

98TH CONGRESS
2D SESSION

H. R. 4681

[Report No. 98-961, Parts I and II]

Relating to the administration of polygraph examinations and prepublication review requirements by Federal agencies.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 30, 1984

Mr. BROOKS introduced the following bill; which was referred to the Committee on Post Office and Civil Service

MARCH 22, 1984

Additional sponsors: Mr. FASCELL, Mr. WEISS, Mr. NEAL, Mr. FRANK, Mr. COLEMAN of Texas, Mrs. BOXER, Mr. LEVINE of California, Mr. OWENS, Mr. KOLTER, Mr. ACKERMAN, Mr. AKAKA, Mr. ANDREWS of Texas, Mr. BARNES, Mr. BEDELL, Mr. BERMAN, Mr. FAUNTROY, Mr. FAZIO, Mr. FISH, Mr. FROST, Mr. GARCIA, Mr. GEJDENSON, Mr. GONZALEZ, Mrs. HALL of Indiana, Mr. KOSTMAYER, Mr. LOWBY of Washington, Mr. MCCLOSKEY, Mr. MARKEY, Mr. MATSUI, Mr. MILLER of California, Mr. MITCHELL, Mr. MRAZEK, Mr. OTTINGER, Mr. RANGEL, Mr. RICHARDSON, Mr. RODINO, Mr. SABO, Mr. SMITH of Florida, Mr. STOKES, Mr. STUDDS, and Mr. UDALL

AUGUST 6, 1984

Reported with an amendment and referred to the Committees on Armed Services and the Judiciary, and to the Permanent Select Committee on Intelligence, for a period ending not later than September 21, 1984, for consideration of such portions of the bill and amendment as fall within the jurisdiction of those committees pursuant to rule X, clauses 1(c) and 1(m), and rule XLVIII, clause 2, respectively

[Strike out all after the enacting clause and insert the part printed in italic]

SEPTEMBER 21, 1984

Additional sponsors: Mr. EDGAR, Mr. WEAVER, Mr. MORRISON of Connecticut, Mr. EVANS of Illinois, and Mr. MCHUGH

SEPTEMBER 21, 1984

Discharged from the Committee on the Judiciary

SEPTEMBER 21, 1984

Discharged from the Permanent Select Committee on Intelligence

SEPTEMBER 21, 1984

Reported from the Committee on Armed Services with amendments, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed

[Omit the part in boldface brackets and insert the part printed in boldface roman]

[For text of introduced bill, see copy of bill as introduced on January 30, 1984]

A BILL

Relating to the administration of polygraph examinations and prepublication review requirements by Federal agencies.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
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,*
6 *is amended by adding at the end thereof the following new*
7 *subchapter:*

8 *"SUBCHAPTER VI—POLYGRAPH EXAMINA-*
9 *TION AND PREPUBLICATION REVIEW RE-*
10 *STRICTIONS*

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;*

- 1 “(C) the Postal Rate Commission;
- 2 “(D) the Administrative Office of the United
- 3 States Courts;
- 4 “(E) the Library of Congress;
- 5 “(F) the Government Printing Office;
- 6 “(G) the Office of Technology Assessment;
- 7 “(H) the Congressional Budget Office;
- 8 “(I) the Office of the Architect of the Cap-
- 9 itol; and
- 10 “(J) the Botanic Garden;
- 11 “(2) the term ‘employee’ means—
- 12 “(A) an individual employed by an agency;
- 13 “(B) a Congressional employee (other than
- 14 an individual under subparagraph (A)); and
- 15 “(C) an expert or consultant who is under
- 16 contract under section 3109 of this title with an
- 17 agency, including, in the case of an organization
- 18 performing services under such section, an
- 19 individual involved in the performance of such
- 20 services;
- 21 “(3) the term ‘classified information’ means
- 22 information—
- 23 “(A) specifically authorized under criteria
- 24 established by statute or Executive order to be

1 *kept secret in the interest of national defense or*
2 *foreign policy; and*

3 *“(B) in fact properly classified pursuant to*
4 *such statute or Executive order;*

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

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

14 *“(A) a personnel action under clauses (i)*
15 *through (x) of section 2302(a)(2)(A) of this title;*

16 *“(B) a decision concerning clearance for*
17 *access to classified information; and*

18 *“(C) a performance evaluation (other than*
19 *under chapter 43 of this title);*

20 *in the case of such employee or applicant; and*

21 *“(6) the term ‘prepublication review’ means sub-*
22 *mission of information to an agency for the purpose of*
23 *permitting such agency to examine, alter, excise, or*
24 *otherwise edit or censor such information before it is*
25 *publicly disclosed, but does not include any such sub-*

1 *mission with respect to information which is to be dis-*
2 *closed by an employee in such employee's official*
3 *capacity.*

4 ***“§ 7362. Restrictions relating to polygraph examinations***

5 ***“(a) An agency may not—***

6 ***“(1) require, threaten to require, or, except as pro-***
7 ***vided in subsection (b), request any employee or***
8 ***applicant for employment to submit to a polygraph***
9 ***examination;***

10 ***“(2) take, or threaten to take, any action against***
11 ***an employee or applicant for employment—***

12 ***“(A) on the basis of that individual's refusal***
13 ***to submit to a polygraph examination; or***

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

18 ***“(3) fail to take, or threaten to fail to take, any***
19 ***action on behalf of an employee or applicant for***
20 ***employment—***

21 ***“(A) on the basis of that individual's refusal***
22 ***to submit to a polygraph examination; or***

23 ***“(B) on the basis of any inference or deter-***
24 ***mination described in paragraph (2)(B).***

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

3 “(A) if the examination is administered as part of
4 a specific investigation into alleged criminal conduct—

5 “(i) after the completion, by other means, of
6 as thorough an investigation as circumstances
7 reasonably permit; and

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

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

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

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

18 “(A) the Central Intelligence Agency;

19 “(B) the National Security Agency;

20 “(C) the Federal Bureau of Investigation;

21 “(D) the United States Secret Service;

22 “(E) the Drug Enforcement Administration;

23 “(F) the Bureau of Alcohol, Tobacco, and Fire-
24 arms;

1 “(G) the Postal Inspection Service, United States
2 Postal Service;

3 “(H) the Intelligence and Security Command,
4 United States Army;

5 “(I) the Criminal Investigation Command,
6 United States Army;

7 “(J) the Naval Investigative Service, Department
8 of the Navy;

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

11 “(L) the Marine Corps.

12 **“§ 7363. Restrictions relating to prepublication review**

13 “An agency may not—

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

18 “(2) take, or threaten to take, any action against
19 an employee or applicant for employment on the basis
20 of that individual’s refusal to enter into such an
21 agreement;

22 “(3) take, or threaten to take, any action against
23 an employee or applicant for employment on the basis
24 of that individual’s refusal to comply with any of the

1 *provisions of such an agreement which require pre-*
2 *publication review;*

3 *“(4) fail to take, or threaten to fail to take, any*
4 *action on behalf of an employee or applicant for em-*
5 *ployment on the basis of a refusal referred to in*
6 *paragraph (2) or (3); or*

7 *“(5) establish or enforce, or threaten to establish*
8 *or enforce, any other requirement in order to compel*
9 *prepublication review.*

10 **“§ 7364. Remedies**

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

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

1 “(3) *The court shall award reasonable costs of litiga-*
2 *tion, and may award reasonable attorney fees, to a prevailing*
3 *plaintiff in an action brought under this subsection.*

4 “(b)(1) *If a person aggrieved by a violation of section*
5 *7362 or 7363 of this title would also be entitled to initiate*
6 *proceedings for remedial action under agency administrative*
7 *procedures, such person may raise the matter under subsec-*
8 *tion (a) or under such administrative procedures, but not*
9 *both.*

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

17 “(3) *For purposes of this subsection, the term ‘agency*
18 *administrative procedures’ means any formal process of*
19 *review by an agency provided under statute, regulation, or*
20 *Executive order, including judicial review of any determina-*
21 *tion made in the course of such process.*

22 “**§ 7365. Exemptions**

23 “(a) *Sections 7362 and 7363 of this title do not*
24 *apply—*

1 “(1) to the Central Intelligence Agency, in the
2 case of any individual employed by, or detailed to, the
3 Central Intelligence Agency, any individual applying
4 for a position in the Central Intelligence Agency, or
5 any expert or consultant under contract with the
6 Central Intelligence Agency; or

7 “(2) to the National Security Agency, in the case
8 of any individual employed by, **and assigned to**, or
9 detailed to, the National Security Agency, any individ-
10 ual applying for a position in the National Security
11 Agency, or any expert or consultant under contract
12 with the National Security Agency. [”.]

13 **“(b) Section 7362 of this title does not apply to**
14 **the Department of Defense in the case of any indi-**
15 **vidual employed by, or detailed to, the Department**
16 **of Defense, any individual applying for a position**
17 **in the Department of Defense, or any expert or**
18 **consultant under contract with the Department of**
19 **Defense—**

20 **“(1) if the individual has access under a**
21 **special access program to classified informa-**
22 **tion that has been specifically designated by**
23 **the Secretary of Defense for the purposes of**
24 **this paragraph or is being considered for a**

1 **position in which access to such information**
2 **will be required;**

3 “(2) if interim clearance of the individual
4 **for a special access program is required;**

5 “(3) if the individual is employed in or
6 **assigned to (or is being considered for em-**
7 **ployment in or assignment to) a position in**
8 **the Defense Intelligence Agency specified by**
9 **the Secretary of Defense for the purposes of**
10 **this paragraph;**

11 “(4) in the case of an individual who is
12 **not a citizen of the United States, if a poly-**
13 **graph examination is necessary to assist in**
14 **determining the initial eligibility of the indi-**
15 **vidual for access to classified information or**
16 **is necessary to ensure that continued access**
17 **by the individual to classified information is**
18 **clearly consistent with the national security;**

19 “(5) if a polygraph examination is neces-
20 **sary to assist in determining the suitability,**
21 **reliability, or credibility of an individual who**
22 **is used as, proposed for use as, or purports to**
23 **be an agent, source, or operative in foreign**
24 **intelligence or counterintelligence;**

1 **“(6) if a polygraph examination is con-**
2 **ducted at the request of an individual who is**
3 **the subject of a criminal, counterintelligence,**
4 **or personnel security investigation, as a**
5 **means of exculpation with respect to allega-**
6 **tions arising in the course of the investiga-**
7 **tion; and**

8 **“(7) if a polygraph examination is neces-**
9 **sary to resolve serious credible derogatory al-**
10 **legations developed in connection with a per-**
11 **sonnel security investigation of a Department**
12 **of Defense civilian or contractor employee or**
13 **a member of the Armed Forces, if the allega-**
14 **tion cannot be resolved in any other manner**
15 **and the consent of the individual who is**
16 **to be given the polygraph examination is**
17 **obtained.”.**

18 *(b) The analysis for chapter 73 of title 5, United States*
19 *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.”.

20 *SEC. 3. (a)(1) The provisions of any agreement referred*
21 *to in section 7363(1) of title 5, United States Code (as added*

1 *by this Act) are, to the extent that such provisions relate to*
2 *prepublication review, hereby rescinded.*

3 *(2) The head of each agency concerned shall provide*
4 *written notice to each individual who, immediately before this*
5 *Act takes effect, was a party to any such agreement, inform-*
6 *ing such individual of—*

7 *(A) the enactment of this section; and*

8 *(B) the provisions of the agreement rescinded as a*
9 *result of the enactment of this section.*

10 *(b) Nothing in subsection (a) applies with respect to the*
11 *Central Intelligence Agency or the National Security*
12 *Agency, or to any agreement which requires prepublication*
13 *review by either of those agencies.*

14 *(c) For purposes of this section, “prepublication review”*
15 *and “agency” each has the meaning given that term in sec-*
16 *tion 7361 of title 5, United States Code (as added by this*
17 *Act).*

18 *SEC. 4. This Act shall take effect on October 1, 1984.*

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