

10 December 1982
OGC 82-10968

MEMORANDUM FOR THE RECORD

FROM:
Legislation Division/OGC

SUBJECT: House Judiciary Subcommittee Hearing
on DOD Polygraph Policy Change

On 9 December 1982, I attended a hearing held by the House Judiciary Committee's Subcommittee on Civil and Constitutional Rights. The hearing was on the changes which the Department of Defense (DOD) proposes to make in its policies/regulations regarding the use of polygraph examinations in security investigations.

Appearing on behalf of DOD were Retired General Stilwell, Deputy Under Secretary of Defense for Policy, and the DOD's General Counsel, Robert Taft. Attached is a copy of the prepared statement of General Stilwell.

In summarizing his statement, General Stilwell made a number of points. First, under the proposed changes, there will continue to be no "lifestyle" questions on DOD paragraphs: the scope of the examination will be limited strictly to "counterintelligence" matters. The groups of personnel to be tested will be expanded to include military personnel to be assigned to duty at the National Security Agency. Repolygraphs will be done in the discretion of the DOD component involved. Finally, polygraphs will be used for interim access while awaiting the completion of a background investigation.

There will be no change in the requirement that submission to a polygraph examination is voluntary. There will be no change in the requirement that the polygraph is to be viewed as supplementary to a field investigation. There will be no change in the policy that polygraph results cannot provide the sole basis for disciplinary action. Finally, there will be no change in the strictures governing the dissemination of polygraph information. General Stilwell noted that DOD may, however, deny access to certain sensitive intelligence information to persons refusing to take a polygraph examination. He also noted that DOD has only 100 polygraph operators to cover the entire Department.

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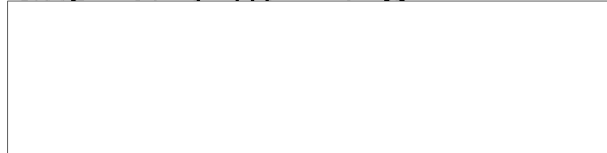
DOD made it clear that the changes were only proposed and that suggestions from everyone, including the Subcommittee, were welcomed.

It was pointed out by DOD that some of the changes were the result of suggestions made by the Agency about the need to protect sensitive intelligence information. Other than this, there was no mention of the Agency or its polygraph policy.

The DOD presentation was generally well received. There were only a few pointed questions and those were well handled. The presentation seemed to defuse the issue from the way in which it had been initially reported in the press.

The Subcommittee then heard from an academician who was opposed to the proposed changes.

On 14 December 1982, the same witnesses are scheduled to appear on the same topic before the Senate Governmental Affairs Committee's Subcommittee on Civil Service and General Services. I plan to attend this hearing also.



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Attachment

cc: General Counsel
C/OGC/ALD
D/OS

Distribution: ✓
Original - LED File: Polygraph
1 - Signer
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STATEMENT OF GENERAL RICHARD G. STILWELL, USA (RET.)

DEPUTY UNDER SECRETARY OF DEFENSE FOR POLICY

BEFORE

THE SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS

COMMITTEE ON THE JUDICIARY

U.S. HOUSE OF REPRESENTATIVES

DECEMBER 9, 1982

MR. CHAIRMAN, I APPRECIATE THIS OPPORTUNITY TO APPEAR BEFORE THE SUBCOMMITTEE TO CLARIFY THE NATURE AND STATUS OF THE PROPOSED CHANGE TO THE DEPARTMENT'S POLICY REGARDING USE OF THE POLYGRAPH. THE PRESS ACCOUNTS OF THIS MATTER DID ACCURATELY REPORT THAT CHANGE IS CONTEMPLATED. BEYOND CONVEYING THIS BASIC FACT, HOWEVER, THE COVERAGE HAS BEEN BOTH INACCURATE AND INCOMPLETE. PRESS ACCOUNTS TO THE CONTRARY NOTWITHSTANDING, THIS PROPOSED CHANGE DOES NOT SIGNAL WIDESPREAD USE OF THE POLYGRAPH WITHIN DEFENSE, NOR WOULD IT ENTAIL UNWARRANTED INTRUSION UPON THE PRIVACY OF OUR PERSONNEL. CONTRARY TO PRESS REPORTS, NO DEFENSE DEPARTMENT EMPLOYEE HAS BEEN ASKED TO WAIVE HIS RIGHT TO REFUSE THE POLYGRAPH, NOR WOULD SUCH A REQUEST BE PERMITTED UNDER EITHER THE EXISTING OR THE PROPOSED POLICY.

DESPITE WHAT HAS BEEN IN THE PRESS, IT IS NOT DESIRE TO CLAMP DOWN ON "LEAKERS" THAT MOTIVATED THE PROPOSALS BUT RATHER QUALITATIVE IMPROVEMENT IN OUR PERSONNEL SECURITY PROGRAM. THE NEW POLICY WOULD, IN OUR CONSIDERED ESTIMATE, PROVIDE GREATER ASSURANCE THAN WE PRESENTLY HAVE THAT THOSE EMPLOYEES HAVING ACCESS TO THE MOST SENSITIVE INFORMATION HELD BY THE DEPARTMENT ARE NOT SPYING FOR A HOSTILE GOVERNMENT.

I WOULD ALSO EMPHASIZE, MR. CHAIRMAN, THAT ALTHOUGH PORTRAYED IN THE PRESS AS THE HANDIWORK OF A MISGUIDED MINORITY, THE CHANGES UNDER CONSIDERATION IN FACT STEMMED FROM THE DELIBERATIONS OF A VERY SENIOR GROUP OF DEFENSE OFFICIALS WHO REVIEWED OUR

PERSONNEL SECURITY PROGRAM LAST WINTER AND FOUND IT IN NEED OF CONSIDERABLE REPAIR. THE RECOMMENDATIONS OF THIS PANEL WHICH PERTAINED TO USE OF THE POLYGRAPH WERE INCORPORATED INTO A PROPOSED POLICY CHANGE THAT WAS CIRCULATED TO ALL MAJOR COMPONENTS OF THE DEPARTMENT OF DEFENSE LAST JUNE. IT HAS SINCE BEEN AGREED TO BY EACH OF THE MILITARY DEPARTMENTS AND DEFENSE AGENCIES. IT IS UNCLASSIFIED. IT HAS BEEN FREELY DISCUSSED WITHIN DEFENSE FOR THE LAST SIX MONTHS. THERE IS NOTHING MYSTERIOUS ABOUT IT.

INDEED, MR. CHAIRMAN, EVEN BEFORE THE STORIES IN THE NEWSPAPER, WE HAD DECIDED ON OUR OWN TO PUBLISH THE PROPOSAL IN THE FEDERAL REGISTER SO THAT INDIVIDUAL DEFENSE EMPLOYEES AND CONTRACTORS, AS WELL AS INTERESTED MEMBERS OF THE PUBLIC, COULD BE AWARE OF THE CHANGES BEING PROPOSED, AND BE ABLE TO COMMENT UPON THEM, IF THEY CHOSE TO DO SO.

WE STILL STAND READY TO DO THIS, BUT, IN DEFERENCE TO THE SUBCOMMITTEE, HAVE DELAYED SUCH ACTION PENDING THESE HEARINGS. SUFFICE IT TO SAY, HOWEVER, THAT WE ARE STILL OPEN TO SUGGESTIONS, AND WOULD WELCOME THEM FROM THIS SUBCOMMITTEE, AS WELL AS ANY OTHERS WHO ARE INTERESTED.

BEFORE COVERING THE BASIC FEATURES OF THE PROPOSED POLICY, LET ME BE MORE SPECIFIC ABOUT ITS DEVELOPMENT. IN THE FALL OF 1981, I CONVENED A SPECIAL PANEL OF SENIOR DEFENSE OFFICIALS, CHAIRED BY DAVID O. COOKE, DEPUTY ASSISTANT SECRETARY OF DEFENSE FOR ADMINISTRATION. THE PANEL INCLUDED THE DIRECTOR

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OF THE ARMY STAFF, THE GENERAL COUNSEL OF THE NAVY, THE ASSISTANT SECRETARY OF THE AIR FORCE FOR LOGISTICS, THE DEPUTY DIRECTOR OF THE NATIONAL SECURITY AGENCY, AND THE CHIEF OF STAFF OF THE DEFENSE INTELLIGENCE AGENCY. THE PANEL'S CHARGE WAS TO REVIEW THE PERSONNEL SECURITY PROGRAM OF THE DEPARTMENT FROM TOP TO BOTTOM, AND IT DID JUST THAT, PRODUCING A REPORT CALLING FOR MANY NEEDED IMPROVEMENTS IN THE PERSONNEL SECURITY AREA. AMONG THE PANEL'S WIDE-RANGING RECOMMENDATIONS WAS A LIMITED EXPANSION OF THE USE OF THE POLYGRAPH SPECIFICALLY TO SCREEN EMPLOYEES WHO WERE TO BE GIVEN ACCESS TO EXTREMELY SENSITIVE INFORMATION. A COPY OF THE PANEL'S REPORT HAS BEEN PROVIDED THE SUBCOMMITTEE SO I WILL NOT FURTHER ELABORATE ON ITS RECOMMENDATIONS. SUFFICE IT TO SAY, HOWEVER, THE PANEL'S RECOMMENDATIONS WITH RESPECT TO THE POLYGRAPH ARE, FOR THE MOST PART, REFLECTED IN THE REVISION OF THE DEPARTMENT'S POLYGRAPH POLICY NOW UNDER DISCUSSION.

IT IS PERTINENT, MR. CHAIRMAN, THAT DEFENSE HAS FOR MANY YEARS BEEN ENCOURAGED BY SUCCESSIVE DIRECTORS OF CENTRAL INTELLIGENCE TO EXPAND THE USE OF THE POLYGRAPH TO COVER EMPLOYEES OF DEFENSE INTELLIGENCE COMPONENTS WITH ACCESS TO SENSITIVE CIA INFORMATION. SIMILAR ENCOURAGEMENT HAS REPEATEDLY COME FROM MEMBERS OF BOTH THE HOUSE AND SENATE INTELLIGENCE COMMITTEES.

AS YOU HAVE NOTED, BOTH THE EXISTING AND NEW POLYGRAPH DIRECTIVES ARE LONG AND COMPLEX. RATHER THAN ATTEMPT TO

TREAT ALL OF THEIR PROVISIONS IN DETAIL, I BELIEVE IT WOULD BE THE MOST USEFUL FOR PURPOSES OF THE SUBCOMMITTEE'S UNDERSTANDING IF I HIGHLIGHTED THOSE CHANGES IN THE PROPOSED DIRECTIVE THAT WOULD PERMIT OR REQUIRE USE OF THE POLYGRAPH IN CIRCUMSTANCES WHERE IT IS NOT NOW PERMITTED OR REQUIRED. IF THERE ARE QUESTIONS CONCERNING USE OF THE POLYGRAPH UNDER EXISTING POLICY, I WILL BE GLAD TO ADDRESS THEM AFTER MY STATEMENT.

FIRST, THE PROPOSED POLICY WOULD PERMIT DEFENSE COMPONENTS TO USE, SHOULD THEY SEE FIT, A LIMITED POLYGRAPH EXAMINATION -- CONFINED SOLELY TO SECURITY QUESTIONS RATHER THAN MATTERS OF LIFE-STYLE -- AS A CONDITION OF PROVIDING ACCESS TO COMPARTMENTED OR SPECIAL ACCESS PROGRAMS, OR ACCESS TO CRYPTOGRAPHIC INFORMATION OR MATERIALS. THIS TYPE OF POLYGRAPH EXAMINATION WOULD BE LIMITED TO QUESTIONS SUCH AS WHETHER THE PERSON INVOLVED HAS EVER ENGAGED IN ESPIONAGE OR SABOTAGE AGAINST THE UNITED STATES, OR HAS KNOWN OF ANYONE WHO MAY BE ENGAGED IN SUCH ACTIVITIES. QUESTIONS PERTAINING TO THE SUBJECT'S "LIFE-STYLE" -- WHICH MIGHT COVER AREAS SUCH AS HIS ORGANIZATIONAL AFFILIATIONS, SEXUAL PREFERENCES, USE OF ALCOHOL OR DRUGS, WORK HABITS, OR CREDIT STATUS -- WILL NOT BE PERMITTED UNDER THIS OR ANY OTHER PROVISION BEING CONTEMPLATED AS PART OF THE NEW POLICY.

SECOND, THE PROPOSED DIRECTIVE WOULD REQUIRE USE OF THE SAME TYPE OF LIMITED POLYGRAPH EXAMINATION -- AGAIN, NOT INVOLVING MATTERS OF LIFE-STYLE -- FOR MILITARY PERSONNEL ASSIGNED TO

NSA AND FOR EMPLOYEES IN DIA GOING INTO POSITIONS DESIGNATED BY THE DIRECTOR OF THAT AGENCY AS CRITICAL INTELLIGENCE POSITIONS. THIS, TOO, REPRESENTS AN EXPANDED, ALBEIT LIMITED, USE OF THE POLYGRAPH WITHIN THESE TWO INTELLIGENCE AGENCIES. AS YOU KNOW, MR. CHAIRMAN, THE NATIONAL SECURITY AGENCY HAS POLYGRAPHED ITS CIVILIAN APPLICANTS FOR EMPLOYMENT FOR MANY YEARS.

THIRD, THE PROPOSED DIRECTIVE PROVIDES THAT INCUMBENT EMPLOYEES WITH SPECIAL INTELLIGENCE CLEARANCES SHALL BE SUBJECT TO A LIMITED COUNTERINTELLIGENCE-SCOPE POLYGRAPH AS A CONDITION OF THEIR CONTINUED ACCESS TO SPECIAL INTELLIGENCE. THE IMPLEMENTATION OF THIS PROVISION IS LEFT TO THE DISCRETION OF DEFENSE COMPONENTS. SINCE THEIR CAPABILITY TO CONDUCT EXAMINATIONS FOR THIS PURPOSE IS AT PRESENT EXTREMELY LIMITED DUE TO A LACK OF QUALIFIED EXAMINERS, IT IS EXPECTED THAT SUCH EXAMINATIONS WILL BE ADMINISTERED AT RANDOM ON A VERY SMALL-SCALE. THE VALUE OF THE POLICY IS IN ITS DETERRENCE, WHATEVER THE SCALE ON WHICH IT IS IMPLEMENTED. I MIGHT ADD THAT IN THIS CASE THE CHANGE TO THE EXISTING DIRECTIVE REFLECTS A DECISION MADE BY DEPUTY SECRETARY CARLUCCI LAST AUGUST, A COPY OF WHICH HAS ALREADY BEEN PROVIDED THE SUBCOMMITTEE.

FINALLY, THE PROPOSED DIRECTIVE WOULD PERMIT THE USE OF A COUNTERINTELLIGENCE SCOPE POLYGRAPH EXAMINATION BY INTELLIGENCE AGENCIES TO PERMIT THEM TO PROVIDE INTERIM ACCESS TO SENSITIVE

INFORMATION BY NEW EMPLOYEES WHOSE SKILLS ARE CRITICALLY NEEDED BY THE AGENCY INVOLVED, WITHOUT HAVING TO WAIT FOR THE BACKGROUND INVESTIGATION TO BE COMPLETED. USE OF THE POLYGRAPH FOR THIS PURPOSE IS NOT PERMITTED UNDER THE EXISTING DIRECTIVE. UNDER THE NEW PROPOSAL, IT COULD BE USED BUT ONLY IF THE NEW EMPLOYEE SO AGREED.

HAVING HIGHLIGHTED WHAT THE PROPOSED POLICY REVISIONS WOULD PERMIT THAT IS NOT PERMITTED NOW, LET ME SPEND A FEW MINUTES HIGHLIGHTING WHAT THEY WOULD NOT AUTHORIZE:

FIRST, THERE WOULD BE NO, REPEAT NO, CHANGE TO THE POLICY THAT ALL POLYGRAPH EXAMINATIONS MUST BE VOLUNTARY AND ARE GIVEN ONLY AFTER THE SUBJECT HAS BEEN ADVISED OF HIS RIGHTS AND GIVEN AN OPPORTUNITY TO CONSULT LEGAL COUNSEL IF HE SO CHOOSES.

SECOND, POLYGRAPH EXAMINATIONS WILL CONTINUE TO BE CONSIDERED AS SUPPLEMENTARY TO, AND NOT A SUBSTITUTE FOR, OTHER INVESTIGATION THAT MAY BE REQUIRED UNDER THE CIRCUMSTANCES. NO ACTION AFFECTING AN EMPLOYEE WILL BE PERMITTED SOLELY ON THE BASIS OF AN ANALYSIS OF POLYGRAPH CHARTS. (THIS IS AN IMPLICIT RECOGNITION ON OUR PART THAT WHATEVER ITS DEMONSTRATED RELIABILITY, THE POLYGRAPH CAN BE WRONG, AND THEREFORE CANNOT ALONE PROVIDE THE BASIS FOR ACTIONS ADVERSE TO OUR EMPLOYEES.)

THIRD, ALL OF THE SAFEGUARDS AND LIMITATIONS UPON THE CONDUCT OF POLYGRAPH EXAMINATIONS AND THE CONTROLS UPON THE USE OF INFORMATION OBTAINED IN THE COURSE OF SUCH EXAMINATIONS THAT EXIST UNDER THE OLD DIRECTIVE WOULD BE PRESERVED UNDER THE NEW ONE.

FINALLY, WITH THE EXCEPTION OF PERSONS EMPLOYED OR SEEKING EMPLOYMENT IN POSITIONS REQUIRING ACCESS TO EXTREMELY SENSITIVE CLASSIFIED INFORMATION, NO ADVERSE ACTION MAY BE TAKEN AGAINST ANY PERSON FOR REFUSING TO TAKE A POLYGRAPH EXAMINATION. WHERE A COUNTERINTELLIGENCE SCOPE POLYGRAPH EXAMINATION HAS BEEN ESTABLISHED AS A CONDITION OF ACCESS TO EXTREMELY SENSITIVE CLASSIFIED INFORMATION, THE NEW POLICY WOULD PERMIT THE DCD COMPONENT THAT HAD ESTABLISHED THE REQUIREMENT, AFTER "DUE CONSIDERATION", TO DENY A CLEARANCE OR ACCESS FOR REFUSAL TO TAKE THE EXAMINATION. THE DETERMINATION AS TO WHETHER SUCH ACTION SHOULD FOLLOW A REFUSAL IS LEFT TO THE DISCRETION OF COMPONENTS BASED UPON THEIR CONSIDERATION OF ALL FACTORS RELEVANT UNDER THE CIRCUMSTANCES: THE INDIVIDUAL'S REASONS FOR REFUSING TO TAKE THE LIMITED EXAMINATION; HIS RECORD OF SERVICE AND PERFORMANCE; ANY ADDITIONAL FACTORS DERIVED FROM A BACKGROUND INVESTIGATION OF THE INDIVIDUAL; AND THE SENSITIVITY OF THE PARTICULAR INFORMATION TO WHICH HE HAS OR WOULD GAIN ACCESS. IN DRAFTING THE PROPOSED POLICY IN THIS MANNER, WE BELIEVED IT DESIRABLE TO LEAVE SOME LATITUDE FOR COMPONENTS TO DENY ACCESS OR CLEARANCE ON THE BASIS OF A REFUSAL TO TAKE THE COUNTERINTELLIGENCE

POLYGRAPH. THERE ARE CASES IN OUR JUDGMENT WHERE THE INFORMATION

TO BE ACCESSED IS SO SENSITIVE THAT COMPONENTS CANNOT AFFORD TO TAKE THE RISK OF GRANTING ACCESS TO AN INDIVIDUAL WHO REFUSES TO ANSWER THE SECURITY QUESTIONS ON THE POLYGRAPH. WE ARE ADVISED BY OUR GENERAL COUNSEL THAT SUCH A PROVISION MEETS EXISTING LEGAL REQUIREMENTS.

IN SHORT, MR. CHAIRMAN, ALTHOUGH THE PROPOSED POLICY CHANGES ADMITTEDLY WOULD PERMIT A GREATER USE OF THE POLYGRAPH WITHIN DEFENSE, THE EFFECT OF THESE CHANGES IS NEITHER AS DRAMATIC NOR PERVASIVE AS ONE MIGHT BELIEVE FROM THE PRESS COVERAGE.

WHERE POLYGRAPH EXAMINATIONS WOULD BE AUTHORIZED FOR PERSONNEL SCREENING PURPOSES, THEY WOULD BE LIMITED TO COUNTERINTELLIGENCE INQUIRIES, NOT QUESTIONS ABOUT LIFE-STYLE OF THE INDIVIDUAL. THE ONLY AGENCIES WHERE A SUBSTANTIAL EXPANSION IS LIKELY TO OCCUR ARE THOSE IN THE INTELLIGENCE BUSINESS, OR ARE CONCERNED WITH EXTREMELY SENSITIVE R&D PROJECTS OR MILITARY OPERATIONS REQUIRING COMPARTMENTED ACCESSES, SUCH AS THE IRANIAN RESCUE MISSION. FINALLY, THE BASIC PROVISIONS OF THE OLD DIRECTIVE, DESIGNED TO PROTECT THE RIGHTS AND PRIVACY OF DoD EMPLOYEES, ARE CARRIED OVER IN THE PROPOSED REVISION.

IN CONCLUSION, I AM CONVINCED THE POLYGRAPH CAN BE EMPLOYED IN A MANNER THAT DOES NOT VIOLATE THE RIGHTS AND PRIVACY OF OUR EMPLOYEES, AND YET PROVIDES THE DEPARTMENT WITH A GREATER DEGREE OF SECURITY ASSURANCE WITH RESPECT TO OUR MOST SENSITIVE

PROGRAMS THAN WE NOW HAVE. WE BELIEVE THE MERE POSSIBILITY OF BEING SUBJECTED TO A POLYGRAPH EXAMINATION WILL ACT AS A POWERFUL DETERRENT TO INDIVIDUALS INTENT ON PENETRATING SUCH ACTIVITIES AND PROGRAMS. CONVERSELY, WE BELIEVE THE POLYGRAPH CAN HELP US TO FERRET OUT THOSE WHO MIGHT TAKE THE RISK. THE UNITED STATES HAS A GREAT DEAL AT STAKE IN THE SUCCESS OF ITS INTELLIGENCE ACTIVITIES; ITS RESEARCH AND DEVELOPMENT PROJECTS; AND ITS MILITARY OPERATIONS. AS WE HAVE RECENTLY SEEN WITH THE PRIME CASE, IT ONLY TAKES ONE PERSON WITH ACCESS TO SENSITIVE INFORMATION WHO IS WILLING TO SHARE IT WITH OUR ADVERSARIES TO COST THE NATIONAL SECURITY DEARLY IN TERMS OF ITS RESOURCES, AND, IN SOME CASES, THE LIVES OF ITS PERSONNEL. PERSONALLY, MY RANK AND RECORD NOTWITHSTANDING, I DO NOT CONSIDER IT AN INTRUSION UPON MY PRIVACY FOR THE GOVERNMENT TO ASK ME PRIOR TO GIVING ME THE CAPABILITY TO DO SUCH HARM, WHETHER I AM WORKING FOR THE OTHER SIDE. INDEED, IT ONLY SEEMS PRUDENT THAT IT DO SO.

I WOULD HOPE, MR. CHAIRMAN, THAT I HAVE CLARIFIED SOME OF THE MISUNDERSTANDING CONCERNING THE SCOPE AND INTENT OF THE POLYGRAPH PROPOSAL NOW UNDER CONSIDERATION IN DEFENSE. AS I STATED AT BEGINNING, WE ARE OPEN TO ANY SUGGESTIONS THAT THE SUBCOMMITTEE AND THE PUBLIC MAY WISH TO OFFER US IN THIS REGARD TO BETTER ACCOMPLISH THESE OBJECTIVES.

WITH THIS, MR. CHAIRMAN, I WILL TURN THE FLOOR OVER TO MR. TAFT, THE GENERAL COUNSEL, FOR HIS COMMENTS.