

**THE ADMINISTRATION'S INITIATIVES TO EXPAND
POLYGRAPH USE AND IMPOSE LIFELONG CEN-
SORSHIP ON THOUSANDS OF GOVERNMENT EM-
PLOYEES**

TWENTY-FIFTH REPORT

BY THE

**COMMITTEE ON GOVERNMENT
OPERATIONS**

**together with
Additional and Dissenting Views**



**NOVEMBER 22, 1983.—Committed to the Committee of the Whole House
on the State of the Union and ordered to be printed**

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LETTER OF TRANSMITTAL

HOUSE OF REPRESENTATIVES,
Washington, D.C., November 22, 1983.

HON. THOMAS P. O'NEILL, JR.,
Speaker of the House of Representatives,
Washington, D.C.

DEAR MR. SPEAKER: By direction of the Committee on Government Operations, I submit herewith the committee's twenty-fifth report to the 98th Congress. The committee's report is based on a study made by its Legislation and National Security Subcommittee.

JACK BROOKS, *Chairman.*

(III)

CONTENTS

	Page
I. Summary -----	1
II. Discussion -----	3
A. Background -----	3
B. The Government's increasing reliance on polygraphs -----	4
1. The polygraph -----	4
2. Prior Federal use of polygraphs -----	5
3. The directives -----	6
4. The Office of Technology Assessment study -----	8
a. Polygraph use in investigations -----	8
b. Personnel security screening -----	10
c. Coercive use of the polygraph and its impact on employees -----	10
d. Countermeasures -----	12
C. Prepublication review agreements -----	13
1. The Interdepartmental Report—The Rationale for Prepublication Review -----	13
2. The agreements -----	14
3. Quantitative assessment—GAO's testimony -----	15
4. Prepublication review and the Constitution -----	15
5. Censorship is not a public good -----	17
III. Findings -----	20
IV. Conclusions and recommendations -----	21

VIEWS

Additional views of Hon. Glenn English -----	22
Additional views of Hon. Frank Horton, Hon. Lyle Williams, Hon. William F. Clinger, Jr., Hon. Judd Gregg, and Hon. Tom Lewis -----	25
Dissenting views of Hon. John N. Erlenborn, Hon. Thomas N. Kindness, Hon. Robert S. Walker, Hon. Dan Burton, Hon. Alfred A. (Al) McCandless, and Hon. Larry E. Craig -----	26

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HOUSE OF REPRESENTATIVES {

REPORT
No. 98-578 }

THE ADMINISTRATION'S INITIATIVES TO EXPAND POLYGRAPH USE AND IMPOSE LIFELONG CENSOR- SHIP ON THOUSANDS OF GOVERNMENT EMPLOYEES

NOVEMBER 22, 1983.—Committed to the Committee of the Whole House on the
State of the Union and ordered to be printed

Mr. BROOKS, from the Committee on Government Operations, sub-
mitted the following

TWENTY-FIFTH REPORT

together with
Additional and Dissenting Views

BASED ON A STUDY BY THE LEGISLATION AND NATIONAL SECURITY
SUBCOMMITTEE

On November 15, 1983, the Committee on Government Operations approved and adopted a report entitled "The Administration's Initiatives To Expand Polygraph Use and Impose Lifelong Censorship on Thousands of Government Employees." The chairman was directed to transmit a copy to the Speaker of the House.

I. SUMMARY

Stating that additional safeguards are needed to protect classified information, the present Administration has undertaken a number of new policy initiatives. While few disagree with the end sought, there has been considerable controversy over some of the specific programs the Administration has developed and sought to implement. Perhaps the most drastic are the Administration's proposals to extend the Government's reliance on polygraph in ferreting out leakers and potential leakers of classified information, and to impose life-long censorship upon employees and others who have access to certain types of classified information.

On March 11, 1983, President Reagan issued a directive on safeguarding national security information. That Directive mandates

greater use of and reliance on polygraph examinations in investigations of leaks of classified information. Under its provisions, Federal employees are required to submit to such exams or face the prospect of adverse consequences. These changes were based upon the recommendations of an Interdepartmental Group set up to study the problem of media leaks.

The Directive also requires all individuals with access to classified information designated Sensitive Compartmented Information, or SCI, to sign a prepublication review agreement. It requires the submission for governmental review of all writings, including fiction, and proposed speeches which touch upon intelligence matters. This requirement is life long.

In June of 1983, the Department of Defense released proposed revisions to its polygraph regulations which would expand significantly the Department's use and reliance upon the polygraph. The changes would require polygraph exams in pre-employment and pre-access interviews for positions requiring access to certain classified information. Thereafter, polygraph exams could be given randomly in continuing security checks. As with the President's Directive, anyone refusing to submit to a polygraph exam would be subject to adverse consequences.

The House Government Operations Committee has held extensive hearings on the Federal Government's use of the polygraph. Reports were issued in 1965 and again in 1976. Both concluded that the validity of polygraph testing was not scientifically supported. The first recommended limiting their use to only the most important national security cases and criminal investigations; the latter recommended curtailing their use altogether.

Because the Department of Defense's proposed regulations ignore the committee's previous recommendations, Chairman Brooks sought and obtained on July 26, 1983, an amendment to the Defense Department Authorization legislation which prevented implementation of the DOD revisions until April 15, 1984. This was done to allow sufficient time for Congress to review the new policies.

Neither the polygraph procedure nor the prepublication review requirement is new; both were generated and have been employed for some time within the intelligence agencies of the Government. It is the attempt to apply these requirements beyond the Central Intelligence Agency and the National Security Agency to other agencies of the Executive Branch which has demanded scrutiny.

An extensive review of this new application, culminating in a public hearing on October 19, 1983, was undertaken by the Legislation and National Security Subcommittee of the Committee on Government Operations. Answers were sought to questions concerning the justification of and effects that will accompany the expansion of the use of polygraph examinations and the prepublication review requirement to non-intelligence agencies. To this end, Congress' General Accounting Office (GAO) and Office of Technology Assessment (OTA) were requested to collect and analyze information relevant to the proposed changes. Additional witnesses were called to present their views at the hearing held by the Subcommittee on Legislation and National Security. While the data revealed and conclusions drawn

may have bearing upon the operation of these programs within the intelligence agencies, the focus of the investigation has been on the application of the polygraph and censorship programs outside of the intelligence agencies. The Committee has not attempted to review their use in those specialized agencies.

The Committee concludes, based on these studies and the testimony presented at the hearing, that the validity of the polygraph is not scientifically supported for the purposes and manner of its use proposed by the Administration. The risk of misidentifying truthful persons as deceptive is great in these new policies and they should not be implemented. In addition, the prepublication review requirement will result in significant infringement of the free flow of information and debate which is necessary for an informed public and which has been historically protected from prior censorship. With the prepublication review requirement, the Government can censure the books, articles, editorials, and fictional writings of many former Government officials. Prepublication review should be rejected as a wholly inappropriate response to the negligible problem of former officials divulging classified information.

II. DISCUSSION

A. BACKGROUND

In a public hearing of the Legislation and National Security Subcommittee, held on October 19, 1983, two separate but related Directives proposed by the Administration were examined.¹ The President on March 11, 1983, issued a Security Directive to all executive agencies and Departments aimed at reducing unauthorized disclosures of classified information.² This Directive closely follows the recommendations of an Interdepartmental Report which studied a particular aspect of the problem of unauthorized disclosures, i.e., those disclosures which occur where "there is no apparent involvement of a foreign power."³ The Report and its recommendations were aimed at preventing "media," not "espionage" leaks.

The Subcommittee focused upon two policies mandated by the Directive: (1) The expanded reliance on the use of polygraph exams as a means of enhancing the investigations of these leaks when made by anonymous government employees, and (2) the imposition of prepublication review agreements to prevent leaks which may occur in publications and statements by former or current Federal employees.

In addition, the subcommittee also examined proposed revisions, dated June 1983, to the Department of Defense's polygraph regulations.⁴ These proposals were based upon a DOD study that recom-

¹ Hearing before the Legislation and National Security Subcommittee of the Government Operations Committee, Oct. 19, 1983, hereinafter referred to as the "Hearing."

² National Security Decision Directive—84 on Safeguarding National Security Information, issued on Mar. 11, 1983, hereinafter referred to as the "President's Directive."

³ Report by The Interdepartmental Group on Unauthorized Disclosures of Classified Information, Mar. 31, 1982, p. A-1. This group was appointed by Attorney General William French Smith at the request of William P. Clark, the then Assistant to the President for National Security Affairs. Members of the group include representatives from the Departments of State, Treasury, Defense, Energy, and the Central Intelligence Agency. The group was chaired by Richard K. Willard of the Department of Justice.

⁴ Department of Defense Directive No. 5210.48, Oct. 6, 1975, as amended Jan. 14, 1977, "Polygraph Examinations and Examiners," hereinafter referred to as the "DOD Directive."

mended changes in security policy.⁵ Specifically, the proposed changes to the DOD Directive will require expanded reliance on polygraph testing to assist in determining the initial and continuing eligibility of civil, military, and contractor personnel at DOD for access to specific types of, and special programs involving, classified information. Polygraph exams would be used by all DOD components in screening potential employees and in conducting periodic random checks of DOD personnel as is currently done at the National Security Agency.

While consistent with the President's Directive in using the polygraph in "media leak" investigations, the DOD's proposed changes in polygraph use greatly exceed the scope of the President's Directive.

In one fundamental aspect of major importance, however, both Directives are similar. Whatever the use of the polygraph envisioned by each Directive, both provide that adverse consequences to an employee may accompany a refusal to submit to a polygraph exam. From an employee's point of view, therefore, he or she will be coerced into submitting to polygraph examinations.

To assist the Subcommittee in its review of both these Directives, Chairman Brooks requested the GAO to compile and analyze statistical information concerning the need for, and effect of, these sweeping policy changes.⁶ On June 14, 1983, a questionnaire was sent by Chairman Brooks to those executive agencies and departments covered by various provisions of the President's Directive. Later, additional information was requested and obtained. The results of these surveys were revealed and discussed at the Hearing.

Further, on February 3, 1983, Chairman Brooks, with the support of Representative Frank Horton, the Ranking Minority Member of the committee, requested that OTA review available scientific literature on polygraphs to determine their validity.⁷ OTA was not asked to examine the issues of utility, privacy, constitutionality or the ethical aspects which have been previously raised in the polygraph debate. The OTA also presented its conclusions at the Hearing.⁸

B. THE GOVERNMENT'S INCREASING RELIANCE ON POLYGRAPHS

1. *The Polygraph*

Through the ages man has sought an easy and sure method of separating truth from falsehood.⁹ That elusive search continues today. There are those who hope somehow to "divine" the honest from the dishonest through a sure and simple measurement. The fact is, however, that there is no simple way to discover when a person is lying. The polygraph instrument is not a "lie detector" per se; it does not indicate directly whether a subject is being deceptive or truthful. This is because there is no known physiological response that is unique to deception. A polygraph examination consists not only of the collection of physiological response measurements but the examiner's evaluation of

⁵ DOD Select Panel Review of the DOD Personnel Security Program, April 1982.

⁶ Letter of Chairman Brooks to the General Accounting Office, dated May 18, 1983.

⁷ Letter of Chairman Brooks to the Office of Technology Assessment, Feb. 3, 1983.

⁸ Scientific Validity of Polygraph Testing (A Research Review and Evaluation) Technical Memorandum, October 1983, hereinafter cited as the "OTA Study" and testimony of John H. Gibbons, Director of OTA at the Hearing.

⁹ For a history, see H. Rept. 80-198, 89th Congress, 1st Session, Mar. 22, 1965. "Use of Polygraphs as 'Lie Detectors' by the Federal Government," Committee on Government Operations, pp. 8-9.

those measurements as well. This is often referred to as a diagnosis of truthfulness or deception. Measured increases in physiological responses may be caused by any number of factors, including fear, anxiety, or excitement. Today, the term polygraph refers to the multiple-pen measuring system which simultaneously records three physiological responses on a roll of moving paper: breathing patterns, blood pressure, and galvanic skin response.

2. *Prior Federal Use of Polygraphs*

The House Government Operations Committee has a longstanding interest in polygraph use within the Federal Government. In 1964 the Foreign Operations and Government Information Subcommittee conducted a Hearing on the Federal Government's use of polygraphs. They found that, excluding the National Security Agency (NSA) and the Central Intelligence Agency (CIA), Federal agencies had conducted 19,796 polygraph examinations in 1963. In 1965, after carefully considering the evidence presented during the hearing, the House Committee on Government Operations issued a report in which it was concluded that there was no scientific evidence to support the use of the polygraph and that the research on its accuracy was not adequate.¹⁰ The Committee recommended that additional research be conducted, that training for polygraph examiners be improved, that the government guarantee that polygraph exams in fact be voluntary (insure that refusal to take the exam will not constitute prejudice), and that the President set up an interagency committee to develop regulations for Federal Government polygraph use.¹¹

Following the issuance of the Committee's report, an interagency polygraph committee, consisting of representatives from DOD, the Central Intelligence Agency, the Department of Justice, the Bureau of the Budget, the Office of Science and Technology, and other agencies, was formed. That committee, after study and review of Federal polygraph use, concluded that there was insufficient scientific evidence concerning the validity and reliability of polygraph testing and that polygraph use constituted an invasion of the privacy of the individual being examined. The interagency committee recommended that the "use of polygraphs in the Executive Branch should be generally prohibited and used only in special national security cases and in specified criminal cases."¹²

In 1973, the Civil Service Commission (now the Office of Personnel Management) issued Appendix D, to Chapter 736 of the Federal Personnel Manual setting forth specific regulations on the use of polygraphs in personnel investigations of competitive service applicants and appointees for competitive service positions.¹³ That Appendix, which is still in effect pending full implementation of the President's Directive, states that only executive agencies with highly sensitive intelligence or counterintelligence missions directly affecting the national security are permitted to use the polygraph for employment screening and personnel investigations of applicants for competitive service positions. Further, it requires that such examinations be volun-

¹⁰ Id., page 25.

¹¹ Id., page 2.

¹² Letter to President Lyndon B. Johnson from the Civil Service Commission, dated July 3, 1968, page 2.

¹³ Federal Personnel Manual, Appendix D, Chapter 736.

tarily agreed to by an employee in writing and that the refusal to consent to a polygraph examination will not be made a part of his or her personnel file.

In 1976, the Foreign Operations and Government Information Subcommittee of the House Government Operations Committee again held hearings and reported on the use of polygraphs by Federal agencies.¹⁴ In that report the Committee determined that polygraph use had declined significantly since 1963 and that there had not been much additional research on polygraph validity. The Committee concluded that "the nature of research undertaken, both federally and privately funded, and the results therefrom, have done little to persuade the Committee that polygraphs . . . have demonstrated either their validity or reliability, in differentiating between truth and deception, other than possibly in a laboratory situation."¹⁵ Further, that report concurred with the conclusion in the 1965 report that there is no such thing as a "lie detector" device. The Committee recommended prohibiting the use of polygraphs in all cases.¹⁶

In July 1975, DOD issued its Directive regulating polygraph use for the first time within the Department.¹⁷ As amended in 1977, that Directive has governed polygraph use in DOD to this date. The DOD Directive provides that DOD and its components may use polygraph exams only in limited circumstances. It states that "[a]ll DOD investigations and interviews shall depend upon relevant evidence secured through skillful investigations and full interrogations" and that "[p]roperly used, the polygraph can be a useful investigative aid in securing and verifying evidence, however, the polygraph shall be employed only as an aid to support other investigative techniques and be utilized generally only after the investigation by other means has been as thorough as circumstances permit."¹⁸ Thus, at DOD, the polygraph was intended to be used only as an adjunct to other investigative techniques. Further, the DOD Directive carefully controls DOD polygraph use to prevent "its use in cases other than serious criminal cases, national security investigations and highly sensitive national security access cases."¹⁹

Finally, the DOD Directive explicitly prohibits adverse actions against any employee for refusing to submit to a polygraph examination and forbids recording such a refusal in that employee's personnel file. "Adverse action shall not be taken against a person for refusal to take a polygraph examination, . . . [i]nformation concerning a person's refusal to submit to a polygraph examination shall not be recorded in his or her personnel file and shall be protected against unauthorized disclosure."²⁰ Thus, under the present DOD Directive, the polygraph is to be used "only when the individual taking the polygraph examination *volunteers* to take the examination."²¹ [Emphasis added.]

3. The Directives

Both the President's Directive and DOD's proposed changes to its directive represent radical departures from past Government policy

¹⁴ H. Rept. No. 94-795, 94th Congress, 2d Session, January 28, 1976, "The Use of Polygraphs and Similar Devices by Federal Agencies."

¹⁵ *Id.*, page 12.

¹⁶ *Id.*, page 46.

¹⁷ The DOD Directive, *supra* n. 4.

¹⁸ *Id.*, page 2.

¹⁹ *Id.*

²⁰ *Id.*, page 4.

²¹ *Id.*, page 2.

regarding polygraph use. The President's Directive provides, in pertinent part:

The Office of Personnel Management and all departments and agencies with employees having access to classified information are directed to revise existing regulations and policies, as necessary, so that employees *may be required* to submit to polygraph examinations, when appropriate, in the course of investigations of unauthorized disclosures of classified information. At a minimum, such regulations shall permit an agency to decide that appropriate *adverse consequences will follow an employee's refusal to cooperate with a polygraph examination* that is limited in scope to the circumstances of the unauthorized disclosure under investigation. Agency regulations may provide that only the head of the agency, or his delegate, is empowered to order an employee to submit to a polygraph examination. Results of polygraph examinations should not be relied upon to the exclusion of other information obtained during investigations.²² [Emphasis added.]

Under the proposed revisions to the DOD Directive, polygraphs would be used throughout the Department to assist in determining the initial and continuing eligibility of employees for access to certain classified information. Polygraphs would be used both in the initial screening of personnel who would have access to certain classified information and, thereafter, in aperiodic testing. Specifically, the DOD revisions would authorize the use of the polygraph to determine initial and continuing eligibility of DOD civilian, military and contractor personnel for access to classified information known as Sensitive Compartmented Information (SCI) or to special access programs within the Department.²³

As with the President's Directive, adverse consequences may follow an employee's refusal to submit to the exam under the DOD Directive revisions.

When a polygraph has been established as a requirement for selection or assignment to a position within the Department of Defense, as a condition of access to classified information, or for use in investigation of unauthorized disclosures, *refusal to take such an examination may result in adverse consequences after due consideration of such factors as the individual's reasons for refusal; his or her record of service and performance; any additional factors derived from a background investigation of the individual; the sensitivity of the particular information to which he or she has or would gain access; and other relevant factors . . .*²⁴ [Emphasis added.]

These initiatives stand in sharp contrast to the policies set forth in the Federal Personnel Manual and the 1975 DOD Directive, as previously discussed.

²² The President's Directive, *supra* n. 2, paragraph 5.

²³ Department of Defense proposed revision, June 1983, page 4.

²⁴ *Id.*, at page 3.

4. *The Office of Technology Assessment Study*

At the Hearing, the OTA presented its findings based on its study on polygraph validity. For background, the OTA reviewed the present extent of Federal polygraph use and determined that over the last ten years polygraph use has tripled, with roughly 23,000 examinations being conducted in 1982. Thus, while the Government Operations Committee was able to determine that polygraph use by the Federal Government had dropped in the preceding 10-year period (1963 to 1973), its use has made a dramatic return. Except in the National Security Agency and the Central Intelligence Agency, more than 90 percent of all polygraph tests in 1982 were for criminal investigations. At present, the non-intelligence agencies make very little use of the polygraph for investigations of unauthorized disclosures of classified information. Between 1980 and 1982, polygraphs were used on 261 occasions in such investigations.²⁵

Statistics collected by the GAO in their survey reveal the magnitude of changes which the new policies will entail. Under the terms of the President's Directive, almost half of the Federal workforce, or over 2.5 million individuals, are potentially exposed to polygraph exams in leak investigations. Under the DOD Directive, if revised according to plan, about 2.4 million employees who have security clearances would be subject to its requirements. In addition, about 1.3 million employees of defense contractors would be covered.²⁶

The primary focus of the OTA review was to evaluate the scientific evidence on polygraph validity. OTA conducted an extensive analysis of all relevant prior research reviews, analyzed a wide range of field and analogous studies, and surveyed Federal agencies for relevant data.

OTA concluded that no overall measure or single statistic of polygraph validity can be demonstrated through the available research. Some uses of the polygraph have been comparatively well researched, such as the use of polygraphs in criminal investigations. Other uses, such as pre-employment screening, have had no acceptable research attention. Conclusions about polygraph validity can only be made regarding the particular type of polygraph use in question. For the study, the OTA identified three predominant categories of polygraph use: Specific-issue criminal investigations (i.e., as an aid in narrowly defined investigations of misbehavior), specific-issue screening investigations (i.e., the "dragnet" investigation), and personnel security screening (i.e., pre-employment, pre-access, and aperiodic screening.)²⁷

a. Polygraph Use in Investigations

Use of the polygraph in criminal investigations is most often characterized by a prior investigation that both narrows the list of possible suspects down to a very few, and importantly, has already developed significant information about the crime itself. This allows questions to be asked that can be very specific and aimed at particular knowledge only the guilty suspect would possess.

²⁵ OTA study, pages 1-1 and 1-2.

²⁶ Testimony of Dr. Kenneth J. Coffey, Associate Director—GAO, pages 5-8. (GAO Survey, October 18, 1982, pages 1-2.)

²⁷ OTA study, page 1-2.

This application of the polygraph is the only use extensively researched. OTA reports, however, that the results of the relevant studies vary widely with regard to the validity of the test. In a review of 28 studies meeting "acceptable scientific criteria", correct guilty detections ranged from 17 to 100 percent. "Overall, the cumulative research evidence suggest that when used in criminal investigations, the polygraph test detects deception better than chance, but with significant error rates."²⁸

Both the President's Directive and the proposed revisions to the DOD Directive authorize the use of the polygraph in administrative and criminal investigations of unauthorized disclosures of classified information. OTA was not, however, able to generalize the results of the prior studies to these new proposals primarily because no specific investigative procedure has been identified for use under these Directives.

The second type of polygraph use examined in detail by OTA is the specific-issue screening method. This method is used, for example, to screen a large number of people regarding the commission of a crime. The President's Directive is equivocal regarding "dagnet" use of polygraphs in investigations involving the unauthorized disclosure of classified information. While the Department of Justice witness testified that the Administration does not interpret the Directive as encompassing such usage,²⁹ the lack of an expressed prohibition in the Directive suggests that specific issue screening with polygraphs could be permissible.

OTA reports that there has been no scientific research conducted on specific-issue screening of the polygraph. OTA was unable to generalize from the research that does exist on polygraph use in criminal investigations, because conditions surrounding the unauthorized disclosure of classified information will likely vary greatly from the conditions reviewed by OTA in the criminal setting.

A major problem, identified by OTA, with using polygraphs in large-scale screening situations, is the significantly higher error rates that will likely result in this context.

The screening situation is most dependent on the so-called base rate of guilt, that is, the percentage of groups of persons being screened that has engaged in the criminal (or otherwise proscribed) activity. If the percentage of guilty is small, say 5 percent (1 guilty person out of every 20 persons screened, or 50 out of 1,000), then even assuming a very high (95%) polygraph validity rate, the predictive value of the screening use of the polygraph would only be 50 percent. This is, for each 1,000 individuals screened, about 47 out of the 50 guilty persons would be correctly identified as deceptive, but 47 out of the 950 innocent persons would be incorrectly identified as deceptive (false positives). Thus, of the 94 persons identified as deceptive, one-half would be innocent persons. For every person correctly identified as deceptive, another person would be incorrectly identified.³⁰

²⁸ *Id.*, pages 1-5.

²⁹ Testimony of Richard Willard, pages 45-48.

³⁰ OTA study, pages 7-6 and 7-7.

It is important to note that the Federal Bureau of Investigation, which is the principal non-intelligence agency using the polygraph, prohibits the "use of the polygraph for dragnet-type screening of large numbers of suspects or as a substitute for logical investigations by conventional means."³¹ Further, polygraph examinations are allowed in the FBI only when "there is reasonable cause to believe that the person to be examined has knowledge of or was involved in the matter under inquiry or investigation, or if the person is withholding information relevant to the inquiry or investigation."³²

b. Personnel Security Screening

OTA also examined the scientific validity of polygraphs for use in personnel security screening. As indicated, the proposed revisions to the DOD Directive would authorize the use of the polygraph for determining initial and continuing eligibility of DOD civilian, military and contractor personnel for access to highly classified information, SCI and/or for special access programs. These entail the use of polygraphs in pre-employment, pre-access, and in aperiodic testing of such employees.

OTA's review of the scientific literature uncovered only four studies (one by DOD) that address this use. Unfortunately, none specifically address validity and according to OTA "all had serious limitations in study design."³³ Therefore, OTA concluded that there is no acceptable research to establish polygraph validity for use in personnel screening, be it pre-employment, pre-clearance, or aperiodic.

As with specific-issue screening, personnel screening carries with it the problem of incorrectly identifying innocent people as deceptive in large numbers. "All other factors being equal, the lower base rates of guilt in screening situations would lead to high false positive [identifying a truthful person as deceptive] rates, even assuming very high polygraph validity."³⁴

Dr. John H. Gibbons, Director of OTA testified at the Hearing that "there is legitimate concern that DOD use of polygraphs for screening purposes may incorrectly identify significant numbers of innocent persons as deceptive."³⁵

The OTA conclusions on polygraph validity may be summarized as follows: There is no scientific evidence to support the use of polygraphs for screening purposes, investigatory or otherwise, and there is good reason to expect that such use will carry with it the high risk of misidentifying many innocent persons as liars. Further, while there has been some scientifically acceptable study of the use of polygraphs in the context of narrow investigations, the conclusions on validity are conflicting. The validity of the polygraph has simply not been conclusively demonstrated.

c. Coercive Use of the Polygraph and Its Impact on Employees

Another important issue addressed in the OTA study is that of the voluntariness of submission to a polygraph exam. OTA reports that "coercing persons to take a polygraph test could affect validity,"³⁶ and cautions that "imposing penalties for not taking a test may create

³¹ FBI Polygraph Regulations 13-22.2(2), 1980.

³² *Id.*, 13-22.4(2).

³³ OTA study, pages 1-4.

³⁴ OTA study, pages 7-9.

³⁵ Hearing.

³⁶ OTA study, pages 1-6.

a de facto involuntary condition that increases the chances of invalid or inconclusive test results.”³⁷ Both the President’s Directive and the DOD proposed revisions would allow adverse consequences to be taken against any employee who refuses to take a polygraph examination. This is a sharp break with present policy in DOD. As it stands now, polygraph examinations are voluntary. That is, a person will not be punished in any way for refusing to take polygraph examinations.

The DOD directive limits adverse consequences to “nonselection for the assignment or employment; denial or revocation of clearance or reassignment to a nonsensitive position.”³⁸ The President’s Directive gives the agencies no guidance in determining what constitutes “appropriate adverse consequences.”

Richard K. Willard, Deputy Assistant Attorney General, testifying on behalf of the Administration, said:

In our view, an employee who refuses an order to take a polygraph examination in an appropriate case may be subject to a range of administrative sanctions to include removal, as well as lesser forms of discipline, such as a letter of reprimand or suspension without pay. The appropriateness of any sanction for refusal to comply with an order to take a polygraph examination would obviously depend upon the circumstances of the case, including the reason given by the employee for refusing the order.³⁹

Even if the refusal to submit to a polygraph involved no loss of job or demotion, the loss of career opportunities is still coercive and likely to affect the validity of the test, as well as the morale of government workers.

Kenneth Blaylock, the President of the American Federation of Government Employees, AFL-CIO, expressed his and the members of the union he represents views on the practical effects the government’s increasing use of polygraphs will have on government workers. He stated at the Hearing, “. . . everything in the regulation supports the prime abuse of polygraphs—namely, the use of those unreliable machines to intrude into the private lives and thoughts of American citizens.”⁴⁰

The American Federation of Government Employees represents over 700,000 workers, many of whom are employed at DOD. Mr. Blaylock characterized the Administration’s polygraph policy as “an unwarranted intrusion in the private lives of loyal, hard-working federal employees.”⁴¹ Addressing the President’s directive, he asserted, “If this directive is implemented as proposed, federal workers would not even have the dignity and protections routinely granted an indicted suspect in the criminal courts.”⁴²

Former Senator Sam Ervin (D-N.C.), who was concerned about the expansion of polygraph use during his tenure in the Senate, wrote Chairman Brooks on September 22, 1983. In this letter Senator Ervin referred to the polygraph as a fraud and twentieth century witchcraft.⁴³

³⁷ *Id.*, pages 1-7.

³⁸ Department of Defense proposed revision, *supra* n.23, page 3.

³⁹ Testimony of Richard Willard, pages 31-32.

⁴⁰ Testimony of Kenneth Blaylock, page 11.

⁴¹ *Id.*, page 1.

⁴² *Id.*, page 7.

⁴³ Letter to Honorable Jack Brooks from Sam Ervin, Sept. 22, 1983.

d. Countermeasures

A final area of concern is the susceptibility of polygraph exams to countermeasures. These may include the more mundane practices of simple physical movement or pressure during the exam or prior practice with the instrument, as well as tactics involving drugs, hypnosis, and biofeedback to "beat the machine." The OTA found research in the area of countermeasures to be "limited" and the results "conflicting."⁴⁴ To the extent that the polygraph is to be used in safeguarding the national security, this is a serious and troubling area which demands further study before the instrument is considered reliable.

Dr. John Beary, Associate Dean at the Georgetown University School of Medicine, and former Principal Deputy Assistant Secretary of Defense for Health Affairs, testifying at the Hearing, emphasized the dangers that reliance on the polygraph may have for our national security. In response to questioning by Chairman Brooks he indicated:

This machine cannot tell who is lying and who isn't, one would have to assume someone who is as professional as the KGB is going to train their spies. They do indeed, I understand, have a camp in Eastern Europe where they do this . . . If you don't confess, you are never going to get caught by this thing. I would suspect, judging by the number of people and the security lapses we have had at CIA and other places where they use the polygraph, that people are getting through. Things are happening even though they are being screened on this.

So, if it doesn't work yet your people think it does, your managers think it does, then you have a spy sitting there comfortably who is home free. Once you pass that, people pretty much forget about you in this context.⁴⁵

Thus, the DOD's reliance on polygraphs to screen for spies creates a false sense of security. Prior to the Hearing, Dr. Beary's views on polygraphs were well known within the DOD. In memorandums sent to the Secretary of Defense, he criticized the plans to extend polygraph use.⁴⁶ At the hearing he reiterated his position by stating that there is no such thing as a "lie detector" and that there is no physiological response unique to lying.

In his testimony, Dr. Beary posed the question of why, considering all its scientific shortcomings, the polygraph is used by private companies and government agencies. The answer, he stated:

. . . is the *placebo response*. Because most citizens are scientifically naive, some confess to things when hooked up to the polygraph because they believe it really can detect lies. However, you don't get something for nothing. The innocent people whose careers are damaged by the machine are the price paid for these placebo-induced confessions.⁴⁷

⁴⁴ OTA study, p. 1-8.

⁴⁵ Hearing.

⁴⁶ Memorandum of Dr. John Beary, dated Dec. 16, 1982, and Jan. 11, 1983.

⁴⁷ Testimony of Dr. John Beary, p. 5.

C. PREPUBLICATION REVIEW AGREEMENTS

The other major policy initiative, which the President's Directive mandates in an effort to stop unlawful disclosures of classified information, is the requirement that all persons with access to Sensitive Compartmented Information (SCI) sign a nondisclosure agreement which contains a prepublication review provision. Specifically, the Directive requires that "Each agency of the Executive Branch that originates or handles classified information shall adopt internal procedures . . ." which, at a minimum, require "[all persons with authorized access to Sensitive Compartmented Information (SCI) . . . to sign a nondisclosure agreement as a condition of access . . ." which ". . . must include a provision for prepublication review to assure deletion of SCI and other classified information."⁴⁸

This requirement was also carefully reviewed, by the Legislation and National Security Subcommittee at the Hearing.

1. *The Interdepartmental Report—The Rationale for Prepublication Review*

As with the polygraph provision of the Directive, prepublication review agreements were recommended in the Interdepartmental Report. Within the scope of that report (as indicated previously, unauthorized disclosures of classified information in which there is no apparent involvement of a foreign power) there were two primary types of unauthorized disclosures identified. First, the use of polygraph examinations was envisioned as a means to enhance the investigations of "media" leaks by anonymous Government employees; second, the imposition of prepublication review agreements was recommended to stop classified information from being disclosed overtly in publications and materials by former or current employees.

These two policies serve different purposes and may be strictly segregated. When a leak is made by an anonymous government employee to the media, an investigation is required to determine the source. Preventing these leaks requires the establishment of a deterrent to future leaks by finding the source and punishing the person responsible. In this context, expanding the use of polygraph testing was recommended by the Interdepartmental group to improve the Government's ability to investigate and prosecute this type of leak.

When a disclosure of classified information occurs through a publication or other prepared materials by a former or current official, however, the source is known. The former or current official, as the author, is clearly the source of the unauthorized disclosure and investigations are not problematic. This type of disclosure, it would appear, will most often occur through inadvertence, not in a deliberate attempt to reveal classified information. According to the Interdepartmental Committee, prevention requires a system of government review, prior to publication, of those publications or materials by current or former individuals which may contain classified information to assure its deletion. The requirement of prepublication review agreements to be signed by those with access to Sensitive Compartmented Information (SCI) develops such a system by a contractual method.

⁴⁸ The President's Directive, *supra* N.2, paragraphs 1 and 1b.

2. The Agreements

In compliance with the President's Directive, a civilly enforceable prepublication review contract was issued by the Department of Justice on August 24, 1983, to all Federal agencies with personnel who have access to SCI. Those agencies are currently in the process of obtaining the required signatures from the covered individuals.

This Sensitive Compartmented Information Nondisclosure Agreement provides, *inter alia*, that those who sign:

In consideration of being granted access to SCI and of being assigned or retained in a position of special confidence and trust requiring access to SCI, and other classified information, . . . agree to submit for security review by the Department or agency last granting . . . either a security clearance or an SCI access approval all materials, including works of fiction, that . . . contemplates disclosing to any person not authorized to have such information or that . . . [is] prepared for public disclosure, which contain or purport to contain:

(a) any SCI, any description of activities that produce or relate to SCI, or any information derived from SCI;

(b) any classified information from intelligence report or estimates; or

(c) *any information concerning intelligence activities, sources or methods.* [Emphasis added.]⁴⁹

Further, the agreement makes clear that the obligation to submit such information for review is lifelong.⁵⁰ The contract provides that, upon receipt of submitted material, the government (the department or agency to which it was submitted "coordinating with the intelligence community or other agencies when appropriate") will substantially respond within 30 working days from the date of receipt.⁵¹ The contract provides administrative and civil remedies for a breach.⁵²

Finally, the agreement reminds those who sign it that unauthorized disclosures of classified information may constitute violations of several criminal statutes⁵³ and indicates that the agreement does not constitute a waiver by the Government of any criminal sanctions under these provisions.⁵⁴

⁴⁹ Sensitive Compartmented Information Nondisclosure Agreement, section 5.

⁵⁰ *Id.*, "I understand and agree that my obligation to submit such information and materials for review applies during the course of my access to SCI and at all times thereafter."

⁵¹ *Id.*, section 7.

⁵² The Sensitive Compartmented Information Nondisclosure Agreement provides that administrative sanctions include:

"(1) Termination of any security clearances and SCI access approvals.

"(2) Removal from any position of special confidence and trust requiring such clearances or access approvals; and

"(3) The termination of . . . employment or other relationships with the departments or agencies that granted [the] . . . security clearances or SCI access approval." (Section 8.)

Civil remedies provided in the Agreement include:

"(1) The assignment to the United States Government of 'all royalties, remunerations, and emoluments that have resulted, will result, or may result from any [breaching] disclosure, publication, or revelation,' and

"(2) a court injunction 'prohibiting disclosure of information in breach of [the] agreement.'" (Sections 9 and 10.)

⁵³ Specifically, Sections 641, 793, 794, 798, and 952 of Title 18, United States Code; Section 783(b), Title 50, United States Code, and the provisions of the Intelligence Protection Act of 1982.

⁵⁴ Sensitive Compartmented Information Nondisclosure Agreement, section 8.

3. *Quantitative Assessment—GAO's Testimony*

As with its review of polygraph policy, the General Accounting Office (GAO) compiled and analyzed statistical information obtained in response to a questionnaire from Chairman Brooks to the departments and agencies covered concerning the need for, and effect of, this sweeping policy change.

On the basis of the information submitted by the agencies a clearer picture of the problem of unauthorized disclosures can be seen, and the potential effects of the Directive are readily apparent.

Of particular importance to the Committee in conducting its review of the prepublication review requirement was an assessment of the need for this provision. As indicated, the prepublication review requirement was designed to prevent those disclosures which occur through publications and other prepared materials by employees or former employees themselves.

According to the GAO testimony, there were 21 unauthorized disclosures of classified information made through writings or speeches of current or former employees from six agencies in the last five years. Of these 21 "leaks," it was not determined how many could have been prevented by a prepublication review agreement had it been in effect, because it is not known how many of these disclosures were made by individuals with access to SCI. Of particular note, however, was the revelation that at most, only two leaks resulted in SCI being disclosed. Further, of the 21, the Departments of Defense and State each had only one unauthorized disclosure of this sort.⁵⁵

To combat this problem, GAO testified that the President's Directive will require 127,750 Federal employees and contractor employees who have SCI access, excluding employees in the CIA and NSA, to sign the life-long prepublication review agreements. Of this total, 120,940 persons, or approximately 95 percent, are employees of the Departments of Defense and State.

Based upon the answers given in the GAO's investigation, the prepublication review provision of the Directive is a massive policy response to what has been, in the recent past, a very limited disclosure problem. The extent of this policy imbalance is further realized when one considers the qualitative effects the prepublication review requirement will have on free speech in our nation.

4. *Prepublication Review and the Constitution*

Two First Amendment scholars—Professors Lee Bollinger of the University of Michigan Law School and Lucas Powe of the University of Texas Law School—testified at the Hearing, and declared that the prepublication review requirement in the Directive violates the Constitution.⁵⁶ Professor Thomas Emerson of Yale University Law School submitted a written statement also criticizing the Directive on constitutional grounds.⁵⁷ Professor Powe characterized the requirement as "an outrageous assault on the first amendment," and indicated

⁵⁵ Letter to the Honorable Jack Brooks from Frank C. Conahan, Director, National Security and International Affairs Division, General Accounting Office, on October 18, 1983, Enclosure III.

⁵⁶ Testimony of Lee Bollinger, page 2, and Lucas Powe, page 1.

⁵⁷ Letter of Thomas Emerson to Chairman Brooks dated Oct. 31, 1983.

that "[w]hat the administration has done is beyond precedent."⁵⁸ Although each professor took a different tack in his analyses of the legal issues, they agreed on the fundamental points. All three indicated that the prepublication review requirement constitutes, in legal parlance, a "prior restraint or licensing system" and that there is no question but that the framers intended the First Amendment to guard against such prior censorship programs.

Quoting Chief Justice Burger's comments in *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976), Professor Emerson concludes that:

The essence of Directive 84 is to impose a sweeping prior restraint . . . it sets up a classic and virulent scheme of censorship. As Chief Justice Burger has said, "prior restraints are the most serious and least tolerable infringements on First Amendment rights."⁵⁹

Professor Powe stated:

It [the prepublication review requirement] also attacks the First Amendment at the one place where there is *no* debate at all about what the Framers intended: Prior censorship should be unconstitutional. If government had the ability to punish individuals for what they said, the Framers believed that that power could only be brought into play after the speech occurred. Licensing was totally forbidden. [Emphasis added.]⁶⁰

Professor Bollinger concurred:

For more than six decades now, the courts of this country have struggled with the task of defining a workable set of concepts and principles for the first amendment. Throughout this time, however, a virtual consensus has formed around one basic idea—and that is that prior restraints are the least favored, the most distrusted, method of proceeding against harmful speech activity. Licensing, or prior restraint, it has been repeatedly noted in the literature and cases, is the one matter, perhaps the only matter, we can be confident that the Framers intended to prohibit by the Free Speech Clause.⁶¹

Our national abhorrence of prior restraints is confirmed by ample legal precedent, particularly when applied in the context of public or political speech and including instances when national security information was considered to be at stake.⁶²

Despite deep and long standing opposition to prior censorship programs the Administration is proposing—through the requirement of prepublication review agreements—just such a system. As a matter of Supreme Court precedent the professors identified only one opinion which arguably supports the new policy constitutionally. In a recent

⁵⁸ Testimony of Lucas Powe, page 1.

⁵⁹ Written statement of Thomas Emerson, page 11.

⁶⁰ Testimony of Lucas Powe, page 1.

⁶¹ Testimony of Lee Bollinger, page 3.

⁶² *Id.*, page 4, citing *Patterson v. Colorado*, 205 U.S. 454 (1907); *Near v. Minnesota*, 283 U.S. 697 (1931); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *The New York Times Co. v. United States*, 403 U.S. 713 (1971); *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976); *Organization for Better Austin v. Keefe*, 402 U.S. 415 (1971); *Southeastern Promotion, Ltd. v. Conrad*, 420 U.S. 546 (1975).

decision, *Snepp v. United States*, 444 U.S. 507 (1980), the Supreme Court upheld the validity of a prepublication review agreement signed by a CIA agent. *Snepp* is the only authority upon which the prepublication review requirement can rest.

While each professor took issue with the holding in *Snepp* itself, each recognized its precedential value. As a valid precedent, they nevertheless concluded that *Snepp* does not support the use of prepublication review agreements outside intelligence agencies and the "special nature of the employment relationship between agents like *Snepp* and an agency like the CIA."⁶³

Each professor dismissed the argument that the Directive only imposes a prior censorship system on government employees and that it is done contractually (therefore, arguably, voluntarily) as irrelevant to First Amendment considerations. They concluded that the extension of this prior restraint could only be justified under the Constitution if an extraordinary governmental need for such a drastic policy is demonstrated.

In light of the GAO testimony revealing that only two actual unauthorized disclosures of SCI through writings and speeches have occurred, it is clear that an extraordinary need for this drastic approach does not exist. The Interdepartmental Report which recommends the use of prepublication review deals primarily with problems in investigating leaks and finding their source. However, finding the source of a leak is not a problem in the context of disclosures through publications by employees or former employees. The prepublication review agreements were recommended apparently as an afterthought, even though there was simply no evidence mentioned that overt disclosures through publications by employees are a serious problem. As Professor Emerson writes, "[t]he conclusion is inescapable that the government can adequately protect national security without doing such excessive damage to the system of free expression."⁶⁴

Instead, as Professor Powe indicates, the prepublication review recommendation rests ". . . on a misreading of *Snepp* [whereby] someone wrongly concluded that censorship was a public good." He cautions ". . . since there cannot be a dispute that what has been set up is a system of censorship, one would do well to recall exactly why censorship has a bad name in our society."⁶⁵ The evils of censorship were fully discussed by the numerous other witnesses at the hearing.

5. Censorship Is Not a Public Good

The list of arguments against prior restraints and censorship is lengthy and well known. Aside from the potential for manipulation and political abuse that a prior restraint system creates for those in government who would endeavor to maliciously control speech for their advantage, such a system has many harmful consequences even when implemented and carried out with the most noble of intentions. Prior restraint systems inevitably result in too much censorship and will restrict the flow of important non-classified information. Prior restraint programs cause delay, often when the value of the speech

⁶³ Id., page 19.

⁶⁴ Written statement of Professor Emerson, page 14.

⁶⁵ Testimony of Lucas Powe, page 6.

depends upon its timeliness. Further, prior restraint programs deter speech from the outset by providing a disincentive for the effected speaker to participate in public debate.

Many of the witnesses at the hearings testified to these and other problems inherent in the prepublication review program mandated by the Directive. Several former high level government officials testified from their perspective as ones who would have been subjected to such censorship had the Directive been in effect during their service. Former Deputy Secretary of State, George W. Ball, indicated in his testimony that the Directive will . . . "require the establishment of a censorship bureaucracy far larger than anything known in our national experience."⁶⁶

Further, urging the Committee to express its opposition to the Directive, he concluded that . . .

The obvious effect of this Directive will be to discourage anyone who has served the Government in a sufficiently elevated position to have access to sensitive information from participating actively in the public discussion of American policy, even though he may be uniquely qualified to offer illuminating comments and advice. The onerous mechanics of such censorship and the delay they would impose would render impossible informed comments on evolving events and greatly inhibit the bringing to bear of past experience on the formulation of policy.⁶⁷

Former Assistant Secretary of State for International Organization Affairs, Charles William Maynes, also expressed disapproval of the Directive in his testimony. As the current Editor of Foreign Policy, he emphasized the problem of delay that the prepublication review agreement creates for free and open debate and said:

The essence of public-policy information is not only substance, but timing. The 30-day provision alone effectively grants a standing administration critical control over the course of debate on a large number of key public-policy issues. My own magazine will suffer gravely if these regulations are enacted. Over the 13 years of its existence, foreign policy has received 34 percent of its articles from former officials, or 222 articles from these authoritative specialists.⁶⁸

Former Assistant Secretary of State for Human Rights and Humanitarian Affairs, Patricia Derian, currently representing the Fund for Free Expression, concurred with the others' assessment that the Directive should be stopped. In preparation for the hearing, the Fund conducted a survey which revealed that in 1982, more than three hundred articles written by current or former officials appeared in the pages of five national papers and that most would have been subject to prior censorship under the Directive's requirements.

Mr. Dennis Hays, President of the American Foreign Service Association, which represents 11,000 members of the U.S. Foreign Service, testified that:

⁶⁶ Testimony of George Ball, page 2.

⁶⁷ *Id.*

⁶⁸ Testimony of Charles William Maynes, page 6.

Approximately 4,500 State Department employees have access to Sensitive Compartmented Information . . . [and would therefore] be required to submit for prepublication review anything they write in any form and for any forum that may happen to relate to SCI.⁶⁹

He urged the Committee on behalf of the Association to oppose the Directive indicating that if the "Directive is allowed to go forward, there can be no expert commentary on issues of intense national importance . . . , except from official government sources."⁷⁰

Dr. Robert L. Park, a professor of physics at the University of Maryland and former government scientist, related the effects the Directive would have on academics who enter government service. Representing the American Association of University Professors, Dr. Park stated that:

Each year countless numbers of professors representing a wide range of academic disciplines serve the government . . . [and to accomplish the ends of the directive] government agencies would need to establish a vast apparatus for administration and enforcement.⁷¹

He emphasized that the Directive will result in fewer qualified academics entering government service. "The Directive can also be expected to take its toll by reducing the willingness of academics to accept government responsibilities."⁷² He urged that the Directive be withdrawn.

The chilling effect the prepublication review requirement would have on legitimate free speech was perhaps anticipated best by those who testified on behalf of the press—both the broadcasting and print media.

Representing the Society of Professional Journalists, Bob Schieffer of CBS News and Bruce Sanford, counsel to the Society, testified against the Directive. Pointing to the existing criminal statutes prohibiting the disclosure of classified information, they indicated that the Directive is, "[a]s unneeded as it is unprecedented and ill-conceived."⁷³

Commenting directly on the effect the Directive will have on journalism, Bob Schieffer commented:

The impact on journalists would be real and rude and unreasonable . . . The nebulous net of the Directive would compel virtually all government officials to say nothing for fear of possibly offending some bureaucratic censor's interpretation of the scope of the Directive . . . The public's understanding of fast breaking news events would particularly suffer.⁷⁴

Ralph P. Davidson, Chairman of the Board of Time, Inc., indicated that the Directive is "a critically flawed rule . . . and [that] it should be rescinded."⁷⁵ According to Davidson, the Directive "will make it

⁶⁹ Testimony of Dennis Hays, page 3.

⁷⁰ *Id.*, page 4.

⁷¹ Testimony of Robert Park, page 6.

⁷² *Id.*, page 8.

⁷³ Testimony of Bruce Sanford, page 1.

⁷⁴ Testimony of Bob Schieffer, page 8.

⁷⁵ Testimony of Ralph Davidson, page 7.

substantially more difficult to present [current and former government official's] views" which is central to the exercise of the journalists' responsibility "to inform the public fully."⁷⁶

Others—Charles Rowe, editor and co-publisher of the Free Lance-Star, and representing the American Society of Newspaper Editors; Jack Landau, representing the Reporters Committee for Freedom of the Press; and Heather Gant Florence, Vice President, Secretary and General Counsel of Bantam Books, representing the Association of American Publishers—reiterated the disastrous consequences that the prepublication review requirement would have on free speech and national public debate through the media.

III. FINDINGS

Based on a complete review of the available scientific evidence on polygraph use and an analysis of the effects of the prepublication review requirement contained in the President's National Security Decision Directive, the Committee makes the following findings:⁷⁷

1. There is no scientific evidence to demonstrate the validity of polygraph use for screening purposes of any sort, be it for investigations, or for pre-employment, pre-clearance, or aperiodic testing.

2. Use of the polygraph for screening purposes runs a great risk of incorrectly identifying a large number of persons as being deceptive.

3. OTA found scientific support for the validity of polygraph examinations only in narrowly focused criminal investigations where conventional investigative methods had identified a very few suspects and detailed information was already known about the crime itself. These scientific studies of polygraph use in criminal investigations nevertheless vary greatly in their conclusions on polygraph validity.

4. Because there is no physiological response unique to lying, the polygraph cannot distinguish between people who are lying and those who are merely afraid or nervous. Therefore, the policy of forcing employees to submit to polygraphs by the threat of adverse consequences is dangerous and may result in high rates of misidentification.

5. The prepublication review agreements required by the President's Directive constitute an unwarranted prior restraint in violation of the First Amendment.

6. In the past five years, there have been 21 unauthorized disclosures of classified information by officials or former officials through publications or speeches. Of these, only two have involved SCI and only two have occurred in the Departments of State and Defense where the requirement will have its greatest application.

7. To counter this rare and specific type of disclosure, lifelong prepublication review agreements will be required of 127,750 Federal employees and contractor personnel with access to SCI.

8. These prepublication review agreements require the creation of a large bureaucracy to censor the writings and speeches of former Government employees. As with any government censorship of political speech, the potential for political abuse is great. The prepublication review requirement poses a serious threat to freedom of speech and national public debate.

⁷⁶ *Id.*, page 4.

⁷⁷ **NOTE.**—These findings do not involve or relate to the Central Intelligence Agency or the National Security Agency.

IV. CONCLUSIONS AND RECOMMENDATIONS

Concerning the Administration's proposals to expand the use of and reliance on polygraph examinations, the Committee concludes that there is no scientifically acceptable evidence to support these changes and good reason to believe they will result in high error rates, thereby causing harm to many innocent people and our government. While there has been acceptable research conducted on the use of polygraph examinations in the context of narrowly defined criminal investigations, the scientific conclusions on its validity in this area are conflicting. There is, however, no acceptable scientific evidence to support the polygraph's use in "dragnet" style screening in investigations or in such areas as pre-employment, pre-access, or aperiodic testing. Further coercing submission to polygraph exams in any context may seriously impair any validity the test may have.

The President's Directive and the proposed revisions to the DOD's regulation on polygraphs will allow its use in these unsupported and highly questionable ways. Section 5 of the President's Directive creates the possibility of polygraph use in "dragnet" style investigations. The proposed changes to the Department of Defense's polygraph directive authorize testing in screening situations—pre-employment, access and aperiodic. In these areas the polygraph's validity is expected to be very low and the potential for misidentification very high. Both the President's and the DOD proposed revisions change polygraph examining from a voluntary to an involuntary process by coercing submission through the threat of adverse consequences, thereby further sacrificing accuracy.

With regard to the prepublication review requirement mandated in the President's Directive, the Committee concludes that this censorship poses a serious threat to freedom of speech and debate cherished in our nation. Its imposition is unwarranted; the Committee does not find a compelling governmental need for this prior restraint on free speech.

The Committee, therefore, makes the following recommendations:

1. It is recommended that the proposed revisions to the Department of Defense Directive on polygraph use should not be implemented.
2. It is recommended that sections 1b and 5 of the President's Directive on Safeguarding National Security Information should be rescinded.
3. It is recommended, in the event that the foregoing recommendations are not followed by the Administration, that the Congress should enact legislation prohibiting these changes in polygraph use and the infringement on free speech and political debate the Administration's initiatives entail.

ADDITIONAL VIEWS OF HON. GLENN ENGLISH

I agree wholeheartedly with the conclusions, findings, and recommendations of this report. I am taking this opportunity to file additional views in order to make some related points about the policies of the Reagan Administration with respect to the public availability of government information.

The Reagan Administration has established a clear and consistent pattern of restricting the availability of government information to the public. The range of Reagan anti-disclosure activities is sweeping. It includes administrative limitations on the Freedom of Information Act and legislative proposals to cutback on the Act's utility; expansion of the government's authority to classify information for "national security" reasons; deemphasis of the declassification of historical documents and other information that no longer warrants continued classification; proposals to restrict the availability of information under the Privacy Act of 1974; decrease in the resources devoted to federal statistical activities; cutbacks on the number and availability of government publications; imposition of restrictions on the ability of reporters to speak with government officials; increased government efforts to manage news and to prevent the press from reporting on major government actions such as the invasion of Grenada; registration of films from foreign countries dealing with issues of public interest; and denials of visas to selected foreign nationals. The polygraph and pre-publication review proposals contained in NSDD-84 are among the most recent additions to this list.¹

One of the most distressing aspects of these information restrictions is the failure of the Reagan Administration to offer a credible explanation and justification for the new policies. The report makes this point in the case of both polygraphs and prepublication review. For polygraphs, the study by the Office of Technology Assessment demonstrates that there is no scientific evidence to demonstrate the validity of polygraph use for the purposes proposed by NSDD-84. Since polygraphs may not work, it is difficult to accept at face value the Administration's explanation for increased use of polygraphs.

For pre-publication review, the Administration has failed to demonstrate that there is a problem with the unauthorized disclosure of sensitive compartmentalized information by those whose writings will be subject to review. The report concludes that "it is clear that an extraordinary need for this drastic approach does not exist." Pre-publication review is nothing more than a solution in search of a problem. What are the Administration's real reasons for the adoption of pre-publication review?

¹ The Reporters Committee for Freedom of the Press has accused the Reagan Administration of "a coordinated campaign to impose content censorship and information restriction on an entire range of Government information . . ." The Reporters Committee has compiled a list of Administration activities that are part of this campaign, and this list has been reprinted in *Oversight of the Privacy Act of 1974: Hearings before a Subcomm. of the House Comm. on Government Operations, 98th Cong., 1st Sess. 321-23 (1983).*

The same failure to fully explain and justify changes in information disclosure policies characterized the Reagan Administration's 1982 Executive Order on Security Classification. In a report reviewing the new security classification policy, this Committee found that the Reagan Administration failed to provide a full and complete explanation of the changes that were made by Executive Order 12356. The Committee also found that:

Many of the explanations offered after the order was signed by the President were inadequate, inconsistent, incomplete, or not credible. It remains uncertain why many of the changes were made, and there is substantial doubt that the changes could be justified.²

These same comments seem fully applicable to NSDD-84.

There is some evidence to confirm the suspicion that the need for increased protection of sensitive information is not the primary motivation of the Reagan Administration for imposing restrictions such as pre-publication review. The Administration has refused to adopt other measures designed to increase security over the same type of information that is the subject of NSDD-84.

A recent report by the General Accounting Office addressed some security issues surrounding special access contracts at the Department of Defense.³ These special contracts are supposed to be used to provide additional security for sensitive information. Most of the contracts involve sensitive, compartmentalized information (SCI). The protection of SCI is, of course, the stated purpose of the pre-publication review provisions of NSDD-84.

GAO found that the special access contracts may have been used for reasons other than the protection of sensitive information. GAO found some evidence that the special contracting procedures were used by one component of DOD to keep another component from knowing about the project rather than to ensure the security of the information. GAO also found evidence that the special contracts were used to preclude someone from identifying the military service that awarded the contract and the amount of money being spent. In other cases, it appeared that the special contracts were used to expedite procurements and to facilitate sole-source awards. An Administration that has been so zealous in creating new programs to restrict public disclosure of information should be equally careful to ensure that secrecy programs are not being used to hide bureaucratic waste and inefficiency.

Other GAO findings and recommendations related to the administrative oversight of contracts involving SCI. GAO found the need for better control of special access contracts involving SCI and recommended that DOD conduct threat analyses for facilities containing SCI and that the Defense Investigative Service be given increased responsibility for inspection of such facilities.

These simple, basic recommendations, made by the GAO after a thorough examination of the problems of SCI contracts, were designed to ensure appropriate levels of security for SCI. The recommendations

²Committee on Government Operations, *Security Classification Policy and Executive Order 12356*, H.R. Rept. 97-731, 97th Cong., 2d Sess. 42 (1982).

³General Accounting Office, *Further Improvements Needed in Department of Defense Oversight of Special Access (Carve-Out) Contracts (GGD-83-48)* (Feb. 18, 1983).

were rejected by DOD. The same Administration, however, rushed to impose new and massive censorship programs in the name of increased security notwithstanding the absence of any significant evidence that there was a problem that the censorship was intended to solve.

The issues raised by this GAO study are only a small part of the broad picture of the protection of SCI. Of course I agree that we must have reasonable protection for information that is truly vital to our national defense and foreign policy. However, I also believe that the Reagan Administration had an obligation to exhaust every security alternative before even considering the establishment of an unprecedented censorship program of dubious constitutionality. The response to the GAO report shows that, for at least one category of SCI, there were some stones that were left unturned.

GLENN ENGLISH.

**ADDITIONAL VIEWS OF HON. FRANK HORTON, HON.
LYLE WILLIAMS, HON. WILLIAM F. CLINGER, JR., HON.
JUDD GREGG, AND HON. TOM LEWIS**

We support the use of the polygraph in the non-intelligence departments and agencies of government if it is applied on a voluntary basis by expert personnel as one of several investigative methods in highly structured investigations where there is sufficient evidence that the person in question may have broken the laws governing the use and protection of classified information.

We are persuaded by evidence presented to the Committee by the Office of Technology Assessment that the polygraph is of highly dubious value if employees are coerced into its use or if it is used in an unfocused manner without the benefit of more standard investigative techniques to confirm results.

Because pre-employment, pre-access, aperiodic, and specific issue screening are by their very nature less structured and more widely focused, the validity of the polygraph in these instances is questionable and its use may result in high rates of misidentification causing confusion in government agencies and harm to innocent people.

The use of the polygraph in pre-employment, pre-access, aperiodic, and specific issue screening at NSA and CIA does not automatically justify its use elsewhere. Official government policy condoning the use of the device in these ways in the non-intelligence agencies of government should not be done without conclusive scientific support for its validity and proper safeguards to ensure its appropriate use.

We feel that the regulations currently governing the use of the polygraph by the Federal Bureau of Investigation provides appropriate guidance for the use of this device in the non-intelligence agencies of government. That regulation prohibits the "use of the polygraph for dragnet-type screening of large numbers of suspects or as a substitute for logical investigations by conventional means." It allows polygraph examinations only when "there is reasonable cause to believe that the person to be examined has knowledge of or was involved in the matter under inquiry or investigation, or if the person is withholding information relevant to the inquiry or investigation."

Concerning the lifelong prepublication review requirement, we agree: (1) that there is no evidence presented to the Committee to indicate that there exists a serious problem of former Government employees divulging sensitive compartmented information through published materials; (2) that a compelling overriding governmental need for prior restraint has not been established; and, (3) that the few instances of unauthorized disclosure do not, on balance, justify or warrant the imposition of a lifelong censorship system.

**FRANK HORTON.
LYLE WILLIAMS.
WILLIAM F. CLINGER, Jr.
JUDD GREGG.
TOM LEWIS.**

DISSENTING VIEWS OF HON. JOHN N. ERLNBORN, HON.
THOMAS N. KINDNESS, HON. ROBERT S. WALKER, HON.
DAN BURTON, HON. ALFRED A. (AL) McCANDLESS, AND
HON. LARRY E. CRAIG

We believe the debate that has been waged on NSDD 84 and DOD's proposed revision of its polygraph policy can be reduced to the following questions:

(1) Should the government, in agencies other than the CIA and NSA, expand its use of the polygraph for purposes of pre-employment, pre-clearance, and aperiodic testing?

(2) Should adverse consequences follow the refusal to submit to such polygraph testing?

(3) Should a lifelong prepublication requirement be required of employees of agencies other than the NSA and CIA who have access to Sensitive Compartmented Information?

In contrast to the majority's conclusions, we answer affirmatively on the first two questions and offer a qualified "yes" on the third. We believe, simply, that the protection of classified information—particularly Sensitive Compartmented Information—is important enough to warrant the restrictions proposed by the current Administration.

In response to the first question, we note with some interest that the majority failed to argue with the polygraph policy at NSA and CIA. We cannot help but conclude that, if it is good enough for NSA and CIA employees who have access to classified information, the President's proposed polygraph policy is good enough for all other Federal employees who have similar access to classified information. Classified information, after all, is classified information regardless of the agency involved.

The majority rests its case on the argument that because the scientifically acceptable evidence does not conclusively demonstrate the validity of the polygraph, the device should not be used. The issue is not this simple. While individual studies on polygraph validity may show a wide variation, there is clear scientific consensus on the main point: polygraph examinations produce statistically significant indications of deception or nondeception.

It is also noteworthy to point out that even though the absolute validity of the device may be open to some question, its use at the NSA and the CIA for many years suggests that the device is of some utility.

Unlike the majority, we believe that adverse consequences should be considered as an appropriate response to an employee's refusal to cooperate with a polygraph examination that is conducted in accordance with the President's directive. Because access to classified information is an earned privilege, not a Constitutional right, we believe that any employee who agrees to work with classified information should be

prepared to be subjected to much greater scrutiny than the average employee. Simply put, it goes with the territory.

The question about a lifelong prepublication review requirement causes us some concern, but not because we disagree with the concept of prepublication review for employees who have access to Sensitive Compartmented Information. Once again, we believe that such a tough process goes with the territory. We have some reservation, however, about the lifetime provision of the non-disclosure agreement that accompanies NSDD 84. We believe that consideration should be given to changing the lifetime provision to a time certain provision that would run throughout a person's employment with the government and for a reasonable period thereafter.

Because we do not take classified information lightly, we do not take the President's interest in this area lightly. We applaud him for his effort to tighten security and for his public recognition of the importance of protecting our nation's national security interests.

Finally, we cannot help but point with some measure of satisfaction to the majority's grudging acknowledgment that there is, indeed, scientifically acceptable evidence that the polygraph does produce valid results in narrowly focused investigations, particularly in criminal investigations and particularly when it is used in conjunction with other investigative techniques. Such an acknowledgment is light years removed from the Committee's 1975 recommendation that "the use of polygraphs and similar devices be discontinued by all government agencies for all purposes."

We congratulate the majority for making such dramatic progress in this area.

For these and other reasons, we reject the majority's report and we register our firm endorsement of the President's initiatives in this important area.

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