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**THE MENTAL HEALTH OF OUR NATIONAL SECURITY:
PROTECTING THE MINDS THAT PROTECT THE HOMELAND**

ALAN WEHBÉ*

I first met Sergeant First Class (SFC) Domenic D'Ambra when I was assigned as the judge advocate¹ for a United States Army Special Forces² battalion in June 2009. I met Dom while we were preparing for an upcoming deployment to Afghanistan to support Operation Enduring Freedom. Dom was a young Green Beret³ from Providence, Rhode Island, but he sure sounded like he was from Boston. Having attended college in Boston, the accent holds a special place in my heart so Dom and I hit it off right away. I think Dom got along with everybody because he was an incredibly positive man. Dom would stop in my office periodically and we would chat about nothing and everything.

In March 2011, our battalion deployed to Afghanistan. That July 31st there was a fire on our camp in the team living quarters for one of the Marine Special Operation Teams.⁴ Three Marines died in the fire along with one military working dog, Tosca.⁵ I witnessed incredible bravery and heroism that day, including Soldiers and Marines in shorts and t-shirts taking hoses from

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¹ U. S. Army, *About Army JAG Corps*, GO ARMY, <http://www.goarmy.com/jag/about.html> (last visited Oct. 9, 2016).

² U. S. Army, *Special Forces: Primary Missions*, GO ARMY, <http://www.goarmy.com/special-forces/primary-missions.html> (last visited Oct. 9, 2016).

³ Green Beret is the colloquial term for a member of the United States Army Special Forces.

⁴ Hope Seck, *MARSOC Honors Fallen Marine Dog Handler*, MARINE CORPS TIMES (Sept. 4, 2015) <https://www.marinecorpstimes.com/story/military/2015/09/04/marsoc-honors-fallen-marine-dog-handler/71698408/>; U. S. Marine Corps, *About MARSOC*, MARINES.MIL, <http://www.marsoc.marines.mil/About.aspx> (last visited Oct. 9, 2016).

⁵ U. S. Marine Corps, *About MARSOC*, MARINES.MIL, <http://www.marsoc.marines.mil/About.aspx> (last visited Nov. 12, 2015).

firefighters to fight the fire while ordnance and ammunition detonated within the house. From the aid station, I watched these Marines pull the remains of their brothers and sister from the smoldering rubble of the team's house. I will never forget helping the team leader secure their valuables from the remains (including a wedding ring) and ensuring that their remains would receive the proper care and respect. Several days later, our chaplain held a meeting for people to talk about and share their feelings of grief and stress. Some of America's finest warriors, Green Berets, SEALs,⁶ Marines, and others were emotionally brought to their knees, some even weeping in grief. These men prepared much of their adult lives for the horrors of combat, including the possibility of losing a brother or their own life in the process of answering the nation's call to service, but not a single one of them had a mental framework to understand the tragedy of this fire. My background in the fire service made me somewhat more prepared for this event and resulted in my ability to more deliberately observe the aftermath of the tragic fire.

We returned from that deployment in February 2012 and I was quickly rotated to a position in the legal office at the United States Army Military District of Washington in D.C. I was immediately inundated with the day-to-day business of being a prosecutor for the Army in our nation's capitol.⁷ That May I learned the devastating news that Dom had apparently committed suicide.⁸

⁶ U. S. Navy, *Navy SEALs (Sea, Air & Land)*, NAVY.COM, <https://www.navy.com/careers/special-operations/seals.html#ft-key-responsibilities> (last visited Nov. 22, 2015).

⁷ Joint Force Headquarters Nat'l Cap. Region, U.S. Army Mil. District of Washington, Off. of the Staff Judge Advocate, *Military Justice*, ARMY.MIL, http://www.mdwhome.mdw.army.mil/sja_nav/military-justice (last visited Nov. 22, 2015).

⁸ S. Res. 2999, 2012 Gen. Assem., Jan. Sess. (R.I. May 23, 2012) (expressing condolences on the passing of Sergeant First Class Domenic D'Ambra, III).

We are failing our national security practitioners⁹ when it comes to mental health and we have to do better.¹⁰ We need better screening,¹¹ better support and resources,¹² and better organizational cultures. Suicide rates among national security practitioners are unacceptably high.¹³ Mental illness has also arguably led to security leaks that have harmed national security in

⁹ The phrase “national security practitioners” includes a large variety of people working in fields such as law enforcement, the intelligence community, the military, and the defense industry, which will be further defined below. See infra note 22 (defining “national security practitioner”).

¹⁰ Recently, it appears that some in Congress are moving towards possibly starting to address some of the problems with mental health legislatively. See Mike DeBonis, *Ryan’s Nod Could Get Mental Health Legislation Moving*, THE WASHINGTON POST (Dec. 1, 2015), https://www.washingtonpost.com/news/powerpost/wp/2015/12/01/ryans-nod-could-get-mental-health-legislation-moving/?tid=sm_tw (discussing currently legislative efforts to address mental health); Deirdre Walsh, *Paul Ryan: ‘Clearly We Can Do More’ to Address Mental Health Issues*, CNN (Dec. 1, 2015), <http://www.cnn.com/2015/12/01/politics/paul-ryan-colorado-shooting-mental-health-issues/index.html?sr=twCNN120115paul-ryan-colorado-shooting-mental-health-issues0640PMVODtopLink&linkId=19210503> (discussing Speaker Ryan’s reaction to news that the suspect of a recent mass-shooting incident likely has mental health issues).

¹¹ See Francis X. Brickfield, *Improving Scrutiny of Applicants for Top Secret / SCI Clearances by Adding Psychological Assessments*, 2 NAT’L. SEC. L. J. 252, 294–298 (2014) [hereinafter *Improving Scrutiny of Applicants*] (recommending adding psychological screening to process for granting top-secret clearances).

¹² See, *Understanding Confidential Non-medical Counseling for Service Members and Their Families*, MILITARY ONESOURCE, http://www.militaryonesource.mil/confidential-help/non-medical-counseling?content_id=282398 (last visited Oct. 30, 2016) (describing no-cost program providing confidential mental health services for military members).

¹³ According to a 2012 symposium, “law enforcement officer deaths by suicide were twice as high as compared to traffic accidents and felonious assaults during 2012.” Cmty. Oriented Policing Servs., *LACP National Symposium on Law Enforcement Officer Suicide and Mental Health: Breaking the Silence on Law Enforcement Suicides*, in IACP SYMPOSIUM REPORT, vi (2014) [hereinafter *Breaking the Silence*]; see also Han K. Kang DrPH, et al., *Suicide risk among 1.3 million veterans who were on active duty during the Iraq and Afghanistan wars*, 25 ANNALS OF EPIDEMIOLOGY 96 (2015) (finding suicide rate among veterans who had deployed to Iraq or Afghanistan 41% higher than civilian average, 61% higher for veterans who had not deployed); Alice Speri, *At Least 22 Veterans Kill Themselves Every Day and No One Gives a Shit*, VICE NEWS (Apr. 1, 2014), https://news.vice.com/article/at-least-22-veterans-kill-themselves-every-day-and-no-one-gives-a-shit?utm_source=vicenewsfb (noting that, between the beginning of 2014 and the date of publication, 1,892 former service members took lives as well as efforts to address the problem); Dustin DeMoss, *Is the 22-Veterans-Per-Day Suicide Rate Reliable?*, HUFFINGTON POST (Jan. 5, 2015), http://www.huffingtonpost.com/dustin-demoss/veteran-suicide-rate_b_6417182.html (questioning the reliability of the statistics related to veteran suicide rates).

cases such as with Aldrich Ames,¹⁴ Robert Hanssen,¹⁵ Bradley Manning¹⁶ and Edward Snowden.¹⁷

Mental illness challenges all segments of society.¹⁸ It is frequently in the forefront of the national discussion and in the media.¹⁹ This article examines the risk posed by the mental health of our national security²⁰ practitioners,²¹

¹⁴ George Ellard, *A New Paradigm of Classified Disclosures*, 8 J. NAT'L SECURITY L. & POL'Y 103 (2015) [hereinafter *New Paradigm*]; LTC David M. Crane, *Divided We Stand: Counterintelligence Coordination Within The Intelligence Community Of The United States*, ARMY LAW., Dec. 1995, at page 26; Throwbridge Ford, *Why CIA's Ames and the Bureau's Hanssen Driven to Spy For Soviets*, VETERANS TODAY (Aug. 31, 2011), <http://www.veteranstoday.com/2011/08/31/why-cias-ames-and-the-bureau-hanssen-driven-to-spy-for-soviets/> [hereinafter *Driven to Spy*]; David Wise, *The Phantom Menace*, SMITHSONIAN, Nov. 2015, at 26–33, 102.

¹⁵ *New Paradigm*, *supra* note 15, at 105; George Ellard, *Top Hat's Face: Explaining Robert Hanssen's Treason*, 23 GEO. MASON U. PHIL. & PUB. POL'Y Q. 2, 2–14 (2003); *Driven to Spy*; *Hanssen's Puzzling Profile*, CBS NEWS (June 19, 2001), <http://www.cbsnews.com/news/hanssens-puzzling-profile/>; David Wise, *The Phantom Menace*, SMITHSONIAN, Nov. 2015, at 26–33, 102, <http://www.smithsonianmag.com/history/still-unexplained-cold-war-fbi-cia-180956969/?no-ist>.

¹⁶ *New Paradigm*, *supra* note 15, at 103; David D. Cole, *Assessing the Leakers: Criminals or Heroes?*, 8 J. NAT'L SECURITY L. & POL'Y 107, 107–09 (2015) [hereinafter *Assessing the Leakers*]; Julie Tate, *Army ignored Manning's deteriorating mental health, defense attorney says*, WASHINGTON POST (Aug. 13, 2013), https://www.washingtonpost.com/world/national-security/army-ignored-mannings-deteriorating-mental-health-defense-attorney-says/2013/08/13/56dd9e70-0451-11e3-a07f-49ddc7417125_story.html.

¹⁷ *New Paradigm*, *supra* note 15, at 103–05; *Assessing the Leakers*, *supra* note 17, at 107–18; Snezana Farberov, *How ISIS Relies On Edward Snowden's Leaks To Outsmart Western Intelligence: Militants Now Use Encrypted Channels And Couriers To Avoid Detection*, DAILY MAIL (July 21, 2015), <http://www.dailymail.co.uk/news/article-3169416/How-ISIS-relies-Edward-Snowden-s-leaks-outsmart-Western-intelligence-Militants-use-encrypted-channels-couriers-avoid-detection.html>; Jeffrey Toobin, *Edward Snowden Is No Hero*, THE NEW YORKER (Jun. 10, 2013), <http://www.newyorker.com/news/daily-comment/edward-snowden-is-no-hero>.

¹⁸ U.S. DEP'T OF HEALTH AND HUMAN SERV., RESULTS FROM THE 2013 NAT'L SURVEY ON DRUG USE AND HEALTH: MENTAL HEALTH FINDINGS (HHS Publication No. (SMA) 14-4887) 1-2 (2014) [hereinafter 2013 NSUDH].

¹⁹ Lena H. Sun, *Mental Health in the Spotlight Thursday on Capitol Hill*, WASHINGTON POST (Oct. 29, 2015), <https://www.washingtonpost.com/news/to-your-health/wp/2015/10/29/mental-health-in-the-spotlight-today-on-capitol-hill/>.

²⁰ As a guideline, the Department of Defense defines national security as:

A collective term encompassing both national defense and foreign relations of the United States with the purpose of gaining: a. A military or defense advantage over any foreign nation or group of nations; b. A favorable foreign relations position; or c. A defense posture capable of successfully resisting hostile or destructive action from within or without, overt or covert.

DEP'T OF DEFENSE, JOINT PUBLICATION 1-02: DEP'T OF DEFENSE DICTIONARY OF MIL. AND ASSOCIATED TERMS (Nov. 8, 2010).

²¹ For the purposes of this article, national security practitioners are any employees, whether federal or private, who work in the field of national security. This article will examine a representative segment of national security practitioners. That segment will include select

including analysts,²² case agents,²³ operators,²⁴ and countless others and examine methods to mitigate such risks. As you can see from the stories

personnel from the Department of Defense, Department of Homeland Security, Department of Justice, and other members of the Intelligence Community as defined by Exec. Order No. 12,333, 46 Fed. Reg. 59953 (Dec. 4, 1981) and Exec. Order No. 12,036, 43 Fed. Reg. 3691 (Jan. 24, 1978). These personnel are generally exposed to the stress of and also charged with thwarting national security risks and likely feel the pressure of preventing the next major attack.

²² Analysts generally receive, review, analyze and organize information. As a result of these duties, analysts are regularly exposed to information and reports of violence, the threat of violence, and the details of operations, even if they are not subject to the violence or national security operations themselves. According to the Federal Bureau of Investigation, “the primary responsibility of intelligence analysts is to gather, analyze, and disseminate information.” *Intelligence Analysts Part 2: The Subject Matter Experts*, FBI (Aug. 23, 2011), <https://www.fbi.gov/news/stories/2011/august/intelligence-analysts-subject-matter-experts>. The Central Intelligence Agency notes, “An intelligence analyst pulls together relevant information from all available sources and then analyzes it to produce timely and objective assessments, free of any political bias.” *Careers and Internships: Analytic Positions*, CIA, <https://www.cia.gov/careers/opportunities/analytical> (last updated Sept. 8, 2016).

²³ Many agencies employ some type of agent who operates under myriad authorities. The Office of Personnel Management (OPM) classifies several relevant occupations in the Position Classification Standards for White Collar Work, specifically, in two relevant occupational series, 1810, General Investigation and 1811, Criminal Investigation. OFF. OF PERS. MGMT., JOB FAMILY POSITION CLASSIFICATION STANDARD FOR ADMIN. WORK IN THE INSPECTION, INVESTIGATION, ENFORCEMENT, AND COMPLIANCE GROUP. 11–14 (2011), <https://www.opm.gov/policy-data-oversight/classification-qualifications/classifying-general-schedule-positions/standards/1800/1800a.pdf>. Regardless of terminology, classification, or specific duties, the qualification standard of 1811, Criminal Investigator gives us a good partial statement of the scope of this segment of our population of interest, including employees in “positions which supervise, lead, or perform work involving planning, conducting, or managing investigations related to alleged or suspected criminal violations of Federal laws,” adding, for our purposes, that such investigations would be related to national security. OFF. OF PERS. MGMT., JOB FAMILY POSITION CLASSIFICATION STANDARD FOR ADMIN. WORK IN THE INSPECTION, INVESTIGATION, ENFORCEMENT, AND COMPLIANCE GROUP 11–14 (2011), <https://www.opm.gov/policy-data-oversight/classification-qualifications/classifying-general-schedule-positions/standards/1800/1800a.pdf>. This category would also include state and local law enforcement or investigative authorities when employed in a national security posture, such as when authorized under the Immigration and Nationality Act, 8 U.S.C. § 1357(g) with a so-called 287(g) agreement. DEP’T. OF HOMELAND SECURITY, OFF. OF THE INSPECTOR GENERAL, OIG-10-63, THE PERFORMANCE OF 287(G) AGREEMENTS 2 (Mar. 2010).

²⁴ For the purposes of our analysis, this category includes groups such as military conventional forces and special operations forces, Central Intelligence Agency (CIA) Paramilitary Operations Officers, Federal Air Marshals, the FBI’s Critical Incident Response Group’s Tactical Operations Section, and state and local Special Weapons and Tactics (SWAT) teams, when employed in a national security context. DEP’T OF DEFENSE, JOINT PUBLICATION 1-02, DEP’T OF DEFENSE DICTIONARY OF MIL. AND ASSOCIATED TERMS 50 (Nov. 8, 2010) (“1. Those forces capable of conducting operations using nonnuclear weapons. 2. Those forces other than designated special operations forces.”); *Id.* at 224 (“Those Active and Reserve Component forces of the Services designated by the Secretary of Defense and specifically organized, trained, and equipped to conduct and support special operations.”); *Careers and Internships: Paramilitary Operations Officer/Specialized Skill Officer*, CIA, <https://www.cia.gov/careers/opportunities/clandestine/cmo-specialist.html> (last visited Oct. 17, 2015) (“Directorate of Operations (DO) Paramilitary Operations Officers and Specialized

above and will see in the pages that follow, this group is subject to the unique and intense stress of protecting the homeland, preventing the next major terrorist attack, and keeping their country and loved ones safe. We owe these brave and dedicated people our gratitude, not to mention support and protection of their mental health.

The entry to such national security positions tends to require a clearance,²⁵ so this article will examine the laws related to granting access to classified information provided in the Code of Federal Regulations and certain Executive Orders.²⁶ This article examines the legal underpinnings (or lack thereof) for mental health support to national security practitioners, and the legal standards for removal from employment.²⁷ After reviewing such

Skills Officers serve at CIA Headquarters and overseas focusing on intelligence operations and activities in support of US policy objectives in hazardous and austere overseas environments.”). *Testimony on Federal Air Marshal Service: Hearing Before the H. Comm. on Oversight and Gov’t Reform*, 114th Cong. (2015) (statement of Roderick Allison, Director of the Office of Law Enforcement/Federal Air Marshal Service) (“The mission of the Federal Air Marshal Service (FAMS) is to detect, deter, and defeat criminal and terrorist activities that target our Nation’s transportation systems.”); *Critical Incident Response Group: Tactical Operations*, FBI, <https://www.fbi.gov/about-us/cirg/tactical-operations> (last visited Oct. 18, 2015) (“The Tactical Section includes the Hostage Rescue Team (HRT), the Crisis Negotiation Unit (CNU), and other programs to support SWAT operations, tactical intelligence, and tactical aviation.”).

²⁵ See William H. Miller, *A Position Of Trust: Security Clearance Decisions After September 11, 2001*, 14 GEO. MASON U. CIV. RTS. L. J. 229 (2004); David C. Mayer, *Reviewing National Security Clearance Decisions: The Clash Between Title VII And Bivens Claims*, 85 CORNELL L. REV. 786, 792 (2000) (describing security clearances generally).

²⁶ Suitability, 5 C.F.R. §§ 731.101–731.601 (2009); National Security Positions, 5 C.F.R. §§ 732.101–732.401 (1991); Adjudicative Guidelines for Determining Eligibility for Access to Classified Information, 32 C.F.R. §§ 147.1–147.33 (2003); Guideline 1–Emotional, Mental, and Personality Disorders, 32 C.F.R. § 147.11 (2003); Exec. Order No. 10,450, Security Requirements for Government Employment, 18 Fed. Reg. 2489 (Apr. 27, 1953); Exec. Order No. 12,968, Access to Classified Information, 60 Fed. Reg. 40245 (Aug. 2, 1995); Exec. Order No. 13,467, Reforming Processes Related to Suitability for Government Employment, Fitness for Contractor Employees, and Eligibility for Access to Classified National Security Information, 73 Fed. Reg. 38103 (Jun. 30, 2008).

²⁷ Victor R. Donovan, *Administrative and Judicial Review of Security Clearance Actions: Post Egan*, 35 A.F. L. REV. 323, 323 (1991); see also *Dep’t of Navy v. Egan*, 484 U.S. 518, 533 (1988) (holding that the Merit Systems Protection Board does not have authority to review underlying executive agency decision to deny or revoke security clearance); *Greene v. McElroy*, 360 U.S. 474, 513 (1959) (holding that private contractor was entitled to some measure of due process in being denied access to classified information and therefore causing him to be fired); Emilio Jaksetic, *Security Clearance Determinations and Due Process*, 12 GEO. MASON U. L. REV. 171, 171 (1990) (arguing that, as there is no liberty or property interest in a security clearance, due process is irrelevant to most decisions granting or revoking a security clearance); Daniel Pines, *The Extraordinary Restrictions on the Constitutional Rights of Central Intelligence Agency Employees: How*

standards, I make several recommendations to better protect the mental health of our national security practitioners. First, I recommend adding psychological screening to the process for granting access to classified information, based in part on recommendations by Francis X. Brickfield in *Improving Scrutiny of Applicants for Top Secret / SCI Clearances by Adding Psychological Assessments*.²⁸ Next, there should be mandatory periodic mental health assessments for all national security practitioners. Directly related to that recommendation, all relevant agencies must implement no cost and confidential mental health treatment programs where their employees can seek mental health treatment completely separate from their employers. Further, employees should be allowed and encouraged to take other mental health measures such as physical fitness, yoga, or meditation. Lastly, these agencies need to actively and deliberately change their organizational cultures with regard to mental health and mental illness,²⁹ and encourage all employees to tend to their mental health.

National Security Concerns Legally Trump Individual Rights, 21 J. TRANSNAT'L L. & POL'Y 105, 119–126 (2011) (discussing due process afforded to employees).

²⁸ *Improving Scrutiny of Applicants*, *supra* note 12, at 299–300.

²⁹ The cultural bias against seeking treatment for mental health can be seen across society. See John Dolores, J.D., Ph.D., *Psychotherapy: Not Just For Chronic Mental Illness*, WYO. LAW., June 2011, at 60 (discussing the benefit of psychotherapy for maintenance of mental health); Maria A. Morrison, *Changing Perceptions of Mental Illness and the Emergence of Expansive Mental Health Parity Legislation*, 45 S.D. L. REV. 8, 9 (2000) (discussing the impact of negative perception related to mental illness in the field of mental health benefits); Kristie Rieken, *NFL Players Talk Openly to Help Destigmatize Mental Illness*, ASSOCIATED PRESS (Nov. 24, 2015), <http://bigstory.ap.org/article/8245df369d3e44db83083c33d07d3472/nfl-players-talk-openly-help-destigmatize-mental-illness> (discussing NFL players seeking mental health treatment and support, and the creation of a mental health non-profit organization); MAYO CLINIC, *Mental Health: Overcoming the Stigma of Mental Illness*, <http://www.mayoclinic.org/diseases-conditions/mental-illness/in-depth/mental-health/ART-20046477> (last accessed Oct. 10, 2016) (discussing mental illness stigma and ways for a patient to cope); Bonnie Miller Rubin, *Kennedy Forum Illinois Aims to End Stigma Around Mental Illness*, *Addiction*, CHICAGO TRIBUNE (Nov. 29, 2015), <http://www.chicagotribune.com/news/ct-patrick-kennedy-forum-illinois-met-20151129-story.html> (discussing advocacy group's efforts to combat stigma surrounding mental illness).

I. BACKGROUND

A. Security, Leaks, and Mental Illness

Mental illness has proven to be a formidable challenge to national security.³⁰ A particularly high-profile example arises in the case of the Army's prosecution of Private Bradley Manning.³¹ Throughout the course of sentencing, Private Manning's attorneys argued that he "was experiencing an intense personal crisis and deteriorating mental health in the months he was leaking large amounts of classified data to the anti-secrecy group WikiLeaks, and he should not have been kept in a war zone."³² A review of the record of trial and appellate documents released by the Army³³ show there was some evidence³⁴ of mental illness. Furthermore, these documents reveal the extent to which Private Manning's actions harmed national security.³⁵ This

³⁰ Jeffrey Toobin, *Edward Snowden Is No Hero*, THE NEW YORKER (Jun. 10, 2013), <http://www.newyorker.com/news/daily-comment/edward-snowden-is-no-hero>; Egil Krogh, *The Break-In That History Forgot*, NY TIMES (Jun. 30, 2007), <http://www.nytimes.com/2007/06/30/opinion/30krogh.html>; see also Bryan A. Liang & Mark S. Boyd, *PTSD In Returning Wounded Warriors: Ensuring Medically Appropriate Evaluation And Legal Representation Through Legislative Reform*, 22 STAN. L. & POL'Y REV. 177, 192–203 (2011) (discussing many challenges facing wounded warriors with PTSD in obtaining appropriate benefits and care).

³¹ See *United States v. Manning*, No. Army 20130739 (Army Ct. Crim. App.), <https://www.foia.army.mil/ReadingRoom/Detail.aspx?id=92> (providing links to case documents).

³² Julie Tate, *Army ignored Manning's deteriorating mental health, defense attorney says*, WASHINGTON POST (Aug. 13, 2013), https://www.washingtonpost.com/world/national-security/army-ignored-mannings-deteriorating-mental-health-defense-attorney-says/2013/08/13/56dd9e70-0451-11e3-a07f-49ddc7417125_story.html.

³³ DEP'T OF THE ARMY, FREEDOM OF INFORMATION ACT LIBRARY, CHELSEA (BRADLEY) MANNING COURT-MARTIAL DOCUMENTS, <https://www.foia.army.mil/ReadingRoom/Detail.aspx?id=92> (last visited Oct. 31, 2015).

³⁴ The author expresses no opinion on whether such evidence warranted a different outcome and notes that at the time of this writing, Private Manning's conviction is being reviewed by the Army Court of Criminal Appeals. Further, all information analyzed for this article was publically released by the Army.

³⁵ DEP'T OF THE ARMY, FREEDOM OF INFORMATION ACT LIBRARY, CHELSEA (BRADLEY) MANNING COURT-MARTIAL DOCUMENTS, <https://www.foia.army.mil/ReadingRoom/Detail.aspx?id=92> (last visited Oct. 10, 2016); Tom Ramstack, *Manning Leaks Caused Diplomatic 'Horror and Disbelief': Testimony*, REUTERS (Aug. 1, 2013), <http://www.reuters.com/article/2013/08/01/us-usa-wikileaks-manning-idUSBRE97013S20130801>.

information, when coupled with a review of the risk that a single person can pose, highlights the danger of mental illness in national security practitioners.³⁶

B. Prevalence of Mental Illness in America

According to the 2013 *National Survey on Drug Use and Health: Mental Health Findings* (“NSDUH”), the United States Department of Health and Human Services (HHS) estimated that 18.5%³⁷ of United States adults³⁸ suffered from any mental illness (AMI).³⁹ HHS further estimated that 4.2% of adults suffered from serious mental illness (SMI).⁴⁰ This is especially significant in a field where a single breach or leak can have a profound impact on national security.⁴¹ Nearly a quarter of an agency’s workforce, if representative of the United States population, is estimated to suffer from diagnosable mental illness. This includes just over 4% suffering from mental

³⁶ *Statement for the Record, Worldwide Threat Assessment of the U.S. Intelligence Community Before the House Appropriations Subcomm. on Defense*, 114th Cong. (2015) (statement of James R. Clapper, Director of National Intelligence); Tony Capra, *Snowden Leaks Could Cost Military Billions: Pentagon*, NBC NEWS (Mar. 6, 2014), <http://www.nbcnews.com/news/investigations/snowden-leaks-could-cost-military-billions-pentagon-n46426>; Tom Ramstack, *Manning leaks caused diplomatic ‘horror and disbelief:’ testimony*, REUTERS (Aug. 1, 2013), <http://www.reuters.com/article/2013/08/01/us-usa-wikileaks-manning-idUSBRE97013S20130801>.

³⁷ 2013 NSUDH, *supra* note 19, at 10.

³⁸ Defined as aged 18 or older. *Id.* at 3.

³⁹ Defined as adults who “currently or at any time in the past 12 months having had a diagnosable mental, behavioral, or emotional disorder (excluding developmental and substance use disorders) of sufficient duration to meet the diagnostic criteria specified within the *Diagnostic and Statistical Manual of Mental Disorders . . .*” *Id.* at 9.

⁴⁰ Defined as adults who “currently or at any time in the past year have had a diagnosable mental, behavioral, or emotional disorder (excluding developmental and substance use disorders) of sufficient duration to meet diagnostic criteria specified within DSM-IV (APA, 1994) that has resulted in serious functional impairment, which substantially interferes with or limits one or more major life activities.” *Id.* at 11–12.

⁴¹ See Capra, *supra* note 37 (describing both the cost in terms of time and money to fix the damage caused by the Snowden leaks); Ramstack, *supra* note 36. (relating the shock to American diplomats that their communications were available online).

illness that “has resulted in serious functional impairment, which substantially interferes with or limits one or more major life activities.”⁴²

C. *Human Cost of Mental Illness*

One urgent question of mental health is its relation to violence.⁴³ The effect of mental health related violence on our national security is clear, when looking at, for example, mass shootings occurring on military installations where many of our national security practitioners work.⁴⁴ Experts do not agree whether violence is a direct consequences of mental illness,⁴⁵ however, even those experts who argue that mental illness is not a predictor of violence tend to agree that mental illness can be a contributing factor to incidents of violence.⁴⁶ One worrisome obstacle to further illuminating the gun violence portion of this issue and its possible relationship with mental illness is a

⁴² 2013 NSUDH, *supra* note 19, at 11–12.

⁴³ HARVARD HEALTH PUBLICATIONS, HARVARD MEDICAL SCHOOL, MENTAL ILLNESS AND VIOLENCE (Jan. 1, 2011), http://www.health.harvard.edu/newsletter_article/mental-illness-and-violence [hereinafter *Mental Illness and Violence*]; Eric Silver, *Understanding The Relationship Between Mental Disorder and Violence: The Need For a Criminological Perspective*, 30 LAW & HUM. BEHAV. 685, 689 (2006) (explaining the need to look at individual risk factors that may increase the likelihood of violence either in conjunction with or independent of mental illness).

⁴⁴ See Ernesto Londono, et al., *Defense Department Orders Review Of Security Clearance Procedures*, WASHINGTON POST (Sep. 18, 2013), https://www.washingtonpost.com/politics/defense-department-orders-review-of-security-clearance-procedures/2013/09/18/56e26b0e-207f-11e3-8459-657e0c72fec8_story.html (describing the burden on the federal government to track the millions of employees with security clearances); Catherine E. Shoichet, et al., *Fort Hood Shooting: Psychiatric Issues Fundamental Underlying Causal Factor*, CNN (Apr. 4, 2014), <http://www.cnn.com/2014/04/03/us/fort-hood-shooting/> (recounting Army Specialist Ivan Lopez's history of depression and anxiety before killing three Army personnel and wounding sixteen others at Fort Hood); DJ Jaffe, *Carson City Shooting: Mental Illness Compromises National Security*, HUFFINGTON POST, (Nov. 9, 2016), http://www.huffingtonpost.com/dj-jaffe/carson-city-shooting-ment_b_951549.html (listing numerous attacks committed by mentally-ill individuals, whose victims include military service members, police officers, members of congress, and presidents of the United States).

⁴⁵ See *Mental Illness and Violence*, *supra* note 44; Kirk Heilbrun & Gretchen White, *The Macarthur Risk Assessment Study: Implications For Practice, Research, and Policy*, 82 MARQ. L. REV. 733, 742 (1999) (noting that scientific studies utilize different methods to assess levels of violence and that, controlling for substance abuse, violence may reflect environmental factors rather than psychiatric disorder).

⁴⁶ See *Mental Illness and Violence*, *supra* note 44. (suggesting that adequate treatment of mental illness may help reduce rates of violence).

federal law providing that, “none of the funds made available for injury prevention and control at the Centers for Disease Control and Prevention may be used to advocate or promote gun control.”⁴⁷ Though this law did not appear to prevent federal research into gun violence, that is exactly what happened, as the Center for Disease Control (CDC) and National Institute of Health (NIH) stayed away from projects that might fall into that category for fear of losing funding.⁴⁸

Mother Jones magazine conducted an investigation into mass shootings across the United States in 2012, and it continually updates the data.⁴⁹ A cursory review of the data reveals that the vast majority of cases involve mental health concerns.⁵⁰ As Dr. Jonathan M. Metzl and Dr. Kenneth T. MacLeish note in a 2015 article, “[o]ur brief review suggests that connections between mental illness and gun violence are less causal and more complex than current US public opinion and legislative action allow.”⁵¹ This view is generally shared by other mental health experts, including Dr. Jeffrey Swanson, who noted, “[p]eople with serious mental illness are three to four

⁴⁷ Omnibus Consolidated Appropriations Act of 1996, Pub. L. No. 104-208, Title II, 110 Stat. 3009-244 (1996) (sometimes referred to as the “Dickey Amendment”).

⁴⁸ See Christine Jamieson, *Gun Violence Research: History of the Federal Funding Freeze*, AM. PSYCHOL. ASSOC. (2013), <http://www.apa.org/science/about/psa/2013/02/gun-violence.aspx> (Feb. 2013) (ascribing the reluctance of federal agencies to conduct research to the ambiguous nature of what qualified as acceptable inquiry); Delphine d’Amora, *A Lot of People Are Telling Congress to Repeal Its Gag Order on Gun Violence Research*, MOTHER JONES (Dec. 2, 2015), <http://www.motherjones.com/politics/2015/12/pressure-builds-gun-research-congress> (delineating the groups calling on Congress to repeal the Dickey amendment); Brady Dennis, *Hours Before San Bernardino Shooting, Doctors Urged Congress to Lift Funding Ban on Gun Violence Research*, WASHINGTON POST (Dec. 2, 2015), <https://www.washingtonpost.com/news/to-your-health/wp/2015/12/02/hours-before-san-bernardino-mass-shooting-doctors-were-on-capitol-hill-petitioning-congress-to-lift-ban-on-gun-violence-research> (noting that the San Bernardino shooting occurred hours after a group of physicians delivered a petition to Congress to lift the restriction on gun violence).

⁴⁹ Mark Follman, et al., *US Mass Shootings, 1982-2015: Data From Mother Jones’ Investigation*, MOTHER JONES (Dec. 28, 2012), <http://www.motherjones.com/politics/2012/12/mass-shootings-mother-jones-full-data>.

⁵⁰ *Id.*

⁵¹ Jonathan M. Metzl, M.D., Ph.D. & Kenneth T. MacLeish, Ph.D., *Mental Illness, Mass Shootings, and the Politics of American Firearms*, 105 AM. J. PUB. HEALTH 240, 246 (2015).

times more likely to be violent than those who are not. However, “the vast majority of people with mental illness are not violent and never will be.”⁵²

The recurrent intersection of mental illness and mass violence applies to our national security practitioners.⁵³ A mass shooting at the Navy Yard in Washington, D.C. in September 2013, caused Defense Department officials to review clearance procedures.⁵⁴ This incident, along with countless others, further demonstrates the potential risk that mental illness poses to our national security practitioners.

Several authors have probed the legal limits of the connection between mental illness and violence. For example, on gun control laws in Tennessee, “Tennessee should implement a behaviorally-based gun control statute that goes beyond the isolated issue of mental health and applies risk assessment criteria associated with violent behavior in determining whether an individual should have access to firearms.”⁵⁵ Carolyn Wolf and Jamie Rosen, while critical of the assertion that mental health is connected with violence notes, “the mental health system has failed to identify those individuals who are a danger to themselves or others.”⁵⁶ Wolf and Rosen recommend a number of ways to improve the “flawed mental health system,” including allocating

⁵² Lois Beckett, *What We Actually Know About the Connections Between Mental Illness, Mass Shootings, and Gun Violence: A Conversation with Dr. Jeffrey Swanson*, PACIFIC STANDARD (June 10, 2014), <https://psmag.com/what-we-actually-know-about-the-connections-between-mental-illness-mass-shootings-and-gun-violence-4d550c45ce90#.6104wo4s3>.

⁵³ See *Breaking the Silence*, *supra* note 14, at 1 (noting that the mental health of law enforcement receives less attention and resources as the physical safety of officers); Greg Bothelo & Joe Sterling, *FBI: Navy Yard Shooter ‘Delusional,’ Said ‘Low Frequency Attacks’ Drove Him To Kill*, CNN (Sep. 26, 2015), <http://www.cnn.com/2013/09/25/us/washington-navy-yard-investigation/> (describing the mental delusions of Aaron Alexis before his attack on the Navy Yard).

⁵⁴ Ernesto Londono, et al., *Defense Department Orders Review of Security Clearance Procedures*, WASHINGTON POST (Sep. 18, 2013), https://www.washingtonpost.com/politics/defense-department-orders-review-of-security-clearance-procedures/2013/09/18/56c26b0e-207f-11e3-8459-657e0c72fec8_story.html.

⁵⁵ M. Roxana Nahhas Rudolph, *Balancing Public Safety With The Rights Of The Mentally Ill: The Benefit Of A Behavioral Approach In Reducing Gun Violence In Tennessee*, 45 U. MEM. L. REV. 671, 709 (2015).

⁵⁶ See Carolyn Reinach Wolf & Jamie A. Rosen, *Missing The Mark: Gun Control Is Not The Cure For What Ails The U.S. Mental Health System*, 104 J. CRIM. L. & CRIMINOLOGY 851, 868–870 (2014) (noting that between fiscal year 2009 and 2014, states cut a total of \$4.3 billion from their budgets). Such budget cuts force individuals suffering from mental health issues to overwhelm emergency rooms.

increased resources to mental health at the state level.⁵⁷ Finally, Eric Silver, reviews the relationship between mental health and violence, noting that the relationship is complicated when paired with substance abuse, and underscores the extent to which our knowledge on the relationship between mental health and violence still needs to be examined.⁵⁸

D. *Financial Cost of Mental Illness*

According to the Congressional Budget Office, “[a]bout one-sixth of federal spending goes to national defense.”⁵⁹ Having determined that mental health is a significant concern in the United States population⁶⁰ and that such a high portion of federal spending goes to national defense, we must therefore examine the financial cost of the intersection of these two issues.⁶¹ It may be impossible to truly ascertain the total cost due to the intangible nature of some costs that could arguably be related to mental health. Nonetheless, HHS endeavored to collect this information in the *Projections of National Expenditures for Mental Health Services and Substance Abuse Treatment (2004-2014)*.⁶² The mere existence of such a report underscores the importance and potential impact of mental illness in the United States.⁶³ At

⁵⁷ *Id.* at 869–872. Additionally, Wolf and Rosen recommend that schools and workplaces implement systems to identify early indications of a looming crisis. Departments in schools or workplaces should communicate when red flags such as “aggression, resentment, lack of motivation, performance issues, paranoia, . . . and interest in guns” are detected.

⁵⁸ Eric Silver, *Understanding The Relationship Between Mental Disorder And Violence: The Need For A Criminological Perspective*, 30 LAW & HUM. BEHAV. 685, 685 (2006).

⁵⁹ CONG. BUDGET OFF., DEFENSE AND NAT’L SECURITY, <https://www.cbo.gov/taxonomy/term/17/featured> (last visited Nov. 15, 2015).

⁶⁰ 2013 NSUDH at 1–2; U.S. DEP’T OF HEALTH AND HUMAN SERV., RESULTS FROM THE 2013 NATIONAL SURVEY ON DRUG USE AND HEALTH: SUMMARY OF NATIONAL FINDINGS (HHS Publication No. (SMA) 14-4863NSDUH Series H-48) (2014) (stating that in 2013 an estimated 24.6 million, or 9.4 percent, Americans age 12 or older were current illicit drug users, meaning they used an illicit drug during the month prior to the survey).

⁶¹ Katharine R. Levitt, et al., U.S. DEP’T OF HEALTH AND HUMAN SERV., PROJECTIONS OF NAT’L EXPENDITURES FOR MENTAL HEALTH SERVICES AND SUBSTANCE ABUSE TREATMENT (2004-2014) (HHS PUBLICATION NO. SMA 08-4326) (2008).

⁶² *Id.*

⁶³ *Id.*

that time, the *National Expenditure Projections* showed an expected \$203 billion cost of mental health treatment by 2014 in the United States.⁶⁴ The *National Expenditure Projections* estimated only \$35 billion toward treating substance abuse in the same timeframe.⁶⁵

A report from the World Economic Forum and the Harvard School of Public Health examined current data and made projections on the global cost of non-communicable diseases, to include mental illness.⁶⁶ The report estimated global output losses attributed to mental illness at \$8.5 trillion in 2010 and projected losses of \$16.1 trillion by the year 2030.⁶⁷ To put this into context, the same report estimated the global output losses of cardiovascular disease at \$8.3 trillion in 2010 and projected losses of \$15.8 trillion by 2030.⁶⁸

Clearly, the cost on employers is significant, but there is also great cost on the individual employee.⁶⁹ In a 2008 study, Ronald C. Kessler, Ph.D. and some of his colleagues looked into the “association between mental disorder and earnings.”⁷⁰ Dr. Kessler found that in 2002, “mental illness was estimated to be associated with a loss of \$193.2 billion in personal earnings” in the United States.⁷¹ Dr. Kessler noted disparity with several studies of this topic, but noted, “[i]rrespective of the reasons for the differences in estimates across studies, all three studies found that mental disorders are associated with massive losses of productive human capital.”⁷² While assessing the exact cost is unimportant for this article, the efforts taken to pinpoint figures again

⁶⁴ *Id.* at iii.

⁶⁵ *Id.* at iv.

⁶⁶ See WORLD ECONOMIC FORUM & THE HARVARD SCHOOL OF PUBLIC HEALTH, THE GLOBAL ECONOMIC BURDEN OF NON-COMMUNICABLE DISEASES at 5 (2011). (indicating that mental health conditions will account for the loss of \$16.1 trillion over the next twenty years, in addition to dramatically affecting productivity and quality of life).

⁶⁷ *Id.* at 34.

⁶⁸ *Id.* at 34.

⁶⁹ See Ronald C. Kessler, Ph.D., et al., *Individual and Societal Effects of Mental Disorders on Earnings in the United States: Results From the National Comorbidity Survey Replication*, 165 AM J PSYCHIATRY 703, 703 (2008) (finding that individuals suffering from twelve-month, serious mental illnesses earned significantly less).

⁷⁰ *Id.*

⁷¹ *Id.* at 708.

⁷² *Id.*

underscore the urgency of mental health problems and mental illness in America.

Another study examined by Dr. Chava Sibman, revealed relevant results.⁷³ Specifically, Dr. Sibman determined that, “[a]n annual average of 14.3 percent...of adults ages 18–64 (about 27.5 million adults) had expenses for treatment for mental health disorders in 2009–2011.”⁷⁴ Dr. Sigman also noted that, “[o]f those adults ages 18–64 in 2009–2011 who had a mental health-related expense, the average annual total expense on mental health was \$1,751.”⁷⁵ Therefore, it is clear that mental illness and the treatment of mental health is a significant factor in the United States and global economy.

II. CURRENT MENTAL HEALTH FRAMEWORK IN NATIONAL SECURITY CONTEXT

The foundation of our analysis lies in the legal and policy framework applicable to mental health in the national security arena. This section reviews current statutory provisions, executive actions, and samples policies from throughout the target population to examine their efficacy in protecting the mental health of national security practitioners.

A. Mental Health Standards for Entry

It is first important to understand the current situation of the law related to mental health in screening applications for national security positions. One nearly universal requirement for employment in the national security field is a

⁷³ Chava Zimban, *Statistical Brief #454: Expenditures for Mental Health Among Adults, Ages 18-64, 2009- 2011: Estimates for the U.S. Civilian Noninstitutionalized Population*, MEDICAL EXPENDITURE PANEL SURVEY (Oct. 2014), https://meps.ahrq.gov/data_files/publications/st454/stat454.shtml.

⁷⁴ *Id.* at 1.

⁷⁵ *Id.*

security clearance.⁷⁶ The standards for mental health applicable to security clearances can be found in several places including statutes, executive orders, and agency policies.

The adjudicative process for security clearances is specifically governed by the Adjudicative Guidelines for Determining Eligibility for Access to Classified Information, codified in title 32 of the C.F.R.⁷⁷ Guideline I governs emotional, mental, and personality disorders.⁷⁸ Guideline I notes that emotional, mental, and personality disorders “are of security concern because they may indicate a defect in judgment, reliability, or stability.”⁷⁹ Guideline I further provides that “[a] credentialed mental health professional (e.g., clinical psychologist or psychiatrist), employed by, acceptable to or approved by the government, should be utilized in evaluating potentially disqualifying and mitigating information fully and properly, and particularly for consultation with the individual's mental health care provider.”⁸⁰ Finally, Guideline I provides criteria for conditions that may disqualify an applicant.⁸¹ Note that

⁷⁶ Victor R. Donovan, ADMINISTRATIVE AND JUDICIAL REVIEW OF SECURITY CLEARANCE ACTIONS: POST EGAN, 35 A.F. L. REV. 323, 324 (1991); *All About Security Clearances*, U.S. DEP'T OF STATE, <http://www.state.gov/m/ds/clearances/c10978.htm> (last visited Oct. 31, 2016); *Careers & Internships*, CIA, <https://www.cia.gov/careers/application-process> (last visited Oct. 31, 2016); *Special Agent Selection System*, FBI, <https://www.fbijobs.gov/special-agent-selection-system> (last visited Oct. 8, 2016).

⁷⁷ Adjudicative Guidelines for Determining Eligibility for Access to Classified Information, 32 C.F.R. §§ 147.1–147.33 (2003).

⁷⁸ Guideline I--Emotional, Mental, and Personality Disorders, 32 C.F.R. § 147.11 (2003).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ The regulation provides:

(b) Conditions that could raise a security concern and may be disqualifying include:

- (1) An opinion by a credentialed mental health professional that the individual has a condition or treatment that may indicate a defect in judgment, reliability, or stability;
- (2) Information that suggests that an individual has failed to follow appropriate medical advice relating to treatment of a condition, e.g., failure to take prescribed medication;
- (3) A pattern of high-risk, irresponsible, aggressive, anti-social or emotionally unstable behavior;
- (4) Information that suggests that the individual's current behavior indicates a defect in his or her judgment or reliability.

(c) Conditions that could mitigate security concerns include:

- (1) There is no indication of a current problem;

the general language of § 147.11(b) and (c) allows “credentialed mental health professionals” to exercise a fair amount of discretion in making a preliminary determination of suitability.⁸² It is further worth noting that part 147 does not have a definitions section.⁸³

Section 8(a)(1)(IV) of Executive Order 10,450 further provides that investigations should include, “An adjudication of insanity, or treatment for serious mental or neurological disorder without satisfactory evidence of cure.”⁸⁴

Finally, section 3.1(e) of Executive Order 12,968, *Access to Classified Information* provides:

No negative inference concerning the standards in this section may be raised solely on the basis of mental health counseling. Such counseling can be a positive factor in eligibility determinations. However, mental health counseling, where relevant to the adjudication of access to classified information, may justify further inquiry to determine whether the standards of subsection (b) of this section are satisfied, and mental health may be considered where it directly relates to those standards.⁸⁵

It is important to note that this provision is generally permissive in allowing applicants who have sought counseling to be cleared, so

(2) Recent opinion by a credentialed mental health professional that an individual's previous emotional, mental, or personality disorder is cured, under control or in remission and has a low probability of recurrence or exacerbation;

(3) The past emotional instability was a temporary condition (e.g., one caused by a death, illness, or marital breakup), the situation has been resolved, and the individual is no longer emotionally unstable.

Id. at § 147.11(b)-(c).

⁸² *Id.* at § 147.11.

⁸³ Adjudicative Guidelines for Determining Eligibility for Access to Classified Information, 32 C.F.R. § 147 (2003).

⁸⁴ Exec. Order No. 10,450, 18 Fed. Reg. 2489 (Apr. 27, 1953), *reprinted in* 5 U.S.C. § 7331 (2003).

⁸⁵ Exec. Order No. 12,968, 2 C.F.R. 1995 Comp., p. 391 (Aug. 22, 1995).

long as the applicant currently meets the access requirements.⁸⁶ In other words, these provisions do not bar applicants who have ever sought mental health treatment. This means that the simple act of seeking mental health treatment does not prevent one from successfully receiving a security clearance.⁸⁷ In fact, this further means that even prior diagnoses of mental illness are not a *per se* bar to obtaining a security clearance.⁸⁸

B. *Collecting Mental Health Information*

This information may be collected in a number of ways, but the most common is on a Standard Form (SF) 86, electronically managed by OPM at the Electronic Questionnaires for Investigative Processing (e-QIP) system.⁸⁹ This can be a lengthy process, as a blank SF 86 is 127 pages.⁹⁰ Section 21 of the SF 86 requires the applicant to answer whether:

In the last seven (7) years, have you consulted with a health care professional regarding an emotional or mental health condition or were you hospitalized for such a condition? Answer 'No' if the counseling was for any of the following reasons and was not court-ordered:

- strictly marital, family, grief not related to violence by you; or
- strictly related to adjustments from service in a military combat environment

Please respond to this question with the following additional instruction: Victims of sexual assault who have consulted

⁸⁶ 32 C.F.R. § 147.11.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ OFF. OF PERS. MGMT., COMPLETING THE 2010 SF 86 IN E-QIP (Jul. 2012).

⁹⁰ OFF. OF PERS. MGMT., QUESTIONNAIRE FOR NAT'L SECURITY POSITIONS, STANDARD FORM 86, OMB FORM NO. 3206 0005 (Dec. 2010) [hereinafter *SF86*].

with the health care professional regarding an emotional or mental health condition during this period strictly in relation to the sexual assault are instructed to answer No.⁹¹

This is how such information is collected.⁹² Affirmative answers require the applicant to execute an “Authorization for Release of Medical Information Pursuant to the Health Insurance Portability and Accountability Act (HIPAA),” so that the investigative agency can request medical records related to mental health treatment.⁹³

C. *Mental Health Screening For Entry*

There are no specific statutory guidelines for what actual mental health conditions disqualify someone for a security clearance.⁹⁴ There is certainly some value in this ambiguity for the statutory provisions.⁹⁵ Nonetheless, the mental health screening that occurs as a condition precedent to entry, in most cases, requires the applicant to self-report an existing condition.⁹⁶ As discussed throughout this article, there is no uniform standard for how agencies conduct this screening.⁹⁷ For example, the Central Intelligence Agency warns candidates that their, “hiring process also entails a thorough medical examination of one's mental and physical fitness to perform essential job functions.”⁹⁸ The efficacy of these processes is often called into question.

⁹¹ *Id.* at 84–85.

⁹² See OFF. OF DIR. OF NAT'L INTELLIGENCE, 2014 REPORT ON SECURITY CLEARANCE DETERMINATIONS (Apr. 2015) (detailing the collection methodology).

⁹³ SF86, *supra* note 92, at 126.

⁹⁴ Adjudicative Guidelines for Determining Eligibility for Access to Classified Information, 32 C.F.R. §§ 147.1–147.33 (2003).

⁹⁵ Francis Brickfield makes an interesting argument about adding psychological assessments to screening for higher level clearances, which includes a discussion relevant to this topic. *Improving Scrutiny of Applicants*, *supra* note 12, at 294–298.

⁹⁶ SF86, *supra* note 92, at 84.

⁹⁷ *Improving Scrutiny of Applicants*, *supra* note 12, at 282–88.

⁹⁸ *Careers & Internships: Application Process*, CIA, <https://www.cia.gov/careers/application-process>. (last updated Sept. 20, 2016, 09:32 AM).

Travis Tritten, writing for *Stars and Stripes* notes, “potential recruits are asked about past suicide attempts or mental disorders, and the military conducts security background checks. But recent studies have indicated such informal screening has not been entirely effective, and problems manifest or are detected after the recruit has entered service.”⁹⁹

D. Mental Health Resources After Entry

Another area where the agencies have broad guidance, but no specific implementing directives, is mental health resources after entry. Section 1.5(b) of Executive Order 12,968 provides that “[t]he head of each agency that grants access ... shall establish a program for employees with access ... (b) inform employees about guidance and assistance available...including sources of assistance for ... mental health, or substance abuse.”¹⁰⁰

An example of one such program can be found in the United States Army. The Army has several resources related to monitoring and maintaining mental health. First, there is an Army Regulation related to health promotion generally.¹⁰¹ Army Regulation 600-63 is entitled “Army Health Promotion” and gives some general guidance to mental health programs for Soldiers.¹⁰² This regulation charges senior leaders with ensuring periodic health assessments are conducted, “to enable early identification and treatment of physical and behavioral health issues.”¹⁰³ In fact, the regulation specifically addresses the concern of this article, noting that one of the “three cornerstones of effective strategies to promote” mental health is, “[r]educing

⁹⁹ Travis J. Tritten, *House Passes New Mental Health Screening for Recruits*, STARS & STRIPES (May 22, 2014), <http://www.stripes.com/news/house-passes-new-mental-health-screening-for-recruits-1.284738>.

¹⁰⁰ Exec. Order No. 12,968, 60 Fed. Reg. 40245, 40248 (Aug. 2, 1995).

¹⁰¹ ARMY HEALTH PROMOTION, ARMY REG. 600-63, 1, 6–37 (Apr. 14, 2015).

¹⁰² *Id.* at 8–9.

¹⁰³ *Id.* at 7–8.

structural barriers to health.”¹⁰⁴ However, such programs are hollow and ineffective if the culture of such employers dissuades employees from seeking mental health treatment. Simply put, the cultures of agencies where national security practitioners work are often cultures that may not encourage seeking mental health treatment based upon notions of strength of character.¹⁰⁵ This fact is discussed further in the sections on barriers to seeking mental health treatment and cultural change.

E. No Cost and Confidential Mental Health Resources

As part of an integrated mental health support strategy, or as a subset of mental health resources after entry into the national security field, employers can offer access to no cost and confidential mental health resources. Military OneSource provides one such program for the Department of Defense.¹⁰⁶ Military OneSource is a “confidential Department of Defense-funded program providing comprehensive information on every aspect of military life at no cost” to qualifying service members.¹⁰⁷ A strength of this program is that it can circumvent some of the barriers to seeking mental health treatment discussed below, particularly among the military population. The program does so by providing an opportunity for confidential “non-medical counseling” free of charge.¹⁰⁸ The ability to seek treatment that is

¹⁰⁴ *Id.* at 15. The regulation goes on to note that, “[p]rograms that reduce structural barriers to BH should promote access to sources of BH care and reduce the stigma traditionally associated with BH services.” *Id.* at 16.

¹⁰⁵ *Breaking the Silence*, *supra* note 14, at 4.

¹⁰⁶ *About Mil. OneSource*, MIL. ONESOURCE, http://www.militaryonesource.mil/footer?content_id=267441 (last visited Oct. 30, 2015).

¹⁰⁷ *Id.*

¹⁰⁸ *Understanding Confidential Non-Medical Counseling for Service Members and their Families*, MIL. ONESOURCE, http://www.militaryonesource.mil/confidential-help/non-medical-counseling?content_id=282398 (last visited Oct. 30, 2015).

confidential from the employer is a critical factor to maintaining mental health of the target population of national security practitioners.¹⁰⁹

F. Barriers to Seeking Mental Health Treatment and Support

There is no doubt that there is a stigma surrounding mental illness.¹¹⁰ A survey published by the Center for Disease Control and Prevention (CDC) noted that, “negative attitudes about mental illness often underlie stigma, which can cause affected persons to deny symptoms; delay treatment; be excluded from employment, housing, or relationships; and interfere with recovery.”¹¹¹ The survey noted interesting findings with regard to how people feel about others with mental health problems, revealing that “[m]ost adults (88.6%) agreed with a statement that treatment can help persons with mental illness lead normal lives. However, fewer (57.3%) agreed with a statement that people are generally caring and sympathetic to persons with mental illness... [and] fewer persons with symptoms (24.6%) believed that people are caring and sympathetic to persons with mental illness.”¹¹² It is important to note that these results were from the general public and not specifically aligned with our target population of national security practitioners, but nonetheless are illustrative of the problem across society.

¹⁰⁹ See, e.g., Camilla Schwoebel & Roger Schlimbach, *Confidentiality: A Conundrum In Veterans Behavioral Health Care*, 32 DEV. MENTAL HEALTH L. 1, 1-3 (2013) (discussing typical concerns of veterans in seeking mental health care).

¹¹⁰ See Cara-Ann M. Hamaguchi, *A Precarious Balance: Managing Stigma, Confidentiality, and Command Awareness in the Mental Health Arena*, 222 MIL. L. REV. 156 (2014) (analyzing implications of the mental health stigma in military context); CTR. FOR DISEASE CONTROL AND PREVENTION, MORBIDITY AND MORTALITY WKLY. REP., ATTITUDES TOWARD MENTAL ILLNESS—35 STATES, DISTRICT OF COLUMBIA, AND PUERTO RICO, 2007 (May 28, 2010), <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm5920a3.htm> [hereinafter *Attitudes Toward Mental Illness*] (noting that negative attitudes of mental illness may cause those affected to deny symptoms).

¹¹¹ *Attitudes Toward Mental Illness*, *supra* note 112.

¹¹² *Id.*

National security practitioners are uniquely subject to stress¹¹³ and mental illness due to the nature of their work and yet, this is a population that is also uniquely stubborn in seeking help.¹¹⁴ The lessons described by the *Law Enforcement Suicide Report* and the conditions found therein can be extrapolated across our target population of national security practitioners.¹¹⁵ For example, the report notes that “[o]fficer safety is the top concern for police executives. Every chief wants their officers to return home each day as healthy and safe as when they came on duty.”¹¹⁶ This highlights the priority that law enforcement leadership places on physical safety.¹¹⁷ Yet, “[i]n a profession that prides itself on bravery and heroism mental health concerns can be seen as weaknesses and antithetical to the strong courageous police persona.”¹¹⁸ The hesitance to seek help is compounded by requirements to obtain and maintain a security clearance for national security practitioners, but follows the same rationale as discussed for law enforcement generally.¹¹⁹

As evidence of such concern, there are many articles answering some variant of the question of how seeking treatment for mental health will impact getting a security clearance, and thus eligibility for national security careers.¹²⁰ One such article notes, “[m]ental health issues can adversely affect an individual’s eligibility for a federal security clearance, but many clearance

¹¹³ See *Breaking the Silence*, *supra* note 14, at 10 (listing the stressors experienced by law enforcement officers). As discussed above, the population of national security practitioners includes personnel working in a variety of fields including law enforcement, the military, and the intelligence community. The unique stressors encountered by the law enforcement community are well outlined in *Breaking the Silence* and include exposure to combat conditions and the stress of attempting to prevent attacks on the homeland.

¹¹⁴ *Id.* at 1.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ William Henderson, *Mental Health and Final Security Clearances*, CLEARANCE JOBS (Mar. 19, 2010), <https://news.clearancejobs.com/2010/03/19/mental-health-and-final-security-clearances/>; Tamra Haire, *Financial Problems or PTSD Need Not Affect Security Clearance*, DEP’T OF THE ARMY (Jul. 8, 2009), <http://www.army.mil/article/24053/financial-problems-or-ptsd-need-not-affect-security-clearance/>.

applicants worry unnecessarily and sometimes choose not to seek treatment due to fears that it could result in the denial or revocation of a clearance.”¹²¹

The hesitance persists among those who serve. “Many Soldiers expressed an unwillingness to participate in behavioral or psychological health programs based on the perception that a “Yes” answer to the mental health question (Q21) on the United States Office of Personnel Management Standard Form 86 Questionnaire for National Security Positions would lead to denial, suspension or possible loss of a security clearance.”¹²² One prescient example of this hesitance was relayed in an article about the suspected suicide of a Navy SEAL Commander during a deployment to Afghanistan, noting that “[e]ven though the military has stepped up efforts to identify and treat mental health problems, many SEAL team members say they fear that acknowledging such problems is a career ender.”¹²³

G. Standards for Removal or Termination for Mental Health Reasons

Given the sensitivity of health generally and mental health specifically, as well as the sense of right to employment, agencies have procedures for terminating or removing employees for reasons of mental health. As a practical matter, an initial determination would have to be made that there is a mental health issue that makes the employee unsuitable for maintaining a clearance. One way to make such a determination would be to require a mental health examination. Authority to require such examinations can be found at 5 C.F.R. § 339.301(e)(1):

An agency may order a psychiatric examination (including a psychological assessment) only when:

¹²¹ Henderson, *supra* note 122.

¹²² Haire, *supra* note 122.

¹²³ Nicholas Kulish & Christopher Drew, *A Deadly Deployment, a Navy SEAL's Despair*, NY TIMES: ASIA PACIFIC (Jan. 19, 2016), http://www.nytimes.com/2016/01/20/world/asia/navy-seal-team-4-suicide.html?ref=middleeast&_r=2.

(i) The result of a current general medical examination which the agency has the authority to order under this section indicates no physical explanation for behavior or actions which may affect the safe and efficient performance of the individual or others, or

(ii) A psychiatric examination is specifically called for in a position having medical standards or subject to a medical evaluation program established under this part.

Looking at the criteria, one can imagine that supervisors in the culture described above may be reticent to require psychiatric examinations for national security practitioners.

Public employees who have a “property right in continued employment” cannot be deprived of this right, “without due process of law.”¹²⁴ An example of the due process afforded Soldiers, with regards to mental health, is found in Army Regulations 635-200¹²⁵ and 600-8-24.¹²⁶ These regulations delineate agency policy for administratively eliminating service members for reasons to include behavioral or mental health concerns.¹²⁷ Both regulations include requirements for medical evaluations when elimination is considered,

¹²⁴ *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985); see J. Michael McGuiness, *Procedural Due Process Rights of Public Employees: Basic Rules and a Rationale for a Return to Rule-Oriented Process*, 33 NEW ENG. L. REV. 931, 937–938 (2011) (discussing procedural due process afforded to public employees).

¹²⁵ See DEP'T. OF THE ARMY, ARMY REG. 635-200, ACTIVE DUTY ENLISTED ADMIN. SEPARATIONS at 14–15 (Sept. 6, 2011) [hereinafter *AR 635-200*] (setting forth a process by which enlisted members of the Army can be separated for medical, mental or other causes).

¹²⁶ DEP'T. OF THE ARMY, ARMY REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES at 58–59 (Sept. 13, 2011) [hereinafter *AR 600-8-24*] (setting forth a process by which officers of the Army can be separated for medical, mental or other causes).

¹²⁷ AR 635-200, *supra* note 125, at 14–15; AR 600-8-24, *supra* note 126, at 58–59.

and both regulations provide for redirecting certain types of eliminations from misconduct or inefficiency to the medical evaluation processes.¹²⁸

H. Appealing Mental Health Determinations

An example of one such process is the Defense Office of Hearings and Appeals.¹²⁹ A review of the process can be found in a report from the Department of Defense Inspector General from December 2003.¹³⁰ Courts generally grant great deference to an agency's determinations, even when the result is the loss of employment.¹³¹ And the standard is quite high, "clearly consistent with the national interest."¹³² The Supreme Court has held that, "[i]t should be obvious that no one has a 'right' to a security clearance."¹³³ Even the Americans with Disabilities Act¹³⁴ is no savior when it comes to

¹²⁸ *Id.*

¹²⁹ Department of Hearings and Appeals (DOHA) has authority to adjudicate appeals of clearance revocations and denials under DEP'T OF DEFENSE, DEP'T OF DEFENSE DIR. 5200.02, DOD PERS. SECURITY PROGRAM at 8 (Mar. 21, 2004, revised Sep. 9, 2014) with respect to service members and DoD civilian employees, and under DEP'T OF DEFENSE, DEP'T OF DEFENSE DIR. 5220.6, DEFENSE INDUSTRIAL PERS. SECURITY CLEARANCE REVIEW PROGRAM at 36, 45 (Jan. 2, 1992, revised Aug. 30, 2006) with regard to contract personnel.

¹³⁰ OFF. OF THE INSPECTOR GEN. OF THE DEP'T OF DEF., REP. NO. 04-INTEL-02, D, SECURITY ADJUDICATION AND APPEALS PROCESS 4-6 (Dec. 12, 2003) (providing an examination of the adjudication and appeals process for Department of Defense security clearances).

¹³¹ See Victor R. Donovan, *Administrative and Judicial Review of Security Clearance Actions: Post Egan*, 35 A.F.L. REV. 323, 328 (1991); Dep't of Navy v. Egan, 484 U.S. 518, 529-30 (1988) (holding that in cases related to determinations to grant or revoke security clearance, the courts will generally grant deference to administrative agencies); see also Charles Pollack, *A Delicate Balance: Federal Employees, Security Clearances, and the Role of The Federal Circuit*, 23 FED. CIRCUIT B.J. 133, 146 (2013) (discussing availability of judicial review for security clearance determinations).

¹³² *In the Matter of: *** Applicant for Security Clearance*, ISCR Case No. 10-10821 (D.O.H.A.), 2012 WL 840120 (Jan. 10, 2012).

¹³³ *Egan*, 484 U.S. at 528.

¹³⁴ 42 U.S.C. §§ 12101-12213 (1994); 42 U.S.C. §§ 12101-12213 (1994).

disqualifying mental illness.¹³⁵ As Byers notes, and *Egan* teaches us, the courts will not disturb agency determinations in the area of security clearances.¹³⁶

III. THE UNIQUE RISKS TO MENTAL HEALTH OF NATIONAL SECURITY PRACTITIONERS

Our target population of national security practitioners is subject to unique stresses not present in most other occupations, stresses that make this population particularly at risk for mental illness or mental health difficulties.¹³⁷ As Craig Stickler notes in his introductory letter to the report of the International Association of Police Chiefs' National Symposium on Law Enforcement Officer Suicide and Mental Health, "[t]he truth is our police officers, and professional employees, are not immune to the stresses of the job. Arguably, they are more susceptible given the nature of police work."¹³⁸ This reference to the stresses of police work certainly applies to our target population as well. These individuals see, analyze, and investigate, critical and often profoundly disturbing national security matters and events.¹³⁹

The stress brought on is not, however, confined to the stress of the work itself.¹⁴⁰ There is also stress in simply holding such positions of public trust, which make national security practitioners particularly subject to the dangers

¹³⁵ See *McCoy v. Pennsylvania Power & Light Co.*, 933 F. Supp. 438, 443-44 (M.D. Pa. 1996) (holding an alcoholic plaintiff was not qualified for a disability under the Americans with Disabilities Act as his alcoholism precluded his retention of a security clearance necessary for his job); *McDaniel v. AlliedSignal, Inc.*, 896 F. Supp. 1482, 1491-92 (W.D. Mo. 1995) (holding that a plaintiff who suffered from depression and alcoholism was not qualified for a disability under the Americans with Disabilities Act, as his mental condition precluded his maintaining a required security clearance); Keith Alan Byers, *No One Is Above the Law When It Comes to the ADA and the Rehabilitation Act—Not Even Federal, State, or Local Law Enforcement Agencies*, 30 LOY. L.A. L. REV. 977, 1020 (1997) (noting that any person with a disability who is denied a security clearance will be unlikely to prevail if that individual challenges the determination that he or she is not otherwise qualified).

¹³⁶ Byers, *supra* note 137, at 1020; *Egan*, 484 U.S. at 528-30.

¹³⁷ *Breaking the Silence*, *supra* note 14, at iii.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

of public shaming for a misstep or mistake.¹⁴¹ In fact, the threat of such shaming, even if mistaken, can still have catastrophic consequences.¹⁴² One such example is the case of a San Antonio Police Department Captain¹⁴³ in the aftermath of the Ashley Madison hack.¹⁴⁴ Captain Michael Gorhum committed suicide after his official email address was published with the list of purported users of Ashley Madison, a website for helping users arrange extra-marital affairs.¹⁴⁵ According to reports, Captain Gorhum was not actually on the list of users involved in this breach, however, “when Capt. Gorhum's name was published, he was devastated and his colleagues quickly became aware of his presence on it.”¹⁴⁶

Another example of the unique stressors can be found in the suicide rate among military members.¹⁴⁷ One study found that the suicide rate in the Army was below that of the general civilian population until surpassing it in 2008.¹⁴⁸ There could be many reasons for the change including increased number of deployments,¹⁴⁹ decreased standards to support increased

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Shekhar Bhatia, *EXCLUSIVE: 'Ashley Madison' Suicide Cop Killed Himself After Police-Hating Website CLAIMED His Email Address Was Among Members Even Though It WASN'T Actually on Leaked List*, DAILY MAIL (Aug 27, 2015), <http://www.dailymail.co.uk/news/article-3213302/Ashley-Madison-suicide-cop-NOT-leaked-list-cop-hating-website-published-email-address-member-took-life.html>.

¹⁴⁴ Robert Hackett, *What To Know About The Ashley Madison Hack*, FORTUNE: TECH (Aug. 26, 2015), <http://fortune.com/2015/08/26/ashley-madison-hack/>; *Online Cheating Site Ashley Madison Hacked*, KREBS ON SECURITY (Jul. 15, 2015), <http://krebsonsecurity.com/2015/07/online-cheating-site-ashleymadison-hacked/>.

¹⁴⁵ Bhatia, *supra* note 145.

¹⁴⁶ *Id.*

¹⁴⁷ Carrie Gann, *Suicides, Mental Health Woes Soar Since Start of Iraq War, Study Finds*, ABC NEWS (Mar. 8, 2012), <http://abcnews.go.com/Health/study-80-percent-army-suicides-start-iraq-war/story?id=15872301>.

¹⁴⁸ Matthew K. Nock, et al., *Suicide Among Soldiers: A Review of Psychosocial Risk and Protective Factors*, 76 PSYCHIATRY 2, 97–125 (2013).

¹⁴⁹ Though a recent study suggests it is not directly related to the deployments themselves, the increased number of deployments through the wars (and surge operations therein) in Iraq and Afghanistan have increased enlistment and discharge rates. See Dave Phillips, *Study Finds No Link Between Military Suicide Rate and Deployments*, NY TIMES (Apr. 1, 2015), http://www.nytimes.com/2015/04/02/us/study-finds-no-link-between-military-suicide-rate-and-deployments.html?_r=0 (noting that soldiers may be deployed without being in combat and soldiers who left military service within four years were at much higher risk of suicide than those who continued to serve).

enlistments,¹⁵⁰ and many others. These numbers further demonstrate that national security practitioners are at a particular risk and warrant our attention.

IV. RECOMMENDATIONS

A. *What to Change:*

1. Mental Health Screening

Current mental health screening is inadequate. Francis X. Brickfield examines this issue in *Improving Scrutiny of Applicants for Top Secret / SCI Clearances by Adding Psychological Assessments*.¹⁵¹ As part of this article's recommendations, Brickfield's recommendations should be considered and generally implemented.¹⁵² Though Brickfield focuses on screening for candidates based upon the type of clearance, it is worth considering extending the proposed improvements to screening based upon the type of position – in this case all national security practitioners.¹⁵³ As Brickfield notes, there is a cost involved, and that is a factor when considering how to implement additional psychological screening for security clearances.¹⁵⁴ Take particular note of Brickfield's assessment that psychological screening, like polygraph examinations, is a potentially useful additional tool in screening applicants.¹⁵⁵ The additional cost is the main challenge to this recommendation, one that

¹⁵⁰ Fred Kaplan, *Dumb and Dumber: The U.S. Army Lowers Recruitment Standards . . . Again*, SLATE (Jan. 24, 2008), http://www.slate.com/articles/news_and_politics/war_stories/2008/01/dumb_and_dumber.html; Tom Bowman & Steve Inskeep, *Army Documents Show Lower Recruitment Standards*, NPR (Apr. 17, 2008), <http://www.npr.org/templates/story/story.php?storyId=89702118>.

¹⁵¹ *Improving Scrutiny of Applicants*, *supra* note 12, at 255.

¹⁵² *Id.* at 287–290.

¹⁵³ *Id.* at 294–95.

¹⁵⁴ *Id.* at 291–294.

¹⁵⁵ *Id.* at 290–292.

could be easily overcome.¹⁵⁶ Further as part of this recommendation, it will no longer be necessary to collect this information in the manner it is currently collected, on the SF86 or in e-QIP.¹⁵⁷ Therefore, section 21 should be removed from this process.¹⁵⁸ This yields the added benefit of no longer including mental health records in this portion of an applicant's file, allowing better control of mental health records and increased protections of privacy and confidentiality.

2. Mandatory Periodic Mental Health Assessments

In addition to the provisions for self-referral or supervisor referral of employee mental health problems, each relevant agency should implement periodic mental health assessments. Just as many of the relevant agencies require periodic medical evaluations, periodic mental health assessments could be an effective tool for identifying and mitigating many mental health problems at an early stage. Such a program should include mandatory periodic counseling sessions that are entirely confidential. The role of the mental health provider in these recommendations is paramount, but the nature of the recommendations implicates significant potential ethical concerns related to confidentiality¹⁵⁹ and duty to warn¹⁶⁰ as well as legal concerns related to provider liability.¹⁶¹ While the federal government has the

¹⁵⁶ *Id.* at 292–93.

¹⁵⁷ *SF86*, *supra* note 92.

¹⁵⁸ *Id.*

¹⁵⁹ Jaffee v. Redmond, 518 U.S. 1, 17–18 (1996); Helen A. Anderson, *The Psychotherapist Privilege: Privacy And "Garden Variety" Emotional Distress*, 21 GEO. MASON L. REV. 117, 121–139 (2013).

¹⁶⁰ Griffin Edwards, *Doing Their Duty: An Empirical Analysis of the Unintended Effect of Tarasoff v. Regents on Homicidal Activity*, 57 J. L. & ECON. 321, 323 (2014); Marshall A. Glenn, Ph.D. & Christopher A. Tumminiaa, *The Duty to Warn in Oklahoma: A Survey of Law Across Licensed or Certified Psychotherapists*, 38 OKLA. CITY U. L. REV. 81, 84 (2013).

¹⁶¹ See Thomas L. Hafemeister, et al., *Parity at a Price: The Emerging Professional Liability of Mental Health Providers*, 50 SAN DIEGO L. REV. 29 (2013) (discussing mental health professionals' liability concerns generally); Charles E. Cantu, et al., *Bitter Medicine: A Critical Look at the Mental Health Care Provider's Duty to Warn in Texas*, 31 ST. MARY'S L. J. 359, 403 (2000).

authority to order such evaluations,¹⁶² they also raise certain privacy concerns that must be navigated.¹⁶³ Such evaluations will certainly reveal conditions that are service-disqualifying for the employee, which in turn requires some provision for transition to alternate employment in order to give the employees confidence in the system.

3. No-Cost Confidential Mental Health Treatment

Another provision that must be present alongside mandatory periodic health assessments is no-cost confidential mental health treatment. Similar to the services provided by Military OneSource as discussed above, these provisions will allow employees to self-refer to mental health treatment and increase the probability that mental health issues or illness will be identified and treated early.¹⁶⁴ It is important for the agency to fund such programs because many highly educated government employees make comparatively less money than civilian equivalents¹⁶⁵ (which includes a portion of our target population) and economic constraints may prevent them from seeking treatment.

4. Other Mental Health Measures

Information provided by various sources, including the Mayo Clinic and Center for Investigating Healthy Minds at the University of Wisconsin, suggest that prevention of mental illness can be aided by prior mental fitness.

¹⁶² Authority to Require an Examination, 5 C.F.R. § 339.301 (1947).

¹⁶³ David P. Twomey, *Employee Privacy Law And The Developing Law Relating To Employee Medical Information And "Other" Private Matters*, 2 QUINNIPIAC HEALTH L.J. 135, 138 (1999).

¹⁶⁴ *Early Mental Health Intervention Reduces Mass Violence Trauma*, NAT'L INSTITUTE OF MENTAL HEALTH (Sep. 6, 2002), <http://www.nimh.nih.gov/news/science-news/2002/early-mental-health-intervention-reduces-mass-violence-trauma.shtml>.

¹⁶⁵ CONG. OF THE U.S., CONG. BUDGET OFF., *COMPARING THE COMPENSATION OF FED. AND PRIVATE-SECTOR EMPLOYEES* (PUB. NO. 4403) 6-8 (January 2012).

¹⁶⁶ Studies suggest that practices such as yoga,¹⁶⁷ meditation,¹⁶⁸ physical exercise,¹⁶⁹ and other methods have significant mental health benefits. Therefore, employers should focus on providing opportunities for their employees to engage in such activities, to include offering incentive or cost-sharing programs and awareness programs.

5. Alternate Hiring Provisions or Authorities

Mandatory periodic mental health assessments will likely lead to the identification of employees who no longer meet standards for maintaining a security clearance. Therefore, a necessary complement to that recommendation are provisions that provide such employees with opportunities for continued employment in a field compatible with the mental illness from which they are suffering. The legislative branch has approached such provisions for military members or former military members by providing for medical retirement and transition to care under the Veterans Affairs Administration.¹⁷⁰ The struggles of that agency and legislative efforts to improve it notwithstanding,¹⁷¹ the issue is in dire need of attention as even if the VA achieved total success for treating military members with mental illness, there would still be a significant issue of re-

¹⁶⁶ *Diseases and Conditions: Mental Illness*, MAYO CLINIC (last updated Nov. 1, 2015), <http://www.mayoclinic.org/diseases-conditions/mental-illness/basics/prevention/CON-20033813>; Univ. of Wisconsin, *Change Your Mind. Change Your World. 2015 Annual Report*, CENTER FOR INVESTIGATING HEALTHY MINDS AT THE WAISMAN CENTER, <http://investigatinghealthyminds.org/pdfs/Annual-report-digital.pdf> (last updated on Nov. 1, 2015).

¹⁶⁷ Amy Novotney, *Yoga as a Practice Tool*, 40 MONITOR ON PSYCHOL. 10, 38 (2009).

¹⁶⁸ *Meditation: A Simple, Fast Way to Reduce Stress*, MAYO CLINIC (last updated Nov. 1, 2015), <http://www.mayoclinic.org/tests-procedures/meditation/in-depth/meditation/art-20045858>.

¹⁶⁹ Kirsten Weir, *The Exercise Effect*, 42 MONITOR ON PSYCHOL. 11, 48 (2011).

¹⁷⁰ HERBERT HOOVER: PROCLAMATIONS AND EXECUTIVE ORDERS, MARCH 4, 1929 TO MARCH 4, 1933 623–624 (1974).

¹⁷¹ Jim Kuhnhenh, *VA Review Finds ‘Significant And Chronic’ Failures*, ASSOCIATED PRESS (Jun. 28, 2014), <http://bigstory.ap.org/article/obama-hear-update-veterans-affairs-problems>; Ramsey Cox, *GOP Blocks Veterans Bill*, THE HILL: FLOOR ACTION (Feb. 27, 2014), <http://thehill.com/blogs/floor-action/senate/199480-gop-blocks-veterans-bill>.

employment. The federal government offers several programs related to hiring and re-hiring preference so these provisions should be incorporated therein.¹⁷²

B. How to Change:

1. Legislative Action

There is often controversy over the separation of powers between the legislative branch and the executive branch when it comes to matters of national security.¹⁷³ The legislative power of matters of national security derives greatly from the power of the purse provided under the Article I, Section 8 of the Constitution.¹⁷⁴ For the most effective enactment of these recommendations, therefore, the preference would be legislative action with consistent executive action, putting the Executive's actions in its strongest position as described by Justice Jackson's concurrence in the *Steel Seizure* case.¹⁷⁵ In his concurrence in the *Steel Seizure* case, Justice Jackson examines the separation of powers in the national security context between the executive branch and the legislative branch.¹⁷⁶ Justice Jackson identifies three categories of executive action in this context, first where the Executive acts with specific legislative authority and is therefore at its strongest authority;

¹⁷² Joe Davidson, *What Do You Think About The Federal Government's Veterans' Hiring Preference?*, WASHINGTON POST (Aug. 19, 2014), <https://www.washingtonpost.com/news/federal-eye/wp/2014/08/19/what-do-you-think-about-the-federal-governments-veterans-hiring-preference/>.

¹⁷³ See *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (expanding on Justice Jackson's analysis from *Steel Seizure*, stating that where executive acts on area that legislative has been silent and remains silent, executive action is valid); *Youngstown Sheet & Tube Co. v. Sawyer* (*Steel Seizure*), 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (setting the framework for examining executive action with legislative authority, without legislative authority, and against legislative authority); Robert F. Turner, *Understanding the Separation of Foreign Affairs Powers Under the Constitution*, 60 N.Y. ST. B.J. 8, 13 (1988) (describing competing theories about the separation of foreign affairs powers).

¹⁷⁴ U.S. CONST. art. I, § 8.

¹⁷⁵ *Steel Seizure*, 343 U.S. at 634-637 (Jackson, J., concurring).

¹⁷⁶ *Id.*

second, where the Executive acts contrary to legislation and is therefore at its weakest authority; and the twilight in between.¹⁷⁷

Therefore, the Congress should take two steps. First, it should fund mental health programs for the relevant agencies. Second, the Congress should make select statutory adjustments that provide authority for the executive to utilize such funds for mental health programs, screening, and re-employment initiatives.

One such statutory amendment should be made to Guideline I criteria related to emotional, mental, and personality disorders.¹⁷⁸ Section 147.11(b), which identifies certain conditions that may be disqualifying has two provisions which should be changed.¹⁷⁹ Subparagraph (b)(2) provides, “[i]nformation that suggests that an individual has failed to follow appropriate medical advice relating to treatment of a condition, e.g., failure to take prescribed medication;” and subparagraph (b)(4) provides, “information that suggests that the individual's current behavior indicates a defect in his or her judgment or reliability.”¹⁸⁰ Specifically, the word “suggests” should be replaced with “demonstrates” in both subparagraphs.¹⁸¹ This change will prevent providers from ambiguous application of the word “suggests” with relation to specific criteria for eliminating an applicant from consideration.¹⁸²

2. Executive Action

While the legislative changes recommended above could address many of the concerns posed in this article, the executive branch need not wait for such legislation. As we learn from the *Steel Seizure Case* we know that especially in the field of national security, the President can take executive action in the

¹⁷⁷ *Id.*

¹⁷⁸ Guideline I--Emotional, Mental, and Personality Disorders, 32 C.F.R. § 147.11 (2003).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

absence of legislative action to the contrary, and such action will likely be upheld by the courts.¹⁸³ Given the above recommendations for legislative action, the executive actions recommended herein would either be with express legislative authority, or at least on matters for which the legislative has remained silent. Doing so puts the executive actions on quite firm legal standing based upon the *Steel Seizure* analysis and thus more likely to be effective.¹⁸⁴ The primary recommendation for executive action is to issue an executive order that implements the programs recommended above. Specifically, the executive order should change mental health screening, add mandatory periodic mental health assessments, add no-cost mental health treatment programs for employees, and implement soft-landing provisions. Such an order should also make clear that oversight for these programs is a top priority, to ensure their efficacy and employee awareness.

3. Policy

Each agency discussed or implicated by the recommendations in this article have different policies, procedures, and cultures. It may not be feasible or practical for the Executive to implement specific programs to enact these recommendations. Therefore, agencies should be permitted to enact the specific programs in a manner deemed most effective by each individual agency where appropriate.

Agencies need not wait for legislative or executive action. Many of the proposed changes are already authorized or could be enacted under the authority of 5 U.S.C. § 7901, Health Service Programs.¹⁸⁵ Section 7901 permits agency heads to establish health service programs that “promote and

¹⁸³ *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 634-39 (1952) (Jackson, J., concurring).

¹⁸⁴ *Id.*

¹⁸⁵ 5 U.S.C. § 7901 (2015).

maintain the physical and mental fitness of employees” and specifically may include, “preventative programs relating to health.”¹⁸⁶

4. Culture Change

There are significant cultural barriers across the target population to seeking mental health treatment.¹⁸⁷ Further, organizational culture is notoriously difficult to change.¹⁸⁸ Therefore, organizational leaders at every level need to take steps to ensure a cultural change that allows and encourages these employees to maintain their mental health as progressively as their physical health. Leaders should focus on multi-faceted approaches that emphasize the maintenance of mental health through awareness, by senior leader example, and through other initiatives directed at cultural change.¹⁸⁹ The importance of leading by example cannot be understated.

5. Debunking Myths

Lastly, one great area for improvement would be an affirmative effort to debunk common myths and misconceptions of the affect on mental health treatment on the application for a security clearance. This idea has already gained some traction, as seen in an article found on the Military OneSource

¹⁸⁶ *Id.*

¹⁸⁷ *Breaking the Silence*, *supra* note 14, at 4.

¹⁸⁸ See Leong Chee Tung, *Why Creating Organizational Change is So Hard*, GALLUP BUS. J. (May 22, 2014), <http://www.gallup.com/businessjournal/168992/why-creating-organizational-change-hard.aspx> (detailing steps to improve the probable success of organizational change); Leon Neyfakh, *How To Change A Culture*, BOSTON GLOBE (Sep. 23, 2012), <http://www.bostonglobe.com/ideas/2012/09/22/how-change-culture/HitMpC95xPFidEjEl2cx9J/story.html?camp=pm> (arguing that an effective method of changing group behavior is to convince the group that others are already acting in the desired manner).

¹⁸⁹ *Culture as Culprit: Four Steps to Effective Change*, WHARTON @ WORK (Sept. 2011), <http://executiveeducation.wharton.upenn.edu/thought-leadership/wharton-at-work/2011/09/four-steps-culture-change>; Michael Watkins, *What is Organizational Culture? And why Should we Care?*, HARV. BUS. REV. (May 15, 2013), <https://hbr.org/2013/05/what-is-organizational-culture/>.

website encouraging Soldiers to take care of their psychological problems.¹⁹⁰ This is an area that needs emphasis from senior leaders throughout the organizations involved, especially given the difficulty in changing organizational cultures.¹⁹¹

CONCLUSION

This article addresses the mental health and well-being of a segment of our nation's most important working population: those tasked with the protection of our national security and the defense of our homeland. While mental health is a concern across society, the maintenance of the mental health of this specific population is absolutely vital to the national security. The current law is ambiguous in some key areas and nearly silent in others, such as providing mental health support and resources. We need to implement psychological screening to identify potential problems prior to entry. Then, understanding the nature of the work to which these employees are subject; we need to better support their mental health through periodic screening for early detection, and provide no-cost confidential treatment. Lastly, we must better care for these employees when the stresses from protecting this nation overcome their ability to continue working in the field of national security. We must do better for Dom, for each other, and for national security

¹⁹⁰ *How Receiving Psychological Health Care Impacts Your Security Clearance*, MIL. ONESOURCE (Sep. 22, 2015), http://www.militaryonesource.mil/crisis-prevention?content_id=273266.

¹⁹¹ Tung, *supra* note 190; Neyfakh, *supra* note 190; D. MICHAEL ABRASHOFF, GET YOUR SHIP TOGETHER (Penguin Group 2004).