



**U.S. Department of Justice  
Office of the Inspector General  
Evaluation and Inspections Division**

# **Use of Polygraph Examinations in the Department of Justice**

**September 2006**

**I-2006-008**

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## EXECUTIVE SUMMARY

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The Department of Justice (Department) and several of its components use and conduct polygraph examinations for a variety of administrative and investigative uses. In this Office of the Inspector General (OIG) review, we examined the polygraph programs in the Department and its components, including the components' management and use of polygraph examinations, the Department's policies governing the use of polygraph examinations, and the oversight mechanisms for ensuring that the components conduct and use polygraph examinations in accordance with established professional and technical standards.

In this report, we do not make recommendations regarding the Department's polygraph use; rather, for informational purposes, we provide a detailed description of how polygraphs are used throughout the Department.

A polygraph is an examination process that uses a diagnostic instrument capable of measuring and recording a subject's physiological reactions as the subject answers questions. Because physiological reactions can vary when subjects are telling the truth and when they are being deceptive, by comparing a subject's reactions to different questions a polygraph examiner can detect reactions that may indicate deceptive responses to specific questions. The results of polygraph examinations are generally not admissible in court. However, various components of the Department use polygraph examinations, primarily for criminal, foreign counterintelligence and counterterrorism investigations, administrative investigations (internal affairs and misconduct), and pre-employment and personnel security screening.

Four Department components – the Federal Bureau of Investigation (FBI); Drug Enforcement Administration (DEA); Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF); and the OIG – administer their own polygraph programs and have units that conduct polygraph examinations in support of their operations or at the request of other Department components and outside law enforcement and intelligence agencies.

Seven other Department components do not operate their own polygraph programs but use the results of polygraph examinations conducted by the FBI, DEA, ATF, OIG, or an outside agency or private contractor. These seven components are the Department's Criminal Division, Justice Command Center (JCC), Antitrust Division (ATR), National

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Drug Intelligence Center (NDIC), Office of Professional Responsibility (OPR), Federal Bureau of Prisons (BOP), and U.S. Marshals Service (USMS).

During fiscal years (FY) 2002 through 2005, Department components conducted over 49,000 polygraph examinations. The examinations were used for a variety of reasons, including making pre-employment and personnel security decisions; investigating criminal, administrative, and security violations; ensuring witness security; providing sex offender treatment; and providing operational support in examining or “vetting” foreign task force members and validating intelligence sources.

### **Polygraph Programs in the Department of Justice**

In describing the four components that conduct their own polygraph examinations – the FBI, DEA, ATF, and OIG – we provide information concerning the following key elements of each program’s:

- history;
- mission;
- policies and regulations;
- organization and staffing;
- polygraph examination uses and procedures;
- examiner qualifications and training;
- workload and program costs;
- quality control, quality assurance, and oversight; and
- program performance and results.

We also discuss the Department’s limited policies regarding the use of polygraph examinations. Existing Department-level policies include guidance regarding the introduction of polygraph examinations as evidence and the use of polygraph for the Witness Security Program.<sup>1</sup> There is no Department-wide policy concerning the conduct and use of polygraph examinations. Rather, each of the four components has its own policies and procedures governing its polygraph examinations. Those policies and procedures define who is subject to examination; the consequences of refusing to take a polygraph examination; professional, ethical, and

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<sup>1</sup> The *U.S. Attorneys’ Manual*, Section 9-13.300, states that it is the Department’s policy to oppose all attempts by defense counsel to admit polygraph evidence or to have an examiner appointed by the court to conduct a polygraph test and that Department attorneys should refrain from seeking the admission of favorable examinations that may have been conducted during an investigation. The Section 9-21.340 also establishes a requirement for potential entrants to the Witness Security program to undergo polygraph examinations.

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technical standards for conducting an examination; quality control and assurance standards and procedures; and the rights to be afforded individuals who undergo polygraph testing. The four components also have specific policies defining the use and role of polygraph examinations in making investigative, personnel, and security decisions. Each policy notes that polygraph testing is an investigative tool and should not be the sole basis for investigative, personnel, or security decisions.

### Purposes for Polygraph Examinations

**History of Polygraph Examinations in the Department.** For over 70 years, certain Department components have used polygraph examinations primarily as an investigation tool in criminal investigations and administrative misconduct investigations involving Department employees. The FBI first began using polygraph examiners in 1935 and established a centralized polygraph program for conducting testing in 1978. The DEA established a polygraph program in the early 1970s when it began conducting polygraph examinations in criminal drug and misconduct investigations. The OIG established its polygraph program and began conducting polygraph examinations in 1990 in both criminal and misconduct investigations. ATF, which was part of the Department of the Treasury until January 2003, began conducting polygraph examinations in criminal investigations in 1978. In more recent years, the four components have conducted polygraph examinations in foreign counterintelligence and counterterrorism investigations, pre-employment screening, personnel security screening, foreign vetting, and supporting the polygraph needs of other agencies.

**Criminal Investigations.** The FBI, DEA, ATF, and OIG conduct specific-issue polygraph examinations as a tool in criminal investigations. From FY 2002 through 2005, the four components conducted a total of 8,356 polygraph examinations of criminal suspects, witnesses, and informants in criminal investigations. The examinations were used to detect and identify criminal suspects, verify information furnished by an informant or witness, and to obtain additional information and investigational leads.

**Administrative Investigations.** The FBI, DEA, ATF, and OIG conduct polygraph examinations in administrative investigations into allegations of misconduct by Department employees. From FY 2002 through 2005, the four polygraph units conducted 149 specific-issue polygraph examinations of employees who were subjects, witnesses, or complainants in investigations of personal misconduct in the performance of their official duties.

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### **Foreign Counterintelligence and Counterterrorism Investigations.**

From FY 2002 through 2005, the FBI conducted 1,994 polygraph examinations of FBI and non-FBI personnel during foreign counterintelligence and counterterrorism investigations. The examinations were used to resolve specific issues related to espionage or sabotage, to validate information sources, or to make resource decisions (such as whether to conduct surveillance).

**Pre-Employment Screening.** Between 1985 and 1998, the FBI, DEA, and ATF expanded their use of polygraphs to include pre-employment examinations for Special Agent candidates. By 1994, the FBI had extended its requirement for pre-employment testing to candidates for all FBI jobs. In 1996, the DEA extended its pre-employment examination requirement to applicants for DEA Intelligence Research Specialist positions. From FY 2002 through 2005, the FBI, DEA, and ATF conducted approximately 28,000 pre-employment polygraph examinations, which represented about 57 percent of all polygraph examinations conducted in that period.

**Personnel Security and Counterintelligence Screening.** The FBI is the only component that routinely conducts random and periodic personnel security and counterintelligence screening of its employees. In the wake of the arrest of FBI Special Agent Robert Hanssen for espionage in February 2001, the FBI greatly expanded its Personnel Security Program to include a wider use of polygraph examinations for personnel security and counterintelligence purposes. From FY 2002 through 2005, the FBI conducted 4,721 examinations for personnel security purposes. That number represents an almost 750-percent increase from the 331 examinations conducted in FY 2002 to the 2,481 conducted in FY 2005. All personnel assigned to FBI counterintelligence, counterterrorism, and security programs, including state and local law enforcement personnel serving on Joint Terrorism Task Forces (JTTF), are now required to take personnel security polygraph examinations.<sup>2</sup> FBI officials said they were considering extending the requirement for periodic and random personnel security polygraph examinations to all of the FBI's approximately 35,000 employees and contractor personnel, as well as personnel from other organizations with access to FBI information, information systems, and space.

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<sup>2</sup> Since 1980, the FBI has established JTTFs to enhance interagency cooperation and coordination among federal, state, and local law enforcement agencies in counterterrorism efforts.

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**Foreign Vetting.** From FY 2002 through 2005, the DEA and ATF conducted 4,403 polygraph examinations to assess foreign personnel selected by their countries for membership in DEA Sensitive Investigative Units (SIU) overseas. The SIUs work in sensitive bilateral investigations in countries critical to the counter-narcotics objectives of the United States. ATF conducted foreign vetting polygraphs in FY 2002 at the request of other agencies, but has not conducted any such examinations since that time.

**Requested by Other Components.** The FBI conducted approximately 1,661 polygraph examinations and the OIG conducted 33 polygraph examinations at the request of seven other Department components that do not have their own polygraph programs. The seven components used the results of those polygraph examinations for witness security screening; administrative investigations (misconduct and internal affairs); criminal investigations; personnel security screening; and vetting foreign witnesses, prosecutors, and law enforcement personnel. In addition, these seven components also occasionally used polygraph examinations conducted by the Secret Service, the Central Intelligence Agency, the BOP's Sex Offender Treatment Program (SOTP), and a contractor working for the USMS on the Witness Security (WITSEC) Program. Those examination results were used for witness security, national security, and sex offender treatment.

### Requirements for Polygraph Examinations

The consequences of polygraph examinations vary, depending on whether the examination is considered voluntary, mandatory, or compelled; the reason for the examination; and the examination results.

**Voluntary Examinations.** Polygraph examinations given to federal employees or other individuals may be voluntary, meaning that the examinee may refuse to take the examination with no adverse consequences. For example, witnesses or subjects in a criminal investigation are protected by the Fifth Amendment right against self-incrimination and therefore can refuse to speak with investigators or take a polygraph examination.

**Mandatory Examinations.** In some cases, polygraph examinations conducted by the FBI, DEA, and ATF are mandatory. In these cases, completion of a successful examination is required for an individual to obtain a desired benefit such as consideration for employment, membership in a foreign investigative unit, or obtaining a security clearance. The consequences of refusing to take a mandatory polygraph examination – or of

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having results that indicate deception – vary according to the policy of the component requiring the test. For example:

- All applicants for employment in the FBI must undergo and pass a pre-employment polygraph examination. Applicants who refuse to take a polygraph examination are ineligible for employment. When the final opinion is Deception Indicated, the results are reported to adjudication officials who decide whether to disqualify the applicant or, based on other information available to the adjudicators, request that the applicant be retested.
- The FBI also requires selected employees and non-FBI personnel with access to national security or sensitive FBI information to undergo periodic and random personnel security polygraphs as a deterrent to espionage. FBI employees who refuse to submit to mandatory polygraph examinations, such as during periodic security reinvestigations or investigations of national security matters, may be transferred to positions that do not require access to sensitive information, have their security clearances denied or re-evaluated, or face disciplinary action for insubordination. Because holding a security clearance is a condition of employment at the FBI, FBI employees who lose their clearances may also be dismissed.
- In the DEA, polygraph examinations are mandatory for applicants for Special Agent and Intelligence Research Specialist positions, and for foreign candidates for membership in foreign Sensitive Investigative Units. Applicants for Special Agent and Intelligence Research Specialist positions who refuse to take a polygraph examination are not eligible for DEA employment. Membership in a foreign investigative unit is contingent on taking and passing a polygraph examination.
- ATF requires all applicants for Special Agent positions to undergo a mandatory pre-employment polygraph examination. Those who refuse are not eligible for employment. If an applicant's examination results in indications of deception, or if the applicant admits to deception or to disqualifying behavior (such as abuse of illegal drugs), the individual may be ineligible for employment.

**Compelled Examinations in Administrative Investigations.**

Compelled polygraph examinations are those in which employees are ordered to submit to examination under threat of adverse action (including suspension or dismissal) if the employees do not comply. Federal courts have reviewed a number of cases in which public employees were dismissed

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for refusing to take a polygraph examination when compelled in an administrative inquiry. Those courts have held that employees can be compelled to submit to polygraph examinations in investigations into the performance of their official duties, so long as they are not also required to relinquish their privilege against self-incrimination.

The Merit Systems Protection Board, which reviews adverse actions against federal employees covered by the Civil Service Reform Act, has never specifically addressed whether an employee may be removed for refusing to submit to a polygraph examination in an administrative inquiry.

Within the Department, the FBI was the only component that reported having policies and procedures for compelling its employees to undergo polygraph examinations in personnel security and misconduct investigations. The FBI's policies cover all FBI employees, including attorneys. An FBI employee can be compelled to take the examination if the allegations under investigation involve one or more of seven specified violations of law or FBI policy.<sup>3</sup> FBI employees who refuse to take a polygraph examination under these circumstances face potential administrative discipline, up to and including dismissal. FBI policies also state that designated FBI officials can "compel any Bureau or non-Bureau person with access to FBI information or facilities to submit to a polygraph examination to resolve specific issues which may impact a person's trustworthiness for security matters."

It is not clear whether employees of other Department components similarly can be compelled to take a polygraph in administrative investigations in the absence of a policy regarding compelled polygraphs. We found that the Department and components other than the FBI have not issued policies defining the circumstances under which employees can be compelled to submit to polygraph examinations in administrative misconduct investigations. We also found no evidence that an employee of

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<sup>3</sup> FBI employees can be compelled to submit to a polygraph examination to resolve an issue during the investigative phase of a disciplinary matter if the employee will not do so without being compelled and if the matter involves: (1) intentional and unauthorized release of sensitive, protected information; (2) a relationship with or allegiance to a foreign power; (3) an illegal or improper exercise of influence; (4) intentional and unauthorized destruction, alteration, misplacement, taking, falsification, or other impairment of FBI documents or evidence; (5) use of or unauthorized dealing in controlled substances; (6) false statements or the failure to candidly disclose information; or (7) theft, fraud, or misuse of government money or property. According to the FBI's *Security Policy Manual*, an employee's refusal to take an examination can be treated as if the employee had failed the examination. However, an employee's refusal will not by itself substantiate the misconduct charge.

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any other Department component has been compelled to take a polygraph examination in an administrative investigation. While we are aware of several proposals to develop a Department-wide polygraph policy, none has been acted upon to date.

For example, in August 2001 the Justice Management Division (JMD) provided the Deputy Attorney General with a memorandum containing three options for developing a Department polygraph policy and proposing that the Deputy Attorney General discuss with the affected components whether the Department should adopt a polygraph policy. The Department did not act on that proposal. In July 2004, JMD responded to an OIG inquiry about the Department's polygraph policy during an OIG investigation of potential misconduct by a Department attorney. The OIG asked JMD for the Department's position on whether Department employees could be compelled to submit to a polygraph examination. JMD informed the OIG that it believed, in the absence of a Department polygraph policy, that the Department could not compel Department employees. JMD also stated that it was unlikely that disciplinary action against an employee based on information gained through a compelled polygraph examination would be sustained on appeal.<sup>4</sup> Also in July 2004, JMD's Security and Emergency Planning Staff stated its understanding that, absent a Department polygraph policy that was approved by the Office of Personnel Management (OPM), the Department could not polygraph a competitive service employee, even with the employee's consent.<sup>5</sup> In response to the OIG's 2004 inquiry,

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<sup>4</sup> Most federal government civilian employees are part of the competitive civil service, which is governed by the Civil Service Rules in Title 5 of the Code of Federal Regulations. However, some agencies, including the FBI, are exempt from those competitive civil service procedures. Those agencies, called excepted service agencies, establish their own personnel rules.

<sup>5</sup> JMD's 2004 position that it lacked the authority to compel polygraph examinations was based on its understanding that an undated memorandum signed by President Lyndon B. Johnson (Johnson Memorandum) was the governing authority for federal polygraph programs. The Johnson Memorandum prohibited the use of polygraphs by federal agencies except for (1) pre-employment screening, personnel investigations, and intelligence and counterintelligence operations; (2) criminal investigations; and (3) research and development. As described in the Background section of this report, however, we found strong indications that the Johnson Memorandum was never issued. Instead, the President directed the Civil Service Commission (the predecessor to OPM) to issue regulations governing the use of polygraph examinations by Executive Branch agencies, which it did in 1969. Those regulations became part of the *Federal Personnel Manual* (FPM), which has since been retired. In May 2006, OPM cited Executive Orders 10450 and 10577 as its authority for overseeing the use of polygraph examinations for pre-employment and personnel security screening of competitive service employees in the Executive Branch, using the standards for personnel security polygraphs contained in the

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JMD again proposed developing a Department polygraph policy for submission to OPM, but the Department did not act on this proposal.

Finally, as part of this review, in June 2006 the OIG met with JMD officials to discuss whether the Department's position on compelled polygraphs had changed since 2004. After discussing JMD's 2004 position, JMD officials informed the OIG that they intended to ask JMD's Office of General Counsel to reexamine whether the Department has the legal authority to compel employees to submit to polygraph examinations during investigations of administrative misconduct and, if so, what procedural steps would be required to exercise that authority.

### Organization and Staffing of Polygraph Programs in Department Components

The FBI, DEA, ATF, and OIG each have a polygraph unit that administers the component's polygraph program. All of the polygraph units have a headquarters staff supervised by a polygraph unit chief (FBI, DEA, and ATF) or a polygraph program manager (OIG). These officials manage the day-to-day operations of the polygraph units and oversee the work of the headquarters staff and the examiners in the field. All polygraph examiners in the four agencies are Special Agents who may be collaterally assigned to participate in criminal investigations. A description of the staffing and structure of each program follows.

The FBI has the largest polygraph unit, consisting of 119 examiners, support staff, and contractors at FBI Headquarters and in field offices. The FBI's Headquarters Polygraph Unit is located in the Personnel Security Adjudication Section of the Security Division and employs 18 personnel, which include 13 supervisory special agent examiners. The FBI polygraph program's field structure comprises 5 Regional Polygraph Program Managers (regional managers) who oversee the operations of 96 field examiners in the FBI field offices.

The DEA's Polygraph Support Unit has 27 examiners in its headquarters and field offices. The Chief of the Polygraph Support Unit and Polygraph Coordinators in the unit have authority over all technical issues involving the administration of polygraph examinations. The three Polygraph Coordinators conduct quality control reviews of all polygraph examinations conducted by the field examiners. The DEA's field examiners

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U.S. Security Policy Board's *Polygraph Memorandum of Agreement* (SPB 058-99). As a result, procedurally OPM continues to follow the standards that were contained in the FPM.

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work for the Special Agent in Charge (SAC) of the offices where they are assigned, but function under the technical supervision of the Chief of the Polygraph Support Unit.

The ATF Polygraph Branch has a staffing level of 16 certified polygraph examiners, including the SAC of the Polygraph Branch, 3 regional team leaders, and 12 field examiners. ATF's Polygraph Branch is located in the Office of Field Operations, Special Operations Division. The Chief of the Special Operations Division has overall responsibility for ATF's polygraph program. The SAC of the Polygraph Branch reports to the Chief of the Special Operations Division and is responsible for establishing and implementing policies and procedures for the Polygraph Branch.

As of July 2006, the OIG had three field examiner positions whose activities were coordinated by the SAC of the Special Operations Branch at OIG Headquarters. The SAC serves as the OIG's Polygraph Program Manager and Coordinator, and is responsible for oversight of the polygraph program as well as management of its day-to-day operations. All requests, reports, and recommendations relating to polygraph activities are directed to the SAC for action. The OIG examiners are Special Agent criminal investigators as well as OIG-certified polygraph examiners.

#### Examiner Qualifications and Training

Each component has established qualification and training requirements for examiners. The FBI, DEA, ATF, and OIG require that polygraph examiners be selected from Special Agent (GS-1811 series) personnel. All components require that polygraph examiner candidates complete training at a certified polygraph training facility. Since 1994, the Department of Defense Polygraph Institute (DoDPI) has been the central provider of training for federal polygraph examiners, research, and monitoring of technical and scientific developments in polygraphy. The DEA, ATF, and OIG policies specify that examiners receive their basic examiner training at DoDPI, while the FBI accepts training either from DoDPI or a school approved by the FBI or the American Polygraph Association. Before they are certified, all examiner candidates must also complete an internship, during which they work under the supervision of an experienced polygraph examiner.

Once certified, examiners must meet minimum training and performance standards to maintain certification. Federal polygraph continuing education standards require that examiners receive 80 hours of polygraph-related training every 2 years. For examiners to remain certified, the OIG requires that they conduct at least 12 examinations per year, the

DEA requires that they conduct 25, ATF requires that they conduct 36 (a minimum of 18 in each six month period), and the FBI requires that they conduct at least 48. DoDPI has certified that all FBI, DEA, ATF, and OIG examiners meet established federal qualifications and training requirements.

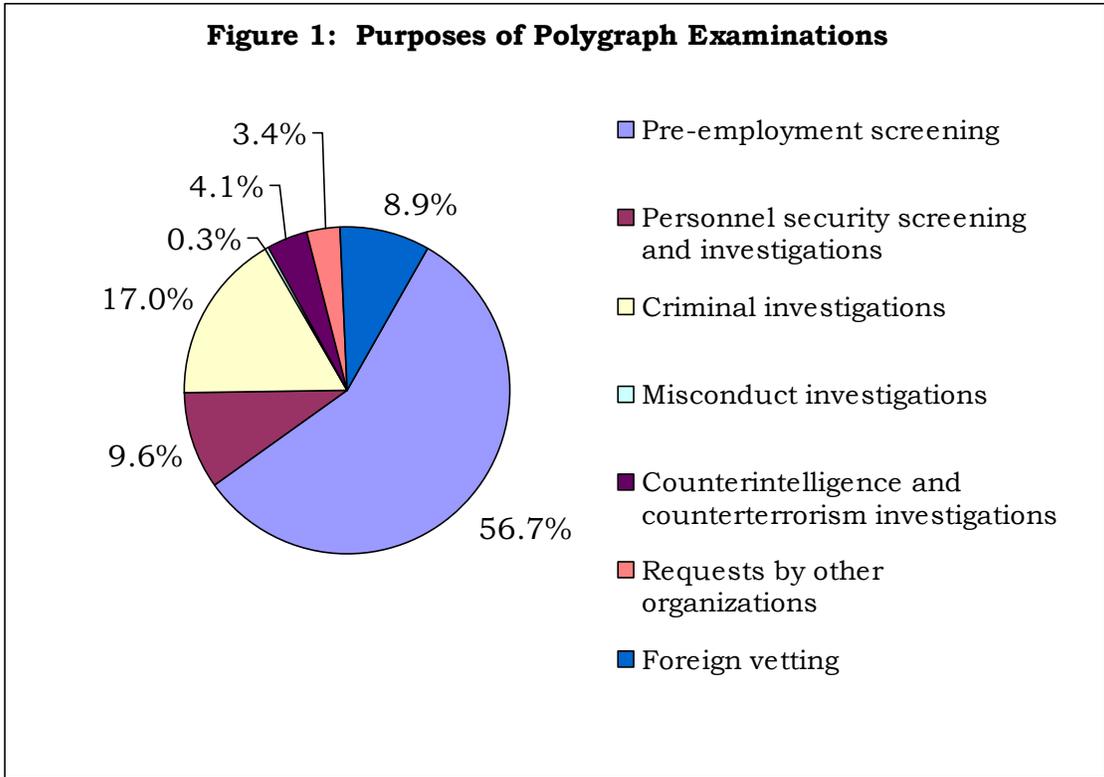
Polygraph Program Workload

From FY 2002 through 2005, the FBI, DEA, ATF, and OIG reported conducting 49,197 polygraph examinations (Table 1). The FBI conducted most of those examinations (over 77 percent), followed by the DEA (17 percent), ATF (5 percent), and the OIG (under 1 percent). The number of examinations conducted each year increased by about 38 percent during the 4-year period, primarily due to a 45-percent increase in the number of examinations conducted by the FBI.

| <b>Table 1: Department of Justice Polygraph Use<br/>FY 2002 through 2005</b> |               |              |              |            |               |
|--|---------------|--------------|--------------|------------|---------------|
| <b>Fiscal Year</b>   | <b>FBI</b>    | <b>DEA</b>   | <b>ATF</b>   | <b>OIG</b> | <b>Total</b>  |
| 2002   | 7,754         | 1,804        | 654          | 32         | 10,244        |
| 2003   | 7,420         | 2,270        | 712          | 52         | 10,454        |
| 2004   | 11,567        | 2,048        | 710          | 44         | 14,369        |
| 2005   | 11,276        | 2,185        | 624          | 45         | 14,130        |
| <b>Total</b>   | <b>38,017</b> | <b>8,307</b> | <b>2,700</b> | <b>173</b> | <b>49,197</b> |

Source: FBI, DEA, ATF, OIG

Overall, about 57 percent of the examinations were conducted during pre-employment screening; 17 percent during criminal investigations; 10 percent during personnel security screening; 9 percent for vetting foreign agents; 4 percent during counterterrorism or counterintelligence investigations; and less than 1 percent during misconduct investigations. The remaining examinations (about 3 percent) were conducted at the request of other agencies and were not identified by these four components by purpose. (See Figure 1.)



Source: Component data

Quality Control, Quality Assurance, and Oversight

The quality control, quality assurance, and oversight mechanisms for the FBI, DEA, ATF, and OIG polygraph programs are described below.

All of the components’ polygraph programs require that a supervisory polygraph official conduct an internal quality control review of all examination records and examiner opinions before rendering a final opinion on the results of a polygraph examination. The quality control reviews are intended to ensure satisfactory quality and the correctness of examiner opinions on the results of polygraphs. Each program has procedures for referring cases, in which the reviewer does not agree with the examiner, to a second reviewer before results are considered final. In addition, the polygraph programs of the FBI, DEA, and ATF are subject to internal oversight reviews conducted by the components’ internal inspection offices. These reviews examine general administrative management, operations management, and performance issues, but do not assess polygraph examiner performance or compliance with federal polygraph standards.

The FBI, DEA, ATF, and OIG polygraph programs and examination records are reviewed under the DoDPI-administered federal Quality

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Assurance Program. However, the DoDPI has not reviewed the polygraph examinations conducted by a private contractor working for the USMS WITSEC Program nor those conducted for the BOP's SOTP. Since 1996, inspectors working at DoDPI have conducted technical reviews of federal polygraph programs to ensure that they are managed in compliance with the standards in the *Federal Examiner Handbook*. The DEA and ATF began participating in the program in 1997, the OIG in 2000, and the FBI in 2002. After an inspection, agency officials are given a draft report and have 30 days to respond to any findings or recommendations. Once all issues are resolved, DoDPI certifies that the agency's polygraph program complies with federal standards, a certification OPM requires for agencies seeking its approval to polygraph competitive service personnel.

The DoDPI inspection reports we reviewed generally stated that the internal quality control process of each component provided independent and objective reviews of all polygraph examinations. The programs of the DEA, ATF, and OIG were consistently certified as being in compliance with federal standards. However, the FBI's program was not certified as complying with federal standard after the three inspections DoDPI conducted in FY 2003 through 2005 because of repeated instances of noncompliance with federal polygraph standards during polygraph examinations. The noncompliance included instances of improperly constructed questions, opinions on results (i.e., Deception Indicated, No Deception Indicated, or Inconclusive) that were not supported by standard test scoring techniques, and the routine destruction of the score sheets that examiners and supervisors prepared when examining polygraph test results. Although not all issues were finally resolved, the issues were sufficiently addressed so that in January 2006 DoDPI certified the FBI polygraph program for the first time.

The DEA and ATF must receive annual authorization from OPM because those two agencies use polygraph examinations for pre-employment screening of employees covered by the Civil Service Reform Act. For an agency to receive OPM authorization, OPM must first certify that the requesting agency has a national security mission and must approve the agency's polygraph policies and regulations. In addition, agencies must demonstrate full compliance with federal polygraph standards, agree not to deny a clearance or employment based on an inconclusive polygraph result, and submit to a DoDPI quality assurance review at least every 2 years. Both the DEA and ATF have routinely received annual OPM reauthorizations to continue using polygraph examinations for pre-employment screening. The most recent reauthorizations were granted by OPM on May 12, 2006, for FY 2006. The FBI does not have to obtain OPM's approval for its program because most FBI employees are members of the

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excepted service and are not covered by the Civil Service Reform Act. The OIG does not have to obtain OPM approval for its program because it does not use polygraph examinations for pre-employment or personnel security screening.

### Program Performance and Results

In accord with federal polygraph standards, the FBI, DEA, ATF, and OIG collect statistical data on the type, purpose, and results of polygraph examinations they conduct. The data are used to identify trends, manage the examination workload, monitor the work of individual examiners, develop budget estimates, and track performance. Certain results data serve as indicators of the performance of the polygraph examiners. For example, the skill of examiners in using the polygraph technique can be assessed by their rate of conclusive opinions (i.e., the percentage of “Deception Indicated” or “No Deception Indicated” opinions versus “Inconclusive” results). We examined the components’ data on the outcomes of polygraph examinations from FY 2002 through 2005 and found that all met an industry standard of 80-percent conclusive opinions for screening examinations.

### **Seven Components that Do Not Conduct but Use Polygraph Examinations**

Seven organizations in the Department reported using the results of polygraph examinations conducted by other federal agencies (usually the FBI) or by a private contractor. From FY 2002 through 2004, the Criminal Division, JCC, ATR, NDIC, OPR, BOP, and USMS asked other agencies to conduct a total of 1,728 polygraph examinations for various purposes, such as witness security (WITSEC) screening; administrative investigations (misconduct and internal affairs); criminal investigations; personnel security screening; sex offender treatment; and vetting foreign witnesses, prosecutors, and law enforcement personnel.<sup>6</sup>

There is no central review by the Department, and DoDPI has never conducted a quality assurance review of the seven components’ uses of polygraph examinations. DoDPI may have reviewed some of the examination records as a part of its quality assurance reviews of the FBI and OIG polygraph programs, as those offices conducted examinations for

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<sup>6</sup> The same polygraph examinations reported in this section as requested by the seven components were also reported by the FBI in its number of polygraph examinations conducted for other agencies.

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the seven components. However, although the FBI conducted approximately 96 percent of the examinations the seven users requested from FY 2002 through 2004, the FBI has not provided many of the records of those examinations for DoDPI review because of logistical problems with retrieving the records of criminal specific-issue, pre-employment, and personnel security polygraph examinations from the requesting agencies. Further, the FBI does not provide DoDPI with examination records associated with the WITSEC, Foreign Counterintelligence and Counterterrorism, and OPR programs for DoDPI review, whether the examinations were conducted for FBI purposes or for another agency, due to the sensitive nature of those programs.

Of the seven users, the BOP, JCC, and NDIC have internal policies and procedures governing the use of polygraph examinations.<sup>7</sup> The seven components' uses of polygraph examinations are discussed below.

**Criminal Division.** From FY 2002 through 2004, 4 of the 19 organizations within the Criminal Division requested that the FBI and other law enforcement agencies conduct a total of 1,200 polygraph examinations:

- The Office of Enforcement Operations uses polygraph examinations to evaluate prisoner-witnesses seeking entry into the WITSEC Program.
- The Domestic Security Section occasionally uses polygraph examinations in its investigations of criminal organizations that smuggle aliens, including those with ties to terrorist organizations, into the United States.
- The Overseas Prosecutorial Development, Assistance, and Training (OPDAT) Section uses polygraph examinations in providing technical assistance to foreign counterparts as they establish their own investigative units. About 5 to 10 percent of the 50 to 60 countries that receive OPDAT technical assistance each year use polygraphs (generally conducted by the FBI at the request of OPDAT) to determine, for example, whether the foreign prosecutors have taken bribes or violated human rights laws in their countries.

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<sup>7</sup> As described in the Introduction section of the full report, the Department has policies and procedures dealing with the use of polygraph examinations in criminal investigations, prosecutions, and the Witness Security Program that apply to all of its components.

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- The Public Integrity Section uses polygraph examinations in connection with criminal cases involving public corruption to verify the truthfulness of cooperating witnesses, informants, and subjects of criminal investigations.

**Justice Command Center.** The JCC, which serves as a crisis center for the Department and functions as an around-the-clock contact point for all Department operations worldwide, is a branch of the Justice Management Division's Security and Emergency Planning Staff. Because the JCC handles highly classified intelligence information, it requires its employees and job candidates to pass a narrowly focused, counterintelligence-scope polygraph examination as part of the security clearance process. The JCC has 15 positions subject to mandatory polygraph examinations. The JCC is the only one of the seven users discussed in this section that OPM has ever authorized to use polygraph examinations for personnel security screening. Although OPM originally authorized the JCC's use of polygraph examinations in October 1987, and reauthorized it annually through September 30, 1996, OPM officials said they had no record of any reauthorization requests from the Department from FY 1997 through 2004. On November 23, 2005, after we asked to review JCC records of reauthorization requests, the Department applied for reauthorization to use polygraph examinations for JCC personnel. On May 12, 2006, OPM officials granted the JCC's reauthorization request to use pre-employment and personnel security screening polygraphs in FY 2006.

**Antitrust Division.** The ATR uses polygraph examinations infrequently in connection with criminal investigations related to its enforcement of antitrust laws. From FY 2002 through 2004, the Division used polygraph examinations only twice.

**National Drug Intelligence Center.** The NDIC's Office of Security and Classified Programs uses polygraph examinations for pre-employment screening. From FY 2002 through 2004, the office asked the FBI to conduct 72 polygraph examinations for its use in screening job applicants who had received conditional offers of NDIC employment. The NDIC's use of polygraph examinations does not require OPM's approval because the NDIC's employees are in the excepted service.

**Office of Professional Responsibility.** OPR has jurisdiction to investigate allegations of misconduct by Department of Justice attorneys that relate to the exercise of their authority to investigate, litigate, or provide legal advice. OPR also has jurisdiction to investigate allegations of misconduct by law enforcement personnel when they are related to

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allegations of misconduct by attorneys within the jurisdiction of OPR. OPR officials reported that it uses polygraph examinations as an investigative tool in criminal and administrative misconduct investigations. However, OPR officials told us that they had not requested a polygraph examination since before FY 2001. An OPR official told us that, in the past, polygraph examinations have only been conducted when the proposed test subject has consented to the examination.

**Federal Bureau of Prisons.** The BOP uses polygraph examinations as an investigative tool in administrative investigations of BOP employees, as a condition for inmates' entry into the WITSEC Program, and as a condition for participation in the BOP's Sex Offender Treatment Program. The following sections within the BOP used polygraph examinations in FY 2002 through 2004.

- The BOP's Office of Internal Affairs (OIA) used polygraph examinations of subjects, witnesses, and complainants in administrative investigations into alleged misconduct by BOP employees. The OIA requested 21 polygraph examinations during administrative investigations from FY 2002 through 2004. The OIG conducted 17 of the examinations, and the FBI conducted 4. Fifteen of the examinations were administered to subjects of investigations, four to victims, and two to complainants. According to BOP internal policy, neither BOP staff nor inmates can be compelled to take a polygraph examination. Both inmates and staff must sign consent forms before they take a polygraph examination.
- BOP institutions use the results of polygraph examinations in determining whether prisoners can be placed in a Protective Custody Unit and before leaving a BOP facility. The Criminal Division, working through the BOP, uses these polygraph examinations as a tool for maintaining the security of prisoner-witnesses and to help determine whether an inmate seeking admission to the WITSEC Program intends to harm another inmate in the program. From FY 2002 through 2004, the FBI and the OIG conducted a total of 338 polygraph examinations of WITSEC inmates in BOP institutions.
- The BOP's Sex Offender Treatment Program (SOTP) at the Butner Federal Correctional Institution in North Carolina houses up to 112 federal inmates who are convicted sex offenders. All SOTP participants must agree to undergo and pass polygraph examinations when entering the program, upon release, and

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during probation after their release. From FY 2002 through 2004, the SOTP examiner conducted a total of 76 polygraph examinations.<sup>8</sup> The SOTP uses polygraph examinations as an aid in managing the potential risks inmates pose to the community after they are released from prison. They are used for clinical, not investigative, purposes.

**U.S. Marshals Service.** The USMS reported that it uses polygraph examinations for administrative investigations involving USMS personnel and for individuals in the WITSEC Program who are not incarcerated and claim their security has been breached. From FY 2002 through 2004, the USMS requested 16 polygraph examinations of witnesses in the WITSEC Program, but none for administrative investigations. The examinations were conducted by either ATF or a private contractor.

### **New Requirements for Federal Personnel Security Programs**

In December 2004, the President signed into law the Intelligence Reform and Terrorism Prevention Act of 2004 (Pub. L. No. 108-458). Certain provisions of this Act may require the Department to examine its components' use of polygraph examinations in conducting background investigations for personnel security clearances. Specifically, to facilitate reciprocal acceptance of security clearances among federal agencies, Title III of the Act directs the federal government to improve the security clearance process by establishing central oversight and uniform policies for investigating and adjudicating personnel security clearances. The Act states that the federal government must begin:

developing and implementing uniform and consistent policies and procedures to ensure the effective, efficient, and timely completion of security clearances and determinations for access to highly sensitive programs, including standardization of security questionnaires, financial disclosure requirements for security clearance applicants, and polygraph policies and procedures.

As described in this report, each of the components establishes its own policy and procedures for conducting and using the results of polygraph examinations. With the exception of the polygraph examinations conducted by a private contractor for the USMS's WITSEC Program and

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<sup>8</sup> The SOTP polygraph examiner is a psychologist who was trained to conduct criminal investigative and national security screening examinations at DoDPI.

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those conducted for the BOP's SOTP, we found that the other polygraph programs in the Department comply with federal standards; however, the components are not consistent in whom they require to take polygraph examinations in order to receive a security clearance, how frequently the examinations are administered, or what happens in the event of an unfavorable or inconclusive result. There is no comprehensive Department-wide polygraph policy addressing those issues and no government-wide policy establishing standard policies and procedures for all polygraph programs.

As the provisions of the Intelligence Reform Act are implemented over the next year, the Department may need to resolve any differences in its components' policies and procedures that could impede full reciprocity in personnel security clearances. In Executive Order 13381, issued on June 27, 2005, the President assigned the Office of Management and Budget (OMB) to direct the implementation of the Act's provisions, including those that require a system to support reciprocity in the investigation and adjudication of personnel security clearances. In May 2006, OPM officials told us that OMB had not yet designated an agency to lead government efforts to develop and implement standard polygraph policy and procedures. In July 2006, the President extended the provisions of the Executive Order 13381 for a year.

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## LIST OF ACRONYMS

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|        |   |
|--------|---|
| AIG    | Assistant Inspector General                                     |
| AO     | Administrative Opinion  |
| ASAC   | Assistant Special Agent in Charge                               |
| ASCLAD | American Society of Crime Laboratory Directors                  |
| ATF    | Bureau of Alcohol, Tobacco, Firearms and Explosives             |
| ATR    | Antitrust Division  |
| BOP    | Federal Bureau of Prisons                                       |
| CIA    | Central Intelligence Agency                                     |
| DEA    | Drug Enforcement Administration                                 |
| DI     | Deception Indicated   |
| DoDPI  | Department of Defense Polygraph Institute                       |
| DSS    | Domestic Security Section                                       |
| FBI    | Federal Bureau of Investigation                                 |
| FPM    | <i>Federal Personnel Manual</i>                                 |
| FY     | Fiscal year   |
| INC    | Inconclusive  |
| JCC    | Justice Command Center  |
| JMD    | Justice Management Division                                     |
| JTTF   | Joint Terrorism Task Force                                      |
| MAOP   | <i>FBI's Manual of Administrative Operations and Procedures</i> |
| MIOG   | <i>FBI's Manual of Investigative Operations and Guidelines</i>  |
| MOA    | Memorandum of Agreement   |
| MSPB   | Merit Systems Protection Board                                  |
| NDI    | No Deception Indicated  |
| NDIC   | National Drug Intelligence Center                               |
| NO     | No Opinion  |
| NSA    | National Security Agency  |

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|        |  |
|--------|--|
| NSR    | No Significant Response  |
| OEO    | Office of Enforcement Operations                               |
| OIA    | Office of Internal Affairs                                     |
| OIAP   | Office of Investigative Agency Policies                        |
| OIG    | Office of the Inspector General                                |
| OII    | Operations Support Division, Office of Internal Investigations |
| OLC    | Office of Legal Counsel  |
| OMB    | Office of Management and Budget                                |
| OPDAT  | Overseas Prosecutorial Development, Assistance, and Training   |
| OPR    | Office of Professional Responsibility                          |
| OPM    | Office of Personnel Management                                 |
| PDD    | Psychophysiological detection of deception                     |
| SAC    | Special Agent in Charge  |
| SCI    | Sensitive Compartmented Information                            |
| SEPS   | Security and Emergency Planning Staff                          |
| SIU    | Sensitive Investigative Unit                                   |
| SOTP   | Sex Offender Treatment Program                                 |
| SR     | Significant Response   |
| USMS   | United States Marshals Service                                 |
| WITSEC | Witness Security   |

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## INTRODUCTION

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The Office of the Inspector General (OIG) conducted this review of polygraph programs in the Department of Justice (Department) to develop an in-depth description of the regulatory requirements governing the use of polygraph examinations, the components' management and use of polygraph examinations, the Department's polygraph policy, and oversight mechanisms for ensuring that the components conduct and use polygraph examinations in accordance with professional and technical standards. In this introductory section, we describe the history and current status of federal policies regarding the use of polygraph examinations, polygraph examiner training and quality standards, and recent legislation relevant to polygraph examinations. We also describe efforts to develop policy within the Department regarding polygraph usage. We next describe the types and uses of polygraph examinations, provide general information on the use of polygraph examinations in the Department, and describe how we conducted our study of the Department's operations.

The results section of the review contains detailed descriptions of the polygraph programs of the four Department components that administer polygraphs: the (1) Federal Bureau of Investigation (FBI); (2) Drug Enforcement Administration (DEA); (3) Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF); and (4) OIG. We also provide a summary description of the uses of polygraph examinations by seven components that do not directly administer their own polygraph programs but use polygraphs conducted for them by other agencies or contractors. These components are the Department's Criminal Division, Justice Command Center, Antitrust Division, National Drug Intelligence Center, Office of Professional Responsibility, Federal Bureau of Prisons, and U.S. Marshals Service.

### **Background**

A polygraph is an examination process that uses a diagnostic instrument capable of measuring and recording a subject's respiratory, electrodermal, and cardiovascular reactions.<sup>9</sup> The theory behind polygraph testing is that physiological reactions exhibited by subjects as they are responding to questions generally vary when subjects are telling the truth and when they are being deceptive. By enabling an examiner to compare a subject's physiological reactions when responding to different questions, a

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<sup>9</sup> Electrodermal reactions are related to the electrical properties of the skin.

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polygraph examiner can detect reactions that may indicate deceptive responses to specific questions. These indications can then be used to either corroborate or challenge information provided by the subject or developed during an investigation.

As of July 2006, 24 federal agencies in 11 major departments of the federal government had polygraph programs. Those agencies, which employ approximately 600 federal polygraph examiners, use polygraph examinations as a tool in making pre-employment and personnel security decisions; investigating misconduct, criminal cases, and security violations; and providing operational support such as vetting foreign sources and validating intelligence sources. In addition, many agencies without a polygraph program use the results of polygraph examinations conducted by other agencies.

### Historical Background of Federal Policy Governing the Use of Polygraph Examinations

Our review determined that the Executive Branch's polygraph policy originated with an undated memorandum signed by President Lyndon B. Johnson (Johnson Memorandum).<sup>10</sup> In this memorandum, President Johnson adopted the findings of an interagency committee established in 1965 to examine the use of polygraphs in the federal government. The Johnson Memorandum prohibited the use of polygraphs by federal agencies except for (1) pre-employment screening, personnel investigations, and intelligence and counterintelligence operations; (2) criminal investigations; and (3) research and development.<sup>11</sup>

Under the terms of the Johnson Memorandum, however, an Executive Branch agency could not use polygraphs for employment screening,

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<sup>10</sup> In 1964, a series of hearings was held by Congressman Moss of the House Committee on Foreign Operations and Government Information on the use of polygraph examinations. The hearings resulted from an attempt by the labor unions to have the use of "lie detector tests" by federal agencies banned. As a result of the hearings, the Moss Committee recommended that government polygraph programs be centralized, that quality control reviews be implemented in government programs, that research continue, and that federal examiners receive standardized education in the use of the polygraph technique.

<sup>11</sup> The Johnson Memorandum did not specifically address administrative misconduct investigations. The section of the memorandum that addresses "personnel investigations" has been interpreted by OPM as relating to investigations to "[e]nsure the suitability of applicants for and appointees to Federal positions" (i.e., pre-employment and security investigations), rather than to personnel misconduct investigations.

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personnel investigations, or intelligence and counterintelligence operations unless the Chairman of the Civil Service Commission (now the Office of Personnel Management (OPM)) certified that the agency had an intelligence or counterintelligence mission directly affecting national security. If the Chairman so certified, the agency had to prepare regulations governing the use of polygraphs. The Johnson Memorandum also provided detailed criteria for agency regulations governing polygraph use in the context of employment screening and personnel investigations, and required that those regulations be approved by the Chairman of the Civil Service Commission. To gain approval, such regulations had to contain, at a minimum:

1. Specific purposes for which the polygraph could be used, the types of positions for which it would be used, and the officials authorized to approve such examinations.
2. A directive that the person to be examined was to be informed as far in advance as possible of the intent to use the polygraph and of:
  - a. Other devices or aids to the interrogation that could be used simultaneously with the polygraph, such as voice recordings, etc.
  - b. The person's privilege against self-incrimination and right to consult with legal counsel or to secure other professional assistance prior to the examination.
  - c. The effect of the polygraph examination or the subject's refusal to take such examination on the subject's eligibility for employment. The subject was to be informed that refusal to consent would not be made part of the subject's personnel file.
  - d. The characteristics and nature of the polygraph device and examination, including an explanation of the physical operation of the device, the procedures to be followed during the examination, and the disposition of the information developed.
  - e. The general areas of all questions to be asked during an examination.

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3. A directive that no polygraph examination would be given unless the person to be examined had voluntarily consented in writing to be examined after having been informed of the above.
  4. A directive that questions to be asked during a polygraph examination had to have specific relevance to the subject of the particular inquiry.
  5. Adequate standards for the selection and training of examiners, keeping in mind the government's objective of ensuring protection for the subject of an examination and the accuracy of the polygraph results.

The Johnson Memorandum's criteria for regulations related to the use of polygraphs for intelligence and counterintelligence operations were considerably less detailed. The memorandum required that after the Chairman of the Civil Service Commission certified that the agency had an intelligence or counterintelligence mission directly affecting national security, the agency prepare regulations and directives governing the use of polygraphs in that context and that the agency head approve those regulations.

The Johnson Memorandum permitted Executive Branch departments and agencies to use polygraphs in criminal investigations, as long as they had promulgated regulations governing their use and had obtained approval of those regulations from the Attorney General. According to the Johnson Memorandum, those regulations were to contain, at a minimum:

1. The range of criminal matters in which the polygraph would be used.
2. A statement that no polygraph examination would be given unless the person to be examined had voluntarily consented in writing after being fully informed of:
  - a. the subject's privilege against self-incrimination,
  - b. the subject's right to consult a lawyer prior to the examination,
  - c. the subject's right to refuse to submit to the examination, and

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- d. the characteristics and nature of the polygraph machine and examination, including an explanation of the physical operations of the machine, the procedures to be followed during the examination, and the disposition of information developed from an examination.
  3. An affirmation that in the case of an employee of the federal government refusal to consent to a polygraph examination would not lead to any adverse action against the employee and would not be made a part of the employee's personnel file.
  4. Adequate standards for the selection and training of examiners, keeping in mind the government's objective of ensuring protection for the subject of any examination and the accuracy of polygraph results.

However, documents from the Johnson Library strongly suggest that the Johnson Memorandum itself, while signed, was never issued.<sup>12</sup> Instead, it appears that President Johnson accepted the advice of his staff that he implement the interagency committee's recommendations by requiring the Civil Service Commission to issue a directive setting forth the policy.

Consequently, the formal Executive Branch policy for polygraph examinations was issued by the Civil Service Commission as Chapter 736, Section 2-6 of the *Federal Personnel Manual* (FPM).<sup>13</sup> This section, entitled "Use of the Polygraph in Personnel Investigations," tracks much of the

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<sup>12</sup> According to an archivist with the Johnson Library who investigated the status of the Johnson Memorandum in some detail at our request, the memorandum was not contained in the Library's collection of memorandum to heads of departments and agencies, nor was it located in the Weekly Compilation of Presidential Documents, which is where issued memorandums should be found. He stated that the Johnson Library had found no evidence that the memorandum was ever officially promulgated.

<sup>13</sup> In introducing the general requirements for the use of the polygraph in the Executive Branch, the FPM stated: "With the concurrence of President Lyndon B. Johnson, the following rules, incorporated in an interagency committee report dated July 29, 1966, remain in effect." FPM, Ch. 736, § 2-6(a). Similarly, in its 1996 proposed rule to replace the FPM, OPM characterized the relationship between the Johnson Memorandum and the FPM as follows: "Chapter 736 of the former FPM contained limitations upon using polygraphs in personnel investigations based upon a July 29, 1966, interagency committee report approved by former President Lyndon B. Johnson." See Suitability, National Security Positions, and Personnel Investigations, 61 Fed. Reg. 394, 396 (Jan. 5, 1996).

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language of the Johnson Memorandum, with some important changes. The OPM regulations specifically excluded excepted service employees (such as those in the FBI and the Central Intelligence Agency (CIA)) from its oversight. We also found that in 1991, OPM reaffirmed that these provisions of the FPM remained in effect.

However, the FPM was withdrawn in 1995 as a part of an effort to reduce government regulations. At that time, an OPM notice stated that “the guidance it [the FPM] contained is no longer binding upon Federal agencies.”<sup>14</sup> Since 1995, no comprehensive framework governing the administration of polygraph examinations in the Executive Branch has been issued to replace the provisions of the FPM.

It appears that various agencies, including OPM and the Department, continued to rely on the guidance contained in the FPM or the Johnson Memorandum.<sup>15</sup> For example, in 2004, in response to inquiries from the OIG about an ongoing investigation related to alleged misconduct by a Department attorney, the Department’s Justice Management Division (JMD) stated that the Johnson Memorandum was still in effect and therefore the Department could not compel attorneys to take a polygraph examination.

We also found that some agencies that used to seek OPM’s yearly approval of their polygraph policies under the FPM, including the DEA and ATF, continued to submit their policies for approval, even after the FPM was retired in 1995. Moreover, OPM has advised these agencies that, although the FPM has been abolished, it has not been superseded and the guidance contained in the FPM provides a “safe harbor” from investigation by OPM for those agencies that had been following the FPM in preparing and obtaining approval for their polygraph policies.

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<sup>14</sup> FPM Sunset Notice, [www.opm.gov/rif/html/fpm.htm](http://www.opm.gov/rif/html/fpm.htm).

<sup>15</sup> For example, among the documents we uncovered is a September 17, 1999, memorandum prepared by the Criminal Division’s Office of Enforcement Operations for the Attorney General, forwarding a request from the Department of the Interior that the Attorney General approve Interior’s policy governing the use of polygraph examinations in its criminal investigations. The memorandum recommended that the Attorney General approve the policy, citing the Johnson Memorandum as the source of the Attorney General’s authority to do so. The memorandum did not probe the basis for Interior’s request, but simply stated that the requisites of the Johnson Memorandum were met. This was the only instance we identified in which an agency sought Attorney General approval of its polygraph policy under the Johnson Memorandum.

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Our reading of the law suggests that notwithstanding their continued use by some agencies, neither the Johnson Memorandum nor the FPM still governs the use of polygraphs in the Executive Branch. Instead, Executive Branch polygraph policy today relies on a patchwork of Executive Orders and other presidential policy statements, case law, regulations, and administrative decisions, several of which we describe below.

### Current Authorities and Guidelines for Pre-Employment and Personnel Security Screening Polygraphs on Competitive Service Employees

The following sections describe the current OPM guidance on its oversight of polygraph programs; a 1999 Memorandum of Agreement containing operating guidelines that was signed by most agencies that conduct polygraph examinations; quality assurance and training standards established by the Department of Defense's Polygraph Institute; and requirements related to polygraph programs contained in the Intelligence Reform and Terrorism Prevention Act of 2004.

**Office of Personnel Management.** In April 2006, OPM's Office of General Counsel told us that it had reviewed OPM authorities for overseeing management of the competitive service and reaffirmed that OPM continues to have the authority and responsibility under Civil Service Rules (Rule II and Rule IV) to review executive agencies' use of polygraph examinations for pre-employment and personnel security screening for the competitive service positions.<sup>16</sup> An OPM official who reviews agency requests to use pre-employment and personnel security screening polygraphs for competitive service employees told us that a requesting agency must still justify to OPM its need to use polygraph examinations based on a mission that directly affects the national security, submit its governing policies and regulations for OPM review, and stipulate to several conditions, such as participation in the federal quality assurance program, before OPM will approve the use of polygraph examinations. He also said that OPM has never extended its procedural requirements for using pre-employment and personnel security polygraphs for competitive service employees to their use for excepted service employees.

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<sup>16</sup> Most federal government civilian employees are part of the competitive civil service, which is governed by the Civil Service Rules in Title 5 of the Code of Federal Regulations. However, some agencies, including the FBI, are exempt from the competitive civil service procedures established in those rules. These agencies, called excepted service agencies, establish their own personnel rules.

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OPM does not conduct reviews of executive agencies to verify that they are using polygraph examinations in compliance with OPM and Civil Service rules. However, OPM's Center for Merit System Compliance does conduct reviews of agency compliance with federal requirements for managing personnel security, suitability determination, and investigation programs. As part of the OPM review, agencies are asked whether they use polygraph examinations for pre-employment and personnel security and, if they do, whether the agencies' use of polygraphs has been approved by OPM. If OPM does not approve an agency's request, the agency is not authorized to use polygraph examinations for pre-employment and personnel security screening of competitive service employees. Also, since at least 2002, OPM has required that agencies with OPM-certified polygraph programs submit to biennial quality assurance inspections and provide copies of the inspection reports as proof that they are compliant with federal polygraph standards.

Even though Chapter 736, Section 2.b, of the FPM was retired in 1995, OPM continued to follow the procedures it contained. In letters approving the DEA's, ATF's, and JCC's continued use of polygraph examinations for pre-employment and personnel security screening for FY 2006, OPM cited Executive Orders 10450 and 10577 as its authority for overseeing these uses of polygraph examinations for competitive service employees in the Executive Branch. OPM also cited the standards for personnel security polygraphs contained in the U.S. Security Policy Board's Polygraph Memorandum of Agreement (SPB 058-99). OPM approval letters further stated that "OPM follows the standards it formerly prescribed in FPM Chapter 736, section 2-6, titled Use of the Polygraph in Personnel Investigations."

**1999 Interagency Memorandum of Agreement.** Most of the federal agencies that conduct polygraph examinations signed a Memorandum of Agreement (MOA) in 1999 that contains operational requirements for polygraph programs, such as participation in a federal quality assurance program, access by federal inspectors to the records of personnel security examinations, the applicability of federal technical standards, examiner certification requirements, and the appropriate scope of certain questions. The development of the MOA began in 1993 when the Secretary of Defense and the Director of the CIA convened a Joint Security Commission to review and recommend improvements to federal security programs. Part of the review examined the use of polygraph testing in personnel screening as a condition for employment and in personnel security evaluations. In its 1994

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report, the Joint Security Commission stated that it found federal agencies' personnel screening program practices were inconsistent.<sup>17</sup> For example, agencies varied as to when or if a screening polygraph was required, where or how it was administered, the subject areas covered during the test, how questions were worded, and what techniques were to be employed in administering the tests. The report recommended that the intelligence community develop standards to ensure consistency in the administration, application, and quality control of polygraph testing for personnel screening.

In response to the Commission's recommendation, the U.S. Security Policy Board developed an MOA to promote standardization and reciprocity in personnel security evaluation programs.<sup>18</sup> In 1999, 12 of the 13 members of the U.S. Security Policy Board Forum signed the MOA.<sup>19</sup> The one agency that did not sign the MOA was the FBI.<sup>20</sup> The signatory agencies agreed to participate in a federal quality assurance program for polygraph examinations, to allow federal inspectors to review the records of personnel security examinations, and to abide by federal technical standards as outlined in the *Federal Psychophysiological Detection of Deception Examiner Handbook (Federal Examiner Handbook)*, among other things.<sup>21</sup> They also agreed to certify the competency of their examiners based on federal standards. They agreed to limit the scope of counterintelligence questions and to minimize the intrusiveness of control

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<sup>17</sup> Joint Security Commission, *Redefining Security, A Report to the Secretary of Defense and the Director of Central Intelligence*, Washington, D.C., February 29, 1994.

<sup>18</sup> The U.S. Security Policy Board was established by Presidential Decision Directive/NSC-29, "Security Policy Coordination," September 16, 1994. It has since been disbanded.

<sup>19</sup> The 1999 MOA was signed by the U.S. Air Force, U.S. Army, CIA, DEA, Defense Intelligence Agency, Department of Defense, Department of Defense Polygraph Institute, Department of Energy, U.S. Navy, National Reconnaissance Organization, National Security Agency, and the Department of the Treasury.

<sup>20</sup> The U.S. Security Policy Board's July 1999 approval memorandum noted that the FBI declined to sign the MOA because of unspecified "unique, on-going operational and policy issues." While our study was in progress, the FBI indicated to us and to the Department of Defense Polygraph Institute that it was now interested in becoming a signatory, but as of July 2006 no action had been taken on this issue. According to the Institute, because the U.S. Security Policy Board has been abolished, the FBI would have to sign a separate agreement containing the terms of the original MOA.

<sup>21</sup> Federal agencies have adopted the term psychophysiological detection of deception (PDD) to describe the process known as a polygraph examination. PDD and "polygraph examination" are synonymous.

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questions. According to the MOA, agencies would accept each others' polygraph results.

**Federal Examiner Training, Standards, and Quality Assurance Program.** Also in its February 1994 report, the Joint Security Commission recommended that the CIA and the Department of Defense consolidate the CIA's Polygraph School with the Department of Defense's Polygraph Institute (DoDPI) to form an institute that would conduct all polygraph education and training of federal government polygraph examiners. The recommendation was implemented, and since 1995, DoDPI has been the central provider of training for federal polygraph examiners, research, and monitoring of technical and scientific developments in polygraphy. Since 1996, DoDPI has also conducted quality assurance reviews of federal polygraph programs. Today, most federal polygraph examiners (including those who work for the FBI, DEA, ATF, and OIG) are trained at DoDPI. On May 13, 1999, operational responsibilities for DoDPI were placed under the Defense Security Service.<sup>22</sup> DoDPI was transferred from the Defense Security Service to the Department of Defense, Counterintelligence Field Activity on December 19, 2002, based upon a memorandum signed by the Deputy Secretary of Defense. With the cooperation and assistance of other federal agencies, DoDPI:

- Manages a continuing education program for federal polygraph examiners that requires a minimum of 80 hours of related instruction every 2 years,
- Provides for research in forensic psychophysiology and credibility assessment methods,
- Maintains federal polygraph standards as established in the *Federal Examiner Handbook*, and
- Administers the federal Quality Assurance Program for polygraph programs.

DoDPI officials are assisted by an Executive Committee that is composed of 24 federal polygraph program managers, including program managers from the FBI, DEA, ATF, and OIG. The Executive Committee reviews new research, training proposals, suggested changes to the *Federal*

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<sup>22</sup> See Department of Defense Directive 5105.42, "Defense Security Service."

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*Examiner Handbook*, and the quality assurance standards.<sup>23</sup> The *Federal Examiner Handbook* contains technical standards, procedures, and test formats. It was developed with input from all agencies of the federal polygraph community, including federal law enforcement, intelligence, and security agencies.

Since the Quality Assurance Program began in 1996, inspectors working at DoDPI have conducted technical reviews of federal polygraph programs to ensure that they are managed in compliance with the standards in the *Federal Examiner Handbook*. All federal agencies with polygraph programs, except the BOP's SOTP and the USMS's Witness Security (WITSEC) Program, participate in the Quality Assurance Program and undergo biennial inspections. As a matter of policy, participation is mandatory for Department of Defense polygraph programs and voluntary for other executive agencies. All federal law enforcement and intelligence agencies, except the FBI, agreed in the 1999 MOA to participate in the program, to use the *Federal Examiner Handbook*, and to supplement its instructions only when necessary to address unique requirements in their respective missions. The FBI began participating in the program in 2002.

A DoDPI inspection team consists of two or more certified polygraph examiners who review a sample of between 50 and 100 of the agency's recent polygraph examination records as well as agency policies and procedures to determine compliance with 118 criteria in 9 primary program areas. The team evaluates all aspects of an agency's polygraph program and reviews the work of examiners to ensure compliance with the *Federal Examiner Handbook*.

For example, inspectors verify that examination records contain consent forms signed by the examinees. They review questions asked during each examination to determine whether the questions were appropriate for the testing format used and the issue under inquiry. Inspectors review polygraph test charts and examiners' numerical score sheets to determine whether the test data supported the examiners' analysis and conclusion. Inspectors also determine whether the reviewing

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<sup>23</sup> The federal polygraph standards were developed based on the American Society of Crime Laboratory Directors (ASCLAD) inspection process. The ASCLAD process is a voluntary fee-for-service inspection process that certifies most federal, state, and local crime laboratories. The original and all subsequent modifications to federal polygraph standards as found in the *Federal Examiner Handbook* must be approved in writing by all 25 federal agencies that participate in the federal Quality Assurance Program administered by DoDPI.

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supervisor's score sheet for an examination agreed with the field examiner's score sheet and whether a test subject was retested. Inspectors analyze the time taken between the polygraph examinations and the supervisory quality control reviews to determine whether retests were conducted within a reasonable time.

After completing an inspection, the inspectors brief agency officials on the results of the inspection and provide them with a draft inspection report. When an inspected agency receives an inspection report, it has 30 days to respond to its findings and recommendations. If there are outstanding issues, inspectors conduct a follow-up inspection the next year to verify that changes necessary for compliance certification have been implemented both in policy and in practice. After all issues have been favorably resolved, DoDPI issues a letter to agency officials certifying that the agency's polygraph program is in compliance. OPM requires that agencies present the DoDPI certification of compliance letter when they apply yearly for OPM approval to polygraph competitive service personnel. Since OPM does not conduct compliance reviews of the polygraph programs it has approved, OPM stipulates participation in and compliance with DoDPI's quality assurance programs as a surrogate means of verifying that agency programs meet minimum professional and technical standards.

**Intelligence Reform and Terrorism Prevention Act of 2004.** In the Intelligence Reform and Terrorism Prevention Act of 2004 (Pub. L. No. 108-458), Congress directed the federal government to establish requirements for improving the security clearance process. Specifically, Title III, Section 3001 (b) (2) requires the selection of a single entity to be responsible for

developing and implementing uniform and consistent policies and procedures to ensure the effective, efficient and timely completion of security clearances and determinations for access to highly sensitive programs, including . . . polygraph policies and procedures . . . .

On June 27, 2005, Executive Order 13381 gave the Office of Management and Budget (OMB) responsibility for standardizing the federal security clearance process and ensuring uniform standards of reciprocity in the recognition of clearances across agencies. OMB issued a plan to improve the personnel security process in November 2005. The plan called for the development of the Clearance Verification System, a database of individuals' names and their clearance status. In December 2005, OMB also issued a memorandum to all executive departments and agencies

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outlining issues inhibiting reciprocity of security clearances and actions departments and agencies are required to take to address them. According to the memorandum, federal agencies had until March 31, 2006, to report to OPM which of their personnel received a polygraph examination as part of their security clearance investigations as well as the agency that conducted the examination.

In May 2006, OPM officials told us that OMB had not yet designated an agency to lead government efforts to develop and implement standard polygraph policy and procedures. Hence, that work had not started. OPM officials said that Executive Order 13381, which was scheduled to expire on July 1, 2006, would probably be extended so that the work being done to implement the requirements of the Intelligence Reform and Terrorism Prevention Act could continue.

### Department of Justice Polygraph Policy

We found that the Department has no comprehensive policy regarding the conduct and use of polygraph examinations. As described later in this section, the U.S. Attorneys' Manual contains limited policies regarding the use of polygraph examinations in criminal investigations and for witness security.<sup>24</sup> It is also Department policy to oppose attempts by defense counsel to admit the results of polygraph examinations into evidence or to have an examiner appointed by the court to conduct a polygraph examination.<sup>25</sup>

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<sup>24</sup> Department policy requires that all Witness Security (WITSEC) Program candidates who are incarcerated undergo a polygraph examination before acceptance into the program. *See U.S. Attorneys' Manual*, Chapter 9, Section 9-21.340, Polygraph Examinations for Prisoner-Witness Candidates, and Section 9-21.600, Prisoner-Witnesses. The WITSEC Program provides for the security, health, and safety of government witnesses, incarcerated or not, and their immediate dependents whose lives are in danger as a result of their testimony against drug traffickers, terrorists, organized crime members, and other major criminals.

<sup>25</sup> The *U.S. Attorneys' Manual*, Subsection 9-13.300, provides that the "Department opposes all attempts by defense counsel to admit polygraph evidence or to have an examiner appointed by the court to conduct a polygraph test. . . . On the other hand, the Department recognizes that in certain situations, as in testing the reliability of an informer, a polygraph can be of some value. Department policy therefore supports the limited use of the polygraph during investigations." Chapter 9, Criminal Division, Section 9-13, Obtaining Evidence, Subsection 9-13.300, Polygraphs – Department Policy. The *U.S. Attorneys' Manual* contains general policies and procedures relevant to the work of the United States Attorneys' Offices and to their relations with the legal divisions, investigative agencies, and other components within the Department of Justice.

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The Department has periodically considered establishing policies governing the use of polygraph examinations for pre-employment and personnel security screening of Department employees after the FPM was made non-binding, but such policies have not been adopted. For example, in an October 21, 1996, report on the results of a Department-wide survey of pre-employment polygraph testing, the Attorney General asked the FBI's Office of Investigative Agency Policies (OIAP) to study and provide advice on the need for Department policy on the use of pre-employment polygraph examinations. The survey showed that only three organizations – the FBI, DEA, and JMD – used pre-employment polygraph testing for some of their employees. The Attorney General asked the OIAP to answer a number of questions concerning the FBI's and other components' use of pre-employment polygraphs and to advise the Attorney General as to whether the Department should establish a standardized set of guidelines for applicant and employee testing. However, the OIAP's response in 1997 provided an analysis only of the FBI's policy of testing all applicants and not the broader analysis of Department policy that the Attorney General requested.

On August 1, 2001, JMD presented to the Deputy Attorney General three options for a Department-wide policy on the use of polygraph examinations in personnel security evaluations that would have been applicable to all Department components except the FBI.<sup>26</sup> The options provided alternatives for Department policy (applicable to all Department components except the FBI) on the use of counterintelligence-scope polygraph examinations in personnel security investigations.<sup>27</sup> The first

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<sup>26</sup> JMD based the proposed policy on the Johnson Memorandum, assuming that the memorandum had been issued. In discussing the FPM (which had, by then, been retired), JMD noted that "OPM continues to exercise its oversight over agency polygraph use despite the lack of formal regulations in effect at this time." Even though a Departmental polygraph policy would affect both excepted service and competitive service personnel, JMD opined that "it would be advisable to comply with OPM guidance and seek OPM approval of any proposed regulations. Having OPM approval for Department regulations would also afford greater protection against any legal challenges to the Department's policy."

<sup>27</sup> Executive Order 12968, "Access to Classified Information," August 2, 1995, established a uniform personnel security program for employees who are to be considered for initial or continuing access to classified information. According to the Executive Order, eligibility for initial access is based on a personnel security investigation of an individual's background. Employees who are eligible for access to classified information must undergo periodic reinvestigations and may also be reinvestigated if, at any time, there is reason to believe that they may no longer meet the standards for access established by the Executive Order.

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option was to maintain the status quo, which would continue to allow the components to establish component-level policies. At the time, the DEA had policy for pre-employment screening for Special Agent applicants, and the FBI had policy for pre-employment and personnel security screening. The second option was that the Department would require periodic polygraph examinations for those employees with regular access to the highest levels of classified information. The third option was to require polygraph examinations for all employees with access to any level of classified information.

JMD recommended that the Deputy Attorney General raise the issue of polygraph examinations for personnel screening with affected components to determine whether the Department should adopt a policy. In its memorandum to the Deputy Attorney General, JMD said that, if the components subsequently decided that the Department needed to adopt a polygraph policy, JMD recommended the second option (require periodic examinations for those employees with regular access to the highest levels of classified information) over the third option (require polygraph examinations for all employees with access to classified information). However, the Department did not act on JMD's recommendations.

In 2004, during an OIG investigation of potential misconduct by a Department attorney, the OIG asked JMD for the Department's position on whether Department employees could be compelled to submit to a polygraph examination. JMD informed the OIG that it believed, in the absence of a Department polygraph policy, the Department could not compel Department employees. JMD also stated that it was unlikely that disciplinary action against an employee based on information gained through a compelled polygraph examination would be sustained on appeal.

In July 2004, JMD's Security and Emergency Planning Staff (SEPS) proposed the formation of a working group to establish Department polygraph policy for pre-employment and personnel screening. JMD proposed this initiative after determining that it did not have the authority to conduct a polygraph examination of a competitive service employee, even with the employee's consent. This issue arose when, during an adjudication of a background investigation, an employee volunteered to submit to a polygraph examination to resolve an issue. JMD proposed a working group to develop a policy to govern the Department's use of polygraph examinations for pre-employment and personnel screening that would be submitted for OPM's review and approval. As of July 2006, the Department had not formed such a working group.

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Another proposal regarding the use of polygraphs in the Department was made in September 2004, when the FBI submitted a request to the Office of the Deputy Attorney General for approval to polygraph employees of other Department components who had regular access to sensitive FBI information. This request would have affected Department attorneys and other personnel who had access to the FBI's most sensitive national security information. The proposal specifically identified Department employees assigned to the offices of the Attorney General and the Deputy Attorney General, Office of Intelligence Policy and Review, Criminal Division, OIG, and U.S. Attorneys' Offices. Under the proposal, employees in those components who had regular access to FBI information would have undergone counterintelligence-scoped polygraph examinations as a condition of access eligibility. On July 12, 2005, the Deputy Attorney General met with the FBI Director and advised him that he would not require Department attorneys to undergo polygraph examinations.

As part of this review, in June 2006 the OIG met with JMD officials to discuss whether the Department's position on compelled polygraphs had changed since 2004. After discussing JMD's 2004 position, JMD officials informed the OIG that they intended to ask JMD's Office of General Counsel to reexamine whether the Department has the legal authority to compel employees to submit to polygraph examinations during investigations of administrative misconduct and, if so, what procedural steps would be required to exercise that authority.

### Requirements and Process of Polygraph Examinations

**Polygraph Examination Requirements.** All subjects of polygraph examinations must consent to be tested. However, there may be consequences when a subject refuses to take a polygraph examination or when an examination indicates deception. As described in this section, the consequences of polygraph examinations vary, depending on whether the examination is considered voluntary, mandatory, or compelled; the reason for the examination; and the examination results.

Voluntary Examinations. Some polygraph examinations given to federal employees or other individuals may be voluntary, meaning that the examinee may refuse to take the examination with no adverse consequences. For example, a witness or subject in a criminal investigation may be asked to take a voluntary polygraph examination to resolve discrepancies or confirm the veracity of his or her information. Because such witnesses and subjects are protected by the Fifth Amendment right against self-incrimination (discussed further below), they can refuse to

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Speak with investigators or to take a polygraph examination and are not to suffer negative consequences for the refusal.

Mandatory Examinations. Mandatory polygraph examinations are those in which a successful examination is required for an individual to, for example, be considered for employment, become a member of a foreign investigative unit, or receive a security clearance. Generally, the consequences of refusing to take a mandatory polygraph examination are related to the administrative purpose for which the examination was required. As described in the following examples, applicants who refuse to take mandatory examinations may be denied employment, and employees who refuse to take mandatory polygraph examinations for a security clearance may be denied access to national security information.

- All applicants for employment in the FBI must undergo and pass a pre-employment polygraph examination. Applicants who refuse to take a polygraph examination are ineligible for employment. Applicants who fail their polygraph examinations and subsequently admit to deceptive or disqualifying behavior are normally barred from FBI employment. Applicants found to be deceptive, but who make no admission or confession during the examination process, may appeal the results of their examinations and may or may not be retested.

The FBI also requires selected employees and non-FBI personnel with access to sensitive FBI information to undergo periodic and random personnel security polygraphs as a deterrent to espionage. Employees who refuse to submit to mandatory polygraph examinations, such as during periodic security reinvestigations or investigations of national security matters, may face transfer to a position with no access to sensitive information, denial or re-evaluation of their security clearances, or disciplinary action for insubordination. Since holding a security clearance is a condition of employment at the FBI, revocation of an FBI employee's clearance would also lead to dismissal.

- In the DEA, polygraph examinations are mandatory for applicants for Special Agent and Intelligence Research Specialist positions, and foreign candidates for membership in Sensitive Investigative Units. Applicants for Special Agent and Intelligence Research Specialist positions who refuse to take a polygraph examination are not eligible for DEA employment. When an applicant's polygraph results indicate deception and the applicant

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subsequently confesses or admits deception, they are not hired. When the results indicate deception, but there is no subsequent confession, the DEA may retest the individual or try to resolve the issue by conducting a background investigation. However, membership in a foreign investigative unit is contingent on taking and passing a polygraph examination.

- ATF requires all applicants for Special Agent positions to undergo a mandatory pre-employment polygraph examination. Those who refuse are not eligible for employment. If an applicant's examination results in indications of deceptiveness or an admission of deception or disqualifying behavior, the individual may be ineligible for hire. Other positions in ATF do not require a pre-employment polygraph examination.

Compelled Examinations. Compelled polygraph examinations are those in which an employee is ordered to submit to the examination under threat of adverse action (including suspension or dismissal) if they do not comply. Information gained through a compelled polygraph examination cannot be used in criminal proceedings against the subject, although it may be used for administrative purposes. Whether an agency can take adverse action against an employee for refusing to take a polygraph examination when compelled during an investigation of administrative misconduct or a security investigation depends on whether the employee is in the competitive service or excepted service, and whether the agency has implemented OPM-approved polygraph policies, among other things. Within the Department, only the FBI has issued policies outlining when employees can be compelled to submit to polygraph examinations.

Federal courts have reviewed a number of cases in which public employees were dismissed for refusing to take compelled polygraphs during an investigation into administrative misconduct issues. As described below, these courts held that public employees can be compelled to submit to polygraph examinations in investigations into the performance of their official duties, so long as they are not also required to relinquish their privilege against self-incrimination. Thus, for example, the Eighth Circuit rejected the Fifth Amendment and due process claims of a police officer who was terminated after refusing to take a polygraph examination regarding the disappearance of a photograph of a beaten detainee:

The [Fifth] Amendment is violated when public employees are compelled to testify by employers who require the employees to either incriminate themselves or to forfeit their

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jobs. As long as a public employer does not demand that the public employee relinquish the employee's constitutional immunity from prosecution, however, the employee can be required to either testify about performance of official duties or to forfeit employment.<sup>28</sup>

Other cases that do not specifically involve polygraphs affirm the right of the government to compel public employees – regardless of whether they are law enforcement officers or not – to answer questions about the performance of their official duties.<sup>29</sup>

However, many Department employees compelled to answer questions (including questions asked as part of a polygraph examination) have procedural protections from adverse employment actions under the Civil Service Reform Act, 5 U.S.C. § 1101 *et seq.* Since 1990, Department attorneys have been among that group. *Id.* § 7511(a)(1)(C). Before the Civil Service Due Process Amendments were enacted, the Department's Office of Legal Counsel (OLC) had opined that a Department attorney could be

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<sup>28</sup> See *Hill v. Johnson*, 160 F.3d 469, 471 (8<sup>th</sup> Cir. 1998) (citations omitted). Because of “the important public interest in securing from public employees an accounting of their public trust,” *id.*, only “the combined risks of both compelling the employee to answer incriminating questions and compelling the employee to waive immunity from the use of those answers” violate the employee's privilege against self-incrimination. *Id.* See also *Wiley v. Doory*, 48 F.3d 773 (4<sup>th</sup> Cir. 1995) (rejecting Fifth Amendment claims of police officers who were compelled to take polygraphs in connection with an investigation into a shooting and who were threatened with job loss, when none of the officers was compelled to waive his Fifth Amendment rights); *Hester v. Milledgeville*, 777 F.2d 1492 (11<sup>th</sup> Cir. 1985) (rejecting Fifth Amendment claims of firefighters who were fired for refusing to take polygraphs in connection with an investigation into illegal drug activity, where none of the firefighters was compelled to waive his Fifth Amendment rights); *Gulden v. McCorkle*, 680 F.2d 1070 (5<sup>th</sup> Cir. 1982) (rejecting Fifth Amendment claims of Department of Public Works employees who were fired for refusing to take polygraphs in connection with an investigation into a bomb threat called in to a Department office, where none of the employees was compelled to waive his Fifth Amendment rights). The Second Circuit has upheld an FBI agent's termination for cocaine use and lack of candor, holding that even if the agent was terminated for refusing to take a polygraph examination, his termination was not constitutionally impermissible because he “was explicitly promised throughout the administrative investigation that any ‘information’ resulting therefrom . . . would not be used against him in criminal proceedings.” *Mack v. United States*, 814 F.2d 120, 124 (2d Cir. 1987).

<sup>29</sup> See *Lefkowitz v. Turley*, 414 U.S. 70 (1973); *Uniformed Sanitation Men Assoc. v. Commissioner*, 392 U.S. 280 (1968); *Garrity v. New Jersey*, 385 U.S. 493 (1967).

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removed for refusing to submit to a polygraph examination in connection with an investigation into a leak in an ongoing criminal matter.<sup>30</sup>

Specifically, in its 1980 opinion, OLC stated that Department attorneys had no procedural protections from summary removal under the Civil Service Reform Act, other than a statement of reasons for the discharge. The OLC opinion stated:

Substantively, Department attorneys are provided no protections by Department regulations. And since they are not covered by the “for cause” standard of the civil service laws, attorneys apparently serve at the pleasure of the Attorney General.

OLC stated that failure to submit to a polygraph would amount to insubordination, which is punishable by removal, and “arguably impedes investigation of government misconduct.” OLC concluded, in accordance with the Fifth Amendment discussion above, that as long as a Department attorney was “warned that failure to submit to the test could lead to his or her dismissal and that nothing obtained in the examination will be used against the employee in a subsequent criminal proceeding,” the Attorney General could dismiss a Department attorney for failing to submit to a polygraph.

After the Civil Service Due Process Amendments were enacted in 1990, it is no longer true that a Department attorney could be summarily dismissed. A Department attorney is able to appeal certain disciplinary decisions to the Merit Systems Protection Board (MSPB). It is unclear whether the MSPB would uphold a dismissal for insubordination based on an employee’s refusal to take a polygraph.<sup>31</sup> However, the MSPB has not specifically addressed the question of whether an employee can be removed for refusal to take a polygraph in connection with an investigation into administrative misconduct.

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<sup>30</sup> 4B Op. Off. Legal Counsel 421 (1980).

<sup>31</sup> In *Meier v. Department of Interior*, 3 M.S.P.R. 247 (1980), the Board declined to draw an adverse inference against an employee who did not take a polygraph examination in connection with an investigation into his alleged misconduct. Whether the agency had ever actually requested that the employee take a polygraph is not clear. Because the FPM’s restrictions on polygraph use would still have been in effect, the agency would not have been able to compel the employee to submit to a polygraph.

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As of June 2006, the FBI was the only component within the Department that has issued policies and procedures for compelling its employees to undergo polygraph examinations in misconduct or security investigations. The FBI's policy covers all FBI employees, including attorneys. Employees of the FBI also can be ordered to take a polygraph examination in an administrative investigation if the matter involves one or more of seven specified violations of law or FBI policies, such as the unauthorized release of sensitive information.<sup>32</sup> FBI employees who refuse to take a polygraph examination under these circumstances face administrative discipline, up to and including dismissal. FBI policy also states that designated FBI officials can

compel any Bureau or non-Bureau person with access to FBI information or facilities to submit to a polygraph examination to resolve specific issues which may impact a person's trustworthiness for security matters.

The FBI policies appear consistent with the criteria established in court cases for upholding dismissals when employees refuse to take compelled polygraph examinations.<sup>33</sup>

While FBI employees can be compelled to submit to polygraph examinations, it is not clear whether employees of other Department components can be compelled to do so in the absence of a policy regarding compelled polygraphs. As described previously, in 2004 JMD informed the OIG of the Department's position that, in the absence of approved regulations, it does not have the authority to compel employees to take

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<sup>32</sup> The seven violations are: (1) intentional and unauthorized release of sensitive, protected information; (2) relationship with or allegiance to a foreign power; (3) illegal or improper exercise of influence; (4) intentional and unauthorized destruction, alteration, misplacement, taking, falsification, or other impairment of FBI documents or evidence; (5) use of or unauthorized dealing in controlled substances; (6) false statements or the failure to candidly disclose information; and (7) theft, fraud, and misuse of government money and property.

<sup>33</sup> Those criteria were most clearly stated in *Eshelman v. Blubaum*, (App) 114 Ariz 376, 560 P2d 1283. *Eshelman* concerned a Deputy Sheriff who was dismissed for willful disobedience of an order and insubordination for refusing to take a polygraph examination during an internal investigation. The court stated that the criteria for demanding a polygraph in the course of an internal investigation is that the employee be informed in advance that (1) the questions to be asked during the polygraph examination will relate specifically and narrowly to the performance of the employee's duties, (2) the answers given will not be used against the employee in any subsequent criminal prosecution, and (3) the penalty for refusing can include dismissal.

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polygraph examinations during administrative misconduct investigations. The Department and Department components other than the FBI have not issued such policies, and we found that several proposals to develop a Department-wide polygraph policy have not been acted upon to date. Consistent with the position expressed by JMD in 2004, we found no instance in which an employee of a Department component, other than the FBI, has been compelled to take a polygraph examination in an administrative misconduct investigation. However, when the OIG met with JMD officials in June 2006, the JMD officials stated that they intended to ask JMD's Office of General Counsel to reexamine whether the Department has the legal authority to compel employees to submit to polygraph examinations during investigations of administrative misconduct.

**General Polygraph Examination Process.** As described in the following paragraphs, the polygraph examination process typically includes a pretest interview, collection of physiological data using a polygraph instrument, analysis of the test data, and a post-test interview in which the examiner questions the subject about answers that evoked a response. (See Chart 1 on page 24.) Examinees are generally asked to give written consent before they undergo a polygraph examination.

Pretest Interview. The first step in the polygraph process is a pretest interview. During the pretest interview, the examiner verifies information that the subject provided previously and gathers information to formulate the questions that will be asked during the physical test.<sup>34</sup> According to a National Academy of Sciences report, a comprehensive and careful pretest is critical to a successful examination.<sup>35</sup> During the pretest interview, subjects are encouraged to correct prior statements (for example, statements regarding the extent of prior drug use) and to reveal relevant information not previously disclosed (such as criminal behavior or security violations). In some cases, a subject may make an admission or confession during the pretest interview that will obviate the need for further testing.

Testing. During the testing phase, the examiner asks the examinee questions while the examinee is connected to the polygraph instrument.

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<sup>34</sup> *Redefining Security, A Report to the Secretary of Defense and the Director of Central Intelligence.*

<sup>35</sup> The Committee to Review the Scientific Evidence on the Polygraph established by the National Research Council of the National Academy of Sciences issued the study, *The Polygraph and Lie Detection*, published in October 2003 by the National Academies Press.

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The examinee is instructed to answer each question with either a “yes” or “no,” and the polygraph instrument measures and records the examinee’s physiological reactions as the examinee answers each question.

In general, the format and scope of the questioning depends on the purpose of the test. Questions follow one of two formats – specific issue and non-specific issue (screening). Specific-issue examinations are conducted to resolve questions related to specific factual issues or single known events under investigation.<sup>36</sup>

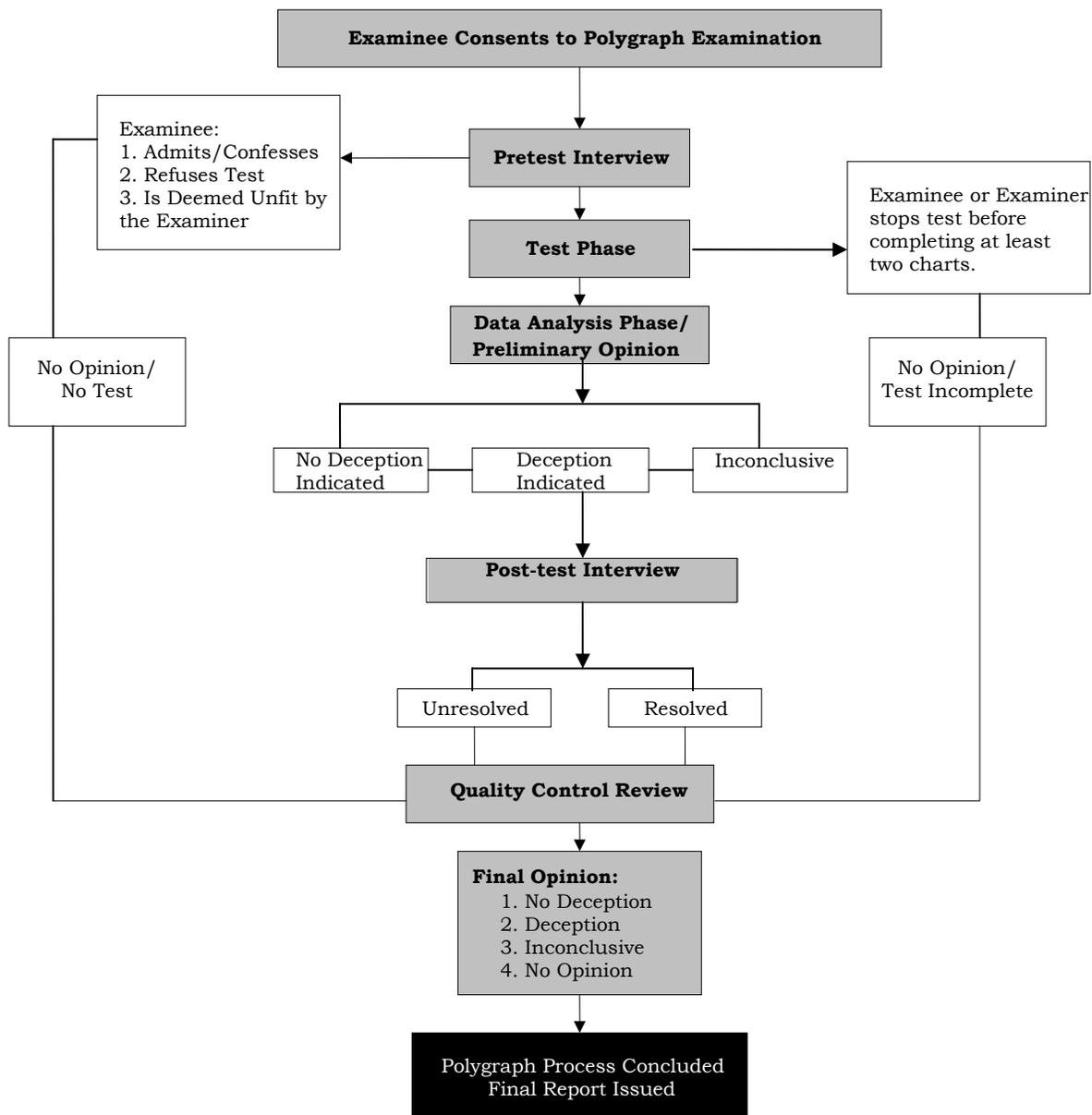
Questions asked during specific-issue examinations relate to the specific incident and generally have little ambiguity (for example, “Did you see John Smith on Monday at 2 p.m.”). In contrast, in non-specific examinations, such as those conducted during pre-employment testing and employee screening, there is no specific known event being investigated. The questions asked during a non-specific examination may cover multiple topics and may range across an entire lifetime (“Have you ever revealed classified information to an unauthorized person?”).

Among non-specific polygraph examinations, there are two general scope categories: the counterintelligence-scope polygraph and the full-scope polygraph. The counterintelligence-scope polygraph focuses on identifying involvement in espionage, sabotage, terrorism, mishandling of classified information, and unauthorized contacts with representatives of foreign governments. The full-scope polygraph covers all of the counterintelligence-scope questions and also includes questions pertaining to both security issues and suitability for employment. Questions involving suitability asked during an examination usually address criminal history, use of illegal drugs, and falsification of information on the personal history statement.

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<sup>36</sup> Joint Security Commission, *Redefining Security*.

**Chart 1: Polygraph Examination Process**



Source: OIG analysis

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Data Analysis. After completing the physical test, the examiner analyzes the physiological reactions that the subject exhibited in response to each question asked during the test. The examiner assigns a score to each response. The standards for analyzing and scoring test results are prescribed in the *Federal Examiner Handbook*. Once the analysis and scoring are completed, the examiner issues one of four opinions:<sup>37</sup>

- Deception Indicated – The subject’s physiological reactions when responding to one or more relevant questions were indicative of deception.
- No Deception Indicated – The subject had no physiological reactions indicative of deception when responding to relevant questions.
- Inconclusive – The examiner cannot reach a conclusion of Deception Indicated or No Deception Indicated.
- No Opinion – The examiner cannot render an opinion based on the physiological data on the charts. A result of No Opinion often indicates that the subject stopped the test before it was completed.

If the examination results in a finding of No Deception Indicated, Deception Indicated, or Inconclusive, the polygraph process continues with a post-test interview or additional testing.

Post-Test Interview. To resolve inconclusive results or determine why a subject exhibited indications of deceptiveness in response to specific questions, the examiner may discuss the test results with the subject. In some cases, the subject may give an acceptable explanation for why the subject reacted to a particular question, or the subject may confess to wrongdoing or undesirable behavior.

After the polygraph examiner formulates a preliminary opinion on the results of the examination, a supervisory examiner reviews the examination record and the examiner’s opinion as a quality control measure. The supervisory examiner issues the final opinion on the results. The polygraph examination process essentially ends with the issuance of the

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<sup>37</sup> There are variations in terminology used in different polygraph units, but in general they are synonymous with these four basic opinions. Later sections of this report discuss variations in terminology where they exist in the Department.

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final opinion and a referral of the findings to adjudicating or investigating officers.

### Polygraph Examinations in the Department of Justice

Eleven components in the Department reported conducting or using polygraph examinations since the beginning of fiscal year (FY) 2002. Four of them, the FBI, DEA, ATF, and OIG, administer their own polygraph programs and conduct examinations for their organization as well as for other organizations. The other seven components do not conduct their own polygraph examinations; instead, they use the services of other agencies. Those seven components are the Department's Criminal Division, Justice Command Center (JCC), Antitrust Division (ATR), National Drug Intelligence Center (NDIC), Office of Professional Responsibility (OPR), Federal Bureau of Prisons (BOP), and U.S. Marshals Service (USMS).

**Purposes of Polygraph Examinations.** Polygraph examinations are used for several purposes, depending on the Department component's mission and requirements. Components use polygraph examinations primarily for:

- Pre-employment screening,
- Personnel security screening,
- Criminal investigations,
- Counterintelligence and counterterrorism investigations,
- Misconduct and internal affairs investigations,
- Witness security, and
- Foreign vetting.

These uses of polygraph examinations are briefly described below.

Pre-Employment Screening. Pre-employment polygraph examinations are non-specific, full-scope examinations that are used to identify past behavior (e.g., use of illegal drugs, involvement with foreign nationals) that may indicate a lack of reliability in the potential employee. The FBI and the JCC require all applicants to undergo a pre-employment polygraph examination. The DEA, ATF, and NDIC require only applicants for certain specified positions (such as GS-1811 criminal investigators) to be tested. The OIG does not conduct pre-employment polygraph examinations.

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Personnel Security Screening. Polygraph examinations are used in personnel security programs to identify individuals that present serious threats to national security and to deter and detect unwanted behaviors such as espionage. Personnel security polygraphs are non-specific, counterintelligence-scope examinations. The examiners ask questions pertaining to the subject's involvement in espionage, sabotage, terrorism, unauthorized disclosure of classified information, and unauthorized foreign contacts. Personnel security screening examinations can be conducted as a condition of initial access to national security or sensitive information, as a part of periodic security reinvestigations, or on randomly selected individuals. The FBI is the primary user of personnel security polygraphs in the Department and intends to require them of all personnel. The DEA conducts personnel security polygraphs only on its polygraph examiner trainees, who are required by DoDPI to undergo the examination before being accepted for training. ATF and the OIG do not conduct personnel security polygraphs.

Criminal Investigations. Polygraph examinations used in criminal investigations are specific-issue examinations that are administered to subjects, witnesses, or informants to (1) detect and identify criminal suspects; (2) verify information furnished by an informant or a witness to establish or corroborate credibility; and (3) obtain additional information leading to new evidence or identification of additional suspects, witnesses, or locations. The FBI, DEA, ATF, and OIG conduct and use polygraph examinations as a tool in criminal investigations. The FBI also conducts criminal, specific-issue polygraph examinations for the Department's ATR, Criminal Division, and OPR when requested.

Counterintelligence and Counterterrorism Investigations. During investigations into suspected security breaches (espionage) or foreign or domestic terrorist threats to national security, specific-issue polygraph examinations may be administered to the subjects, witnesses, or informants associated with the incident or threat under investigation. The FBI is the only Department component that conducts and uses polygraph examinations in counterintelligence and counterterrorism operations.

Misconduct and Internal Affairs Investigations. Specific-issue polygraph examinations may be given to employees who are subjects, witnesses, or complainants in investigations of personal misconduct in the performance of official duties. These examinations are used to substantiate or refute allegations, verify information furnished by complainants or subjects, establish or corroborate credibility, and obtain additional information. The FBI, DEA, OIG, BOP, USMS, and OPR reported using

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polygraph examinations as a tool in misconduct investigations. (See Tables 2 and 3 at the end of this section.) The FBI and the OIG also conduct examinations when requested by the BOP, USMS, and OPR.

WITSEC Program. “Prisoner-witnesses” who want to participate in the WITSEC Program must undergo a specific-issue polygraph examination to aid in assessing their truthfulness. According to the Department’s *U.S. Attorneys’ Manual*, Title 9, Chapter 21, a polygraph examination is required of all WITSEC Program candidates who are incarcerated in order to maintain the security of individuals housed in a BOP Protective Custody Unit. The USMS also uses polygraph examinations for witnesses that are not incarcerated, but claim that their security has been breached and ask the USMS to move them to a new location. The FBI, OIG, or the Secret Service conducts polygraph examinations for the WITSEC Program when requested by the Department’s Criminal Division, which oversees the WITSEC Program. A private contractor working for the U.S. Marshals Service conducts polygraph examinations of WITSEC participants who are not incarcerated.

Foreign Vetting. Foreign agents and law enforcement officials assigned to joint law enforcement task forces or overseas operations involving Department components are vetted using non-specific, full-scope polygraph examinations. These examinations are conducted to help identify potential security risks and to identify individuals whose past behavior could indicate uncertain reliability. The DEA and ATF reported using polygraph examinations to vet foreign participants of task forces and overseas operations.

**Number of Polygraph Examinations Conducted by the Department’s Four Polygraph Programs (FBI, DEA, ATF, and OIG).**

From FY 2002 through 2005, the four Department components that conduct polygraph examinations (the FBI, DEA, ATF, and OIG) performed approximately 49,197 examinations.<sup>38</sup> The examinations conducted by the components were used as follows:

- 27,866 (56.7 percent ) for pre-employment screening (the FBI, DEA, and ATF),
- 4,735 (9.6 percent) for personnel security screening and investigations (the FBI and DEA),

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<sup>38</sup> The number is an approximation because the four components do not all track their uses of polygraph examinations in the same way.

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- 8,356 (17 percent) for criminal investigations (the FBI, DEA, ATF, and OIG),
  - 149 (0.3 percent) for misconduct investigations (the FBI and DEA),
  - 1,994 (4.1 percent) for counterintelligence and counterterrorism investigations (the FBI only),
  - 1,694 (3.4 percent) for requests by other organizations for a variety of uses (the FBI and OIG), and
  - 4,403 (8.9 percent) for foreign vetting (the DEA and ATF).

Table 2 lists the number and type of polygraph examinations conducted by each of the four components.

**Table 2: Polygraph Examinations Conducted by Component  
FY 2002 through 2005**

| <b>Component</b>         | <b>Polygraphs Conducted for</b>                       | <b>Number Conducted</b> | <b>Percentage of Total</b> |
|--------------------------|---|-------------------------|----------------------------|
| <b>FBI</b>               | • Pre-employment screening                            | 23,310                  |                            |
|                          | • Personnel security                                  | 4,721                   |                            |
|                          | • Criminal investigation                              | 6,203                   |                            |
|                          | • Misconduct investigation                            | 128                     |                            |
|                          | • Foreign Counterintelligence and Counterterrorism    | 1,994                   |                            |
|                          | • As requested by other agencies <sup>a</sup>         | <u>1,661</u>            |                            |
|                          | <b>Subtotal</b>                                       | <b>38,017</b>           | <b>77.3%</b>               |
| <b>DEA</b>               | • Pre-employment screening                            | 3,218                   |                            |
|                          | • Personnel security <sup>b</sup>                     | 14                      |                            |
|                          | • Criminal investigations                             | 733                     |                            |
|                          | • Misconduct investigations                           | 21                      |                            |
|                          | • Foreign vetting                                     | <u>4,321</u>            |                            |
|                          | <b>Subtotal</b>                                       | <b>8,307</b>            | <b>16.9%</b>               |
| <b>ATF</b>               | • Pre-employment screening                            | 1,338                   |                            |
|                          | • Criminal investigations                             | 1,280                   |                            |
|                          | • Foreign vetting for other agencies                  | <u>82</u>               |                            |
|                          | <b>Subtotal</b>                                       | <b>2,700</b>            | <b>5.5%</b>                |
| <b>OIG</b>               | • Criminal and misconduct investigations <sup>c</sup> | 140                     |                            |
|                          | • As requested by other agencies                      | <u>33</u>               |                            |
|                          | <b>Subtotal</b>                                       | <b>173</b>              | <b>0.4%</b>                |
| <b>Total<sup>d</sup></b> | <b>49,197</b>   | <b>100.0%</b>           |                            |

<sup>a</sup> Some of the examinations conducted by the FBI were for agencies outside of the Department.

<sup>b</sup> While the DEA reported conducting 14 personnel security polygraphs, those were done only for polygraph examiner trainees who were seeking training at DoDPI, which requires that candidates undergo the examination as a pre-condition for acceptance.

<sup>c</sup> The OIG does not distinguish between criminal and administrative investigations. We counted them as criminal investigations.

<sup>d</sup> The total does not include limited numbers of examinations conducted by the BOP's SOTP, Secret Service, CIA, and a contractor for the USMS's WITSEC Program, which we roughly estimate at 89 examinations during the study period.

Source: FBI, DEA, ATF, and OIG

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**Number of Polygraph Examinations Used or Conducted by Seven Other Department Components.** From FY 2002 through 2004, the seven Department components that use the results of polygraph examinations reported using approximately 1,361, as shown in Table 3 on the next page. Most of those examinations are included in the numbers that the FBI, DEA, ATF, and OIG reported conducting, (shown in Table 2). However, some of the examinations shown in Table 3 were conducted by the Secret Service, CIA, BOP's SOTP, and a contractor for the USMS's WITSEC Program. The BOP and USMS conduct limited numbers of polygraph examinations but do not have polygraph programs like those of the FBI, DEA, ATF, and OIG. Table 3, on the next page, lists these "user" components, the number and purpose of the examinations requested or used, and the components that conducted the examinations.

| <b>Table 3: Number of Polygraph Examination Results Used By Seven Other Components in FY 2002 through 2004</b> |  |   |                                |
|--|--|---|--------------------------------|
| <b>Component</b>   | <b>• Polygraphs' Use</b>   | <b>Conducted by</b>                                     | <b>Results Used</b>            |
| <b>Antitrust Division</b>  | • Criminal investigations  | FBI   | 2                              |
| <b>Bureau of Prisons</b>   | • Witness security <sup>a</sup><br>• Internal affairs (misconduct) <sup>b</sup><br>• Sex offender assessments <sup>c</sup> | FBI, OIG<br>FBI, OIG<br>BOP                             | (338)<br>21<br>76              |
| <b>Criminal Division</b>   | • Foreign vetting<br>• National security<br>• Witness security<br><br>• Criminal investigations                            | FBI<br>FBI, CIA<br>FBI, OIG, Secret Service<br>FBI, OIG | 725<br>4<br>427<br>15          |
| <b>Justice Command Center</b>  | • Pre-employment screening   | FBI   | 3                              |
| <b>National Drug Intelligence Center</b>   | • Pre-employment screening   | FBI   | 72                             |
| <b>Office of Professional Responsibility</b>   | • Criminal investigations<br>• Misconduct investigations   | FBI<br>FBI  | 0<br>0                         |
| <b>U.S. Marshals Service</b>   | • Misconduct investigations<br><br>• Witness security  | FBI<br><br>Contractor, ATF<br>OIG                       | 0<br><br>16                    |
|  |  |   | <b>Total 1,361<sup>d</sup></b> |

<sup>a</sup> The Office of Enforcement Operations in the Criminal Division approves all polygraph examinations conducted for the Witness Security program. The 338 reported by the BOP are included in the 427 total WITSEC examinations reported by the Criminal Division in August 2006.

<sup>b</sup> Some of these polygraphs were administered during the course of OIG investigations.

<sup>c</sup> The BOP's Director of the Sex Offender Treatment Program began conducting polygraphs in mid-2002.

<sup>d</sup> Most of these examinations are included in the numbers reported in Table 2, page 30, for polygraph examinations conducted by the FBI, ATF, and OIG. They also include a number of examinations conducted by the Secret Service (unknown), CIA (2), BOP (76), or the USMS contractor (11 of 16). The examinations conducted by the USMS's WITSEC contractor and the BOP's SOTP are limited and represent anomalies in the Department.

Source: Components' data

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## **Purpose, Scope, and Methodology**

The OIG conducted this study of polygraph programs in the Department to develop detailed information concerning the use of polygraph examinations in the Department, including trends in polygraph use as well as common issues affecting the Department's polygraph programs and uses. We focused on identifying and describing:

- Legal and regulatory requirements governing the use of polygraph examinations in the federal government;
- Department policy and mechanisms for oversight of component use and administration of polygraph examinations; and
- Key characteristics of the Department's polygraph programs, the various uses of polygraph examinations, and how the components manage their use of polygraph examinations in compliance with federal and professional standards.

We studied the 11 Department components that used polygraph examinations in FY 2002 through 2005. In conducting this examination, we reviewed government and private studies, component policies and regulations, federal and component polygraph manuals, and journal articles. We also reviewed federal legislation, Presidential Memorandums and Executive Orders, and security directives and guidelines to determine the legal and regulatory requirements for using and conducting polygraph examinations in the Department.

In addition, we talked with officials in the criminal, intelligence, counterintelligence, and personnel security divisions of the Department, FBI, DEA, ATF, and OIG to determine their use and experience with polygraphs. We talked with security officials, officials dealing with issues of misconduct, adjudicators, and personnel specialists to identify policies and procedures for requesting and approving polygraph examinations and the pool of candidates subject to initial, periodic, random, and compelled polygraphs. We also examined how the results of polygraphs examinations were interpreted, adjudicated, managed, and stored.

We talked with polygraph examiners and officials administering polygraph programs and managing polygraph units for the FBI, DEA, ATF, and OIG. We identified the key components in each polygraph program and, when necessary, developed organizational charts showing both the headquarters and field structures.

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We analyzed budget data, polygraph statistics, performance measures, and strategic plans regarding these polygraph programs. We also reviewed the mission, policies, and procedures guiding each of the units as well as their interaction with other polygraph units and professional organizations. We talked with field supervisory examiners regarding the use and conduct of polygraph examinations and examiner recruitment, training, certification, performance, and oversight.

We traveled to DoDPI, which is located at Fort Jackson, South Carolina; interviewed DoDPI officials; and received a briefing on DoDPI's role. We identified federal training requirements and issues regarding polygraph use in the federal government. We discussed federal technical standards and requirements for the conduct of polygraphs.

To gauge the performance of the Department's polygraph units and examiners, we reviewed quality assurance and internal inspection reports on the FBI, DEA, ATF, and OIG polygraph programs. We used the inspection results to evaluate the overall performance of the units in complying with internal policies and procedures and in meeting established standards for polygraph programs in the federal government.

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## **RESULTS**

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### **SECTION I: Polygraph Programs in the Department of Justice**

#### **THE FBI POLYGRAPH PROGRAM**

##### **Background**

The FBI employed polygraph examiners as early as 1935. In the early to mid-1970s, the FBI sent agents for polygraph training first at Quantico, Virginia, and, in the late 1970s, to the U.S. Army Military Police School at Fort Gordon, Georgia. The FBI centralized its polygraph program in 1978.

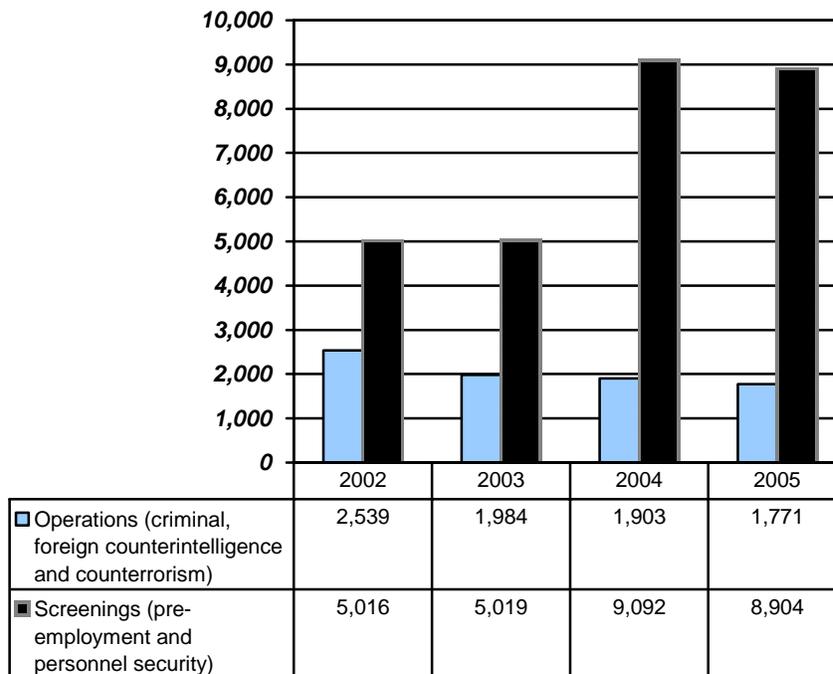
Before the mid-1980s, the FBI used polygraph examinations as an investigation tool in criminal cases. In the mid-1980s, the FBI began conducting polygraph examinations of its own agents when they held sensitive positions. FBI personnel already on duty, including Special Agents, were not required to take polygraph examinations unless they had access to certain sensitive programs or investigations coordinated through outside intelligence agencies. A few Special Agents in sensitive positions were tested when they were detailed to organizations outside the FBI (such as the CIA) where counterintelligence-scope polygraphs were required for authorization to access facilities and information. FBI personnel were also subject to polygraph examinations if they were investigated by the FBI's Office of Professional Responsibility because of misconduct allegations. In 1985, the FBI began limited pre-employment testing and, by 1994, all applicants for FBI employment were required to undergo pre-employment polygraph examinations.

The FBI's Polygraph Program expanded greatly in the wake of the arrest of FBI Special Agent Robert Hanssen for espionage in February 2001. After Hanssen's arrest, the FBI implemented a Personnel Security Polygraph Program that requires specified personnel to undergo personnel security polygraph examinations as a deterrent to those contemplating espionage or engaging in espionage within the ranks of the FBI. Also, the numbers of pre-employment screening polygraph examinations conducted by the FBI have grown significantly since 2001 because of hiring initiatives following the September 11, 2001, terrorist attacks. As shown in Figure 2 on the next page, overall there has been a 30-percent decline in the numbers of

polygraphs conducted by the FBI for operations,<sup>39</sup> but a 78-percent increase in the overall number of screening polygraphs (i.e., pre-employment and personnel security screening) from FY 2002 to FY 2005.

**Figure 2: FBI Polygraph Examinations Conducted and Used for Operational and Pre-employment Screenings**

**(FY 2002 – 2005)**



Source: FBI Polygraph Unit

This shift in polygraph priorities was supported in part by a recommendation in *A Review of FBI Security Programs*, published by the Commission for the Review of the FBI Security Programs (the Webster Commission), dated March 31, 2002. The Webster Commission recommended that the FBI implement a counterintelligence polygraph

<sup>39</sup> As shown in Table 5, on page 55 of this report, the decline in the use of polygraph examinations in operations occurred in their use in criminal investigations not in foreign counterintelligence and counterterrorism. Their use in criminal investigations decreased 43 percent, while their use in foreign counterintelligence and counterterrorism increased by 31 percent from FY 2002 to 2005.

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program for employees and non-FBI personnel with access to Sensitive Compartmented Information (SCI) and special access clearance. Since that time, the FBI has elevated the role of personnel security within the FBI, brought personnel security expertise to the FBI from other intelligence agencies, established a Security Division and appointed a Director of Security, and shifted internal resources (including moving the Polygraph Unit from the Laboratory Division to the Security Division) as part of an ongoing restructuring plan.<sup>40</sup> In June 2002, the FBI Director approved the expansion of the Personnel Security Polygraph Program to make it a permanent part of the FBI security process.

From March 2001 through February 2005, the FBI also expanded the number of FBI positions for which it requires periodic and random personnel security polygraphs for access to sensitive and national security information from approximately 550 positions to 18,384 employees and Joint Terrorism Task Forces (JTTF) members. All personnel assigned to FBI counterintelligence, counter-terrorism, and security programs fall under the requirement for personnel security polygraph examinations, including state and local law enforcement personnel serving on JTTFs. Other FBI elements that require personnel to undergo personnel security screening include the Cyber Division, Records Management Division, Directorate of Intelligence, and Information Technology Operations Division.

According to the Chief of the Personnel Security Adjudication Section and the Chief of the Polygraph Unit, the FBI is considering requiring all personnel who have access to FBI space, information, and information systems to undergo periodic and random counterintelligence-scope polygraph examinations. Non-FBI personnel would also be included, among them employees of other Department components, JTTF members, and FBI contractor employees. Although no specific deadline has been set for imposing this requirement, if implemented, it would raise the number of FBI positions subject to this requirement to approximately 35,000.<sup>41</sup>

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<sup>40</sup> The FBI established “detail” assignments to the Security Division from the CIA and NSA. For example, the FBI’s Assistant Director of the Security Division and the Chief of the Personnel Security Adjudication Section are CIA employees on temporary assignment to the FBI.

<sup>41</sup> This number is based on the FBI’s staffing level of 30,430 employees as of March 2006, an undetermined number of contractors that may be as high as 3,500, approximately 400 persons outside the FBI requiring initial special access, and 1,518 JTTF members.

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To establish an infrastructure to support the expansion of the polygraph program, the FBI Polygraph Unit Chief, in FY 2004, established regional manager positions, which placed a supervisory polygraph examiner in each of seven geographical regions to provide supervisory reviews of polygraph examinations as part of the FBI's quality control process. In addition, the FBI increased its polygraph examiner workforce. In FY 2005, the Polygraph Unit hired 21 new examiners, and all were expected to complete DoDPI training by December 2005.

Besides using polygraph examinations in criminal investigations and personnel security and pre-employment screening, the FBI uses polygraph examinations in counterintelligence and counterterrorism investigations and in misconduct investigations involving FBI employees. The FBI also conducts many of the polygraph examinations requested by Department components that use the results of polygraph examinations but that do not have their own polygraph capability. It also provides support to other organizations such as the Department of State, the Department of the Interior's Bureau of Indian Affairs, and the Department of Defense.

During FY 2005, FBI examiners conducted over 11,000 polygraph examinations in the United States and abroad. The FBI's Polygraph Unit provides support to the FBI's Administrative Services; Counterintelligence, Counterterrorism, Criminal, and Security Divisions; Office of Professional Responsibility, Legal Attaché Offices, and all FBI field offices.

### **Mission and Purpose**

The FBI's Polygraph Unit is located within the FBI's Security Division, in the Personnel Security Adjudication Section. The stated mission of the Personnel Security Adjudication Section is to protect FBI people, facilities, and information by ensuring the trustworthiness of FBI employees and non-FBI personnel through initial and continued vetting and counterintelligence measures. The mission of the FBI Polygraph Unit is to provide polygraph support to the FBI by conducting polygraph examinations in criminal, counterintelligence and counterterrorism, and misconduct investigations; pre-employment and personnel security screening; and as requested by other agencies.

### **Policies and Regulations**

The FBI polygraph program is governed by the FBI Security Division's *Security Policy Manual*, the *Polygraph Examiner Manual*, the FBI's *Manual of*

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*Administrative Operations and Procedures (MAOP), and the Manual of Investigative Operations and Guidelines (MIOG).*

The *Security Policy Manual* was developed in response to recommendations made in the 2002 Webster Commission report and the FBI Director's subsequent security program improvement initiatives. As previously discussed, the Webster Commission was established in March 2001 to review FBI security programs in the aftermath of the Robert Hanssen espionage case. The *Security Policy Manual*, which took effect on December 1, 2005, consolidated FBI security policy regarding the use of polygraph examinations that was previously contained in the MAOP, MIOG, and other applicable security policy documents issued by the Security Division.<sup>42</sup> However, the *Security Policy Manual* does not address the use of polygraph examinations in criminal investigations. The MIOG continues to be the primary source of FBI guidance for the use of polygraph examinations in investigative operations.

The *Security Policy Manual* contains FBI policies regarding the use of polygraph in personnel security matters. Among other things, the *Security Policy Manual* addresses approving authorities, identifies personnel subject to routine polygraph examinations, those subject to specific-issue examinations, the consequences of refusing to take a voluntary polygraph examination, instances in which an FBI employee can be ordered to undergo an examination, and the consequences of a Deception Indicated polygraph result.

The *Polygraph Examiner Manual*, which was last revised in 2006, contains technical guidance for examiners on conducting, evaluating, and reporting the results of a polygraph examination. Its provisions largely reflect those found in the *Federal Examiner Handbook*.

The MIOG, Part 2, is still the primary source of general polygraph policy and procedures and of policy and procedures for the use of polygraph examinations as a tool in criminal investigations. However, the MIOG has not been revised to reflect changes resulting from the reorganization of the FBI's Polygraph Unit, which moved from the Laboratory Division to the Security Division.

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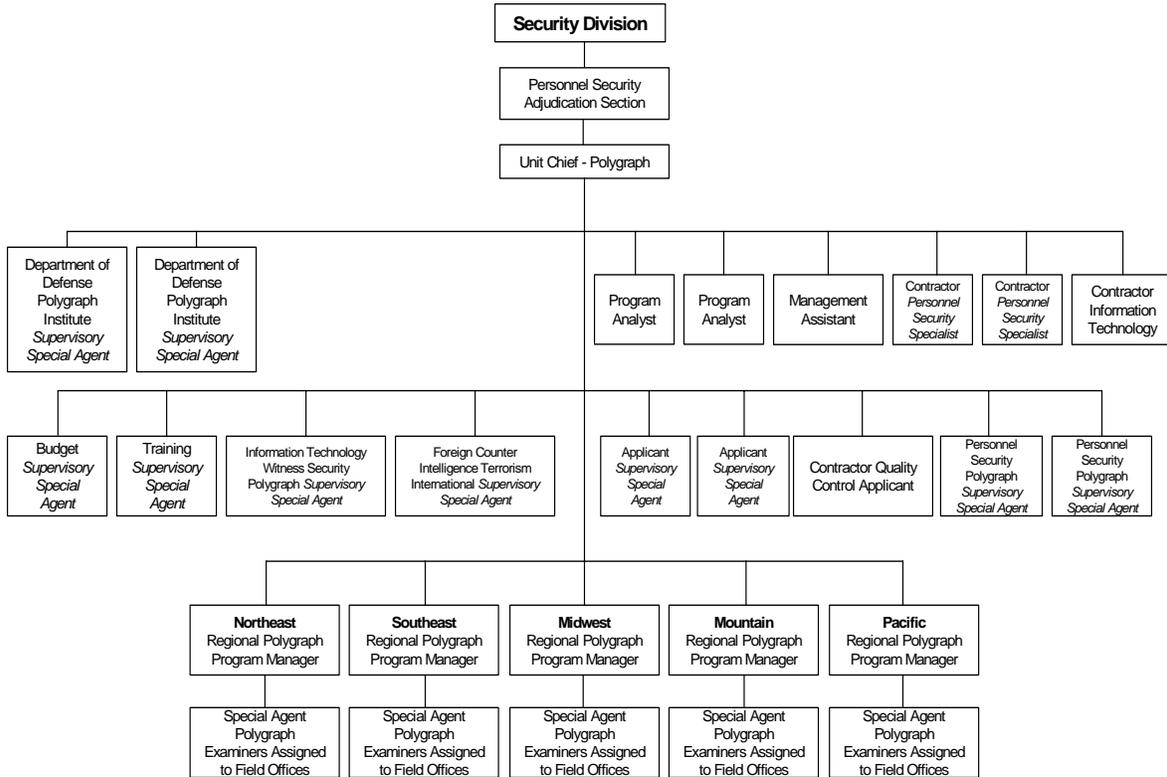
<sup>42</sup> The FBI's *Security Policy Manual*, Section 1.1, Polygraph Program, replaced polygraph policy contained in Part 2 of the FBI's MIOG.

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## Organization and Staffing

The FBI's polygraph program comprises the Polygraph Unit at FBI Headquarters and a field structure comprised of a total of 119 personnel. Chart 2 shows the FBI's polygraph program organizational structure.

**Chart 2: FBI Polygraph Organization Structure**



Source: Organization chart provided by the FBI, with field examiners added by the OIG

### Headquarters Structure and Staff

The FBI polygraph program is managed by the Polygraph Unit, which is responsible for:

- establishing technical standards,
- supervising the work of the Regional Polygraph Program Managers and polygraph work by field examiners,

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- conducting quality control reviews of all FBI polygraph examinations, administering polygraph examinations in high-profile and sensitive investigations,
  - equipping and supplying examiners,
  - coordinating examiner assignments,
  - responding to requests for services from other federal agencies,
  - providing technical assistance to FBI Headquarters personnel and field managers, and
  - conducting training.

As of August 24, 2006, the Polygraph Unit Headquarters had a staff of 18, which included a GS-15 Unit Chief, 2 Supervisory Special Agent Examiners assigned to DoDPI as trainers, 1 management assistant, 2 program analysts, 4 contractor personnel, and 8 Supervisory Special Agent Examiners. Polygraph examinations for pre-employment screening, personnel security, and Inspection Division inquiries that are conducted in the field are primarily initiated and requested by FBI Headquarters staff through the Polygraph Unit.

#### Field Structure and Staff

As of August 24, 2006, the FBI polygraph program's field organization comprised 5 Regional Polygraph Program Managers (regional managers) who were responsible for overseeing the polygraph work of 96 field examiners. Each of the 5 regional managers supervises the polygraph work of between 18 to 20 field examiners who are special agents and conduct polygraph examinations as a collateral duty. They are under the operational supervision of the SAC of their assigned field offices. The field examiner positions include a number that were added in 2005 in preparation for the expansion of the FBI's Personnel Security Polygraph Program.

The FBI created the regional manager positions in 2004 by realigning eight GS-14 supervisory positions from Headquarters to five regions that provide coverage of the field offices. The regional managers are physically located in field division offices and are responsible for providing oversight of all polygraph operations in their assigned geographic regions. The field staff report directly to the Special Agent in Charge (SAC) of their field offices, but receive their administrative direction, quality control reviews, and work performance assessments from the Polygraph Unit. The regional managers conduct quality control reviews of the results of specific-issue polygraph

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examinations conducted in field offices assigned to their region. They also provide direction, training, and assistance to field examiners in their regions and coordinate personnel security polygraph testing of individuals in their region as identified by FBI Headquarters.

### **Polygraph Examination Uses and Procedures**

The FBI uses polygraph examinations for five primary purposes: pre-employment screening, personnel security screening, counterintelligence and counterterrorism investigations, criminal investigations, and administrative investigations. The FBI also conducts polygraph examinations at the request of other federal agencies.

#### Refusing to Take a Polygraph Examination

According to the FBI's *Security Policy Manual*, all polygraph examinations are "voluntary" – any individual can refuse to submit to an examination. Individuals that consent to undergo a polygraph examination must do so in writing. However, although consent is required, a refusal may have negative consequences, including an employee's dismissal from the FBI. Even though an individual may only agree to a polygraph examination to avoid negative consequences, the decision to submit to a polygraph examination is still considered voluntary by the FBI.

The Chief of the Personnel Security Adjudication Section told us that sanctions are decided on an individual basis. The specific consequences of a refusal depend on the purpose for which the polygraph examination would be used (i.e., pre-employment screening, personnel security screening, misconduct investigations, witness security, etc.). For example:

- All applicants for employment with the FBI must consent in writing to submit to and pass a mandatory pre-employment polygraph examination as a condition of eligibility for employment consideration.
- The Fifth Amendment right against self-incrimination protects criminal defendants from being compelled to take polygraph examinations, and the results of a polygraph examination are, by and large, inadmissible in a criminal prosecution. However, some defendants may agree to take a polygraph as part of a pre-sentencing agreement.
- Employees who refuse to submit to mandatory or compelled polygraph examinations, such as during periodic security reinvestigations, or

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investigations of national security matters, may face negative consequences, such as transfer to a position with no access to sensitive information, denial or re-evaluation of their security clearance, or disciplinary action for misconduct (insubordination). Since holding a security clearance is a condition of employment, revocation of an employee's clearance could also lead to dismissal.

- For employees asked to take a polygraph examination related to an administrative matter, the consequences of refusal depend on the circumstances of the request. For example, employees who are subjects or witnesses in routine administrative investigations may decline to take a polygraph examination without adverse administrative consequences.

Only specific senior FBI officials are authorized to compel FBI employees and certain others to submit to polygraph examinations under specific circumstances, according to the *Security Policy Manual*. The Assistant Director, Security Division, is authorized to compel any FBI employee or a non-FBI person with access to FBI information or facilities to submit to a polygraph examination to resolve specific issues that may have an impact on a person's trustworthiness.<sup>43</sup> The Assistant Director, Inspection Division, can compel an employee to submit to a polygraph examination to resolve an issue during the investigative phase of a disciplinary matter *if* the employee first refuses voluntarily to take a polygraph *and* if the matter involves one or more of the following seven serious violations:

- Intentional and unauthorized release of sensitive, protected information;
- Relationship with or allegiance to a foreign power;
- Illegal or improper exercise of influence;
- Intentional and unauthorized destruction, alteration, misplacement, taking, falsification or other impairment of FBI documents or evidence;
- Use of or unauthorized dealing in controlled substances;
- False statements or the failure to candidly disclose information; and

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<sup>43</sup> As defined by Executive Order 12968 and related Adjudication Guidelines.

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- Theft, fraud, and misuse of government money and property.

When an FBI official orders an employee to submit to a polygraph during an administrative investigation, the *Security Policy Manual* requires the official to first inform the employee of the consequences of a refusal and that failure to cooperate during the requested examination will be considered a refusal. If an employee refuses to take an examination when compelled during the adjudication process, the FBI's Office of Professional Responsibility can treat the refusal as if the subject had failed the examination. However, the FBI policy also states that an employee's refusal to take a polygraph when compelled will not by itself substantiate the original misconduct charge.

### Inconclusive or Deception Indicated Results

The FBI also has policy concerning actions that may be taken based on the results of polygraph examinations. For pre-employment polygraph examinations, if the examination results are Deception Indicated, or if the examiner cannot render an opinion, then the applicant normally is not hired. The FBI policy allows an applicant to appeal the results of a polygraph examination, in which case the FBI may grant the applicant a retest.

For polygraph examinations administered to employees, if the results are Inconclusive, Deception Indicated, or No Opinion, and the employee makes no admission, then the test result is considered "unexplained" or referred to as an "examination pending resolution." The FBI policy states that no adverse action will be taken based solely on the results of a polygraph examination. In October 2005, the Chief of the FBI's Personnel Security Adjudication Section told us that the FBI had not taken adverse action against any employee based solely on the results of a polygraph examination. Instead, the FBI may retest the employee or initiate an investigation to resolve the issues raised by the examination.

In the case of a personnel security polygraph, the Polygraph Unit reports "unexplained" results to the Assistant Director, Security Division, who functions as the FBI's Security Program Manager. The Assistant Director, Security Division, in conjunction with the employee's division head, the Counterintelligence Division, and other appropriate management officials, initiates (1) a security risk assessment of the employee's continued access to sensitive information and (2) an investigation to resolve the unexplained results. An employee working in a sensitive area may be reassigned until the investigation is completed. If derogatory information is

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uncovered during the investigation, the employee may be suspended or the employee's security clearance may be revoked. However, if no information is developed that indicates the examinee has engaged in a prohibited activity, the Security Division conducts an assessment of the security risk of allowing the person continued access to sensitive or national security information. According to the Chief of the Personnel Security Adjudication Section, the FBI has employees whose polygraph examinations resulted in an Inconclusive or Deception Indicated opinion, but the results were not corroborated by a follow-on investigation, and those employees have been cleared to continue working.

The policy and processes for conducting each type of polygraph examination vary slightly. In the following sections, we discuss each use.

### Pre-Employment Polygraphs

Under FBI security policy, all job applicants must undergo a pre-employment polygraph examination on issues that relate to their trustworthiness.<sup>44</sup> The process begins when an applicant receives a "Conditional Job Offer" for a position at the FBI and completes a Personnel Security Interview, which may be conducted by an FBI agent. The Security Division's Personnel Security Investigations Section makes a request to the Polygraph Unit to conduct polygraph examinations of applicants for both FBI Headquarters and field office positions. From FY 2002 through 2005, the FBI performed 23,310 pre-employment polygraph examinations.

For applicants for Special Agent positions, the FBI conducts the polygraph examination before beginning the background investigation. That enables the FBI to limit the costs of conducting a background investigation when applicants are determined to be ineligible for employment based on their polygraph examination results, e.g., they admitted to disqualifying behavior during the examination process. The FBI investigators are also able to use information gathered during the polygraph examination to focus background investigations. FBI Security officials said that, before 2005, all applicants were given polygraph examinations before their background investigations were initiated, but in 2005 the FBI decided to begin the background investigation process for non-agent applicants before conducting their polygraph examinations as a time-saving measure.

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<sup>44</sup> Some FBI agents were administered pre-employment polygraph examination examinations in the mid-1980s. The FBI's requirement for pre-employment polygraph examinations was extended to all prospective applicants in 1994.

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Pre-employment polygraph examinations are generally conducted by field office examiners working directly with the field office applicant coordinators and the Polygraph Unit. The examiners use information gathered during the Personnel Security Interview in formulating test questions during the pretest phase of the examination. The applicants are then given non-specific, full-scope polygraph examinations. Once an examination is completed, the examiner forwards the records and the examiner's initial opinion on the results to the Polygraph Unit at FBI Headquarters for an independent quality review. For completed pre-employment polygraph examinations, there are three potential outcomes – No Deception Indicated, Deception Indicated, and Inconclusive – Inconclusive – based on the final opinion:

- When the final opinion is No Deception Indicated, the applicant's employment processing continues. The applicant may be hired after successfully completing the remaining requirements, such as a successful background investigation.
- When the final opinion is Deception Indicated, the results are reported to adjudication officials who decide whether to disqualify the applicant or, based on other information available to the adjudicators, request that the applicant be retested. According to FBI Security officials, the Personnel Security Adjudications Unit makes all hiring decisions. FBI officials reported that test results in which an applicants have been determined to have been deceptive have been validated by confessions or admissions in over 50 percent of all cases.
- FBI officials said that when an applicant's test result is Inconclusive, the applicant is automatically retested. However, if an examiner suspects that an applicant is attempting to use countermeasures and the examiner's suspicion is confirmed during the quality control review, or the supervisory reviewer detects the use of countermeasures during their review, the Polygraph Unit usually recommends that the applicant receive no further testing.

The FBI does not have written policy or procedures that require FBI officials to report the results of a failed polygraph examination to an applicant's employing agency when the applicant is already a federal employee who is applying for an FBI law enforcement position. According to an FBI official in the Security Division, Adjudication Section, each case "would be examined and particular attention would be given to foreign

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counterintelligence issues.” The official said that the FBI would have an obligation to report an Inconclusive or Deception Indicated result that the FBI could not resolve to the employee’s home agency. She said that, should the polygraph examination raise a foreign counterintelligence issue, the FBI would refer the matter to its Counterintelligence Division for follow-up. The applicant’s information would also be entered into an FBI database that is used to alert other agencies of an applicant who might go from agency to agency trying to get hired. She said the FBI would also contact an appropriate security official in the Department’s Security and Emergency Planning Staff (SEPS).<sup>45</sup> However, she was not aware of any instances in which the FBI had reported such information on a Department employee to SEPS. She said there had been instances in which polygraph results of employees from other departments were referred to the employing agency.

### Personnel Security Polygraphs

As of January 24, 2006, all FBI and non-FBI personnel assigned to the FBI’s Directorate of Intelligence, Counterintelligence Division, Counterterrorism Division, Cyber Division, Security Division, Office of the Chief Information Officer, and the Information Technology Operations Division were required to undergo random and periodic polygraph examinations.<sup>46</sup> In addition, selected personnel with access to FBI information or facilities who are identified by the Assistant Director, Security Division, as persons whose circumstances suggest that they are or could be subjected to coercive influences also may be asked to submit to a polygraph examination on a periodic basis.<sup>47</sup> The personnel security polygraph program is intended to serve as an investigative tool and as a deterrent to espionage. The FBI Director has delegated to the Assistant Director of the Security Division the authority to approve polygraph

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<sup>45</sup> Department security officials with SEPS told us that SEPS does not have a process for receiving notifications when a Department employee’s polygraph results in an Inconclusive or Deception Indicated. They also told us they were not aware of a requirement for Department agencies such as the FBI, DEA, or ATF to notify SEPS when a Department employee fails or has an inconclusive polygraph. The SEPS official did recall being notified by the FBI in at least one instance in which a Department employee’s polygraph examination raised security issues.

<sup>46</sup> Examples of these non-FBI personnel include JTTF members, contractors, and others who are covered by FBI policy and who perform functions requiring access to “sensitive” FBI information, systems, or space in the specified FBI offices and divisions.

<sup>47</sup> Coercive influences include extortion, blackmail, and situations where a relative may be held hostage.

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examinations relating to security clearance adjudication and to compel any FBI or non-FBI personnel with access to FBI information or facilities to submit to a polygraph examination to resolve specific security issues.

Between 2001 and 2005, the number of FBI and non-FBI personnel subject to mandatory random and periodic testing under the Personnel Security Polygraph Program increased from 550 to 18,384. The FBI conducted a total of 4,721 personnel security polygraph examinations from FY 2002 through 2005.

The FBI's *Security Policy Manual* contains a provision concerning a potential future expansion of the FBI's Personnel Security Polygraph Program, "This policy will expand to apply to other FBI divisions over time." The Chief of the Personnel Security Adjudication Section explained that this provision reflects the FBI's consideration of a plan to expand the requirement for periodic and random counterintelligence-scope polygraph examinations to all of the FBI's approximately 35,000 employees, contractors, task force members, and a number of non-FBI personnel with special access. According to the Chief of the Personnel Security Adjudication Section, the FBI's plan is meant to improve personnel security, deter and detect espionage, and counter criticisms of the FBI's security program in the wake of the Hanssen spy case. The Section Chief said that the FBI's program was being expanded in response to recommendations contained in the Webster Commission's report and because the FBI wants to strengthen its security program in awareness of insider threats to security.<sup>48</sup> FBI officials began implementing this program in 2001 and have since increased the number of affected positions from 550 in 2001 to approximately 18,000 in 2005, with approximately 400 non-FBI personnel also being polygraphed each year.<sup>49</sup>

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<sup>48</sup> The Webster Commission report actually recommended restricting the FBI's use of personnel security polygraphs. Citing the experience of the CIA when it implemented a similar plan, the Webster Commission cautioned the FBI concerning the potential risks to innocent individuals' careers in terms of delays in assignments and promotions and damage to employee morale. The Commission also cautioned the FBI against an over-reliance on polygraph examinations for personnel security and recommended the FBI "adopt a counterintelligence test in reinvestigations of employees and non-FBI personnel with SCI and special access clearances. This approach focuses on personnel who may pose the greatest risk to national security and minimizes the risk of false positives."

<sup>49</sup> Non-FBI personnel include local law enforcement agency personnel assigned to counterterrorism task forces. The FBI's Personnel Security Polygraph Program has been expanded to include all Joint Terrorism Task Force officers, contract linguists, and industrial security contractors with SCI access.

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According to the Chief of the Personnel Security Adjudication Section, that office, in conjunction with a Field or Division Security Officer, notifies employees when they have been randomly selected for a polygraph examination or when they will be required to undergo a polygraph as part of a periodic security reinvestigation. If the employee refuses to take a polygraph examination, the employee may be transferred to a less sensitive position, referred to the FBI's Office of Professional Responsibility, subjected to a security risk assessment, or have his or her security clearance reevaluated. Employees who consent to polygraph examinations first undergo Personnel Security Interviews with their Security Officers. The employees are then given polygraph examinations by examiners who are personally unfamiliar with the subjects. Individuals who are subject to personnel security polygraph examinations receive non-specific, counterintelligence-scope security polygraphs. According to FBI officials, test questions are limited to security issues raised by federal adjudication guidelines.

After the examination is completed, the examiner forwards an examination report to the Polygraph Unit at FBI Headquarters, where it undergoes a quality review by a supervisory examiner who issues a final opinion on the results of the examination and forwards a report to the Security Division. According to the Chief of the FBI's Personnel Security Adjudication Section, the potential outcome for a completed personnel security examination is based on the final opinion:

- When the final opinion is No Deception Indicated, the Polygraph Unit notifies the Security Program Manager that the employee "passed" the examination.
- When the final opinion is Inconclusive or No Opinion, the Personnel Security Adjudication Section usually orders a retest to see whether the examiner can reach a conclusive, final opinion – that is, a finding of Deception Indicated or No Deception Indicated. If the retest does not result in a conclusive opinion of No Deception Indicated, the FBI will conduct a security risk assessment or an investigation to resolve the issues.
- When the final opinion is Deception Indicated, the FBI will attempt to determine whether the employee poses a security risk. The Analysis and Investigations Unit may conduct a more focused background investigation of the employee, including a thorough interview in an attempt to resolve the issues. The Security Program Manager can also recommend a range of other actions

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such as another retest, reassignment to a less sensitive position, or the initiation of a criminal investigation. According to FBI officials, an agent in a sensitive position will be reassigned until issues stemming from the examination can be resolved. If the individual is not in a sensitive position, he or she may be allowed to remain in the position. If the Analysis and Investigations Unit finds no evidence to corroborate an issue of potential deception, the Security Program Manager may wait to act until the employee undergoes another periodic security examination. According to FBI Security officials, the FBI has never discharged an FBI employee solely on the basis of a personnel security polygraph examination.

In 2004, the Security Division initiated a process for compelling personnel to undergo a polygraph examination to resolve specific issues regarding their trustworthiness. In such cases, the Assistant Director of the Security Division is authorized to compel any FBI or non-FBI personnel with access to FBI information or facilities to take a polygraph examination if the employee is suspected of unauthorized contact with or providing sensitive or classified information to a foreign intelligence service or if the employee poses a security risk to the FBI in some capacity.

#### Foreign Counterintelligence and Counterterrorism Investigations

The FBI uses polygraph examinations during counterintelligence and counterterrorism investigations to resolve specific issues related to espionage, sabotage, or validation of information sources, as well as to make resource decisions such as whether to conduct surveillance. FBI officials told us that the process for initiating, approving, and conducting polygraph examinations and using their results in counterintelligence and counterterrorism investigations is similar to that for criminal investigations. As with polygraphs conducted for criminal investigations, which will be discussed in the next section, the FBI Director has delegated approving authority for polygraph examinations used in connection with non-administrative investigations to the Assistant Director in Charge, SAC, or person acting in that capacity on a specific investigation. Consistent with that policy, polygraph examinations conducted in counterintelligence and counterterrorism investigations require the written approval of the Assistant Director in Charge or the SAC of the relevant field office. The FBI conducted a total of 1,994 counterintelligence and counterterrorism polygraph examinations from FY 2002 through 2005.

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Polygraphs conducted for counterintelligence investigations are overseen by the Counterintelligence Division, which provides centralized management and oversight of all foreign counterintelligence investigations. Any government agency can refer a case for investigation by the Counterintelligence Division, including requesting a polygraph examination. As with polygraph examinations used in other FBI investigations, the case agent requests authorization to conduct a polygraph examination from the SAC of the field division.<sup>50</sup> The Counterintelligence Division also has to give permission before a field office can interview a case subject, including conducting a polygraph examination. The Section Chief, Counterespionage Section (part of the Counterintelligence Division), said that the decision on whether to use a polygraph examination depends on the specifics of each case. According to the Chief of the Counterespionage Section, between 65 and 85 percent of the subjects in espionage cases undergo polygraph examinations.

The conduct of a polygraph examination in a counterintelligence investigation depends on the purpose for the test. Polygraph examinations are also used during counterintelligence investigations to validate sources in high-risk investigations and at the end of investigations as a final check of case facts. The results obtained through polygraph examinations during counterintelligence investigations may be used several ways. If the case began as a referral from another agency, the results would be provided to the referring agency, and that agency would take the appropriate action. If the subject was an FBI employee and they did not pass the foreign counterintelligence elements of the polygraph test, further investigation would be conducted.<sup>51</sup> If that investigation confirmed the results of the polygraph, and no foreign government was involved, the case would be referred to the FBI's Office of Professional Responsibility for adjudication. If a foreign government was involved, and a crime was detected, the case would be referred to the Criminal Investigative Unit for prosecution.

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<sup>50</sup> The Assistant Section Chief of International Terrorism Section I of the Counterterrorism Division said that all counterterrorism investigations are criminal in nature and are based in one of the FBI's 56 field offices.

<sup>51</sup> A counterintelligence or counterterrorism investigation can sometimes involve an FBI employee. The FBI has had approximately 15 espionage cases in the past 10 years that involved FBI employees, including the case of former Special Agent Robert Hanssen and, more recently, analyst Leandro Aragoncillo. These are categorized as personnel security cases and handled by the FBI's Security Division.

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## Criminal Investigations

The FBI uses polygraph examinations during criminal investigations to resolve specific issues related to developing investigative leads and information; to verify information provided by subjects, witnesses, and informants; and to elicit confessions. The FBI Director has delegated approving authority for polygraph examinations used in connection with non-administrative investigations to the Assistant Director in Charge, SAC, or person acting in that capacity on a specific investigation. In field offices, the SAC can authorize polygraph examinations in connection with ongoing cases. From FY 2002 through 2005, the FBI performed 6,203 polygraph examinations related to criminal investigations.

Requests for specific-issue polygraph examinations that originate in the FBI's field offices are handled and scheduled by the polygraph examiner assigned to that field office. The case agent usually talks with an examiner to determine whether a polygraph examination should be conducted. The case agent obtains the SAC's approval for conducting the test, and the examiner and the case agent set a mutually agreeable date for conducting the test.

Prior to an examination, the examiner discusses with the case agent the facts and issues of the case and why a polygraph examination is needed. All examinees must voluntarily consent in writing to undergo a polygraph examination. After the FBI issues a final opinion on the results of a polygraph, a copy of the polygraph report and test charts are provided to the case agent for inclusion in the investigative file. If the examination was requested by an Assistant United States Attorney, the case agent or the agent's supervisor is responsible for providing the attorney with a copy of the polygraph examination report.

In general, the results of polygraph examinations in criminal investigations are used as a tool to focus and direct the investigation and to elicit information and confessions. According to Department policy, the results of polygraph examinations are generally not used in court proceedings. However, voluntary admissions and statements made by individuals during examinations may be used in testimony.<sup>52</sup>

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<sup>52</sup> See *U.S. Attorneys' Manual*, Title 9 – Criminal Division, Chapter 9-13.300 Polygraphs – Department Policy; 9-21.340, Polygraph Examinations for Prisoner-Witness Candidates; and 9-21.600 Prisoner-Witnesses, October 1999. See also the *Criminal Resource Manual*, at 259 *et seq.*, for a discussion of case law on polygraph examinations.

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## Misconduct Investigations

The FBI conducts polygraph examinations to resolve allegations against FBI employees or to confirm the veracity of a complainant in an administrative investigation involving potential disciplinary action. The FBI conducted a total of 128 polygraph examinations related to misconduct investigations from FY 2002 through 2005. The FBI Director has delegated the authority to approve polygraph examinations concerning employee disciplinary matters to the Assistant Director, Inspection Division. FBI regulations identify two types of administrative polygraph examinations – a voluntary examination and a compelled examination an employee is ordered to take. The FBI’s Inspection Division decides whether or not to conduct an investigation and, if so, whether it will request an employee to volunteer to take a polygraph or order an employee to submit to a polygraph when needed. The results of these polygraph examinations are used to make investigative or adjudicative decisions.

## Other Agency Requests

The Polygraph Unit has provided services for the DEA and BOP and also for other federal agencies, including the Department of Defense, Department of State, and the Department of the Interior’s Bureau of Indian Affairs. It has routinely conducted polygraph examinations for the Department’s ATR, Criminal Division, JCC, NDIC, OPR, and USMS. The unit has also provided foreign governments with support – primarily the governments of Mexico and Colombia – by conducting polygraph examinations of their investigation units. Between FY 2002 and 2005, the FBI’s Polygraph Unit reported that FBI examiners conducted 1,661 polygraph examinations at the request of other federal agencies and foreign governments.

An outside federal agency or foreign government must provide a written request for services. A polygraph examination will be conducted in response only after the Assistant Director, Security Division has approved the request and the Polygraph Unit has determined that resources are available and that FBI priorities will not be affected by responding to the request. When a polygraph examination is done in response to one of these requests, the Polygraph Unit is responsible for arranging and scheduling the examination if it is to be conducted by an examiner at FBI Headquarters. If it is to be done in the field, the SAC of the field office must also approve the request, and an examiner in the field office schedules and conducts the examination. The requesting agency receives a copy of the examination

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report and a copy of the report is also retained for 2 years in the examiner's file.

### **Examiner Qualifications and Training**

The FBI selects polygraph examiners from among its Special Agent workforce. Candidates must have at least 5 years of FBI investigative experience and demonstrated success as an interviewer, interrogator, and case agent in complex investigations. Candidates must also have the ability to perform well under stress and in confrontational situations. Prior to selection, examiner candidates must undergo a personnel security polygraph examination.

Candidates with prior experience at conducting polygraph examinations must have completed a basic polygraph course at a polygraph school approved by the FBI or certified by the American Polygraph Association. Candidates who are not experienced examiners or do not have training from an approved school are sent to DoDPI's 14-week course for examiner trainees. After graduation from the DoDPI course, new examiners are mentored by a senior examiner during a supervised internship. New examiners receive 1 week of specialized training in the Polygraph Unit, and their first 12 examinations are monitored by a senior examiner. Examiners who successfully complete all required training and a 1-year internship, during which they complete at least 48 polygraph examinations, are certified by the FBI. FBI examiners are required to complete at least 48 polygraph examinations a year to maintain their certification. They also must complete a minimum of 80 hours of polygraph-related training every 2 years as part of their continuing education. Because of the extensive training provided to new FBI examiners, they are expected to serve for a minimum of 3 years.

As of December 2005, the FBI Polygraph Unit's supervisory personnel had an average of 18 years of investigative experience and an average of 9 years of polygraph experience. Field examiners had an average of 17 years of investigative experience and 9 years of polygraph experience.

### **Workload and Program Costs**

The FBI's polygraph program is the largest in the Department, both in the number of polygraph examinations conducted each year and the financial resources dedicated to the program. From FY 2002 through 2005, the FBI conducted 38,017 polygraph examinations (Table 4). The number of examinations conducted annually increased by approximately 45 percent

from FY 2002 to 2005. Most of the increase resulted from increases in the number of pre-employment and personnel security polygraph examinations, which by FY 2005 accounted for approximately 79 percent of the polygraph examinations conducted by the FBI. At the same time, the FBI's use of polygraph examinations in criminal investigations dropped by over 40 percent, from almost 2,100 to about 1,200.

|              | <b>Pre-<br/>Employment</b> | <b>Criminal</b> | <b>Personnel<br/>Security</b> | <b>FCI/CT<sup>a</sup></b> | <b>Misconduct</b> | <b>For Other<br/>Agency</b> | <b>Total</b>  |
|--------------|----------------------------|-----------------|-------------------------------|---------------------------|-------------------|-----------------------------|---------------|
| <b>2002</b>  | 4,685                      | 2,098           | 331                           | 441                       | 33                | 166                         | <b>7,754</b>  |
| <b>2003</b>  | 4,354                      | 1,562           | 665                           | 422                       | 39                | 378                         | <b>7,420</b>  |
| <b>2004</b>  | 7,848                      | 1,351           | 1,244                         | 552                       | 35                | 537                         | <b>11,567</b> |
| <b>2005</b>  | 6,423                      | 1,192           | 2,481                         | 579                       | 21                | 580                         | <b>11,276</b> |
| <b>Total</b> | 23,310                     | 6,203           | 4,721                         | 1,994                     | 128               | 1,661                       | <b>38,017</b> |

<sup>a</sup> Counterintelligence (CI) and Counterterrorism (CT).

Source: FBI Polygraph Unit

As previously discussed, the FBI is considering policy changes that could increase the number of FBI and non-FBI personnel required to undergo periodic or random personnel security polygraph examinations to approximately 35,000 individuals. If the FBI requires all 35,000 employees to undergo personnel security polygraph examinations, the number of personnel security examinations would increase from 2,481 conducted in FY 2005 to over 7,000.

#### Polygraph Program Costs

At our request, the FBI's Polygraph Unit and budget and finance offices provided us with estimates of polygraph program budget and cost data for FY 2003, 2004, and 2005. In FY 2002, the Polygraph Unit did not have a separate budget because it was part of the FBI's Laboratory Division, and funding for the polygraph program was not separately identified within that Division's budget. Subsequently, the Polygraph Unit was transferred to the FBI's Security Division. Although records of the funding dedicated to the polygraph program were not maintained, the FBI estimated for us that it spent approximately \$6 million in FY 2002 to establish the polygraph

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program as part of the Security Division and to cover the salaries of its full-time examiners.<sup>53</sup>

The FBI requested additional funding for FY 2003 to expand its polygraph program to conduct an additional 7,100 personnel security polygraph examinations annually. For FY 2003, Congress provided an additional \$6.8 million, which included \$4.5 million for Polygraph Unit operations and \$2.3 million for hiring 15 new examiners and 2 new program analysts. These additions raised the authorized number of examiners from 73 to 88. The money requested for hiring new examiners included only the costs for new examiner training and equipment, not the cost of salaries. In the FBI, all personnel costs are centrally funded and managed. The FBI estimated for us that its FY 2003 expenditures for Polygraph Unit operations, authorized new hires, and full-time examiner salaries was approximately \$7.5 million.<sup>54</sup>

In its FY 2004 budget request, the FBI sought another budget enhancement of \$5.7 million for hiring, training, and equipping 32 additional examiners and 5 support personnel, and \$1.4 million for non-personnel costs. The FBI planned to increase the number of examiners from 88 to 120 to handle its projected polygraph workload. Congress provided \$6.4 million, which included approximately \$1.4 million for non-personnel costs and \$5 million for hiring 32 additional examiners and 5 additional support staff. The FBI estimated for us that its expenditures for FY 2004 were approximately \$8.9 million for Polygraph Unit operations, new examiner training, equipment, and full-time examiner salaries.

In FY 2005, the FBI did not request or receive a budget enhancement for its polygraph program. At the beginning of FY 2005, the Polygraph Unit, working with the Security Division Program and Plans Unit, estimated \$5.8 million in recurring funding needs and developed an annual spending plan that designated funds for operational and training travel, conference expenses, education, supplies, consulting services, and equipment. During the course of the fiscal year, the Security Division received approximately \$3.3 million in various budget cuts for the polygraph program. Consequently, the FBI's polygraph program had a net authorization of approximately \$2.5 million in FY 2005.

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<sup>53</sup> The FBI's estimated expenditures do not include the costs for facilities build-out, General Services Administration rent, and field office costs for part-time examiners.

<sup>54</sup> The FBI's Personnel Security Adjudication Section Chief said that the Security Division does not have the ability to estimate the costs of the hours that examiners devote to activities other than polygraph examinations.

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## Quality Control and Oversight

The quality control and oversight mechanisms for the FBI's polygraph program include quality control provided by the FBI's Polygraph Unit, internal oversight by the FBI's Inspection Division, and external quality assurance provided by the DoDPI Quality Assurance Program. Each of these efforts is described below.

### Quality Control

The FBI's Polygraph Unit implements the FBI's internal quality control review process. According to the *Federal Examiner Handbook*, each agency within the federal government with a polygraph examination capability must maintain a program and procedures for conducting independent and objective quality control reviews of all polygraph reports, technical documents, and polygraph charts. The reviews are intended to ensure satisfactory quality and the correctness of examiner opinions on the results of polygraphs. Under the FBI's procedures, all polygraph examination records undergo a supervisory review before final opinions on the results are rendered. For each specific-issue polygraph examination, the field examiner forwards the original and one copy of the polygraph report, test data, and all other related documents to the Regional Polygraph Program Manager for a quality control review. All other polygraph examinations are forwarded to the FBI Polygraph Unit for a quality control review.

Following a quality control review, the polygraph materials for a criminal or foreign counterintelligence or counterterrorism polygraph examination are returned to the examiner. Polygraph materials for other matters are forwarded to the proper unit or outside agency for review and storage.

The Polygraph Unit's quality control process consists of a supervisory review of the test data from each examination. The supervisory review must be completed before the examination result is considered final. If the reviewing supervisor disagrees with the examiner's conclusion, the supervisor may request a second review by another supervisor. In some cases, the Unit Chief may be asked to review the data and provide the final decision. If the reviewing supervisor agrees with the examiner's initial conclusion, the examination record is returned to the examiner. The DoDPI inspection reports on the FBI's Polygraph Unit that we reviewed consistently stated that the FBI's internal quality control process resulted in a thoroughly independent and objective review of all polygraph examinations conducted by FBI examiners.

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## Internal Oversight

The FBI Inspection Division provides internal oversight of all FBI divisions through triennial reviews. The Polygraph Unit was last inspected in August 2004 as part of a review of the productivity of each unit in the Security Division. The inspection examined the unit's administrative management, operations management, and performance. The inspection did not report any management deficiencies and concluded that the Polygraph Unit was effectively and efficiently managed. The inspection did not include any specific assessment of polygraph examiner performance or compliance with federal polygraph standards.

## External Quality Assurance

In January 2006, the FBI polygraph program was certified by DoDPI for the first time since the FBI agreed, in 2002, to allow a limited quality assurance review by the DoDPI Quality Assurance Program. DoDPI conducted four inspections during FY 2002 through 2006. During each of the inspections, DoDPI reviewed 118 criteria in 9 primary areas specified in the *Quality Assurance Program, Inspection Manual Standards and Criteria* (1999). In the 3 inspections conducted in FY 2002 through 2005, DoDPI inspectors reviewed a total of 318 criminal, specific-issue, and pre-employment polygraph examination records, or approximately 100 records during each inspection. During those years, the FBI allowed DoDPI inspectors to review only records of examinations conducted for criminal investigations and pre-employment screenings. DoDPI was not allowed to review the records of examinations conducted for the WITSEC Program, Personnel Security, Office of Professional Responsibility, or Foreign Counterintelligence and Counterterrorism programs.<sup>55</sup> Although limited in scope, the DoDPI inspections resulted in a number of findings and recommendations that, had they been implemented, would have brought the FBI into full compliance with federal standards found in the *Federal Examiner Handbook* and resulted in DoDPI's certification of FBI compliance. However, some of the issues DoDPI raised involved repeat findings that were not resolved until January 2006. In DoDPI's FY 2006 inspection report, the results of a review of 100 polygraph examination records resulted in four

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<sup>55</sup> According to DoDPI inspection reports, the FBI requested that polygraph records from these programs not be reviewed because of the sensitive nature of the programs. In FY 2006, the FBI allowed DoDPI inspectors to review the results of personnel security polygraph examinations but, as it had previously, requested that polygraphs conducted for the Witness Security, Office of Professional Responsibility, and Foreign Counterintelligence and Counterterrorism programs not be included as part of the inspection.

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recommendations that were resolved within the resolution period. DoDPI then certified the FBI polygraph program for the first time.

DoDPI inspection reports for FY 2002 through 2004 noted repeated instances of noncompliance with the federal polygraph standards. For example, DoDPI found that the FBI was using nonstandard techniques and practices during polygraph examinations, and noted that FBI examiners:

- Used improperly constructed polygraph test questions. DoDPI criticized the FBI for using “sensitive norm” comparison questions, which are a type of irrelevant question that mentions the relevant issue.<sup>56</sup> The FBI was also using probable-lie comparison questions that were not clearly separated from the relevant issue.<sup>57</sup> Federal standards do not allow for the use of sensitive norm questions, and probable-lie questions are allowed under federal standards only if they are constructed so that they are clearly separated from the relevant issue by time, place, or category. The FBI’s Polygraph Unit Chief told us that in May 2005 he instructed FBI examiners to stop using sensitive norm questions. In response to DoDPI’s concerns over improperly constructed probable-lie questions, the FBI agreed to issue instructions to the field examiners to create a clear dichotomy between relevant and comparison questions.
- Rarely conducted known-solution acquaintance tests. The *Federal Examiner Handbook* recommends as a best practice that subjects receive a known-solution acquaintance test before they are given a polygraph examination to familiarize the examinee with the basic concepts of the examination and to demonstrate the reliability of

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<sup>56</sup> According to the FBI Polygraph Unit Chief, although sensitive norm questions address the relevant issue, they do not encompass the relevant area for which the examination is being conducted. For example, an FBI examiner inquiring about the use of illegal drugs may ask, “Have you ever been around friends or relatives who have used illegal drugs?” to overcome examinee concerns about their response to a relevant question (i.e., if the examinee used drugs themselves). The examinee may not use drugs, but a member of his or her family may and the fact of the family member’s drug use may cause a “false” reaction to a relevant question about the examinee’s own drug use. The Chief of the DoDPI Quality Assurance Program said that there has been no research to support the use of sensitive norm questions or to determine what effect(s), if any, their use might have on the outcome of the polygraph examination.

<sup>57</sup> Probable-lie comparison questions are constructed so that most people who answer “no” will be lying. An example of a probable-lie question would be, “Have you ever stolen anything?”

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the polygraph. However, DoDPI reported that few subjects were given this type of acquaintance test (2 of 55 in 2002; and 3 of 48 applicant examinations and 24 of 57 specific-issue examinations in 2004). After the 2004 inspection, the FBI agreed to revise its policy to require examiners to conduct appropriate acquaintance tests for subjects that had not previously undergone a polygraph examination. In all other cases, FBI field examiners' use of the acquaintance test would be discretionary. Nevertheless, FBI polygraph policies still allowed examiners to conduct *unknown* solution acquaintance tests – a test for which there is no empirical research and that all other federal agencies have discontinued using.

- Rendered opinions not supported by standard test data analysis techniques. In 2004, DoDPI reported three issues related to the opinions rendered by FBI examiners. DoDPI reported that in 9 of 48 pre-employment polygraph records it reviewed, the FBI field examiners had rendered conclusive opinions that were not in accordance with standard numerical evaluation procedures and cutoff scores. In these cases, the FBI examiners rendered an opinion of No Deception Indicated or Deception Indicated when standard scoring techniques would have resulted in an opinion of Inconclusive. DoDPI also reported that FBI examiners did not always follow federal standards that require them to evaluate all the test results (such as respiration, heart rate, and skin reactions) before rendering an opinion. In six of the nine cases that DoDPI questioned, the FBI examiners had rendered their opinions based on only two components of the test. Finally, DoDPI found that FBI examiners used a “global evaluation technique” in which a subjective conclusion is rendered on the overall polygraph test, rather than by a systematic numerical comparison among questions.<sup>58</sup>
- Destroyed score sheets. In the inspections conducted in FY 2002 through 2004, DoDPI reported that the FBI routinely destroyed the

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<sup>58</sup> In October 2005, the Chief of the FBI Polygraph Unit told us that the FBI used global scoring in these instances because he believed the use of standard cutoff scores would have resulted in too many Inconclusive results and subsequent retests. He said that global scoring allows the examiner to use his experience and judgment in assessing the test subject's responses when the scoring is close. He also said that polygraph schools other than DoDPI use different scoring formats and different numerical scales and that examiner experience is important in evaluating physiological indicators of deception.

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score sheets that examiners and supervisors prepared when examining polygraph test results. Under federal standards, the score sheets are part of the permanent examination record. However, according to the FBI's polygraph procedures, quality control personnel in the FBI's Polygraph Unit destroy the score sheets after rendering a final opinion on the test results.<sup>59</sup> After DoDPI raised this issue for the third time in 2004, the FBI's Polygraph Unit responded that the score sheets are meaningless because only the determination of the quality control supervisor at Headquarters is final. The Chief of the FBI Polygraph Unit also asserted that the score sheets could be used to raise questions in court concerning the credibility of the FBI's polygraph results, especially when there are differences between the field examiner's scoring and that of the quality control supervisor.

According to DoDPI, using nonstandard questions and evaluation techniques may reduce the reliability of polygraph examination results, which has both security and personnel implications. For example, making a determination of No Deception Indicated when standard test scoring techniques should have resulted in an Inconclusive result and a retest has the potential to allow a security risk to pass undetected. Also, law enforcement agencies often ask applicants whether they have previously taken a polygraph and whether they passed or failed. Therefore, making a determination of Deception Indicated when standard test scoring techniques should have resulted in an Inconclusive result could have a significant impact on a subject, particularly if the subject is seeking employment in law enforcement. Although the results of FBI polygraphs are now readily accepted by other federal agencies, DoDPI officials warned that continued failure to adhere to standardized numerical scoring techniques could impact the FBI's future reciprocity agreements.

Because of the continuing unresolved issues, in 2004 DoDPI concluded that the FBI's internal quality control process did not ensure that its examiners followed federal technical standards in conducting polygraph examinations. According to the DoDPI Quality Assurance Program Chief, subsequent to the March 2003 DoDPI inspection, the FBI Polygraph Unit Chief developed policies for the FBI that almost fully complied with federal

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<sup>59</sup> After the FBI is notified that a DoDPI inspection is planned, the FBI retains score sheets for 90 days to enable DoDPI to evaluate examiner and supervisor performance. FBI examiners can keep personal copies of their score sheets, at their discretion.

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standards.<sup>60</sup> However, after the January 2004 inspection, FBI polygraph officials advised the DoDPI Quality Assurance Program Chief that they were unable to implement these policies because they lacked adequate quality control staff. In August 2005, DoDPI officials told the OIG team that, even where the FBI had revised its policy to conform to federal standards, the FBI supervisory staff had not implemented the policy. Because the FBI did not revise its operations to address the outstanding issues, DoDPI would not certify that the FBI polygraph program was operating in compliance with federal standards.

In FY 2006, DoDPI inspectors reviewed 100 examination records, which for the first time included records of personnel security polygraphs as well as those conducted for criminal, specific-issue investigations, and pre-employment screening. The scope of the FY 2006 DoDPI inspection, completed in December 2005, was still limited because it did not include records of examinations conducted for the WITSEC Program, Office of Professional Responsibility, and Foreign Counterintelligence and Counterterrorism programs.<sup>61</sup> DoDPI inspectors told us that the FBI is one of only two federal agencies that exclude any examination records from review.<sup>62</sup> FBI officials stated that they did not allow DoDPI to review those records because of the sensitive nature of those elements of the polygraph program.

The results of the FY 2006 DoDPI inspection indicated that the FBI was more responsive to DoDPI's inspection findings than in previous years. The DoDPI report contained a total of four recommendations that the:

1. FBI policy changed to discontinue the use of the unknown-solution acquaintance test.
2. Enforce existing policy and discontinue use of the sensitive norm question in all FBI testing formats.

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<sup>60</sup> The revised policies would not have resolved the issues involving the removal of score sheets and the use of the known-solution acquaintance test.

<sup>61</sup> We also found that DoDPI has never reviewed the records of polygraph examinations the FBI conducted for other components. We were told by FBI and DoDPI officials that logistical problems prevented the FBI from gathering some of those records from the requesting components for inspection.

<sup>62</sup> The CIA is the only other agency that restricts DoDPI review of polygraph examination records. The CIA does not allow DoDPI to review its foreign intelligence operations examination records.

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3. Maintain the original test data analysis score sheets of field examiners and quality control personnel.
  4. FBI use movement sensor devices during the conduct of all (polygraph) examinations.

According to the DoDPI Quality Assurance Program Chief and the FBI Polygraph Unit Chief, only two recurring issues from previous inspections were still at issue: (1) the continued destruction of score sheets and (2) the continued use of the unknown-solution acquaintance test.

In response to DoDPI recommendations to address these issues, the FBI Polygraph Unit Chief reported that the FBI will continue to destroy score sheets and that the FBI's *Polygraph Examiner Manual* was revised to partially implement DoDPI's recommendation to discontinue the use of the unknown-solution acquaintance test.<sup>63</sup> In response to DoDPI's two other recommendations for the FBI polygraph program, the FBI Polygraph Unit Chief reported that all examiners were reminded to stop using "sensitive norm" questions and that the FBI planned to ensure that all examiners use movement sensor devices when conducting polygraph examinations.<sup>64</sup> On January 31, 2006, DoDPI certified the FBI's polygraph for the first time since the FBI agreed to allow DoDPI inspectors to review its polygraph results in 2002.

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<sup>63</sup> On January 18, 2006, the Polygraph Unit Chief responded to DoDPI's recommendations contained in the FBI's December 2005 quality assurance report that the FBI would not comply with DoDPI's recommendation to retain the original data analysis score sheets because "we [the FBI] continue to believe that it is not the agency's best interest to maintain original score sheets." Regarding the continued use of the unknown-solution acquaintance test, the Polygraph Unit Chief reported to DoDPI that, "In May 2005, the FBI's *Polygraph Examiner Manual* was revised to reflect that the examiner should utilize either the known-solution acquaintance test or a blind-stimulation test for those examinations wherein the examinee has not previously taken a polygraph examination. Its use in examinations wherein the examinee has previously undergone an FBI or other agency examination is at the discretion of the examiner." The FBI did not give a specific reason as to why it would continue to use the unknown solution acquaintance test in some cases.

<sup>64</sup> The Chief reported that approximately 70 percent of all FBI examiners were in compliance with DoDPI's recommendation that movement sensors – which detect physical countermeasures – be used in all polygraph examinations and stated that he anticipated procuring all of the necessary equipment by December 2006.

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## OPM Oversight

As noted in the Background section of this report, OPM does not require that organizations whose employees are in the excepted service receive OPM certification of their polygraph programs in order to conduct pre-employment and personnel security polygraphs. Consequently, the FBI's polygraph program has never been reviewed or certified by OPM. However, we noted that, although FBI employees are in the excepted service, the FBI is polygraphing employees of other agencies who are not in the excepted service. These examinations may be conducted at the request of the employee's parent agency or because the employee has been assigned to work with the FBI. In some cases, the parent agency also conducts polygraphs and has a polygraph program that is certified by OPM (for example, the DEA).

As detailed in the Workload and Program Costs section above, the FBI conducted 1,661 examinations for other agencies from FY 2002 through 2005. In a few cases involving requests by Department components, such as those requested by the Justice Command Center, the examinations were of competitive service employees and required OPM oversight of the FBI's polygraph program to ensure it was managed in compliance with federal standards. Early in the review, we discussed this issue with the OPM Program Manager, Center for Federal Investigative Services, who said that OPM was unaware that competitive service employees were being examined by the FBI.

In 2006, for the first time, OPM required that the FBI provide OPM with copies of its DoDPI quality assurance report and subsequent DoDPI certification letter stating that the FBI polygraph program was compliant with federal polygraph standards. OPM's requirement occurred after a request by the Justice Command Center for reauthorization to continuing using the results of polygraph examinations for its competitive service employees. The FBI complied with OPM's requests in May 2006 (see full discussion in Section II, under JCC), and OPM reauthorized JCC to continue using polygraph examinations for FY 2006.

### **Program Performance and Results**

In accordance with federal polygraph standards, the FBI collects statistical data on its polygraph program operations. The FBI's Polygraph Unit collects the data using a dedicated database that can extract a wide range of statistical analyses related to the polygraph program. It uses information on the type, purpose, and results of examinations to identify

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trends, manage its examination workload, monitor the work of individual examiners, develop budget estimates, characterize its productivity, and measure its performance.

According to the Deputy Director, DoDPI, the interrogation skills of examiners can be gauged by the confession rate they achieve, but their skill in using the polygraph technique for assessing truthfulness is better judged by how well they follow professional standards of conduct. He also said that the performance of federal polygraph programs is now being assessed to some degree by their achieved rate of conclusive opinions (the percentage of Deception Indicated or No Deception Indicated opinions). As shown in Table 5, the FBI compiles data on the results of all polygraph examinations.

We examined the FBI's data on the outcomes of polygraph examinations from FY 2002 through 2005 and found that FBI examiners issued conclusive opinions (No Deception Indicated or Deception Indicated) in 92.2 percent (34,468) of all examinations (37,336), which is well above the industry standard of 80 percent. For that same time period, the results of 7.8 percent (2,898) of all completed examinations were inconclusive.

The FBI also uses the "confession rate" as a measure of its polygraph performance. The confession rate is calculated by dividing the number of times examinees with a final opinion of Deception Indicated ended up making an admission or confession that confirmed the polygraph result. In 2006, the FBI's Polygraph Unit reported to DoDPI that 61 percent of individuals with final opinions of Deception Indicated made an admission or confession, a rate that is considered high within the polygraph community.

| <b>Table 5: FBI Polygraph Examination Results<br/>FY 2002 through 2005</b> |               |                                       |                                |                     |                       |              |
|--|---------------|---------------------------------------|--------------------------------|---------------------|-----------------------|--------------|
| <b>Examinations</b>  |               | <b>Examination Result</b>             |                                |                     |                       |              |
| <b>Use</b>   | <b>Number</b> | <b>No<br/>Deception<br/>Indicated</b> | <b>Deception<br/>Indicated</b> | <b>Inconclusive</b> | <b>No<br/>Opinion</b> | <b>Total</b> |
| <b>Non Specific-Issue (Screening) Polygraph Examinations</b>               |               |                                       |                                |                     |                       |              |
| Pre-Employment   | 23,310        | 67%                                   | 24%                            | 8%                  | 1%                    | 100%         |
| Personnel Security   | 4,721         | 95%                                   | 2%                             | 3%                  | 0%                    | 100%         |
| <b>Specific-Issue Polygraph Examinations</b>                               |               |                                       |                                |                     |                       |              |
| Criminal   | 6,203         | 37%                                   | 47%                            | 11%                 | 5%                    | 100%         |
| CI/CT  | 1,994         | 50%                                   | 35%                            | 13%                 | 3%                    | 100%         |
| Misconduct   | 128           | 48%                                   | 41%                            | 5%                  | 6%                    | 100%         |
| <b>FBI requests</b>  | <b>36,356</b> | N/A                                   | N/A                            | N/A                 | N/A                   |              |
| <b>Outside agency requests</b>   | <b>1,661</b>  | 78%                                   | 18%                            | 3%                  | 2%                    | 100%         |
| <b>Total</b>   | <b>38,017</b> | N/A                                   | N/A                            | N/A                 | N/A                   | N/A          |

Source: FBI Polygraph Unit

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## **THE DEA POLYGRAPH PROGRAM**

### **Background**

The DEA uses polygraph examinations in criminal and misconduct investigations, pre-employment and personnel security screenings, and screening foreign personnel assigned to investigative units overseas. The DEA began administering specific-issue polygraph examinations in drug and internal integrity (misconduct) investigations in the early 1970s. In 1995, the DEA began requiring applicants for Special Agent positions to pass a polygraph examination as a condition for employment. Also in 1995, the DEA began requiring foreign nationals seeking assignment to Sensitive Investigative Units overseas to pass a polygraph examination as a condition of membership in the unit. In 1996, the DEA extended the polygraph requirement to applicants for DEA intelligence research specialist positions.

### **Mission and Purpose**

The mission of the DEA Polygraph Support Unit is to provide polygraph support for DEA investigations on a worldwide basis. The unit also provides polygraph assistance to federal, state, foreign, and local law enforcement agencies in anti-drug operations.<sup>65</sup> In addition, it provides applicant screening for designated DEA employees and supports the polygraph requirements of the DEA's Office of Professional Responsibility.

### **Policies and Regulations**

The DEA's polygraph program policy is contained in its Office of Investigative Technology's *Technical Operations Manual*, Chapter 6, Section 6.5, "Polygraph Program." Specific DEA policy, for the use of polygraph examinations as a tool for corroborating or disproving allegations of misconduct, is found in the DEA's *Planning and Inspections Manual*, Section 8313.5, "Use of the Polygraph Examination." The DEA's policy regarding polygraph requirements for members of Sensitive Investigative Units is contained in the Sensitive Investigative Unit Program's *Standard Operating Policies and Procedures*.<sup>66</sup>

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<sup>65</sup> The unit provides polygraph support to the counter-narcotics enforcement agencies of various allied governments.

<sup>66</sup> All of these documents are marked "DEA Sensitive."

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The DEA's *Technical Operations Manual* provides general information concerning the use of polygraph examinations and requires the administration of all polygraph examinations in a manner consistent with policies and procedures taught at DoDPI and all applicable DEA rules and regulations. Among other things, the *Technical Operations Manual* describes why the polygraph program was established, its mission, and the purposes for which the polygraph may be used. According to the manual, the DEA must notify the appropriate U.S. Attorney's Office when a polygraph examination is conducted as part of a DEA investigation. All requests for polygraph examinations are to be made through either the DEA division examiner in one of the field division offices or directly to the Chief of the Polygraph Support Unit. If the Chief approves a request for polygraph examinations, he arranges for an examiner, in coordination with the examiner's divisional office, to conduct the examination. The *Technical Operations Manual* also provides policy for examiner selection, training, continuing education, certification, supervision, and performance monitoring. It establishes quality control and assurance policy, and details procedures for reviewing all polygraph examinations and for resolving differences of opinion regarding the results of an examination.

The DEA previously maintained a polygraph procedures handbook. However, as of March 2006, the Chief of the Polygraph Unit said that the DEA handbook was no longer in force. Instead, DEA examiners have been instructed to use the *Federal Examiner Handbook* for procedural and technical guidance.

As discussed in the following sections, DEA polygraph policies describe when an individual may refuse to take a polygraph examination and the potential consequences. The DEA policies and procedures also establish the consequences for an individual whose polygraph results indicate deception. The DEA does not retest individuals whose test results indicate deception, but the results of a polygraph examination are just one factor in the overall hiring decision. If the test result is inconclusive, no determination can be made as to the person's truthfulness. The DEA does not require employees to take a polygraph examination to receive access to sensitive or national security information and does not conduct random or periodic personnel security polygraph examinations of its employees or other personnel working for the DEA.<sup>67</sup>

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<sup>67</sup> Although not a primary program purpose, the DEA has conducted 14 personnel security screening polygraphs of examiner trainees before they entered DoDPI because DoDPI requires that trainees pass a screening polygraph as a condition for admission to its  
(Continued)

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## **Organization and Staffing**

The DEA's polygraph program is administered by the DEA's Operational Support Division. The Deputy Assistant Administrator, Office of Investigative Technology, has overall responsibility for the polygraph program and certifies DEA examiners to conduct polygraph examinations. The Chief of the Communications and Polygraph Support Section is responsible for establishing and implementing the policies and procedures that govern the DEA polygraph program. The Chief of the Polygraph Support Unit reports to the Chief of the Communications and Polygraph Support Section. Polygraph program operations are coordinated by the Polygraph Support Unit.

The Polygraph Support Unit is staffed with a Unit Chief and three polygraph coordinators. Polygraph coordinators are senior polygraph examiners (GS-1811-14) who have at least 2 years of experience as a DEA-certified polygraph examiner. The Chief of the Polygraph Support Unit and the polygraph coordinators have authority over all technical issues involving the administration of polygraph examinations. The three polygraph coordinators conduct quality control reviews of all polygraph examination records.

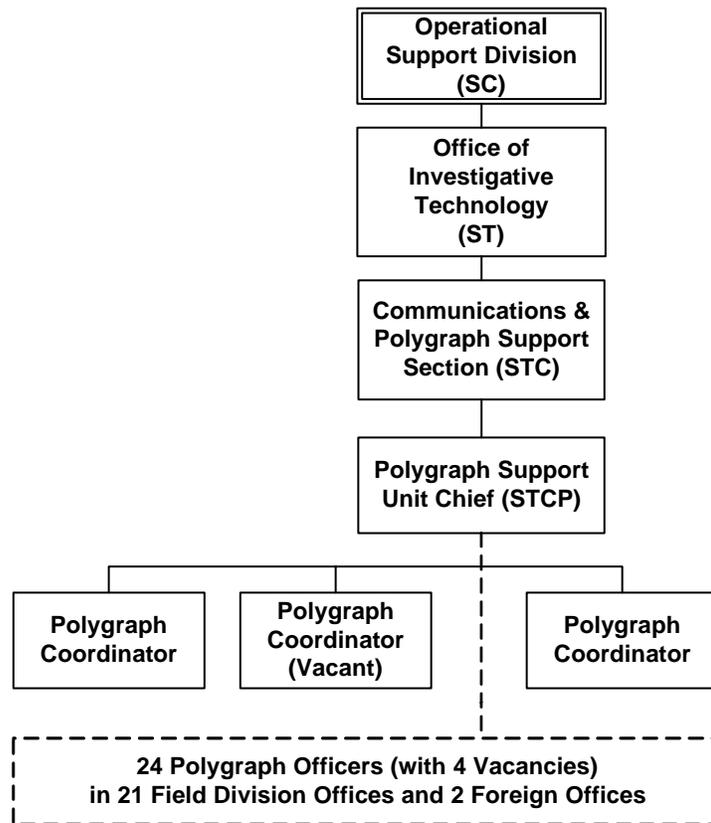
Most polygraph examinations are conducted at field offices by 24 GS-1811-13 Special Agents who are certified polygraph examiners. The DEA field office polygraph examiners work for the SAC of the office, but function under the technical supervision of the Chief of the Polygraph Support Unit. Special Agents in Charge of the field offices are responsible for logistics and supervision of the Special Agent examiners assigned to their offices (see Chart 3).

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basic examiner training program. These are personnel security polygraphs that include counterintelligence-scope questioning.

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**Chart 3: DEA Polygraph Program**



Source: DEA Operational Support Division

### **Polygraph Examination Uses and Procedures**

The DEA uses polygraph examinations primarily for pre-employment suitability screening of Special Agent and intelligence research specialist job applicants; investigating misconduct and criminal allegations; and vetting foreign nationals seeking assignment to Sensitive Investigative Units overseas. The policies and processes for conducting polygraph examinations vary with each use. The DEA does not routinely require its employees to take periodic or random personnel security polygraph examinations.

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## Pre-Employment Screening

All applicants for Special Agent and Intelligence Research Specialist positions in the DEA must take pre-employment polygraph examinations to be hired.<sup>68</sup> Because the DEA hiring process is lengthy, the background investigation may begin prior to the polygraph. The applicants are given non-specific, full-scope examinations that include questions related to national security issues, past drug use, serious criminal activity, and truthfulness on the application form. All test results are reviewed by Polygraph Support Unit personnel who make the final determination on test results. According to the Deputy Assistant Administrator, Office of Investigative Technology, the results of a polygraph are never the sole factor in determining an applicant's suitability for employment.

When the results of a DEA polygraph examination show no indication of deceptiveness, the DEA proceeds with the background investigation and the hiring process. If a DEA examiner finds indications of deceptiveness and the applicant subsequently makes a disqualifying admission, the DEA stops both the background investigation and the hiring process. The DEA does not retest individuals whose polygraph results indicate deception; however,

### **DEA Test Result Designations**

The DEA differs slightly from the other components in how it labels pre-employment polygraph test results. Like other components, DEA examiners render conclusions of No Deception Indicated (NDI), Deception Indicated (DI), Inconclusive (INC), and No Opinion (NO). However, for pre-employment polygraph screening only, the DEA uses the terms "No Significant Response" (NSR) and "Significant Response" (SR) instead of NDI and DI. According to DoDPI officials, the alternative terms are synonymous with DI and NDI, but carry a less negative connotation in the law enforcement community. For consistency, in this report we use the decision terms DI and NDI instead of SR and NSR. In addition, DEA examiners use the term "No Test" to indicate that a full test cycle was not completed. This can occur for a number of reasons such as that the examiner determined the examinee was unfit for an examination or the examinee made a pretest admission or confession.

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<sup>68</sup> Because each DEA field division office handles its own recruiting of Special Agents, the pre-employment polygraph process for these applicants is initiated by a request from the DEA recruiter in a division office to the division polygraph examiner. The division polygraph examiner then requests authorization from the Polygraph Support Unit staff at DEA Headquarters to conduct the examination. Examination requests for Intelligence Research Specialist candidates are submitted directly to the DEA Polygraph Support Unit by the Intelligence Division at DEA Headquarters.

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individuals whose results are inconclusive are retested. The hiring recommendation is based on all factors, including the polygraph results. DEA does not disqualify an applicant solely on the basis of an inconclusive polygraph examination result.<sup>69</sup>

### Criminal Investigations

The DEA's polygraph program was initially established as an investigative tool in criminal cases. Criminal defendants, suspects, or witnesses in an investigation may voluntarily undergo a polygraph examination. According to DEA policy and the Deputy Assistant Administrator, Office of Investigative Technology, a subject or witness in a criminal investigation can refuse to take a polygraph examination, with one exception. The exception is when a defendant consents to undergo a polygraph examination as part of a plea agreement and subsequently reneges. In that case, the refusal may violate the terms of the plea agreement.

DEA officials evaluate each case to determine whether it involves an investigative issue that could be aided by a polygraph examination. When a DEA field agent or an Assistant U.S. Attorney identifies a need to polygraph an individual associated with a criminal investigation, the DEA field agent submits a request for an examination to the polygraph examiner assigned to the agent's field office. The field agent and examiner review the case file for an investigative issue that lends itself to the use of a polygraph examination and, if so, discuss and formulate the questions to be asked during the examination. The examiner reviews the questions with the examiner's supervisor at the Polygraph Support Unit and obtains authorization from the Polygraph Support Unit before conducting the examination.

Once the examination is conducted, a quality control review is completed (described in the Quality Assurance section below), and a final opinion is issued, the examiner forwards a copy of the polygraph report to the requesting DEA agent, who then notifies the Assistant U.S. Attorney assigned to the case. The agent maintains a copy of the polygraph report in

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<sup>69</sup> Derogatory information obtained from a pre-employment polygraph examination of a current Department employee (including a DEA employee seeking to move from a position that does not require a polygraph to one that does) is referred to the DEA's Office of Professional Responsibility (OPR), which determines if the information warrants further action and how it should be disseminated. OPR officials said that they were not aware of any such information ever being referred back to an employing Department agency or to SEPS.

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the criminal case file. The polygraph subject is then notified of the final results of the examination. If the subject or subject's attorney requests a copy of the polygraph report, the Assistant U.S. Attorney may provide one.

### Misconduct Investigations

The DEA's OPR receives allegations of misconduct from DEA employees and from external sources such as law enforcement officials, confidential informants, cooperating witnesses, other governmental agencies, and the public. According to the DEA's *Planning and Inspection Manual*, OPR is responsible for deciding whether a polygraph examination will be used as an investigative tool in a misconduct investigation. Specifically, the OPR Assistant Administrator for Planning and Inspection and the OPR Deputy Assistant Administrator may authorize a polygraph examination in an integrity, misconduct, or internal security matter. The DEA policy also states that a polygraph examination should be offered and used as a matter of course for an individual who makes an allegation against a DEA employee.

When a DEA OPR investigation is initiated, an OPR Associate Deputy Chief Inspector determines whether the investigation will be conducted by an OPR investigator or delegated to a SAC of a division field office or other office head at DEA Headquarters. Less serious administrative cases, such as those that do not appear to involve a criminal or integrity issue, generally are delegated for investigation. An OPR investigator monitors delegated cases for quality and timeliness.

The OPR investigator typically interviews the subject, complainant, witnesses, and other pertinent individuals, and gathers relevant documents and other evidence. The investigator may ask the subject or witnesses in a misconduct investigation to voluntarily consent to undergo a polygraph examination. A request for an employee to take a polygraph examination is made off the record and, if refused, nothing is reflected in the investigative file unless the employee at first agreed, but later reneged. Employees or individuals must voluntarily consent to undergo a polygraph examination. The DEA does not compel its employees to undergo polygraph examinations in misconduct investigations.

When an individual agrees to take a polygraph examination, the OPR inspector or case agent submits a request for a polygraph examination to the DEA's Polygraph Support Unit, and Unit officials assign an examiner to conduct the examination. The examiner reviews the examination questions with Unit officials and the inspector before the examination and obtains

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authorization from Unit officials to proceed with the examination. Once the polygraph examination is completed, the examiner analyzes the test data and renders a preliminary opinion on the results. A Polygraph Coordinator at the Polygraph Support Unit conducts a quality control review of the examination record, renders a final opinion on the results of the examination, and notifies the examiner of the results via electronic mail. The Polygraph Coordinator or the examiner gives OPR the results of the examinations. OPR forwards the final investigation record, including the results of a polygraph examination, to the DEA's Board of Professional Conduct.

The Board of Professional Conduct reviews investigative and polygraph evidence in reaching a decision on disciplinary or adverse action. The Board weighs all of the evidence gathered during the misconduct investigation (a polygraph examination is only one piece of evidence) and cannot base recommendations solely on polygraph results. The Chairman of the Board of Professional Conduct said that polygraph examination results have not figured prominently in any decision that he has made for proposed action as the result of an integrity investigation. Once all of the evidence has been evaluated, the Board recommends clearing, disciplining, or removing the employee, and a final decision is made by the Deciding Official.

### Foreign Agent Vetting

In the Department's FY 1997 Appropriations Act, Congress authorized and approved funding for the DEA to create, train, and support Sensitive Investigative Units (SIU), or foreign vetted units, to work in sensitive bilateral investigations in key countries critical to the counter-narcotics objectives of the United States. The personnel selected by their respective countries to participate in the SIU program undergo a strict security screening. The vetting process includes drug testing, medical and psychological screening, and a background investigation. All foreign nationals who volunteer to become members of an SIU do so with the knowledge that the vetting process includes a polygraph examination. The polygraph examination is the final step in the vetting process, and acceptance into an SIU is contingent on the results.

A DEA Country Office sends a request for a foreign vetting polygraph examination to the DEA's Office of Investigative Technology. The request is forwarded to the DEA's Polygraph Support Unit. The Polygraph Unit sends a team of polygraph examiners to the requesting country to conduct the examination. A Polygraph Coordinator from the Polygraph Support Unit

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frequently accompanies the examiners to manage the assignment, conduct a quality control review of the examination record, and make a final decision as to the results of the examination. The DEA sends a notification of the official results to the Country Attaché in the DEA Country Office. Foreign candidates for SIU membership whose polygraph examination results indicate deception are not accepted into the unit.

Foreign law enforcement officers who pass the vetting process attend a 5-week SIU special training program at the DEA Training Academy in Virginia and, later, in-service training. SIU support personnel, such as accountants, maintenance personnel, and translators, undergo the required background, drug test, and polygraph portion of the vetting process, but do not attend the training.

After 24 months in an SIU, members are subject to random polygraph examinations. In general, 25 percent of the SIU members are subjected to random polygraphs each year. To accomplish this, DEA polygraph examiner teams travel to SIU locations and conduct these examinations at the same time. A finding of Deception Indicated results in the expulsion of the SIU member. In cases where mitigating or extenuating circumstances exist, the Country Attaché may request a retest of the SIU member.

Along with initial and random polygraphs, members of an SIU are subject to polygraph examinations at any time questions arise concerning the member's integrity. If a Special Agent Advisor believes that there may be an integrity issue, the Advisor can send a request for a polygraph examination to the Office of Investigative Technology.

### **Examiner Qualifications and Training**

Candidates for DEA polygraph examiner positions are selected from among the DEA's career Special Agent workforce. When there is a vacancy for a polygraph examiner, any career Special Agent who meets the DEA's requirements for the position may be considered. To qualify, an agent must meet minimum federal standards that include being: (1) a U.S. citizen, (2) at least 25 years old, (3) a graduate of an accredited 4-year college (or equivalent), (4) an experienced investigator with a recognized federal government or other law enforcement agency, (5) of high moral character and sound emotional temperament based on a background investigation, and (6) judged suitable for the position after taking a polygraph examination.

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Each field division handles its own recruiting, and candidates apply through their division chain of command to Headquarters. The selection is coordinated between the SAC and the Deputy Assistant Administrator, Office of Investigative Technology.

The DEA's examiner candidates must complete basic training and an internship to be certified to conduct polygraph examinations. For training, the DEA requires examiners to complete a basic examiner's course at DoDPI. After successfully completing their basic training at DoDPI, DEA examiners also must complete an internship under the supervision of a certified senior examiner who is assigned by the Chief of the Polygraph Support Unit. During the internship, the examiner must conduct at least 25 examinations that have been monitored, reviewed, and approved by a certified examiner. Interns must demonstrate to the senior examiner that they have the ability to conduct examinations independently and in accordance with federal standards and DEA policy. On the successful completion of the internship, an examiner receives a written certification of proficiency. Certified examiners are required to conduct at least 25 polygraph examinations per fiscal year to demonstrate continued proficiency in the use of the polygraph technique. They must also complete 80 hours of continuing education every 2 years.

As of January 2005, the DEA reported that its Chief of the Polygraph Support Unit had over 16 years of investigative experience including 4 years of polygraph experience. The Unit's 3 Polygraph Coordinators had an average of 13.5 years of investigative experience and 8 years of polygraph experience.<sup>70</sup> The field examiners had an average of 13.5 years of investigative experience and 5 years of polygraph experience. Field examiners conducted an average of 79 examinations each in FY 2004.

### **Workload and Program Costs**

From FY 2002 through 2005, DEA Office of Investigative Technology records show that DEA examiners conducted a total of 8,307 polygraph examinations. Of the 8,307 polygraph examinations, 52 percent were used for vetting foreign agents, 38.7 percent were used for pre-employment screening, and 8.8 percent were used in criminal investigations (Table 6). Less than one-half of 1 percent of the examinations was used for personnel security screening and misconduct investigations.

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<sup>70</sup> DEA policy requires GS-14 Special Agents with 3 years in a polygraph management position to rotate out of the DEA polygraph program.

| <b>Table 6: DEA Polygraph Support Unit's Workload by Use<br/>FY 2002 through 2005</b> |                        |                       |                               |                                 |                           |              |
|---|------------------------|-----------------------|-------------------------------|---------------------------------|---------------------------|--------------|
| <b>Fiscal Year</b>  | <b>Foreign Vetting</b> | <b>Pre-Employment</b> | <b>Criminal Investigation</b> | <b>Misconduct Investigation</b> | <b>Personnel Security</b> | <b>Total</b> |
| <b>2002</b>   | 995                    | 552                   | 248                           | 5                               | 4                         | 1,804        |
| <b>2003</b>   | 1,112                  | 947                   | 205                           | 4                               | 2                         | 2,270        |
| <b>2004</b>   | 987                    | 889                   | 159                           | 8                               | 5                         | 2,048        |
| <b>2005</b>   | 1,227                  | 830                   | 121                           | 4                               | 3                         | 2,185        |
| <b>Total</b>  | <b>4,321</b>           | <b>3,218</b>          | <b>733</b>                    | <b>21</b>                       | <b>14</b>                 | <b>8,307</b> |

Source: DEA Polygraph Support Unit

### Polygraph Program Costs

The DEA does not track or request specific funding through the budget process for the polygraph program. In response to our request for information on the costs of the DEA polygraph program, the DEA provided estimates of polygraph-related expenditures for FY 2002 through 2004 for its Headquarters component only. The figures in Table 7 include only the direct costs (personnel, travel, training and equipment, and polygraph services) for the polygraph program at Headquarters. It does not include the costs of obligated expenditures and overhead costs such as rent and utilities. The DEA could not provide cost estimates for polygraph work done at field offices.<sup>71</sup>

<sup>71</sup> The DEA manages its polygraph program centrally for matters such as training, policy, and quality control. However, most DEA polygraph examiners are assigned to DEA field offices. The majority of polygraph work involves cases and applicants under the field offices' areas of responsibilities, and DEA officials said they do not capture or centrally track those expenditures under the polygraph program initiative code. Consequently, the costs shown in Table 8 do not reflect field costs such as travel-related expenses or salaries and benefits for field examiners, which are funded and recorded at the field level.

**Table 7: DEA Polygraph Program Headquarters Cost Estimates  
FY 2000 through 2004**

| <b>Fiscal Year</b> | <b>Personnel</b>    | <b>Travel</b>    | <b>Training</b>  | <b>Equipment</b> | <b>Polygraph Services</b> | <b>Total</b>        |
|--------------------|---------------------|------------------|------------------|------------------|---------------------------|---------------------|
| <b>2002</b>        | \$3,792,752         | \$120,053        | \$98,965         | \$69,540         | \$24,502                  | \$4,105,812         |
| <b>2003</b>        | \$3,959,264         | \$95,107         | \$97,227         | \$98,872         | \$11,262                  | \$4,261,732         |
| <b>2004</b>        | \$4,132,855         | \$99,420         | \$94,336         | \$74,102         | \$10,726                  | \$4,411,439         |
| <b>Total</b>       | <b>\$11,884,871</b> | <b>\$314,580</b> | <b>\$290,528</b> | <b>\$242,514</b> | <b>\$46,490</b>           | <b>\$12,778,984</b> |

Source: DEA Polygraph Unit

### **Quality Control and Oversight**

The DEA's quality control and oversight mechanisms to ensure the integrity of its polygraph program include quality control provided by the DEA's Polygraph Support Unit and external quality assurance provided by the DoDPI Quality Assurance Program. In addition, the DEA's polygraph program is also subject to the oversight of OPM. Each of these mechanisms is described below.

#### Quality Control

Internal quality control for the DEA polygraph program is provided primarily through technical reviews conducted by the DEA's Polygraph Support Unit. At the conclusion of each polygraph examination, the DEA field examiner conducts a numerical test data analysis of the polygraph charts and forwards the examination record, including all charts, forms, worksheets, and electronic media to a Polygraph Coordinator in the Polygraph Support Unit. The Polygraph Coordinator reviews the field examiner's notes and then conducts an independent test data analysis. The Polygraph Coordinator compares his or her analysis of test results with the analysis of the field examiner. If the Polygraph Coordinator disagrees with the field examiner's original conclusion, another Polygraph Coordinator conducts a second review. If both coordinators disagree with the field examiner's conclusion, the examination record is returned to the field examiner for correction or retest. If all aspects of the examination are approved, the Polygraph Coordinator sends a confirmation of the results to the field examiner. The final results of all examinations conducted by field examiners are filed at the Polygraph Support Unit, which is located in Lorton, Virginia, and are accessible only to the unit's personnel.

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## External Quality Assurance

The DEA agreed to participate in the DoDPI Quality Assurance Program in 1997. Since then, DoDPI has conducted reviews of the DEA's polygraph program in FY 2001, 2003, and 2005. DoDPI reviewed a total of 189 polygraph examination files during the 3 inspections. Each DoDPI review encompassed a sample of all DEA pre-employment and specific-issue polygraph examination records and resulted in the following recommendations:

- The DEA's first DoDPI inspection in January 2001 resulted in recommendations that the DEA: (1) reconsider its policy of limiting the tenure of polygraph examiners in management positions to 3 years because the policy resulted in a loss of experienced examiners, and (2) stop its examiners from using comparison questions that encompassed relevant issues because the questions did not comply with federal standards.
- A January 2003 DoDPI review resulted in only one finding, which was that the DEA follow its own policy of requiring that the Chief of the Polygraph Support Unit provide input into the examiner selection process. The inspection revealed that the DEA policy was not being followed in many cases. DoDPI inspectors believed that, by including input from its polygraph experts in the selection process, the DEA could reduce the number of DEA students failing to complete DoDPI basic examiner training (22 percent in FY 1991 through 2002). In comparison, DoDPI had found that federal law enforcement agencies that included expert input in the selection process only had a 1-percent dropout rate during the same period.
- In January 2005, DoDPI inspectors found that two DEA examiners had not completed their continuing education requirement of 80 hours every 2 years. Therefore, the DEA was out of compliance with the requirements of the Federal Polygraph Continuing Education Certification Program. DoDPI recommended that the DEA comply with the requirements in all cases.

Each of the three DoDPI inspection reports on the DEA polygraph program concluded that the DEA's internal quality control program met or exceeded federal quality control standards for federal polygraph programs, that the program included an independent and objective review of all examinations, and that the process was free of undue influence. After each

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inspection, DoDPI certified the DEA program as compliant with DEA policies and procedures as well as with federal standards for polygraph programs.

After receiving the DoDPI reports, the DEA implemented corrective action for all but one of DoDPI's recommendations. The DEA did not change its procedures concerning the tenure of polygraph managers, which was not a compliance issue.<sup>72</sup>

### OPM Oversight

Because the DEA uses polygraph examinations for pre-employment screening and personnel security screening for competitive service employees, the DEA polygraph program falls within the purview of OPM's oversight responsibilities. OPM requires the DEA to apply to OPM each year for re-authorization to continue using polygraph examinations in its pre-employment screening program for Special Agent and Intelligence Research Specialist positions. For the DEA to receive OPM authorization, OPM must first have certified the DEA's national security mission and approved the DEA's policy and regulations for conducting pre-employment screening and personnel investigations. In addition, the DEA must meet three requirements stipulated by OPM as follows:

- The DEA must demonstrate full compliance with polygraph community standards for the use of polygraph examinations, including those contained in the *Federal Examiner Handbook*. The DEA meets this requirement by citing its most recent DoDPI inspection report and letter of compliance certification.
- The DEA's Chief of the Security Office must review proposed denials of employment or security clearances when results of polygraph examinations are inconclusive, and he must review and approve any denials that involve uncorroborated information gleaned from polygraph examinations. The DEA meets this requirement by agreeing to continue its policy of not denying a clearance or employment based on an inconclusive polygraph result.

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<sup>72</sup> In its report, DoDPI noted that DEA policy requires GS-14 Special Agents with 3 years in a management position to leave the DEA polygraph program. DoDPI noted that other federal polygraph programs maintain experienced personnel in order to retain their technical expertise and recommended that the DEA review its policy regarding polygraph program managers.

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- The DEA must schedule and submit to a quality assurance review of the DEA's polygraph program by DoDPI at least every 2 years and ask DoDPI to forward a copy of the results of these reviews to OPM's Federal Investigative Services and to the Department's Security and Emergency Planning Staff. To satisfy this requirement, the DEA informs OPM of the date of its next DoDPI review and agrees to provide the results of the review as required.

The DEA has routinely received OPM authorization to continue its use of polygraph examinations for screening DEA employees.<sup>73</sup>

### **Program Performance and Results**

The DEA collects and maintains statistical data on its polygraph program in its Polygraph Information Tracking System. The DEA uses the data to analyze its polygraph program, characterize polygraph productivity, and measure program performance. DoDPI, in February 2005, certified that the DEA's polygraph program met federal standards for maintaining statistical reports regarding polygraph examination activity. The results of the DEA's polygraph examinations are shown in Table 8.

We examined the data on the outcomes of polygraph examinations from FY 2002 through 2005 and found that DEA examiners reached conclusive opinions (No Deception Indicated/No Significant Response and Deception Indicated/Significant Response) in 91.2 percent (7,154) of all examinations that were completed (7,843), which is well above the standard of 80 percent. For that same period, 8.8 percent (689) resulted in Inconclusive or No Opinion. The remaining 464 polygraph tests were not completed and are not included in the calculation of the DEA's Conclusive Opinion rate. The DEA does not routinely track its polygraph examiners' confession and admission rate.

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<sup>73</sup> On May 12, 2006, OPM officials granted the DEA authorization to use polygraph examinations for pre-employment and personnel security screening in FY 2006.

| <b>Table 8: DEA Polygraph Examination Results,<br/>FY 2002 through 2005</b> |               |  |                |            |           |              |
|---|---------------|--|----------------|------------|-----------|--------------|
| <b>Examinations</b>   |               | <b>Examination Result (Percentage)</b> |                |            |           |              |
| <b>Use</b>  | <b>Number</b> | <b>NDI (NSR)</b>                       | <b>DI (SR)</b> | <b>INC</b> | <b>NO</b> | <b>Total</b> |
| <b>Non-Specific Issue (Screening) Polygraph Examinations</b>                |               |  |                |            |           |              |
| Pre-Employment  | 3,218         | 67.2%                                  | 16.6%          | 12.1%      | 4.2%      | 100%         |
| Personnel Security  | 14            | 85.7%                                  | 7.1%           | 0.0%       | 7.1%      | 100%         |
| Foreign Vetting   | 4,321         | 78.8%                                  | 13.9%          | 4.7%       | 2.5%      | 100%         |
| <b>Specific-Issue Polygraph Examinations</b>                                |               |  |                |            |           |              |
| Criminal  | 733           | 26.6%                                  | 31.2%          | 12.8%      | 29.3%     | 100%         |
| Misconduct  | 21            | 42.9%                                  | 23.8%          | 9.5%       | 23.8%     | 100%         |
| <b>DEA total</b>  | 8,307         | N/A                                    | N/A            | N/A        | N/A       | N/A          |

Source: DEA Polygraph Support Unit

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## **THE ATF POLYGRAPH PROGRAM**

### **Background**

ATF's mission is to conduct criminal investigations, regulate the firearms and explosives industries, and assist other law enforcement agencies as part of the federal government's effort to counter terrorism, reduce violent crime, and protect the public. ATF, which was part of the Department of the Treasury until January 24, 2003, began using polygraph examinations as an investigative aid in the resolution of criminal investigations under its jurisdiction in 1978. In September 1998, OPM allowed Treasury to expand its polygraph program to include pre-employment polygraph examinations for applicants for ATF GS-1811 Special Agent positions. On October 27, 2003, OPM granted approval for the transfer of Treasury's authority for the ATF polygraph program to the Department of Justice.

### **Mission and Purpose**

ATF's Polygraph Branch provides technical support for ATF's law enforcement mission and the applicant screening process. The Polygraph Branch also develops and presents training at the Federal Law Enforcement Training Center; coordinates with other federal, state, and local agencies; and provides intelligence support to Special Agents related to the specific use of the polygraph technique.

### **Policies and Regulations**

ATF's policies and regulations regarding the use of polygraph examinations are contained in several ATF orders and an examiners' handbook.<sup>74</sup> ATF's draft handbook for examiners, *Standard Operating Procedures: Polygraph*, provides guidelines for the use of polygraph testing. The draft handbook is designed to serve as an examiners' field reference on

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<sup>74</sup> As of March 2006, ATF's policies and regulations were under revision. The revisions were required because the documents were written while the agency was still part of Treasury and included some references and office names that were outdated as the result of reorganization in 2005. A proposed substantive change in the ATF polygraph policy, according to ATF officials, involves ATF's hiring decisions related to "significant responses." Currently, applicants for ATF positions are told that they will not be hired if there is an unresolved "significant response" during their pre-employment polygraph examination. The draft handbook proposes that applicants be told that they *may* not be hired if there is an unresolved response.

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recommended procedures and to supplement examiners' DoDPI training. According to the draft handbook, all polygraph examinees are to be tested with the presumption that they are being truthful. ATF examiners are charged with ensuring that the ATF polygraph program is conducted within the guidelines of the American Polygraph Association's Code of Ethics and the technical parameters established by DoDPI. Examiners are instructed to use polygraph testing only as an investigative tool and not as a replacement for a proper and thorough investigative effort.

The draft handbook provides guidance for scheduling polygraph examinations and establishes a scheduling priority based on the nature and immediacy of the investigation. It also encourages examiners to conduct no more than two examinations in a single day and to provide for the presence of a second examiner in complex cases.

Along with the draft handbook, ATF has policy and guidance dealing with specific uses of polygraph examinations in criminal investigations and pre-employment screening. A 1999 order is currently being rewritten, but, according to the SAC of the Polygraph Branch, it still provides applicable ATF policy for the use of polygraph examinations in criminal investigations.<sup>75</sup>

An August 2005 ATF policy document updated ATF's policies and procedures for the pre-employment screening and reflects several ATF office name changes that resulted from ATF's reorganization as a bureau within the Department of Justice.<sup>76</sup> As previously discussed, OPM has authorized ATF to administer polygraph examinations only to Special Agent applicants. ATF does not compel its employees to take polygraph examinations or to undergo personnel security polygraph examinations on a routine or random basis.

## **Organization and Staffing**

ATF's polygraph program is carried out by the Polygraph Branch, located in the Office of Field Operations, Special Operations Division. The Chief of the Special Operations Division has overall responsibility for ATF's

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<sup>75</sup> The order being rewritten is ATF Order 3210.7C, Investigative Priorities, Procedures and Techniques, Chapter J, Investigative Resources, Section 122, Polygraph; February 25, 1999.

<sup>76</sup> ATF Brief 2123.4, Pre-employment Polygraph Screening Program, August 25, 2005 (expires August 25, 2007).

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polygraph program. The SAC of the Polygraph Branch reports to the Chief of the Special Operations Division and is responsible for establishing and implementing policies and procedures for the Polygraph Branch.

The ATF Polygraph Branch comprises 16 certified polygraph examiners, including the SAC of the branch, 3 regional team leaders (currently 1 vacancy), and 12 field examiners (currently 1 vacancy). All polygraph examiners are Special Agents.

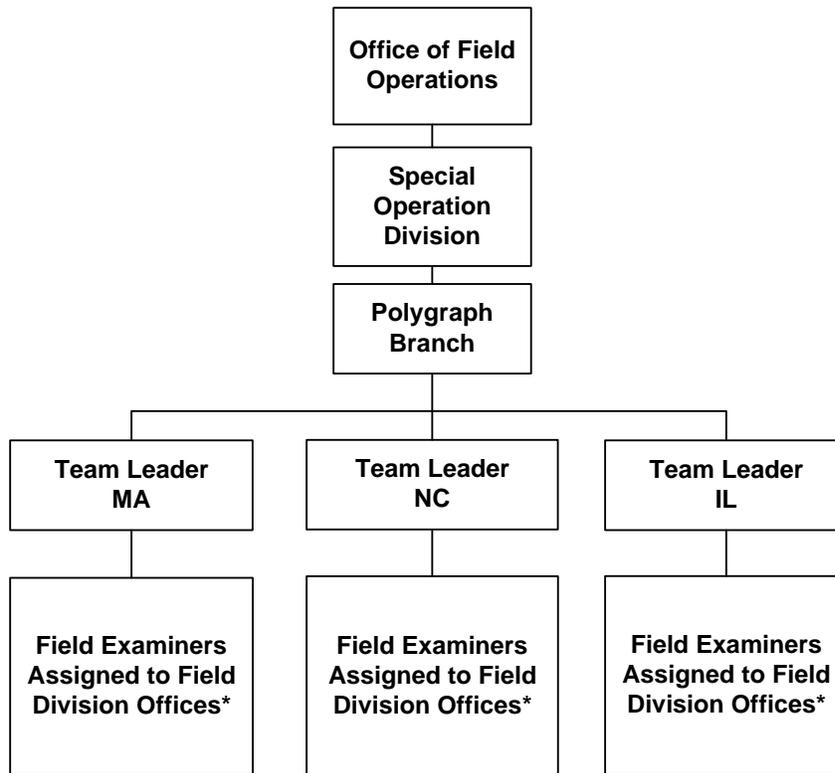
The SAC of the Polygraph Branch coordinates polygraph services at both the ATF Headquarters and Field Division levels. The SAC is responsible for training new examiners, ensuring the proper use of polygraph examinations, serving as technical advisor for field examiners, and monitoring the overall activities of the polygraph program.

Three regional team leaders report to the SAC of the Polygraph Branch but are physically located in field offices. Currently, the three team leader positions are located in division field offices in Massachusetts, North Carolina, and Illinois. Each of the team leaders is a lead criminal investigator. The team leaders, while having the same responsibility for conducting polygraph examinations as field examiners, also have additional duties. When requested, they conduct polygraph examinations for ATF's Office of Professional Responsibility and Security Operations on issues of employee integrity or conduct. They also conduct quality control reviews for and provide technical supervision over field examiners who carry out polygraph examinations in a designated geographical area.

The 12 field examiners serve as Special Agent criminal investigators. They are assigned to the Special Operations Division organizationally, but are physically located in 12 of ATF's 23 division field offices. While most of the field examiners' time is spent conducting GS-13 level investigations, a portion of their time is spent conducting polygraph examinations as a collateral duty. The SAC of the Polygraph Branch and the team leaders may assign any field examiner to conduct any polygraph examination that falls within ATF's purview regardless of the issue or the geographical location of the examination. The examiners' respective Field Division SAC and the SAC of the Polygraph Branch can approve requests for polygraph examinations, but the final decision on whether to conduct a polygraph examination rests with the polygraph examiner. (See Chart 4.)

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**Chart 4: ATF Polygraph Program**



\* Twelve Special Agent Polygraph Examiners in AZ, CA, FL, GA, IL, MI, PA, TN, TX, VA, WA

Source: ATF Polygraph Unit

### **Polygraph Examination Uses and Procedures**

ATF uses polygraph examinations for two primary reasons: specific-issue examinations as a tool in criminal investigations and pre-employment screening to verify the truthfulness of Special Agent applicants. Before transferring to the Department, ATF's Polygraph Branch also supported the DEA, USMS, and the U.S. Secret Service by conducting polygraph examinations to vet foreign candidates seeking membership in sensitive investigative units in other countries. ATF has not conducted foreign vetting polygraphs since transferring to the Department in 2003.

The SAC of the Polygraph Branch told us that she must approve the use of polygraph examinations in an administrative misconduct investigation, but that the Polygraph Branch had not conducted any

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examinations for that purpose in the past 3 years. She said that some employees were asked during that time to volunteer for polygraph examinations for administrative investigations, but they had declined without consequences to the employees for their declinations.

ATF's processes for conducting polygraph examinations vary with each distinct use in terms of who requests, authorizes, conducts, analyzes, reviews, and issues the final opinion on examination results. Different results or outcomes of polygraph examinations also trigger specific actions. In the following sections, we discuss each use.

### Criminal Investigations

ATF uses polygraph examinations during criminal investigations to achieve its law enforcement objectives, including:

- detecting and identifying criminals;
- verifying information from informants or witnesses to establish or corroborate credibility; and
- obtaining additional information leading to new evidence or identification of additional suspects, witnesses, or locations.

According to ATF Order 3210.7C, ATF Special Agents or an attorney with a U.S. Attorney's Office can request a polygraph examination in support of a criminal investigation. Such requests must first be reviewed and approved by the local SAC and then authorized by the ATF Division Director. Authorized agents can request polygraph services from the examiner who serves the agent's geographic area, the SAC of the Polygraph Branch, or the Chief of the Special Operations Division. All such polygraph examinations in criminal investigations are taken voluntarily without repercussions from declining to undergo one, unless the polygraph examination is required as a part of a plea agreement. In that case, refusing to take the examination may invalidate the agreement.

Prior to beginning the examination, the examiner must determine whether the proposed test subject is mentally and physically fit to undergo the examination. If the test subject is deemed fit, a Special Agent (usually the examiner) advises the subject of his or her rights and asks the subject to consent, in writing, to take the examination. If the subject does not formally consent, the examination process stops.

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If the examination goes forward, a Special Agent familiar with the case assists the examiner during the pretest interview, the actual examination, and the post-test interview. All polygraph examinations used in criminal investigations are specific-issue examinations.

After the examination, the field examiner sends the examination records to a regional team leader or to the Polygraph Branch at ATF Headquarters for a quality review. The reviewer issues the final opinion on the results of the examination, and the results are then transmitted back to the field examiner. The examiner verbally informs the test subject and the subject's attorney of the results.

### Pre-Employment Screening

ATF uses pre-employment screening polygraph examinations as a tool to assist in verifying information provided by job candidates and to evaluate applicants' eligibility for employment. ATF Brief 2123.4 provides guidance on the role of polygraph testing in pre-employment screening, examiner responsibilities, and the consequences of either an admission made during the examination or the discovery of a discrepancy in information previously provided by the examinee.

When an applicant receives a tentative job offer and submits an application for a security clearance, ATF's Human Resources Division or the Chief of the Recruitment and Hiring Center forwards a formal request for a security investigation and a copy of the application materials to the Personnel Security Branch, Security and Emergency Programs Division, Office of Professional Responsibility and Security Operations. The Personnel Security Branch forwards the application materials, background information, and a written polygraph authorization to the SAC of the Polygraph Branch. The applicant's name is entered into a control log and a polygraph examiner is assigned. The assigned examiner is responsible for scheduling and conducting the examination, obtaining the applicant's consent to be polygraphed, and advising the applicant of the applicant's constitutional rights concerning self-incrimination and seeking the advice of counsel.

The polygraph examination begins with the pretest interview and documentation of any significant pretest admissions or discrepancies in information previously provided by the applicant that could affect the results of the polygraph examination and prevent the completion of the examination. If significant admissions occur or discrepancies in information previously provided by the applicant are found during the

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pretest, in-test, or post-test phases, the examiner forwards that information through the SAC of the Polygraph Branch to the Chief of the Special Operations Division. The Chief of the Special Operations Division reviews the results and forwards them through the Office of Professional Responsibility and Security Operations, which sends them on to the Chief of the Recruitment and Hiring Center for disposition.

An exception to this process occurs when an applicant's admission concerns ongoing criminal behavior. If an applicant who is not an ATF employee makes an admission concerning ongoing criminal behavior that warrants prompt attention, the information is forwarded to the local SAC for referral to the appropriate authorities. The polygraph consent form signed by an applicant makes clear that any derogatory information that is developed as a result of the polygraph examination could be disqualifying and lead to disciplinary action, including dismissal from the applicant's current job.

If a Department employee applies for an ATF position and fails the polygraph examination, ATF officials in the Security and Emergency Programs Division reported that, to their knowledge, there is no ATF or Department policy requiring or ensuring that such information is provided to the employing agency in the Department. However, they told us that, if a Department employee failed the national security portion of the polygraph examination, they would probably seek approval to provide the information to the employing agency or office. They could not recall a case in which that happened.

If an applicant is an ATF employee who takes a pre-employment polygraph examination in order to change positions within ATF, the information is forwarded to the Office of Professional Responsibility and Security Operations. Admissions of past criminal behavior by an ATF employee are included in the polygraph report and forwarded through the Chief of the Special Operations Division to the Personnel Security Branch in the Office of Professional Responsibility and Security Operations, where the information is evaluated and, if necessary, referred to the appropriate authorities.

If an applicant's pre-employment polygraph examination results in unresolved, significant responses indicative of deception, the applicant may be ineligible for hire. The applicant may also be ineligible if the examiner detects any attempt by the applicant to manipulate the results of the examination. If the examination results in a No Opinion determination because the examiner cannot render a conclusive opinion based on the test

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charts, the Polygraph Branch will, when appropriate, retest the applicant in an attempt to obtain a conclusive determination. If a conclusive determination cannot be made, the results are documented and sent through the SAC of the Polygraph Branch to the Chief of the Special Operations Division who sends the results on to Office of Professional Responsibility and Security Operations. In accordance with OPM requirements, ATF does not deny employment on the basis of an Inconclusive polygraph examination without a review of the decision by ATF's Office of Chief Counsel.

### Foreign Vetting

Although ATF has not conducted a polygraph examination for foreign vetting since 2002, when ATF conducted those examinations, they were governed by an agreement with the host country and the requesting agency (the DEA, USMS, or U.S. Secret Service). All the examinations were conducted in the host country, and the requesting agency made arrangements with the host country for authorization to conduct the tests. ATF conducted the polygraph examinations, performed quality control on site, and reported the results to the requesting agency. The examinations were all personnel security screening polygraph examinations. They were used to detect security risks and to assess the suitability of candidates for membership in Sensitive Investigative Units overseas. The requesting agency and the host country decided how the results of those examinations were used. ATF was not involved in deciding how to use the results and tracked only the number of examinations conducted for reporting purposes.

### **Examiner Qualifications and Training**

The ATF draft examiners' handbook establishes that a candidate for the position of polygraph examiner must meet the following minimum standards:

- U.S. citizenship,
- at least 25 years old,
- graduate of an accredited 4-year college,
- at least 2 years of experience as an investigator with a recognized federal or other law enforcement agency,
- job qualifications at the GS-12 journeyman level,
- successful background investigation and polygraph examination,
- make a 5-year commitment to serve as a polygraph examiner,
- be interviewed by the SAC of the Polygraph Branch,

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- willingness to travel during the required internship period, and
  - willingness to respond to specific polygraph needs and requests from the Chief of the Special Operations Division and the SAC of the Polygraph Branch.

Special Agents selected for training must successfully complete DoDPI's 14-week Polygraph Examiner Training Course and a supervised 6-month internship as an ATF examiner before they can be certified competent to conduct polygraph examinations. During the internship, trainees must conduct at least 25 polygraph examinations and reach an acceptable level of proficiency and competency in the polygraph technique to be certified. The SAC of the Polygraph Branch certifies the competency of ATF examiners and recommends them for full membership in the American Polygraph Association.

To remain certified, ATF examiners are required to meet the requirements of the Federal Polygraph Continuing Education Certification, which is a minimum of 80 hours of creditable education during each consecutive 2-year period in which they are assigned duties as a polygraph examiner. With the exception of the SAC of the Polygraph Branch, each examiner should conduct a minimum of 18 polygraph examinations during each 6 month period. When possible, ATF examiners attend annual conferences sponsored by the American Association of Police Polygraphists or the American Polygraph Association. ATF also encourages its examiners to complete advanced polygraph training.

In DoDPI's June 2004 biennial report on ATF's polygraph program, DoDPI reported that the SAC of the Polygraph Branch had 20 years of investigative experience and 5 years of polygraph experience. Overall, ATF's polygraph program team leaders had an average of 25 years of investigative experience and 12 years of polygraph experience. ATF's field examiners averaged 15 years of investigative experience and 5 years of polygraph experience.

### **Workload and Program Costs**

From FY 2002 through 2005, ATF reported conducting 2,700 polygraph examinations. Of those, about 50 percent were conducted for pre-employment screening, 47 percent for criminal investigations, and 3 percent for vetting foreign agent candidates. The 82 foreign screening examinations that ATF conducted in FY 2002 were done at the request of the DEA, USMS, and the U.S. Secret Service (Table 9).

| <b>Table 9: ATF Polygraph Unit Workload by Use<br/>FY 2002 through 2005</b> |                        |                 |                         |              |
|---|------------------------|-----------------|-------------------------|--------------|
| <b>Fiscal Year</b>  | <b>Pre-Employment*</b> | <b>Criminal</b> | <b>Foreign Vetting*</b> | <b>Total</b> |
| <b>2002</b>   | 266                    | 306             | 82                      | 654          |
| <b>2003</b>   | 384                    | 328             | 0                       | 712          |
| <b>2004</b>   | 372                    | 338             | 0                       | 710          |
| <b>2005</b>   | 316                    | 308             | 0                       | 624          |
| <b>Total</b>  | <b>1,338</b>           | <b>1,280</b>    | <b>82</b>               | <b>2,700</b> |

\* The number of pre-employment screening and foreign vetting examinations includes the total number of tests and retests.

Source: ATF Polygraph Unit

From FY 2002 through 2004, ATF spent an average of approximately \$2.5 million per year for its polygraph program (Table 10). ATF's Special Operations Division tracks all polygraph program costs – both Headquarters and field costs.

| <b>Table 10: ATF Polygraph Program Costs<br/>FY 2002 through 2004</b> |                    |                  |                  |                        |                    |
|---|--------------------|------------------|------------------|------------------------|--------------------|
| <b>Fiscal Year</b>  | <b>Personnel</b>   | <b>Travel</b>    | <b>Training</b>  | <b>Other Expenses*</b> | <b>Total</b>       |
| <b>2002</b>   | \$2,096,401        | \$130,026        | \$102,671        | \$43,846               | \$2,372,944        |
| <b>2003</b>   | \$2,153,296        | \$170,710        | \$81,599         | \$39,929               | \$2,445,534        |
| <b>2004</b>   | \$2,272,372        | \$161,287        | \$59,309         | \$56,108               | \$2,549,076        |
| <b>Total</b>  | <b>\$6,522,069</b> | <b>\$462,023</b> | <b>\$243,579</b> | <b>\$139,883</b>       | <b>\$7,367,554</b> |

\* Other Expenses include the costs of shipping, rentals, services, supplies, and equipment.

Source: ATF Polygraph Branch

## **Quality Control and Oversight**

Quality control and oversight mechanisms to ensure the integrity of ATF's polygraph program include: (1) internal quality control checks of polygraph results by the ATF Polygraph Branch, (2) internal oversight provided by ATF's Inspections Division, (3) external quality assurance provided by the DoDPI Quality Assurance Program, and (4) external oversight by OPM. Each of these mechanisms is described below.

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## Quality Control

The ATF Polygraph Branch conducts a quality control review of each polygraph examination to ensure that ATF examiners conform to accepted polygraph practices prescribed in ATF's draft examiner's handbook and as set forth by DoDPI. ATF defines its quality control review as a systematic evaluation, review, and critique of each polygraph examination conducted by ATF examiners. Examination results are not final until the polygraph examination records undergo a quality review and the reviewing official or officials agree with the results of the examination and issue a final opinion on the results.

All quality control reviews are conducted by the SAC of the Polygraph Branch, a team leader, or other designated senior examiner. The quality control process for polygraph examinations conducted by one of ATF's 12 field examiners is slightly different from the quality control process for polygraph examinations conducted by one of the three team leaders.

When a field examiner completes a polygraph examination, the test data, including the test charts and all related paperwork, is forwarded to one of the three team leaders for a quality control review. The team leader reviews the entire examination, analyzes test question construction, evaluates the polygraph charts independently, and reviews the overall technical aspects of the examination. The quality review is intended to ensure that the field examiner followed required procedures and that the polygraph charts are compatible with the field examiner's opinion on the results of the examination. The team leader reviews the polygraph charts first, rather than the report summary, so that his review is objective and unbiased by the information in the summary report.

If the team leader agrees with the field examiner's opinion, the examination package is forwarded to the SAC of the Polygraph Branch, who reviews the examination to determine whether the team leader and the field examiner agreed on the examination results. When there is agreement, the examination is considered complete.

If the team leader disagrees with the field examiner's opinion on the examination, the team leader contacts the examiner to discuss the review and to identify corrective action. If there is still disagreement, the team leader forwards the complete packet to a second team leader for review. If the second team leader agrees with the field examiner, the case is considered complete. If the second team leader agrees with the initial team

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leader, additional testing is scheduled or the examination report is amended as appropriate.

The difference in the quality control process for team leaders is that, when a team leader conducts an examination, the results are forwarded to another team leader for a quality control review. If there is disagreement between the two team leaders, the examination is sent to the SAC of the Polygraph Branch for additional evaluation and a final opinion on the results. The SAC of the Polygraph Branch also annually reviews at least one polygraph examination conducted by each ATF examiner to further ensure compliance with applicable policies and procedures.

In DoDPI's last three reports on the ATF polygraph program, DoDPI has reported that ATF's quality control program includes an independent and objective review that is free of undue influence from the original examiner or other sources.

### Internal Oversight

ATF management is responsible for ensuring that its various divisions and offices comply with all applicable laws and regulations. To ensure compliance, ATF performs triennial reviews of all of its operations. During the week of December 12 through 15, 2005, ATF's Office of Professional Responsibility and Security Operations, Inspection Division, conducted an inspection of the Polygraph Branch. The inspection covered the period of October 1, 2004, through September 30, 2005. The Polygraph Branch received an overall rating of "Green" for "Effective and Efficient," which is the highest rating attainable.

### External Quality Assurance

ATF has participated in the DoDPI Quality Assurance Program since 1997 and underwent its first review on September 30, 1997. DoDPI conducted its last three reviews in September 2000, May 2002, and June 2004. Each of the DoDPI reviews covered 118 criteria in 9 primary areas of ATF's polygraph program. The next DoDPI review is expected to be conducted in 2006.

We reviewed DoDPI's last two reports on ATF's polygraph program, and all subsequent findings and recommendations, and we found that ATF had responded to all issues in a timely manner. According to the 2002 report, DoDPI reviewed 73 polygraph examinations (41 pre-employment screenings and 32 specific-issue examinations). DoDPI inspectors made

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only one recommendation, which stemmed from a finding of improper question construction. DoDPI inspectors found that the probable lie comparison questions used in several applicant screening examinations did not meet federal standards for question construction because they were not clearly separated from the relevant issue. DoDPI recommended that all probable lie comparison questions conform to federal standards. According to the FY 2004 report, DoDPI officials reviewed 70 polygraph examinations (35 pre-employment screening and 35 specific-issue examinations). DoDPI officials made no recommendations regarding the 118 criteria that were reviewed.

Subsequent to both reviews, DoDPI issued a letter to ATF stating, “The ATF Polygraph Branch was found to comply with ATF polygraph policies and procedures and its polygraph program and staff met the standards required of a Federal Government polygraph program.”<sup>77</sup>

### OPM Oversight

ATF employees are part of the competitive civil service and fall under the purview of OPM. OPM annually reviews and approves ATF’s request to be allowed to continue using pre-employment polygraph examinations as a screening tool for determining the suitability of job applicants for ATF Special Agent positions. OPM has continued to grant ATF annual reauthorization to administer pre-employment screening polygraphs. To continue receiving OPM’s approval, ATF has to re-apply to OPM each year and attest to its continuing policies of:

- Complying with polygraph standards that are at least as stringent as or more stringent than those found in the *Federal Examiner Handbook*,
- Not denying employment or a security clearance based on the results of an Inconclusive polygraph examination without the review and approval of ATF’s Chief Security Officer,
- Participating in the federal quality assurance review program by undergoing biennial reviews by DoDPI and submitting the results of the reviews to OPM and ATF’s Office of Security.

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<sup>77</sup> The most recent letter from DoDPI attesting to ATF’s compliance with federal standards was dated June 24, 2004.

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ATF's last application for OPM approval was September 8, 2005. In its application, ATF asked OPM for a 1-year authorization for the expanded use of polygraph in the screening of competitive and excepted service GS-1811 criminal investigator, Special Agent applicants, as part of the pre-employment background investigation process. The request was for authorization for the period of October 1, 2005, to September 30, 2006. On April 26, 2006, OPM officials granted ATF authorization to use polygraph examinations for pre-employment and personnel security screening for FY 2006

From February to June 2004, OPM's Center for Merit System Compliance conducted an appraisal of the ATF personnel security, suitability determination, and investigation programs for compliance with applicable requirements. As part of the appraisal, OPM asked whether ATF used polygraph examinations for security or suitability purposes and whether OPM had approved the agency's use for competitive service appointment. ATF answered "Yes" to both questions. Further, OPM found that ATF had a strong program that met or exceeded federal requirements.<sup>78</sup>

### **Program Performance and Results**

The ATF Polygraph Branch maintains a database that is used to generate monthly and annual reports on the quantity and quality of polygraph examinations conducted by ATF's polygraph examiners. ATF uses the data to analyze its polygraph program, characterize polygraph productivity, and measure program performance. In its June 2004 report on the ATF polygraph program, DoDPI found that ATF's polygraph program database and the statistical reports generated from the database met federal requirements for program statistics.

Table 11 shows that during FY 2002 through 2005, ATF's conclusive rate for criminal, specific-issue polygraphs was 62.7 percent. Its conclusive rate was 81.2 percent for pre-employment screenings and 84.1 percent for foreign vetting polygraph examinations. ATF's conclusive rate for pre-

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<sup>78</sup> Executive Order 10450, "Security Requirements for Government Employees," April 27, 1953, grants OPM authority to make these appraisals to determine whether an agency has established and maintained an effective program to insure that employment and retention in employment of any civilian officer or employee is clearly consistent with national security interests. The appraisals involve a review of an agency's program operations and guidelines, personnel security records, suitability files, adjudication decisions, official personnel folders, and other related documents and records, and interviews with agency managers and employees.

employment screening and foreign vetting exceeds an industry standard of 80 percent.<sup>79</sup> While ATF tracks the number of pre-employment examinations during which the examinee made an admission or confession in the pretest phase, ATF does not track the overall confession rate of its examiners.

ATF uses categories for reporting polygraph results that are slightly different from those used by the FBI and DEA. For example, similar to the DEA, ATF uses the terms “No Significant Response” (NSR) and “Significant Response” (SR) when reporting the results of pre-employment screening and foreign vetting polygraph examinations. ATF also uses a “No Opinion” (NO) to mean that the examiner could not render an opinion based on the physiological data on the charts. ATF’s “NO” is similar in definition to the FBI’s and DEA’s “Inconclusive” result. ATF also uses the term “Administrative Opinion” (AO) to categorize tests that were scheduled but not conducted for a variety of reasons, such as when the test subject refused to go through with the examination or the examiner determined that the test subject was not medically, physically, or mentally fit to undergo the examination.

| <b>Table 11: ATF Polygraph Examination Results<br/>FY 2002 through 2005</b> |               |  |                 |           |           |              |
|---|---------------|--|-----------------|-----------|-----------|--------------|
| <b>Examinations</b>   |               | <b>Examination Result (Percentage)</b> |                 |           |           |              |
| <b>Use</b>  | <b>Number</b> | <b>NDI (NSR)</b>                       | <b>DI (SR)*</b> | <b>NO</b> | <b>AO</b> | <b>Total</b> |
| <b>Non-Specific Issue (Screening) Polygraph Examinations</b>                |               |  |                 |           |           |              |
| Pre-Employment  | 1,338         | 72.3%                                  | 8.9%            | 16.0%     | 2.8%      | 100%         |
| Foreign Vetting   | 82            | 76.8%                                  | 7.3%            | 14.6%     | 1.2%      | 100%         |
| <b>Specific-Issue Polygraph Examinations</b>                                |               |  |                 |           |           |              |
| Criminal  | 1,280         | 29.3%                                  | 33.4%           | 15.1%     | 22.2%     | 100%         |
| <b>Total</b>  | 2,700         | N/A.                                   | N/A             | N/A       | N/A       | 100%         |

\*Includes pre-test confessions/admissions.

Source: ATF Polygraph Branch

<sup>79</sup> ATF reports the results of each series of questions that an examinee undergoes during a pre-employment or foreign vetting screening – not the results of the overall examination as do the FBI and DEA. When calculating ATF’s conclusive rate, we used the total number of series as the basis.

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## **THE OIG POLYGRAPH PROGRAM**

### **Background**

The OIG investigates alleged violations of criminal and civil laws, and regulations pursuant to the Inspector General Act of 1978 and Attorney General Order 1393-90, dated January 29, 1990.

### **Mission and Purpose**

The OIG Polygraph Unit is staffed by Special Agents whose primary responsibility is to conduct investigations of suspected criminal and administrative violations affecting Department resources and programs. When requested, the OIG Polygraph Unit also sometimes conducts examinations in support of the BOP, USMS, U.S. Attorneys' Offices, and other federal agencies.

### **Policies and Regulations**

The OIG's Assistant Inspector General (AIG) of Investigations has been delegated responsibility for the formulation and implementation of policy and procedures pertaining to the administration and conduct of polygraph examinations by OIG personnel.

OIG polygraph policy is contained in the *Inspector General Manual*, Volume III, *Investigations*, Chapter 265, Polygraph Examinations, January 16, 2001, and in the *Inspector General Handbook, Investigations Division, Polygraph Examiner Handbook*, January 2003. Chapter 265 of the *OIG Investigations Manual* establishes procedures and guidelines for the use of polygraph examinations as a tool in OIG investigations. The *OIG Polygraph Examiner Handbook* establishes procedures and guidelines for the conduct of polygraph examinations by polygraph examiners. Its provisions, along with those of Chapter 265 of the *Investigations Manual*, apply to all polygraph examinations conducted by examiners in the OIG's Investigations Division. OIG policy states that polygraph examiners are to strictly adhere to all OIG rules, regulations, and established procedures so that they are prepared to defend their competence, procedures, opinions, and standards before all judicial bodies concerning any examination in which they are involved.

Individuals polygraphed by the OIG normally are not compelled to take a polygraph examination, and they may refuse to do so without adverse

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administrative action or a negative inference. An exception occurs when the OIG is conducting an administrative investigation involving FBI employees who, under FBI policy, can be compelled to take a polygraph examination if an administrative investigation concerns a serious violation of the law or FBI policy. The FBI can compel its employees to cooperate with OIG investigations and to take polygraph examinations in certain circumstances (described on pages 43 and 44) or face disciplinary action.

Provisions of the OIG *Investigations Manual* require OIG examiners to use DoDPI question formulation procedures for all authorized polygraph examinations. The manual's provisions also state that the examiner's opinion should not be the sole factor in determining the guilt or innocence of the test subject.

The OIG's *Polygraph Examiner Handbook* addresses the more general aspects of conducting polygraph examinations and includes policy on initiating a polygraph examination, certifying OIG examiners, controlling examination quality, authorization and reporting procedures, and polygraph examination procedures.

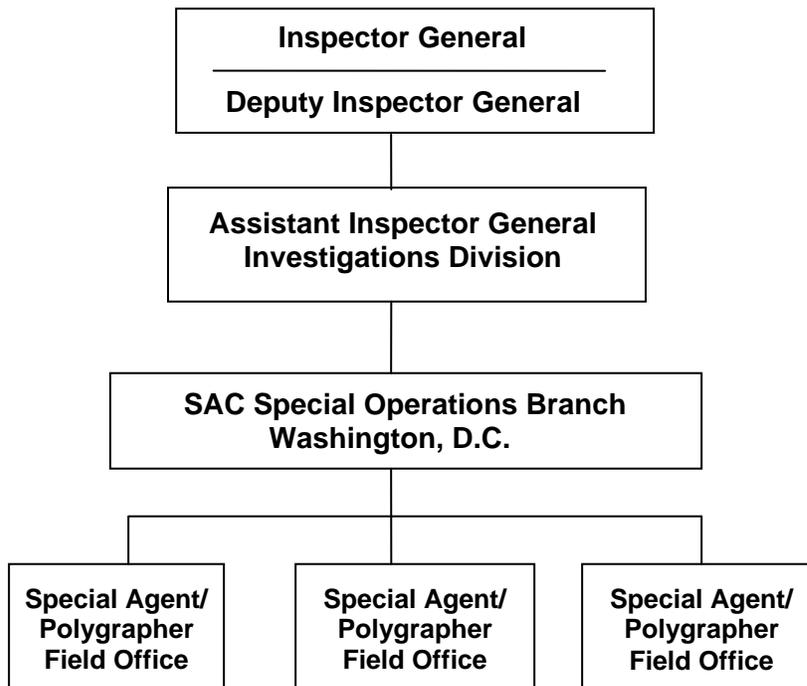
### **Organization and Staffing**

As shown in Chart 5, the SAC of the Special Operations Branch has been designated by the AIG of the Investigations Division to serve as the OIG's Polygraph Program Manager and Coordinator. The SAC, assigned to OIG Headquarters in Washington, D.C., is responsible for specific oversight of the polygraph program as well as management of its day-to-day operations. All requests, reports, and recommendations relating to polygraph activities are directed to the SAC for action.

The SAC is assisted by three Special Agent/Polygraphers. The three Special Agent/Polygraphers, who are GS-1811 Special Agent criminal investigators, may be assigned to participate in criminal investigations as well as to conduct polygraph examinations. The Special Agents maintain an investigative caseload in their assigned field offices and also conduct polygraph examinations as assigned.

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**Chart 5: OIG Polygraph Program**



Source: OIG Polygraph Unit

### **Polygraph Examination Uses and Procedures**

The OIG uses specific-issue polygraph examinations in its investigations into allegations of criminal activity or other misconduct by Department employees. The OIG does not require its job applicants to undergo a pre-employment polygraph examination. Further, the OIG does not subject its employees to random or periodic personnel security screening polygraphs as a condition for access to sensitive information or to obtain a security clearance.

In addition to its own polygraph activities, the OIG sometimes conducts polygraph examinations for Department components that do not have their own polygraph programs. These examinations are conducted at

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the request of the other agencies with the approval of the SAC of the Special Operations Branch.<sup>80</sup>

The SAC of the Special Operations Branch must authorize all OIG-administered polygraph examinations, including those requested by other law enforcement and intelligence agencies. A polygraph examination may be authorized for any offense subject to investigation by the OIG. If there is a conflict between OIG polygraph procedures and those of a requesting agency, the OIG uses its own procedures.

Polygraph examinations conducted by the OIG are normally requested by an investigating agent. Prior to making an official request for polygraph assistance, the case agent determines whether a polygraph examination would be useful and whether a proposed test subject would be willing to take a polygraph examination.<sup>81</sup> If the case agent is unsure about the feasibility of using a polygraph examination in an investigation, the agent is encouraged to discuss the matter with the SAC of the Special Operations Branch. The case agent is also encouraged to use the polygraph as an investigative tool only when other investigative leads have been exhausted, but the primary issues have not been resolved.<sup>82</sup> Requests can be made in writing or by telephone, but all requests must include specific information concerning the proposed test subject (such as age, physical and mental condition, and special requirements) and the investigation (such as the name of the requestor, type of case, and issues needing resolution).

The SAC of the Special Operations Branch must approve all polygraph examinations the OIG conducts. Once an examination is scheduled, the case agent is responsible for providing logistical support to the assigned examiner, being available to confer with the examiner concerning the specifics of the case, ensuring the examinee is present at the scheduled time, witnessing the advisement of the examinee's rights and the signing of the consent form, monitoring the examination when possible, and obtaining a formal statement in the event that the examinee makes a confession or

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<sup>80</sup> From FY 2002 through 2005, the OIG conducted 33 polygraph examinations for other Department components. These polygraphs were conducted for Federal Bureau of Prisons internal affairs investigations and Criminal Division criminal investigations.

<sup>81</sup> For cases involving FBI employees, OIG investigators do not take into account whether the subject of the investigation would be willing to take a polygraph examination.

<sup>82</sup> On occasion, the OIG will conduct polygraphs on complainants at the start of an investigation.

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admission during the examination process. When practical, the OIG honors requests made by an examinee's legal counsel to observe the examination.

The examiner is responsible for developing a written report on the results of the examination. The examiner can render one of three preliminary opinions regarding the results of a completed examination:

- Deception Indicated,
- No Deception Indicated, or
- Inconclusive.

Multiple series, or retests, may be conducted at the discretion of the examiner to clarify an initial inconclusive opinion.<sup>83</sup> If the examiner finds indications of deception, the examiner conducts a post-test interview to attempt to resolve any relevant issues.

The examiner develops an examination report for each test and submits it to the SAC of the Special Operations Branch within 5 days of the examination. Each polygraph report and preliminary opinion by the examiner is reviewed by the SAC for quality, and the SAC renders the final opinion on the results of the examination. Polygraph examinations are not complete until the SAC signs the polygraph report.

The original polygraph report is sent to the requesting area or field office where the investigation originated for retention in the working and permanent case file. When the OIG conducts a polygraph examination at the request of another component, the original report is sent to the requesting component. A copy of all examination reports is retained in the OIG Investigations Division's files.

### **Examiner Qualifications and Training**

The AIG for Investigations is responsible for selecting and training OIG polygraph examiners. Only OIG-certified polygraph examiners conduct OIG-sponsored polygraphs, unless the AIG for Investigations authorizes the use of another federally certified examiner.

OIG Special Agents selected to be trained as polygraph examiners are GS-1811 series criminal investigators who must have a minimum of 4 years

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<sup>83</sup> An OIG examiner's opinion can be rendered based on a minimum of two polygraph test charts – one less than most federal polygraph program standards require.

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of criminal investigative experience and pass a mandatory integrity screening polygraph examination. OIG examiner trainees receive basic examiner training at DoDPI and must successfully complete a supervised internship.

After examiners complete all required training, they receive a certificate of competence from the Inspector General through the AIG for Investigations. To maintain their certification, examiners must conduct, review for quality, or act as second examiner for a minimum of 12 polygraph examinations per year. Examiners also have to participate in the federal continuing education program by attending at least one polygraph-related training course or by accumulating at least 80 hours of advanced training courses biannually.<sup>84</sup>

The AIG for Investigations can decertify OIG examiners, which means they can no longer conduct polygraph examinations for the OIG. Examiners can be decertified for repeatedly failing to demonstrate the ability to conduct proper examinations, render accurate opinions, meet reporting requirements, or act in a professional manner consistent with the professional and ethical standards of the OIG.

As of January 2006, the SAC of the Special Operations Branch had over 31 years of investigative experience and 22 years of polygraph experience.

### **Workload and Program Costs**

In FY 2002 through 2005, the OIG Polygraph Unit conducted 173 polygraph examinations. (See Table 12.) The OIG conducted 81 percent (140) of the examinations as part of OIG criminal and misconduct investigations.<sup>85</sup> The OIG conducted the other 19 percent (33) in response to requests made by other agencies that included the BOP (17), Criminal Division (5), the WITSEC Program (3), U.S. Attorneys (2), and agencies outside of the Department (6).

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<sup>84</sup> OIG examiners are also required to be members of the American Polygraph Association. Examiners are encouraged to belong to other law enforcement-related professional organizations as well.

<sup>85</sup> The OIG does not distinguish between examinations conducted for criminal investigations and those conducted for misconduct investigations. Both criminal and administrative investigations are handled in the same manner. A case may be initiated as a criminal investigation but change to an administrative investigation at some point.

| <b>Table 12: OIG Polygraph Unit Workload<br/>FY 2002 through 2005</b> |                    |
|---|--------------------|
| <b>Fiscal Year</b>  | <b>Misconduct*</b> |
| 2002  | 32                 |
| 2003  | 52                 |
| 2004  | 44                 |
| 2005  | 45                 |
| <b>Total</b>  | <b>173</b>         |

\* The OIG does not compile data for criminal and misconduct investigations separately.

Source: OIG Polygraph Unit

As shown in Table 13, the OIG spent approximately \$559,000 in support of its polygraph program in fiscal years 2002 through 2004.

| <b>Table 13: OIG Polygraph Unit Budget Costs<br/>FY 2002 through 2004</b> |                   |                                 |                  |                 |                  |                  |
|---|-------------------|---------------------------------|------------------|-----------------|------------------|------------------|
| <b>Fiscal Year</b>  | <b>Polygraphs</b> | <b>DoDPI and Other Training</b> | <b>Personnel</b> | <b>Travel</b>   | <b>Equipment</b> | <b>Total</b>     |
| 2002  | 32                | \$8,629                         | \$121,162        | \$14,374        | \$11,709         | \$155,874        |
| 2003  | 52                | \$9,234                         | \$163,194        | \$23,946        | \$0              | \$196,374        |
| 2004  | 44                | \$9,451                         | \$174,325        | \$21,852        | \$1,515          | \$207,143        |
| <b>Total</b>  | <b>128</b>        | <b>\$27,314</b>                 | <b>\$458,681</b> | <b>\$60,172</b> | <b>\$13,224</b>  | <b>\$559,391</b> |

Source: OIG Polygraph Unit

## **Quality Control and Oversight**

The OIG's polygraph program has two oversight and quality control mechanisms – an internal quality control program conducted by the SAC of the Special Operations Branch and an external quality assurance review by DoDPI.

### Quality Control Review

The SAC of the Special Operations Branch, or a senior examiner who is designated by the SAC, conducts a quality control review of every

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examination record to ensure that the examination was conducted according to the highest standards of professionalism, accuracy, and reliability. The SAC's opinion is based on an independent and objective analysis of the test data followed by a review of all other documentation, including the examination report. The SAC can "concur" or "non-concur" with the examiner's preliminary opinion on the results of the examination. The SAC's chart analysis, opinion, and other commentary become a permanent part of the examination file.

If the SAC concurs with the examiner's opinion, the examination report is considered complete and the original polygraph report is sent to the controlling field office to be used in the investigation and to become a part of the case file. If the SAC does not agree with the examiner's opinion, the file is forwarded to the U.S. Secret Service or the FBI for a third and final opinion that is binding. When the SAC conducts a polygraph examination, another senior OIG examiner is designated to conduct a quality control review of the examination record. No examination is considered valid and complete until the quality control review has been completed and the SAC has signed the polygraph report.

In its three quality assurance reviews of the OIG Polygraph Unit, DoDPI has consistently found that the OIG's quality control process is independent, objective, and free of undue influence.

#### DoDPI Quality Assurance Reviews

DoDPI provides external oversight of the OIG Polygraph Unit through its biennial quality assurance reviews. In 2000, 2002, and 2004, DoDPI reviewed 112 examination records to determine whether the program was being managed and implemented in compliance with OIG polygraph policies and procedures and the standards established for federal polygraph programs. The examination records were reviewed for compliance with the 118 criteria in 9 primary management and technical areas.

A number of recommendations were made in DoDPI's 2000 review, and all but one were implemented prior to the completion of the review. Consequently, DoDPI's report on its 2000 review contained one recommendation, which addressed the OIG's use of a fourth chart, or a fourth round of questioning. Although OIG policy limited the use of a fourth chart, records showed that examiners had used a fourth chart in circumstances that were not supported by OIG policy and federal standards. The DoDPI report recommended that the OIG ensure that a fourth chart was used only when appropriate.

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In 2002, DoDPI recommended that OIG polygraph examiners adhere to OIG policies pertaining to question formulation and examination test formats. The recommendation stemmed from a DoDPI finding that, in 3 of the 32 examinations, examiners had not followed OIG policies and procedures for test question construction.

In 2004, the DoDPI report contained no recommendations because DoDPI inspectors found that the OIG program met or exceeded all the requirements expected of a federal polygraph program.

DoDPI reported that, after each of its three reviews of the OIG Polygraph Unit, the OIG responded in a timely and cooperative manner to all DoDPI recommendations and was subsequently certified compliant with federal standards. The most recent certification was on November 9, 2004.

### **Program Performance and Results**

The OIG maintains a database concerning its use of polygraph examinations. The database includes information on who was polygraphed, whether they were a subject or witness in an investigation, the organization with jurisdiction in the case, and the results of the examination. The SAC of the Special Operations Branch uses the information to manage the OIG's polygraph program, to characterize and report its workload and productivity, and to meet federal standards for maintaining program statistics. The results of the OIG's polygraph examinations are shown in Table 14.

We examined data on the outcomes of polygraph examinations from FY 2002 through 2005 and found that OIG examiners reached conclusive opinions (e.g., No Deception Indicated or Deception Indicated) in 94 percent (145) of all examinations that were completed (155). This means that OIG examiners had an inconclusive rate of 6 percent. The remaining 18 examinations resulted in a "No Opinion" (NO) because the examiner stopped the examination before collecting enough data to render a conclusive decision or in a "No Examination" because the proposed examinee did not undergo an examination as scheduled. DoDPI reported that during FY 2004 OIG examiners had a confession rate of over 84 percent.

| <b>Table 14: OIG Polygraph Examination Results<br/>FY 2002 through 2005</b> |               |  |                                |                     |   |              |
|---|---------------|--|--------------------------------|---------------------|---|--------------|
| <b>Examinations</b>   |               | <b>Examination Result (Percentage)</b> |                                |                     |   |              |
| <b>Use</b>  | <b>Number</b> | <b>No Deception<br/>Indicated</b>      | <b>Deception<br/>Indicated</b> | <b>Inconclusive</b> | <b>No Opinion<br/>or No<br/>Examination</b> | <b>Total</b> |
| <b>Specific-Issue Polygraph Examinations</b>                                |               |  |                                |                     |   |              |
| Criminal and<br>Misconduct<br>Investigations                                | 173           | 49%                                    | 35%                            | 6%                  | 10%   | 100%         |

Source: Special Operations Branch

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## **SECTION II: Other Polygraph Users in the Department of Justice**

### **Background**

Seven organizations in the Department reported using the results of polygraph examinations that were conducted by other federal agencies, such as the FBI, OIG, and CIA, or by a private contractor. The seven users were the Department's Criminal Division, Justice Command Center (JCC), Antitrust Division (ATR), National Drug Intelligence Center (NDIC), Office of Professional Responsibility (OPR), BOP, and USMS. From FY 2002 through 2004, the seven users requested other agencies to conduct a total of 1,728 polygraph examinations for witness security screening, administrative (misconduct and internal affairs) investigations, criminal investigations, personnel security screening, sex offender treatment, and vetting foreign witnesses, prosecutors, and law enforcement personnel.<sup>86</sup> Over 96 percent of the examinations were conducted by the FBI.

Of the seven users, only the BOP, JCC, and NDIC have internal policies and procedures governing the use of polygraph examinations.<sup>87</sup> The JCC is the only user that OPM has approved to use narrowly focused, counterintelligence-scope polygraph examinations as part of the security clearance process for its competitive service employees and recruits. OPM granted the Department authority to use polygraph examinations for positions in the JCC after OPM determined that the JCC had a national security mission supporting the use of polygraphs and approved the JCC's polygraph policies and procedures.

DoDPI has never conducted a quality assurance review of the seven components' uses of polygraph examinations. DoDPI has reviewed some of the examination records via its quality assurance reviews of the polygraph programs of the agencies such as the DEA, ATF, and OIG that conduct examinations. Although the FBI conducted approximately 96 percent of the examinations requested by the seven users in FY 2002 through 2004, the FBI has not provided the records of those examinations for DoDPI review.

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<sup>86</sup> The same polygraph examinations reported in this section as requested by the seven user components were also reported by the FBI in its number of polygraph examinations conducted for other agencies.

<sup>87</sup> As described in the Introduction section, the Department has policies and procedures dealing with the use of polygraph examinations in criminal investigations, prosecutions, and the Witness Security Program that apply to all of its components.

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The FBI cited the logistical problems of retrieving the records of criminal specific-issue, pre-employment and personnel security polygraph examinations from the requesting agencies as the reason for not providing them to DoDPI for review. The FBI does not provide examination records associated with the WITSEC Program, Foreign Counterintelligence and Counterterrorism, and Office of Professional Responsibility programs for DoDPI review, whether they are conducted for FBI purposes or for another agency, due to the sensitive nature of those programs.

A description of the polygraph policy and operations of each of the seven components that use polygraph examination results follows.

### **Criminal Division**

The Department's Criminal Division and the 93 U.S. Attorneys have responsibility for overseeing criminal matters under more than 900 federal statutes as well as certain civil litigation. The Division also approves or monitors sensitive areas of law enforcement, such as participation in the WITSEC Program and the use of electronic surveillance. According to the Criminal Division, 4 of the 19 organizations within the Division oversee or use the results of polygraph examinations. From FY 2002 through 2004, the 4 organizations requested that the FBI and other law enforcement agencies conduct a total of 1,171 polygraph examinations. Each of the four organizations is described below.

#### Office of Enforcement Operations (OEO)

OEO provides U.S. Attorneys' Offices with assistance on wiretaps, subpoenas, witness security, and prisoner transfers. OEO uses the results of polygraph examinations primarily to evaluate prisoner-witnesses seeking entry into the WITSEC Program. (See the box on page 136 for a description of polygraph usage in WITSEC.) The FBI conducts most of the examinations, but the OIG and the Secret Service have also conducted them for OEO. Although rare, OEO has asked the FBI and OIG to polygraph informants in undercover operations to verify their truthfulness.

The Chief of the WITSEC Security Unit and the Director of OEO and the WITSEC Program are responsible for overseeing polygraph examinations. They use the provisions of the *U.S. Attorneys' Manual*, which

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contains Department policy and guidance for prisoner-witnesses seeking entry into the WITSEC Program.<sup>88</sup>

OEO Intelligence Analysts initiate requests for polygraph examinations via memorandums to the FBI, OIG, or Secret Service, depending on the availability of examiners. After an individual takes a polygraph examination, the examining authority (FBI, OIG, or Secret Service) submits a report on the results to OEO. Candidates for the WITSEC Program who fail a polygraph examination are not admitted to a BOP Protective Custody Unit.

About 7 months before an individual in a Protective Custody Unit leaves prison, the individual undergoes an exit polygraph examination. The purpose of this examination is to determine whether someone leaving the Protective Custody Unit is or is planning to exchange information on how to contact someone else in the unit. If the polygraph results are inconclusive, OEO authorizes another examination, but it never authorizes more than two. The conducting agency sends OEO the polygraph examination report. OEO maintains a copy of the report because it is ultimately responsible for the prisoners. The BOP also receives a copy. OEO provides the results of exit polygraph examinations to the USMS, which assumes responsibility for protecting WITSEC Program participants who are not incarcerated. OEO officials said that they do not know whether the agency conducting the polygraph examination (usually the FBI) keeps a copy of the examination records. The results of the polygraph examinations remain in OEO's files as part of the prisoner-witness's permanent record. OEO restricts access to those files to only WITSEC staff.

OEO officials said that neither the Department nor DoDPI has reviewed OEO's use of polygraph examinations. Although DoDPI conducts biennial reviews of the polygraph programs managed by the FBI, OIG, and the Secret Service, the FBI conducts most of the examinations and it does not make those records available to DoDPI for review.

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<sup>88</sup> The purpose of Title 9, Chapter 9-21 of the *U.S. Attorneys' Manual* is to provide information and guidance to Department attorneys with respect to the Witness Security Reform Act of 1984, Part F of Chapter XII of the Comprehensive Crime Control Act of 1984 (Pub. L. No. 98-473). According to Section 9-21.340, *Polygraph Examinations for Prisoner-Witness Candidates*, "A polygraph examination is required of all Witness Security Program candidates who are incarcerated . . . ." The *U.S. Attorneys' Manual* further provides that candidates must consent to take an examination in writing.

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## Domestic Security Section (DSS)

The DSS investigates and prosecutes criminal organizations that smuggle aliens, including those that could be used to smuggle terrorists into the United States. The DSS also investigates and prosecutes individuals that harbor aliens, provide false identification documents, and contract with smuggling groups to obtain illegal workers for factories and plants. The DSS sometimes supports bringing to the United States potential witnesses, such as persons who were being smuggled or are connected to the smuggling organization. DSS officials said that, while they themselves rarely, if ever, use polygraph examinations, they work closely with other agencies that may use polygraphs more frequently, such as the FBI and CIA. If the results of a polygraph examination are available and have any application to a DSS investigation, DSS officials may review the results of a polygraph examination because it may be relevant to assessing the reliability of a witness. DSS officials said that they recently concurred in a decision to polygraph two potential witnesses for national security purposes. The DSS uses Department regulations in the *U.S. Attorneys' Manual* for guidance in their use of polygraph examinations. The DSS also reviewed the results of four polygraph examinations from FY 2002 through 2004.

## Overseas Prosecutorial Development, Assistance, and Training (OPDAT)

OPDAT trains and provides technical assistance to foreign counterparts to develop reliable law enforcement partners overseas.<sup>89</sup> OPDAT offers technical assistance, including arranging for and supporting polygraph examinations, to host countries that decide to establish vetted units staffed by investigators and prosecutors, as well as, in some instances, financial and administrative support staff. Host country officials choose the prosecutors and investigators for membership in the units and also determine whether the candidates will be vetted. OPDAT officials told us that only 4 percent of the approximately 70 countries that receive OPDAT technical assistance have been assisted with FBI polygraph services. If the host country request polygraph services, OPDAT arranges for FBI examiners to conduct the polygraph examinations to determine, for example, whether the foreign prosecutors have taken bribes or violated human rights laws in

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<sup>89</sup> The Department of State provides funding for technical assistance to OPDAT through an interagency agreement.

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their countries.<sup>90</sup> As shown in Table 3, during our study period, FY 2002 through 2004, the FBI conducted 725 polygraph examinations for OPDAT. However, OPDAT began using polygraph examinations in its programs in FY 1999. OPDAT officials reported in August 2006, that, over the life of the program, a total of 1,954 examinations have been conducted at OPDAT's request:

- FY 1999 - 162;
- FY 2000 - 224;
- FY 2001 - 198;
- FY 2002 - 302;
- FY 2003 - 136;
- FY 2004 - 287;
- FY 2005 - 420; and
- FY 2006 - 225 (as of August 2006).

OPDAT does not have written internal policy or procedures for its use of polygraph examinations for foreign vetting. To initiate a polygraph examination, OPDAT personnel in Washington, D.C., forward a request to the FBI based on information received from an OPDAT office in another country. OPDAT staff work with FBI examiners to develop test questions, and the FBI Polygraph Unit uses OPDAT funding to send a group of examiners to the designated country to conduct the examinations. An individual who fails a polygraph examination is not allowed to work with a vetted task force and, in some countries, may be ineligible to receive OPDAT assistance. OPDAT relies heavily on polygraph examination results because of the limitations on the background investigations that can be done on foreign prosecutors. The results of an examination are reported to OPDAT and shared with the FBI Embassy Legal Attaché, Embassy Regional Security Officer, and the host country. A senior-level team leader supervises the FBI polygraph examiners in-country. OPDAT's Resident Legal Advisors also provide oversight to the teams while they are in-country.

DoDPI has not reviewed OPDAT's use of polygraph examinations for foreign vetting. OPDAT officials said they relied on the FBI to comply with federal standards. DoDPI has certified that the FBI's polygraph program meets federal technical, professional, and ethical standards. However, DoDPI has not reviewed the FBI's records of the OPDAT examinations or the OPDAT files.

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<sup>90</sup> According to OPDAT officials, if FBI examiners are not available, OPDAT asks the DEA to conduct an examination.

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## Public Integrity Section

The Public Integrity Section prosecutes public corruption cases nationwide, typically working with the law enforcement agencies, especially the FBI and the OIG community, to investigate alleged crimes. The Public Integrity Section uses polygraph examinations in connection with criminal cases to verify the truthfulness of cooperating witnesses and informants, as well as the subjects of criminal investigations. The Criminal Division reported to us that polygraph examinations were used by law enforcement agents in 15 instances in matters handled by the Public Integrity Section in FY 2002 through 2004.

The Public Integrity Section follows Department polygraph policy contained in the *U.S. Attorneys' Manual*.<sup>91</sup> The Public Integrity Section does not have a formal process for initiating a request for a polygraph examination. Typically, the law enforcement agent that is working with the Public Integrity Section staff on an investigation will initiate the idea of using a polygraph examination as an investigative tool and officials in the Public Integrity Section will either object or agree to its use. Public Integrity Section officials said that law enforcement agents are more inclined to use polygraph examinations than others who are involved in their cases such as the prosecutor. All requests are handled by the law enforcement agency's case agent who is working with the Public Integrity Section. Usually, the Public Integrity Section's Deputy Chief and the trial attorney discuss a request from the case agent and decide whether to grant it based on the potential value of the examination results in the investigation. Their decision is conveyed to the case agent. Proposed subjects cannot be compelled to take a polygraph examination. Results of polygraph examinations are placed in the appropriate case files.

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<sup>91</sup> Title 9, Chapter 13 of the *U.S. Attorneys' Manual*, Section 9-13.300, Polygraphs – Department Policy, states that that the “Department opposes all attempts by defense counsel to admit polygraph evidence or to have an examiner appointed by the court to conduct a polygraph test. Government attorneys should refrain from seeking the admission of favorable examinations that may have been conducted during the investigatory stage. . . . Given the present theoretical and practical deficiencies of polygraphs, the government takes the position that polygraph results should not be introduced into evidence at trial. On the other hand, in respect to its use as an investigatory tool, the Department recognizes that in certain situations, as in testing the reliability of an informer, a polygraph can be of some value. Department policy therefore supports the limited use of the polygraph during investigations. This limited use should be effectuated by using the trained examiners of the federal investigative agencies, primarily the FBI, in accordance with internal procedures formulated by the agencies . . . .”

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Public Integrity Section officials told us that their use of polygraph examinations has not been reviewed by DoDPI. However, the FBI and the OIG maintain copies of those polygraph examination records, and DoDPI may have reviewed the FBI's or the OIG's copies of some of the records during its biennial quality assurance reviews of the FBI's and OIG's polygraph program.

### **Justice Command Center**

The JCC, which serves as a crisis center for the Department, is a branch of the Justice Management Division's SEPS. The JCC is the primary crisis management facility for the Attorney General and other senior Department decision makers. It also functions as an around-the-clock contact point for all Department operations worldwide.

Because the JCC handles highly classified intelligence information, the JCC requires its employees and job recruits to pass a narrowly focused, counterintelligence-scope polygraph examination as part of the security clearance process. The JCC established the requirement for polygraph examinations in 1987 at the request of the National Security Agency, which was the controlling authority for some of the cryptographic information and information systems accessed by JCC personnel.<sup>92</sup>

The JCC has 15 positions subject to mandatory polygraph examinations. Three personnel security polygraph examinations were conducted by the FBI for the JCC in FY 2002 through 2004.<sup>93</sup>

The JCC is the only one of the seven users discussed in this section that OPM has authorized to use polygraph examinations for personnel security screening. In October 1987, as then required by federal regulations,<sup>94</sup> the Department's Assistant Attorney General for Administration applied to the OPM Director for authority to require

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<sup>92</sup> At the time, NSA and CIA employees with similar access were required to take polygraph examinations. The JCC's employees who were hired before 1987 had never been tested, but volunteered to be tested when asked in 1987.

<sup>93</sup> Only three JCC employees were hired during this period. The remaining employees had previously submitted to mandatory polygraph examinations during their pre-employment hiring process or when the requirement was established in 1987.

<sup>94</sup> See Subchapter 2-6 of the *Federal Personnel Manual*, dated January 6, 1984, regarding federal requirements for using polygraph examinations in personnel investigations.

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polygraph examinations of the JCC's competitive service employees and any future recruits. On November 24, 1987, the OPM Director granted authority to the Department to conduct polygraph examinations of JCC personnel with access to cryptographic keying material and SCI. OPM required that the Department reapply each year for continued authority to polygraph its personnel. Records OPM provided to us show that the Assistant Attorney General for Administration reapplied to OPM in FY 1988 through 1995 and that the OPM Director approved each reauthorization request through September 30, 1996. OPM officials said they had no record of reauthorization requests by the Department in FY 1997 through 2004, and JCC officials could not provide us any additional authorizations.

On November 23, 2005, after we asked to review JCC records of reauthorization requests, the Department applied for reauthorization to use polygraph examinations for JCC personnel. In early May 2006, OPM officials told us that their reauthorization letters to all agencies had been delayed while OPM officials reviewed OPM's authorities for requiring reauthorizations and revised the language contained in previous authorization letters to federal agencies.<sup>95</sup> However, on May 12, 2006, OPM officials grant JCC's authorization to use polygraph examinations for pre-employment and personnel security screening for FY 2006.

The SEPS Director authorizes requests for polygraph examinations for JCC job applicants. A supervisory security specialist in the JCC has managerial responsibility for the polygraph process. JCC job announcements indicate that successful completion of a background investigation, including a polygraph examination, is a mandatory condition of employment. Applicants who refuse to take a polygraph examination are not considered for employment in the JCC. If applicants are currently employed in the Department, the refusal to take the polygraph examination is not made a part of their personnel file.

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<sup>95</sup> OPM's reauthorization of the JCC's use of polygraphs was also delayed because the FBI, which conducts the examinations for the JCC, had not provided OPM with a copy of its most recent DoDPI quality assurance review report, as required by OPM. (OPM's requirement to submit a copy of a DoDPI quality assurance review report was probably instituted sometime after 1995, that is, after the *Federal Personnel Manual* was retired. A review of OPM's authorization of the DEA's program, for example, showed that OPM's requirement for a copy of a DoDPI report was not in its FY 1994 or FY 1995 authorization letters to the DEA.) This is the first time that OPM has asked for a copy of the FBI's DoDPI quality assurance report and OPM is still in discussion with OPM about the necessity of providing the report as a precondition for approving the request for JCC reauthorization.

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After selecting a candidate, the JCC supervisor sends a memorandum to the FBI requesting an examination, and the FBI examiner contacts the applicant to schedule the examination. According to the Department's JCC polygraph regulations, the scope of the polygraph examination is limited to questions related to counterintelligence, and a list of the questions is provided to the job applicant before testing begins. The FBI conducts the examination and forwards a report on the results to the SEPS Director, who is responsible for adjudicating personnel security decisions.

The Department's use of polygraph examinations for JCC personnel has never been reviewed by DoDPI as part of the federal quality assurance program. Also, records of examinations conducted by the FBI for the JCC have never been reviewed by DoDPI inspectors during quality assurance reviews of the FBI's polygraph program because the FBI did not allow DoDPI to begin reviewing its personnel security examination records until DoDPI's last review of the FBI polygraph program in December 2005.

### **Antitrust Division**

The ATR enforces antitrust laws to protect the competitive process from prohibited practices such as price-fixing and bid-rigging conspiracies, corporate mergers likely to reduce competition, and business practices designed to achieve or maintain monopoly power. The ATR prosecutes serious and willful violations of the antitrust laws by filing civil and criminal suits. Criminal prosecutions can lead to large fines and jail sentences.

The ATR uses polygraph examinations only in connection with criminal investigations. The ATR is involved in about 100 criminal investigations each year. It has used polygraph examinations only twice from FY 2002 through 2004. The examinations were conducted at the ATR's request by the FBI and the U.S. Army Criminal Investigation Command.<sup>96</sup>

The ATR has no internal policies or procedures for using polygraph examinations and no formal process for requesting other agencies to

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<sup>96</sup> The Army Criminal Investigation Command polygraphed one of the subjects in a now-closed investigation into bidding irregularities on a major contract and possible acceptance of gratuities from the winner of that contract. It did not cover criminal antitrust issues (collusion) because there was no such evidence at the time (or subsequently). The Army Criminal Investigation Command, which had initiated and formed a multi-agency task force to handle the investigation, arranged for the polygraph. The ATR did not request the polygraph, but did approve it.

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conduct examinations for the ATR's use. However, the ATR's Director of Criminal Enforcement said that he had attended an FBI class on the uses of polygraph examinations. The ATR's Director of Criminal Enforcement said that an investigating agency or a defendant's attorney probably requested the two examinations conducted during our study period. Before making a request for an examination, a federal agent discusses the potential use of an examination with the ATR's Director of Criminal Enforcement and litigation staff, according to the Director. A defendant's attorney may also request a polygraph; however, the Director said that he usually denies defense attorneys' requests if ATR staff members believe they already have sufficient evidence to prove their case. If the Director approves a request for a polygraph examination, the investigating agency conducts the polygraph examination and reports the results to the ATR. According to the Director, the results of an examination may influence an ATR investigation, but the ATR would not enter the results of a polygraph examination as evidence at trial.

### **National Drug Intelligence Center**

The NDIC, located in Johnstown, Pennsylvania, is responsible for the production of domestic, strategic, drug-related intelligence. When the NDIC was created in 1992, it was organized under the FBI. The NDIC was reorganized in 1996 as a separate component of the Department of Justice.

The NDIC's Office of Security and Classified Programs uses polygraph examinations for pre-employment screening. From FY 2002 through 2004, the NDIC's Office of Security and Classified Programs asked the FBI to conduct 72 polygraph examinations for its use in screening job applicants who had received conditional offers of NDIC employment.

In 1997, the Department gave the NDIC Director approval to hire NDIC employees into the excepted service and to use pre-employment polygraph examinations in its hiring process.<sup>97</sup> The Department's Director of Personnel asked the NDIC to develop written internal policy addressing why polygraph examinations were necessary, who would be subject to

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<sup>97</sup> Most federal government civilian positions are part of the competitive civil service, which means they must compete with other applicants according to competitive civil service procedures. Agencies' compliance with those procedures is overseen by OPM. Excepted service agencies, like the NDIC, are excluded from the competitive civil service procedures and OPM oversight. In 1997, OPM officials wrote to the Department saying that the NDIC did not need OPM approval to use pre-employment polygraph examinations because its employees were in the excepted service.

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polygraph examinations, and how the examinations would be conducted. NDIC Procedure Number SEC-26, "Security Program Unit Hiring Process for New Employees," provides policy and implementing guidance for the NDIC's use of polygraph examinations. According to SEC-26, all new employees hired from outside the federal government, including those working with government contractors at the time of hire, are required to pass a full-scope, pre-employment polygraph examination before assuming a position at the NDIC. NDIC policy does not specifically require new hires from within the federal government to pass a polygraph examination. An NDIC official told us that the NDIC usually waives the requirement for a polygraph examination for new hires who are already working in the federal government and who have Top Secret security clearances issued by another agency.

NDIC vacancy announcements include a notice that a polygraph is required for employment and that an applicant who refuses to take a polygraph examination will not be hired. After the NDIC Human Resources Office makes an applicant a conditional offer of employment, a member of the Office of Security and Classified Programs makes a direct request to an FBI examiner located in the NDIC's geographic region. The FBI conducts most of the examinations at the NDIC facility in Johnstown. The FBI examiner provides a copy of the results of the examination as well as the polygraph test charts to the NDIC's Chief of the Office of Security and Classified Programs. According to the Chief, four people in his office (including the Chief) have authority to adjudicate personnel security decisions based on the results of polygraph examinations.

If the FBI examiner detects indications of deception during the initial polygraph examination, the NDIC's Office of Security and Classified Programs notifies the Human Resource unit of the test results, and the Human Resources unit sends a letter to the applicant withdrawing its conditional offer of employment. However, if after receipt of the letter, the applicant submits a formal request for a retest, a second polygraph is generally granted. If the applicant does not pass the second examination, the applicant cannot be hired because the applicant does not meet the requirements of the job. If an applicant passes, the Security Office advises the Human Resources unit to proceed with the hiring process.

DoDPI has not reviewed the NDIC's use of polygraph examinations or its polygraph activities. However, the FBI maintains copies of the NDIC's polygraph examination records, and DoDPI may have reviewed the FBI's

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copies of some of the records during its biennial quality assurance reviews of the FBI's polygraph program.<sup>98</sup>

### **Office of Professional Responsibility**

The Department's OPR was established by the Attorney General in 1975. It has the jurisdiction:

to investigate allegations of misconduct by Department of Justice attorneys that relate to the exercise of their authority to investigate, litigate, or provide legal advice; and to investigate allegations of misconduct by law enforcement personnel when they are related to allegations of misconduct by attorneys with the jurisdiction of OPR.<sup>99</sup>

OPR can use the results of polygraph examinations, which the FBI conducts for OPR, as an investigative tool in criminal and administrative misconduct investigations. OPR's investigations also may involve agents and witnesses who have already taken a polygraph examination. OPR officials told us that they had not requested a polygraph examination since before FY 2001.

According to an OPR official, a request for a polygraph examination would be initiated by an OPR team conducting an investigation. The OPR Counsel and Deputy Counsel review requests for polygraph examinations; if they approve the request, the OPR Counsel asks the FBI to arrange and conduct the examination. The FBI sends a report on the results of the polygraph examination to OPR, which may or may not include it in its final investigative report. An OPR official told us that, in the past, polygraph examinations have only been conducted when the proposed test subject has voluntarily consented to the examination.

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<sup>98</sup> We were unable to determine if the NDIC's polygraph examination records were included in DoDPI's review of the FBI's polygraph examination records.

<sup>99</sup> 28 C.F.R. Sec. 0.39a (a).

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## **Federal Bureau of Prisons**

The BOP is responsible for the administration of 106 institutions, 6 regional offices, a Central Office (headquarters), 2 staff training centers, and 28 community corrections offices. It is responsible for the custody and care of approximately 185,000 federal offenders.

The BOP uses polygraph examinations as an investigative tool in administrative investigations of BOP employees, as a condition for inmates' entry into the WITSEC Program, and as a condition for participation in the BOP's Sex Offender Treatment Program (SOTP).<sup>100</sup> BOP units used the results of 435 polygraph examinations in FY 2002 through 2004. The following sections detail the BOP's uses of polygraph examinations.

### Office of Internal Affairs

The BOP's Office of Internal Affairs (OIA) is a branch of the Office of General Counsel and Review. In coordination with the OIG, it is responsible for investigating allegations of administrative misconduct by BOP employees. The OIA uses the results of polygraph examinations that the FBI or the OIG conducts of subjects, witnesses, and complainants in administrative investigations into alleged misconduct. The OIA requested 21 polygraph examinations during administrative investigations from FY 2002 through 2004. The OIG conducted 17 of the examinations, and the FBI conducted 4. Fifteen of the polygraph examinees were the subjects of misconduct investigations, four were alleged victims, and two were complainants.

BOP Program Statement 1210.24 provides policy and guidance for the use of polygraph examinations in administrative investigations.<sup>101</sup> All requests for polygraph examinations regarding staff misconduct must be coordinated through the OIA. When considering a request for a polygraph examination, a "Chief Executive Officer" discusses the matter with the OIA

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<sup>100</sup> A BOP warden also may permit an inmate to take a polygraph examination in connection with a state or federal criminal felony investigation if the inmate consents to the examination. Program Statement 5110.13, "Administering of Polygraph Tests," December 15, 1999, details the procedures for requesting and administering a polygraph examination of a federal inmate. All requests for polygraph testing must be approved by the warden of the institution where the inmate is incarcerated.

<sup>101</sup> See Program Statement 1210.24, "Office of Internal Affairs," May 20, 2003, for details of the procedures for reporting allegations of misconduct to the OIA.

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Chief and receives the Chief's approval prior to arranging an examination.<sup>102</sup> The OIA Chief has the sole authority to approve the use of a polygraph examination during the course of a BOP-run investigation into staff misconduct.<sup>103</sup> According to BOP internal policy (*Office of Internal Affairs Program Statement* 1210.24, May 20, 2003), neither BOP staff nor its prison inmates can be compelled to take a polygraph examination. BOP staff and inmates must voluntarily consent in writing prior to undergoing an examination.

All requests for polygraph examinations regarding staff misconduct must be coordinated through the OIA. Office of Internal Affairs Program Statement 1210.24 says that, whenever possible, the BOP should use the FBI or OIG Polygraph Unit examiners to conduct the examinations.<sup>104</sup> The examiners then provide the OIA with a written report of examination results that becomes part of the investigation record, although the OIA may or may not mention the results of a polygraph examination in its final investigative report. The final investigative report is provided to the warden of the institution that employs the subject of the investigation and to the BOP Assistant Director who makes the decision on appropriate disciplinary action.

OIA officials told us that the OIA's use of polygraph examinations has not been reviewed by the BOP, the Department, or DoDPI. The OIA relies on the FBI and OIG examiners conducting the examinations to comply with federal polygraph standards. DoDPI reviews both the FBI and OIG polygraph programs as part of the federal quality assurance review program. The OIG provides its files for DoDPI reviews and, consequently, the OIA files may have been included in a DoDPI review. However, the FBI does not allow DoDPI to review its records of examinations conducted as part of a misconduct investigation.

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<sup>102</sup> A Chief Executive Officer can be a warden of a correctional facility, director of a staff training center, Regional Director of a regional office, or Assistant Director of a division at the BOP's Central Office.

<sup>103</sup> OIA approval to use a polygraph examination is not necessary in cases unrelated to staff misconduct or when outside authorities, such as the OIG, are conducting an external investigation of staff misconduct.

<sup>104</sup> If an FBI or OIG polygraph examiner is not available, OIA personnel may get a local police department to conduct an examination. This has happened only two or three times since calendar year 2000.

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## WITSEC Program

All BOP prisoners seeking entry into the Criminal Division-run WITSEC Program are required to take polygraph examinations to determine whether they can be placed in a BOP Protective Custody Unit. (See box on page 136 for an overview of the WITSEC Program.) The BOP has seven Protective Custody Units that house program inmates. The Criminal Division, working through the BOP, uses polygraph examinations as a tool for maintaining the security of prisoner-witnesses and to help determine whether an inmate seeking admission to the WITSEC Program intends to harm another WITSEC Program inmate. If prisoner-witnesses fail the polygraph examination, they may or may not be accepted into the WITSEC Program. If they fail, but are still accepted into the program, they may not be housed in a Protective Custody Unit.

The Criminal Division, working through the BOP, also requires prisoner-witnesses in the WITSEC Program to take a polygraph examination before leaving a BOP facility. The purpose of the second polygraph, according to BOP officials, is to deter prisoner-witnesses from sharing information about other WITSEC inmates. Prisoner-witnesses know they have to undergo a polygraph and, if they believe a polygraph examination would detect this activity, they may be less likely to share information about other inmates. The Criminal Division contacts the FBI or the OIG to conduct the examinations for the BOP. In FY 2002 through 2004, the FBI and the OIG conducted a total of 338 polygraph examinations of proposed WITSEC inmates in BOP institutions.

The BOP WITSEC Program Chief is responsible for managerial oversight of the BOP's role in the WITSEC Program. BOP Program Statement 5180.04, "Central Inmate Monitoring System Operations Manual," August 16, 1996, Chapter 8, provides internal guidance for temporary designations of WITSEC cases.<sup>105</sup> The BOP Chief of the WITSEC Program said that neither the Department nor DoDPI had reviewed the BOP's use of polygraph examinations for the WITSEC Program. As previously discussed, the FBI does not open its WITSEC polygraph examination files to DoDPI's quality assurance reviews.

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<sup>105</sup> The BOP's Inmate Monitoring Section receives applications from prisoner-witnesses seeking entry into WITSEC and designates those prisoners as temporary WITSEC cases until they undergo commitment interviews and polygraph examinations.

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## Sex Offender Treatment Program (SOTP)

The BOP's SOTP is located at the Butner Federal Correctional Institution in North Carolina. The SOTP is a voluntary program that can accommodate up to 112 of the approximately 12,000 federal inmates that are convicted sex offenders. Each institution at the Federal Correctional Complex in Butner has a Chief Psychologist. The Chief Psychologist for the Psychological Services Department at the Federal Correctional Institution (Medium), Butner, has overall responsibility for the SOTP. Authority for conducting polygraph examinations for the SOTP comes from the Assistant Director of Correctional Programs, BOP Central Office. All SOTP participants must voluntarily agree to undergo a polygraph examination as a condition for admission to the program. However, an inmate's admission to and retention in the SOTP are not contingent on the results of the polygraph examinations. Participants may undergo an additional examination sometime later in the course of treatment as clinically indicated. Additional polygraph examinations may be conducted at the discretion of the United States Probation Office.<sup>106</sup>

The SOTP at Butner began in 1989, but SOTP officials did not begin using polygraph examinations until FY 2002. In FY 2002 through 2004, the SOTP examiner conducted a total of 76 polygraph examinations. The SOTP polygraph examiner is a psychologist who was trained to conduct criminal investigative and national security screening examinations at DoDPI. He also received advanced training at DoDPI in the use of polygraph examinations in the treatment of sex offenders.

SOTP staff told us that polygraph examinations are used for non-investigative, post-conviction sexual histories and as an aid in managing the potential risks inmates pose to the community after they are released from prison. The questions used for polygraph examinations conducted in the treatment of sex offenders are different from those used in other types of examinations (for example, criminal investigations and personnel security screening). The examiner asks deliberately broad questions that are designed to encourage inmates to be truthful about the full parameters of their past criminal behavior. Although inmates are encouraged to be truthful, they are not required to disclose self-incriminating aspects of their past criminal behavior. Inmates are informed that, if they elect to do so,

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<sup>106</sup> The BOP has no jurisdiction over inmates once they are released from their terms of incarceration. The level of monitoring and any frequency in the administration of polygraph examinations would be solely determined by probation officials.

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they risk criminal prosecution. For example, the inmates are encouraged to reveal whether they raped someone in the past, not who they raped or where the crime was committed because the information is used for clinical, not investigative, purposes.

Bureau policy establishes the general requirement that an inmate entering the SOTP have a maximum of 24 months and a minimum of 12 months remaining on their current incarceration period. A polygraph examination is administered toward the end of the treatment program to confirm the inmate's self-reported sexual offence history. The results of the polygraph examination contribute to the final risk assessment and are incorporated into the inmate's risk management plan for community supervision.<sup>107</sup>

SOTP staff told us that the only oversight mechanism for the SOTP is self-auditing by the staff. In August 2006, BOP officials reported that the SOTP had developed an informal peer review process concerning technical issues such as test question construction with other practitioners specializing in examining sex offenders.

Nonetheless, the SOTP does not have an internal process that provides for a quality control review of 100 percent of the examinations as required by federal polygraph standards, and SOTP officials have declined to participate in the federal quality assurance review program administered by DoDPI.

In August 2006, DoDPI officials told us that significant decisions are being made based in part on the results of polygraph examinations conducted by the SOTP. DoDPI officials also stated that although these SOTP polygraphs are being conducted under the auspices of the Department of Justice, the quality of the work product is not known because the SOTP polygraphs have not been subjected to standard quality assurance reviews through the federal Quality Assurance Program administered by DoDPI. DoDPI also said that most of the federal agencies participating in the program at one time considered this oversight unnecessary, but in every instance those agencies have found great benefit in adopting standardized procedures. DoDPI officials suggested that both the BOP's SOTP and the USMS's WITSEC Program adopt a quality control

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<sup>107</sup> During probation, inmates also may be required to undergo polygraph examinations that are used as a monitoring tool. Inmates are monitored closely for up to 3 years after their release and may be subject to polygraph examinations every 6 months. However, those examinations are not conducted by the SOTP examiner.

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process that ensures an independent and objective review of all examination records before a final opinion on the results is rendered and that they be required to undergo biennial quality assurance reviews in compliance with federal polygraph standards.

### **United States Marshals Service**

The USMS mission is to provide support to all elements of the federal justice system, including protecting the federal judiciary and apprehending fugitives. The USMS uses polygraph examinations for administrative investigations involving USMS personnel and for individuals in the WITSEC Program who are not incarcerated and claim their security has been breached. From FY 2002 through 2004, the USMS requested 16 polygraph examinations of witnesses in the WITSEC Program, but none for administrative investigations.

The FBI and a contractor who is a retired USMS WITSEC Program Inspector administer examinations for USMS. The USMS has no internal policy or regulations addressing the use of polygraphs and no quality control or oversight of the polygraph examinations conducted by the USMS's contractor as required by federal technical standards.

### Operations Support Division

In coordination with the OIG, the Operations Support Division, Office of Internal Investigations (OII) oversees administrative investigations involving USMS personnel. According to USMS, when a dispute or discrepancy arises during the course of an OII investigation, the OII Inspector can offer the subject or witness the opportunity to take a polygraph examination. The individual must sign a form to accept or decline to take a polygraph examination. According to USMS officials, most individuals refuse this offer and no action is taken against those who refuse. If an individual accepts, the OII will ask the FBI to arrange and conduct the examination. The OII Inspector works with the FBI examiner to formulate questions for the examination.<sup>108</sup> Examination results are sent to the OII Inspector and included in the case file. Along with the OII Inspector's findings, polygraph results are ultimately used by the USMS Discipline Panel assigned to make a determination in the administrative investigation.

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<sup>108</sup> On rare occasions, the FBI examiner, after reviewing the case, may determine that the administrative investigation is not a good case for a polygraph examination and decline to administer one.

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Neither the Department nor any other entity has reviewed the USMS's polygraph activities. According to USMS, no polygraph examinations were conducted for OII from FY 2002 through 2004.

### WITSEC Program

The USMS's WITSEC and Prisoner Operations Division is responsible for providing security for protected witnesses who are not incarcerated and their families. The USMS provides 24-hour protection to these witnesses while they are in a high-threat environment, including while attending pretrial conferences, testifying at trial, and attending other court appearances. In certain cases, a protected witness will claim that a security breach has occurred, but the USMS cannot independently corroborate the breach. In those cases, the USMS will request that the witness take a polygraph examination as a means of confirming that a security breach has really occurred before the USMS permanently relocates the witness for their safety. The USMS uses the examinations to deter protected witnesses from falsely claiming they are in danger because they want to move. Witnesses who believe that a polygraph examination would detect deception are less likely to make false claims. Witnesses will often admit to the security breach or their false claims of a security breach with the threat of a polygraph examination. According to a WITSEC Supervisory Inspector, if WITSEC participants refuse, they most likely would be removed from the program.

In FY 2002 through 2004, USMS officials used the results of 16 polygraph examinations conducted by either ATF (5) or a private contractor (11). A WITSEC Chief Inspector told us that he would use more polygraph examinations in the WITSEC Program if he had a dedicated USMS polygraph examiner.

USMS officials said they had no formal internal policy for conducting polygraph examinations of witnesses. However, they do follow the provisions of Title 9, Chapter 21, of the *U.S. Attorneys' Manual* that provides Department policy for witness security. USMS officials said there has been no internal review or DoDPI review of their use of polygraph examinations.

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Also, the USMS has not established an internal quality control program or procedures that ensure an independent and objective review of all examinations conducted by its contractor. Federal standards require that agencies provide for a technical review of all examination records by a certified federal examiner before a final opinion on the examination results is rendered. However, there was no independent technical review of the 11 examinations conducted by the USMS contractor from FY 2002 through 2004.

DoDPI officials said that the use of contractors to conduct polygraph examinations is a common practice throughout the federal government. Federal agencies that use contractors, however, must ensure that those contractors conduct polygraph examinations in compliance with established technical standards by providing quality control reviews. According to Chapter C2 of the *Federal Examiner Handbook*, the USMS can do that by either:

- (1) hiring a certified federal examiner to conduct quality control reviews and oversee the examinations conducted by its contractor, or
- (2) entering into an agreement with another federal agency to obtain quality control services. USMS officials recently told DoDPI officials that they had decided not to hire a senior federal examiner or to establish a USMS polygraph

### **Polygraph Usage in the Federal Witness Security Program**

The WITSEC Program was established to provide protection and security for witnesses in official proceedings. The program involves three Department components – the Criminal Division, BOP, and the U.S. Marshals Service – and, for some witnesses, requires polygraph examinations.

**Criminal Division.** The WITSEC Program is overseen by the Criminal Division’s OEO, which is responsible for authorizing or denying applicants to the WITSEC Program and for coordinating matters related to the program with the BOP and USMS. Polygraph examinations for non-incarcerated witnesses seeking entry into the WITSEC Program are voluntary. The FBI conducts most of the polygraphs for OEO. According to the Criminal Division, a total of 427 polygraphs were conducted for OEO from FY 2002 through 2004 and another 175 in FY 2005, for a total of 602 examinations.

**BOP.** Individuals incarcerated in BOP facilities that seek entry into the WITSEC Program are required to have a polygraph examination before entering a BOP Protective Custody Unit. If granted entry into the WITSEC Program, these witnesses are also required to take a polygraph examination before leaving a BOP facility. The FBI or the OIG conducts these examinations. According to the BOP, 338 polygraphs were conducted of federal inmates for the WITSEC Program from FY 2002 through 2004, which are part of the 427 examinations reported by OEO.

**USMS.** Non-incarcerated witnesses in the WITSEC Program who claim that their security has been breached are asked to take a polygraph examination by the USMS, the agency responsible for providing protection to these individuals. The examinations are conducted by either ATF or a private contractor (a retired USMS WITSEC Inspector). According to the USMS, the contractor (11) or ATF (5) conducted 16 polygraph examinations from FY 2002 through 2004.

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program.<sup>109</sup> DoDPI officials maintain that without the required oversight, the quality of the decisions being provided the USMS cannot be established.

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<sup>109</sup> In November 2004, DoDPI and USMS officials discussed the possibility of the USMS initiating a formal polygraph program in support of its WITSEC mission. However, in FY 2005, the USMS told DoDPI officials that it was not going to pursue its own program.