

*Polygraphs*

OLL 84-1689/1  
25 April 1984

MEMORANDUM FOR: C/SECOM

D/OS

Attn:

25X1

C/ALD/OGC

Attn:

25X1

FROM:

25X1

Chief, Legislation Division  
Office of Legislative Liaison

SUBJECT: H.R. 4681, the "Federal Polygraph  
Limitation and Anti-Censorship Act of 1984"

1. Attached is a copy of the amendment to H.R. 4681 drafted by the staff of the House Permanent Select Committee on Intelligence (HPSCI) which we discussed last month. This draft amendment has now been provided to us by the Office of Management and Budget (OMB) with a request that we submit our views on the amendment by 4 May 1984.

2. As you may recall, during our meeting concerning the attached draft HPSCI amendment, we agreed to a revised version of this amendment which would satisfy many of our concerns with the original Brooks bill. We are now being asked to respond to OMB, however, in order to assist in the formulation of a coordinated Executive Branch position on the amendment, rather than to submit Agency-related comments directly to HPSCI for inclusion in their draft amendment. Essentially, the issue is whether we should attempt to fine-tune and improve the Brooks bill through submitting comments to OMB which track our earlier revision of the attached amendment, or whether we should instead inform OMB that we are completely opposed to the Brooks bill and any amendment thereto which significantly affects the status quo with respect to prepublication review and polygraph usage. I believe that we should make the latter response and inform OMB that we are totally opposed to the Brooks bill and all related initiatives.

3. I would appreciate receiving your comments on the attached amendment and the above proposed response to OMB by COB 1 May 1984, in order that we can prepare an adequate response by the above 4 May date.

25X1

Attachment

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SWH: csh (25 April 1984)

AMENDMENTS OFFERED BY \_\_\_\_\_  
TO THE AMENDMENT IN THE NATURE OF A SUBSTITUTE  
OFFERED BY MRS. SCHROEDER

Page 4, line 2, strike out 'An' and insert in lieu thereof 'Except as provided in section 7365 of this title, an'.

Page 6, line 9, strike out 'An' and insert in lieu thereof 'Except as provided in section 7365 of this title, an'.

Page 8, line 17, strike out 'Exemptions' and insert in lieu thereof 'Exceptions'.

Page 8, line 18, insert '(a)' before 'Sections'.

Page 9, line 6, strike out the closing quotation marks and the final period and add thereafter the following new subsection:

1        '(b)(1) For purposes of this subsection--

1           ''(A) the term 'covered agency' means the Department  
2 of Defense, the Federal Bureau of Investigation, the  
3 Federal Emergency Management Agency, and any other  
4 agency (other than the Central Intelligence Agency or  
5 the National Security Agency) which employs individuals  
6 in positions the primary duties of which involve  
7 cryptographic communications or technology;

8           ''(B) the term 'covered employee'--

9           ''(i) as used with respect to the Department of  
10 Defense, the Federal Bureau of Investigation, or the  
11 Federal Emergency Management Agency, means an  
12 individual employed by or detailed to the agency, an  
13 individual applying for a position in the agency,  
14 and an expert or consultant under contract with the  
15 agency, who has regular and continuous access to  
16 covered information as such an employee (or, in the  
17 case of an individual applying for a position, would  
18 have such access to covered information in such  
19 position); and

20           ''(ii) as used with respect to any other covered  
21 agency, means an individual employed by or detailed  
22 to the agency, an individual applying for a position  
23 in the agency, and an expert or consultant under  
24 contract with the agency, who so has (or would so  
25 have) regular and continuous access to covered

1 information within the meaning of subparagraph  
2 (C)(ii); and

3 '(C) the term 'covered information' means  
4 particularly sensitive classified information--

5 '(i) subject to a special access program  
6 established in accordance with the provisions of  
7 section 4.2(a) of Executive Order 12356, as in  
8 effect on the effective date of the Federal  
9 Polygraph Limitation and Anti-Censorship Act of  
10 1984; or

11 '(ii) concerning cryptographic communications  
12 or technology.

13 '(2) Under regulations issued by the President, the  
14 head of a covered agency may impose the special security  
15 procedures specified in paragraph (3) or (4), or both, with  
16 respect to a covered employee of such covered agency.

17 '(3)(A) A covered agency may, as a condition for access  
18 to covered information, require a covered employee to enter  
19 into an agreement requiring the individual to submit for  
20 prepublication review those portions of any writings of such  
21 individual which such individual reasonably believes might  
22 contain covered information.

23 '(B) Nothing in section 7363 of this title shall  
24 prevent the enforcement of an agreement requiring  
25 prepublication review as described in subparagraph (A).

1       ''(4) A covered agency may, as a condition for access to  
2 covered information, require a covered employee to submit to  
3 a polygraph examination, subject to the following  
4 conditions:

5           ''(A) The head of a covered agency may require a  
6 covered employee to submit to a polygraph examination  
7 only if the agency head determines, in writing, that  
8 such covered employee has (or, in the case of an  
9 applicant, would have) access to covered information,  
10 the unauthorized disclosure of which could reasonably be  
11 expected to result directly in the loss of--

12           ''(i) human life;

13           ''(ii) intelligence sources or methods which are  
14 vital to the fulfillment of national security  
15 requirements or which provide a unique capacity to  
16 intelligence agencies of the United States; or

17           ''(iii) technologies, plans, or procedures vital  
18 to the strategic advantage of the United States.

19       ''(B) A polygraph examination under this paragraph--

20           ''(i) shall be limited to questions designed to  
21 ascertain whether the covered employee has  
22 committed, is committing, or intends to commit  
23 espionage against the United States; and

24           ''(ii) may be administered only as provided in  
25 section 7362(b)(2) of this title.

1           ''(C)(i) A covered agency may not take or threaten  
2 to take any action against a covered employee, or fail  
3 to take or threaten to fail to take any action on behalf  
4 of a covered employee, on the basis of any inference or  
5 determination (referred to in section 7361(4) of this  
6 title) made from that individual's performance in the  
7 course of a polygraph examination, unless the  
8 appropriate agency head personally determines, in  
9 writing, that a decision not to carry out the measure  
10 concerned would pose an unacceptable risk to national  
11 security.

12           ''(ii) For purposes of clause (i), the term 'measure  
13 concerned' means the taking or threatening to take an  
14 action against a covered employee, or the failing to  
15 take or threatening to fail to take an action on behalf  
16 of a covered employee, as referred to in such clause.

17           ''(5)(A) Before placing an individual in a position  
18 which is subject to the special security procedures  
19 specified in paragraph (3) or (4), or which the covered  
20 agency, with reasonable certainty, anticipates will be made  
21 subject to such procedures during the individual's expected  
22 tenure, such agency shall--

23           ''(i) provide written notice informing the  
24 individual--

25           ''(I) of the fact that the position is subject

1 to those procedures, or

2 '(II) of the agency's intention to make the  
3 position subject to those procedures (including the  
4 anticipated effective date),

5 as the case may be; and

6 '(ii) provide to such individual a copy of the then-  
7 current regulations under paragraph (2) which apply to  
8 such position, or which would apply to such position if  
9 it were then so subject to those procedures, as the case  
10 may be.

11 '(B)(i) Notwithstanding any other provision of law, the  
12 failure of an individual described in clause (ii) to comply  
13 with any of the special security procedures specified in  
14 paragraph (3) or (4) may serve as the basis for denying or  
15 withdrawing clearance for access to covered information in  
16 the case of such individual, but may not be considered for  
17 purposes of any decision concerning separation, a reduction  
18 in grade or pay, or other action against such individual.

19 '(ii) An individual shall be considered to be an  
20 individual described in this clause if such individual--

21 '(I) is holding a position as of the date on which  
22 it first becomes subject to any of the special security  
23 procedures specified in paragraph (3) or (4); and

24 '(II) was afforded no advance notice under  
25 subparagraph (A)(i)(II) with respect to such position.



1       ''(6) The President shall submit to each House of the  
2 Congress for each calendar year beginning after the  
3 effective date of the Federal Polygraph Limitation and Anti-  
4 Censorship Act of 1984 a report which shall include--

5           ''(A) a list identifying each agency which was a  
6 covered agency during any part of the year;

7           ''(B) the number of covered employees within each  
8 such agency during such year;

9           ''(C) the number of covered employees, in the  
10 aggregate and by agency, required to enter into an  
11 agreement under paragraph (3) during such year;

12           ''(D) the number of covered employees, in the  
13 aggregate and by agency, subject to any agreement under  
14 paragraph (3) during such year;

15           ''(E) the number of writings submitted during such  
16 year in accordance with any agreement entered into under  
17 paragraph (3); and

18           ''(F) the number of covered employees, in the  
19 aggregate and by agency, required to submit to a  
20 polygraph examination under paragraph (4) during such  
21 year.''. .

Page 9, in the matter after line 8 and before line 9,  
strike out the item relating to section 7365 and insert in

lieu thereof the following:

''7365, Exceptions.''

Page 9, strike out line 20 and all that follows thereafter through page 10, line 2, and insert in lieu thereof the following new subsection:

- 1 (b) Nothing in subsection (a) applies with respect--  
2 (1) to the Central Intelligence Agency or the  
3 National Security Agency, or to any agreement which  
4 requires prepublication review by either of those  
5 agencies; or  
6 (2) to--  
7 (A) a covered agency, as defined in subsection  
8 (b) of section 7365 of title 5, United States Code  
9 (as added by this Act) with respect to any agreement  
10 which requires prepublication review by such covered  
11 agency, but only to the extent that such agreement  
12 would be permitted under paragraph (3) of such  
13 subsection; or  
14 (B) any such agreement, to such extent.

## [COMMITTEE PRINT]

MARCH 19, 1984

[Amendment in the nature of a substitute to H.R. 4681]

Offered by Mrs. SCHBOEDER

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1       Strike out all after the enacting clause and insert in lieu  
2 thereof the following:

3 That this Act may be cited as the "Federal Polygraph Limi-  
4 tation and Anti-Censorship Act of 1984".

5       SEC. 2. (a) Chapter 73 of title 5, United States Code, is  
6 amended by adding at the end thereof the following new  
7 subchapter:

8 "SUBCHAPTER VI—POLYGRAPH EXAMINATION  
9       AND PREPUBLICATION REVIEW RESTRIC-  
10       TIONS

11 "§ 7361. Definitions

12       "For purposes of this subchapter—

13               "(1) the term 'agency' means—

14                       "(A) an Executive agency;

15                       "(B) the United States Postal Service;

16                       "(C) the Postal Rate Commission;

17                       "(D) the Administrative Office of the United

18                       States Courts;

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1           “(E) the Library of Congress;  
2           “(F) the Government Printing Office;  
3           “(G) the Office of Technology Assessment;  
4           “(H) the Congressional Budget Office;  
5           “(I) the Office of the Architect of the Cap-  
6           itol; and

7           “(J) the Botanic Garden;  
8           “(2) the term ‘employee’ means—

9           “(A) an individual employed by an agency;

10           “(B) a Congressional employee (other than  
11           an individual under subparagraph (A)); and

12           “(C) an expert or consultant who is under  
13           contract under section 3109 of this title with an  
14           agency, including, in the case of an organization  
15           performing services under such section, an  
16           individual involved in the performance of such  
17           services;

18           “(3) the term ‘classified information’ means  
19           information—

20           “(A) specifically authorized under criteria es-  
21           tablished by statute or Executive order to be kept  
22           secret in the interest of national defense or foreign  
23           policy; and

24           “(B) in fact properly classified pursuant to  
25           such statute or Executive order.

1           “(4) the term ‘polygraph examination’ means an  
2 interview with an individual which involves the use of  
3 a device designed to permit the examiner to make an  
4 inference or a determination, by evaluation of meas-  
5 ured physiological responses, concerning whether the  
6 individual has truthfully or deceptively responded to  
7 inquiries made in such interview;

8           “(5) the term ‘action’, as used with respect to an  
9 employee or applicant for employment, means—

10           “(A) a personnel action under clauses (i)  
11 through (x) of section 2302(a)(2)(A) of this title;

12           “(B) a decision concerning clearance for  
13 access to classified information; and

14           “(C) a performance evaluation (other than  
15 under chapter 43 of this title);  
16 in the case of such employee or applicant; and

17           “(6) the term ‘prepublication review’ means sub-  
18 mission of information to an agency for the purpose of  
19 permitting such agency to examine, alter, excise, or  
20 otherwise edit or censor such information before it is  
21 publicly disclosed, but does not include any such sub-  
22 mission with respect to information which is to be dis-  
23 closed by an employee in such employee’s official  
24 capacity.

1 "§ 7362. Restrictions relating to polygraph examinations  
2 *Except as provided in section 7365, of this title,*

3 "(a) An agency may not—

4 "(1) require, threaten to require, or, except as  
5 provided in subsection (b), request any employee or  
6 applicant for employment to submit to a polygraph  
7 examination;

8 "(2) take, or threaten to take, any action against  
9 an employee or applicant for employment—

10 "(A) on the basis of that individual's refusal  
11 to submit to a polygraph examination; or

12 "(B) on the basis of any inference or deter-  
13 mination (referred to in section 7361(4) of this  
14 title) made from that individual's performance in  
15 the course of a polygraph examination; or

16 "(3) fail to take, or threaten to fail to take, any  
17 action on behalf of an employee or applicant for  
18 employment—

19 "(A) on the basis of that individual's refusal  
20 to submit to a polygraph examination; or

21 "(B) on the basis of any inference or deter-  
22 mination described in paragraph (2)(B).

23 "(b)(1) An agency may request an employee, in writing,  
24 to submit voluntarily to a polygraph examination—

25 "(A) if the examination is administered as part of  
a specific investigation into alleged criminal conduct—

5

1           “(i) after the completion, by other means, of  
2           as thorough an investigation as circumstances  
3           reasonably permit; and

4           “(ii) solely for the development of informa-  
5           tion essential to that investigation;

6           “(B) if the individual is reasonably believed to  
7           have knowledge of the matter under investigation; and

8           “(C) if the alleged criminal conduct constitutes an  
9           offense punishable by death or imprisonment for a term  
10          exceeding one year.

11          “(2) A polygraph examination under this subsection may  
12          be administered only by an individual employed by, and  
13          under the direction of—

14               “(A) the Central Intelligence Agency;

15               “(B) the National Security Agency;

16               “(C) the Federal Bureau of Investigation;

17               “(D) the United States Secret Service;

18               “(E) the Drug Enforcement Administration;

19               “(F) the Bureau of Alcohol, Tobacco, and Fire-  
20          arms;

21               “(G) the Postal Inspection Service, United States  
22          Postal Service;

23               “(H) the Intelligence and Security Command,  
24          United States Army;

1           “(I) the Criminal Investigation Command, United  
2 States Army;

3           “(J) the Naval Investigative Service, Department  
4 of the Navy;

5           “(K) the Office of Special Investigations, Depart-  
6 ment of the Air Force; or

7           “(L) the Marine Corps.

8 “§ 7363. Restrictions relating to prepublication review  
9 *Except as provided in section 7365 of this title,*  
10 *An agency may not—*

11           “(1) request, require, or threaten to require, an  
12 employee or applicant for employment to enter into an  
13 agreement, any part of which requires prepublication  
14 review;

15           “(2) take, or threaten to take, any action against  
16 an employee or applicant for employment on the basis  
17 of that individual's refusal to enter into such an  
18 agreement;

19           “(3) take, or threaten to take, any action against  
20 an employee or applicant for employment on the basis  
21 of that individual's refusal to comply with any of the  
22 provisions of such an agreement which require pre-  
23 publication review;

24           “(4) fail to take, or threaten to fail to take, any  
action on behalf of an employee or applicant for em-



1 ployment on the basis of a refusal referred to in  
2 paragraph (2) or (3); or

3 “(5) establish or enforce, or threaten to establish  
4 or enforce, any other requirement in order to compel  
5 prepublication review.

6 “§ 7364. Remedies

7 “(a)(1) Subject to paragraph (2) and subsection (b), any  
8 person aggrieved by a violation of section 7362 or 7363 of  
9 this title may bring a civil action against the United States  
10 for equitable or monetary relief, or both, in the district court  
11 of the United States for the district in which that person  
12 resides, for the District of Columbia, or, in the case of an  
13 employee or former employee, for the district in which that  
14 person was employed at the time the cause of action arose.

15 “(2) A civil action under this subsection shall be forever  
16 barred unless commenced within two years after the cause of  
17 action arose. For purposes of this paragraph, a cause of  
18 action shall be deemed to have arisen on the date that the  
19 person aggrieved knew, or with reasonable diligence should  
20 have known, of the violation concerned.

21 “(3) The court shall award reasonable costs of litigation,  
22 and may award reasonable attorney fees, to a prevailing  
23 plaintiff in an action brought under this subsection.

24 “(b)(1) If a person aggrieved by a violation of section  
25 7362 or 7363 of this title would also be entitled to initiate

1 proceedings for remedial action under agency administrative  
 2 procedures, such person may raise the matter under subsec-  
 3 tion (a) or under such administrative procedures, but not  
 4 both.

5       “(2) A person shall be deemed to have exercised the  
 6 option under this subsection to raise a matter either under  
 7 subsection (a) or under agency administrative procedures  
 8 upon the timely commencement of an action by such person  
 9 in accordance with the Federal Rules of Civil Procedure or  
 10 the timely initiation of such administrative procedures by  
 11 such person, as the case may be.

12       “(3) For purposes of this subsection, the term ‘agency  
 13 administrative procedures’ means any formal process of  
 14 review by an agency provided under statute, regulation, or  
 15 Executive order, including judicial review of any determina-  
 16 tion made in the course of such process.

17       “§ 7365. <sup>Exceptions</sup> ~~Exemptions~~

18       <sup>(a)</sup> “Sections 7362 and 7363 of this title do not apply—

19       “(1) to the Central Intelligence Agency, in the  
 20 case of any individual employed by, or detailed to, the  
 21 Central Intelligence Agency, any individual applying  
 22 for a position in the Central Intelligence Agency, or  
 23 any expert or consultant under contract with the  
 24 Central Intelligence Agency; or

1           “(2) to the National Security Agency, in the case  
2           of any individual employed by, or detailed to, the Na-  
3           tional Security Agency, any individual applying for a  
4           position in the National Security Agency, or any  
5           expert or consultant under contract with the National  
6           Security Agency.”

(b) *NEW*

7           (b) The analysis for chapter 73 of title 5, United States  
8           Code, is amended by adding at the end thereof the following:

“SUBCHAPTER VI—POLYGRAPH EXAMINATION AND  
PREPUBLICATION REVIEW RESTRICTIONS

- “7361. Definitions.
- “7362. Restrictions relating to polygraph examinations.
- “7363. Restrictions relating to prepublication review.
- “7364. Remedies.
- “7365. Exemptions.”

9           SEC. 3. (a)(1) The provisions of any agreement referred  
10          to in section 7363(1) of title 5, United States Code (as added  
11          by this Act) are, to the extent that such provisions relate to  
12          prepublication review, hereby rescinded.

13          (2) The head of each agency concerned shall provide  
14          written notice to each individual who, immediately before this  
15          Act takes effect, was a party to any such agreement, inform-  
16          ing such individual of—

17                 (A) the enactment of this section; and

18                 (B) the provisions of the agreement rescinded as a  
19          result of the enactment of this section.

*HS*

20          ~~(b) Nothing in subsection (a) applies with respect to the~~

10

1 ~~Agency, or to any agreement which requires prepublication~~  
2 ~~review by either of those agencies.~~

3 (c) For purposes of this section, "prepublication review"  
4 and "agency" each has the meaning given that term in sec-  
5 tion 7361 of title 5, United States Code (as added by this  
6 Act).

7 SEC. 4. This Act shall take effect on April 15, 1984.

○