

U.S. DEPARTMENT OF ENERGY

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PUBLIC HEARING

ON

POLYGRAPH EXAMINATION REGULATION

\* \* \*

NOTICE OF PROPOSED RULEMAKING

DOCKET NO. CN-RM-99-POLY

\* \* \*

Wednesday, September 22, 1999

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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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P R O C E E D I N G S

(9:03 a.m.)

1  
2  
3 GEN. HABIGER: Good morning, ladies and  
4 gentlemen. I am General Gene Habiger of the Office of  
5 Security and Emergency Operations.

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

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

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

21 We are here focused on what you have to  
22 say. Your comments are not only appreciated. They  
23 are essential to the rulemaking process.

1                   And, gentlemen, over here if I could have  
2 you keep the noise down I'd appreciate it.

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

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

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

20                   This rulemaking also proposes conforming  
21 changes to regulations governing the department's  
22 Personnel Security Assurance Program, or PSAP, and  
23 Personnel Assurance Program, also known as the POP

1 Program.

2 If you have not already read the Federal  
3 Register notice from August 18th, 1999, I urge you to  
4 do so. Copies are available at the registration desk.

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

11 The address for sending in comments is  
12 Douglas Hinckley, U.S. Department of Energy, Office of  
13 Counterintelligence, CN-1, Docket Number CN-RM-99-  
14 POLY, 1000 Independence Avenue, S.W., Washington, D.C.  
15 20585.

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

22 The transcript will also be placed on  
23 DOE's Internet Web site at the following address:

1 home.doe.gov/news/fedreg.htm.

2 In addition, anyone wishing to purchase a  
3 copy of the transcript may make their own  
4 arrangements.

5 This will not be an evidentiary or  
6 judicial type of hearing. It will be conducted in  
7 accordance with Section 553 of the Administrative  
8 Procedures Act, 5 U.S. Code, Section 553 and Section  
9 501 of the DOE Organization Act, 42 U.S. Code, Section  
10 7191.

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

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

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

23 Questions for the speakers will be asked

1       only by members of the DOE panel conducting the  
2       hearing.

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

8               Please remember the close of the comment  
9       period is October 4th, 1999. All written comments  
10      received will be available for public inspection at  
11      the DOE Freedom of Information Reading Room here in  
12      Washington, D.C. The phone number there is (202) 586-  
13      3142.

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

19              Any person submitting information which he  
20      or she believes to be confidential and exempt by law  
21      from public disclosure should submit to the  
22      Washington, D.C. address a total of four copies, one  
23      complete copy with confidential material included, and

1 three copies without the confidential information.

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

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

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

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

23 I'd like to call upon Dave Renzelman,

1 Polygraph Program Manager for the Office of  
2 Counterintelligence, Pacific Northwest National  
3 Laboratory, to provide that briefing.

4 Dave.

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

8 PARTICIPANTS: Yes.

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

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

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

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

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

23 And as such, since 1991 and up until we

1 started the program for the Office of  
2 Counterintelligence, we have established a program  
3 that I will show you later on in this presentation  
4 that is head and shoulders above the standard that is  
5 acceptable in the community today.

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

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

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

21 Espionage. You don't wake up one morning  
22 and fall out of bed and become a spy. That's something  
23 that takes a conscious decision and an act and a

1 series of steps to commit.

2           And one time back in 19, oh, '82 or '83, I  
3 was doing examinations for the Air Force OSI with  
4 scientists in El Segundo, California, and we had some  
5 47 people in the audience, and I thought it would  
6 really be interesting to see what those people thought  
7 the term "espionage" really meant.

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

15           Now, the problem, of course, is that we  
16 need to make sure that if we ask you if you've  
17 committed espionage against the United States, that  
18 that question means the same to you as it does to us.

19           So in preparation to ask that question on a polygraph  
20 test, which only takes seven or eight minutes, it will  
21 take a good hour to prepare the person to take the  
22 examination.

23           Then we follow on with questions about

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

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

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

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

22 And then we have to talk about  
23 unauthorized contact with foreign intelligence

1 service, and it is important there, and there are case  
2 studies upon case studies of people who have, and the  
3 question is very simple. Has anybody had any  
4 unauthorized or unreported contact with a foreign  
5 intelligence service?

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

12 Then that examiner analyzes the data, and  
13 the two sets of data are compared. If the opinions  
14 are the same, it then goes to supervisory review,  
15 where another blind analysis is done, and finally,  
16 before the test is over, it goes to the Office of  
17 Quality Control, and every federal agency -- and there  
18 are 22 federal agencies that use polygraph in the  
19 United States. Twelve of them do this kind of  
20 testing, and they include agencies like CIA, DIA, DIS,  
21 NSA, NRO, Department of Energy, and all of the  
22 Department of Defense agencies, and they all have  
23 quality control.

1                   We go one step further. We have four  
2 levels of quality control on every test. Why do we do  
3 that? Because your test is just as important to the  
4 Secretary and his designees as it is to you. There  
5 are not going to be any chances taken any way, manner,  
6 shape or form. And the test isn't over until quality  
7 control is complete.

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

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

22                   He is the only person that reviews on,  
23 acts upon, or retains any documentation on any

1 counterintelligence test. After it's done and quality  
2 control is through with it, the results are provided  
3 to him. It is his decision and his decision alone  
4 what happens next.

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

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

14 Now, we record every examination on  
15 videotape, and then we have a unique recording system  
16 in that we take data from the computer, put it through  
17 a TV transponder and insert it into a video tape that  
18 is a split screen function. One half of the screen is  
19 the physiological data that is being recorded real  
20 time. The other half is the person that's taking the  
21 examination. We do that so that we can correlate any  
22 movement or artifacts or perhaps someone would be  
23 foolish enough to attempt countermeasures. It would

1 assist us in determining was that a pure and valid  
2 test from beginning to end.

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

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

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

21 Now, the Secretary of Energy has said if a  
22 person takes a test and there is an issue with that  
23 test and he has or she has a physiological response to

1 a security question that we talked about before and  
2 there is no further evidence to support that  
3 physiological response, then all efforts must be taken  
4 to determine why would the person respond when they  
5 said, "No, I did not commit espionage against the  
6 United States," but the response or the test in and of  
7 and by itself cannot be the basis for adverse action.

8 All of the examiners that DOE has are  
9 graduates of that Polygraph Institute. It's 14 weeks  
10 in duration, and you have to have a baccalaureate  
11 degree, the standard investigative experience, and  
12 then in DOE examiners, we are requiring that they have  
13 five years' polygraph experience in  
14 counterintelligence and ten years' experience as an  
15 1811 or a DOD investigator, as well as being a DODPI  
16 graduate.

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

21 All of our people are DODPI certified, and  
22 that certification requires continuing education by  
23 attending DODPI sponsored courses. As I recall, it's

1 40 hours annually, and all of our people exceed that.

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

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

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

21 I require that they all belong to the  
22 American Polygraph Association and the American  
23 Association of Police Polygraphists. Our people hold

1 positions in both of those associations. One of our  
2 examiners is on the Ethics Committee as the chairman.

3 I serve as the subcommittee chairman for quality  
4 control for APA and the Director of Quality Control  
5 for AAPP.

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

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

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

23 Now, we coordinate all of our procedures

1 with DODPI. We check it out. I will be working with  
2 Dr. Ryan on continuing research and projects that will  
3 be of mutual interest to the Department of Energy and  
4 other federal agencies, and all procedures and  
5 training that comes about.

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

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

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

19 And essentially that will conclude my  
20 presentations about taking a polygraph test with DOE.

21 Should you be tasked or asked to do it, I can tell  
22 you this: that the people will be treated with  
23 dignity and respect, and the test will not go any

1       quicker or faster than the people are able to go  
2       themselves.

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

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

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

19                  Then we're going to ask you questions  
20      about do you think it's a good procedure, and we'll  
21      ask if you took another job and the prerequisites for  
22      that job required a polygraph test, would you take  
23      one; if not, why not?



1 have unscheduled speakers, then we will then proceed  
2 with those.

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

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

9 First, Mr. Drew Richardson. Mr.  
10 Richardson.

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

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

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

21 I would begin by heartily congratulating  
22 you on holding these hearings and for publicly  
23 entertaining diverse opinions, many of which have been

1       contrary to the notion of undertaking the very  
2 polygraph screening program that you propose.

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

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

18               Furthermore, I believe that they parallel  
19 the formal and publicly stated positions of the  
20 American Medical Association and the American  
21 Psychological Association, both of which have gone on  
22 record as opposing the use of polygraph examinations  
23 for generalized screening purposes.

1                   I have no reason to believe that the  
2 proponents of polygraph screening are in any way  
3 disingenuous, nor do I believe that they have  
4 intentionally sought to misrepresent their case, but I  
5 truly do believe that they are wrong and that there  
6 will be serious consequences to individual examinees  
7 and to this nation stemming from their folly.

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

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

18                   As to whether the scientific underpinnings  
19 of polygraph screening are merely pseudo-scientific  
20 mumbo-jumbo, as I would largely submit, has yet to be  
21 shown, but I challenge you to let the debate begin now  
22 on your terms or I suggest it most certainly will  
23 begin at a later time on the adversarial terms of

1 others.

2 I would further suggest that in your  
3 inquiry, it would be only reasonable and prudent to  
4 utilize the vast intellectual force and scientific  
5 talent present in the national laboratory system to  
6 effect such an evaluation. I will leave this line of  
7 reasoning by suggesting to you that it is not mere  
8 circumstance that Nobel Prizes have regularly been  
9 awarded to scientists directly or indirectly  
10 associated with the national labs in the disciplines  
11 of particle physics, theoretical mathematics, and so  
12 forth.

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

18 I am, as others have expressed, concerned  
19 about the plight of falsely accused victims stemming  
20 from polygraph examinations. I have heard in recent  
21 years from a large number of individuals who claim to  
22 have been wrongly found deceptive in polygraph  
23 examinations. A portion of these individuals has

1 claimed improper treatment and conduct on the part of  
2 examining polygraphers.

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

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

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

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

21 To any who believe that these polygraph  
22 results will simply amount to a walk in the park or an  
23 academic hiccup for these individuals until

1 prosecutable facts are either developed or not  
2 developed through investigation, I would refer you to  
3 the recently well publicized cases of Mr. Mark Mallah,  
4 Mr. Adam Ciralsky, and Mr. David Tenenbaum.

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

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

19 GEN. HABIGER: Thank you, Dr. Richardson.

20 Thanks.

21 Our next speaker is Mark Zaid.

22 MR. ZAID: Good morning.

23 GEN. HABIGER: Good morning.

1                   MR. ZAID: Thank you for the opportunity  
2 to appear before the distinguished panel today.

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

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

22                  The underlying motivations for the  
23 department for this new policy are understandable.

1 Recent allegations of espionage involving possible  
2 procurement of classified atomic information is and  
3 should be of significant concern to our government.  
4 National security and the protection of U.S. secrets  
5 is not something to be taken lightly.

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

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

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

22           There are numerous case studies and  
23 personal examines that illustrate the problems with

1 polygraph as either an investigative tool or for  
2 employment screening. Most disconcerting, however, is  
3 the room for over reaction, misuse, and abuse of the  
4 test results by federal agencies.

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

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

20           My experiences in representing national  
21 security employees who are under investigation suggest  
22 that DOE will brand these individuals as traitors and  
23 treat them as such until proven otherwise. Even if

1 the employee is eventually exonerated and his career  
2 is not harmed on paper, the negative stigma that will  
3 attach from such an experience will still be damaging,  
4 and particularly to the employee's reputation.

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

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

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

19 The Senate Select Committee on  
20 Intelligence recently said that "given the potential  
21 unreliability of the polygraph system, the Committee  
22 believes that alternatives to the polygraph should be  
23 explored."

1                   In FBI documents I recently obtained  
2 through litigation, one of President Clinton's White  
3 House counsels flatly refused to take a polygraph  
4 during an FBI investigation on the basis of its  
5 unreliability.

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

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

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

22                   With respect to the proposed regulations,  
23 I have several observations regarding what I perceive

1 as significant flaws. Section 709.24 indicates that  
2 before administering the polygraph exam the examiner  
3 must inform the individual of the use of audio and  
4 video recording. I applaud that. Many agencies have  
5 not done that, and that has caused a tremendous amount  
6 of difficulty in disputes over what questions, how  
7 they were phrased, et cetera, and the answers.

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

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

20 Section 709.26 asserts that DOE will  
21 protect the confidentiality of polygraph examination  
22 records and results in accordance with the Privacy  
23 Act. Despite DOE's attempts to allay concerns that an

1 individual's privacy rights will be protected, the  
2 fact is that sufficient loopholes exist that will  
3 insure no such thing happens at least with respect to  
4 other agencies.

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

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

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

21           The regulations propose that no  
22 unfavorable employment decisions will result solely on  
23 the basis of the polygraph. According to Section

1 709.15, all indications of deception will allegedly be  
2 followed up by investigation.

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

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

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

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

22 That the individual was not yet employed  
23 by the DOE does not preclude certain constitutional

1 rights from attaching even in the application process,  
2 and DOE will be potentially liable for its actions.

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

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

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

20 In closing, let me remind you of an old  
21 adage that we're all familiar with that illustrates  
22 what the United States represents in terms of liberty  
23 and justice.

1           Our judicial system is designed to free  
2    ten guilty people in order to protect one innocent  
3    person from being punished. The polygraph stands that  
4    very principle on its head, and if utilized in the  
5    envisioned fashion by the DOE, you will potentially  
6    disgrace the honor and loyalties of many otherwise  
7    trustworthy and dedicated Americans.

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

11           GEN. HABIGER: Comments? Question?

12           (No response.)

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

15           Our next speaker is Roger Johnston.

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

22           I do appreciate the opportunity to comment  
23    on the proposed regulation. I believe that the

1 regulation, as well as polygraphs in general, are  
2 really bad science and bad personnel management.

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

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

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

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

23 Section 709.21 calls for 48 hours only

1 advanced notice in order to secure legal counsel. I  
2 don't believe that's practical unless one has an  
3 attorney on an expensive retainer. You're not likely  
4 to get assistance in 48 hours.

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

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

19 I also believe DOE in the rush to  
20 implement this regulation has overlooked a number of  
21 regulatory review issues, in particular. Statements  
22 that this regulation will have minimal impact on small  
23 businesses, families, jobs, and productivity clearly

1 isn't true.

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

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

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

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

1 security concerns.

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

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

13 GEN. HABIGER: Thank you, Dr. Johnston.

14 Our final scheduled speaker is Steven  
15 Aftergood.

16 Good morning, sir.

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

19 My name is Steven Aftergood, and I'm on  
20 the staff of the Federation of American Scientists  
21 here in Washington, which is a public interest,  
22 policy, research, and advocacy organization founded by  
23 scientists at Los Alamos in 1945.

1           I have submitted a lengthy written  
2 statement for the record. Right now I would just like  
3 to make a few points that are presented at greater  
4 length there.

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

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

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

22           My own opinion on the subject is that DOE  
23 has not adequately explained exactly what problem it

1 is trying to solve with the polygraph and why the  
2 polygraph is the best solution to that particular  
3 problem.

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

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

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

22           Another important omission, in my opinion,  
23 is the whole subject of countermeasures. Some DOE

1 officials like Director Curran of the Office of  
2 Counterintelligence at DOE have been quoted to believe  
3 that countermeasures really don't work.

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

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

14 After all, it is the guilty test subject who  
15 will be the most highly motivated and perhaps the best  
16 trained to use countermeasures against the polygraph.

17 The proposed policy would actually reward such a  
18 culprit for doing so successfully.

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

23 Finally, I would just urge you to take

1 your responsibility in this process as seriously as  
2 possible. I think that there has been a lot of  
3 careless, misinformed, and even malicious talk  
4 concerning security at the national laboratories.  
5 False accusations have been widely circulated. Ill  
6 conceived policies have actually been legislated, and  
7 national security has been used as a pretext for  
8 pursuing political vendettas.

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

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

22 Thank you.

23 GEN. HABIGER: Thank you very much, sir.

1                   That completes our scheduled speakers.  
2           Andi, we have no unscheduled speakers at this point?

3                   MS. KASARSKY: No.

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

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

10                  GEN\_\_\_. HABIGER: Well, ladies and  
11           gentlemen, if I can have your attention, we'll convene  
12           the hearing.

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

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

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

22                  I apologize because I did not intend to  
23           speak. I do not disagree with the polygraph rule. I

1 do not share the same views as the other presenters.

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

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

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

22           I know that within the CIA, the Director  
23 is usually the first one. I know that the Secretary

1 has taken a polygraph, and I believe that any  
2 appointee who would have the access authorizations and  
3 would normally be required as a result of the job  
4 should not be exempt.

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

9 So I thank you for your time.

10 GEN. HABIGER: Thank you, sir.

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

13 Thank you.

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

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

20 And as I understand it from the individual  
21 who's in charge of these sorts of things, we have no  
22 additional unscheduled speakers. So our business is  
23 concluded.

1                   Before we adjourn though, I would like to  
2 offer an opportunity for my colleague to make a  
3 statement, and I'll sum it up, and with that, Bill,  
4 I'll let you say a few words.

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

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

12                  GEN. HABIGER: Okay. Very good.

13                  Lise.

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

18                  Thanks.

19                  GEN. HABIGER: Okay. Doug?

20                  MR. HINCKLEY: I concur with my  
21 colleagues.

22                  Thank you very much, Andi, and we  
23 appreciate the comments we've received.

1                   GEN. HABIGER: Let me just sum it up by  
2 saying I could not have asked for a better panel. We  
3 have gained a great deal of insights into this issue,  
4 to the emotion involved, and as a result of these  
5 hearings, the department, whatever route we will go,  
6 will have a program that is going to make sense and is  
7 going to work.

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

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

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

18                   So with that I declare the hearing to be  
19 adjourned.

20                   Thank you.

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