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Presidential Polygraph Order and the Fourth Amendment: Subjecting Federal Employees to Warrantless Searches

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NOTE

THE PRESIDENTIAL POLYGRAPH ORDER AND THE FOURTH AMENDMENT: SUBJECTING FEDERAL EMPLOYEES TO WARRANTLESS SEARCHES

On March 11, 1983, President Ronald Reagan issued National Security Decision Directive 84[1] (Directive) designed to reduce the unauthorized disclosure of classified information. The Directive establishes procedures to be followed by executive branch agencies in investigating unauthorized disclosures,[2] commonly known as "leaks." Specifically, the Directive authorizes executive agencies to conduct polygraph examinations of federal employees in the course of leak investigations.[3]

President Reagan suspended key provisions of the Directive, including the polygraph provisions, in February 1984.[4] Nonetheless, several factors indicate that the issues raised by the Directive have not been laid to rest. First, White House officials state that the Administration is

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1 National Security Decision Directive 84 (Mar. 11, 1983), *reprinted in The President's National Security Decision Directive 84 and Department of Defense Directive on the Use of Polygraphs, 1983: Hearings Before the Legislation and National Security Subcomm. of the House Comm. on Government Operations,* 98th Cong., 1st Sess. (1984) (exhibit B accompanying statement of Richard K. Willard, Deputy Assistant Attorney Gen., Dep't of Justice) [hereinafter cited as *Directive, reprinted in Directive Hearings*]. The Directive is also reprinted in *President Issues Directive on Safeguarding National Security Information,* 5 ABA STANDING COMMITTEE L. AND NAT'L SECURITY INTELLIGENCE REP. 1, 2 (May 1983).

2 *Directive, reprinted in Directive Hearings, supra* note 1, exhibit B, ¶ 1.

3 The section of the Directive authorizing polygraph examinations provided:

> 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. As 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.

Directive, reprinted in Directive Hearings, supra note 1, ¶ 5.

4 *See Reagan to Relent on Secrecy Pledge,* N.Y. Times, Feb. 15, 1984, at A1, col. 1; *Reagan Shelves Requirement for Polygraph Tests,* Wash. Post, Feb. 16, 1984, at A1, col. 1.

Subsequently, National Security Advisor Robert C. McFarlane informed members of Congress that "the Administration will not reinstate [the polygraph provision] for the duration of this session of Congress" but that "we . . . cannot foreclose future action along the lines of NSDD-84 . . . ." Letter from Robert C. McFarlane to Rep. Patricia Schroeder (Mar. 20, 1984).

seeking a bipartisan compromise with Congress on the problems involving leak investigations.[5] Therefore, Congress will have to consider the extent to which federal agencies may order their employees to take polygraph examinations in the course of the investigations. Second, commentators have concluded that election-year pressures[6] and the confirmation hearings of Edwin Meese 3d for Attorney General[7] may have motivated the temporary suspension of the Directive. Thus, if Reagan is reelected in 1984, the Directive might be reinstated.[8] Third, although federal agencies are no longer obliged to implement the Directive's provisions, "each agency is free to enact their own version of the President's . . . polygraph policies . . . ."[9] Despite Reagan's temporary suspension of the Directive, the question remains: To what extent may a federal agency order its employees to take polygraph tests in the course of leak investigations?

Polygraphs have been criticized since their inception in the early 1900s.[10] Most federal courts have concluded that polygraph evidence is generally inadmissible in criminal trials because of serious questions about its validity.[11] In addition, the intrusive and intimidating nature

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5 *See* Letter from National Security Advisor Robert C. McFarlane to Rep. Patricia Schroeder (Mar. 20, 1984) ("[W]e would prefer to work cooperatively with Congress to develop a mutually-acceptable solution to this problem."); *See also Reagan Shelves Requirement for Polygraph Tests,* Wash. Post, Feb. 16, 1984, at A1, col. 1 ("In place of the [Directive provisions] . . . the White House now wants to negotiate a 'bipartisan solution' with Congress 'to the problem of safeguarding classified information' "); *see also Reagan to Relent on Secrecy Pledge,* N.Y. Times, Feb. 15, 1984, at A1, col. 1 (Directive to be withheld "while the Administration tried to negotiate a compromise with Congress").

6 *See, e.g., Democrats to Press Bills Against Secrecy Measures,* N.Y. Times, Feb. 17, 1984, at A6, col. 1 (a motive for withdrawing the Directive "was 'to curtail a tidal wave of bad press until after the election,' " according to Sen. Thomas Eagleton).

7 *See, e.g., id.* (further motive for withdrawing the Directive was "to remove a controversial issue from the Senate hearings on the nomination of . . . Edwin Meese 3d . . . to be Attorney General."); *see also The Censorship Directive,* Wash. Post, Feb. 16, 1984, at A18, col. 2; *Reagan Shelves Requirement for Polygraphs Tests,* Wash. Post, Feb. 16, 1984, at A12, col. 1 (Sen. Charles Mathias had intended "to make the [Directive] an issue in the [Meese confirmation] proceedings").

8 *See, e.g., Reagan to Relent on Secrecy Pledge,* N.Y. Times, Feb. 15, 1984, at A20, col. 4 (White House official "suggested that if the White House did not reach a compromise with Congress, the President could reissue the order if re-elected"); Safire, *Split Screen Candidate,* N.Y. Times, Mar. 9, 1984, at A29, col. 1 ("the prospect of Mr. Meese at the helm of Justice [Department] in a second term sends the frisson that [the Directive] will be back with a vengeance"). *See also* Letter from National Security Advisor Robert C. McFarlane to Rep. Patricia Schroeder (Mar. 20, 1984) ("[W]e . . . cannot completely foreclose future action along the lines of NSDD-84 if a legislative solution to unauthorized disclosure is not found.").

9 Representative Jack Brooks, *quoted in* N.Y. Times, Feb. 17, 1984, at A6, col. 5.

10 *See* D. LYKKEN, A TREMOR IN THE BLOOD 27-28 (1981).

11 Some federal courts have a per se rule excluding polygraph evidence. *See, e.g.,* United States v. Clark, 598 F.2d 994 (5th Cir. 1979), *cert. denied,* 449 U.S. 1128 (1981); Conner v. Auger, 595 F.2d 407, 411 (8th Cir.), *cert. denied,* 444 U.S. 851 (1979). *See generally* Annot., 43 A.L.R. FED. 68 (1979). The trial judge has the discretion to admit polygraph evidence in some circuits. *See, e.g.,* United States v. Rumell, 642 F.2d 213, 215 (7th Cir. 1981); United States v. Webster, 639 F.2d 174, 186 (4th Cir. 1981); United States v. Glover, 596 F.2d 857,

of polygraph examinations raises questions about their use in the manner contemplated by the Directive. This Note discusses the fourth amendment implications of polygraph testing as authorized by the Directive. It analogizes polygraph testing with other governmental invasions of personal privacy that courts have held to be searches under the fourth amendment and considers the degree to which a federal employee forfeits constitutional protections by virtue of public employment. This Note concludes that the fourth amendment requires the head of a federal agency to obtain a warrant before ordering a polygraph examination of one of his employees. Finally, the Note suggests possible remedies for an employee whose fourth amendment rights have been violated. It is important to consider a range of remedies because the protection customarily afforded by the exclusionary rule is of no value when the government pursues administrative sanctions rather than criminal prosecution.

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867 (9th Cir.), *cert. denied,* 444 U.S. 860 (1979); United States v. Marshall, 526 F.2d 1349, 1360 (9th Cir. 1975), *cert. denied,* 426 U.S. 923 (1976). In almost every case, that discretion is exercised to exclude the polygraph evidence. Annot., 43 A.L.R. FED. 68, 72 & n.2 (1979). In *Marshall,* for example, the Ninth Circuit noted that "a trial court will rarely abuse its discretion by refusing to admit the [polygraph] evidence, even for a limited purpose and under limited conditions." 526 F.2d at 1360. The Justice Department also "has traditionally opposed the use of polygraph examination results in criminal trials." *The President's National Security Decision Directive 84 and Department of Defense Directive on the Use of Polygraphs, 1983: Hearings Before the Legislation and National Security Subcomm. of the House Comm. on Government Operations,* 98th Cong., 1st Sess. 23 (1984) (statement of Richard K. Willard, Deputy Assistant Attorney Gen., Dep't of Justice) [hereinafter cited as *Directive Hearings].*

The general exclusion of polygraph evidence in criminal proceedings is appropriate because its interpretation is highly subjective. *See* STAFF OF THE SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 93D CONG., 2D SESS., PRIVACY, POLYGRAPHS, AND EMPLOYMENT 9 (Comm. Print 1974) [hereinafter cited as PRIVACY AND POLYGRAPHS]. Polygraph test results by themselves are not useful; the results must be interpreted by the test's administrator. Skolnick, *Scientific Theory and Scientific Evidence: An Analysis of Lie Detection,* 70 YALE L.J. 694, 703-04 (1961). Thus, the conclusion of the examiner is not purely objective. Technicians cannot definitively certify that the subject is lying; they merely form their own opinion of the subject's veracity based on the test results and other factors, including the subject's demcanor and conduct. Thus, the examiner is required to make subjective evaluations of the subject's credibility. *See* Skolnick, *supra,* at 704-06. The determination of a witness's credibility based on personal observation, however, is thought to be a task entrusted exclusively to the jury. Because the conclusions of a polygraph examiner depend in large part upon the examiner's assessment of nonobjective factors, polygraph evidence encroaches on the province of the jury, replacing the jury's determination of credibility with the conclusion of a single person, the examiner.

Furthermore, many people wrongly believe that polygraphs can definitively indicate whether a subject is telling the truth. This unfounded faith in the validity of the test causes undue weight to be given to evidence that at best is merely a suggestion of a witness's veracity. *Directive Hearings, supra,* at 24 (statement of Richard K. Willard, Deputy Assistant Attorney Gen., Dep't of Justice).

I
THE DIRECTIVE

Although the Directive has been suspended, its provisions indicate the kind of approach that government officials may pursue in handling leaks. The following discussion will focus on the Directive, as a means for exploring the issues raised by the use of polygraph examinations under any approach to leak investigations.

The Directive was intended to protect "against unlawful disclosures of classified information."[12] Although the Directive was not expected to eliminate all leaks, it was "designed to improve the effectiveness"[13] of the present security program and "reduce the frequency and seriousness of unlawful disclosures of classified information."[14] The Directive established various procedures to protect against unauthorized disclosures.[15] This Note focuses only on the section that authorized polygraph examinations.

The Directive authorized polygraph testing of all employees of federal agencies and departments who have access to classified information.[16] This authorization extended to over two and one-half million

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12 *Directive, reprinted in Directive Hearings, supra* note 1, ¶ 1; *see National Security Directive/Access to Classified Information, 1983: Hearings Before the Subcomm. on Civil & Constitutional Rights of the House Comm. on the Judiciary and the Subcomm. on Civil Service of the House Post Office & Civil Service Comm.*, 98th Cong., 1st Sess. 1 (1984) (statement of Richard K. Willard, Deputy Assistant Attorney Gen., Dep't of Justice) [hereinafter cited as *House Hearings*].

Classified information is information that reasonably could be expected to cause some degree of damage to the national security if disclosed. Exec. Order No. 12,356, § 1.1(a)(3), 3 C.F.R. 166, 167 (1983). *See generally* Cheh, *Judicial Supervision of Executive Secrecy: Rethinking Freedom of Expression for Government Employees and the Public Right of Access to Government Information*, 69 CORNELL L. REV. — (1984).

13 *House Hearings, supra* note 12, at 3 (statement of Richard K. Willard, Deputy Assistant Attorney Gen., Dep't of Justice). The Reagan administration based the Directive on recommendations of an interdepartmental group created by the Attorney General's office. Richard K. Willard, Deputy Assistant Attorney General, was the chairman of the group, which included delegates of the Director of Central Intelligence and the Secretaries of the Treasury, State, Defense, and Energy. *Id.* at 1.

14 *Id.* at 4.

15 One controversial section of the Directive required that persons with access to highly classified information sign an agreement allowing prepublication review of any work they publish. *Directive, reprinted in Directive Hearings, supra* note 1, ¶ 1. Congress delayed implementation of this section of the Directive until April 15, 1984. The Department of State Authorization Act, Pub. L. No. 98-164, § 1010, 97 Stat. 1917, 1061 (1983), provides that no agency head may "implement any . . . directive" before April 15, 1984, that would "require any . . . employee to submit . . . his or her writings for prepublication review." For a discussion of this section of the Directive, see Cheh, *supra* note 12. Other sections of the Directive provided inter alia (1) that agencies must adopt policies regarding contacts between agency employees and members of the press that limit the possibility of leaks; (2) that agencies must maintain records of investigations of disclosures; (3) that the FBI may investigate leaks as violations of federal criminal law, *see infra* note 28 and accompanying text, even though a criminal prosecution is not sought, with the results of the investigation available instead for administrative sanctions. *Directive, reprinted in Directive Hearings, supra* note 1, ¶ 3.

16 *Directive, reprinted in Directive Hearings, supra* note 1, ¶ 5.

federal employees—almost half of the federal work force—as well as to the approximately one and one-half million employees of private contractors with security clearances.[17] The broad scope of the Directive substantially expanded the federal government's use of polygraphs.[18]

The Directive provided little guidance for implementing the polygraph testing program. It instructed the Office of Personnel Management and all agencies dealing with classified information to amend their existing regulations to permit use of polygraph testing in the course of leak investigations.[19] Under the Directive, an agency head or his delegate had the authority and discretion to order that an employee submit to a polygraph examination.[20] The Directive did not, however, limit the circumstances under which a polygraph test may be ordered.[21]

Under the Directive, any employee who refused to take a polygraph test when ordered would suffer "adverse consequences" as a result of his "refusal to cooperate" with the investigation.[22] "Adverse conse-

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17 *Directive Hearings, supra* note 11, at 2 (statement of Dr. Kenneth J. Coffey, Assoc. Director, Nat'l Sec. & Int'l Affairs Div., Gen. Accounting Office); *see Lie Tests Backed by Justice Dept.,* N.Y. Times, Oct. 20, 1983, at A17, col. 1.

18 In 1982, the federal government administered 23,000 polygraph examinations. *Directive Hearings, supra* note 11, at 1-1 (written report of Dr. John H. Gibbons, Director, Office of Technology Assessment). The National Security Agency and the Central Intelligence Agency use polygraphs to screen personnel, and their polygraph use accounted for more than half of the tests given in 1982. Other agencies use polygraphs mainly for criminal investigations. "Federal agencies at present make only very limited use of the polygraph for investigation of unauthorized disclosure of . . . classified information." *Id.* at 1-2.

19 *Directive, reprinted in Directive Hearings, supra* note 1, ¶ 5.

20 *Id.*

21 The report on which the Directive was based recommended several limitations on the use of polygraphs:

> The polygraph should not be used for dragnet-type screening of a large number of suspects or as a substitute for logical investigation by conventional means. It is most helpful when conventional investigative approaches have identified a small number of individuals, one of whom is fairly certain to be culpable, but there is no other way to resolve the case. A polygraph examination . . . should not include questions about life style that many employees would find offensive.

Report of the Interdepartmental Group on Unauthorized Disclosures of Classified Information F-5 (Mar. 31, 1982) (on file at *Cornell Law Review)* [hereinafter cited as Interdepartmental Report].

These recommendations were not incorporated into the Directive. Instead the Directive granted broad discretion to the agency head in ordering polygraph tests, limiting their use only by a requirement that the evidence obtained through such tests not be relied upon to the exclusion of other evidence in an investigation. *Directive, reprinted in Directive Hearings, supra* note 1, ¶ 5.

22 *Directive, reprinted in Directive Hearings, supra* note 1, ¶ 5. The Directive instructed all federal agencies having access to classified information to alter their regulations to "permit an agency to decide that appropriate adverse consequences will follow an employee's refusal to cooperate with a polygraph examination." *Id.* Thus, the Directive itself does not explicitly require such "adverse consequences." However, Richard K. Willard, the chairman of the interdepartmental group that produced the recommendations on which the Directive was based, has indicated that such sanctions are mandatory: "The directive provides that employees found by their agency head . . . to have refused cooperation with investigations will

quences" were defined as mandatory administrative sanctions which require at a minimum that the employee be denied further access to classified information.[23] In most cases, such denial would necessarily involve demotion[24] because access to classified information is a component of a substantial number of federal jobs.[25] The Directive did not prescribe other administrative sanctions beyond this mandatory minimum, but neither did it preclude the possibility that an employee could be fired for his refusal to submit to a polygraph examination.[26] Furthermore, although the results of polygraph testing were not to be "relied upon to the exclusion of other information obtained during investigations"[27] in determining whether an employee has leaked classified information, neither the weight to be given to polygraph results nor the quantum of other evidence required to support the results was specified in the Directive.

Federal criminal statutes also prohibit unauthorized disclosures of classified information[28] and the executive branch of the government may appropriately investigate and prosecute anyone who violates these criminal laws. The government rarely convicts anyone under these statutes because of "procedural barriers to successful criminal prosecution."[29] Chief among these barriers is the government's concern that successful prosecution may entail the disclosure of additional classified information, either as part of the prosecution's proof that the defend-

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be subject to mandatory administrative sanctions to include, as a minimum, denial of further access to classified information." *House Hearings, supra* note 12, at 3 (statement of Richard K. Willard, Deputy Assistant Attorney Gen., Dep't of Justice).

23 *House Hearings, supra* note 12, at 3 (statement of Richard K. Willard, Deputy Assistant Attorney Gen., Dep't of Justice); *see supra* note 22.

24 *Lie Tests Backed by Justice Dept.*, *supra* note 17.

25 *See supra* text at note 17.

26 *See Directive Hearings, supra* note 11, at 4 (statement of Kenneth T. Blaylock, President, Am. Fed'n of Gov't Employees).

27 *Directive, reprinted in Directive Hearings, supra* note 1, ¶ 5.

28 Various federal criminal statutes address the unauthorized disclosure of classified information. *See* 18 U.S.G. § 798 (1982) (prescribing prison terms and fines for anyone who "knowingly and willfully communicates . . . or otherwise makes available to an unauthorized person . . . any classified information"); 18 U.S.C. § 641 (1982) (prohibiting unauthorized conversion of "any record, voucher . . . or thing of value of the United States"); 42 U.S.C. § 2277 (1976) (prohibiting federal employees from knowingly communicating classified information regarding atomic weapons and nuclear materials); 50 U.S.C. § 783(b) (1976) (prohibiting federal employees from disclosing classified information to members of communist groups or agents of foreign governments).

The report that formed the basis for the Directive noted that "[t]here is no general criminal penalty for the unauthorized disclosure of 'classified information' as such," Interdepartmental Report, *supra* note 21, at C-3, and recommended "the introduction of legislation imposing a criminal penalty for all unauthorized disclosures of classified information by government employees." *Id.* at C-14.

29 Interdepartmental Report, *supra* note 21, at C-7 ("[N]o criminal prosecution has been attempted since Daniel Ellsberg and Anthony Russo were indicted for leaking the 'Pentagon Papers.' ").

ant's disclosures were damaging to the national security, or as part of the defense's case.[30] Furthermore, because criminal prosecutions "confirm the accuracy and sensitivity of the information that has been disclosed,"[31] agencies may prefer not to prosecute.

By authorizing administrative sanctions, the Directive permitted executive agencies to circumvent the higher standard of proof required to secure criminal convictions and to use polygraph results not generally admissible in a criminal prosecution.[32] Thus, the directive was an "end run" around the standards applied in criminal proceedings.[33] As such, the Directive could have been a more powerful, yet less precise tool for curbing leaks because less conclusive evidence would support sanctions against an employee suspected of leaking classified information.

II
THE POLYGRAPH

Polygraphs measure and record changes in the subject's blood pressure, pulse, respiration, muscular activity, and galvanic skin reflex.[34] Polygraph examiners, or polygraphers, use the test results to assess the subject's veracity.[35] The polygraph's ability to detect deception is based on the theory that "the act of lying leads to conscious *conflict;* confiict induces *fear* or *anxiety,* which in turn results in clearly measurable physiological change."[36]

In a standard polygraph examination, the subject sits in a chair

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30 *Id.* at C-8.

31 *Id.*

32 *See supra* note 11 and accompanying text. Detailed discussion of the use of polygraphs in criminal prosecutions is beyond the scope of this Note, which focuses on the administrative use of polygraphs. As a basic rule, neither the verbal statements made during testing nor the test results themselves are admissible in a criminal action.

The Supreme Court has held that statements obtained from public officials during questioning performed under threat of dismissal cannot be used in subsequent criminal proceedings. *See* Lefkowitz v. Cunningham, 431 U.S. 801, 802-08 (1977); Garrity v. New Jersey, 385 U.S. 493, 499-500 (1967). A public official can be compelled to answer the questions, but he must be granted immunity from criminal prosecution based on such answers as a condition of the questioning. *See* Lefkowitz v. Cunningham, 431 U.S. 801 (1977); Garrity v. New Jersey, 385 U.S. 493 (1967). These cases did not involve use of a polygraph, but statements made during a mandatory polygraph examination would seem to be subject to the same restriction. Furthermore, the test results themselves would not be admissible in a criminal proceeding. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

33 *See Directive Hearings, supra* note 11, at 5 (written statement of Kenneth Blaylock, President, Am. Fed'n of Gov't Employees) (intent of directive seems to be "to scare employees").

34 J. REID & F. INBAU, TRUTH AND DECEPTION 4 (1966). "Galvanic skin reflex" or "electrodermal response" is a change in the skin's conductance of electrical current. *Id.* at 219-20.

35 *Id.* at 3.

36 Skolnick, *supra* note 11, at 699-700 (emphasis in original). The validity of this theory has been strongly questioned. *See infra* notes 42-43 and accompanying text.

equipped with metal bellows on the seat and arms.[37] The examiner attaches a set of electrodes to the subject's fingers,[38] fastens a blood pressure cuff on the subject's arm, and straps a pneumograph tube around the subject's chest or abdomen.[39] The examiner then asks the subject predetermined questions and the machine records the subject's physiological responses.

The next step in the process is the source of the numerous doubts about the validity of polygraph examinations. The examiner asks the subject two types of questions: test questions—questions that directly relate to the investigation at hand—and control questions—questions "not directly concerned with the crime under investigation but that [are] calculated to induce an emotional reaction."[40] By comparing the subject's response to these two types of questions, the examiner infers deception or truthfulness.[41] The inference is questionable because a "polygraph . . . detects excitement, not lies. Lying is only one of several stimuli which may excite a person. Other stimuli which cause excitement are fear of losing one's job, embarrassment, or anger at being examined."[42] These stimuli are highly complex, and yet inferences made under the polygraph techinque do not reflect this complexity.[43]

Polygraphs can also be used as an interrogation tool to extract confessions from subjects. Although this function is completely divorced from the polygraph's purported ability to detect deception based on physiological changes, many consider the extraction of confessions to be the polygraph's most effective use.[44] Richard K. Willard, the Deputy

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37 J. REID & F. INBAU, *supra* note 34, at 212. The bellows measure "movements and pressures in the muscles of the arms and legs." *Id.*

38 *Id.* at 4. The electrodes measure variations in electrodermal response by passing an imperceptible electrical current through the finger or hand. *Id.*

39 The pneumograph tube indicates the respiration rate by expanding and contracting as the subject inhales and exhales. *Id.*

40 D. LYKKEN, *supra* note 10, at 31.

41 *Directive Hearings, supra* note 11, at 1-2 (statement of Dr. John H. Gibbons, Director, Office of Technology Assessment).

42 *Id.* at 2 (statement of Dr. John F.Beary, Assoc. Dcan, Georgetown Univ. School of Medicine).

43 Dearman & Smith, *Unconscious Motivation and the Polygraph Test,* 119 AM. J. PSYCHIATRY 1017, 1019 (1963). The Office of Technology Assessment states that the "theory of polygraph testing is only partially developed" and that a stronger theoretical base is needed, drawing "from the fields of psychology, physiology, psychiatry, neuroscience, and medicine." *Directive Hearings, supra* note 11, at 1-7 (statement of Dr. John H. Gibbons, Director, Office of Technology Assessment).

44 One commentator noted that "perhaps the major utility of the lie detector is its extraordinary capacity for eliciting confessions." D. LYKKEN, *supra* note 10, at 22. A common polygrapher's technique is to present the subject with an "opportunity" to confess, regardless of the results indicated by the machine. *See also Directive Hearings, supra* note 11, at 5 (statement of Dr. John F. Beary, Assoc. Dean, Georgetown Univ. School of Mcdicine) ("Because most citizens are scientifically naive, some confess to things when hooked up to the polygraph because they believe it really can detect lies."); *id.* at 7-10 (statement of Dr. John Gibbons, Director, Office of Technology Assessment) (National Security Agency and "possibly the

Assistant Attorney General, stated in hearings on the Directive that "subjects quite often make admissions . . . in connection with a polygraph examination. *This phenomenon may actually produce information that is more useful in terms of the purpose of the examination than the examiner's assessment of the subject's physiological responses.*"[45] The admissions obtained during a polygraph test are the product of both the subject's belief in the machine's accuracy[46] and the examiner's skill as an interrogator.

In a commonly-used technique for extracting a confession, the polygrapher completes the examination and then expresses doubt about the answers to certain questions, regardless of whether the machine has indicated an unusual response to the questions. The polygrapher will inquire whether there is some reason that the machine has indicated a reaction to those particular questions.[47] The polygrapher may attempt to convince the subject that "your story won't hold water," and "that it is hopeless, he has seen through you, and you might as well as confess."[48] Thus confronted, people may make a variety of admissions, ranging from minor concessions to complete confessions, in an effort to resolve the supposed inconsistencies in the polygraph results.[49] Furthermore, polygraph examinations are often highly stressful for the subject because, through this interrogation technique,[50] both the innocent and the guilty are thus "informed" that the polygraph indicates they are liars who have committed illegal acts.

Statistical estimates of polygraph accuracy vary tremendously depending upon the type of questioning procedures used,[51] the skill of the examiner, the specific purpose for which the polygraph is employed, and

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CIA" use the polygraph "as a technique of interrogation to encourage admissions" rather than to determine truthfulness per se).

45 *Directive Hearings, supra* note 11, at 17 (statement of Richard K. Willard, Deputy Assistant Attorney Gen., Dep't of Justice) (emphasis added).

46 *See* Skolnick, *supra* note 11, at 704-05. The subject's belief in the infallibility of the machine aids the polygraph examiner in two ways. First, the examiner's initial observation and hypothesis of guilt depends upon the subject's attitude toward the machine; an enthusiastic subject is deemed "likely" to be innocent, because he believes that the machine will be accurate and exonerate him. Second, the subject's belief in the machine heightens bodily reactions; if the subject is dubious about its accuracy, fear of detection would be reduced, which would lessen the bodily response. *Id.; see also* PRIVACY AND POLYGRAPHS, *supra* note 11, at 5.

47 D. LYKKEN, *supra* note 10, at 20-21. Professor Lykken teaches psychiatry at the University of Minnesota Medical School and is a long-time critic of polygraphs.

48 *Id.*

49 This technique can be so effective that it leads to false confessions. Confronted with a hard-nosed interrogator who emphatically asserts that the machine indicates the subject is lying, the innocent subject's faith in the machine may actually lead him to doubt his own memory and conclude that "it really looks like I did it." *Id.* at 210-11, 213-14.

50 *Id.* at 215.

51 *Id.* at 149-50.

the methodology of the study.[52] There are two broad categories of polygraph use: narrowly focused investigations and generalized, wide-scale screening.[53] The Office of Technology Assessment (OTA) evaluated all available polygraph studies and concluded that, when used, in criminal investigations, "the polygraph test detects deception better than chance, but with significant error rates."[54] The OTA found "no research" on the use of polygraphs as a screening device, however.[55] It cautioned that statistics based on the use of polygraphs in investigations should not be generalized to the screening context. In the latter application several factors may further reduce reliability to a point where fifty percent of those responses identified as deceptive would in fact be truthful.[56] The Directive was not limited to small scale investigations; it "appear[ed] to permit" the screening of a large number of federal employees in the course of investigations into unauthorized disclosures.[57] Thus, the Directive may have allowed for use of the polygraph in situations where it is the least reliable, i.e., as a large scale screening device.

Other studies have also raised serious questions about the reliability of polygraph examinations. One investigator reports that polygraphs may be accurate sixty-three to seventy-two percent of the time, but that the likelihood of a truthful subject being diagnosed as deceptive is as high as fifty percent.[58] This figure has been confirmed by other re-

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52 *Directive Hearings, supra* note 11, at 12 (statement of Richard K. Willard, Deputy Assistant Attorney Gen., Dep't of Justice).

53 *Id.* at 11.

54 *Id.* at 1-5 (statement of Dr. John H. Gibbons, Director, Office of Technology Assessment) (review of 28 studies that satisfied its minimum scientific criteria showed correct guilty detections ranging from 17% to 100%).

55 *Id.* at 7-6.

56 *Id.* at 7-7. This "false positive" polygraph results stem from the fact that few people in the large screening sample are likely to be culpable:

> 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 percent) polygraph validity rate, the predictive value of the screening use of the polygraph would only be 50 percent. That 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) . . . . For every person correctly identified as deceptive, another person would be incorrectly identified.

Id. at 7-6 - 7-7.

57 *Id.* at 7-6.

58 D. LYKKEN, *supra* note 10, at 125. Professor Lykken notes that few of the methods used to assess the reliability of polygraphs have themselves been tested for accuracy. The figures cited are based on the Lie Control Test, a widely employed technique that uses questions about the misdeed at issue along with control questions about past conduct. *Id.* at 109-27.

Polygraphers often claim that determinations of veracity based on polygraph tests are 95% to 99% accurate. *Id.* at 65. Professor Lykken rejects these estimates, asserting that they are erroneous because polygraphers rarely know whether their diagnosis is correct. Therefore, these estimates are based on inadequate data, colored by the polygraphers' belief in the effi-

searchers.[59] These results suggest that, at least in some contexts, polygraphs are no better than a coin flip.

"False negatives," where deceptive persons are characterized as truthful, may also occur. "False negative" results are aggravated by countermeasures taken by the guilty person to escape detection.[60] The OTA notes that "even a small false negative rate" could have serious consequences if the polygraph is relied upon for national security purposes, because "those individuals who the Federal Government would most want to detect (e.g., for legitimate national security violations) may well be the most motivated and perhaps the best trained to avoid detection."[61]

III
FOURTH AMENDMENT ANALYSIS

A. The Fourth Amendment and Polygraph Testing

The fourth amendment protects against "unreasonable searches and seizures."[62] Extending fourth amendment protection to federal employees subjected to polygraph examinations thus requires an initial determination that these examinations are "searches" in the constitutional sense. Furthermore, constitutional protections pertain only to those searches which infringe on an interest that the fourth amendment was designed to protect.[63]

The following section argues that polygraph examinations are "searches" under the fourth amendment. The section then analyzes whether fourth amendment protection extends to federal employees who are ordered to submit to polygraph testing. This analysis, which balances the employees' interest in avoiding the warrantless intrusion against the interests of the federal agency ordering the test, concludes that the fourth amendment requires agencies to obtain warrants before ordering polygraph examinations of federal employees.

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cacy of the machine. *Id.* at 64-68. *See also* Skolnick, *supra* note 11, at 699 (questioning one study's conclusion that polygraphs have accuracy rate of 95%).

59 *See, e.g.,* Horvath, *The Effect of Selected Variables on Interpretation of Polygraph Records,* 62 J. APPLIED PSYCHOLOGY 127-36 (1977).

60 *See* D. LYKKEN, *supra* note 10, at 237-43. Countermeasures may include techniques such as biofeedback, muscle tensing, and other self-induced stimuli. *Id.*

61 *Directive Hearings, supra* note 11, at 7-11 (statement of Dr. John H. Gibbons, Director, Office of Technology Assessment).

62 U.S. CONST. amend. IV. The entire amendment reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

63 *See infra* note 101 and accompanying text.

1. *Polygraph Tests As "Searches"*

At first glance, polygraph examinations may not resemble traditional searches. A closer look, however, reveals compelling similarities between polygraph examinations and other governmental practices restricted by the fourth amendment.

The fourth amendment protects our "interests in human dignity and privacy" from searches involving bodily intrusions.[64] Admittedly, polygraph examinations do not require penetration of the skin, unlike blood tests;[65] nor do they require the subject to remove his clothing, unlike strip searches, cavity searches, and searches to obtain pubic hair samples. As a physical invasion, polygraph tests are argnably fairly innocuous. Innocuousness, however, is not the constitutional standard for determining what constitutes a search.

The fourth amendment protects an individual's reasonable expectation of privacy from governmental intrusion.[66] In cases involving various types of body searches, the courts have found that an expectation of privacy is not reasonable where the evidence obtained has been subject to constant and knowing public exposure.[67] In *United States v. Dionisio,*[68] the Supreme Court held that the required disclosure of a voice sample was not protected by the fourth amendment because "[t]he physical characteristics of a person's voice, its tone and manner, . . . are constantly exposed to the public. . . . No person can have a reasonable expectation that others will not know the sound of his voice. . . ."[69] Similarly, the Supreme Court held in *United States v. Mara*[70] that handwriting exemplars were not protected under the fourth amendment because handwriting is also regnlarly exposed to the public.[71] In addition, the Court has noted that fingerprinting "involves none of the probing into an individual's private life and thoughts that marks [a] . . . search."[72]

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64 Schmerber v. California, 384 U.S. 757, 769-70 (1966).

65 In Schmerber v. California, 384 U.S. 757 (1966), the Supreme Court stressed that a search that went beyond the surface of the skin, such as a blood test, required a "clear indication" that the evidence sought would actually be obtained in the search. *Id.* at 770. This "clear indication" requirement seems to be a higher standard than probable cause. J. HALL, SEARCH AND SEIZURE § 17:5, at 513-14 (1982).

66 Terry v. Ohio, 392 U.S. 1, 9 (1968) ("[W]herever an individual may harbor a reasonable 'expectation of privacy,' . . . he is entitled to be free from unreasonable governmental intrusion.") (quoting Katz v. United States, 389 U.S. 347, 361).

67 United States v. Dionisio, 410 U.S. 1, 14 (1973) ("[T]he Fourth Amendment provides no protection for what 'a person knowingly exposes to the public . . . .' ") (quoting Katz v. United States, 389 U.S. 347, 351 (1967)).

68 410 U.S. 1 (1973).

69 *Id.* at 14.

70 410 U.S. 19 (1973).

71 *Id.* at 21.

72 Davis v. Mississippi, 394 U.S. 721, 727 (1969) (reversing conviction where fingerprint evidence was product of unlawful detention).

In contrast, courts have found that taking blood tests,[73] pubic hair sampling,[74] x-raying,[75] and the collection of fingernail scrapings[76] constitute searches under the fourth amendment. In these cases, the search "went beyond mere 'physical characteristics . . . constantly exposed to the public.' "[77] In *Schmerber v. California,*[78] the defendant had been arrested for driving while intoxicated and the police directed a physician to extract a blood sample over the defendant's protest. At trial, the defendant objected to the admission of the chemical analysis made from the sample, contending that the withdrawal of blood denied him his fourth amendment right not to be searched without a warrant.[79] The Court found that the blood test "plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment . . . [and that] [s]uch testing procedures plainly constitute searches of 'persons' . . . within the meaning of that Amendment."[80]

Given the "broadly conceived reach" of the fourth amendment, it is not unreasonable to view a polygraph examination as a fourth amendment "search." The responses recorded by polygraphs are too subtle to be observed by the eye alone. Like blood tests, x-rays, and fingernail scrapings, polygraph evidence is useful only after sophisticated processing. The physiological responses measured by polygraphs are not "constantly exposed to the public,"[81] suggesting that it is reasonable for an individual to expect privacy regarding these responses.[82] Furthermore, an individual's feelings of excitement, embarrassment, shame, or anger[83] are often extremely private, prompting reasonable expectations that these emotions and the physiological responses they evoke will not become public knowledge without consent. Because an individual can reasonably expect privacy from the intrusion involved in a mandatory polygraph examination, polygraph tests are properly characterized as searches within the fourth amendment.

The conclusion that polygraph tests as contemplated by the Direc-

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73 *See, e.g.,* Schmerber v. California, 384 U.S. 757 (1966).

74 *See, e.g.,* Bouse v. Bussey, 573 F.2d 548 (9th Cir. 1977) (pubic hair). *But cf.* United States v. D'Amico, 408 F.2d 331 (2d Cir. 1969) (scalp hair sample did not constitute search because intrusion was so minor that seizure was reasonable).

75 *See, e.g.,* United States v. Allen, 337 F. Supp. 1041 (E.D. Pa. 1972).

76 *See* Cupp v. Murphy, 412 U.S. 291 (1973).

77 *Id.* at 295 (quoting United States v. Dionisio, 410 U.S. 1, 14 (1973)).

78 384 U.S. 757 (1966).

79 *Id.* at 758-59.

80 *Id.* at 767. The Supreme Court affirmed Schmerber's conviction, however, because the arresting officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destrnction of evidence.' " *Id.* at 770 (quoting Preston v. United States, 376 U.S. 364, 367 (1964)).

81 United States v. Dionisio, 410 U.S. 1, 14 (1973).

82 J. HALL, *supra* note 65, § 17:3, at 512.

83 *See supra* note 42 and accompanying text.

tive are searches for fourth amendment purposes must be measured further against the Supreme Court's decision in *Wyman v. James,*[84] which illustrates the Court's somewhat different attitude toward governmental invasions in administrative contexts. In *James,* the plaintiff, a recipient of state Aid to Families with Dependent Children, challenged the state requirement that caseworkers visit homes of recipients as a condition of receiving assistance. The plaintiff contended that the mandatory visitation was a search that violated her fourth amendment rights if not consented to or supported by a search warrant. The Supreme Court, in a five-to-four decision,[85] held that these home visits were not searches under the fourth amendment because they were conducted for benevolent rather than investigative purposes. Furthermore, the visits were not forced and refusal to permit the intrusion was not subject to criminal sanction.[86] The Court noted that, if the aid recipient does not consent, the visit does not occur and the aid "merely ceases."[87]

Polygraph testing of federal employees differs substantially from the home visits at issue in *James,* however, both in the nature and the purpose of the governmental invasion. The *James* Court concluded that the visits were not fourth amendment searches primarily because of their benevolent, rehabilitative nature. The Court downplayed any investigative aspects of the visits and stated that the intrusion should not be equated with the searches traditionally performed in connection with criminal investigations.[88]

Polygraph testing under the Directive is, however, exclusively investigative. The testing is intended to identify for sanctions those employees who have leaked classified information. In most cases, the suspected leak implicates federal criminal laws,[89] although the polygraph results cannot be used in a criminal prosecution against the tested employee.[90] There is no suggestion that the testing is any way benevolent or rehabilitative in nature.

The distinction between the benevolent nature of the visits in *James* and the investigative nature of polygraph testing is clearly illustrated in *Reyes v. Edmunds.*[91] In *Reyes,* the district court concluded that *James* did

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84 400 U.S. 309 (1971).

85 Justice Douglas wrote a dissenting opinion, *id.* at 326, as did Justice Marshall. Justice Marshall's dissent was joined by Justice Brennan. *Id.* at 338. Justice White dissented on the fourth amendment issue, but concurred in the remainder of the majority's opinion. *Id.* at 326.

86 *Id.* at 317. *Cf.* Camara v. Municipal Court, 387 U.S. 523 (1967) (fourth amendment prohibits criminal prosecution for refusal to permit warrantless inspection); See v. City of Seattle, 387 U.S. 541 (1967) (same).

87 400 U.S. at 317-18.

88 *Id.* at 317.

89 *See supra* note 28 and accompanying text .

90 *See supra* notes 11, 32 and accompanying text.

91 472 F. Supp. 1218 (D. Minn. 1979).

not apply to home visits of welfare recipients by county welfare fraud investigators. The Welfare Fraud Unit in *Reyes* sent representatives to recipients' homes to investigate complaints of fraud. If a welfare recipient refused to allow the investigators into his home, the aid would be automatically terminated.[92] The *Reyes* court distinguished *James,* finding that the visits by the Welfare Fraud Unit were searches requiring a warrant. As the court noted, "[t]his Unit was not engaged in social work, but in police work"[93] regardless of "[w]hether or not the authorities later chose to prosecute for infractions . . . ."[94] Similarly, polygraph tests under the Directive are investigations targeted at criminal activity, notwithstanding the government's choice to pursue administrative rather than criminal sanctions.

As further support for its conclusion that the caseworker's visit fell outside the scope of the fourth amendment, the *James* Court noted that the intrusion was not "forced or compelled," and the denial of consent was not criminally sanctioned.[95] This reasoning has been sharply criticized,[96] because as Justice Marshall stated in his dissent, "there is neither logic in, nor precedent for, the view that the ambit of the Fourth Amendment depends not on the character of the governmental intrusion but on the size of the club that the State wields against a resisting citizen."[97]

The *James* Court's fourth amendment analysis has been criticized as

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92 *Id.* at 1225.

93 *Id.*

94 *Id.*

95 400 U.S. at 317.

96 *See, e.g.,* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 4:12, at 262 (2d ed. 1978) (coneluding that under JAMES, "*everyone's home* may be subjected to a warrantless search if the penalty for refusal is withdrawal of a benefit" because of the many governmental benefits received by the public); Note, Wyman v. James: *Welfare Home Visits and a Strict Construction of the Fourth Amendment,* 66 NW. U.L. REV. 714, 722 (1971) ("Merely to distinguish the home visit from a criminal search and from an intrusion enforced by criminal penalty, does not make the home visit any less a governmental intrusion upon the privacy protected by the fourth amendment."). *See generally* Burt, *Forcing Protection on Children and Their Parents: The Impact of* Wyman v. James, 69 MICH. L. REV. 1259 (1971); Note, *The Supreme Court, 1970 Term,* 85 HARV. L. REV. 3, 258-69 (1971).

97 400 U.S. at 340-41. Justice Marshall pointed out that the criminal penalty in See v. City of Scattle, 387 U.S. 541 (1967), was a $100 suspended fine but that the "penalty" for refusing to consent to the visit in *James* was the loss of the sole means of support for the plaintiff and her dependent child. Thus, the criminal sanction in *See* was actually far less severe than the withdrawal of benefits in *James. Id.*

Like the welfare recipient in *James,* federal employees ordered to take polygraph examinations under the Directive can prevent the invasion by withholding consent. Thus, neither invasion is absolutely compelled. Polygraph tests, however, are primarily investigative. In this regard, they are similar to searches of licensed businesses, conducted by governmental officials to ensure compliance with regulatory standards. Regulatory licenses, like welfare payments, are benefits granted by the state. Searches of licensed businesses have been held to require a warrant, *see* Wyman v. James, 400 U.S. at 331, however, despite the fact that the licensee could have avoided the search by relinquishing his license. The investigative nature of license-connected searches, which require a warrant, seems far more analogous to poly-

inconsistent with established precedent.[98] Furthermore, the *James* Court seemed to limit its analysis to the facts of the case[99]—facts that are quite distinguishable from the investigative polygraph examinations authorized by the Directive.[100] Thus, the *James* decision does not alter the conclusion that the testing of federal employees as contemplated by the Directive constitutes a fourth amendment search.

2. *Interests Protected by the Fourth Amendment*

The analysis does not end with the conclusion that a polygraph examination is a fourth amendment "search." Warrantless polygraph tests will violate fourth amendment rights only if they infringe on "an interest which the Fourth Amendment was designed to protect."[101] Thus, it is necessary to define the scope of a federal employee's interest invaded by a mandatory polygraph test.

Two underlying considerations should be highlighted in evaluating

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graph examinations under the Directive than the more benevolent visits conducted by welfare inspectors.

98 *See James,* 400 U.S. at 338-39 (Marshall, J., dissenting).

99 *Id.* at 326.

100 The *James* Court, after holding that the caseworker's visit was not a search, concluded, apparently as dicta, that even if the visit were characterized as a search, it would not be an unreasonable search, and thus would not be proscribed by the fourth amendment. *Id.* at 318. The Court based this conclusion on a variety of factors, including: the need to protect the dependent child, the need to ensure that the aid is being used appropriately, the need to effectuate the goals of the Aid to Dependent Children program, the reasonable means used in conducting the visit, the benevolent nature of the visit, the lack of a criminal investigation, and the difficulties that would be encountered if a warrant were required for all visits by welfare personnel. *Id.* at 318-24.

Polygraph testing of federal employees is readily distinguishable from these factors. The testing is part of a quasi-criminal investigation that would not be undermined by requiring a warrant based on probable cause. The goals of leak investigations could be attained by relying on secondary sources and traditional investigative techniques to assemble evidence sufficient to support a warrant. The potentially indiscriminate use of polygraph testing differs markedly from the helpful nature of the home visits emphasized by the Court in *James.*

101 Rakas v. Illinois, 439 U.S. 128, 140 (1978). *Rakas* involved a police examination of a locked glove compartment, an act that was admittedly a scarch. The Court found that in order to decide "whether the challenged search . . . violated . . . Fourth Amendment rights," it had to determine whether the search infringed on a protected interest. *Id.*

In defining the scope of the petitioner's interest, the *Rakas* Court relied on Katz v. United States, 389 U.S. 347 (1967), which "held that capacity to claim the protection of the Fourth Amendment depends . . . upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." 439 U.S. at 143. The *Rakas* Court's use of *Katz* suggests that defining the scope of protected fourth amendment interests is analogous to determining whether an individual's expectation of privacy is "reasonable" or "legitimate." Both approaches appear to call for a comparison of the relevant individual and governmental interests. This Note proposes a similar balancing of governmental and private interests. *See infra* notes 118-42 and accompanying text.

The *Rakas* Court noted that an expectation of privacy is likely to exist where an individual has an ownership interest that allows him to exclude others from his property. *Rakas* at 143-44 n.12. This "right to exclude" is equally present in the context of polygraph examinations, beeause generally an individual can exclude whomever he pleases from knowledge of the nature and intensity of his emotions and the subtle physiological responses they produce.

the scope of a public employee's rights. First, an individual does not abandon all constitutional protections by accepting employment with the government.[102] The second consideration is that the government "has interests as an employer in regulating . . . its employees that differ significantly from those it possessed in connection with regulation . . . of the citizenry in general."[103] Thus, a public employee's exercise of constitutional rights may be limited to some degree by virtue of his employment.

a. *Lower Courts' Approach to Searches of Public Employees.* In his concurrence in *Katz v. United States,*[104] Justice Harlan articulated a two-step test defining the scope of fourth amendment protection. Under Harlan's test, establishing a fourth amendment claim requires "first that a person [has] exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' "[105] A number of courts faced with fourth amendment disputes involving employee privacy have relied on Harlan's test.[106]

For example, in *United States v. Bunkers,*[107] the Ninth Circuit held that the search of a postal employee's locker was outside the scope of the four amendment. In *Bunkers,* a union agreement advised all postal employees of the government's authority to search their lockers. The court found that the agreement precluded employees from having a subjective expectation that the contents of their lockers would remain private. Without this subjective belief, the defendant employee did not have a "reasonable" expectation of privacy. Therefore, the search of her locker fell outside the protection of the fourth amendment.[108]

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102 *See, e.g.,* Connick v. Myers, 103 S. Ct. 1684, 1688-89 (1983) ("[T]he theory that public employment . . . may be subjected to any conditions, regardless of how unreasonable, [has] been uniformly rejected."). This has not always been the case. For many years, it was believed that a public employee could be subject to any conditions of employment, "including those which restricted the exercise of constitutional rights." *Id.* at 1688. For a discussion of the evolution of constitutional protections afforded public employees, *see generally id.* at 1688-89.

103 Pickering v. Board of Educ., 391 U.S. 563, 568 (1968); *see also* Connick v. Myers, 103 S. Ct. 1684, 1687 (1983); Civil Serv. Comm'n v. Letter Carriers, 413 U.S. 548 (1973).

104 398 U.S. 347, 361 (1967).

105 *Id.*

106 *See* United States v. McIntyre, 582 F.2d 1221 (9th Cir. 1978) (no regulation or practice to diminish Assistant Chief of Police's reasonable expectation that he would not be subject to electronic surveillance); Gillard v. Schmidt, 579 F.2d 825 (3d Cir. 1978) (applying Harlan's test without citing *Katz* in holding that school guidance counselor had reasonable expectation that her desk would not be searched in absence of accepted practice or regulation to contrary); *see also infra* note 108.

107 521 F.2d 1217 (9th Cir.), *cert. denied,* 423 U.S. 989 (1975).

108 *Id.* at 1219-21. The Third Circuit used the *Bunkers* analysis in a similar case but concluded that the search was illegal. *See* United States v. Speights, 557 F.2d 362 (3d Cir. 1977). In *Speights,* there were no departmental regulations or practices to put the defendant on notice that his locker could be searched; the department allowed the use of personal locks

The requirement that a person have an actual, subjective expectation of privacy has been strongly criticized, mainly because it begs the question: An employee cannot subjectively expect privacy in an area if the government has established a practice of conducting searches of that area.[109] Thus, a majority of the Supreme Court in *Smith v. Maryland*[110] cautioned that the "subjective expectation of privacy" formula would not be an adequate "index of Fourth Amendment protection" in all situations.[111]

Harlan's *Katz* formulation should not be applied to determine whether polygraph tests fall within the scope of the fourth amendment. Under Harlan's analysis, the notice provided by the Directive itself would be sufficient to destroy the employee's subjective expectations of privacy, thus precluding fourth amendment protection. This would be an absurd result; the content of human thought and emotion is not analogous to the content of a locker. A prudent employee will rid his locker of its questionable contents upon receiving notice that the locker may be searched, but an individual cannot rid his mind of its contents, whether or not notice is given. Harlan's two part test, and the lower court opinions that employ that test, are therefore not helpful in analyzing the fourth amendment issues surrounding polygraph examinations.

b. *Balancing Test.* Given the inapplicability of Harlan's *Katz* formulation to an assessment of fourth amendment protections for polygraph examinations, one must look elsewhere for an appropriate

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on the lockers and permitted the employee police officers to keep personal belongings in their lockers. The court concluded that the defendant officer had a reasonable expectation of privacy and thus was protected by the fourth amendment. *Id.* The court distinguished its result from similar cases, such as United States v. Bunkers, 521 F.2d 1217 (9th Cir.), *cert. denied,* 423 U.S. 989 (1975), United States v. Donato, 269 F. Supp. 921, *aff'd,* 379 F.2d 288 (3d Cir. 1967) (locker search), and Shaffer v. Field, 339 F. Supp. 997 (C.D. Cal. 1972), *aff'd,* 484 F.2d 1196 (9th Cir. 1973) (same), by noting that those cases "all relied on specific regulations and practices in finding that an expectation of privacy was not reasonable. In [Speights], there [was] no regulation and no police practice . . . shown which would alert an officer to expect unconsented locker searches." 557 F.2d at 365.

109 *See, e.g.,* Amsterdam, *Perspectives on the Fourth Amendment,* 58 MINN. L. REV. 349 (1974). Professor Amsterdam commented:

> An actual, subjective expectation of privacy obviously has no place in a statement of what *Katz* held or in a theory of what the fourth amendment protects. It can neither add to, nor ean its absence detract from, an individual's claim to fourth amendment protection. If it could, the government could diminish each person's subjective expectation of privacy merely by announcing half-hourly on television that . . . we were all forthwith being placed under comprehensive electronic surveillance.

Id. at 384.

110 442 U.S. 735 (1979).

111 *Id.* at 740 n.5. According to Professor LaFave, the rcasoning of the formula should be avoided because "while it will frequently lead to the correct result, it distorts and unduly limits the rule of the *Katz* case." 1 W. LAFAVE, SEARCH AND SEIZURE § 2:1, at 230 (1978). LaFave also points out that Harlan himself "came around" in United States v. White, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting), where Harlan stated that a KATZ analysis should "transcend the search for subjective expectations." 1 W. LAFAVE, *supra,* § 2:1, at 230.

standard. Cases addressing the first amendment rights of public employees are helpful in formulating such a standard. These cases suggest that courts, in assessing the scope of a public employee's first amendment rights, must balance the employee's interest against the interest of the government. As the Supreme Court indicated in *Pickering v. Board of Education,*[112] the interest of the employee "in commenting upon matters of public concern" must be balanced against the government's interest "as an employer, in promoting the efficiency of the public service it performs through its employees."[113]

In *Connick v. Myers,*[114] the Court considered the claim of an assistant district attorney who alleged[115] that she had been fired for exercising her right of free speech. Myers's supervisor had proposed her transfer to a different section of the department. Myers strongly objected to the transfer and distributed a questionnaire to co-workers regarding transfer policy and other office practices. She was subsequently dismissed. In a five-to-four opinion, the Court held that the supervisor had not violated Myers's right to free speech.[116] Both the majority and the dissenters in *Connick* based their analysis on the *Pickering* balancing test.[117]

The Court's use in *Connick* of a balancing approach to determine permissible restrictions on a public employee's exercise of first amendment rights suggests that courts might use a similar approach to analyze fourth amendment protections provided public employees. Thus, to determine whether the federal government may order an employee to submit to a polygraph test, one must balance the fourth amendment interests of the employee with the government's interest in ordering the test.

Polygraph examinations authorized by the Directive infringed upon federal employees' interest in being protected against the "invasion which [an unreasonable] search entails."[118] Admittedly, the physi-

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112 391 U.S. 563 (1968).

113 *Id.* at 568.

114 103 S. Ct. 1684 (1983).

115 The action was brought under 42 U.S.C. § 1983 (1976 & Supp. V 1981).

116 103 S. Ct. at 1693-94.

117 Connick v. Myers, 103 S. Ct. 1684, 1687, 1695 (1983). The crucial disagreement among the members of the Court was whether Myers's speech addressed a matter of public concern. *Id.* at 1690, 1698. This factor was pivotal in the case because "speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Id.* at 1689 (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982)). Had the majority found that Myers's expression touched on public issues, the importance of its first amendment protection would have outweighed the government's interest in "effective and efficient fulfillment of its responsibilities to the public." *Id.* at 1692. The majority stated that Myers's speech was within the protection of the first amendment, but because it was not highly protected speech involving a public concern, the Court would not overrule a personnel decision by a public agency. *Id.* at 1690, 1694. The majority did not wish to "constitutionalize" what it perceived as an employee grievance. *Id.*

118 Camara v. Municipal Court, 387 U.S. 523, 537 (1967).

cal aspects of polygraph tests are only minimally intrusive.[119] The significant impact on the employee comes not only from the tangible, physical intrusion of the polygraph, however, but also from its emotional intrusiveness.[120]

The polygraph's emotional intrusiveness stems from its ability to "inflict great stress and emotional disturbance on the innocent and guilty alike."[121] A federal employee has a strong interest in avoiding the emotional invasion of a polygraph, an interest that directly implicates the fourth amendment's "basic purpose to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials."[122]

The government's interest in administering warrantless polygraph tests to its employees rests on its responsibility to protect the national security by investigating and deterring leaks.[123] Courts traditionally accord great weight to national security interests[124] when balancing those interests against individual rights, because "while the Constitution protects against invasions of individual rights, it does not withdraw from the Government the power to safeguard its vital interests."[125] The fact that a national security interest may be involved does not end the dis-

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119 *See supra* notes 37-39, 65 and accompanying text.

120 The emotional intrusiveness of a polygraph examination is important in evaluating the employee's interests under the fourth amendment. In Terry v. Ohio, 392 U.S. 1 (1968), the Supreme Court evaluated a "stop and frisk" search by balancing the relevant governmental interests against the nature and quality of the search's intrusion upon the individual. The Court's discussion of the intrusion concluded that even a brief frisk search is "an annoying, frightening, and perhaps humiliating experience." *Id.* at 25. Similarly, in Delaware v. Prouse, 440 U.S. 648 (1979), the Court considered both physical and psychological intrusions resulting from random automobile searches in balancing an individual's interests against the need for the search.

121 D. LYKKEN, *supra* note 10, at 215; *see also supra* notes 44-50 and accompanying text.

122 Camara v. Municipal Court, 387 U.S. 523, 528 (1967).

123 Classified information is information that "reasonably could be expected to cause damage to the national security if disclosed." Exec. Order No. 12,356, § 1.1(a)(3), 3 C.F.R. 166, 167 (1983). Thus, any leak implicates the government's interest in protecting national security, because a leak is an unauthorized disclosure of classified information.

124 Critics of the Directive question whether the national security problem that the Directive purports to address does in fact exist. *See, e.g., Directive Hearings, supra* note 11, at 5 (statement of Bruce Sanford, Society of Professional Journalists) (noting "disturbing" lack of evidence that national security is being injured by leaks); *Id.* at 1 (statement of Rep. Mel Levine) ("[T]here is no indication of any instances in which our national security interests have recently been compromised as a result of unauthorized leaks by . . . government employees."). Furthermore, questions have been raised about whether all the information that is classified actually would threaten the national security if disclosed. *See, e.g., Directive Hearings, id.* at 3 (statement of Bruce Sanford, Society of Professional Journalists); *see also* Cheh, *supra* note 12.

The integrity of the classification system and the need for the Directive are beyond the scope of this Note. This Note will assume for the purposes of argument that the national security actually is jeopardized to some degree by unauthorized disclosures of classified information.

125 United States v. Robel, 389 U.S. 258, 267 (1967).

cussion, however. As the Supreme Court noted in *United States v. Robel,*[126] "this concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of . . . power designed to promote such a goal."[127]

The government's interest in protecting national security is less weighty in the case of polygraph examinations because that interest is not harmed by requiring a warrant prior to an examination in conformance with fourth amendment protections. As the Supreme Court stated in *Camara v. Municipal Court:*[128]

> The final justification suggested for warrantless administrative searches is that the public interest demands such a rule. . . . But we think this argument misses the mark. The question is not, at this stage at least, whether these inspections may be made, but whether they may be made without a warrant. . . . In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search. . . . It has nowhere been urged that [this search] could not achieve [its] goals within the confines of a reasonable search warrant requirement. Thus, we do not find the public need argument dispositive.[129]

The reasoning in *Camara* is equally applicable to polygraph searches. National security is not jeopardized by the requirement that the government demonstrate cause and obtain a warrant before subjecting one of its employees to a search. Polygraph evidence is not evanescent,[130] and thus the "burden of obtaining a warrant" is unlikely "to frustrate the governmental purpose behind the search."[131]

The reasonableness of a search depends at least partially on the effectiveness of the investigative technique employed. For example, in

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126 389 U.S. 258 (1967).

127 *Id.* at 264. *Robel* involved a statute passed pursuant to Congress's war power, which abridged the appellee's first amendment right of free association. The Court held that the statute was overbroad, and that the fact that the statute was passed under the war power to further national defense could not remove constitutional safeguards of essential liberties. *Id.* at 264-65.

128 387 U.S. 523 (1967). *Camara* involved warrantless searches of private residences by municipal housing inspectors.

129 *Id.* at 533 (citation omitted).

130 Evanescent evidence is evidence that is likely to disappear or dissipate and thus falls under the exigent circumstances exception to the warrant requirement. *See, e.g.,* Cupp v. Murphy, 412 U.S. 291 (1973) (holding that traces of blood, skin, and other materials under defendant's nails was highly evanescent evidence, which justified limited warrantless search required to preserve it); *see also supra* note 80.

131 Camara v. Municipal Court, 387 U.S. 523, 533 (1967).

Schmerber v. California,[132] the Court noted that a blood test was a reasonable method for analyzing blood-alcohol levels, because "[e]xtraction of blood samples for testing is a highly effective means of determining the degree to which a person is under the influence of alcohol."[133] In contrast, the Court in *Delaware v. Prouse*[134] considered the legality of stopping and searching randomly selected automobiles and concluded that "[i]n terms of [meeting the governmental interest in discovering and deterring unlicensed drivers], the spot check does not appear sufficiently productive to qualify as a reasonable law enforcement practice under the Fourth Amendment."[135] The *Prouse* Court noted that the additional governmental interest in ensuring compliance with state automobile registration did not necessitate stopping vehicles, because improperly registered vehicles could be identified by their failure to display the appropriate license plates.[136] In addition, the Court doubted that spot checks would further deter unlicensed drivers who were already faced with the possibility of being caught after a traffic violation.[137] Thus, the "spot check" search was not a "sufficiently productive mechanism" to allow intrusion upon fourth amendment interests.[138]

Polygraph examinations suffer a similar defect, both in their capacity to discern deception accurately and in their ability to deter future leaks. The personal invasion that a polygraph search necessarily entails is not justified in light of its questionable accuracy.[139] Although allowing warrantless polygraph tests might deter some disclosures, the deterrent effect is likely to be minimal given the substantial criminal penalties for unauthorized disclosures that already exist.[140] Furthermore, as the Office of Technology Assessment pointed out, "those individuals who the Federal Government would most want to detect (e.g., for legitimate national security violations) may well be the most motivated and perhaps the best trained to avoid detection [through the use of countermeasures]."[141] The polygraph's potential for inculpating the innocent and exculpating the guilty indicates that it is not a "sufficiently productive mechanism to justify the intrusion upon Fourth Amendment interests"[142] that such tests entail.

In sum, a public employee's interest in avoiding the emotional and

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132 384 U.S. 757 (1966).
133 *Id.* at 771.
134 440 U.S. 648 (1979).
135 *Id.* at 660.
136 *Id.*
137 *Id.*
138 *Id.* at 659.
139 *See supra* notes 51-61 and accompanying text.
140 *See, e.g., supra* note 28.
141 *Directive Hearings, supra* note 11, at 7-11 (statement of Dr. John H. Gibbons, Director, Office of Technology Assessment).
142 Delaware v. Prouse, 440 U.S. 648, 659 (1979).

physical invasion of a polygraph test outweighs the government's interest in maintaining security, at least where that security is to be protected by a procedure of questionable effectiveness. This conclusion is particularly compelling because a warrant requirement would protect an employee's interests and yet would allow the government to achieve its objectives. The warrant serves solely as a check on the discretionary use of polygraphs.

B. The Warrant Requirement

A warrant requirement is vital to the protection of employee interests from the unrestricted discretion to order polygraph examinations granted to agency heads under the Directive. Such "standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent."[143] The remaining issue involves the standards under which a magistrate may properly issue a warrant authorizing a polygraph examination of a federal employee.

Courts have uniformly applied an objective standard to determine whether sufficient cause exists to issue a warrant.[144] The government must base its warrant request on factual evidence, not mere conclusions.[145] Therefore, at a minimum, an agency head seeking a warrant to subject an employee to a polygraph test must present some quantum of objective, factual evidence to support the issuance of a warrant.

Depending upon the nature of the search or seizure, the Supreme Court has applied various tests to determine the level of cause needed to issue a warrant and the evidence necessary to support that standard of cause. These tests include: (1) the traditional "probable cause" test used in criminal search and arrest cases; (2) the test used in *Schmerber v. California,*[146] which requires "clear indication" that the evidence sought would in fact be found in searches entailing a physical intrusion into the subject's body;[147] and (3) the *Camara v. Municipal Court* test,[148] which balances the invasion involved in the search against the need for undertaking the invasion.

The *Camara* balancing test provides the most appropriate warrant

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143 *Id.* at 661.

144 *See, e.g.,* Terry v. Ohio, 392 U.S. 1, 21-22 (1968).

145 Aguilar v. Texas, 378 U.S. 108, 112-13 (1964) (mere conclusions insufficient to justify issuance of warrant). In Brinegar v. United States, 338 U.S. 160, 175 (1949), the Supreme Court concluded that probable cause means "more than bare suspicion."

146 384 U.S. 757, 770 (1966) (warrantless withdrawal of blood sample by physician to test for intoxication constitutional under exigency exception).

147 *Id.* at 772.

148 387 U.S. 523 (1967) (warrantless building inspection violated fourth amendment); *see also* Terry v. Ohio, 392 U.S. 1 (1968) (using *Camara* balancing test in determining level of cause needed to conduct "stop and frisk" search).

standard for polygraph examinations authorized by the Directive. Because the polygraph examinations are not conducted as part of a criminal prosecution,[149] the rigor of the traditional probable cause standard associated with criminal proceedings is not suitable. Similarly, the physical invasion accompanying a polygraph examination is not a sufficient bodily intrusion to merit the use of the "clear indication" test. The *Camara* test is particularly useful when applied outside the usual context of criminal investigations and arrests because it provides "a flexible standard, permitting consideration of . . . public and individual interests."[150]

In *Camara,* the appellant was arrested after he refused to allow a housing inspector to search his residence without a warrant. The Supreme Court held that a warrant was required to conduct the inspection[151] and went on to consider the standard under which such a warrant could be issued. The Court concluded that the appropriate standard could be determined by "balancing the need to search against the invasion which the search entails."[152] Under this approach, the Court found that an amount of evidence less than that required by the traditional probable cause test was constitutionally necessary for the inspector to obtain a warrant for the type of administrative search involved in *Camara.*

The *Camara* Court distinguished routine housing inspections from searches that seek the "fruits and instrumentalities" of criminal activity, concluding that an individual's interest in avoiding an invasion is less weighty when an inspection is involved.[153] Polygraph tests under the Directive are not part of a criminal prosecution; instead the government proposes to use the tests under threat of administrative sanctions.[154] The warrant standard may therefore be lower than the "probable cause" standard commonly used in criminal investigations. Although the agencies applying the tests do not seek criminal evidence, the test results may be used to effect consequences more severe than the consequences associated with a routine housing inspection. Unlike a housing inspection, the employee faces serious job sanctions under the Directive.[155]

The foregoing discussion suggests that a reasonable warrant standard for polygraph examinations of federal employees would require a

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149 Polygraph test results are generally inadmissible in criminal proceedings, *see supra* note 11, and the fifth amendment bars the use in subsequent criminal proceedings of any admissions obtained in questioning, *see supra* note 32.

150 3 W. LAFAVE, *supra* note 111, § 10.1, at 190.

151 387 U.S. at 540.

152 *Id.* at 537.

153 *Id.* at 538.

154 *See supra* notes 22-27 and accompanying text.

155 *See supra* notes 22-25 and accompanying text.

showing of cause less than the probable cause necessary for an arrest, but greater than the level of cause required for a routine housing inspection. An appropriate standard was suggested in *Delaware v. Prouse,*[156] a case involving searches conducted on randomly stopped automobiles. In *Prouse,* the Supreme Court used the *Camara* balancing test, holding that searches of randomly stopped vehicles violate the fourth amendment in the absence of "individualized, articulable suspicion . . . pursuant to previously specified 'neutral criteria.' "[157] Under this standard, an agency head seeking a warrant under the Directive would be required to show objective evidence implicating the specific individual to be tested. Such a standard would permit the government to conduct a polygraph test when supported by objective, articulable facts, but would protect employees from "dragnet" testing or testing conducted at the whim of their agency heads.

Camara suggests that courts should apply a balancing test to determine the amount of evidence necessary to support a polygraph warrant. Thus, cases like *Prouse* indicate only a range of evidence necessary to support a warrant under the Directive. The exact quantum of evidence required, although falling within that range, would not be uniform but would vary somewhat from case to case in accord with *Camara's* flexible standard.

Camara's balancing test requires an evaluation of individual and governmental interests similar to the analysis used above to determine that the fourth amendment applies to mandatory polygraph examinations.[158] These interests will be reconsidered briefly to determine the proper standard for issuing a warrant authorizing a polygraph test.

A polygraph examination constitutes a physical and psychological invasion of the subject.[159] The test is a subtle form of interrogation, with all the accompanying anxieties of "being on the hot-seat."

The invasion accompanying a polygraph test must be balanced against the government's need to conduct the examination. The agency head who requests a warrant has as his primary goal the identification and sanction of employees who have made unauthorized disclosures of classified information. Polygraph testing may make only a small contribution towards attaining this goal, however, because the inaccuracies of the test make the evidence obtained highly suspect. Nonetheless, the polygraph may be one component of the government's investigation.

Agency heads requesting warrants to conduct polygraph examinations under the Directive must present concrete evidence implicating the

156 440 U.S. 648 (1979).

157 *Id.* at 662.

158 *See supra* notes 118-42 and accompanying text for discussion of individual and governmental interests.

159 *See supra* note 121 and accompanying text.

employee to be examined. The amount of evidence needed will always be less than that required by the traditional probable cause test used in criminal cases, but will vary in accord with the government's need to conduct the examination.

IV
REMEDIES

A. Equitable Relief

The exclusionary rule, a common "remedy" for persons subject to unconstitutional searches, applies principally to criminal trials.[160] Thus, absent a criminal prosecution for leaking information, the exclusionary rule will not provide relief for an aggrieved federal employee.[161] Nonetheless, if pursuant to the Directive an agency head who has not obtained a warrant orders a federal employee either to submit to a polygraph test or face demotion or transfer,[162] the employee will desire relief and may turn to the federal courts to enforce constitutional protections. For example, the employee may seek declaratory and injunctive relief on behalf of himself and others similarly situated.

Federal courts have traditionally enjoined federal officials when their conduct threatens constitutionally protected rights.[163] Courts hesitate, however, to issue injunctions based solely on a "single nonrecurring instance"[164] of allegedly unconstitutional activity. Thus, in order to obtain an injunction, a federal employee threatened with a polygraph examination must allege an infringement of fourth amendment rights and demonstrate a substantial risk of future violations.[165]

In *Long v. District of Columbia,*[166] the court refused to grant an in-

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160 1 W. LAFAVE, *supra* note 111, § 1.5, at 83.

161 A federal employee could use the exclusionary rule in a subsequent administrative hearing to fire the employee. Powell v. Zuckert, 366 F.2d 634 (D.C. Cir. 1966). *See generally* 1 W. LAFAVE, *supra* note 111, § 1.5(e).

162 *See supra* note 24 and accompanying text.

163 *See, e.g.,* Bell v. Hood, 327 U.S. 678, 684 (1946) ("[I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution . . . ."). The courts' power to enjoin does not stem from any statutory authorization, but from the Constitution itself. *Id.* at 684-85.

For many years the Supreme Court was reluctant to find a legal cause of action for damages in the absence of statutory authorization where a federal official had violated someone's constitutional rights. *See, e.g.,* Bell v. Hood, 327 U.S. 678 (1946). An injunction, however, is an equitable remedy; as such, the courts could provide relief regardless of statutory authorization.

The Court has since found a legal action for damages in the absence of a statutory provision. *See* Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) (holding that violation by federal agents of fourth amendment prohibition against unreasonable searches and seizures gave rise to direct cause of action for damages).

164 Long v. District of Columbia, 469 F.2d 927, 933 (D.C. Cir. 1972).

165 *See, e.g., id.*

166 467 F.2d 927 (D.C. Cir. 1972).

junction where the plaintiff had alleged isolated instances of unconstitutional warrantless searches. The *Long* court denied relief because it found no substantial risk of future violations. The court noted, however, that such a risk would exist where there is an official, publicly adopted policy "of inflicting searches which, when tested, are unlawful."[167] Such a policy leaves no question that the unconstitutional procedures are regular, recurring practices.[168] The Directive explicitly establishes such a policy and thus demonstrates the substantial risk of future violations. Under the reasoning of *Long,* if a federal court concluded that mandatory polygraph examinations violate employees' fourth amendment rights, an injunction prohibiting warrantless searches under the Directive would be appropriate.

In addition to injunctive relief, an aggrieved employee can request a declaration from the court establishing that a federal agency desiring to order a polygraph test of the employee must obtain a warrant before conducting the examination.[169] Federal courts may grant a declaratory judgment in favor of any party with standing,[170] provided an actual controversy exists between parties with adverse legal interests.[171] An action for injunctive and declaratory relief brought by a federal employee threatened with a warrantless polygraph test under the Directive would clarify the rights of federal workers regarding such tests and would resolve the issues discussed in this Note.

B. Legal Relief: The *Bivens* Action

A less useful remedy for an employee subject to a warrantless polygraph search is an action for damages under *Bivens v. Six Unknown Named Agents.*[172] In *Bivens,* the Supreme Court held that a violation of the fourth amendment by federal agents gave rise to a cause of action for damages. Under *Bivens,* the aggrieved employee could sue an agency

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167 *Id.* at 932.

168 *Id.*

169 In federal court, a declaratory judgment would be requested under Federal Rule of Civil Procedure 57 and the Declaratory Judgment Act, 28 U.S.C. § 2201 (1976).

170 The general principles of standing apply to declaratory judgment suits. At a minimum, article III of the Constitution requires a plaintiff to show "injury in fact" resulting from the challenged activity. Other decisions look for a connection between the asserted injury and the protective purpose of the relevant constitutional provision, and where "the injury asserted involves an interest that was intended to be protected, standing exists." 13 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531, at 176-77 (1975). Federal employees seeking a deelaratory judgment to establish that the Directive violates their fourth amendment rights would have standing under either standard. *Cf.* Seattle School Dist. No. 1 v. Washington, 633 F.2d 1338 (9th Cir. 1980) (plaintiffs had standing to challenge constitutionality of specific statute by declaratory judgment suit where enforcement was threatened against parties whose legal interests were identical to those of plaintiffs).

171 10 C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 2757 (2d ed. 1983).

172 403 U.S. 388 (1971).

head for money damages for injuries caused by the warrantless polygraph examination.[173]

A federal employee sued in a *Bivens* action, however, can escape liability if he can prove "not only that he believed, in good faith, that his conduct was lawful, but also that his belief was reasonable."[174] If the challenged polygraph test was ordered by the agency head *after* a federal court had issued a declaratory judgment that such testing requires a warrant in order to be constitutionally permissible, then the agency head could not claim that he reasonably believed that a warrantless order was lawful. On the other hand, a *Bivens* suit brought *before* such a judicial determination may be unsuccessful. A federal agent's reliance on a regulation as it existed at the time of the search has been construed to constitute reasonable belief in the search's lawfulness.[175]

The possibility that a governmental official may have some immunity for actions taken in the course of performing his official duties may also create obstacles for a plaintiff in a *Bivens* action. In *Butz v. Economou,*[176] the Supreme Court recognized that a qualified immunity may protect a federal official in suits for damages arising from unconstitutional actions. This immunity, however, is not absolute.[177]

In *Barr v. Mateo,*[178] the Supreme Court stated that an official is immune when he performs "discretionary acts at those levels of government where the concept of duty encompasses the sound exercise of discretionary authority" and where the act complained of is "within the outer perimeter of [the official's] line of duty."[179] The directive clearly gave agency heads the discretion to order polygraph tests.[180] Where the agency head orders a test in the course of investigating a leak, the official's actions fall within his "line of duty" under the Directive. The immunity of federal officials may therefore pose a problem in some *Bivens* actions. In cases involving clear abuse of discretion, however, the polygraph order may not be within the limits of the official's line of duty, and thus official immunity will not apply. In any event, an employee seeking damages under *Bivens* for an unconstitutional polygraph examination will have to establish that a qualified immunity does not protect the agency head ordering the test.

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173 *See generally* 1 W. LAFAVE, *supra* note 111, § 1.8(b).

174 Bivens v. Six Unknown Named Agents, 456 F.2d 1339, 1348 (2d Cir. 1972).

175 *See* Morales v. Hamilton, 391 F. Supp. 85, 89 (D. Ariz. 1975) (officer had good reason to rely on state of law at time in conducting border search).

176 438 U.S. 478 (1978).

177 *See* Butz v. Economou, 438 U.S. 478, 507 (1978) (federal officials entitled only to qualified immunity); Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974) (qualified immunity's availability depends on scope of discretion and responsibilities).

178 360 U.S. 564 (1949).

179 *Id.* at 575.

180 *See supra* text at notes 20-21.

CONCLUSION

National Security Decision Directive 84 seriously threatened the privacy and dignity of the four million people[181] who under the Directive could have been ordered to submit to polygraph tests at the unbridled discretion of governmental officials. In constructing future approaches to leak investigations, federal policymakers must realize that although the Directive's approach may have addressed important national security interests by attempting to deter leaks of classified information, those interests cannot justify standardless discretion which jeopardizes federal employees' constitutional rights. In order to subject a federal employee to the physical and emotional invasion of a polygraph examination, the fourth amendment requires that a federal official obtain a warrant. A warrant can be issued upon a showing of "individualized, articulable suspicion" that the particular employee has knowledge of a leak. Such a showing will in no way weaken the government's ability to protect national security, but it will give federal employees the assurance that they will not be searched without cause. The fourth amendment has always stood as a fortress against arbitrary invasions by the federal government. Its protection must extend to federal employees who are subjected to polygraph examinations under standardless, discretionary orders.

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181 *See supra* note 17 and accompanying text.