

polygraph

OLL 84-1004
8 March 1984

MEMORANDUM FOR: Deputy Director for Administration
Director of Security
Chairman, SECOM
C/L&LD/OGC
C/ALD/OGC

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STAT FROM:
Chief, Legislation Division

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

1. Attached is a redraft of H.R. 4681, Representative Brooks' bill limiting the use of the polygraph and prepublication review requirements by federal agencies, which has been prepared by Andy Feinstein, Chief Counsel and Staff Director of Representative Schroeder's Subcommittee on Civil Service. Mark-up of the bill by the Subcommittee has been scheduled for 14 March 1984. I would appreciate your comments concerning this draft at the earliest practicable moment.

2. This new draft continues to provide an exemption for the Central Intelligence Agency (CIA) from the polygraph and prepublication prohibitions contained in Sections 7362 and 7363 of the bill. The exemption has been expanded to apply to "any individual employed by, or detailed to, the Central Intelligence Agency, or any individual applying for a position in the Central Intelligence Agency...."

3. With respect to the restrictions on polygraph use contained in Section 7362, the bill prohibits an agency, other than CIA or the National Security Agency (NSA), from requiring any employee or applicant for employment to submit to a polygraph examination, or taking any action against an employee or applicant who refuses to submit to such an examination. Specified agencies, including the CIA, may still administer polygraph examinations on a voluntary basis as part of a specific investigation into alleged criminal conduct. It is unclear given the present wording of subsection 7362(b) whether agencies are limited to administering such examinations only to their own employees, or whether, if an individual's consent is obtained, an agency also may polygraph employees of other agencies who are implicated in a criminal investigation.

4. With respect to prepublication review, Section 7363 provides that agencies, other than CIA or NSA, may not require an employee or applicant for employment to enter into an agreement which requires prepublication review, or take any action against an employee or applicant on the basis of that individual's refusal to sign such an agreement. The present draft also retains the provision requiring heads of agencies to rescind any prepublication review agreement in effect on the date the act takes effect. This provision for some reason is not contained in the prepublication review section (7363), but instead is inserted in the exemption provision at 7365(b). This is troublesome because the "agencies" which will be subject to this mandatory rescission provision are defined in such a manner so as to include this Agency. The Agency exemption contained in 7365(a) only applies to the prohibitions contained in Sections 7362 and 7363, thus creating the anomalous result that the Agency could require its employees to sign prepublication review agreements but must rescind all agreements in effect on the date the act takes effect. This defect could be cured by providing that the Agency exemption provided in subsection (a) of Section 7365 applies not only to Sections 7362 and 7363, but also to subsection (b) of Section 7365.

5. The attached revision has addressed certain of the Agency's concerns with the Brooks bill. Most notably, the Agency's exemption now applies to detailees, the damaging findings contained in the beginning of the Brooks bill questioning the reliability of the polygraph have been deleted, and Section 7 of the original bill which stated that the act did not constitute affirmation for prepublication review or polygraph usage not otherwise prohibited by the bill also has been deleted. The fact remains, however, that the Director of Central Intelligence's ability to protect intelligence sources and methods is still diluted since non-disclosure agreements containing prepublication review provisions can only be signed under this bill by employees of CIA and NSA. In light of this fact, we believe our proposed response to Mr. Feinstein concerning the Agency's position with respect to this revised bill should be that the Agency still strongly opposes the enactment of any legislation in this area and that while certain of the Agency's concerns have been addressed in the revision, a more reasonable solution which more adequately accommodates Intelligence Community concerns with the protection of national security information can be reached.

STAT



Attachment

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cc: Liaison

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✓1 - LEG File: Polygraphs

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SWH: csh (8 March 1984)

[DISCUSSION DRAFT]

MARCH 5, 1984

AMENDMENT TO H.R. 4681

OFFERED BY MRS. SCHROEDER

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

1 That this Act may be cited as the 'Federal Polygraph
2 Limitation and Anti-Censorship Act of 1984'.

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

6 'SUBCHAPTER VI--POLYGRAPH EXAMINATION AND PREPUBLICATION
7 REVIEW RESTRICTIONS

8 '\$7361. Definitions

9 'For purposes of this subchapter--

10 '(1) the term 'agency' means--

11 '(A) an Executive agency;

12 '(B) the United States Postal Service;

13 '(C) the Postal Rate Commission;

14 '(D) the Administrative Office of the United
15 States Courts;

16 '(E) the Library of Congress;

17 '(F) the Government Printing Office;

18 '(G) the Office of Technology Assessment;

1 ''(H) the Congressional Budget Office;
2 ''(I) the Office of the Architect of the
3 Capitol; and
4 ''(J) the Botanic Garden;
5 ''(2) the term 'employee' means--
6 ''(A) an individual employed by an agency; and
7 ''(B) a Congressional employee (other than an
8 individual under subparagraph (A));
9 ''(3) the term 'classified information' means
10 information--
11 ''(A) specifically authorized under criteria
12 established by statute or Executive order to be kept
13 secret in the interest of national defense or
14 foreign policy; and
15 ''(B) in fact properly classified pursuant to
16 such statute or Executive order;
17 ''(4) the term 'polygraph examination' means an
18 interview with an individual which is conducted in whole
19 or in part for the purpose of enabling the examiner to
20 make an inference or a determination, by evaluation of
21 measured and recorded physiological responses,
22 concerning whether the individual has truthfully or
23 deceptively responded to inquiries made in such
24 interview;
25 ''(5) the term 'action', as used with respect to an

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1 employee or applicant for employment, means--

2 '(A) a personnel action under clauses (i)
3 through (x) of section 2302(a)(2)(A) of this title;

4 '(B) a decision concerning clearance for access
5 to classified information; and

6 '(C) a performance evaluation (other than under
7 chapter 43 of this title);

8 in the case of such employee or applicant; and

9 '(6) the term 'prepublication review' means
10 submission of information to an agency for the purpose
11 of permitting such agency to examine, alter, excise, or
12 otherwise edit or censor such information before it is
13 publicly disclosed, but does not include any such
14 submission with respect to information which is to be
15 disclosed by an employee in such employee's official
16 capacity.

17 ''§7362. Restrictions relating to polygraph examinations

18 '(a) An agency may not--

19 '(1) require, threaten to require, or, except as
20 provided in subsection (b), request any employee or
21 applicant for employment to submit to a polygraph
22 examination;

23 '(2) take, or threaten to take, any action against
24 an employee or applicant for employment--

25 '(A) on the basis of that individual's refusal

1 to submit to a polygraph examination; or

2 '(B) on the basis of any inference or
3 determination (referred to in section 7361(4) of
4 this title) made from that individual's performance
5 in the course of a polygraph examination; or

6 '(3) fail to take, or threaten to fail to take, any
7 action on behalf of an employee or applicant for
8 employment--

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

11 '(B) on the basis of any inference or
12 determination under paragraph (2)(B).

13 '(b)(1) An agency may request an employee, in writing,
14 to submit voluntarily to a polygraph examination if the
15 examination is administered as part of a specific
16 investigation into alleged criminal conduct (including an
17 unauthorized disclosure of classified information)--

18 '(A) after the completion, by other means, of as
19 thorough an investigation as circumstances reasonably
20 permit;

21 '(B) solely for the development of information
22 essential to that investigation;

23 '(C) if the individual is reasonably believed to
24 have knowledge of the matter under investigation; and

25 '(D) if the alleged criminal conduct constitutes an

1 offense punishable by death or imprisonment for a term
2 exceeding one year.

3 '(2) A polygraph examination under this subsection may
4 only be administered by--

5 '(A) the Central Intelligence Agency;

6 '(B) the National Security Agency;

7 '(C) the Federal Bureau of Investigation;

8 '(D) the United States Secret Service;

9 '(E) the Drug Enforcement Administration;

10 '(F) the Bureau of Alcohol, Tobacco, and Firearms;

11 '(G) the Postal Inspection Service, United States
12 Postal Service;

13 '(H) the Intelligence and Security Command, United
14 States Army;

15 '(I) the Criminal Investigation Command, United
16 States Army;

17 '(J) the Naval Investigative Service, Department of
18 the Navy;

19 '(K) the Office of Special Investigations,
20 Department of the Air Force; or

21 '(L) the Marine Corps.

22 ''§7363. Restrictions relating to prepublication review

23 ''An agency may not--

24 '(1) require an employee or applicant for
25 employment to enter into an agreement, any part of which

1 requires prepublication review;

2 '(2) take any action against an employee or
3 applicant for employment on the basis of that
4 individual's refusal to enter into such an agreement;

5 '(3) take any action against an employee or
6 applicant for employment on the basis of that
7 individual's refusal to comply with any provisions of
8 such an agreement which require prepublication review;

9 '(4) fail to take any action on behalf of an
10 employee or applicant for employment on the basis of a
11 refusal referred to in paragraph (2) or (3);

12 '(5) establish or enforce any other requirement in
13 order to compel prepublication review; or

14 '(6) threaten to engage in any conduct described in
15 paragraphs (1) through (5) (including a failure to take
16 an action, as described in paragraph (4)).

17 **[''§7364. Remedies**

18 '(a) Any person aggrieved by a violation of section
19 7362 or 7363 of this title may institute an action for
20 injunctive or monetary relief, or both, in the United States
21 District Court for the District of Columbia or for the
22 district in which that person resides or in which that
23 person was employed at the time the cause of action arose.
24 Such person may also petition the court for appropriate
25 temporary relief (including a restraining order), and the

1 court shall grant such relief unless there is no probable
2 cause to believe that a violation has occurred or will
3 occur.

4 '(b) An action for monetary relief may include relief
5 for damages to reputation and privacy.

6 '(c) The court shall award to a prevailing plaintiff in
7 an action brought under this section costs of litigation and
8 reasonable attorney's fees.

9 '(d) The remedies provided by this section are in
10 addition to, and not in lieu of, any other remedy available
11 to any employee by law.]

12 **''§7365. Exemptions**

13 ''Sections 7362 and 7363 of this title do not apply--

14 ''(1) to the Central Intelligence Agency, in the
15 case of any individual employed by, or detailed to, the
16 Central Intelligence Agency, or any individual applying
17 for a position in the Central Intelligence Agency; or

18 ''(2) to the National Security Agency, in the case
19 of any individual employed by, or detailed to, the
20 National Security Agency, or any individual applying for
21 a position in the National Security Agency.''.
22

(b) The analysis for chapter 73 of title 5, United
23 States Code, is amended by adding at the end thereof the
24 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.''. *(a)*

1 SEC. 3. (a) The head of each agency shall rescind any *(2)*
 2 agreement referred to in section 7363(1) of title 5, United *(1)*
 3 States Code (as added by this Act) in effect on the date
 4 this Act takes effect, and provide written notice of the
 5 rescission to any individual who was a party to such an
 6 agreement. *sub in* *eff. 10/1/84 to CIA in USA* *10/1/84*

7 (b) For purposes of subsection (a), the term 'agency'
 8 has the meaning given such term by section 7361 of title 5,
 9 United States Code (as added by this Act).

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