.
3. I have never used illegal drugs or abused prescription drugs.
4. I have never sold drugs of any type.

THE POLYGRAPH RESULTS INACCURATELY INDICATE THAT MY PAST DRUG USE HISTORY IS OUTSIDE THE ACCEPTABLE PARAMETERS OF THE FBI'S HIRING POLICIES AND PRACTICES

5. In late 1997, I underwent a polygraph examination at the FBI's field office in San Francisco, California. Although I have never used illegal drugs, I was accused of lying about whether I had violated the FBI's guidelines with regard to drug use. The polygrapher attempted to get me to confess to drug use, which I refused to do. As a result, I was subsequently notified by letter that I failed the polygraph and my conditional job offer was rescinded.

STIGMATIZATION CAUSED BY THE POLYGRAPH RESULTS

6. I am in the process of applying for employment as a federal law enforcement officer. Ironically, although I am probably one of the few people my age who has never experimented with illegal drugs, I will have to reveal the fact that I failed the drug questions on an FBI polygraph examination. The FBI will also release this finding to any agency for which I seek employment. This will obviously seriously impact my chances of obtaining federal employment, if not eliminate it outright.

I do solemnly affirm under the penalties of perjury that the contents of the foregoing paper are true to the best of my knowledge.

Date: September 29, 2000

 9-29-00
Eric Croddy



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ERIC CRODDY *et al.*,

Plaintiffs

v.

FEDERAL BUREAU OF
INVESTIGATION *et al.*,

Defendants

Civil Action No. 00-0651 (EGS)

* * * * *

DECLARATION OF JOHN DOE#1

JOHN DOE#1, pursuant to 28 U.S.C. § 1746, hereby declares as follows:

1. I am a person over eighteen (18) years of age and competent to testify. I make this declaration on personal knowledge and in support of the plaintiffs' Opposition to Defendants' Motion to Dismiss and Cross-Motion for Discovery.

2. I am a plaintiff in this action. My identity is known to this Court and the defendants.

THE POLYGRAPH RESULTS INACCURATELY INDICATE THAT MY PAST DRUG USE HISTORY IS OUTSIDE THE ACCEPTABLE PARAMETERS OF THE FBI'S HIRING POLICIES AND PRACTICES

3. I used marijuana approximately ten (10) times from 1985 - 1988. I use the word "approximately" because I cannot accurately recall each instance in which I took a puff from a marijuana cigarette, but I am confident that my uses of marijuana were not greater than 10 times.

4. The last time I used marijuana, and the only time I used any illegal drug during college, was in January 1988; I was nineteen years old. My uses of marijuana were infrequent, experimental, and due mainly to poor judgment as a result of social drinking during high school at a young age.

5. I used cocaine once in 1985 during the fall of my senior year in high school. I was seventeen years old. Again, this one use of cocaine was prefaced by irresponsible use of alcohol as a teenager. Had it not been for my youthful indiscretion, I would have never experimented with cocaine. I have never done so since then, and I never will.

6. I have never purchased or sold any illegal drugs. I do not currently use illegal drugs. In fact, I have not taken any illegal drugs since January 1988, when I was nineteen years old. I am now thirty-two.

7. I do not have, nor have I ever had, any kind of substance abuse problem or addiction.

8. I disclosed all of the above facts to the FBI well in advance of my polygraph examination. I am currently completely within the FBI's guidelines on experimental drug usage, and I was completely within the FBI's guidelines on experimental drug usage when I was polygraphed.

9. I have reiterated this fact to the FBI in writing numerous times since my polygraph test in June 1996. Any background investigation of me would support everything I have stated here. All I have ever wanted was for the FBI to take the time to investigate my background - not rely on the results of a machine whose validity is so widely questioned by experts inside and outside of the FBI.

STIGMATIZATION CAUSED BY THE FBI'S POLYGRAPH RESULTS

10. I fully believe that my failed FBI polygraph affected my applications for employment for sworn positions to the North Carolina State Bureau of Investigation, The Chapel Hill, North Carolina Police Department, and the Raleigh, North Carolina Police Department.

11. The Chapel Hill and Raleigh Police departments actually conducted background investigations on me as part of the application process. I passed two Voice Stress Analysis tests (detection of deception exams) with the Raleigh Police Department during two

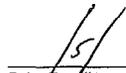
separate application processes. My statements concerning my drug usage were part of that test for deception.

12. On the written application for all the law enforcement agencies that I applied to after failing the FBI polygraph exam, I was required to disclose that I had applied to other law enforcement agencies (which has only been the FBI) and that I was not hired. Both the Chapel Hill and Raleigh police departments asked me about my experience with the FBI. I had to specifically disclose to them during my interviews that I failed the FBI's polygraph exam. In each interview setting, my polygraph exam became a point of contention or concern to my interviewers. I was asked if I lied. I was asked what I had lied about. I was asked why I failed. Based on these questions, I believe my failing the FBI's polygraph exam negatively stigmatized me and adversely affected the decisions of law enforcement agencies not to hire me.

13. Furthermore, if I apply to other law enforcement agencies, whether state, local or federal, I will be required - and even if not, it would be prudent - to reveal the fact that I failed prior FBI polygraph examinations on the drug usage questions. In any event, at some point the FBI will notify these other agencies that I failed their polygraph examination. Since I did not lie to the FBI, the fact that the FBI will inform prospective employers that I failed the polygraph will always stigmatize me.

I do solemnly affirm under the penalties of perjury and upon personal knowledge that the contents of the foregoing paper are true to the best of my knowledge.

Date: September 28, 2000



John Doe #1



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ERIC CRODDY *et al.*,

Plaintiffs

v.

FEDERAL BUREAU OF
INVESTIGATION *et al.*,

Defendants

Civil Action No. 00-0651 (EGS)

* * * * *

DECLARATION OF JOHN DOE#2

JOHN DOE#2, pursuant to 28 U.S.C. § 1746, hereby declares as follows:

1. I am a person over eighteen (18) years of age and competent to testify. I make this declaration on personal knowledge and in support of the plaintiffs' Opposition to Defendants' Motion to Dismiss and Cross-Motion for Discovery.

2. I am a plaintiff in this action. My identity is known to this Court and the defendants.

THE POLYGRAPH RESULTS INACCURATELY INDICATE THAT MY PAST DRUG USE HISTORY IS OUTSIDE THE ACCEPTABLE PARAMETERS OF THE FBI'S HIRING POLICIES AND PRACTICES

3. As an applicant for employment with the Federal Bureau of Investigation ("FBI"), I was required to truthfully reveal my past drug usage. As part of the formal written application process an applicant must answer two questions regarding past drug usage: 1) Have you used marijuana more than 15 times total or during the last 3 years, and 2) Have you used any other illegal drug or combination of illegal drugs more than 5 times or during the last 10 years. I answered both questions with the answer "no" throughout the written application process.

4. When undertaking my first polygraph examination on or about October 20, 1998, I was asked these questions again and instructed to reveal all past drug usage with times

and dates of drug usage, as well as identify the type of drug was used. I informed the FBI polygrapher that I recalled having used marijuana 5 times in my life. The occasions were as follows:

- 1) May or June of 1984 - shared a single marijuana cigarette with 3 others at a high school graduation party.
- 2) Between March and April of 1985 - shared a single marijuana cigarette with two others while drinking at a bar.
- 3) July 1985 - shared a single marijuana cigarette with other coworkers after work.
- 4) November 1988 - Smoked a marijuana cigarette after my discharge from the Army. It was a tradition for the outgoing servicemen to smoke marijuana as a way of bucking the system.
- 5) March 1989 - Smoked marijuana with friends at a college party.

I also noted that there was a one time incident in which I technically experimented with cocaine sometime during the later part of 1985. While at a house watching a football game, several coworkers, who unbeknownst to me used cocaine on a regular basis, had cocaine. As a curiosity I dipped my finger in the cocaine and tasted it. I also rubbed it around on my gums but was to scared to actually take it. Since this one-time "experiment" had occurred more than ten years earlier, I was not required to have noted this on my written application.

5. I also honestly revealed to the FBI that, like so many other college students, I had been around illegal drugs on some occasions while in college at parties. I had seen cocaine on 3 other occasions and marijuana several times. However, beyond what I described above, I did not participate in any other drug usage.

6. When pushed by the polygrapher, who was apparently trying to ascertain a number that I would supposedly be comfortable with for the purposes of the polygraph, I said I certainly could have forgotten a time or two smoking marijuana since I never kept a diary. However, I had no recollections of any other occasions. However, based on the assurances of the polygrapher and just to be safe, I settled with the number 7.

7. No further drug admissions were made. No other drug usage incidents existed.

8. By letter dated November 4, 1998, from Charles S. Prouty, Chief, Bureau Applicant Recruiting and Selection Section, Administrative Services Division, FBI, I was notified that my conditional offer of appointment had been rescinded because the results of my polygraph examination were not within acceptable parameters. Following my request, I was permitted to undergo a second polygraph examination on or about February 12, 1999. However, by letter dated February 26, 1999, from Patrick M. Maloy, Chief, Special Agent and Support Applicant Unit, Administrative Services Division, FBI, I was again notified that the results of the polygraph examination were not within acceptable parameters.

9. The FBI's interpretation of my polygraph results is entirely inaccurate and unfounded. If the FBI had pursued a background investigation of my, it would have revealed that my past drug usage was well within the acceptable parameters and that I truthfully provided the information.

10. Throughout my professional career, I have had to submit to numerous drug tests. I was administered random drug tests throughout my military experience in the United States Army from 1986-89, including a brief time period when I was in the National Guard in Florida. I also submitted to two drug tests in 1994 to attain my current full-time and part time positions. In April 2000, I submitted to a drug test as an applicant with the Bureau of Alcohol, Tobacco and Firearms ("ATF"). I have never failed a drug test.

STIGMATIZATION CAUSED BY FAILED POLYGRAPH EXAMINATIONS

11. The failed FBI polygraphs have foreclosed my opportunities for federal employment as a criminal investigator. In March 1999, I applied for a position with the ATF, and I was granted an interview in November 1999. At that time I was questioned about my past drug usage. I provided the same answers I previously provided to the FBI during its application process. I was notified I passed the interview in April 2000, and I was then scheduled for a physical and drug test. After both tests were completed and processed, I was scheduled to undergo a polygraph examination on May 31, 2000.

12. I attended the polygraph examination with high hopes of passing and clearing up the past problems I encountered with the FBI's test. My pre-polygraph interview was conducted by ATF polygrapher Vince Noble. As with my earlier polygraph examinations, I answered all questions truthfully. I also revealed the two alleged failed polygraphs with the FBI and detailed my past drug usage. Additionally, I also discussed my participation in the current lawsuit so that there would be no surprises if this was revealed later. I was told by Mr. Noble that the lawsuit was irrelevant and would not harm me in any way. In fact, to put me at ease he stated he had filed a lawsuit against the federal government. I did not attempt to deceive anyone and was hoping for a fair opportunity.

13. After completing the pre-polygraph interview, I was seated in the lobby while the polygrapher was apparently preparing the questions for my polygraph examination. After a few moments passed, Mr. Noble came to get me and I was again taken into the polygraph room. Upon sitting down he indicated that he and his supervisor, Special Agent Eduardo Fernandez, had called ATF headquarters in Washington, D.C. regarding my failed polygraphs with the FBI. I was explicitly told that headquarters instructed Mr. Noble to terminate my polygraph proceedings at that moment pending further investigation. When I asked what they needed to investigate, they told me that they were investigating what I had told the FBI versus what I had told them. I stated that I was prepared to take the polygraph at that moment and why not utilize their honesty machine to save us all a lot of time. However, no polygraph test was administered.

14. I was informed that a decision would be made by ATF headquarters in Washington. As of this writing, I have yet to received any kind of response. All attempts to find out the status of my application have been handled with the same answers, "the legal team is reviewing your case and a decision will be forthcoming". It appears clear to me that my past alleged polygraph failures have negatively stigmatized me in my pursuit for employment with the ATF.

I do solemnly affirm under the penalties of perjury and upon personal knowledge that

I do solemnly affirm under the penalties of perjury and upon personal knowledge that the contents of the foregoing paper are true to the best of my knowledge.

Date: September 28, 2000



John Doe#2



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ERIC CRODDY et al.

Plaintiffs

v.

Civil Action No. 00-0651 (EGS)

FEDERAL BUREAU OF
INVESTIGATION et al.

Defendants

* * * * *

DECLARATION OF JOHN DOE#3

JOHN DOE#3, pursuant to 28 U.S.C. § 1746, hereby declares as follows:

1. I am a person over eighteen (18) years of age and competent to testify. I make this

declaration on personal knowledge and in support of the plaintiffs' Opposition to

Defendants' Motion to Dismiss and Cross-Motion for Discovery.

2. I am a plaintiff in this action. My identity is known to this Court and the
defendants.

**THE POLYGRAPH RESULTS INACCURATELY INDICATE THAT MY PAST
DRUG USE HISTORY IS OUTSIDE THE ACCEPTABLE PARAMETERS OF
THE DEA AND FBI'S HIRING POLICIES AND PRACTICES**

3. I last used marijuana more than 14 years ago when I was sixteen years old. I know
this because I was at a party to celebrate my sixteenth birthday and the fact that I had just
acquired a new car. I ended up at a party where marijuana was being smoked by various
kids at the party. I recall being passed a "joint" and I reluctantly took a single puff. As far
as I could tell, it really had no effect on me. Later that same night, I again took a single
puff off a joint when the party relocated elsewhere. The effects from it never hit me and I
remembered thinking "what's the big deal?".

4. I recall the next occasion was approximately three months later while attending a junior prom. I was in a limousine and a person passed me a "joint". Unfortunately, I used poor judgment and decided to take a "puff". I did this a second time that same evening while riding home from the event in the same limo. When I was sixteen there were many social situations where marijuana was being used, as was typical in the early 1980s. Since I was not a "user", I declined many other offers to use marijuana. However, I do vaguely recall that were three or four other occasions where I took single "puffs" off a joint.

5. I can definitively recall that I ceased all experimentation with marijuana prior to New Years Eve 1986. I recall that I was at a New Years Eve party and marijuana was being smoked. I was offered a "puff" from a "joint" and unequivocally declined, recalling that I made a conscious decision that I would no longer submit to the peer pressures of smoking marijuana. That decision was almost like a New Years Resolution to me. My parents had always vociferously warned me of the dangers of drugs and alcohol. I felt ashamed and embarrassed that I had tried marijuana at all. I decided at that point that I would never be pressured into any further drug experimentation.

6. I never again have in any way, style or fashion, used marijuana or any other illegal drug. I would also adamantly point out that, other than the above incidents, I have never experimented with any other illegal drugs. I find it astonishing and insulting that someone with my background - a current law enforcement officer, a former undercover narcotics officer and a former DEA Special Agent Trainee - has to defend the few times I experimented with marijuana more than a decade ago when I was sixteen, and distinguish between whether puffing a joint more than once but on the same night constitutes one or two occasions.

7. On or about November 13, 1995, I underwent a polygraph examination by Special Agent Jimmy Fox from the Atlanta Division of the Drug Enforcement Administration ("DEA"). During the pre-interview, I explained that I was not entirely comfortable with the exact number of times I had experimented with marijuana, as so many years had passed. Although I was assured as a result of my interview that no problems would arise, I was accused of lying on the drug usage questions during the polygraph examination. On or about December 24, 1995, I received a letter from the DEA stating I would not be hired. There is no doubt in my mind that this decision was based on my polygraph results, particularly because I have reviewed documents from my DEA file.

8. In 1996, I was also polygraphed by the Federal Bureau of Investigation ("FBI") for a position as a support employee with the Special Surveillance Group ("SSG"). Soon after starting the test, I was told I had failed the questions on drugs. Approximately two months later, in or around May or June 1996, I received a letter from the FBI stating that I had failed the polygraph.

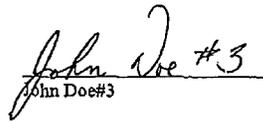
STIGMATIZATION CAUSED BY FAILED POLYGRAPHS

9. I am in the process of applying for employment as a federal law enforcement officer with the United States Secret Service. During the application process I will be required - and even if not, it would be prudent - to reveal the fact that I failed prior DEA and FBI polygraph examinations on the drug usage questions. Additionally, the records of my failed DEA and FBI polygraph examinations will be provided to other law enforcement agencies by the DEA and FBI. Since I did not lie to these agencies, the fact

that they will inform prospective employers (i.e., United States Secret Service) that I failed the polygraph will stigmatize me.

I do solemnly affirm under the penalties of perjury and upon personal knowledge that the contents of the foregoing paper are true to the best of my knowledge.

Date: September 28, 2000


John Doe#3



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ERIC CRODDY *et al.*

Plaintiffs

v.

FEDERAL BUREAU OF
INVESTIGATION *et al.*

Defendants

Civil Action No. 00-0651 (EGS)

DECLARATION OF JOHN DOE#4

JOHN DOE#4, pursuant to 28 U.S.C. § 1746, hereby declares as follows:

1. I am a person over eighteen (18) years of age and competent to testify. I make this declaration on personal knowledge and in support of the plaintiffs' Opposition to Defendants' Motion to Dismiss and Cross-Motion for Discovery.
2. I am a plaintiff in this action. My identity is known to this Court and the defendants.

THE POLYGRAPH RESULTS INACCURATELY INDICATE THAT MY PAST DRUG USE HISTORY IS OUTSIDE THE ACCEPTABLE PARAMETERS OF THE HIRING POLICIES AND PRACTICES OF THE FEDERAL BUREAU OF INVESTIGATION AND SECRET SERVICE

3. I experimented with marijuana for a period of about 5-6 months during my freshman year in college (October 1986 - March 1987). While I am not certain of the exact amount of times that I did smoke marijuana, since this occurred more than one decade ago, I am certain that it is within the guidelines set forth by the Federal Bureau of Investigation ("FBI") and United States Secret Service ("USSS"). I stated on my employment applications with both the FBI and USSS that the number of times was around seven (7). I was asked several times during the application process if I wanted to change the number, but I was comfortable with my answer as being as accurate as I honestly could be. Other than this usage, I have never used any illegal narcotics or abused

prescription drugs.

4. During the polygraph exam with the USSS I nevertheless and reluctantly modified my answer at the urging of, and with reassurances by, the polygraph examiner. During the initial round of testing, Special Agent Hutzell based his questions on the information indicated on my application (around 7 times). He stated that I was being deceptive and that I was having trouble with the drug question. At this point he suggested that maybe I smoked less than ten (10) times, which is true, and adjusted the question regarding drugs to "less than 10 times" during the second round of testing.

5. Again, Special Agent Hutzell said I was having trouble and being deceptive in my answers. He accused me of being a drug user and perhaps of even dealing drugs. I emphatically denied his accusations. Special Agent Hutzell then moved close to me and said the following (paraphrased): "At this point we've reached a point in the road where you can either run into a roadblock or a barrier. I can help you out with the roadblocks, but there's nothing I can do about a barrier. If there's something you want to tell me, then you should think about it now." He suggested that I change the number of times I smoked pot to "under 15", which is still consistent with what I originally stated (around 7 times). I did so and then he ended the testing saying my results were inconclusive but that it did not look good.

6. I also "failed" the FBI's polygraph exam, although that test was much shorter, far less confrontational, and had its questions posed in a different fashion. For example, the polygraph examiner asked the drug question based on the established FBI guidelines ("Are you within the drug use guidelines established by the FBI?").

7. I have passed every drug test that I have ever taken (about four). The tests were for the military when I was applying to flight school through the U.S. Air Force and New Hampshire Air National Guard.

STIGMATIZATION CAUSED BY THE POLYGRAPH RESULTS

8. The FBI was informed of my having failed the USSS polygraph exam, and I believe this was taken into account when the FBI rescinded my conditional job offer.

9. I am also in the process of applying for employment as a federal law enforcement officer. At some point during the application process I will have to reveal the fact that I supposedly failed polygraph examinations with both the FBI and USSS. Both of these agencies will also reveal to other agencies that I failed the tests. As a result, my chances of attaining employment in the law enforcement arena will be significantly diminished, if not eliminated altogether.

I do solemnly affirm under the penalties of perjury and upon personal knowledge that the contents of the foregoing paper are true to the best of my knowledge.

Date: September 28, 2000

John Doe #4
John Doe#4



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ERIC CRODDY <i>et al.</i> ,	*	
	*	
Plaintiffs	*	
	*	
v.	*	Civil Action No. 00-0651 (EGS)
	*	
FEDERAL BUREAU OF	*	
INVESTIGATION <i>et al.</i> ,	*	
	*	
Defendants	*	
* * * * *	*	

DECLARATION OF JOHN DOE "E"

JOHN DOE "E", pursuant to 28 U.S.C. § 1746, hereby declares as follows:

1. I am a person over eighteen (18) years of age and competent to testify. I make this declaration on personal knowledge and in support of the plaintiffs' Opposition to Defendants' Motion to Dismiss and Cross-Motion for Discovery.

2. My identity is known to the government.

3. In 1983, I entered active duty in the U.S. Army as an interrogator with a secret clearance based on a National Agency Check. After completing training at the Military Intelligence school at Ft. Huachuca, Arizona and Arabic language training at the Defense Language Institute in Monterey, California, I served as a strategic debriefer in the Federal Republic of Germany, where I debriefed refugees coming from the Middle East.

4. After completing my enlistment in 1987, I went through the Army ROTC program and was commissioned as a second lieutenant in the Army Reserve, Military Intelligence branch, in 1989. After a Special Background Investigation, I received a top secret clearance and was authorized SCI access. In 1991, during the Gulf War, I was mobilized and detached to the Federal Bureau of Investigation. I performed counterintelligence duties at the Washington Metropolitan Field Office at Buzzard Point and at the Los Angeles Field Office.

5. In 1993, after the World Trade Center bombing, I was again mobilized and detached to the FBI and performed counterintelligence duties at the New York Metropolitan Field Office.

6. In early 1995, favorably impressed by my two tours of duty with the FBI, I applied to become an FBI Special Agent. After passing the initial entry tests and scoring well on an Arabic language test, I received a phone call from Supervisory Special Agent Sue Chainer on May 10, 1995. She wanted to hire me as soon as possible as a contract linguist pending agent hire. I agreed to begin working 20 hours a week, and she told me that she would arrange a polygraph examination for me. On May 11, 1995, the chief recruiter at the Los Angeles Field Office, Special Agent Mike Hilliard, called me to schedule an interview for agent hire on June 9, 1995 at the FBI's San Francisco Field Office.

7. On May 15, 1995, I reported to the Los Angeles Field Office for a pre-employment polygraph examination. In the pre-test phase, my polygrapher, SA Jack Trimarco, falsely represented to me that the FBI had a new polygraph technique without control questions. He then proceeded to administer a probable-lie control question test. One of the probable-lie control questions SA Trimarco used was, "Did you ever drive while under the influence of alcohol?" or something very similar, but I had never driven under the influence of alcohol.

8. After the in-test phase, SA Trimarco falsely accused me of deception in denying having released classified information to unauthorized persons and having had unauthorized contacts with representatives of a foreign intelligence agency. The FBI peremptorily terminated my application for employment based on the polygrapher's opinion, and SSA Chainer's offer to hire me as a contract linguist was withdrawn.

9. Without my knowledge, the FBI reported this information to the U.S. Army. I know this because in two January 1999 interviews, U.S. Army Intelligence Special Agent David DeStefano explicitly mentioned it to me. In fact, the purpose of his visit was specifically to investigate the information the FBI reported to the Army. On

December 13, 2000, the U.S. Army Central Personnel Clearance Facility sent me a letter notifying me of its intention to revoke my SCI access and my security clearance. The accompanying Statement of Reasons twists information that I provided to FBI Special Agent Trimarco during my pre-employment polygraph examination to portray me as a disloyal subversive. I am challenging the Army's decision.

I do solemnly affirm under the penalties of perjury and upon personal knowledge that the contents of the foregoing paper are true to the best of my knowledge.

Date: February 2, 2001

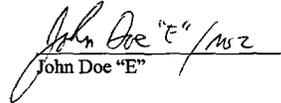

John Doe "E"

EXHIBIT "2"



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ERIC CRODDY et al.

Plaintiffs

v.

FEDERAL BUREAU OF
INVESTIGATION et al.

Defendants

Civil Action No. 00-0651 (EGS)

DECLARATION OF JOHN DOE#5

The undersigned hereby declares as follows:

1. I am a person over eighteen (18) years of age and competent to testify. I make this Declaration on personal knowledge. This Declaration is submitted in support of the plaintiffs' Opposition to Defendants' Motion to Dismiss and Cross-Motion for Discovery.

2. I am a plaintiff in this matter. My true identity is known to the defendants and this Court.

THE POLYGRAPH RESULTS INACCURATELY ACCUSE ME OF PAST DRUG USE AND PREVENTED MY HIRING BY THE SECRET SERVICE

3. I have never used illegal drugs or abused prescription drugs.

4. I have never sold drugs of any type.

5. On or about October 13, 1998, I was administered a polygraph examination by Special Agent Rob Savage of the United States Secret Service. I was specifically accused of deception in the area of drug usage and serious crimes. A second polygraph examination was conducted on or about October 30, 1998, by Special Agent Ignatio Zamora. I was told again that I was being untruthful in the area of drug usage and serious crimes. Both Special Agents Zamora and Savage told me they believed, based solely on the polygraph results, that I was withholding information. I was not.

6. By letter dated January 7, 1999, from Donna Burgess, Chief, Special Agent and Office of Investigations Branch, I was notified that I was not selected for a position as a Special Agent of the USSS. I believe this decision was solely based on my polygraph results.

**STIGMATIZATION CAUSED BY THE
SECRET SERVICE'S POLYGRAPH RESULTS**

7. I am in the process of applying for employment as a federal law enforcement officer. During the application process I will have to reveal the fact that I supposedly failed two earlier USSS polygraph examinations. Even if not required, I would still reveal this fact so as to be up front at all times. Of course, my USSS files are available for review by any law enforcement agency that would ask for them from the USSS. Since I did not lie about my past drug usage - as there is none - to the USSS, the fact that the USSS will notify my prospective employers that I failed the polygraph regarding past drug usage will stigmatize me, particularly as a law enforcement officer.

I do solemnly affirm under the penalties of perjury that the contents of the foregoing paper are true to the best of my knowledge.

Date: September 25, 2000



John Doe #5



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ERIC CRODDY <i>et al.</i> ,	*	
	*	
Plaintiffs	*	
	*	
v.	*	Civil Action No. 00-0651 (EGS)
	*	
FEDERAL BUREAU OF	*	
INVESTIGATION <i>et al.</i> ,	*	
	*	
Defendants	*	
	*	
* * * * *		

DECLARATION OF DARRYN MITCHELL MOORE

The undersigned hereby declares as follows:

1. I am a person over eighteen (18) years of age and competent to testify. I make this Declaration on personal knowledge. This Declaration is submitted in support of the plaintiffs' Opposition to Defendants' Motion to Dismiss and Cross-Motion for Discovery.

2. I am a plaintiff in this matter.

THE POLYGRAPH RESULTS INACCURATELY ACCUSE ME OF PAST DRUG USE AND PREVENTED MY HIRING BY THE SECRET SERVICE

3. I have never once used illegal drugs or abused prescription drugs.

4. On or about October 5, 1999, I underwent a polygraph examination in the Atlanta Field Office of the United States Secret Service ("USSS"). Special Agent Clarence Jorif, who conducted my polygraph, accused me of being a drug dealer and drug user. I was told I failed the examination and that I was "f***ed up."

5. On or about October 26, 1999, I underwent a second polygraph examination that was conducted by Special Agent Motts. After 20 minutes I was informed I had failed and was again accused of having used drugs.

6. By letter dated November 19, 1999, from Donna Burgess, Chief, Special Agent and Office of Investigations Branch, USSS, I was notified that I was not going to be hired by the USSS. This decision was clearly made solely because of my polygraph results.

7. In September 1986, I applied for a position with the Atlanta Police Department in Atlanta, Georgia. During the hiring process I was required to submit to a polygraph examination. The polygrapher asked questions on whether I used or sold illegal drugs. I responded saying no. The exam lasted for 3 hours, and I passed. The police department hired me three weeks later after conducting a full background investigation.

8. During the application process for a position of Special Agent with the Drug Enforcement Administration ("DEA"), I submitted to a urine test in 1998. The results were negative.

9. Prior to resigning from the police department to pursue a career in television news, I submitted to a drug test for FOX News in Chattanooga, Tennessee in May 1999. I was given a urine test and passed.

STIGMATIZATION CAUSED BY FAILED POLYGRAPH EXAMINATIONS

10. On or about September 14, 1998, I submitted my initial application to the DEA. I passed all phases of the applicant process: written test panel interview (December 3, 1998); psychological examination/drug test (December 4, 1998); medical examination (December 7, 1998 and December 15, 1998); physical task test (February 10, 1999); psychological interview (February 18, 1999); polygraph examination (March 11, 1999); background investigation (March 17, 1999 - completed by Special Agent Eldridge Earls); and a suitability review (May 1999). However, a little more than two weeks after Special Agent Jorif told me that I had failed my USSS polygraph examination, I was notified by the DEA that I was not chosen for a Special Agent position.

11. On April 19, 1999, I applied for the position of Special Agent with the Bureau of Alcohol, Tobacco and Firearms ("ATF"). A year later April 17, 2000, I received confirmation from ATF that I qualified for the position and I would have to take the TEA Exam, which was administered on July 19, 2000. I received written notice of the results on or about July 24, 2000, that indicated I passed the test. Although I was told I would be

scheduled for a panel interview at one of ATF's field division offices, I have not yet had an interview scheduled.

12. In or around February 2000, I applied for the position of Postal Inspector with the United States Postal Inspection Service ("USPIS"). After being informed that I met the necessary qualifications, I was scheduled to take a written examination on June 20, 2000, which I passed. As of this date I have not heard anything further from the USPIS.

13. On September 14, 2000, I requested an application to apply for a Special Agent position with the Internal Revenue Service, and I intend to submit an application.

I do solemnly affirm under the penalties of perjury that the contents of the foregoing paper are true to the best of my knowledge.

Date: September 25, 2000



Darryl Mitchell Moore



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ERIC CRODDY *et al.*,

Plaintiffs

v.

Civil Action No. 00-0651 (EGS)

FEDERAL BUREAU OF
INVESTIGATION *et al.*,

Defendants

* * * * *

DECLARATION OF JOHN DOE "C"

JOHN DOE "C", pursuant to 28 U.S.C. § 1746, hereby declares as follows:

1. I am a person over eighteen (18) years of age and competent to testify. I make this declaration on personal knowledge and in support of the plaintiffs' Opposition to Defendants' Motion to Dismiss and Cross-Motion for Discovery.
2. My identity is known to the government. I served honorably and with distinction as a Marine Corps Officer for five years, thirteen months of which were overseas, seven of them in a hostile environment. I worked with the poor in a southern city for a year as a full-time Volunteer. Before entering the accounting profession, I spent two years teaching and counseling troubled boys. I have spent the better part of my adult life serving my country and community.
3. In 1997, I applied for a position as a Special Agent of the United States Secret Service ("USSS"). In August 1997, I was administered a polygraph examination at the New Orleans field office by Special Agent Finn Ahlberg, who informed me that he believed I was trying to deceive him about my involvement with illegal drugs and serious crimes. I protested the results as being inaccurate.
4. As a result of my protest, I was administered a second polygraph in September 1997, by Special Agent John Lowe. I was led to believe by Special Agent Lowe that I

"failed" the second exam as well. By letter dated March 5, 1998, I was advised that I was no longer a candidate for employment. No reason was provided. Considering that I passed all other parts of the application process and that a background investigation was never started, it is a safe assumption that I was refused employment solely because of the polygraph results.

STIGMATIZATION CAUSED BY FAILED POLYGRAPH EXAMINATIONS

5. At the same time I was pursuing employment with the USSS, I was also involved in the application process with the United States Marshal's Service ("USMS"). Coincidentally, just days after I was excluded from USSS employment, the USMS notified me by letter dated March 9, 1998, that I was given a conditional offer of employment as a Deputy U.S. Marshal. However, by letter dated December 18, 1998, I was notified by the USMS that I was no longer under consideration for the position.

6. I was specifically informed by the USMS that I was denied employment with their agency because of my failing the USSS polygraph examinations. By letter dated July 14, 1999, Joseph E. Tolson, Team Leader, Background Suitability Human Resources Management, wrote:

You were the subject of a pre-employment background investigation completed by the U.S. Marshals Service on June 1, 1998. On the USMS Pre-interview Checklist you reported submitting an application for employment with the United States Secret Service (USSS) in September 1996. In [sic] inquiry into the status of your application revealed that you failed two polygraph examinations and the USSS discontinued processing your application. Information was obtained that your response to involvement or participation in serious crimes and drugs were deceptive. It was further discovered that you denied using any illegal drugs when you were being process [sic] for employment with USSS in 1996.

Based on your failure to disclose using a controlled substance in 1992 during the 1996 USSS applicant processing, the deceptive determination by the USSS Polygraph Examiner after two tests and

your admission of using a controlled substance precluded an approval for employment.

7. By letter dated July 23, 1999, I challenged the erroneous decision of the USMS. I explained that during the USSS pre-polygraph interview, without any prompting or coercion, I had revealed to Special Agent Ahlberg that while attending a fellow Marine officer's wedding in Cleveland, Ohio in June of 1992, I received from a friend of mine (a former Marine officer himself) medication that a doctor friend of his had prescribed for the specific purpose of mitigating hangover symptoms. I did not and still do not know the name of this medication. I took it the day of the wedding before drinking alcohol. It was not advertised as providing, nor did it provide, any hallucinatory or mind-altering effects; it simply lessened my headache the next morning. The use of this medication was unplanned and unsolicited; it was a spontaneous and isolated occurrence. I had not indicated this on any of the USSS forms because I just did not think that this event qualified as illegal drug use as defined on the forms or by common definition. However, in the spirit of full disclosure, and to ensure that it would not cause me any reactionary problems on the polygraph, I disclosed this event in the pre-exam interview. Special Agent Ahlberg's reaction indicated that he regarded this as a benign, harmless event that did not qualify as illegal drug use. In fact, he minimized it and quickly dismissed it. After being told that I was deceptive on drug use, I brought this incident up again. Special Agent Ahlberg again dismissed it, indicating that it was a harmless and irrelevant event. Based on this information, I requested that the USMS reconsider my application.

8. Although the USMS eventually conceded that I had not withheld information from the USSS, by letter postmarked March 2, 2000, I was notified that my application would not be reconsidered. Mr. Tolson wrote:

The USSS Polygraph Examination Unit substantiated that you were given two pre-employment polygraph examinations and that they were conducted by different examiners at intervals. Both USSS Polygraph Examiners deduced you were deceptive to questions (a) ["Have you ever committed a serious crime?"] and (b) ["Are you

intentionally withholding information regarding your use of illegal drugs?" listed above. The issues of consistently testing deceptively to the same questions on both polygraph examinations remain a concern to the agency.

9. Mr. Tolson also affirmatively notified me that I could appeal his decision to the Merit Systems Protection Board.

10. I was also offered a conditional appointment as a Special Agent with the U.S. Customs Service in June or July 1999. By letter dated April 19, 2000, the U.S. Customs Service's Personnel Security Branch notified me that I was found unsuitable for employment. I believe my failing the two USSS polygraph examinations played a significant role in that decision.

I do solemnly affirm under the penalties of perjury and upon personal knowledge that the contents of the foregoing paper are true to the best of my knowledge.

Date: October 2, 2000



John Doe "C"



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ERIC CRODDY et al.,

Plaintiffs

v.

Civil Action No. 00-0651 (EGS)

FEDERAL BUREAU OF
INVESTIGATION et al.

Defendants

* * * * *

DECLARATION OF JOHN DOE "A"

JOHN DOE "A", pursuant to 28 U.S.C. § 1746, hereby declares as follows:

1. I am a person over eighteen (18) years of age and competent to testify. I make this declaration on personal knowledge and in support of the plaintiffs' Opposition to Defendants' Motion to Dismiss and Cross-Motion for Discovery.

2. My identity is known to the government.

THE POLYGRAPH RESULTS INACCURATELY ACCUSE ME OF PAST DRUG USE AND PREVENTED MY HIRING BY THE SECRET SERVICE

3. During 1999, I was an applicant for the position of Special Agent with the United States Secret Service ("USSS"). After having been conditionally offered the position, my offer was rescinded by letter dated December 28, 1999, after the polygraph phase of the application process. On April 7, 2000, I was specifically informed by the polygrapher, Special Agent Nick Stein, that I failed the polygraph. I was told that I was showing deception on the questions regarding the illegal use of drugs, honesty on the application, and the honesty and integrity (control) questions.

4. I have never taken an illegal drug, abused prescription medicine or committed a serious crime. I was completely honest, candid, and forthright on my application.

**THE POLYGRAPH EXAMINATION INCLUDED
INAPPROPRIATE AND OFFENSIVE QUESTIONS**

5. During the pre-interview portion of the polygraph exam, I was asked if I had ever had sex with an animal.

STIGMATIZATION CAUSED BY THE POLYGRAPH RESULTS

6. I may apply for employment as a federal law enforcement officer in the future. Undoubtedly, I will have to reveal the fact that I was accused of lying by the USSS and that I failed the polygraph examination. Even if I do not reveal this stigma, the USSS will release the information to the agencies for which I seek employment. As a result, I will probably never be hired.

I do solemnly affirm under the penalties of perjury and upon personal knowledge that the contents of the foregoing paper are true to the best of my knowledge.

Date: September 29, 2000

John Doe "A"
John Doe "A"



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ERIC CRODDY *et al.*,

Plaintiffs

v.

Civil Action No. 00-0651 (EGS)

FEDERAL BUREAU OF
INVESTIGATION *et al.*,

Defendants

DECLARATION OF JOHN DOE "B"

JOHN DOE "B", pursuant to 28 U.S.C. § 1746, hereby declares as follows:

1. I am a person over eighteen (18) years of age and competent to testify. I make this declaration on personal knowledge and in support of the plaintiffs' Opposition to Defendants' Motion to Dismiss and Cross-Motion for Discovery.
2. My identity is known to the government.
3. During 1998, I was an applicant for the position of Special Agent with the United States Secret Service ("USSS"). Although I was provided a conditional offer of employment, this offer was rescinded by letter dated January 7, 1999, because of my polygraph results.

THE POLYGRAPH EXAMINATION INCLUDED
INAPPROPRIATE AND OFFENSIVE QUESTIONS

4. On August 25, 1998, I was administered a polygraph examination by Special Agent Ignacio Zamora. I was informed that I failed that portion of the test concerning illicit drug use, despite the fact that I was truthful in all my statements. I was provided another opportunity to take the polygraph exam on November 3, 1998, at which time the test was administered by Special Agent John Savage. I was again told I was lying about my past drug use when I was not.

5. During both examinations I was asked by Special Agents Zamora and Savage whether I had ever committed a felony. Both Special Agents specifically asked whether I had ever had sex with an animal. Of course I answered no.

I do solemnly affirm under the penalties of perjury and upon personal knowledge that the contents of the foregoing paper are true to the best of my knowledge.

Date: September 28, 2000


John Doe "B"



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ERIC CRODDY <u>et al.</u> ,	*	
	*	
Plaintiffs	*	
	*	
v.	*	Civil Action No. 00-0651 (EGS)
	*	
FEDERAL BUREAU OF	*	
INVESTIGATION <u>et al.</u> ,	*	
	*	
Defendants	*	
* * *	* * *	* * *

DECLARATION OF JOHN DOE "D"

JOHN DOE "D", pursuant to 28 U.S.C. § 1746, hereby declares as follows:

1. I am a person over eighteen (18) years of age and competent to testify. I make this declaration on personal knowledge and in support of the plaintiffs' Opposition to Defendants' Motion to Dismiss and Cross-Motion for Discovery.

2. My identity is known to the government.

THE POLYGRAPH EXAMINATION INCLUDED
INAPPROPRIATE AND OFFENSIVE QUESTIONS

3. During 1998, I was an applicant for the position of Special Agent with the United States Secret Service ("USSS"). Following written and verbal testing, I was given a conditional offer of employment. I underwent a polygraph examination conducted by Special Agent Ignatio Zamora on May 26, 1998. Although the examination lasted 4-5 hours, we did not complete it and I was asked to return on May 28, 1998. Throughout both examinations Special Agent Zamora tried to intimidate me and repeatedly yelled.

4. Special Agent Zamora asked me a lot of questions about drugs. I have only smoked pot two times in my life, and it was four years before I took the polygraph examination. Special Agent Zamora intimated to me that there was basically no way I could have only smoked twice. When he asked where I was when I smoked, I told him

once was in a friend's dorm room, and the second at a Grateful Dead concert. He then responded that if I went to a Grateful Dead concert then I was a pothead and would definitely have smoked more than two times. This is completely untrue and I denied it. Special Agent Zamora also questioned whether I had ever done anything to embarrass my family, including having pre-marital sex. I said I had had pre-marital sex, but that would not embarrass my family. He told me that it would have embarrassed his family.

5. On June 2, 1998, I was informed that I had failed the polygraph by Special Agent James Smith. Special Agent Zamora contacted me on July 21, 1998, and asked if I was still interested in employment. I said I was and we scheduled another polygraph examination. The second examination occurred on July 29, 1998, and was administered by Special Agent Raleigh Robinson, who said he was the "fix it man." He said they sent him special cases that needed a second chance. Throughout the test, he would stop the recorder and tell me stories of people who lied on the first test, then came clean with him and are now happy productive employees of the USSS. They ran the gamut of people who were heroin users, people who were the get-away drivers for liquor store robberies, liars, cheaters, whatever. One story in particular got my attention. Special Agent Robinson told me the story of a police officer in Georgia who had barnyard sex with a pig or sheep or some other animal. After each "story" ended, he told me how brave the person had to be to tell him the story, and then ask if something like that happened to me. I denied I had ever done any of these acts.

6. On August 31, 1998, I was told my application was terminated and that I failed the polygraph test.

7. During the polygraph interview process, I was asked if I had ever had sex with an animal. I was completely shocked and taken aback by this question. In fact, I believe my internal physiological reaction was significant enough to have thrown off the actual exam, particularly because now I really did not know what to expect as far as questions.

I do solemnly affirm under the penalties of perjury and upon personal knowledge that the contents of the foregoing paper are true to the best of my knowledge.

Date: September 28, 2000


John Doe "D"

Chairman HATCH. Mr. Keifer?

**STATEMENT OF RICHARD W. KEIFER, PAST PRESIDENT,
AMERICAN POLYGRAPH ASSOCIATION, APOPKA, FLORIDA**

Mr. KEIFER. Thank you for the opportunity to appear before the Committee, Mr. Chairman. My name is Richard Keifer. I'm currently an independent polygraph examiner residing in Orlando, Florida. Until I retired in 1996, I was a special agent of the FBI and a past manager of their polygraph program. I have also served as the President of the American Polygraph Association.

I believe in the protection of individual rights, the monitoring of the government, and the protection of national security. I have

Answer 7: There is research by Raskin and Hare on prison populations of diagnosed psychopaths that indicates they are detectable at approximately the same levels as the general population.

Answer 8: See Department of Defense studies regarding race and gender difference in polygraph testing. It appears there are no relative differences in rates of detection. Further, polygraph is used in Israel, Singapore, Japan, Mexico, and Canada.

Answer 9: To insure polygraph does not probe into private matters, you could record sessions. I believe the privacy concern should outweigh the burdensome records keeping requirements now in place. Written policies have been in effect my entire government career in the FBI Manual of instructions regarding prohibited questioning. These questions ranged from religion, sexual preference, union activities, etc, Management rigorously enforced these privacy concerns.

Responses of Richard W. Keifer to questions submitted by Senator Grassley

Answer 1: Deceptive with No Admissions of Guilt or an inconclusive result. I have been in the private sector since 1996, and am not certain what individual agencies do now. I am certain most individuals would initially be offered a reexamination. If these individuals continued to react I would suspect the employees past work product and access would be closely reviewed, and checked against internal espionage investigations for suspicious patterns. What additional proactive investigative steps would then be conducted, I do not know. There should be a defined adjudication process in place. Some agencies do a modest amount of investigation, and if they can't resolve the matter, refer these cases to the FBI for adjudication.

Answer 2: Most examiners in law enforcement are GS 12 and GS 13's. These agents now conduct investigations of corruption involving the highest levels of the government and also conduct internal investigations. I believe the examiners need to be assigned in a separate administrative division to maintain their independence. Examiners should not test anyone they know. Audit and compliance will insure the correct policies are being followed.

Answer 3: Will there be adverse consequences for not taking the examination, and would this create an uncooperative condition that could affect the results of an examination? From my past experience I would think there would be administrative consequences to anyone who refuses to follow agency policies. Therefore people could be ordered to take an examination. I believe these conscientious objectors should be prepared for the consequences. Internal security cannot be perceived as a game. If any testing was conducted, a recorded record should be maintained. Noncooperation could influence the results but may not. I would then judge these matters on a case-by-case basis.

Answer 4: Regarding FBI Regulations. I am not a current FBI employee. FBI Polygraph Reg: 13-22.299(2) was the standard that was used in criminal specific testing and is a policy I support. I do not know what policies are now in effect in applicant and security testing. In the area of employee testing there is an important distinction between those who react to questions and those who are concluded to be deceptive. I would interpret the history of the use of the polygraph in the FBI and our current knowledge of the capabilities and limitations of the polygraph to mean that adverse action will not necessarily result.

Responses of Mark S. Zaid to questions submitted by Senator Leahy

Question 1: In Mr. Kiefer's testimony, he refers to 'prior studies' indicating that the polygraph has "an accuracy rate" of between 90 percent and 99 percent. Is there any report in the peer-reviewed scientific literature establishing that polygraph screening has a higher accuracy rate than 90 percent? If so, could you please identify that study.

Answer: Almost every available polygraph study conducted pertains to specific incident criminal investigations (i.e., identifying the thief who embezzled funds). This question properly addresses the most significant aspect affecting current federal polygraph policies. The Congress needs to be most concerned about the reliability/validity of polygraph screening tests. It is these types of tests that are administered

every year to thousands of applicants for federal employment, as well as tens of thousands of current federal employees who undergo routine security investigations. The primary purpose of the applicant screening test is to determine suitability while the security screening test is designed to expose espionage. *However, there is absolutely no scientific evidence that either a of screening test is reliable or valid.* The few studies that exist prove that screening tests should be stopped immediately.

The largest study of polygraph tests used for national security screening ever conducted—“*Studies of the Accuracy of Security Screening Polygraph Examinations*”—was published in 1989 for the Department of Defense’s Polygraph Institute Down (“DoDPI”) by Gordon H. Barland, Charles R. Honts and Steven Barger. *Although the report was never classified, the government declined to publish it in the open literature. Indeed, when the results were first made known to the respective agencies involved there was tremendous pressure to classify the entire report. One of the authors, in fact, was forbidden by his parent agency from publishing or presenting the results. As a concession to the agencies involved, the association of the agency names with their performance data was classified.*¹ A copy of the report is at <http://truth.boisestate.edu/raredocuments/bhb.html>.

The study reports on three mock espionage experiments using different polygraph screening techniques. In Experiment One, 94% of the innocent subjects were cleared, but only 34% of the guilty subjects were identified as deceptive. Thus, the false negative rate (i.e., guilty individuals being declared innocent) was a staggering 66%. Experiment Two correctly classified only 79% of those who were innocent and 93% of those who were guilty. Finally, Experiment Three identified 90% of the innocent subjects and 81% of the guilty subjects. It is important to note that the examiners used in these experiments were trained federal polygraphers who regularly conducted periodic national security tests for their agencies. Following this primary study, four follow-up studies were conducted by the Department of Defense. The results of each supported and strengthened the findings of the primary study.

Professor Honts, one of the primary authors of the DoDPI study and a strong advocate of the polygraph, has harshly criticized the federal government’s use of polygraph testing for screening purposes. I strongly recommend that the Committee review two of his articles on the topic: “*The Emperor’s New Clothes: Application of Polygraph Tests in the American Workplace*”, *Forensic Reports*, 4:91–116 (1991)(available at <http://truth.boisestate.edu/raredocuments/ENChtml>), and “*Counterintelligence Scope Polygraph (CSP) Test Found To Be Poor Discriminator*”, *Forensic Reports*, 5: 215–218 (1992)(available at <http://truth.boisestate.edu/raredocuments/CSP.html>).

With respect to specific incident polygraph studies, from which Mr. Kiefer derives his statistics from, there have been many studies regarding the reliability of the polygraph when used in this manner. The resulting figures have varied widely. Though somewhat dated, let me recommend one report in particular for review. In November 1983, the Office of Technology Assessment (“OTA”) issued a report entitled “*Scientific Validity of Polygraph Testing: A Research Review and Evaluation*”. The OTA compiled the results of six prior reviews of polygraph research, ten field studies, and fourteen analog studies that it determined met the minimum scientific standards. The results were as follows:

- 1) Six prior reviews of field studies:
 - average accuracy ranged from 64% to 98%.
- 2) Ten individual field studies:
 - correct guilty detections ranged from 70.6% to 98.6% and averaged 86.3%;
 - correct innocent detections ranged from 12.5% to 94.1% and averaged 76%;
 - false positive rate (innocent persons found deceptive) ranged from 0% to 75% and averaged 19.1 %;
 - false negative rate (guilty persons found nondeceptive) ranged from 0% to 29.4% and averaged 10.2%.
- 3) Fourteen individual analog studies:
 - correct guilty detections ranged from 35.4% to 100% and averaged 63.7%;
 - correct innocent detections ranged from 32% to 91% and averaged 57.9%;
 - false positives ranged from 2% to 50.7% and averaged 14.1 %;
 - false negatives ranged from 0% to 28.7% and averaged 10.4%.

These statistics led to the enactment of The Employee Polygraph Protection Act of 1988, 29 U.S.C. §2001 et sea. The Act outlawed the use of polygraph screening

¹The agencies have since been identified as the Army INSCOM, the Air Force Office of Special Investigations, the National Security Agency and the Central Intelligence Agency.

tests in the private sector. Prior to enactment, it was estimated that each year at least 400,000 honest workers were wrongfully labeled deceptive and suffered adverse employment consequences. However, the federal government was exempted from the legislation.

Given that there are no studies that support either the need or usefulness of this exemption, the Committee should consider legislation to have it removed.

Question 2: Mr. Kiefer opines that, if Robert Hanssen had been given a polygraph examination, he would have “reacted with greater than 99% certainty.” Yet we know that Aldrich Ames was not caught even though he was given two polygraph examinations while he was at the CIA and that other guilty people have passed polygraph tests. Is there any reliable basis to estimate the probability that a particular person would or would not pass a polygraph test?

Answer: Mr. Kiefer’s statement was worded perfectly for use in live testimony in order to generate shock value, but it has absolutely no basis in fact. It is no more based on reality than the magic of pulling a rabbit from a hat. Indeed, as described above, the only government studies available on screening examinations reveal that guilty individuals are far more likely to escape detection than even an innocent person will be falsely accused as high as 66% of the time.

However, more than anything Mr. Kiefer’s statement illustrates the enormous significant dangers that exist with respect to polygraph screening and the negative impact it can have on federal employees. Mr. Kiefer served as a distinguished Special Agent of the Federal Bureau of Investigation for more than two decades, including many years as a polygrapher, and is a former past president of the American Polygraph Association. Based on my experiences, his strong bias is quite typical of government polygraphers in general. With that type of obvious bias revealed publicly, it is not unreasonable to assume that such an attitude during an examination would have negative consequences on many innocent individuals simply because the polygrapher personally believed something was suspect.

In any event, for purposes of my response, let us presume Mr. Kiefer’s statement is accurate and Mr. Hanssen would have registered deceptive in a routine screening examination. What then would have occurred? Based on all publicly available information concerning Mr. Hanssen’s case—and as my legal practice substantially involves national security matters, I am following the investigation very closely—there is little, if any, incriminating evidence that would have been discovered through a follow-up investigation. The overwhelming evidence against Mr. Hanssen was obtained directly from a foreign source or agent. Unlike other spies such as Aldrich Ames, Harold Nicholson, or Edward Howard, there was no suspicious evidence of significant debt, serious employment disputes, drug or alcohol abuse or marital difficulties that would likely have prompted additional investigations and the exposure of espionage activities. Therefore, even if Mr. Hanssen had registered deceptive—and there is no scientific basis to conclude this to be so the result would have likely been no more indicative of a truthful result as that of a false positive.

While it appears so simple to discuss Mr. Hanssen’s case in retrospect, we cannot use the knowledge we possess now in order to analyze the possible scenarios that could have occurred had a polygraph examination been administered. For all anyone knows, a deceptive reading five, ten or fifteen years ago would have meant Mr. Hanssen was being falsely accused of something he never did, as occurs every year to federal employees and applicants, and his career would have unfairly suffered as a result.

Question 3: Everyone acknowledges that “false positive” polygraph examinations can occur in which innocent people will show deceptive reactions. In addition, Mr. Kiefer estimates that “there might be a maximum of 3 spies in a population of 10, 000.” Assuming for the sake of argument that Mr. Kiefer’s estimate of the frequency of espionage is correct:

a. Is it not likely that if you give polygraphs to 10, 000 people in order to catch the three spies, you will get hundreds of false positive responses?

b. Assuming that the three spies all fail their polygraph tests, they would be only three out of perhaps hundreds of employees who failed the test. How are investigators going to be able to find the three real spies and not unfairly cast suspicion on all of the innocent employees who have false positive results?

Answer: Attorney General John Ashcroft recently admitted that there exists a 15% false-positive rate. “Spy-Wary FBI Agrees to Polygraphs”, *Los Angeles Times*, Mar. 2, 2001. Based on this figure, up to 1,500 individuals will be falsely accused of espionage. Even applying the most conservative false-positive figures, say 1%, then 100 individuals will be stigmatized in order to catch three spies. This hypothetical scenario became a reality at the Central Intelligence Agency following the arrest of Aldrich Ames in 1994. Approximately 300 employees had their careers put

on hold, some for as long as six years, until they were finally exonerated of any wrongdoing. Some have likely never recovered from the experiences, nor will they.

Given existing policies at the federal agencies, it is virtually impossible to ensure that unfair suspicion will not be conferred on individual employees during a witch hunt for a spy. This is the essence of the public policy balance that this Committee must address. Is it fair and appropriate to knowingly ruin innocent careers while on a fishing expedition for a spy who likely will never be exposed by the polygraph? In my opinion, it is not.

Question 4: Do you believe it is appropriate to exclude someone from government employment, without any independent corroborating evidence of deception or other information indicating that the applicant is unqualified for the position, solely because that person failed a polygraph? If not, what specific steps should be taken to insure that this does not occur?

Answer: Obviously, I do not. Indeed, this is the very issue that is being litigated in *Crodgy et al. v. FBI et al.*, Civil Action No. 00-0651 (Mar. 15, 2000 D.D.C.) (EGS) and *John Doe #6 et al. v. FBI et al.*, Civil Action No. 00-2440 (Oct. 11, 2000 D.D.C.) (EGS). Federal agencies routinely rescind conditional job offers based solely on polygraph results. I would respectfully refer you to the pleadings in these two cases for further discussion of the relevant legal analysis. Copies can be found at the following websites: www.nopolygraph.com, www.stopolygraph.com and www.antipolygraph.org. Based on my experiences, I would recommend that either screening eligibility tests are eliminated or that a requirement be imposed that a background investigation must first be conducted to corroborate any polygraph results before the information can be considered in the employment decision.

Question 9: How do you insure that routine polygraph tests do not probe into purely private matters? Are there any questions that are off limits? What safeguards exist to prevent the release of private information?

Answer: Although the American Polygraph Association, the Employee Polygraph Protection Act and many state licensing laws prohibit inquiry into such areas as religious beliefs or affiliations, beliefs or opinions regarding racial matters, political beliefs or affiliations, beliefs, affiliations or lawful activities regarding unions or labor organizations and sexual preferences or activities, there are few prohibitions imposed upon the federal government. For example, the United States Secret Service routinely questions applicants on sexual behavior, both lawful (premarital sex) and unlawful (sexual involvement with animals).

The only means by which to ensure certain areas of inquiry are forbidden is to require the federal government to comply with the Employee Polygraph Protection Act. While some exceptions may be necessary, no agency should be permitted to question individuals on topics that do not reasonably relate to the skills needed to adequately perform the position in question.

With respect to the release of private information, there are essentially no existing safeguards. The extent to which a federal agency can disseminate polygraph results to other federal, state or local agencies is governed by the Privacy Act of 1974, 5 U.S.C. § 552a *et seq.* The sharing of information is explicitly permitted under the Act's routine use exception. *Id.* at § 552a(b)(3).

For example, the FBI maintains a system of records—JUSTICE/FBI-002—within its Central Records System that pertains to applicants for employment with the FBI. The system includes all records and information relevant to an applicant's investigation, personnel inquiry, or other personnel matters. The FBI may disclose all personal information and records—even if inaccurate—from this system as a routine use to any federal agency where the purpose in making the disclosure is compatible with the law enforcement purpose for which it was collected, e.g., to assist the recipient agency in conducting a lawful criminal or intelligence investigation, to assist the recipient agency in making a determination concerning an individual's suitability for employment and/or trustworthiness for employment and/or trustworthiness for access clearance purposes, or to assist the recipient agency in the performance of any authorized function where access to records in this system is declared by the recipient agency to be relevant to that function.

As a result of this ability to freely share information, individuals who falsely registered deceptive on one agency's polygraph examination may have that information used against them by another agency, without ever being given an opportunity to challenge the underlying allegation of deception. Unfortunately, the enactment of additional legislation will be required to minimize the extent to which a federal agency can disseminate information pertaining to polygraph examinations. Current law is clearly inadequate.

Responses of Mark S. Zaid to questions submitted by Senator Grassley

Question 1: Let's say that an employee polygraph exam ends with a deceptive result but with no admission of guilt. How do agencies deal with this situation? How about with an inconclusive result?

Answer: Unfortunately, it is difficult to provide a precise answer to this question as procedures differ from agency to agency. Typically, however, should either of the situations occur above, the agency will initiate further investigation into the individual's background and activities. Oftentimes, the employee may be transferred to a non-sensitive or less sensitive position and may even have promotions withheld. On paper, the employee may very well not suffer an adverse personnel action. By this I mean, they will continue to hold employment and remain at the same pay grade.

The most recent example describing this type of circumstance is that of the FBI. By Memorandum dated March 16, 2001, the FBI announced it would institute counterintelligence-focused polygraph examinations to employees who occupy certain assignments or occupations. With respect to those employees who experience trouble with the polygraph, the Memorandum noted:

Experience has shown that most FBI employees taking the counterintelligence-focused polygraph examination successfully complete the test. However, there may be a very small number of employees whose tests are either inconclusive or are indicative of deception. Polygraph examiners will attempt to fully resolve all unexplained responses through the effective use of thorough pre-and post-test interviews. If, upon completion of a thorough examination, there is still an inconclusive or deceptive response, it will be considered "unexplained". Consistent with existing policy, no adverse action will be taken based upon the polygraph results alone. However, more extensive investigation will be initiated to resolve the unexplained test results.

However, realistically, an employee in this situation will unequivocally suffer the equivalent of an adverse personnel decision. Some agencies, such as the CIA and FBI, have taken years to finally resolve a false-positive or inconclusive polygraph result. Some employees may be suspended with pay, which is not always considered an "adverse action". Employees at the CIA who found themselves in such a position were not permitted to attain overseas assignments. This is often the end of a career for individuals employed within the Directorate of Operations. Scientists under contract at the Department of Energy who experience polygraph problems will find themselves transferred to other positions, which often would negatively impact upon their careers. In my written testimony, I described the situation of FBI Special Agent Mark Mallah. In his case, it took approximately two years of intensive and intrusive investigation before he was finally exonerated. He was so disgusted by how he was treated, he resigned in protest. Unfortunately, Special Agent Mallah's reaction is not unusual, and the U.S. government has lost many fine employees strictly because of false polygraph results.

Question 3: Will there be adverse consequences for employees who refuse to take a polygraph examination?

Answer: Again, this can differ from agency to agency. However, most agencies will react in a similar manner. For example, the FBI Memorandum referred to above states that those employees who refuse to take the test will be subjected to administrative actions which may include transfer, a finding of insubordination and disciplinary action or a reevaluation of the employee's security clearance.

Question 5: FBI regulations prohibit the use of the polygraph as a "substitute for logical investigation by conventional means" (FBI Poly. Reg: 13-22.299(2)). Does this mean that, if all other factors are in order, the failure of a polygraph examination in the context of a national security update will not necessarily result in an adverse action?

Answer: Again, by viewing this question solely by the legal definition of "adverse action" (such as those actions that can be appealed to the Merit Systems Protection Board, 5 U.S.C. § 1201.3), the conclusion would be accurate. However, as I described above, reality dictates otherwise. For all intents and purposes, the employee does suffer "adverse consequences", though it might not legally be in the form of an "adverse action".

This question, however, does raise a larger issue. If such a prohibition exists with respect to employees, why should applicants receive any less consideration? How "logical" is that? There is no question that FBI applicants who have received a conditional offer of employment, but who then fail their polygraph examination (or register inconclusive) are not afforded the opportunity of a background investigation.

Their job offer is immediately rescinded. More than that, the polygraph result is maintained in that individual's personnel file, and will be freely disseminated as permitted by law. One polygraph examination may stigmatize an individual throughout the federal government thereby precluding their future employment and contribution to the United States.

There is something inherently wrong and unfair with the current federal polygraph policies that are implemented throughout the different law enforcement and intelligence agencies of our government. Without intervention by this Committee, there is little chance these policies will ever change.

I trust this additional information proves to be useful. I would be happy to elaborate further upon any question, or respond to additional inquiries.

