U.S. DEPARTMENT OF ENERGY

PUBLIC HEARING

ON

POLYGRAPH EXAMINATION REGULATION

NOTICE OF PROPOSED RULEMAKING

DOCKET NO. CN-RM-99-POLY

Wednesday, September 22, 1999

The public hearing was held in the Forrestal Auditorium, Department of Energy, 1000 Independence Avenue, S.W., Washington, D.C., at 9:00 a.m., General Gene Habiger presiding.

PRESENT:

GEN. GENE HABIGER

WILLIAM HENSLEY

DOUGLAS HINCKLEY

LISE HOWE

SPEAKERS PRESENT:
STEVEN AFTERGOOD

ROGER JOHNSTON

DAVID RENZELMAN

DREW RICHARDSON

CHUCK WESTFALL

MARK ZAID
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GEN. HABIGER: Good morning, ladies and gentlemen. I am General Gene Habiger of the Office of Security and Emergency Operations.

On behalf of the Department of Energy and particularly Secretary Richardson, I'd like to thank you for taking the time to participate in this public hearing concerning the proposed polygraph examination program.

Secretary Richardson has personally asked me to be here today to listen carefully to your comments and concerns and report back to him. Let me assure you that we take this issue and your concerns very, very seriously.

The purpose of this hearing is for DOE to listen to your comments on the Department's notice of proposed rulemaking. This is a time for us to listen and to understand your concerns. It is not a forum to debate the issues.

We are here focused on what you have to say. Your comments are not only appreciated. They are essential to the rulemaking process.
And, gentlemen, over here if I could have you keep the noise down I'd appreciate it.

The Department of Energy proposes regulations for the use of polygraph examinations for certain DOE contractor employees, applicants for employment and other individuals assigned or detailed to federal positions in the department.

The proposed regulations describe the categories of individuals who would be eligible for polygraph testing and controls for the use of such testing, as well as for the prevention of unwanted intrusion into the privacy of individuals.

These regulations are being proposed to comply with various executive orders which require the department to protect classified information. These regulations for the use of polygraph examinations for certain DOE and contractor employees are intended to protect highly sensitive and classified information and materials to which such employees have access.

This rulemaking also proposes conforming changes to regulations governing the department's Personnel Security Assurance Program, or PSAP, and Personnel Assurance Program, also known as the POP
If you have not already read the Federal Register notice from August 18th, 1999, I urge you to do so. Copies are available at the registration desk.

The comments received here today and those submitted during the written comment period, which ends October 4th, will assist the department in the rulemaking process. All written comments must be received by this date to insure consideration by the department.


In approximately two weeks, a transcript of this hearing will be available for inspection and copying here at the Department of Energy's Freedom of Information Reading Room. This address is specified in the Federal Register notice and is also available at the registration desk.

The transcript will also be placed on DOE's Internet Web site at the following address:
In addition, anyone wishing to purchase a copy of the transcript may make their own arrangements.

This will not be an evidentiary or judicial type of hearing. It will be conducted in accordance with Section 553 of the Administrative Procedures Act, 5 U.S. Code, Section 553 and Section 501 of the DOE Organization Act, 42 U.S. Code, Section 7191.

In order to insure we get as much pertinent information and as many views as possible, and to enable everyone to express their views, we will use the following procedures.

First, speakers will be called to testify in the order indicated in the agenda. Speakers have been allotted five minutes for their verbal statements.

Anyone may make an unscheduled statement after all the schedules speakers have delivered their statements. To do so, please submit your name to the registration desk before the conclusion of the last speaker.

Questions for the speakers will be asked
only by members of the DOE panel conducting the hearing.

As I said, the purpose of this hearing is to receive your comments and concerns on DOE's notice of proposed rulemaking. I urge all speakers to provide us with your comments, opinions, and pertinent information about the proposed rule.

Please remember the close of the comment period is October 4th, 1999. All written comments received will be available for public inspection at the DOE Freedom of Information Reading Room here in Washington, D.C. The phone number there is (202) 586-3142.

If you submit written comments, include ten copies of those comments. If you have any questions concerning this submission of written comments, please see Andi Kasarsky at the registration desk. She can also be reached at (202) 586-3012.

Any person submitting information which he or she believes to be confidential and exempt by law from public disclosure should submit to the Washington, D.C. address a total of four copies, one complete copy with confidential material included, and
three copies without the confidential information.

In accordance with the procedures established in 10 CFR 1004.11, the Energy Department shall make its own determination as to whether or not the information shall be exempt from public disclosure.

We appreciate the time and effort you have taken in preparing your statements and are pleased to receive your comments and opinions.

I would like to introduce the other members of the panel. Joining us here today is Doug Hinckley, Program Manager, Polygraph Evaluation Board, Office of Counterintelligence; Lise Howe, an attorney with DOE's Office of General Counsel; and Bill Hensley, Director of Office of Security Support with DOE's Office of Defense Programs.

Before we begin to hear your comments, we thought it would be extremely valuable to provide you with a short briefing on polygraphs. We are well aware there's a lot of confusion and many misconceptions about polygraphs. This morning's briefing provides some of that essential information.

I'd like to call upon Dave Renzelman,
Polygraph Program Manager for the Office of Counterintelligence, Pacific Northwest National Laboratory, to provide that briefing.

Dave.

MR. RENZELMAN: I'm not sure about the sound system yet. It looks to me like we're still working on it. Can anybody hear me?

PARTICIPANTS: Yes.

MR. RENZELMAN: Can you? Let me talk without it then.

My name is David Renzelman. I am a contract employee with the Pacific Northwest National Laboratory in --

THE REPORTER: Sir, it is better if you are by the mic.

MR. RENZELMAN: Okay. We were going to have a movable mic, but I'll just redo. This one appears to be working. I'm just going to hold this.

As a contract employee, I am assigned to the Director of the Office of Counterintelligence at DOE, Mr. Edward J. Curran. My job working for him is the Polygraph Program Manager.

And as such, since 1991 and up until we
started the program for the Office of Counterintelligence, we have established a program that I will show you later on in this presentation that is head and shoulders above the standard that is acceptable in the community today.

People say, "How accurate is a polygraph? What does a polygraph do?"

I would like to just explain that a polygraph is only a mechanism or a means that records externally what a person who is taking the examination experiences physiologically internally when they think about and answer a question that was agreed upon between the examiner and the person taking the test. So a polygraph is much like a camera in the sense that it takes a picture of those emotions and prints it out on paper.

And we're going to be talking about questions that are agreed upon between the examiner and the person taking the examination in those four areas that you see on the screen.

Espionage. You don't wake up one morning and fall out of bed an become a spy. That's something that takes a conscious decision and an act and a
series of steps to commit.

And one time back in 19, oh, '82 or '83, I was doing examinations for the Air Force OSI with scientists in El Segundo, California, and we had some 47 people in the audience, and I thought it would really be interesting to see what those people thought the term "espionage" really meant.

So we passed out cards and asked them to write in 25 words or less what they thought espionage was, and one woman said, "Yes, I have committed espionage, but I only did it twice, both times when I was on travel, and then I told my husband about it, and we went to marriage counseling, and I promised never to do it again."

Now, the problem, of course, is that we need to make sure that if we ask you if you've committed espionage against the United States, that that question means the same to you as it does to us. So in preparation to ask that question on a polygraph test, which only takes seven or eight minutes, it will take a good hour to prepare the person to take the examination.

Then we follow on with questions about
sabotage and terrorist activity. I don't need to even
discuss that. You read about it in the paper every
day. We have bombings; we have shootings; we have
drive-by murders, whatever. It would be just a common
sense approach to make sure that people who have
access to our classified information have not
committed either espionage or sabotage against the
United States.

And we want to talk about unauthorized
disclosure of classified information to unauthorized
people of a foreign intelligence service or agency.

Now, people will say, "How about the time
I told my wife something that really, now that I think
about it, I should have done because she doesn't have
a clearance?"

Folks, that's two things. That's not
terribly intelligent, and it's probably a security
infraction, but we have been mandated to insure that
this test will verify that the people that take it and
pass it are only working for the U.S. government, and
not another government as well.

And then we have to talk about
unauthorized contact with foreign intelligence
service, and it is important there, and there are case studies upon case studies of people who have, and the question is very simple. Has anybody had any unauthorized or unreported contact with a foreign intelligence service?

Now, after that is over, the data is collected, and it is analyzed by an examiner, and DOE is unique in this sense because as soon as the examiner analyzes that data and makes an opinion, he or she will take the test in the blind and provide it to a second examiner for peer review.

Then that examiner analyzes the data, and the two sets of data are compared. If the opinions are the same, it then goes to supervisory review, where another blind analysis is done, and finally, before the test is over, it goes to the Office of Quality Control, and every federal agency -- and there are 22 federal agencies that use polygraph in the United States. Twelve of them do this kind of testing, and they include agencies like CIA, DIA, DIS, NSA, NRO, Department of Energy, and all of the Department of Defense agencies, and they all have quality control.
We go one step further. We have four levels of quality control on every test. Why do we do that? Because your test is just as important to the Secretary and his designees as it is to you. There are not going to be any chances taken any way, manner, shape or form. And the test isn't over until quality control is complete.

Now, the Secretary of Energy has designated only one person to approve any counterintelligence polygraph test administered by the Department of Energy Polygraph Program, and that's Edward J. Curran.

Director Curran came to the Department of Energy from the FBI. He is an FBI employee. He is the person that was sent to do the investigation program for the agency in the post-Ames era. He was Deputy Director of the On Site Inspection Agency, and he is the most knowledgeable and experienced counterintelligence officer in this country today. I think that's more than just a good start for the DOE Counterintelligence Program.

He is the only person that reviews on, acts upon, or retains any documentation on any
counterintelligence test. After it's done and quality control is through with it, the results are provided to him. It is his decision and his decision alone what happens next.

If it is an issue or a non-issue type exam where there is no need for further testing, even the videotapes are destroyed. Just a record of the exam that was completed and the results.

If there happens to be an issue where somebody does not successfully complete an examination or admits to doing some wrongdoing that warrants further investigation, Mr. Curran is the one that determines who does that investigation.

Now, we record every examination on videotape, and then we have a unique recording system in that we take data from the computer, put it through a TV transponder and insert it into a video tape that is a split screen function. One half of the screen is the physiological data that is being recorded real time. The other half is the person that's taking the examination. We do that so that we can correlate any movement or artifacts or perhaps someone would be foolish enough to attempt countermeasures. It would
assist us in determining was that a pure and valid
test from beginning to end.

And as I indicated before, if it's a non-
issue test, which the greatest majority of them are,
then that tape is destroyed no later than 90 days
after the date of adjudication.

Now, we only follow procedures that are
set up by the Department of Defense Polygraph
Institute. That is the federal training institute in
the United States, the only one that is authorized to
conduct training for federal examiners.

The Director of that institute is Michael
Capps. The Director of Research is Dr. Andy
Ryan. Dr. Ryan is in our audience today, and they are
the only people that have been mandated by the
Congress of the United States to conduct research in
polygraph in the United States. They are funded by
the Department of Defense, and they provide service to
all federal agencies, including the Department of
Energy.

Now, the Secretary of Energy has said if a
person takes a test and there is an issue with that
test and he has or she has a physiological response to
a security question that we talked about before and there is no further evidence to support that physiological response, then all efforts must be taken to determine why would the person respond when they said, "No, I did not commit espionage against the United States," but the response or the test in and of and by itself cannot be the basis for adverse action.

All of the examiners that DOE has are graduates of that Polygraph Institute. It's 14 weeks in duration, and you have to have a baccalaureate degree, the standard investigative experience, and then in DOE examiners, we are requiring that they have five years' polygraph experience in counterintelligence and ten years' experience as an 1811 or a DOD investigator, as well as being a DODPI graduate.

All of our people have advanced degrees or are working towards their advanced degree in a related discipline, and they have proven and established counterintelligence experience.

All of our people are DODPI certified, and that certification requires continuing education by attending DODPI sponsored courses. As I recall, it's
40 hours annually, and all of our people exceed that.

In addition to that, DOE requires certification, and our certification process begins with the initial interview of the examiner. We're concerned about the kind of people that we test.

You know, when we have people that do the work that we do, it takes an examiner that can relate to them, and we have what I call a charm check, and we spend a great deal of time and effort to make sure that the examiners are the kind of people that can do this relating to the people that we're going to test, the population that examine.

And then the bottom line is if I would not let them test me, if my reputation, career, and future depended on the results of that test, they're not going to test anybody, and every one of the examiners that we have in the Department of Energy -- and they are certified -- I would permit to test me if my future, career, or reputation depended on it. I have that faith and confidence in them.

I require that they all belong to the American Polygraph Association and the American Association of Police Polygraphists. Our people hold
positions in both of those associations. One of our examiners is on the Ethics Committee as the chairman. I serve as the subcommittee chairman for quality control for APA and the Director of Quality Control for AAPP.

One of our examiners is the president of AAPP, and one of our other examiners writes the journal.

We have had our test center inspected by everybody who's qualified to inspect us. We had both national associations inspect the test facility, and then we had the NRO and the Air Force Counterintelligence and the DODPI came and inspects the quality assurance program, and that's required by a memorandum of agreement signed by all the federal agencies that use it.

And I am proud to tell you that Department of Energy is the only federal agency that has been certified by DODPI and inspected by DODPI and found to have zero findings. There was nothing wrong with the DOE polygraph program at our last certification, and we're due again next year.

Now, we coordinate all of our procedures
with DODPI. We check it out. I will be working with Dr. Ryan on continuing research and projects that will be of mutual interest to the Department of Energy and other federal agencies, and all procedures and training that comes about.

And the two people that are empowered to make decisions and recommend policy, both of whom are in the audience today, General Habiger, of course, was the former commander of the Strategic Air Command, and when you talk about a background for coming in as the "Security Czar," you've got to remember he had the power to deploy the weapons that DOE makes.

Then you've got the Director Curran coming from the FBI, as an Assistant Director of the FBI, the most knowledgeable and experienced in the counterintelligence field in this country.

You talk about a good start. That's a leap ahead of what anybody could or would do.

And essentially that will conclude my presentations about taking a polygraph test with DOE. Should you be tasked or asked to do it, I can tell you this: that the people will be treated with dignity and respect, and the test will not go any
quicker or faster than the people are able to go themselves.

How long does it take? That depends on you. Some people are quicker than others, and before the testing begins, the questions are rehearsed and asked and answered, and everybody will concur that they understand the question, and the question or the answers they give didn't bother them.

And we keep a survey. After the test, you have a mechanism to community with Director Curran. You will be asked six questions: if you were offended, embarrassed, humiliated, all in one question. You will be asked if you thought your privacy was unwarrantedly invaded or if you thought the test was unfair in any way.

And if you said yes to any of those three questions, we're going to ask you to tell us why, and you have a place to write a comment.

Then we're going to ask you questions about do you think it's a good procedure, and we'll ask if you took another job and the prerequisites for that job required a polygraph test, would you take one; if not, why not?
And lastly, if espionage ever took place, would you take a polygraph test to assist the FBI or DOE in investigating it. If not, why not?

Then you put that in a sealed envelope and put it in a lock box, and it's delivered to Director Curran, and he opens it up, and you can communicate directly with him.

I can tell you this. Since 1991, when this program was started under the control of David Jones, who is on General Habiger's staff for the AAAP Program for DOE, we have tallied those results, and it's 99.9 percent favorable responses to those questionnaires since the inception of polygraph in DOE in 1991.

We take the extra effort. We take the extra step. It will be done professionally. It will be done once. It will be done right.

And I thank you for your time. That concludes my presentation.

GEN. HABIGER: We have a total of four scheduled speakers this morning, and we'll go ahead and get the laptops off the podium if we could please.

After the four scheduled speakers, if we
have unscheduled speakers, then we will then proceed with those.

This hearing is scheduled to be in session until one o'clock this afternoon.

I'd like to call your first speaker to the podium. For the record, I would ask that each speaker please state his or her name, whom you represent before making your statement.

First, Mr. Drew Richardson. Mr. Richardson.

DR. RICHARDSON: Thank you very much. I appreciate the opportunity to address you today.

My name is Dr. Drew Richardson. I'm a supervisory Special Agent of the FBI and a scientist in the FBI laboratory.

As is the case with others addressing you today, the comments I make and opinions I offer are simply my own, and I would like to emphasize that they are not represented as the views of the FBI, its management, or those in its Polygraph Program.

I would begin by heartily congratulating you on holding these hearings and for publicly entertaining diverse opinions, many of which have been
contrary to the notion of undertaking the very polygraph screening program that you propose.

I, too, however, must express strong reservations about polygraph screening and recommend as strongly as I possibly can that you do not implement such a program. My concerns regarding polygraph screen run the gamut, covering the lack of theoretical foundation, a lack of scientific control, a lack of validity as a diagnostic tool, to general concerns about the ethics of common practice, to the potential lack of due process and fairness to polygraph examinees as it relates to the use of polygraph results.

I believe that the assertions and opinions that I have just offered are in line with the vast majority opinion of the relevant scientific community of psychophysiology.

Furthermore, I believe that they parallel the formal and publicly stated positions of the American Medical Association and the American Psychological Association, both of which have gone on record as opposing the use of polygraph examinations for generalized screening purposes.
I have no reason to believe that the proponents of polygraph screening are in any way disingenuous, nor do I believe that they have intentionally sought to misrepresent their case, but I truly do believe that they are wrong and that there will be serious consequences to individual examinees and to this nation stemming from their folly.

I would challenge you to forego the temptation to use bureaucratic authority alone to foist such a program on your employees.

If proponents of polygraph screening are genuine in their belief and affection for such a program, they should welcome the opportunity through open debate and the rigorous cross examination of opposing ideas to develop the parallel intellectual authority necessary to support their program. No such scientific inquiry has yet occurred.

As to whether the scientific underpinnings of polygraph screening are merely pseudo-scientific mumbo-jumbo, as I would largely submit, has yet to be shown, but I challenge you to let the debate begin now on your terms or I suggest it most certainly will begin at a later time on the adversarial terms of
I would further suggest that in your inquiry, it would be only reasonable and prudent to utilize the vast intellectual force and scientific talent present in the national laboratory system to effect such an evaluation. I will leave this line of reasoning by suggesting to you that it is not mere circumstance that Nobel Prizes have regularly been awarded to scientists directly or indirectly associated with the national labs in the disciplines of particle physics, theoretical mathematics, and so forth.

I would further submit that it is also not merely circumstantial that in the last 75 years of polygraph practice, that no work of any individual at any time has been remotely deemed worthy of said or comparable accolade.

I am, as others have expressed, concerned about the plight of falsely accused victims stemming from polygraph examinations. I have heard in recent years from a large number of individuals who claim to have been wrongly found deceptive in polygraph examinations. A portion of these individuals has
claimed improper treatment and conduct on the part of
examining polygraphers.

This treatment and conduct ranges from
improper language and unprofessional manner to
outright civil rights abuse. My expectation for your
program is that it would be characterized by a very
low level of sensitivity, making it highly unlikely
that a spy will ever be revealed by such methodology.

I also believe that it will be
characterized by the absence of most of the improper
examiner conduct that has been described to me.

And, three, I believe that there will be
an increase in specificity that is over and above what
polygraph accuracy and base rate considerations alone
would suggest, leading, in fact, to a reduction in the
absolute number of false positives.

Although the number of false positive
results will be less, because of the serious nature of
the relevant subject matter issues the consequences to
any one falsely accused individual will be horrendous.

To any who believe that these polygraph
results will simply amount to a walk in the park or an
academic hiccup for these individuals until
prosecutable facts are either developed or not
developed through investigation, I would refer you to
the recently well publicized cases of Mr. Mark Mallah,
Mr. Adam Ciralsky, and Mr. David Tenenbaum.

Let me close by assuring you that I share
your concern for protecting national security and
recognize the immense problems associated with so
doing. I strongly suggest to you that the real
problems unfortunately do not necessarily define
viable solutions. Albeit no doubt well intentioned, I
believe your efforts with polygraph screening will in
no way be found to be a viable solution to your
challenges and, in fact, will only serve to
unequivocally disprove the adage about anything is
better than nothing.

Thank you very much for your time and
attention. I would be glad to address any questions
you might have.

GEN. HABIGER: Thank you, Dr. Richardson.

Thanks.

Our next speaker is Mark Zaid.

MR. ZAID: Good morning.

GEN. HABIGER: Good morning.
MR. ZAID: Thank you for the opportunity to appear before the distinguished panel today.

My name is Mark Zaid. I'm an attorney here in Washington, D.C. My law office primarily handles cases involving national security, and I am also the Executive Director of the James Madison Project, which is a nonprofit organization here in Washington whose purpose is to educate the public on matters relating to national security, secrecy, and government accountability. My remarks this morning, however, are my own and do not necessarily reflect the view of my organization.

I, too, would also like to commend the Department of Energy, the panel members, and Secretary Richardson on the decision to hold open hearings on this very important and controversial issue. Other agencies, such as the FBI and the CIA, which have increased their use of the polygraph in recent years, never bothered to consult with their employees, much less the general public, in order to solicit views one way or the other.

The underlying motivations for the department for this new policy are understandable.
Recent allegations of espionage involving possible procurement of classified atomic information is and should be of significant concern to our government. National security and the protection of U.S. secrets is not something to be taken lightly.

However, the DOE is about to go down a potentially tumultuous path. The proposed plan to administer polygraph examinations to upwards of 5,000 employees, as well as DOE applicants for certain positions in order to hopefully expose those who may have committed espionage or have security violations will, in my opinion, cause far greater harm than good.

Let there be no mistake as to where my remarks are originating. I am presenting representing numerous individuals whose careers have been harmed by defamatory allegations that are based solely on the results of polygraph testing.

Next month I will be filing a lawsuit against several federal agencies asserting various constitutional and statutory violations for the use of the polygraph in pre-employment testing.

There are numerous case studies and personal examines that illustrate the problems with
polygraph as either an investigative tool or for employment screening. Most disconcerting, however, is the room for over reaction, misuse, and abuse of the test results by federal agencies.

Let's assume for the sake of argument that the polygraph has a 95 percent accuracy rate, which as I understand it is high for even those who are proponents of the test. Even with such a success rate, if utilized by the DOE, up to 250 scientists will be falsely accused of deception about matters that under certain circumstances could result in the application of the death penalty.

A false positive reading for an employee can very well be a kiss of death to a career. Given the nature of the proposed questions, DOE may be accusing an individual of treason, a crime that to many government employees, particularly those working in the national security field, is far worse than many capital crimes.

My experiences in representing national security employees who are under investigation suggest that DOE will brand these individuals as traitors and treat them as such until proven otherwise. Even if
the employee is eventually exonerated and his career
is not harmed on paper, the negative stigma that will
attach from such an experience will still be damaging,
and particularly to the employee's reputation.

The employee's peers and supervisors may
always wonder whether the case was dropped because of
proven innocence or simply lack of evidence. As a
result, certain future projects might not be assigned
or even promotions may not be offered.

What will you say to those families
afterwards? Will you simply apologize and move on to
the next suspect?

Consider some of the following government
statements about polygraph testing and examples of its
misuser. The Department of Justice recently argued
successfully to the Supreme Court that there exists an
"unresolvable debate" about the reliability of
polygraphs.

The Senate Select Committee on
Intelligence recently said that "given the potential
unreliability of the polygraph system, the Committee
believes that alternatives to the polygraph should be
explored."
In FBI documents I recently obtained through litigation, one of President Clinton's White House counsels flatly refused to take a polygraph during an FBI investigation on the basis of its unreliability.

Documents obtained from the CIA regarding another client of mine, who had already passed -- he's a CIA employee -- had already passed two polygraph tests, reveal the CIA's manipulation of the polygraph as a means by which to falsely confirm allegations against the employee in order to justify the individual's termination.

The CIA memo written two weeks before the employee's final polygraph quoted DCI Tenet as, quote -- says DCI Tenet says, "This guy is out of here because of lack of candor. Subject is scheduled for another poly. Once that's over, it looks like we'll be waving goodbye to our friend."

The list could go on, and undoubtedly with the other hearings you've held, you've heard many horror stories from witnesses.

With respect to the proposed regulations, I have several observations regarding what I perceive
as significant flaws. Section 709.24 indicates that before administering the polygraph exam the examiner must inform the individual of the use of audio and video recording. I applaud that. Many agencies have not done that, and that has caused a tremendous amount of difficulty in disputes over what questions, how they were phrased, et cetera, and the answers.

But provisions should be added that enable an examinee upon request to obtain copies of both the video and audio tapes of that session. Should an employee or applicant wish to challenge the test results, they should not have to rely on the Freedom of Information or Privacy Acts in order to obtain the information, as litigating under those acts constantly, it would take so long in time for them to obtain copies through that route that it would be almost worthless.

A written transcript, if created, should also be made immediately available.

Section 709.26 asserts that DOE will protect the confidentiality of polygraph examination records and results in accordance with the Privacy Act. Despite DOE's attempts to allay concerns that an
individual's privacy rights will be protected, the fact is that sufficient loopholes exist that will insure no such thing happens at least with respect to other agencies.

Although the DOE asserts that polygraph results will not be placed in an employee's personnel file, the information will be placed in a security file. Other records will be created throughout the investigative process that will likely find their way into a personnel file.

Most importantly, however, a false positive, even if ultimately conceded by the DOE to be an error, will haunt the employee if they ever seek a position at another agency that requires a security clearance.

The Privacy Act will permit other agencies under the auspices of a routine use to have access to the applicant's security and personnel files to ascertain for itself whether a suitability or security risk is present.

The regulations propose that no unfavorable employment decisions will result solely on the basis of the polygraph. According to Section
709.15, all indications of deception will allegedly be followed up by investigation.

Whether subsequent increase of DOE employees will be fair and absent of bias is speculative at the moment, but what can be said of applicants whose polygraph results are suspect? Is the DOE willing and prepared to fully investigate allegations of deception for applicants?

The regulations are somewhat silent on this point, except that Section 709.15(d)(2) and (4) would seem to imply that a possibility exists that absolutely nothing will be done depending upon individual circumstances.

Yet the negative information, whatever that may be, will be placed into that individual's Privacy Act system of records without any opportunity to have challenged the allegation.

As a result, DOE will have possibly contributed to insuring that a position of trust within the government is perhaps forever out of that individual's reach.

That the individual was not yet employed by the DOE does not preclude certain constitutional
rights from attaching even in the application process, and DOE will be potentially liable for its actions.

If the DOE sees fit to unnecessarily utilize this device to route out perceive spies, at least create a mechanism that allows redress for unfounded allegations. It is high time a federal agency insures in advance that accountability for its mistakes will be available, particularly when implementing a system that is known or alleged to be unreliable.

For example, you can place a higher burden of accuracy on the polygrapher by permitting lawsuits for inaccurate assessments or specifically open your agency to liability for destroying someone's career.

Now, I have little faith that these types of provisions would ever be adopted, but I want this panel and Secretary Richardson to reflect on the serious ramifications that implementation of this policy could create for all concerned.

In closing, let me remind you of an old adage that we're all familiar with that illustrates what the United States represents in terms of liberty and justice.
Our judicial system is designed to free ten guilty people in order to protect one innocent person from being punished. The polygraph stands that very principle on its head, and if utilized in the envisioned fashion by the DOE, you will potentially disgrace the honor and loyalties of many otherwise trustworthy and dedicated Americans.

I again thank you for this opportunity. I'd be pleased to answer any questions or clarify any statements that I have made.

GEN. HABIGER: Comments? Question?

(No response.)

GEN. HABIGER: Thank you very much, Mr. Zaid.

Our next speaker is Roger Johnston.

DR. JOHNSTON: Good morning. I am Dr. Roger Johnston. I'm head of the Vulnerability Assessment Team at Los Alamos National laboratory. I, thus, have some interest and knowledge in security issues, but I'm here today simply representing my own views.

I do appreciate the opportunity to comment on the proposed regulation. I believe that the
regulation, as well as polygraphs in general, are really bad science and bad personnel management.

I think the effects this is likely to have on DOE and the national lab's ability to attract the best technical minds and to retain them is going to be seriously hampered, and I think in the long term that will have far more serious consequences for national technical competitiveness, as well as national security than even a half dozen spies.

I also think that the proposed regulation is bad security, but before I get to that, I'd like to raise some specific concerns.

Section 709.14 states that all polygraph examinations administered by DOE are voluntary. I think that's being a little bit intellectually dishonest. The consequences of not fully cooperating in this matter are fairly serious, and to call that voluntary I think is really not acceptable.

Section 709.15 talks about the consequences of "unresolved issues." That term is very poorly defined in the proposed regulations and represents some very serious concerns.

Section 709.21 calls for 48 hours only
advanced notice in order to secure legal counsel. I
don't believe that's practical unless one has an
attorney on an expensive retainer. You're not likely
to get assistance in 48 hours.

Section 709.22 I had to reread multiple
times because I found it quite remarkable. The idea
that an American citizen could be taken into a room,
exposed to interrogation by a government official
without a witness being allowed to be present is,
indeed, remarkable.

To propose this for some of the people who
are partially responsible for winning the Cold War,
who have devoted their careers and their lives to
national security, specifically to prevent this kind
of thing happening to Americans due to some kind of
totalitarian regime; I think to propose that is truly
shameful, and Section 709.22, in my view, needs to be
seriously reviewed.

I also believe DOE in the rush to
implement this regulation has overlooked a number of
regulatory review issues, in particular. Statements
that this regulation will have minimal impact on small
businesses, families, jobs, and productivity clearly
isn't true.

There doesn't seem to have been a serious review in regards to the Paperwork Reduction Act, nor is it clear at all that DOE has fulfilled its general duty to minimize litigation issues on this matter, to deal with ambiguity, to adequately define key terms, in particular, unresolved issues, that DOE has provided clear legal standard for the effective conduct, and it's not clear that the retroactive effects have been specified.

In particular, people will be asked questions about activities that took place prior to when this regulation was implemented.

In terms of security, I believe increasingly nowadays that we need to have particular thorough, particularly comfortable, sophisticated, innovative, and creative approaches to national security because our enemies and our adversaries are that way and because, in general, defense is a lot harder than offense.

I think the proposed regulation doesn't have those attributes. It appears to be a fairly simple minded approach to dealing with some serious
security concerns.

I am greatly worried that the proposed regulation will create so much distraction, so much energy, time, personnel, and effort devoted to the polygraph issue that we won't be able to implement what could potentially be far more effective countermeasures to improve national security.

So in summary, I think the proposed regulation represents bad science, bad personnel management, will have very negative impact upon the national security of this country, and maybe most serious of all, it really is quite un-American.

GEN. HABIGER: Thank you, Dr. Johnston.

Our final scheduled speaker is Steven Aftergood.

Good morning, sir.

MR. AFTERGOOD: Good morning. Thank you for holding this hearing.

My name is Steven Aftergood, and I'm on the staff of the Federation of American Scientists here in Washington, which is a public interest, policy, research, and advocacy organization founded by scientists at Los Alamos in 1945.
I have submitted a lengthy written statement for the record. Right now I would just like to make a few points that are presented at greater length there.

First and foremost, I hope that you will consider the possibility that the proposed polygraph policy could actually damage national security by demoralizing the affected employees and by making the national laboratories unattractive to new talent.

In the worst case, DOE could end up doing what no spy and no adversary has ever managed to do, that is, to degrade the quality of scientific and technical activity at the national labs. This unintended outcome could take place regardless of the validity or utility of polygraph testing.

If the polygraph is perceived by DOE employees whether rightly or wrongly to be an abuse of official authority or an insult to their integrity such that it leads to an erosion of the scientific work force, then the polygraph will have caused net damage to national security.

My own opinion on the subject is that DOE has not adequately explained exactly what problem it
is trying to solve with the polygraph and why the
polygraph is the best solution to that particular
problem.

Ever since polygraph testing was developed
by psychologist William Marston, whose other notable
achievement was the creation of the comic book
character "Wonder Woman," it has been a subject of
controversy and scientific criticism. The polygraph
presumes a uniformity of human physiological response,
as well as a certain naivete that does not seem to be
justified.

Mr. Renzelman earlier this morning said
that the polygraph is a kind of photograph of a
person's emotions. I am not an expert, but I believe
that that is an incorrect analogy and that it is a
mistake to conceive of emotions as purely
physiological responses and from there to assume that
the person's inner motivations and inner thoughts can
be detected by this kind of instrument.

In any event, DOE has really not attempted
to engage the question of scientific validity.

Another important omission, in my opinion,
is the whole subject of countermeasures. Some DOE
officials like Director Curran of the Office of Counterintelligence at DOE have been quoted to believe that countermeasures really don't work.

The scientific literature, on the other hand, suggests that they do, and I've provided a citation to one of the peer reviewed scientific studies that seems to indicate that the polygraph can be defeated through the use of countermeasures.

This is an important disagreement that ought to be resolved. In particular, if countermeasures to defeat the polygraph are feasible, then the whole concept of the exculpatory polygraph needs to be reconsidered and probably abandoned.

After all, it is the guilty test subject who will be the most highly motivated and perhaps the best trained to use countermeasures against the polygraph. The proposed policy would actually reward such a culprit for doing so successfully.

So, again, maybe Mr. Curran is right and the published scientific literature is wrong. I can certainly imagine that that's the case, but that's an issue that ought to be nailed down with some clarity.

Finally, I would just urge you to take
your responsibility in this process as seriously as possible. I think that there has been a lot of careless, misinformed, and even malicious talk concerning security at the national laboratories. False accusations have been widely circulated. Ill conceived policies have actually been legislated, and national security has been used as a pretext for pursuing political vendettas.

Sometimes security policy, like patriotism, can be the refuge of scoundrels. I hope that you will rise far above all of that and just use your best professional judgment.

If, as security professionals, you are honestly convinced that the proposed policy will enhanced the security of the United States, then so be it, but if you are not completely convinced that the polygraph is necessary, and if you see a possibility that it will do more harm than good, then I hope you will tell the policy makers that they have made a mistake and that this proposed rule should be rescinded.

Thank you.

GEN. HABIGER: Thank you very much, sir.
That completes our scheduled speakers. 

Andi, we have no unscheduled speakers at this point? 

MS. KASARSKY: No. 

GEN. HABIGER: We will go into recess until we get additional speakers, and then we will reconvene. 

(Whereupon, the foregoing matter went off the record at 9:53 a.m. and went back on the record at 10:07 a.m.) 

GEN__. HABIGER: Well, ladies and gentlemen, if I can have your attention, we'll convene the hearing. 

Again, we have an unscheduled speaker, and we're very cleared to call to the podium Chuck Westfall. 

Mr. Westfall, the podium is yours, and good morning, sir, and thank you for sharing your views with us this morning. 

MR. WESTFALL: For the record, my name is Chuck Westfall. I'm a contractor employee for Dames & Moore here, working in Defense Programs. 

I apologize because I did not intend to speak. I do not disagree with the polygraph rule. I
do not share the same views as the other presenters.

However, as a retired military officer who has had clearances within the DOD that would include Black Programs, TS SCI, ESI or SIOP-ESI and the other things that you're very familiar with, my life with regards to my security clearances and access is pretty much an open book for the last 30 years.

The problem that I have with the rule as written and that I've discussed previously in other forums is in Section 709.4(b)(1), which states a presintial appointee, if such an appointee has received a favorably adjudicated full field Federal Bureau of Investigation background investigation will not come under this rule.

And I have a problem with that in that some person who could possibly have access to information from my other programs, total scope, will not be polygraphed and will only be subject to the annual or the five-year investigation after the initial investigation, and I believe very strongly that this exemption should not apply.

I know that within the CIA, the Director is usually the first one. I know that the Secretary
has taken a polygraph, and I believe that any appointee who would have the access authorizations and would normally be required as a result of the job should not be exempt.

Maybe I'm not making sense, but I think as a matter of record if I were to speak or if I did speak today, then we'll have to go ahead and be on record of why we're having this exemption.

So I thank you for your time.

GEN. HABIGER: Thank you, sir.

We have no additional unscheduled speakers at this time. So we will, again, go into recess.

Thank you.

(Whereupon, the foregoing matter went off the record at 10:10 a.m. and went back on the record at 1:05 p.m.)

GEN. HABIGER: I would like to reopen the hearing on the Department of Energy's polygraph examination regulation.

And as I understand it from the individual who's in charge of these sorts of things, we have no additional unscheduled speakers. So our business is concluded.
Before we adjourn though, I would like to offer an opportunity for my colleague to make a statement, and I'll sum it up, and with that, Bill, I'll let you say a few words.

MR. HENSLEY: I guess I'd like to not only thank yourself, but thank the department for the opportunity to participate on the panel. I believe that it's been a good series of open hearings.

There have been some significant issues raised and ones that we'll need to take into consideration as we move forward.

GEN. HABIGER: Okay. Very good.

Lise.

MS. HOWE: I'd like to echo what Bill said and thank Andi for all of her hard work and keeping us moving forward and making sure we didn't starve along the way as the lost patrol.

Thanks.

GEN. HABIGER: Okay. Doug?

MR. HINCKLEY: I concur with my colleagues.

Thank you very much, Andi, and we appreciate the comments we've received.
GEN. HABIGER: Let me just sum it up by saying I could not have asked for a better panel. We have gained a great deal of insights into this issue, to the emotion involved, and as a result of these hearings, the department, whatever route we will go, will have a program that is going to make sense and is going to work.

To each and every one of you on the dais, i thank you for the patience and the hard work and the attention that you've paid over the past several tens of hours that we've spent in this process.

And to you, Andi, well done. You certainly have taken great care not only of us, but over the process, and that means a great deal.

So with that, we will hereby adjourn the last and final public hearing regarding the proposed polygraph examination regulations.

So with that I declare the hearing to be adjourned.

Thank you.

(Whereupon, at 1:07 p.m., the meeting in the above-entitled matter was adjourned.)