



COMMENT

IMPROVING SCRUTINY OF APPLICANTS FOR TOP SECRET / SCI CLEARANCES BY ADDING PSYCHOLOGICAL ASSESSMENTS

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INTRODUCTION

Edward Snowden became a contractor with Booz Allen Hamilton supporting IT systems at the National Security Agency (“NSA”) in 2012,¹ his last in a series of positions in the Intelligence Community (“IC”). Snowden first entered the IC as a staff employee at NSA, then transferred to the Central Intelligence Agency (“CIA”), where he worked on information systems security.² After three years, he left CIA as staff, and converted to contractor status because he was unhappy with IC operations and was considering exposing intelligence operations.³ In 2011, his Top Secret / Sensitive Compartmented Information (“TS/SCI”) security clearance came

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¹ Glenn Greenwald et al., *Edward Snowden: The Whistleblower Behind the NSA Surveillance Revelations*, THE GUARDIAN, June 10, 2013, <http://www.theguardian.com/world/2013/jun/09/Edward-snowden-nsa-whistleblower-surveillance>.

² *Id.*

³ *Id.*

due for reinvestigation, a process that has been heavily criticized after his revelations about NSA operations.⁴ A review by the Office of the National Counterintelligence Executive, a division of the Office of the Director of National Intelligence (“DNI”), found that the reinvestigation failed to provide “a comprehensive picture of Mr. Snowden.”⁵ Key differences exist between the processes Mr. Snowden underwent for his initial granting of a TS/SCI clearance as a staff employee and for his reinvestigation as a contractor. While news reports have not clarified whether he underwent a reinvestigation polygraph, he did not undergo the psychological reevaluation that both CIA and NSA require of staff hires, because he rejoined the IC as a contractor rather than as a staff member,⁶ once again working at NSA.

In the wake of the Snowden leaks of TS information about NSA and CIA operations, many questions have been raised about the nature and effectiveness of processing for TS/SCI clearances.⁷ The Navy Yard shootings on September 16, 2013, have spurred further calls for major reforms in the process, particularly those reforms focused on the mental health and stability of cleared individuals.⁸ Both of these unfortunate events have resulted in widespread agreement that the process is broken and needs change.⁹

⁴ Brent Kendall & Dion Nissenbaum, *Leaker’s Security Check Faulted*, WALL ST. J., Aug. 27, 2013, <http://online.wsj.com/articles/SB10001424127887324906304579039381125706104.html>.

⁵ *Id.*

⁶ See *infra* Part II.

⁷ See, e.g., Andrew Katz, *Potential Blind Spots in Clearance Process that Gave Snowden Top-Secret Access*, TIME, June 15, 2013, <http://nation.time.com/2013/6/15/potential-blind-spots-in-clearance-process>.

⁸ Ernesto Londono et al., *Mental-Health Warnings About Alexis Ignored*, WASH. POST, Sept. 19, 2013, at A1. Although the alleged shooter did not have a TS/SCI clearance, the incident nevertheless highlighted deficiencies in the security clearance process generally. *Id.*

⁹ *Safeguarding Our Nation’s Secrets: Examining the Security Clearance Process: Hearings Before the S. Subcomm. on the Efficiency and Effectiveness of Fed. Programs and the Fed. Workforce and Subcomm. on Financial and Contracting Oversight, S. Comm. on Homeland Sec. and Gov’t Affairs*, 113th Cong. (2013), available at <http://www.hsgac.senate.gov/subcommittees/fpww/hearings/examining-the-workforce-of-the-us-intelligence-community-and-the-role-of-private-contractors>.

Since September 11, 2001, the number of Americans granted TS clearances has exploded.¹⁰ In 2012, over 1.4 million people held TS clearances, with the IC issuing over 287,000 new TS clearances during that fiscal year.¹¹ Persons undergo differing levels of scrutiny while obtaining and retaining a TS clearance, depending on their status as staff or contractor, as well as the agency to which the individual is applying. While the factors considered by security professionals in issuance of clearances are uniform and described in 32 C.F.R. § 147.2-15,¹² how a particular agency evaluates applicants varies across the IC in some important respects. This variation includes evaluation by a mental health professional in the course of hiring and retention. According to the DNI, while all positions require completion of an extensive background investigation, few require a polygraph or psychological exam.¹³

This Comment argues for greater uniformity and closer scrutiny of applicants for TS/SCI clearances through greater use of psychological screening of clearance applicants. Psychological screening has been widely adopted in the post-offer, pre-employment evaluation of applicants to sensitive positions in law enforcement, with apparent good results. Based on data from within the IC and from law enforcement hiring, the addition of psychological screening to the TS/SCI process is likely to reduce selection errors.

See also John Hamre, Op-ed, *Making Clearances Secure*, WASH. POST, Sept. 19, 2013, at A17 (calling for greater scrutiny of the entire process).

¹⁰ Dana Priest & William A. Arkin, *Top Secret America: A Hidden World Growing Beyond Control*, WASH. POST, July 19, 2012, <http://projects.washingtonpost.com/top-secret-america/articles/a-hidden-world-growing-beyond-control/print/>. Prior to the first DNI report on clearances in 2011, the Intelligence Community did not systematically collect data on the number of TS/SCI clearances issued or held. This article and accompanying series document the massive growth in personnel and expenditures supporting the IC after the Sept. 2001 attacks. *Id.*

¹¹ OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, 2012 REPORT ON SECURITY CLEARANCE DETERMINATIONS 3-4 (2013) [hereinafter DNI 2012 CLEARANCE REPORT], available at <http://www.dni.gov/files/documents/2012%20Report%20on%20Security%20Clearance%20Determinations%20Final.pdf>.

¹² 32 C.F.R. § 147.2-15 (2013).

¹³ *We Have Thousands of Opportunities in All Kinds of Fields*, OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, <http://www.intelligence.gov/careers-in-intelligence/> (last visited July 28, 2014).

Part I reviews the relevant statutory and regulatory provisions controlling the adjudication of security clearances, and the scrutiny courts apply to the clearance process, focusing on the Supreme Court rulings in *Department of the Navy v. Egan*¹⁴ and *NASA v. Nelson*.¹⁵ This section also discusses the legal status of psychological evaluations in applicant processing, especially in light of the Americans with Disabilities Act (“ADA”) and the Rehabilitation Act of 1973, as amended, and the limitations on their use arising from both the ADA and various federal regulations. This section then reviews the regulatory requirements for consideration of mental health issues, with a discussion of the flexibility inherent in the regulatory language. Lastly, this section explores law enforcement’s successful experience with psychological evaluations as part of its applicant selection process.

Part II reviews the current process for TS/SCI clearances, highlighting the differences among agencies regarding procedural safeguards and the use of various investigative and assessment techniques. It discusses the resulting disparities in clearance decisions, particularly as evidenced by the DNI’s annual reporting on clearance determinations.

Part III examines both the advantages and the legal challenges of introducing psychological evaluation to the TS/SCI clearance process. Because of the nature of the psychological evaluation as a form of medical examination,¹⁶ the law requires certain safeguards for the information derived from psychological evaluations that are distinct from other information gathered in the clearance process. A ready model already exists in the law enforcement realm for dealing with the issues implicated by the ADA, which the courts have found valid for reporting and decision-

¹⁴ *Dep’t of the Navy v. Egan*, 484 U.S. 518 (1988).

¹⁵ *NASA v. Nelson*, 131 S. Ct. 746 (2011).

¹⁶ The EEOC defines a medical examination as a procedure or test that seeks information about an individual’s physical or mental health. EQUAL EMP’T OPPORTUNITY COMM’N, EEOC Notice 915.002, ADA ENFORCEMENT GUIDANCE: PREEMPLOYMENT DISABILITY-RELATED QUESTIONS AND MEDICAL EXAMINATIONS 13 (1995) [hereinafter EEOC ADA PREEMPLOYMENT GUIDANCE], available at <http://www.eeoc.gov/policy/docs/medfin5.pdf>.

making in police candidate selection. Expanding the circumstances under which a federal employer may perform psychological evaluations on staff employees to the language of 5 C.F.R § 339.301 should prevent confusion among agency authorities seeking to conduct such evaluations on government employees.

This Comment focuses on the agencies for which the DNI reports data on the security clearance process: CIA, Defense Intelligence Agency (“DIA”), Federal Bureau of Investigation (“FBI”), National Geospatial-Intelligence Agency (“NGA”); National Reconnaissance Office (“NRO”); NSA; and the Department of State.¹⁷ It also discusses the Department of Defense (“DoD”) clearance processes, as that Department is the largest grantor of TS/SCI clearances, although it does not separately report information for the IC.¹⁸

I. BACKGROUND

Executive Orders and regulations govern the security clearance process for TS/SCI access. Uniform adjudication standards apply across the IC, but the language of the standard for emotional, mental, and personality disorders allows considerable flexibility in its application to the security clearance process. This section provides some definitions for terms used frequently in this Comment, then examines the regulatory framework for adjudication and the view of the courts on the clearance process. This section will take a closer look at the laws and regulations governing use of psychological evaluations, and at the mental health criterion for adjudication. Finally, this section will discuss the application of psychological evaluations in another high risk hiring area, law enforcement.

A. *General Security Clearance Definitions*

Generally, a security clearance is “an administrative determination by competent authority that an individual is eligible,

¹⁷ DNI 2012 CLEARANCE REPORT, *supra* note 11, at 4.

¹⁸ *Id.*

from a security stand-point, for access to classified information.”¹⁹ The United States Government classifies information at three levels based on the degree of protection.²⁰ The highest designation is TS, for which unauthorized disclosure of the information “reasonably could be expected to cause exceptionally grave damage to the national security.”²¹ A TS clearance allows access to such information on a need-to-know basis, and is almost always required for both staff and contract employees at various agencies in the IC. To protect information further and minimize the impact of unauthorized disclosures, information is also compartmentalized, allowing specialized access to be granted to certain information known as SCI.²² Therefore, a person granted a TS/SCI clearance is not necessarily eligible to receive all information. Instead, one can access information classified as TS within a sensitive compartment, subject to a determination by the holder of the information that the individual needs that information to perform one’s job.²³

B. TS/SCI Clearance Determinations

A combination of Executive Orders and federal regulations govern the security clearance process for TS/SCI access. While these sources provide uniform adjudication standards across the IC, the language for emotional, mental, and personality disorders allows considerable flexibility in its application to the security clearance process. Generally, authority to perform security evaluations on

¹⁹ DEP’T OF DEF. DICTIONARY OF MILITARY AND ASSOCIATED TERMS 478 (2005).

²⁰ *Id.* at 477-78. The three levels include Top Secret, Secret, and Confidential. This paper addresses only Top Secret clearances. *Id.*

²¹ *Id.* at 477. The DoD Dictionary explains that “Examples of ‘exceptionally grave damage’ include: armed hostilities against the United States or its allies; disruption of foreign relations vitally affecting the national security; the compromise of vital national defense plans or complex cryptologic and communications intelligence systems; the revelation of sensitive intelligence operations; and the disclosure of scientific or technological developments vital to national security.” *Id.*

²² *Id.* at 480. The DoD Dictionary defines Sensitive Compartmented Information as “all information and materials bearing special community controls indicating restricted handling within present and future community intelligence collection programs and their end products for which community systems of compartmentation have been or will be formally established.” *Id.*

²³ *Id.* at 368.

both employees and contractors comes from Executive Orders.²⁴ Pursuant to that authority, security professionals evaluate candidates according to thirteen criteria defined in agency regulations, focusing on patterns of behavior that may raise concerns about granting access, a list of markers for increased concern, and a list of potential mitigating factors.²⁵ While the adjudicative criteria are the same for all agencies, agencies can and do differ on what procedures they use (such as the polygraph), and also what non-security procedures they require for employment (such as medical and psychological evaluations), as detailed in Section II.C.

1. The Courts and Security Clearances

The Supreme Court has shown great deference to Executive Branch decisions on security clearance determinations. When individuals have challenged adverse determinations in the federal courts, they have been unsuccessful in complaints based on the merits of the decision. Federal courts have also found that when a security clearance has been a job requirement, failure to obtain or keep a clearance will result in loss of one's job. In *Department of the Navy v. Egan*, the Supreme Court determined that discretion on the clearance decision resides with the Executive Branch.²⁶ The Court considered a challenge to a security clearance determination by a civilian Navy employee working at a submarine base.²⁷ The Navy denied him a clearance based on his past criminal record and past alcohol problems.²⁸ Denial of his clearance resulted in the loss of his

²⁴ See, e.g., Exec. Order No. 12,968, 60 Fed. Reg. 40,245 (Aug. 2 1995). For a review of the development of Executive Orders defining the classification and security clearance system, see OFFICE OF THE INSPECTOR GEN. OF THE DEP'T OF DEF., Report No. 04-INTEL-02, 4-6, DOD SECURITY ADJUDICATION AND APPEALS PROCESS (Dec.12, 2003) [hereinafter DOD OIG REPORT ON ADJUDICATION], available at <http://www.dodig.mil/lr/reports/fy04/04-INTEL-02.pdf>.

²⁵ 32 C.F.R. § 147.2-15 (2013). The criteria are: allegiance to the United States; foreign influence; foreign preference; sexual behavior; personal conduct; financial considerations; alcohol consumption; drug involvement; emotional, mental and personality disorders; criminal conduct; security violations; outside activities; and misuse of information technology systems. *Id.*

²⁶ Dep't of the Navy v. Egan, 484 U.S. 518 (1988).

²⁷ *Id.* at 520.

²⁸ *Id.* at 521.

job because a clearance was a necessary condition for his position.²⁹ Egan appealed his clearance denial and resulting termination to the Merit Systems Protection Board,³⁰ which ruled that it had the authority to review the merits of the security decision.³¹ Reversing the Merit Systems Protection Board and the Court of Appeals for the Federal Circuit, the U.S. Supreme Court determined that the grant of a security clearance is a discretionary matter entrusted solely to the President, as head of the Executive Branch and as Commander in Chief.³² Importantly, the Court clarified that no person has a legal right to a clearance, but rather a clearance is an affirmative act of discretion on the part of an agency.³³ The Court stated that such discretion necessarily resided with an agency to allow access to sensitive information, and that such decisions could not be judged by outside non-expert bodies.³⁴ Although the Court noted that there also was an internal appeals process, the Merit Systems Protection Board had a very limited role in review and was confined to ensuring that the process was fair.³⁵ The *Egan* decision has been widely applied by federal courts to preclude substantial review of such determinations by courts and non-Article III tribunals.³⁶

²⁹ *Id.*

³⁰ The Merit System Protection Board (“MSPB”) assumed the employee appeals function of the Civil Service Commission and is responsible for performing merit systems studies and reviewing significant actions of OPM. See *About the MSPB*, MERIT SYS. PROTECTION BD., <http://www.mspb.gov/about/about.htm> (last visited June 20, 2014). The *Egan* decision removed the MSBP from adjudication of any claims involving the substance of a security clearance determination. *Egan*, 484 U.S. at 523.

³¹ 484 U.S. at 523.

³² *Id.* at 527.

³³ *Id.* at 528.

³⁴ *Id.* at 529.

³⁵ *Id.* at 532.

³⁶ See, e.g., *Berry v. Conyers*, 692 F.3d 1223 (Fed. Cir. 2012) (reaffirming limits of MSPB review of security clearance determinations); *Hegab v. Long*, 716 F.3d 790 (4th Cir. 2012) (citing *Egan* in declining to review TS determination by NGA); *Cheney v. Dep’t of Justice*, 479 F.3d 1343 (Fed. Cir. 2007) (stating inability to review the substance of a clearance determination); *Hall v. U.S Dep’t of Labor Admin. Review Bd.*, 476 F.3d 847 (10th Cir. 2007) (finding security clearance determination unreviewable by the court, per *Egan*).

In *Stehney v. Perry*, the Third Circuit considered a challenge to NSA's polygraph requirement.³⁷ Stehney, a contract mathematician, challenged the use of the polygraph as a "random and arbitrary process."³⁸ While not reaching a decision on this arbitrariness question because the claim was not raised at trial, the Third Circuit did note that because the government could provide a rational basis for the polygraph exam, such a consideration would withstand "rational basis" scrutiny under a substantive due process challenge.³⁹ Therefore, the court effectively sustained the determination that Stehney failed to comply with NSA's security process, resulting in the revocation of her clearance and the loss of her job.

In *NASA v. Nelson*, the Supreme Court reviewed the government's ability to compel disclosure of personal information, including mental health treatment, as part of a background check.⁴⁰ In *Nelson*, twenty-eight employers working as contractors at the NASA Jet Propulsion Laboratory challenged a new requirement to comply with a background check as a condition of continued access to the facility.⁴¹ Many of the employees had worked at the facility for years and had not previously been required to obtain a security clearance or undergo any kind of background check.⁴² The level of clearance required was well below that of TS/SCI, but the information sought included past drug use and required that the applicant provide releases for investigators to seek information from references about drug use, mental health issues, and other behaviors.⁴³ The *Nelson* Court observed that the government could require such disclosure as a condition of continued access and that in balancing privacy rights versus the government's need to ensure security of its facilities, the government need not prove its inquiries are necessary or the least restrictive means of furthering its

³⁷ *Stehney v. Perry*, 101 F.3d 925 (3d Cir. 1996).

³⁸ *Id.* at 937.

³⁹ *Id.*

⁴⁰ *NASA v. Nelson*, 131 S. Ct. 746 (2011).

⁴¹ *Id.* at 752.

⁴² *Id.*

⁴³ *Id.* at 752-53.

interests.⁴⁴ Instead, the government need only demonstrate that the inquiries are reasonable, employment-related inquires that further its interest in managing its operations.⁴⁵ The Court specifically allowed gathering and reviewing mental health treatment information in the context of drug abuse and found this inquiry reasonable in light of the government's interests.⁴⁶

Essentially, *Nelson* upheld requirements for provision of financial information, employment data, and mental health information related to drug use, and held that failure to comply with security requirements—when a clearance was a condition of the position—meant that plaintiffs could no longer work in the facility.⁴⁷ Similarly, in *Egan*, the plaintiff lost his job when he could not obtain the necessary clearance.⁴⁸ By finding that loss of a clearance or failure to be granted one allows for removal, the Supreme Court has recognized a security clearance as an essential job element when the government mandates a clearance as a job requirement.⁴⁹

Since *Egan*, the courts have shown great deference to the Executive Branch on the substance of security clearance determinations. While providing for internal review and appeals processes, federal courts have not examined the material basis for determinations.

⁴⁴ *Id.* at 760.

⁴⁵ *Id.* at 759.

⁴⁶ *Nelson*, 131 S. Ct. at 760.

⁴⁷ *Id.* at 752-53.

⁴⁸ *Dep't of the Navy v. Egan*, 484 U.S. 518, 521 (1988).

⁴⁹ *See also Robinson v. Dep't of Homeland Sec.*, 498 F.3d 1361 (Fed. Cir. 2007) (upholding removal after clearance revoked); *Hesse v. Dep't of State*, 217 F.3d 1372 (Fed. Cir. 2000) (upholding removal after revocation of TS clearance); *Blankenship v. Martin Marietta Energy Sys., Inc.*, 83 F.3d 153 (6th Cir. 1996) (upholding failure to reassign employee to non-security position while clearance suspended).

2. Reciprocal Federal Agency Acceptance of TS/SCI Clearance

a. Determinations

To aid in uniformity and functionality, Executive Order (“Exec. Order”) 12,968 provides for reciprocal acceptance of clearance determinations among federal agencies.⁵⁰ Once one agency has conducted its background investigation and granted a clearance, other agencies must usually recognize and allow access based on that determination, without conducting their own review.⁵¹ Exec. Order 12,968 establishes two exceptions to its general rule. First, if an agency has substantial information indicating that an individual may no longer meet the adjudicative criteria, it may conduct its own investigation.⁵² Second, an agency head may add additional, but not duplicative criteria for access.⁵³ This latter provision allows agencies such as CIA or NSA to add security procedures, such as a polygraph, for individuals seeking to transfer into or serve on temporary duty at an agency when they have not already undergone these processes as part of the original clearance assessment, even when they already have an active TS/SCI clearance. But when an agency does not have such additive criteria, it may not routinely require re-investigation of a transferring staff employee or contractor; instead, it must accept the determination of the losing agency.

b. Reinvestigations

Exec. Order 12,968 also requires that individuals granted clearances continue to meet the requirements for approval.⁵⁴ Specifically, § 3.4 requires agencies to conduct periodic reinvestigations with the same priority and care as the initial investigation, and consider the same factors as in an initial clearance.⁵⁵ Although Exec. Order 12,968 does not specify a time

⁵⁰ Exec. Order No. 12,968 § 2.4(a), 60 Fed. Reg. 40,245 (Aug. 2, 1995).

⁵¹ *Id.*

⁵² *Id.* at § 2.4(b).

⁵³ *Id.* at § 2.4(c).

⁵⁴ *Id.* at § 1.2(d).

⁵⁵ *Id.* at § 3.4.

frame for reinvestigations, the Office of Personnel Management has issued a clarifying regulation requiring reinvestigation for a TS clearance every five years.⁵⁶

c. Adverse TS/SCI Clearance Determinations

A combination of Executive Orders and agency regulations also detail the process for challenging an adverse clearance determination.⁵⁷ These procedures include certain individual protections, such as entitlement to receive a detailed statement of the basis for refusal, access to the records and reports forming the basis for the decision, representation by an attorney when challenging the decision, and an opportunity to review and challenge the validity of the factual basis for the determination by appealing the decision in writing and/or appearing personally at some point in the review process.⁵⁸ Additionally, Exec. Order 10,865 provides contract employees the right to cross-examine witnesses either orally or with written interrogatories.⁵⁹

Beyond these individual procedural protections, there are also set institutional procedural mechanisms. To consider the appeal, deciding agencies must convene a review panel with no more than one security professional of the minimum three members.⁶⁰ An agency head may override a panel's decision.⁶¹

Federal courts have enforced a due process right to fairness in the clearance adjudication and review process. In *Greene v. McElroy*, the Supreme Court addressed the denial of a clearance to a contractor, which resulted in the loss of his job.⁶² The Court held that the Executive Branch could not deprive a person of his clearance in a process not authorized by the President or Congress, and required the Executive Branch or Congress to provide procedural

⁵⁶ 5 C.F.R. § 732.203 (2013).

⁵⁷ Exec. Order No. 12,968, at § 5.2.

⁵⁸ *Id.* at § 5.2.a(1-7).

⁵⁹ DOD OIG REPORT ON ADJUDICATION, *supra* note 24, at 5.

⁶⁰ Exec. Order No. 12,968, at § 5.2.a(6).

⁶¹ *Id.*

⁶² *Greene v. McElroy*, 360 U.S. 474, 475 (1959).

due process for contesting clearance decisions.⁶³ In response, the Executive Branch first created the appeals process for denial or revocation of clearances, with safeguards and procedural rights.⁶⁴ Since the enactment of these safeguards, federal courts have continued to hear cases by employees challenging adherence to the agency's process of adjudication and appeal as a due process matter⁶⁵ or in violation of Title VII of the Civil Right Act or of the ADA.⁶⁶

C. *Psychological Evaluations, Applicants, and Employees:
Limitations from the Americans with Disabilities Act, 5 C.F.R.
§ 339, and 5 C.F.R. § 7901*

An overlapping set of statutes and federal regulations govern the use of psychological evaluations with any job applicant and employee, independent of the security clearance process. The Americans with Disabilities Act ("ADA"), and its counterpart for federal employees, the Rehabilitation Act of 1973, as amended,⁶⁷ govern how and when such assessments may be used. For federal employees, but not contractors, agencies may conduct mental health evaluations when required as a job element. Further, under U.S. Code, an agency head may affirmatively establish mental health and other medical services as part of an appropriated medical program, but in doing so may provide such services, including psychological evaluations, only to staff employees, and not to contractors.⁶⁸ These restrictions inform the use of psychological evaluations in the current security paradigm, in that they restrict a medical office from performing psychological or any other medical evaluations on contract personnel. This restriction applies only to a medical

⁶³ *Id.* at 508.

⁶⁴ Exec. Order No. 12,968, at § 5.2; DoD OIG REPORT ON ADJUDICATION, *supra* note 24, at 6.

⁶⁵ *Cheney v. Dep't of Justice*, 479 F.3d 1343 (Fed. Cir. 2007). *See also* *El-Ganayni v. United States Dep't of Energy*, 591 F.3d 176, 186 (3d Cir. 2010) (stating that courts may review clearance denial to ensure agencies have followed their own regulations).

⁶⁶ *See Rattigan v. Holder*, 689 F.3d 764 (D.C. Cir. 2012) (conducting review of the information provided to adjudicators, not review of the decision); *Zeinali v. Raytheon Corp.* 636 F.3d 544 (9th Cir. 2010) (reviewing decision to retain employee after clearance denied, but not the clearance decision itself).

⁶⁷ 29 U.S.C. § 791 (2012).

⁶⁸ 5 U.S.C. § 7901 (2012).

department, and would not apply to a psychologist working in a program outside the appropriated medical program, such as a security office.

The Equal Employment Opportunity Commission (“EEOC”) and the courts, following the ADA, view mental health evaluations designed to detect diagnosable conditions or treatment as medical evaluations.⁶⁹ Psychological examinations are medical tests if they provide information that might reveal a mental disorder or impairment.⁷⁰ Testing and other evaluations that are designed to measure characteristics such as honesty or other traits—not mental health disorders—are usually not considered medical examinations.⁷¹

The ADA divides the employment process into first, the pre-offer; second, the post-offer, pre-employment; and third, employment stages.⁷² In the pre-offer stage, an employer may not ask any questions of an applicant that might reveal medical information and may not conduct medical evaluations of any kind.⁷³ In the post-offer pre-employment phase an employer may ask any medical questions as long as all applicants are subject to the same evaluations and the information obtained is segregated from other employment records.⁷⁴ The results of a medical evaluation may be shared with those making decisions on hiring in order to make appropriate employment decisions, as well as to provide accommodation for disabled persons.⁷⁵

Once a person becomes an employee, use of medical evaluations is again restricted under the ADA.⁷⁶ An employer may not conduct a medical examination, with or without a psychological evaluation, of an employee unless the inquiry is job-related and

⁶⁹ EEOC ADA PREEMPLOYMENT GUIDANCE, *supra* note 16. See also *Karraker v. Rent-a-Center*, 411 F.3d 831, 835 (7th Cir. 2005) (citing EEOC guidance for definition of a psychological test as a medical examination).

⁷⁰ EEOC ADA PREEMPLOYMENT GUIDANCE, *supra* note 16.

⁷¹ *Id.*

⁷² 42 U.S.C. § 12112(d) (2012).

⁷³ EEOC ADA PREEMPLOYMENT GUIDANCE, *supra* note 16.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ 42 U.S.C. § 12112(d)(4) (2012).

consistent with business necessity.⁷⁷ The EEOC's guidance on this issue recognizes an exception for periodic reevaluations and specifically addresses their legality in public safety positions.⁷⁸ The EEOC's guidance cautions that the medical examination must be narrowly tailored to address specific job-related concerns.⁷⁹ An employer may act on the results of the exam, including removing the employee, provided it can demonstrate the employee cannot perform an essential job function.⁸⁰ If maintaining a clearance is an essential job function for IC employees, as federal courts have indicated in *Egan, Nelson, and Stehney*, then a psychological evaluation as part of the security clearance process should be permissible under the EEOC's analysis.

Federal regulation of medical examinations provides a second limitation on the use of psychological assessments of federal employees: under 5 C.F.R. § 339, medical evaluations are authorized only when periodic evaluations must be completed for positions that have medical or physical requirements, or when there is a direct question about an employee's ability to meet the position's psychological requirements.⁸¹ Under the regulation, if an employer wants to do periodic evaluations, it must establish a pre-determined medical standard for assessment. Even then, agencies may order a psychological evaluation only when a general medical examination fails to reveal a cause for the behavior or actions in question or when the mental health evaluation is specifically called for by the medical standards of the position.⁸² Thus, periodic psychological evaluations currently may be routinely conducted on an individual only if the job

⁷⁷ 42 U.S.C. § 12112(d)(4)(A) (2012).

⁷⁸ EQUAL EMP'T OPPORTUNITY COMM'N, EEOC 915.002, ENFORCEMENT GUIDANCE: DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS OF EMPLOYEES UNDER THE AMERICANS WITH DISABILITIES ACT (ADA) (2000) [hereinafter EEOC ADA EMPLOYEE EXAMINATION GUIDANCE], available at <http://www.eeoc.gov/policy/docs/guidance-inquiries.html>.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ 5 C.F.R. § 339.301(b), 302 (2013). Such "for cause" examinations go under the name "fitness for duty examinations" and are conducted under the guidance of the EEOC ADA EMPLOYEE EXAMINATION GUIDANCE, *supra* note 78.

⁸² 5 C.F.R. § 339.301(e)(1) (2013).

position requires such an examination as a medical standard.⁸³ Therefore, if the psychological evaluation becomes an element of the security clearance process and a security clearance is required for a position, then the periodic reevaluation should be allowed under this federal regulation.

Federal regulation also provides a financial limitation on the provision of psychological evaluations. When performed as part of a medical program, federal agencies are generally limited by 5 C.F.R § 7901 in their use of appropriated funds to conduct medical evaluations or to provide medical services to staff employees only.⁸⁴ This limitation excludes contractors from access to health services, including evaluation services, provided by an appropriated medical program.⁸⁵ The range of permitted services for staff applicants and employees includes both pre-employment and periodic medical evaluations.⁸⁶ An agency may conduct psychological examinations under its medical program as part of pre-employment screening, but it may not conduct that evaluation on contractor personnel under this regulation. However this regulation does not speak to a medical evaluation for contractors conducted under a security program. The limits of this regulation apply only to medical programs and do not

⁸³ *Id.* § 339.302.

⁸⁴ 5 U.S.C. § 7901 starts in pertinent part:

- (a) The head of each agency of the Government of the United States may establish, within the limits of appropriations available, a health service program to promote and maintain the physical and mental fitness of employees under his jurisdiction.
- (b) A health service program may be established by contract or otherwise, but only—
 - (1) after consultation with the Secretary of Health, Education, and Welfare and consideration of its recommendations; and
 - (2) in localities where there are a sufficient number of employees to warrant providing the service.
- (c) A health service program is limited to—
 - (1) treatment of on-the-job illness and dental conditions requiring emergency attention;
 - (2) pre-employment and other examinations;
 - (3) referral of employees to private physicians and dentists; and
 - (4) preventive programs relating to health.

Id.

⁸⁵ *Id.* § 7901(a).

⁸⁶ *Id.* § 7901(c)(2).

address medical testing or assessments performed with other appropriated funds. This regulation would not therefore affect psychologists providing services in a security program.

Recently, DoD has created a protocol that requires contractors to undergo pre-deployment medical evaluations when deploying to certain high-risk areas.⁸⁷ The regulation provides a number of mental health conditions that would make contractors ineligible to be deployed.⁸⁸ The regulation does not mandate a specific mental health evaluation but does provide that contractors found unfit will not be deployed.⁸⁹ The regulation does not provide that the DoD conduct the examinations, avoiding the issue of use of appropriated funds and contractors raised in other regulations.⁹⁰ This moves the burden of obtaining the examinations onto the contractor personnel and their companies, incurring no responsibility on the part of the DoD to conduct the evaluations. Importantly, this protocol creates a paradigm for requiring performance of medical evaluations on contractors without implicating 5 U.S.C. § 7901 restrictions on using appropriated medical funds.

Whether conducted inside or outside a medical program, the ADA provides limits on the content of a psychological evaluation and on the handling of information collected. The DoD protocol suggests a way forward for agencies within the IC to expand psychological assessment into the security realm. As these procedures develop, regulators can address many of the issues related to the ADA by looking at law enforcement, an analogous employment area requiring high reliability, judgment, and stability, while also fulfilling compliance obligations.

D. Mental Health Criteria for Top Secret Clearance

The adjudication criteria for a security evaluation include mental health conditions and treatment, and a number of other

⁸⁷ 32 C.F.R. § 158.7(b) (2013).

⁸⁸ *Id.* § 158.7(j)(2)(xxvi-xxix).

⁸⁹ *Id.* § 158.7(b)(4).

⁹⁰ *Id.* § 158.7(a)(4).

behaviors that fall within the purview of mental professionals. Guideline I, “Emotional, Mental, and Personality Disorders” specifically raises mental health conditions and treatment:

(a) *The concern:* Emotional, mental, and personality disorders can cause a significant deficit in an individual’s psychological, social and occupation functioning. These disorders are of security concern because they may indicate a defect in judgment, reliability, or stability. A credentialed mental health professional (e.g., clinical psychologist or psychiatrist), employed by, acceptable to or approved by the government, should be utilized in evaluating potentially disqualifying and mitigating information fully and properly, and particularly for consultation with the individual’s mental health care provider.⁹¹

The regulation outlines the basis for the concern and provides a definition for a “credentialed mental health professional,”⁹² which includes psychologists and psychiatrists. It specifies that the mental health professional consider the condition and/or treatment in question.⁹³ While the regulation allows for mental health professionals to conduct an evaluation, it does not prescribe the timing or contents of the evaluation, other than indicating that the individual’s personal mental health professional should be consulted.⁹⁴ Guideline I does not preclude a direct evaluation of the clearance candidate nor does it require that security personnel discover evidence of a mental health condition before a psychological evaluation.⁹⁵ Also, Guideline I permits the government to choose the mental health professional rendering the opinion, even while it requires that the mental health professional consult with an individual’s personal mental health provider.⁹⁶

In addition to the procedural flexibility of Guideline I, sections (b) and (c) of 32 C.F.R. § 147.11 describe situations that

⁹¹ 32 C.F.R. § 147.11(a) (2013).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

should increase or decrease the adjudicator's concern about the behaviors uncovered in the course of the investigation.⁹⁷ The regulation notes that high risk, aggressive, anti-social, or emotionally unstable behavior should cause concern regardless of whether the employee is formally diagnosed with a mental disorder:

(b) *Conditions that could raise a security concern and may be disqualifying include:* (1) An opinion by a credentialed mental health professional that the individual has a condition or treatment that may indicate a defect in judgment, reliability, or stability; (2) Information that suggests that an individual has failed to follow appropriate medical advice relating to treatment of a condition, e.g., failure to take prescribed medication; (3) A pattern of high-risk, irresponsible, aggressive, anti-social or emotionally unstable behavior; (4) Information that suggests that the individual's current behavior indicates a defect in his or her judgment or reliability.⁹⁸

The purpose of the mental health professional's recommendation is not the ascertainment of a condition or treatment; rather, it is the credentialed mental health professional's opinion of the effect of that condition or treatment on a person's judgment, reliability, or stability.⁹⁹ Indeed, the regulation does not define what a "condition" is, nor does it restrict a condition to a "diagnosis" because the relevant aspect of the mental health professional's opinion is a defensible prediction of future unwanted behavior, rather than an assessment of the candidate's current condition.¹⁰⁰

Similarly, § 147.11(c) provides conditional language to describe certain situations that should reduce concern about a past history of a mental condition.¹⁰¹

⁹⁷ 32 C.F.R. § 147.11(b) (2013).

⁹⁸ *Id.* § 147.11(b)(3-4).

⁹⁹ *Id.* § 147.11(a).

¹⁰⁰ *See id.*

¹⁰¹ *Id.* § 147.11(c).

(c) Conditions that could mitigate security concerns include: (1) There is no indication of a current problem; (2) Recent opinion by a credentialed mental health professional that an individual's previous emotional, mental, or personality disorder is cured, under control or in remission and has a low probability of recurrence or exacerbation; (3) The past emotional instability was a temporary condition (e.g., one caused by a death, illness, or marital breakup), the situation has been resolved, and the individual is no longer emotionally unstable.¹⁰²

The conditional language in section (c), which addresses past mental health issues, does not require that the prior condition be discounted or ignored, only that it "could mitigate" security concerns.¹⁰³

Guideline I is one of several criteria that implicate mental health issues. Other elements of overall security evaluation include consideration of sexual behavior, personal conduct, financial irresponsibility, and substance abuse.¹⁰⁴ In fact, all of these areas may benefit from assessment by a mental health professional as behavioral issues that may implicate underlying mental health issues.¹⁰⁵

The choice of these criteria has an empiric basis. "Project Slammer," a long-running joint CIA-FBI examination of Americans who committed espionage against this country, has identified a number of behaviors and character traits common among 117 convicted spies.¹⁰⁶ Obsessive self-centeredness, selfishness, and

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* § 147.6-147.10.

¹⁰⁵ The Diagnostic and Statistical Manual V provides extensive discussion and assessment criteria in each of these behavioral areas for clinicians to reach provisional and definitive diagnoses and to guide treatment decisions. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-V) (5th ed. 2013). Relevant areas include "Disruptive, Impulse- Control and Conduct Disorders," *Id.* at 461-80; "Substance-Related and Addictive Disorders," *Id.* at 481-591; "Paraphilic Disorders," *Id.* at 685-705; and "Educational and Occupational Problems," *Id.* at 723-26. Gambling is considered under Substance Abuse Disorder, and financial issues are considered in the diagnosis of Bipolar I disorders. *Id.* at 124.

¹⁰⁶ See Lynn F. Fischer, *Espionage: Why Does It Happen?* DEP'T OF DEF. SEC. INST., Oct. 3, 2000, available at <http://www.hanford.gov/files.cfm/whyhappens.pdf>.

alcohol and drug abuse stood out as significant characteristics of these spies.¹⁰⁷ These are issues that mental health professionals have considerable expertise in evaluating.

In the mental health arena, as in other areas of clearance denials, persons may introduce for consideration the reports of mental health providers to add to information or offer an alternate prognosis and assessment of judgment, reliability, or stability.¹⁰⁸ But the government is not bound by such outside information and has the right to its own review and assessment.¹⁰⁹ The evidential burden the government must meet is the introduction of “substantial evidence.”¹¹⁰ The presumptions generally favor the government in adjudication and appeals because the applicant has the burden of proving he or she meets the criteria for granting a security clearance.¹¹¹

The adjudication criteria require assessments in a number of behavioral areas where mental health professionals have expertise. Guideline I in particular creates a role for mental health professionals, yet does not prescribe the extent of that role. Despite uniform reliance on Guideline I and the presence of other behavioral concerns among the adjudication criteria, agencies have varied in employing psychological evaluations in overall applicant evaluations as discussed below in part II.

¹⁰⁷ *Id.*

¹⁰⁸ *See In the Matter of: *** Applicant for Sec. Clearance*, DISCR Case No. 09-03718, 2012 WL 1416017 (D.I.S.C.R. Apr. 16, 2012); *In the Matter of: *** (Redacted) Applicant for Pub. Trust Position*, ADP Case No. 08-06228, 2011 WL 3667921 (D.I.S.C.R. Feb. 25, 2011) (explaining the introduction of expert information, burdens of proof, and presumptions in evaluating appeals for denial of clearances).

¹⁰⁹ *In the Matter of: *** (Redacted) Applicant for Pub. Trust Position*, 2011 WL 3667921 (D.I.S.C.R. Feb. 25, 2011).

¹¹⁰ *Id.* Black’s Law Dictionary defines “substantial evidence” as “[e]vidence that a reasonable mind could accept as adequate to support a conclusion; evidence beyond a scintilla.” BLACK’S LAW DICTIONARY 640 (9th ed. 2009).

¹¹¹ Exec. Order No. 12,968 § 1.2(c), 60 Fed. Reg. 40,245 (Aug. 2, 1995).

E. Psychological Evaluation in Law Enforcement Selection

Law enforcement agencies may serve as a model for the IC since they routinely employ psychological evaluations in selection of personnel and require institutional screening demands analogous to those required in the IC. Survey data indicates that approximately 90% of state and local police forces use some type of psychological evaluation as part of their hiring process.¹¹² The International Association of Chiefs of Police – Police Psychological Services Section has promulgated standards for conducting such evaluation,¹¹³ although the content of evaluations varies widely.¹¹⁴ Such evaluations are not part of a security clearance process *per se*, but are used to evaluate police candidates for mental illness or emotional unfitness for police work,¹¹⁵ concerns similar to the security criteria of judgment, reliability, and stability applied in the IC.

Most police departments rely on a combination of standard psychological tests and in-person interviews.¹¹⁶ Psychologists may communicate their recommendations as a binary “yes/no” answer, but more commonly provide a rating on a five-point scale, ranging from “excellent suitability” to “unsuitable.”¹¹⁷ Publicly available data regarding the numbers of candidates screened out by such routine evaluations is scarce, although one study of 155 police departments found a 5% rejection rate based solely on psychological

¹¹² BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, HIRING AND RETENTION OF STATE AND LOCAL LAW ENFORCEMENT OFFICERS 2008 - STATISTICAL TABLES, fig. 9, at 14 (2012).

¹¹³ IACP Police Psychological Services Section, Pre-Employment Psychological Evaluations Guidelines, 1 (2009), available at <http://www.theiacp.org/portals/0/documents/pdfs/Psych-PreemploymentPsychEval.pdf>.

¹¹⁴ Yossef S. Ben-Porath et. al., *Assessing the Psychological Suitability of Candidates for Law Enforcement Positions*, LXVIII POLICE CHIEF, n.8 (2012), available at http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display&article_id=2448&issue_id=82011. See also M.L. Dantzker, *Psychological Preemployment Screening for Police Candidates: Seeking Consistency if Not Standardization*, 42 PROF. PSYCHOL.: RES. & PRACTICE 276 (2011).

¹¹⁵ Dantzker, *supra* note 114, at 277.

¹¹⁶ Frank J. Gallo & Richard P. Halgin, *A Guide for Establishing a Practice in Police Preemployment Postoffer Psychological Evaluation*, 42 PROF. PSYCHOL.: RES. & PRACTICE 269, 271-73 (2011).

¹¹⁷ *Id.* at 273-74.

evaluations.¹¹⁸ One provider of these evaluations estimated that it cost police departments \$300 per evaluation in 2010.¹¹⁹

Federal courts have upheld the use of psychological evaluations in police officer selection when used in a manner consistent with the EEOC's guidance on medical evaluations. For example, in *Nilsson v. City of Mesa*, the Ninth Circuit rejected a claim by an officer candidate that her rejection—based on the results of psychological evaluation—violated the ADA.¹²⁰ Although Nilsson claimed that her rejection was pretext for retaliation for prior EEOC actions, the court found that the independent assessment—performed in the post-offer phase—was a legitimate reason to not hire her and therefore valid under the ADA.¹²¹ The Second Circuit in *Daley v. Koch* also held that denial of employment on the basis of personality traits identified in a psychological assessment did not violate the Rehabilitation Act, the federal law upon which the ADA was modeled.¹²² Further, in *Martin v. Department of Veterans Affairs*, the Federal Circuit upheld the demotion of an employed federal police officer from armed to unarmed status on the basis of the recommendation from a routine annual psychological assessment,¹²³ suggesting that in the federal arena, such evaluations may be used in both officer retention and selection decisions.

These decisions appear to support the legal basis under the ADA for the widely adopted use of psychological evaluations by police departments in assessing the hiring and retention of police

¹¹⁸ Robert E. Cochrane et al., *Psychological Testing and the Selection of Police Officers*, 30 CRIM. JUSTICE & BEHAVIOR, 511 (2003). The authors were unable to estimate the additional contribution of the evaluation in the overall hiring decision when combined with other factors. *Id.*

¹¹⁹ Mark Zelig, Presentation at the American Psychological Association 2011 Annual Meeting, Pre-Employment Evaluations for High Risk Professions (Aug. 12, 2010).

¹²⁰ *Nilsson v. City of Mesa*, 503 F.3d 947 (9th Cir. 2007).

¹²¹ *Id.* at 955.

¹²² *Daley v. Koch*, 892 F.2d 212, 215 (2d Cir. 1989). *See also* *Terry v. Town of Morristown*, 446 F. App'x 457, 462 (3d Cir. 2011) (upholding rejection based on psychological evaluation); *Damino v. City of New York*, 332 F. App'x 679, 681 (2d Cir. 2009) (finding rejection based on psychological evaluation was nondiscriminatory).

¹²³ *Martin v. Dep't of Veterans Affairs*, 412 F.3d 1258, 1264 (Fed. Cir. 2005).

officers at both the local and federal level. None of these decisions directly address the use of psychological evaluations with contractors, nor have they involved applicants for government employee status, nor applied a framework where the evaluation is included in a specific security clearance paradigm. However, these law enforcement cases provide a roadmap for incorporating psychological evaluations into the clearance process, and demonstrate that psychological evaluation can be used legally in both hiring and retention assessments. Should the IC choose to adopt psychological assessment in the security evaluation framework, the legal questions already answered in the analogous law enforcement arena provide a model for implementation.

II. PRESENT STATE OF THE SECURITY CLEARANCE PROCESS

The news is filled with consternation over serious problems in evaluating people for security clearances.¹²⁴ All applicants for a new or renewed TS/SCI clearance submit an Standard Form 86, Questionnaire for National Security Positions (“SF-86”),¹²⁵ and meet with an investigator. The investigator interviews the applicant, verifies the information on the SF-86, interviews references, and submits his or her report and the information to agency adjudicators for their review and decision. Issues in the process range from inadequate checks on information provided to inadequate interviewing and other corner cutting.¹²⁶ In the wake of the September 2013 Navy Yard shootings, criticism of the whole process has become widespread, and calls for closer scrutiny of candidates for security clearances have grown louder.¹²⁷ Review of the TS/SCI

¹²⁴ Kendall & Nissenbaum, *supra* note 4; Londono et al., *supra* note 8; Trip Gabriel, *Shortcuts Seen by Firm Doing Security Checks*, N.Y. TIMES, Sept. 28, 2013, <http://www.nytimes.com/2013/09/28/us/pressure-reported-in-rush-to-meet-security-clearances-including-edward-snowden-and-aaron-alexis.html>. The articles above report that private contractors conduct a large portion of the background investigations.

¹²⁵ SF-86, QUESTIONNAIRE FOR NATIONAL SECURITY POSITIONS, OMB No. 3206 0005 [hereinafter SF-86], available at http://www.opm.gov/forms/pdf_fill/sf86.pdf.

¹²⁶ Kendall & Nissenbaum, *supra* note 4; Londono et al., *supra* note 8; Gabriel, *supra* note 124.

¹²⁷ London et al., *supra* note 8; *Expect Security Clearance Delays*, FEDERAL TIMES ONLINE (June 24, 2013), <http://www.federaltimes.com/article/20130624/>

clearance process reveals a number of deficiencies that could be improved by the introduction of psychological screening across the IC.

A. *Contents of the Process — The SF-86 and the Background Investigation*

Uniform steps in the process for granting or renewing a TS/SCI clearance include submission of a complete SF-86, interview by an investigator (which may be the only direct contact in the process), and verification of the information provided by the applicant.¹²⁸ The degree of scrutiny an individual receives then begins to diverge within the IC depending on employment status and the hiring agency. While some applicants will undergo only a background investigation, others will undergo a polygraph examination, with a subset that will undergo psychological assessment as part of their medical evaluation for employment; this entire process occurs post-offer in order to abide by the ADA's guidelines.¹²⁹ Security professionals assess the data that is gathered during the clearance process to reach a decision to grant or deny a clearance. Individuals then have the option of appealing a clearance denial.

The SF-86 is the standard form submitted by applicants and employees for a TS/SCI clearance. It consists of 127 pages of information requirements that an applicant must provide in full.

PERSONNEL03/306240008/Expect-security-clearance-delays (noting that upgrades for TS/SCI could include both increased use of polygraph and psychological assessments).

¹²⁸ OFFICE OF PERS. MGMT., *Memorandum for Heads of Agencies: Aligning OPM Investigative Levels with Reform Concepts* (Aug. 24, 2010) [hereinafter OPM MEMO], available at http://www.opm.gov/investigations/background-investigations/federal-investigations-notices/2010/aligning_opm_investigative_levels.pdf.

¹²⁹ See generally *Application Process*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/careers/application-process/application-instructions> (last visited July 15, 2014); *Hiring Requirements*, NAT'L SEC. AGENCY, http://www.nsa.gov/careers/jobs_search_apply/hirerequire.shtml (last visited July 15, 2014); *Criteria*, DEF. INTELLIGENCE AGENCY, <http://www.dia.mil/Careers/Criteria.aspx> (last visited July 15, 2014); *Careers*, INTELLIGENCE.GOV, <http://intelligence.gov/careers-in-intelligence> (last visited July 15, 2014).

The areas covered include:

- individually identifying information;
- residences for the previous ten years;
- education, beginning with high school;
- employment information for the previous ten years;
- prior federal service;
- prior military service;
- three personal references;
- names and other identifying information for all first degree relatives;
- foreign activities and foreign travel;
- mental health treatment or counseling in the previous seven years;
- police records for the previous ten years;
- illegal drug use and any related counseling and treatment for the past ten years;
- alcohol use in the previous seven years, including counseling and treatment;
- security clearance record;
- financial status, including bankruptcies, delinquencies and problems due to gambling;
- misuse of IT systems in the previous seven years;
- civil court actions in the previous ten years; and
- association with organizations involved in terrorism or seeking to overthrow the U.S. government.¹³⁰

Despite its extensive scope, the SF-86 fails to elicit from applicants certain types of information that might be relevant to judgment, reliability, or stability. Question 21 of the SF-86 deals specifically with mental health issues, but is limited because it asks only about counseling received, and not about the existence of a condition. Specifically, the question asks, “In the last 7 years, have you consulted with a health care professional regarding an emotional or mental health condition or were you hospitalized for such a condition?”¹³¹ The instruction advises applicants to answer “no” if

¹³⁰ SF-86, *supra* note 125.

¹³¹ *Id.* at sec. 21. MENTAL AND EMOTIONAL HEALTH.

the counseling was not court ordered, was strictly for marital counseling, family counseling, grief issues not related to violence by the applicant, or was strictly related to adjustments from service in a military combat environment.¹³² The Director of National Intelligence added another exclusion for counseling related to sexual assault in response to concerns about sexual assault within the military.¹³³ Question 23 asks about illegal drug use in the previous seven years and requires that the applicant provide the dates of treatment and the names and address of treatment providers, yet it does not require a description from the applicant regarding treatment outcome.¹³⁴ Question 24 requires the same information regarding alcohol use without any required description of treatment outcome.¹³⁵ However, by asking about negative impacts on work, relationships, finances, or encounters with law enforcement,¹³⁶ Question 24 does allow for the disclosure of certain consequences that mental health professionals often examine in diagnosing alcohol use disorders.¹³⁷

Applicants for clearance issuance or renewal must also provide two releases of information. The first authorizes the investigator to access financial, employment, educational, and government agency records.¹³⁸ The second specifically authorizes release of information by healthcare professionals under the Health Insurance Portability and Accountability Act (“HIPAA”).¹³⁹ The medical release includes a practitioner box at the bottom of the page asking “[d]oes the person under investigation have a condition that could impair his judgment, reliability, or ability to properly safeguard

¹³² *Id.*

¹³³ ODNI News Release 05-13, *Director of National Intelligence Issues New Security Clearance Guidance* (Apr. 5, 2013), available at <http://www.dni.gov/index.php/newsroom/press-releases/191-press-releases-2013/828-director-of-national-intelligence-issues-new-security-clearance-guidance>.

¹³⁴ SF-86, *supra* note 125, at sec. 23. ILLEGAL USE OF DRUGS AND DRUG ACTIVITY.

¹³⁵ *Id.* at sec. 24. USE OF ALCOHOL.

¹³⁶ *Id.*

¹³⁷ DSM-V, *supra* note 105, at 490.

¹³⁸ SF-86, *supra* note 125, at AUTHORIZATION FOR RELEASE OF INFORMATION.

¹³⁹ *Id.* at AUTHORIZATION FOR RELEASE OF MEDICAL INFORMATION PURSUANT TO THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT (HIPAA).

classified national security information?”¹⁴⁰ If the practitioner answers “yes,” the practitioner is then asked to describe—in a space measuring one inch by seven inches on the hard copy form—the nature of the condition, extent and duration of the impairment or treatment, and to provide a prognosis.¹⁴¹ This limited opportunity for response implies that the investigator will receive little substantive information about issues in any of the several areas where mental health concerns might arise.

While all agencies require applicants to submit an SF-86, the internal procedures of the various agencies for reviewing the form can differ dramatically. Most background investigations are now conducted under the supervision of the Office of Personnel Management and include verification of the information provided by the applicant.¹⁴² All TS clearance investigations or reinvestigations include a field investigator interview with the applicant to review and verify the information on the SF-86 and ask additional questions about any ambiguous answers; obtaining records to verify the information provided; interviewing references; and conducting follow-up interviews for any issues identified in the course of the investigation.¹⁴³ Prior to submitting a field report, the investigator will review the answers provided by the applicant and may develop collateral information from personal references, employers, or law enforcement regarding behavioral issues. Increasingly, investigators perform electronic verification rather than engaging in conversation with information providers.¹⁴⁴

Investigators work under significant pressure to quickly complete their field investigations, with pressure principally coming

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Background Investigations*, OFFICE OF PERS. MGMT., <http://www.opm.gov/investigations/background-investigations> (last visited July 5, 2014).

¹⁴³ For details of the contents of clearance investigations, see OPM MEMO, *supra* note 128.

¹⁴⁴ *Personnel Security Clearance Reform: Hearing Before Subcomm. on Intelligence Cmty. Mgmt. Permanent Select Comm. on Intelligence*, 111th Cong. (2010) (statement by Kathy L. Dillaman, Associate Director for Federal Investigative Services, OPM), available at <http://www.opm.gov/news/testimony/111th-congress/personnel-security-clearance-reform>.

from two sources. First, because private companies performing field investigations¹⁴⁵ get paid only upon submission of a completed field report,¹⁴⁶ there is often enormous pressure throughout the organizations conducting the work, which sometimes may lead to incomplete and falsified reports¹⁴⁷ and neglect of secondary reviews before field reports are submitted to adjudicators.¹⁴⁸ Second, and more often the case, the 2004 Intelligence Reform and Terrorism Prevention Act (“IRTPA”) requires that the government complete 90% of clearance requests in sixty days.¹⁴⁹ Although there have been significant reductions in processing time since enacting IRTPA, the trade-off of incomplete investigations has become apparent in the aftermath of the Snowden leak and Navy Yard shooting events.¹⁵⁰ In fact, a sponsor of IRTPA noted that following the Snowden leaks, her confidence in the clearance system had been shaken by the revelations about the process.¹⁵¹

In all cases, the data-gathering phase of the investigation relies on, at the very least, an extensive questionnaire, a single in-person interview, and data verification. While the SF-86 is extensive and detailed, even touching aspects of mental health in a number of questions, the level of detail in areas of mental health concern is

¹⁴⁵ In 2013, USIS, a private firm located in Tyson’s Corner, VA that screened Snowden, performed the majority of field investigations. Tom Hamburger & Zachary A. Goldfarb, *Company Allegedly Mised Government about Security Clearance Checks*, WASH. POST, June 27, 2013, available at http://www.washingtonpost.com/business/economy/company-allegedly-mised-government-about-security-clearance-checks/2013/06/27/dfb7ee04-df5c-11e2-b2d4-ea6d8f477a01_story.html.

¹⁴⁶ Gabriel, *supra* note 124.

¹⁴⁷ *Id.*

¹⁴⁸ *USIS Under Investigation for Clearance Oversight*, MILITARY.COM (July 2, 2013), <http://www.military.com/veteran-jobs/security-clearance-jobs/2013/07/02/usis-under-investigation-for-clearance-oversight.html>. See also Hamburger & Goldfarb, *supra* note 145 (noting that the government was considering dropping USIS for performing sloppy field investigations, including Snowden’s evaluation).

¹⁴⁹ Intelligence Reform and Terrorism Prevention Act, 50 U.S.C. 3301 § (g)(2)(A) (2012).

¹⁵⁰ Rebecca LaFlure, *Security Clearance Lapses Stemmed from Washington’s Heedless Emphasis on Speed Over Quality*, CTR. FOR PUBLIC INTEGRITY (Oct. 1, 2013), <http://www.publicintegrity.org/2013/10/01/13489/security-clearance-lapses-stemmed-washington-s-heedless-emphasis-speed-over-quality>.

¹⁵¹ Gabriel, *supra* note 124.

actually quite limited. These inadequacies are amplified by further structural pressures for investigators to quickly submit reports, sometimes leading to incomplete investigations. Beyond these inadequacies, the structure of the information gathered and the lack of expertise applied to the information has led to deviation in outcomes in the adjudication process.

B. *Adjudication and Appeal of Denials*

Once the field investigation is completed, the information goes to adjudicators for an initial decision on granting or renewing the TS clearance. The granting agency performs this function, although publicly available information is scant outside of DoD as to where the adjudication takes place within an organization. Within DoD, adjudication occurs in either the Central Adjudication Facility for military and civilian staff employees, or the Defense Industrial Clearance Office for contractors.¹⁵² Adjudicators follow the guidelines provided in federal regulation,¹⁵³ including guidance on assessing concerning issues and mitigating factors, and they may request additional information from the applicant to resolve any issues.¹⁵⁴

The underlying approach to evaluation is called the “whole person concept” and entails a consideration of nine factors in evaluating a behavior:

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recentness of the conduct;
- (4) the individual’s age and maturity at the time of the conduct;
- (5) the voluntariness of participation;
- (6) the presence or absence of rehabilitation and other pertinent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress; and
- (9) the likelihood of continuation or recurrence.¹⁵⁵

¹⁵² DoD OIG REPORT ON ADJUDICATION, *supra* note 24, at 6-12.

¹⁵³ 32 C.F.R. § 147 (2013).

¹⁵⁴ DoD OIG REPORT ON ADJUDICATION, *supra* note 24, at 7.

¹⁵⁵ § 147.2(a).

Federal regulation provides specific guidance on resolution of the issues, requiring that “[e]ach case must be judged on its own merits, and final determination remains the responsibility of the specific department or agency. Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security.”¹⁵⁶ Under this standard, the government has great discretion in its decision to grant a clearance.

The DoD appeals process includes a formal hearings process.¹⁵⁷ Although CIA and NSA have not made public their process for appeals, presumably they comply with the requirements of Exec. Order 12,968.¹⁵⁸ Of the other agencies reporting clearance data through the Office of the Director of National Intelligence, only the Department of State provides readily accessible information regarding its appeals process.¹⁵⁹

C. Differences Among the Agencies in Processing and Outcomes

Agencies within the IC differ in a number of respects in processing applicants for security clearances and for employment. First, agencies differ in their use of the polygraph as a routine screening tool.

¹⁵⁶ *Id.* § 147.2(b).

¹⁵⁷ See DoD OIG REPORT ON ADJUDICATION, *supra* note 24 at 10-12.

¹⁵⁸ Exec. Order No. 12,968 § 5.2, 60 Fed. Reg. 40,245 (Aug. 2, 1995).

¹⁵⁹ See, e.g., DEP’T OF STATE OFFICE OF INSPECTOR GEN., ISP-I-06-43, REPORT OF INSPECTION: REVIEW OF THE BUREAU OF DIPLOMATIC SECURITY’S REVOCATION PROCESS FOR SECURITY CLEARANCES 6 (Sept. 2006), available at <http://oig.state.gov/documents/organization/1034666.pdf>.

Table 1. Agency use of polygraph in the security clearance process in FY 2012¹⁶⁰

<i>Department or Agency</i>	<i>Employees</i>	<i>Contractors</i>
Central Intelligence Agency ¹⁶¹	All	All
Defense Intelligence Agency ¹⁶²	Limited	Limited
Federal Bureau of Investigation ¹⁶³	All	None
National Geospatial-Intelligence Agency ¹⁶⁴	Limited	All
National Reconnaissance Office ¹⁶⁵	N/A ¹⁶⁶	All
National Security Agency ¹⁶⁷	All	All
Department of State ¹⁶⁸	None	None
Department of Defense ¹⁶⁹	Selective	Selective

Second, agencies differ in their use of psychological screening of applicants.

¹⁶⁰ DNI employees and contractors undergo security processing through CIA. DNI 2012 CLEARANCE REPORT, *supra* note 11, at 5 n.3 (2013).

¹⁶¹ *Careers & Internships: Application Instructions*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/careers/application-process/application-instructions> (last visited Jul 15, 2014).

¹⁶² *Careers: Criteria*, DEF. INTELLIGENCE AGENCY, <http://www.dia.mil/Careers/Criteria.aspx> (last visited July 15, 2014).

¹⁶³ *Careers: Background Investigation*, FED. BUREAU OF INVESTIGATION, <https://www.fbijobs.gov/53.asp> (last visited July 15, 2014).

¹⁶⁴ *What to Expect*, NAT'L GEOSPATIAL-INTELLIGENCE AGENCY, <https://www1.nga.mil/Careers/ApplicationProc/Pages/ApplicationProcsWhatToExpect.aspx> (last visited July 15, 2014).

¹⁶⁵ OFFICE OF THE UNDER SEC'Y OF DEF. FOR INTELLIGENCE, DEPARTMENT OF DEFENSE POLYGRAPH PROGRAM PROCESS AND COMPLIANCE STUDY (Dec. 19, 2011) [hereinafter DOD POLYGRAPH STUDY], *available at* <http://www.fas.org/sgp/othergov/polygraph/DOD-poly.pdf>.

¹⁶⁶ NRO staff employees are detailed from other agencies, most notably the CIA and Department of the Air Force, while contractors are hired directly. *See Career Opportunities*, NAT'L RECONNAISSANCE OFFICE, <http://www.nro.gov/careers/careers.html> (last visited July 15, 2014).

¹⁶⁷ *Hiring Requirements*, NAT'L SEC. AGENCY, http://www.nsa.gov/careers/jobs_search_apply/hirerequire.shtml (last visited July 15, 2014).

¹⁶⁸ U.S. Department of State Foreign Affairs Manual: Polygraph Policy, 12 FAM 251 (1994), *available at* <http://www.state.gov/documents/organization/88342.pdf>.

¹⁶⁹ DOD POLYGRAPH STUDY, *supra* note 165.

Table 2. Agency use of psychological screening for applicant evaluation

<i>Department or Agency</i>	<i>Employees</i>	<i>Contractors</i>
Central Intelligence Agency ¹⁷⁰	All	None
Defense Intelligence Agency ¹⁷¹	None	None
Federal Bureau of Investigation ¹⁷²	None	None
National Geospatial- Intelligence Agency ¹⁷³	None	None
National Reconnaissance Office	N/A ¹⁷⁴	None
National Security Agency ¹⁷⁵	All	None
Department of State ¹⁷⁶	None	None
Department of Defense ¹⁷⁷	Selective	None

Those agencies that currently perform psychological assessments of applicants do so under the rubric of medical evaluation for employment in the post-offer phase, with authorities derived from federal regulation.¹⁷⁸ Data on the numbers or

¹⁷⁰ *Application Process*, CENT. INTELLIGENCE AGENCY, <http://www.cia.gov/careers/application-process> (last visited June 20, 2014).

¹⁷¹ *Criteria*, DFEF. INTELLIGENCE AGENCY, <http://www.dia.mil/careers/criteria/> (last visited June 20, 2014).

¹⁷² *Background Investigation*, FED. BUREAU OF INVESTIGATION, <https://www.fbijobs.gov/53.asp> (last visited June 20, 2014).

¹⁷³ *What to Expect*, NAT'L GEOSPATIAL-INTELLIGENCE AGENCY, <https://www1.nga.mil/Careers/ApplicationProc/Pages/ApplicationProcsWhatToExpect.aspx> (last visited June 20, 2014).

¹⁷⁴ See DOD POLYGRAPH STUDY, *supra* note 165.

¹⁷⁵ *Hiring Requirements*, NAT'L SEC. AGENCY, http://www.nsa.gov/careers/jobs_search_apply/hirerequire.shtml (last visited June 20, 2014).

¹⁷⁶ *Becoming a Foreign Service Officer*, DEP'T OF STATE, <http://careers.state.gov/officer/selection-process#nogo> (last visited June 20, 2014).

¹⁷⁷ The DoD has a wide array of mental health programs for a variety of purposes, such as screening of combat forces for posttraumatic stress disorder, and reliability for nuclear programs, but no identifiable ones linked to assessing individuals for access to TS/SCI programs. In the course of the recent wars in Iraq and Afghanistan, DoD has instead placed an emphasis on identifying and treating mental health issues, and delinking treatment from security clearances. See *DoD News Briefing with Adm. Mullen, Col. Sutton and Col. Horoho from the Pentagon* (May 1, 2008), <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=4221>; Donna Miles, *Gates Works to Reduce Mental Health Stigma*, AMERICAN FORCES PRESS SERVICE (May 1, 2008), <http://www.defense.gov/news/newsarticle.aspx?id=49738>.

¹⁷⁸ *Application Process*, CENT. INTELLIGENCE AGENCY, <http://www.cia.gov/careers/>

percentages of staff applicants rejected under this medical paradigm for psychological reasons are not publicly available. Notably, no agency requires psychological evaluations for contractors.

The third table compares clearance denial rates, as a percentage of clearance decisions, among the agencies reporting data to the DNI during FY 2011 and 2012. The reported data do not distinguish denial rates for staff and for contractors nor do they provide specifics on why clearance was denied.

Table 3. Percentage of Security Clearance Denials, FY 2011 and 2012¹⁷⁹

<i>Department or Agency</i>	<i>FY 2011</i>	<i>FY 2012</i>	<i>Two Year Average¹⁸⁰</i>
Central Intelligence Agency	5.3	4.9	5.1
Defense Intelligence Agency	1.2	0.0	0.6
Federal Bureau of Investigation	0.2	0.1	0.2
National Geospatial-Intelligence Agency	0.0	1.3	0.6
National Reconnaissance Office	3.8	5.9	4.9
National Security Agency	8.0	5.7	6.9
Department of State	0.5	0.6	0.6
Department of Defense ¹⁸¹	Unreported	Unreported	N/A

application-process (last visited July 15, 2014); *Hiring Requirements*, NAT'L SEC. AGENCY, http://www.nsa.gov/careers/jobs_search_apply/hirerequire.shtml (last visited June 20, 2014).

¹⁷⁹ See OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, 2011 REPORT ON SECURITY CLEARANCE DETERMINATIONS 7 (2012), available at <http://www.dni.gov/files/documents/Newsroom/Reports%20and%20Pubs/2011%20Report%20on%20Security%20Clearance%20Determinations.pdf>; see also DNI 2012 CLEARANCE REPORT, *supra* note 11, at 7.

¹⁸⁰ Assumes number of actions as fairly constant across the two years.

¹⁸¹ The 2011 and 2012 DNI Reports on Security Clearance Determinations state that DoD components other than those listed are unable to extract data specific to the Intelligence Community.

While DoD data on TS/SCI clearances are not available for comparison in the DNI reports, some inferences regarding clearance denial rates can be made based on information from other sources. For example, for FY 2010, denial rates for all types of clearances for the Defense Office of Hearings and Appeals (DOHA), which handles most civilian staff and contractor clearances and denial reviews, the Department of the Navy, and the Department of the Air Force ranged from 0.6 to 1.3%, while the Department of the Army reported a 6.0% rate.¹⁸² Also, a 2000 study that examined data on clearance denials for TS and SCI determinations found that in 1998, DOHA's denial and revocation rate for SCI access was 0.4%.¹⁸³

Comparing these three tables and the DoD data reveals a pattern: those agencies employing psychological screening for staff applicants, such as CIA and NSA, have much higher rates of security clearance denials than those that have no psychological screening, with or without polygraph testing. The only outlier is the NRO, which uses a polygraph, but not psychological screening, and whose denial rate is comparable to CIA and NSA. The reasons for this discrepancy between NRO and other agencies that do not employ psychological screening is not obvious, but may reflect in part the fact that security and mental health personnel at NRO are often CIA employees on assignment to NRO.¹⁸⁴ Recent press reports also indicate that the NRO polygraph program has been particularly aggressive in investigating issues of personal behavior that often fall outside the scope of a counterintelligence polygraph examination.¹⁸⁵

¹⁸² William Henderson, *2011 Security Clearance Year in Review*, CLEARANCEJOBS.COM, <http://news.clearancejobs.com/2012/02/06/2011-security-clearance-year-in-review/> (Feb. 6, 2012). Among the factors that may have led to increased Army denial rates is the high demand for recruits while fighting two wars in 2010. Soldiers are submitted for clearances post-hiring, not post-offer.

¹⁸³ KENT S. CRAWFORD ET AL., DEF. PERS. SEC. RESEARCH SERVICE, AN ANALYSIS OF CLEARANCE REVIEW DECISIONS BY THE DEFENSE OFFICE OF HEARINGS AND APPEALS 2 (Oct. 5, 2000), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA383527>.

¹⁸⁴ See generally *CIA Careers*, NAT'L RECONNAISSANCE OFFICE, <http://www.nro.gov/careers/cia.html> (last visited July 15, 2014).

¹⁸⁵ Marisa Taylor, *National Reconnaissance Office Accused of Collecting Personal Data*, MCCLATCHY NEWS SERVICE (July 10, 2012), <http://www.mcclatchydc.com/2012/07/10/155587/national-reconnaissance-office.html>.

These reports suggest that NRO security adjudicators are attempting to obtain information by the polygraph examination that might become available through psychological screening. Unsurprisingly, CIA, NSA and NRO denial rates are also comparable to those of police departments who rely on psychological screening of their applicants.¹⁸⁶

The data provided on denial rates within the IC do not distinguish between government employees and contractors. As noted in Table 2, medical evaluations, including psychological evaluations, are currently performed only on government employees, and not on contractors. Although DoD has added some requirements for assessment of psychological stability for contractors deploying to a war zone,¹⁸⁷ no agency within the IC requires such an assessment of contract employees. The available data does not allow an inference as to differential rates between staff and contract denials, but it does lead to some inferences about the utility of available screening mechanisms.

The process for evaluating government employees for entry into the IC may include only one (the investigator), two (the polygrapher), or three (the psychologist) face-to-face contacts with a trained interviewer. As described above, those agencies whose process includes only one or two contacts generally have a lower denial rate than those with all three. News reporting has documented numerous widespread deficiencies in the background investigative process, but some data also suggests that reliance on the SF-86 and background investigation is inherently flawed. For example, a DoD study in 2004 suggested that people may make other significant omissions, finding that 38% of persons did not report criminal arrests, charges, or convictions on their SF-86 submission.¹⁸⁸

Edward Snowden was originally hired by the NSA and then transferred to the CIA. His loyalty to the IC changed over time as he worked at the CIA.¹⁸⁹ When he became a contractor and went to

¹⁸⁶ Cochrane et al., *supra* note 118, at 511.

¹⁸⁷ See 32 C.F.R. § 158.7 (2013).

¹⁸⁸ DoD POLYGRAPH STUDY, *supra* note 165, at 9-10.

¹⁸⁹ Greenwald et al., *supra* note 1.

work at NSA, his 2011 reinvestigation would at most consist of a background interview and a polygraph examination. Media reports do not indicate whether he underwent a reinvestigation polygraph, but he certainly did not undergo any psychological screening on reentry into the IC.¹⁹⁰ Thus it appears possible, and even likely, that no one asked him about his attitudes toward the NSA, toward the programs he exposed, or about his intentions in working on highly sensitive information systems. As he has made clear to the media, his intention in working at the NSA was to expose government secrets.¹⁹¹

Beyond the specific situation involving Edward Snowden, institutionally the pressures to quickly produce reports has often led to incomplete investigations. The system's single face-to-face assessment by a background investigator as the sole direct interaction and agency variability in processing demonstrate that the current system is inherently deficient in assessing candidates for a TS/SCI clearance. These problems that have emerged about the current process suggest that something needs to be done to improve outcomes. Fortunately, some agencies, such as the CIA and NSA, are already employing effective additions to the clearance process by increasing the number of direct interactions with applicants, at least for staff employees. For agencies that impose a second or third direct interaction, rejection rates go up, approaching those of organizations in law enforcement that also impose a second look by a mental health professional. This reported data indicates that having a second look yields real benefit in disqualification rates across the IC.

III. PSYCHOLOGICAL EVALUATION FOR THE TS/SCI CLEARANCE PROCESS: RATIONALE AND BARRIERS

Adding psychological screening to the TS/SCI security clearance process would greatly improve the process. On philosophical and practical grounds, psychological evaluation would increase the information available in making a "whole person" judgment, and likely increase denial rates, which should reflect greater detection of unsuitable applicants. Implementation may

¹⁹⁰ Katz, *supra* note 7.

¹⁹¹ Greenwald et al., *supra* note 1.

require some adjustment to existing regulation, particularly in regards to current employees.¹⁹² But existing regulatory authority,¹⁹³ the latitude provided by federal courts to the Executive Branch regarding content and adjudication of clearances, and the court-approved successful integration of such evaluations into law enforcement applicant assessment, suggest that adding routine psychological evaluation to the TS/SCI clearance process can successfully be achieved with careful attention to current law.

A. Why Add Psychological Screening?

Most Americans granted a TS/SCI clearance prove to be reliable, stable, and of good judgment. They will not commit espionage or compromise national security information by their actions. But as events with Edward Snowden showed, this is not the calculus in granting security clearances. Rather, the concern is to screen out those who might engage in such activity. On theoretical, practical, and empirical grounds, psychological screening should be added to the TS/SCI clearance process to reduce these risks. Psychological evaluations will add to the information about the “whole person” and provide an opportunity for expert assessment of behaviors of concern in the clearance process

Psychological evaluation is a screening tool, and like all screening tools, it cannot guarantee that all unsuitable candidates will be identified or that suitable candidates will not be mislabeled as unsuitable. The experience of police departments, where the consequences of selecting an unsuitable candidate can be serious, indicates that those departments overall have found psychological evaluations to be an important tool in reducing that risk, to the point of requiring such evaluations for national accreditation.¹⁹⁴ The data suggest that when psychological evaluations comprise part of the

¹⁹² 5 C.F.R. § 339 (2013).

¹⁹³ *Id.* § 147.

¹⁹⁴ See COMM’N ON ACCREDITATION FOR LAW ENFORCEMENT AGENCIES, INC., CALEA STANDARDS FOR LAW ENFORCEMENT AGENCIES: 32.2.8 PSYCHOLOGICAL FITNESS EXAMINATIONS (2012), available at <http://www.calea.org/content/standards-titles>.

overall evaluation process for staff applicants, there is an increased identification of persons deemed unsuitable for TS/SCI access.¹⁹⁵

Exec. Order 12,968 provides a guiding philosophy for clearance determination by establishing that “[e]ligibility shall be granted only where facts and circumstances indicate access to classified information is clearly consistent with the national security interests of the United States, and any doubt shall be resolved in favor of the national security.”¹⁹⁶ This approach ensures the government receives the benefit of any doubt in reaching a clearance decision. Although federal regulation calls for the use of the “whole person” concept to evaluate each person in granting a clearance,¹⁹⁷ IC agencies vary widely as to how much information is required to assess the whole person.¹⁹⁸ Marked disparities exist in at least two crucial aspects, psychological evaluation and polygraph examination.

Polygraph examination is widely disparaged outside of the IC, and many IC agencies do not routinely employ it.¹⁹⁹ Even some agencies that employ these examinations, such as DoD and the Department of State, tightly regulate the practice despite evidence that it can yield useful information not provided in a background investigation.²⁰⁰ Continued controversy about accuracy²⁰¹ and the nature of the examination make it unpopular in scientific and lay circles.²⁰² While at least one commentator expects increased use of polygraph testing after the Snowden affair,²⁰³ its further adoption will

¹⁹⁵ See *supra* Part II.C.

¹⁹⁶ Exec. Order No. 12,968, at § 3.1(b) (Aug. 2 1995).

¹⁹⁷ § 147.2.

¹⁹⁸ See *supra* tables 1, 2.

¹⁹⁹ See *supra* table 1.

²⁰⁰ DOD POLYGRAPH STUDY, *supra* note 165, at 9-10.

²⁰¹ See NAT'L RESEARCH COUNCIL, THE POLYGRAPH AND LIE DETECTION 12 (2003), available at http://www.nap.edu/booksearch.php?booksearch=1&term=coercive&record_id=10420.

²⁰² For a sampling of anti-polygraph sentiment and collection of articles, see antipolygraph.org. *What We Want*, <https://antipolygraph.org/> (last visited July 15, 2014).

²⁰³ Stephen Losey, *Expect Security Clearance Delays*, FEDERAL TIMES (June 24, 2013), <http://www.federaltimes.com/article/20130624/PERSONNEL03/306240008/Expect-security-clearance-delays>.

likely face considerable resistance from employees, applicants and anti-polygraph advocates.

A psychological evaluation, without a polygraph test, would provide a second source of information and assessment to complete the “whole person” picture. It would supplement data obtained from the background investigation and SF-86, provide the opportunity for a second interaction with a trained interviewer, and afford the input of a professional skilled in assessing human behavior to those making the adjudication decision. Further, because people lie on the SF-86, the information the investigator has to work with can be flawed, if not outright deceptive.²⁰⁴ The current system relies on an often-harried field investigator to develop such information, often without review. Adding a psychological evaluation would provide a second interview, by a professional trained to detect, explore, and assess concerning behavioral traits, such as obsessive self-centeredness, selfishness, and alcohol and drug abuse.²⁰⁵

The empiric data on clearance determinations suggests that those IC agencies employing psychological screening in the post-offer, pre-employment stage of applicant processing in fact deny access to a larger percentage of individuals than those agencies that do not employ this approach.²⁰⁶ The evaluation, while employed merely as a component of a concurrent medical evaluation, appears to boost denial rates by a factor of three to five.²⁰⁷ These rates are consistent with those derived from law enforcement experience,²⁰⁸ suggesting they are a real and tangible effect of adding psychological evaluations to the process. While one might argue that the same outcome could be achieved by more aggressive use of the polygraph,²⁰⁹ the scientific, institutional, and political opposition to polygraphs may make expansion of the polygraph a more difficult path to improve the clearance process. Additionally, press reporting

²⁰⁴ DoD POLYGRAPH STUDY, *supra* note 165, at 9-10.

²⁰⁵ For a description of troublesome behaviors that screening psychologists should look for, *see* Fischer, *supra* note 106.

²⁰⁶ *See supra* Part II.C.

²⁰⁷ *See id.*

²⁰⁸ Cochrane et al, *supra* note 118.

²⁰⁹ As NRO did in recent years. *See* Taylor, *supra* note 185.

suggests that the NRO experience in raising disqualification rates derives in large part from targeting the behavioral areas in the psychological realm.²¹⁰ If true, this observation suggests that the introduction of a psychological assessment may best meet the challenge of focusing efforts on high risk behaviors at issue in the TS/SCI clearance process.

To expand psychological evaluation, policymakers would also have to consider resource issues. Assuming the number of TS/SCI clearance holders remains reasonably constant at 1,410,000 with each due for reinvestigation on a five year cycle, and assuming the IC continues to issue 290,000 initial clearances each year, annual demand for evaluations would be approximately 570,000 per year.²¹¹ Assuming 250 work days in a year and two hours allowed per evaluation, 570 full time equivalent mental health providers would be needed for this effort. Assuming a cost of \$300 per evaluation,²¹² the added costs to the IC for psychological evaluation could be as much as \$171,000,000. However, the additional \$300 per screening would increase the cost of a TS/SCI clearance by only approximately 3-10%²¹³ and would represent less than a 0.3% increase in the IC budget.²¹⁴ In fact, the cost may even be less because this increase does not account for resources already in place at those agencies,

²¹⁰ *Id.*

²¹¹ This is a high-end estimate because it assumes every TS clearance government-wide is at the TS/SCI level and granted to personnel working in the IC. In fact, many of these clearances will fall outside the population that is the subject of this paper. In addition, if the number of clearances relinquished equals the number of new clearances, and the IC has achieved a steady state of total numbers, then even the high-end estimate of total evaluations per year should approach about 300-350,000, and the projected cost should decline to around \$100M per year.

²¹² Mark Zelig, Presentation at the American Psychological Association 2011 Annual Meeting, Pre-Employment Evaluations for High Risk Professions (Aug. 12, 2010).

²¹³ Rod Powers, *Security Clearance Secrets*, ABOUT.COM, http://usmilitary.about.com/cs/generalinfo/a/security2_4.htm (last visited July 15, 2014). Current estimates for a TS/SCI clearance cost range between \$3,000 and \$15,000 for a completed clearance evaluation.

²¹⁴ Barton Gellman & Greg Miller, *U.S. Intelligence Community's Successes, Failures and Objectives Detailed in 'Black Budget' Summary*, WASH. POST, Aug. 29, 2013, http://articles.washingtonpost.com/2013-08-29/world/41709796_1_intelligence-community-intelligence-spending-national-intelligence-program. The reported Intelligence Community budget for FY 2013 is approximately \$52.6 billion. *Id.*

such as NSA and CIA, that already conduct such evaluations as part of their medical clearance process.

In addition to the financial cost of enhancing the clearance process, adding psychological evaluations should also be considered in light of the harms it may prevent. Intelligence agencies do not publish economic costs from their damage assessments after leaks and espionage, so one cannot easily put a dollar figure on each leak prevented. However, the Snowden affair does provide a graphic illustration of the extent of resulting damage that one unhappy employee can cause, with DoD stating that its damage mitigation will take at least two more years and cost billions of dollars.²¹⁵ The revelations of intelligence sources and methods to adversaries and the serious diplomatic repercussions among U.S. allies illustrate the gravity of the damage done.²¹⁶ Given the evident serious deficiencies of the existing clearance system, policymakers should opt to add psychological evaluation to the TS/SCI clearance process to improve screening of candidates. Adding such evaluations appears justified by the goals of the process, by many of the concerns adjudicators must consider in granting a clearance, and by the IC clearance data suggesting their effect on clearance denial rates where employed. If policymakers choose to go this route to enhance the security clearance process, they and their attorneys will have to address a number of issues to ensure its legality, including compliance with the ADA and with other federal regulations.

²¹⁵ Sara Socher, *Highest-ranking U.S. Military Officer Says Snowden's Security Breach Will Cost Billions*, NAT'L J., (Mar. 6, 2014), <http://www.nationaljournal.com/defense/highest-ranking-u-s-military-officer-says-snowden-s-security-breach-will-cost-billions-20140306>.

²¹⁶ Carlo Munoz, *NSA Conducting 'Damage Assessment' of Snowden Leak*, THE HILL (June 13, 2013), <http://thehill.com/policy/defense/305401-nsa-conducting-damage-assessment-of-snowden-leak->. See also Ali Weinberg, *Snowden Leaks Damage Obama Foreign Policy Agenda*, NBCNEWS.com (Nov. 7, 2013), http://firstread.nbcnews.com/_news/2013/11/07/21351474-snowden-leaks-damage-obama-foreign-policy-agenda.

B. Adding Psychological Screening in the Current Legal Framework

Including a psychological evaluation in the security clearance process will implicate several existing laws and regulations. The principle concerns will involve complying with the ADA and the Rehabilitation Act of 1973 as amended, as well as with restrictions on psychological evaluations found in 5 C.F.R. § 339.301. Compliance by the IC with the existing legal architecture requires individual consideration of four scenarios: evaluating government applicants; evaluating contractor applicants; re-investigating government employees; and re-investigating contractor employees. These issues should prove to be manageable given federal courts' deference to the Executive Branch in the security clearance arena.

Guideline I of the adjudicative factors allows for an assessment by a credentialed mental health professional of the condition or treatment and a judgment as to whether it will impair judgment, reliability, or stability.²¹⁷ A psychological evaluation that looks for evidence of emotional, mental, or personality disorders will be regarded as a medical examination under the EEOC's guidelines.²¹⁸

When screening government applicants, the psychological evaluation should take place after the initial job offer to ensure compliance with the ADA.²¹⁹ During a post-offer, pre-employment evaluation, the exam can be wide-ranging and does not face the narrower constraints of being job-related and consistent with business necessity.²²⁰ Although CIA and NSA currently conduct their psychological evaluations of staff applicants under their medical programs, there is currently no legal barrier to conducting the same psychological examination under the sponsorship of the security apparatus.²²¹ All that ADA compliance requires is that medical

²¹⁷ 32 C.F.R. § 147.11 (2013).

²¹⁸ EEOC ADA PREEMPLOYMENT GUIDANCE, *supra* note 16; *Karraker v. Rent-a-Center*, 411 F.3d 831, 835 (7th Cir. 2005).

²¹⁹ EEOC ADA PREEMPLOYMENT GUIDANCE, *supra* note 16.

²²⁰ *Id.*

²²¹ *Id.*

records are segregated from other files concerning the applicant. Presumably, agencies that already operate some type of medical program could be file custodians.

Disappointed applicants in this and other categories may argue that denial of a clearance is discrimination on the basis of a disability. Grounded in courts' reluctance to challenge the merits of a clearance determination, the requirement for a security clearance has created a strong exception in disability protections for law enforcement officers.²²² *Stehney*, a Third Circuit case, also provides some guidance as to how federal courts would view discrimination issues related to clearance denial in the IC.²²³ The *Stehney* court commented in dicta that it considered the NSA's stated reasons for polygraph examinations to constitute a rational basis for the practice.²²⁴ Given the data supporting the usefulness of psychological evaluations for screening purposes, it is likely that federal courts would find a rational basis for these evaluations in the IC context.

While evaluation of contractor applicants yields largely the same analysis, 5 U.S.C. § 7901 presents an additional nuance requiring moving the psychological screening into the security organizational structure and out of the medical program structure. Contractor applicants, like government employees, would be evaluated in the post-offer, pre-employment setting. The examiner would be evaluating the applicant as part of an assessment for an essential job element—the clearance—but not as part of an appropriated medical program. The examiner need not be a federal employee to conduct an evaluation but instead could be either a staff psychologist assigned to and paid within the security office, or retained by the proffering company or the background investigator, as long as she was deemed acceptable to the government.²²⁵ By including the psychological evaluation within the security clearance

²²² Keith Alan Byers, *No One Is Above the Law When It Comes to the ADA and the Rehabilitation Act—Not Even Federal, State, or Local Law Enforcement Agencies*, 30 LOY. L.A. L. REV. 977, 1020 (1997) (discussing the courts' allowance of clearance denial to trump disability claims).

²²³ *Stehney v. Perry*, 101 F.3d 925 (3d Cir. 1996).

²²⁴ *Id.* at 937.

²²⁵ 32 C.F.R. § 147.11(a) (2013).

process and organizational structure, the examination would likely be found consistent with federal regulation²²⁶ because the examination would no longer fall under the rubric of a medical evaluation for employment generally but would be a medical inquiry into ability to perform an essential job function—obtaining a security clearance. In fact, federal regulation affirmatively indicates that the government can impose requirements for medical evaluations on contractors that comply with government standards prior to acceptance of contractor personnel in certain circumstances, and include in those standards certain mental health requirements.²²⁷ To ensure ADA compliance, the examiner should keep the records of the psychological evaluation separate from other investigative files.²²⁸

Reinvestigations of government employees that include psychological evaluations would raise several additional issues, both under the ADA and Rehabilitation Act, as well as under federal regulations.²²⁹ Under the ADA, employers may conduct a medical evaluation of an employee only when the evaluation is job-related and consistent with business necessity.²³⁰ The EEOC has provided guidance that periodic medical evaluations are allowed in public safety positions²³¹ and the Executive Branch has determined the necessity of periodic reevaluations for retention of access to classified material.²³² A challenge under the ADA is unlikely to succeed because federal courts have regarded retention of a clearance as a job requirement and because the Executive Branch is likely able to demonstrate a rational basis for the requirement for periodic reinvestigation, including a psychological assessment. As with applicant evaluations, to comply with the ADA, separate record systems would be required for the information derived from the examination.

²²⁶ 5 U.S.C. § 7901(e) (2012).

²²⁷ 32 C.F.R. § 158.7 (2013).

²²⁸ EEOC ADA PREEMPLOYMENT GUIDANCE, *supra* note 16.

²²⁹ As noted in Part I, reinvestigations follow the same procedures and consider the same factors as initial investigations.

²³⁰ EEOC ADA PREEMPLOYMENT GUIDANCE, *supra* note 16.

²³¹ *Id.*

²³² Exec. Order No. 12,968 § 3.4, 60 Fed. Reg. 40,245 (Aug. 2, 1995).

Under federal regulation, agencies may perform psychological evaluations on current employees under two conditions: when there is a question regarding an individual's fitness to perform the duties of the position or when the particular position has an established medical standard that calls for a psychological evaluation.²³³ Language adding psychological evaluations to the security clearance determination process may by implication create such a standard for positions requiring a TS/SCI clearance. Such language should most likely state: "a psychological evaluation is required as a condition of maintaining a security clearance necessary for the position." By linking the evaluation to the requirement of periodic reinvestigation, this regulatory change would provide notice to incumbents of the legality of the evaluation. Such routine periodic evaluations would differ from a fitness for duty examination because the trigger would not be a question raised about a medical issue interfering with performance of a job. Rather, the issue to be examined would be assessment for those factors prescribed in federal regulation and the individual's judgment, reliability, and stability in protecting national security information.²³⁴

Contractor employee reinvestigations raise fewer legal issues than those for government employees because 5 C.F.R. § 339.301 does not apply to contractors. The justification for the psychological evaluation must be tied to the security clearance process to meet ADA requirements for evaluation of employees, and a separate record system for psychological files must be implemented for the records of this medical evaluation. With federal courts consistently holding that a clearance may be regarded as a job requirement and that revocation of a clearance on the merits is not reviewable by the courts, a challenge on ADA grounds against conducting a psychological evaluation is unlikely to succeed. Also, including the psychological evaluation under the security process avoids issues regarding expenditures on contractors from an agency medical program.

²³³ 5 C.F.R. § 339.301(e)(1)(ii) (2013).

²³⁴ 32 C.F.R. § 147 (2013).

While generally such a reform will likely appeal to mental health professionals, they will likely not appreciate the potential burden of defending their recommendations in the appeals process. The appeals process allows persons who are denied a clearance to challenge that decision, including retaining counsel, obtaining the records on which the decision was based, introducing mitigating information, and in the case of contractors, submitting interrogatories and orally questioning practitioners.²³⁵ Mental health professionals would need to defend their recommendations to an appeals panel and be subject to cross-examination. This additional use of professional time may raise costs and frustrate mental health practitioners, but the procedural assurance of fairness to those denied a clearance on the recommendation of a mental health professional likely outweighs this objection. By having to convince the panel of the correctness of the recommendation, the psychologist would have to show consideration of all available information, including any provided by the applicant from outside providers.

Intelligence agencies could move to block the release of contents of psychological assessments to unsuccessful applicants on grounds that their disclosure might reveal methods in the selection process. CIA has used sources and methods exemptions to block release of employee information,²³⁶ and, like other U.S. intelligence agencies, has resorted to this defense to prevent disclosure on a wide range of issues. Yet despite this challenge, the Defense Office of Hearings and Appeals has for years dealt successfully with Guideline I challenges without apparent harm to U.S. national security. The solution to any such objection may be as simple as the agency providing the applicant and the reviewing officials with a summary of findings and recommendations, since the adjudicator and appellant reviewers, not the psychologist, make the actual clearance decision, and the details of the questions and concerns could be retained by the agency.

²³⁵ See *supra* section I.D.

²³⁶ See *Frugone v. Cent. Intelligence Agency*, 169 F.3d 972 (D.C. Cir. 1999) (upholding FOIA exemption to release employee's personnel records).

IV. CONCLUSION

In the wake of the Snowden affair and Navy Yard shootings, the need for security clearance process reform is evident. The IC could achieve increased scrutiny of applicants and current holders of TS/SCI clearances through implementation of routine psychological evaluations as part of the security clearance process. The addition of psychological screening would be less controversial than expanding polygraph screening and it would focus on behavioral issues of particular concern in the IC. This model has been widely adopted across the law enforcement community and been validated by federal courts in cases involving applicants and current employees. Clearance data within the IC demonstrates adopting such a reform would yield measurable positive results and the IC already has the systems in place to deal with appeals of clearance denials based on psychological evaluations. While implementation of such a practice would be a major policy decision given the financial cost, the legal barriers to adoption are few and such an addition to the clearance process could be implemented in compliance with the ADA. A change in language to 5 C.F.R. § 339.301, while perhaps not necessary, would ensure that agencies can implement psychological evaluations and that courts could uphold clearance denial based on the results of these evaluations.

Thus, with an adjustment to current federal regulation, the IC could add psychological assessment to the TS/SCI clearance process without significant statutory disruption. The advantages would include closer scrutiny of applicants and current holders of clearances, the routine review of behaviors of concern by a trained mental health professional, and most importantly a higher disqualification rate resulting from closer scrutiny, thereby contributing to a more reliable and stable IC workforce. This additional evaluation would also eliminate a disparity between the security assessments of contractors and those of staff personnel and reduce the risk of someone slipping back into the IC through a less rigorous assessment process. As legislators and senior administration officials are seeking to improve the clearance system, they should strongly consider the addition of psychological

evaluations, which provide a legally defensible and empirically attractive improvement.

