

# THE ADMISSIBILITY OF POLYGRAPH EVIDENCE IN COURT-MARTIAL PROCEEDINGS: DOES THE CONSTITUTION MANDATE THE GATEKEEPER?

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## I. INTRODUCTION

The Department of Defense exhibits a love-hate relationship with the polygraph machine. Since 1981, military examiners have performed 370,463 polygraph examinations.<sup>1</sup> Although 87,139 polygraph examinations were conducted during the course of criminal investigations, not one was admitted into a military court-martial after 1991. At that time, the President promulgated Military Rule of Evidence 707<sup>2</sup> which requires the trial judge to

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<sup>1</sup> *Annual Polygraph Report to Congress*, Department of Defense Polygraph Program, Office of the Assistant Secretary of Defense (Command, Control, Communications, and Intelligence) Fiscal Years 1986-1996. The figure quoted represents the total number of polygraph examinations performed for both exculpatory requests and criminal investigations. The author would like to thank Mr. John R. Schwartz, former Deputy Director of the DoD Polygraph Institute, and his staff for providing these reports.

<sup>2</sup> Military Rule of Evidence 707 provides:

- (a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence.
- (b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.

MANUAL FOR COURTS-MARTIAL, United States, Mil. R. Evid. 707 (1995 ed.) [hereinafter MCM]. It should be noted that pursuant to Mil. R. Evid. 1101, Mil. R. Evid. 707 would not apply to Article 32 hearings, Article 72 proceedings for vacation or suspension of a sentence, proceedings for search authorization or pre-trial restraint, or to non-judicial punishment under Article 15, UCMJ, 10 U.S.C. § 815. Mil. R. Evid. 1101.

exclude all forms of polygraph evidence.<sup>3</sup> While legal scholars, practitioners, and the courts continue to debate its merits, the *per se* exclusion of a defendant's polygraph testimony now clearly implicates the Constitution.

First articulated in 1923, the "*Frye* test" of general acceptance within the relevant scientific community effectively barred the admission of polygraph evidence in a military court-martial.<sup>4</sup> Although the President promulgated the Military Rules of Evidence (hereinafter MREs) in 1980, this common-law test continued to represent the admissibility standard for scientific evidence until 1987. In 1987, the United States Court of Military Appeals (hereinafter COMA), in *United States v. Gipson*,<sup>5</sup> held that MRE 702 superseded the "*Frye* test," thereby opening the door for the admissibility of polygraph testimony. The trial judge's determination was to be guided by the MREs, reversible only upon the showing of an abuse of discretion.

The door was only open for four years. In 1991, the President enacted MRE 707, which declared that polygraph evidence was *per se* inadmissible in a military court-martial. However, when the United States Court of Appeals for the Armed Forces (hereinafter CAAF) announced the decision of *United States v. Scheffer* in 1996,<sup>6</sup> it declared that the *per se* exclusion of polygraph evidence, offered by the accused to rebut an attack on his credibility, without providing him an opportunity to lay a foundation under MRE 702 and *Daubert v. Merrell Dow Pharmaceuticals*,<sup>7</sup> violated his Sixth Amendment right to present a defense.

The Supreme Court has granted *certiorari* to the case and should hear oral arguments in the fall of 1997. The Court will have to decide, and this article will attempt to answer, the following constitutional question: "Does the *per se* exclusion of the accused's polygraph evidence result in an arbitrary restriction on his right to present relevant and material evidence?" If polygraph evidence is found to be otherwise inadmissible under the standard rules of evidence, then MRE 707 survives this test. If polygraph evidence is found to be otherwise admissible, then it must be determined whether the President's policy justifications are arbitrary. Only if the policy justifications are deemed arbitrary can MRE 707 be struck.

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<sup>3</sup> The testimony at issue is actually the expert opinion of the polygraph examiner, rendered after an analysis of the polygraph charts. For the purposes of discussion, however, this expert testimony will be referred to as polygraph evidence.

<sup>4</sup> *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

<sup>5</sup> *United States v. Gipson*, 24 M.J. 246 (C.M.A. 1987).

<sup>6</sup> *United States v. Scheffer*, 44 M.J. 442 (C.A.A.F. 1996), *cert. granted*, 117 S. Ct. 1817 (1997). Understanding the significance and unprecedented nature of the decision, the court was careful to limit its holding to exculpatory evidence arising from a polygraph examination of the accused, offered to rebut an attack on his credibility. The court specifically left undecided other constitutional questions such as those involving government-offered polygraph evidence or evidence of another witness' examination.

<sup>7</sup> *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

An appendix to this article reviews the training of DoD polygraph examiners, the procedure for requesting an examination, and an explanation of the actual testing process. This overview is provided as a background for those readers not acquainted with the polygraph examination. Additionally, it serves as the basis of discussion for the practical legal implications of MRE 707, and the admissibility of polygraph evidence post-*Scheffer*.

In Part II, the two general standards for the admission of scientific evidence are reviewed. The first, commonly referred to as the “*Frye* test,” is still applied in a number of state jurisdictions. The second standard, having emerged from the Supreme Court decision of *Daubert v. Merrell Dow Pharmaceuticals*, consists of a determination by the trial judge of the scientific method’s reliability. This approach is utilized by the federal circuits and many states that have adopted variations of Federal Rule of Evidence 702. Although these two standards typically guide the admissibility determination for scientific evidence, the overwhelming majority of both federal and state courts have chosen to either exclude the evidence outright, or permit its admission only if both parties have previously stipulated. Only three federal circuits, three district courts, and one state court have entrusted the admissibility determination to the discretion of the trial judge as directed by *Daubert*.

Part III examines Supreme Court cases interpreting the accused’s Sixth Amendment right to present a defense. While the Court has not defined the accused’s Sixth Amendment right to present either scientific expert testimony or polygraph evidence, the federal circuit and state courts have heard and consistently denied constitutional challenges to both the *per se* exclusion rule and the stipulation requirement.

In Part IV, the legal treatment of the polygraph in the military justice system from 1923 to 1991 is investigated, including the CAAF’s decision in *United States v. Gipson* and its progeny. The President’s rationale supporting the enactment of MRE 707 in 1991 is also reviewed. Finally, the CAAF holdings that directly challenged the constitutionality of MRE 707, *United States v. Williams*<sup>8</sup> and *United States v. Scheffer*, are examined.

Part V of the article scrutinizes the CAAF’s analysis in *United States v. Scheffer*. The framework guiding the constitutional analysis is drawn from the Supreme Court cases interpreting the Sixth Amendment. It is then argued that polygraph evidence may be otherwise inadmissible under the standard rules of evidence. Even if polygraph is otherwise admissible, the President’s rationale for the *per se* rule does not appear to be arbitrary. Consequently, it is argued that MRE 707 does not arbitrarily limit the accused’s right to present relevant and material evidence.

Finally, Part VI examines what remains of MRE 707 in light of *Scheffer*. If the accused places his credibility at issue and it is attacked by the government, then the accused has the right to lay the foundation for the

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<sup>8</sup> *United States v. Williams*, 43 M.J. 348 (C.A.A.F. 1995), *cert. denied*, 116 S. Ct. 925 (1996).

admission of the polygraph expert's testimony. If the accused's exculpatory exam is *ex parte*, he may be required to submit to an exam conducted by the government. Additionally, reliability concerns based upon the "Friendly Examiner Theory" might require that an inculpatory result be admitted. While it is unclear whether the CAAF will invoke *Scheffer* to permit the introduction of a witness' exam, the court has previously held that evidence a witness refused or requested a polygraph exam is irrelevant.

Part VIII is an appendix which explains the DoD Polygraph program.

## II. THE ADMISSIBILITY OF POLYGRAPH TESTIMONY AS SCIENTIFIC EVIDENCE

Scientific evidence is subject to two admissibility standards. The first standard is the "*Frye* test" of general acceptance within the relevant scientific community<sup>9</sup> which is still applied by a number of state jurisdictions. The second standard consists of a determination by the trial judge of the reliability of the scientific methodology or technique, and has emerged from the Supreme Court decision of *Daubert v. Merrell Dow Pharmaceuticals*.<sup>10</sup> This approach is utilized by the federal circuits and many of the states that have adopted variations of Federal Rule of Evidence 702.

In applying these two standards to polygraph evidence, the vast majority of federal and state jurisdictions either exclude the evidence through a *per se* exclusion rule or permit its admission only after both parties have stipulated to it (thereby waiving any objection to otherwise inadmissible evidence). Significantly, the circuit courts of appeal, the highest state courts, and state legislatures constructed these admissibility determinations, which have the same practical effect as a rule of evidence. Only three federal circuits, three district courts, and one state jurisdiction entrust the admissibility determination to the trial judge's discretion as directed by *Daubert*.

### A. General Admissibility Requirements for Scientific Evidence

In 1923, the test governing the admissibility of polygraph evidence in both federal and state courts was first announced by the D.C. Circuit's decision in *Frye v. United States*.<sup>11</sup> The scientific evidence offered was a "systolic blood pressure deception test," which simply measured the change in the individual's blood pressure. This test was a distant forerunner of the modern polygraph.<sup>12</sup> Articulating what is now commonly referred to as the "*Frye* test," the Court stated

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<sup>9</sup> 293 F. 1013 (D.C. Cir. 1923).

<sup>10</sup> 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

<sup>11</sup> 293 F. 1013 (D.C. Cir. 1923).

<sup>12</sup> *Id.*

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while the courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made *must be sufficiently established to have gained general acceptance in the particular field in which it belongs.*<sup>13</sup>

The Federal Rules of Evidence (hereinafter FRE or FREs), enacted by Congress in 1975, include FRE 702 which addresses the admissibility of expert testimony.<sup>14</sup> It was not clear, however, if the *Frye* test of general acceptance survived FRE 702, as the Advisory Notes failed to specifically address the issue. The Supreme Court finally laid to rest the *Frye* test in the case of *Daubert v. Merrell Dow Pharmaceuticals*.<sup>15</sup>

The issue in *Daubert* was whether the drug Bendectin caused birth defects. The scientific expert testimony centered on the use of a particular reanalysis of the epidemiological studies, and more importantly, the appropriate standard for the admissibility of this testimony.<sup>16</sup> The Supreme Court declared that the *Frye* test did not survive the adoption of the FREs.<sup>17</sup> The Court ruled that when a trial judge is presented with a proffer of expert testimony, she must determine at the outset, “pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist

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<sup>13</sup> *Id.* at 1014 (emphasis added).

<sup>14</sup> Federal Rule of Evidence 702 provides: “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of opinion or otherwise.”

<sup>15</sup> *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

<sup>16</sup> *Id.* at 2791-2792.

<sup>17</sup> *Id.* at 2793. Many state courts, however, have declined to adopt the *Daubert* standard and continue to utilize either the *Frye* test or a variation of it. In the following cases, states have declined to adopt *Daubert*; *State v. Carter*, 246 Neb. 953 (1994); *People v. Lyons*, 907 P.2d 708 (Colo. App. 1995), *reh'g denied*, (Sep 07, 1995); *Armstrong v. City of Wichita*, 21 Kan. App. 2d 750 (1995), *review denied*, (Feb 06, 1996); *State v. Case*, 4 Neb. App. 885, 553 N.W.2d 173 (1996); *State v. Jones*, 130 Wash. 2d 302, 922 P.2d 806 (1996). In the following cases, states have declined to follow *Daubert* on state law grounds; *State v. Alt*, 504 N.W.2d 38 (Minn. App. 1993); *People v. Wesley*, 83 N.Y.2d 417, 633 N.E.2d 451 (1994); *People v. Leahy*, 8 Cal. 4th 587, 882 P.2d 321, 34 Cal. Rptr.2d 663, (1994); *State v. Dean*, 246 Neb. 869, 523 N.W.2d 681 (1994); *State v. Carlson*, 80 Wash. App. 116, 906 P.2d 999 (1995); *People v. Dalcollo*, 282 Ill. App. 3d 944, 669 N.E.2d 378 (1996), *reh'g denied*, (Sep 12, 1996); *State v. Cannon*, 130 Wash. 2d 313, 922 P.2d 1293 (1996); *State v. Copeland*, 130 Wash. 2d 244, 922 P.2d 1304 (1996).

the trier of fact to understand or determine a fact in issue.”<sup>18</sup> The Court noted that this judgment “entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.”<sup>19</sup>

In making this judgment, the trial judge was provided with four general factors to consider. First, the judge should ordinarily consider whether the theory can and has been tested.<sup>20</sup> Second, it might be pertinent to consider “whether the theory or technique has been subjected to peer review and publication.”<sup>21</sup> Third, the judge should ordinarily consider the error rate of the particular scientific technique.<sup>22</sup> Finally, the “general acceptance” of the theory or technique could still be taken into account, as a technique which has gained minimal support in the scientific community could be viewed with skepticism.<sup>23</sup>

The Court emphasized that the inquiry under FRE 702 was “a flexible one.”<sup>24</sup> It also instructed the judges to be mindful of other applicable rules of evidence,<sup>25</sup> including the use of the directed verdict.<sup>26</sup> Expressing its confidence in the ability of the jury, however, the Court stated that “[v]igorous cross-examination, presentation of contrary evidence, and careful instructions on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.”<sup>27</sup> The Court concluded that these devices, “rather than wholesale exclusion under an uncompromising ‘general acceptance’ test are the appropriate safeguards” when the basic standards of FRE 702 are met.<sup>28</sup>

## **B. Polygraph Admissibility in Federal and State Courts**

The federal circuits as well as the state courts are split on the treatment and admissibility of a polygraph examiner’s expert opinion. Although many

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<sup>18</sup> *Id.* at 2796 (footnote omitted). The Court did note that if the theory was so firmly established that it has attained the status of scientific law, it was the proper subject of judicial notice under Fed. R. Evid. 201. *Id.* at 2796 n.11.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 2797.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* (citation omitted).

<sup>25</sup> The Court specifically mentioned Fed. R. Evid. 703, Fed. R. Evid. 706 which allows for court appointed experts, and Fed. R. Evid. 403 which permits the judge to exclude the evidence if its prejudicial effect substantially outweighs its probative value. *Id.* at 2797-98.

<sup>26</sup> *Id.* at 2798 (citation omitted).

<sup>27</sup> *Id.* (citing *Rock v. Arkansas*, 483 U.S. 44, 61, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987)).

<sup>28</sup> *Id.*

commentators divide the approaches into three broad categories,<sup>29</sup> a constitutional analysis requires that four categories be defined: 1) *per se* exclusion; 2) admissible if stipulated to by both parties; 3) substantive right to admit upon stipulation; and 4) admission at the trial judge's discretion. While the Supreme Court's holding in *Daubert* has prompted a number of courts to reformulate their approach toward polygraph admissibility under FRE 702, a majority of jurisdictions have maintained their pre-*Daubert* rulings.

### 1. *Per se* Exclusion

In the federal system, the Second,<sup>30</sup> Fourth,<sup>31</sup> Tenth,<sup>32</sup> and DC Circuit<sup>33</sup> maintain a *per se* exclusion of polygraph evidence. Additionally, thirty-one state jurisdictions hold that polygraph evidence is *per se* inadmissible.<sup>34</sup> Generally, the exclusion is absolute and will be invoked by the

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<sup>29</sup> See, e.g., Paul C. Giannelli & Edward J. Imwinkelried, *Scientific Evidence*, 2d ed. Vol.1 at § 8-3 (1993) (dividing admissibility into three categories: 1) *per se* exclusion, § 8-3 (A); 2) by stipulation, § 8-3(B); and 3) discretionary admission, § 8-3(C)). The examination of the admissibility standards for the various jurisdictions that follows draws from this resource.

<sup>30</sup> See, e.g., *United States v. Kwong*, 69 F.3d 663, 668 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1343 (1996).

<sup>31</sup> *United States v. Walker*, 66 F.3d 318, 1995 WL 551361 at n.2 (4th Cir. 1995), *cert. denied sub nom.*, *Harris v. United States*, 116 S. Ct. 967 (1996); *United States v. A&S Council Oil Co*, 947 F.2d 1128, 1134 (4th Cir. 1991).

<sup>32</sup> *United States v. Soundingsides*, 820 F.2d 1232, 1241 (10th Cir. 1987), *reh'g denied*, 825 F.2d 1468 (10th Cir. 1987); *United States v. Hunter*, 672 F.2d 815 (10th Cir. 1982).

<sup>33</sup> See, e.g., *Frye v. United States*, 293 F. 1013, (D.C. Cir. 1923); *United States v. Skeens*, 494 F.2d 1050, 1053, (D.C. Cir. 1974) (“[The Frye test] has been followed uniformly in this and other Circuits and there has never been any successful challenge to it in any federal court”).

<sup>34</sup> Giannelli, *supra* note 29, at § 8-3(A) (Alaska, Colorado, Connecticut, Hawaii, Illinois, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, West Virginia, Wisconsin) (citations omitted). See also *State v. Weston*, 912 S.W.2d 96, 100 (Mo. App. 1995); *People v. Shedrick*, 66 N.Y.2d 1015, 1018, 489 N.E.2d 1290, 499 N.Y.S.2d 388 (1985).

The Supreme Court of Vermont has not spoken on the subject. *State v. Hamlin*, 146 Vt. 97, 108, 499 A.2d 45, 53 (1985). In a hearing on the State's motion to exclude polygraph evidence, the court said:

It would be something more than a major stroke in terms of stare decisis and in terms of innovation in our criminal law if this Judge on his own decided to admit polygraph evidence. I think, if the break-through should come, it should come from the highest court and not from the trial court. The State agreed that the admission of polygraph evidence is within the discretion of the trial court. We express no opinion as to the validity of this agreement.

*Id.* at 109 n.4.

trial judge regardless of whether the parties had previously stipulated to the admission of the evidence.<sup>35</sup> State courts have justified the common law exclusion rule on the grounds that the exams are generally unreliable and because the testimony offered infringes upon the role of the courts while subverting the adversarial process.

At least one state legislature, Montana, has passed a statutory prohibition on the admission of all polygraph evidence at all phases of the criminal process.<sup>36</sup> In interpreting this statute, the Montana Supreme Court has left little to doubt concerning its enthusiasm for polygraph evidence: “We take this opportunity to clarify the following simple rule of law for the benefit of the bench and bar of Montana: Polygraph evidence shall not be allowed in any proceeding in a court of law in Montana.”<sup>37</sup>

At least three states which originally admitted polygraph evidence upon stipulation have reverted to a *per se* inadmissibility standard. The Oklahoma Criminal Appeals Court was the first to abandon the stipulation requirement, holding that the unreliability of the test required its total exclusion.<sup>38</sup> Finding that the stipulation did not enhance the reliability of the test or protect the integrity of the trial process, Wisconsin courts reverted to a *per se* exclusion in 1981.<sup>39</sup> North Carolina followed suit, reenacting its *per se* rule in 1983.<sup>40</sup>

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<sup>35</sup> See, e.g., *State v. Grier*, 307 N.C. 628, 645, 300 S.E.2d 351, 361 (1983). The Supreme Court of North Carolina limited its holding with the following statement: “We wish to make it abundantly clear, however, that this [*per se*] rule does not affect the use of the polygraph for investigatory purposes.” *Id.* See also *Pulaski v. State*, 476 P.2d 474 (Alaska 1970); *Akonom v. State*, 40 Md. App. 676, 394 A.2d 1213 (1978).

<sup>36</sup> *State v. Staat*, 248 Mont. 291, 292, 811 P.2d 1261 (1991).

The Montana legislature has prohibited polygraph examination results from being introduced in evidence. This is the public policy of Montana with which we agree. Section 37-62-302, MCA, enacted in 1983, provides: Results of a polygraph examination or other test given by an examiner may not be introduced or admitted as evidence in a court of law.

*Id.*

<sup>37</sup> *Id.* at 293.

<sup>38</sup> *Fulton v. State*, 541 P.2d 871, 872 (Okla. Crim. 1975).

<sup>39</sup> *State v. Dean*, 103 Wis. 2d 228, 307 N.W.2d 628 (1981). For a compulsory process analysis of the *State v. Dean* decision, see Note, *State v. Dean: A Compulsory Process Analysis of the Inadmissibility of Polygraph Evidence*, 1984 Wis.L.Rev. 237.

<sup>40</sup> *State v. Grier*, 307 N.C. 628, 645, 300 S.E.2d 351, 356-61 (1983). In 1975, the North Carolina courts decided that if the parties stipulated and other conditions were met, the polygraph testimony would be admissible. This holding effectively adopted the rationale of the Arizona Supreme Court in *State v. Valdez*, 91 Ariz. 274, 371 P.2d 894 (1962). In *Grier*, the Court held that the stipulation did not enhance the reliability of the polygraph, placed “incredible burdens” on the administration of the courts, could degenerate the trial into a trial of the polygraph machine, diverted the jury’s attention for the issue of guilt or innocence, and might be unduly persuasive. *Id.* at 637-45.



## 2. Stipulation Requirement

The Sixth,<sup>41</sup> Eighth,<sup>42</sup> and Eleventh<sup>43</sup> Circuits permit polygraph evidence to be admitted if stipulated to by both parties before the test is administered and the trial judge determines that the requirements of the FREs are met. The Eleventh Circuit permits polygraph evidence to be used to impeach or corroborate a witness' testimony even in the absence of a stipulation. Seventeen states also allow polygraph evidence to be admitted upon the stipulation of the parties.<sup>44</sup> At least one state legislature, California,

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However, in an unpublished opinion, a Wisconsin court of appeals judge has recently urged the State Supreme Court to reconsider the decision and permit admission at the discretion of the trial court. *State v. Steven G.B.*, 204 Wis. 2d 108, 552 N.W.2d 897, 1996 WL 426089, (Wis. Ct. App. 1996) (Sundby, J., concurring), *review denied*, 205 Wis. 2d 133, 555 N.W.2d 814 (1996), *and cert. denied sub nom.*, *Berndt v. Wisconsin*, 117 S. Ct. 959, 136 L. Ed. 2d 845, 65 U.S.L.W. 3558, 65 U.S.L.W. 3568 (1997). A Michigan judge has done likewise. *People v. Smith*, 211 Mich. App. 233, 235, 535 N.W.2d 248, 249 (1995) (Baxter, J., dissenting).

The Supreme Court of Connecticut has agreed to hear arguments challenging the *per se* rule as well as the continued applicability of the *Frye* test after *Daubert*. *State v. Hunter*, 37 Conn. App. 907, 655 A.2d 291 (1995), *cert. granted in part*, 236 Conn. 907, 670 A.2d 1307 (Conn. Feb 13, 1996).

The Colorado Court of Appeals has refused to rule that its *per se* requirement violates the Supreme Court's ruling in *Daubert*. In *People v. Lyons*, the Court explained that since *Daubert* was simply an interpretation of the federal rules of evidence. and was not decided on constitutional grounds, it was not binding on the Colorado courts. *People v. Lyons*, 907 P.2d 708, 712 (Colo. App. 1995), *reh'g denied*, (1995); *reaff'g* *People v. Anderson*, 637 P.2d 354 (Colo. 1981). As such, Colorado would continue to apply the *Frye* test to polygraph testimony, while other scientific evidence would be evaluated under Colo. R. Evid. 702. *Id.* at 712 (citing *Fishback v. People*, 851 P.2d 884 (Colo. 1993); *Campbell v. People*, 814 P.2d 1 (Colo. 1991); *People v. Hampton*, 746 P.2d 947 (Colo. 1987)).

<sup>41</sup> *See, e.g.*, *United States v. Sherlin* 67 F.3d 1208, 1217 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 795 (1996); *United States v. Scarborough* 43 F.3d 1021 (6th Cir. 1994); *Poole v. Perini*, 659 F.2d 730, 735 (6th Cir. 1981), *cert. denied*, 455 U.S. 910 (1982).

<sup>42</sup> *See, e.g.*, *Anderson v. United States*, 788 F.2d 517, 519 n.1 (8th Cir. 1986); *United States v. Alexander*, 526 F.2d 161, 163-70 (8th Cir. 1975).

<sup>43</sup> *See, e.g.*, *United States v. Piccinonna*, 885 F.2d 1529 (11th Cir. 1989), *aff'd*, 925 F.2d 1474 (11th Cir. 1991).

<sup>44</sup> Giannelli, *supra* note 29, at § 8-3(B) (Alabama, Arizona, Arkansas, California, Delaware, Florida, Georgia, Idaho, Iowa, Kansas, Nevada, New Jersey, Ohio, Utah, Washington, Wyoming) (citations omitted). *See also* *Sanchez v. State*, 675 N.E.2d 306, 1996 WL 715432, \*1 (Ind. 1996).

A few state courts which currently abide by the stipulation requirement have expressed a willingness to reconsider its underlying logic. For example, a Florida district court, which still follows the *Frye* test, has agreed to review whether the results of polygraph tests are inadmissible as a matter of law. *State v. Santiago*, 679 So. 2d 861, 863 (Fla. Dist. Ct. App. 1996). Additionally, the Supreme Court of Utah rejected a defendant's argument that she should be permitted to introduce polygraph results absence a stipulation because the proper foundation was not laid, but noted that it might be willing to reexamine the issue. *State v. Crosby*, 927 P.2d 638, 643 (Utah 1996) ("While we would be willing to reexamine the

has enacted a specific rule of evidence governing the admissibility determination, which is identical to MRE 707 with the addition of the stipulation requirement.<sup>45</sup>

Two arguments are commonly advanced to defend the requirement of a mutual stipulation. The first argument is that the stipulation acts as a waiver or consent to the introduction of otherwise inadmissible evidence. The court will enforce the agreement out of “fairness” to both parties, since although the accused failed the test and objects to its introduction, undoubtedly he would have moved to admit the result had it been favorable.<sup>46</sup> The second argument is that the stipulation, by outlining the testing procedures and the identity of the particular examiner, enhances the reliability of the polygraph results.<sup>47</sup>

Regardless of which argument is forwarded by the court, the stipulation requirement highlights the unique place of polygraph testimony in the court system. Before the trial judge in any of the respective jurisdictions will consider the admission of the polygraph evidence, both parties must have stipulated to the admissibility of the evidence.<sup>48</sup> Therefore, *ex parte* exams are still *per se* excluded. More importantly, the prosecution can refuse to stipulate for *any* reason. In this manner, it is the prosecution that effectively acts as the “gatekeeper” to the admission of the scientific evidence in question. Without a stipulation, the trial judge’s discretion is limited.

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issue, we note that a future proponent of polygraph evidence should make a more detailed foundational showing, specifically demonstrating how research or recent developments have made the polygraph more reliable”).

<sup>45</sup> California Evidence Code § 351.1 provides:

(a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence in any criminal proceeding. . . unless all parties stipulate to admission of such results.

(b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.

<sup>46</sup> See, e.g., *Cullin v. State*, 565 P.2d 445, 457 (Wyo. 1977).

<sup>47</sup> See, e.g., *State v. Souel*, 53 Ohio St. 2d 123, 133, 372 N.E.2d 1318, 1323 (1978) (“The requirement. . . will insure control over what is generally recognized as the single most important variable affecting the accuracy of the polygraph test results, viz. the polygraph examiner.”); *Accord Corbett v. State*, 94 Nev. 643, 646-47, 584 P.2d 704, 706 (1978).

<sup>48</sup> Many states follow the stipulation requirements set forth in *State v. Valdez*, 91 Ariz. 274, 283-84, 371 P.2d 894, 900-01 (1962). The requirements provide that: 1) all parties sign a written stipulation that the defendant will submit to the test and that the graphs and the examiner’s opinion will be admissible by either party at trial; 2) admission remains at the discretion of the trial judge (e.g., if he is not convinced that the examiner is qualified or the test was conducted under the proper conditions he may refuse); 3) the opposing party has the right to cross-examine; and 4) the judge may provide limiting instructions to the jury.

Once the trial judge determines that a valid stipulation exists, the jurisdictions are also split on whether any further requirements are necessary. A few state courts do not impose any further “gatekeeping” function on the trial judge other than to make this initial determination.<sup>49</sup> On the other hand, the federal circuits require that the district judge ensure that the additional requirements of the FREs are met.<sup>50</sup> Many state courts also require the trial judge to determine that the test was conducted under the “proper conditions.”<sup>51</sup>

Given that courts have justified the stipulation requirement on the grounds that the polygraph is generally unreliable, it is difficult to imagine what standards the judge should use in discerning if “proper conditions” were met. For example, suppose the evidence was not a polygraph exam, but the testimony of a palm reader. The accused contends that the palm reader examined the right hand and not the left, which is the typical procedure used by the majority of palm readers. Should the judge admit the evidence? If the palm reader had read the left hand, it would seem that the “general acceptance” test of *Frye* would have been met and the evidence admissible regardless of the stipulation. Either the evidence meets the necessary requirements of the FREs and should be admitted, or it does not meet the requirements and should be excluded.<sup>52</sup> The FREs do not provide for a middle ground.

The paradox of a stipulation requirement is further illustrated by the rulings of the Eighth Circuit. The court has rejected arguments that polygraph results should be admitted absent stipulation, holding that the requirement did not amount to a denial of due process<sup>53</sup> and that “there is still no evidence that a ‘lie detector’ has any scientific reliability.”<sup>54</sup> Alternately, the Eighth Circuit

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<sup>49</sup> See, e.g., *State v. Marti*, 290 N.W.2d 570, 586-87 (Iowa 1980); *State v. Green*, 245 Kan. 398, 405, 781 P.2d 678 (1989).

<sup>50</sup> See, e.g., *United States v. Piccinonna*, 885 F.2d 1529 (11th Cir. 1989), *aff’d*, 925 F.2d 1474 (11th Cir. 1991).

<sup>51</sup> See, e.g., *State v. Valdez*, 91 Ariz. 274, 283-84, 371 P.2d 894, 900-01 (1962); *State v. Souel*, 53 Ohio St. 2d 123, 133, 372 N.E.2d 1318, 1323 (1978); *Corbett v. State*, 94 Nev. 643, 646-47, 584 P.2d 704, 706 (1978).

<sup>52</sup> The Supreme Court of Wyoming’s opinion in *Cullin v. State*, 565 P.2d 445 (Wyo. 1977) illustrates this double standard. In adopting a stipulation requirement, the court stated that in addition to the stipulation “[t]here should be some test of reasonable reliability before final admission by the judge . . . We see no real or unusual problem in that regard and believe that it can be accomplished through existing, accepted rules of evidence.” *Id.* at 457. Arguably, if the evidence meets the requirements of the “existing, accepted rules of evidence” then it should be admitted regardless of whether the stipulation was signed by both parties. The Court acknowledged this argument, and stated that it would consider the admissibility of the polygraph absent stipulation “when we come to it.” *Id.* at 459 n.14.

<sup>53</sup> *United States v. Gordon*, 688 F.2d 42, 44 (8th Cir. 1982) (citing *United States v. Bohr*, 581 F.2d 1294, 1303 (8th Cir.), *cert. denied*, 439 U.S. 958 (1978)).

<sup>54</sup> *Id.* at 45. However, in *United States v. Williams*, 95 F.3d 723, 728-29 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 750 (1997), the court entertained the notion that *Daubert* may permit the introduction of the evidence absent stipulation, but found that the trial testimony was

does not blindly admit stipulated examinations. Instead, the proffering party must also establish an adequate foundation, which can be “construed through testimony showing a sufficient degree of acceptance of the science of polygraphy by experienced practitioners in polygraphy and other related experts.”<sup>55</sup> When this showing is met, the court has ruled that “[w]e cannot conclude that the stipulated or consented to polygraph is so unreliable as to be inadmissible in this particular case.”<sup>56</sup>

Thus, the Eighth Circuit has differentiated between the standard of “sufficient degree of acceptance in the science” and “sufficient ‘general scientific acceptance.’” However, the question becomes “why does it matter if the parties stipulated to the results?” The evidence should be admissible under either *Frye* or FRE 702 regardless of whether the other party consented to its admission.

The Sixth Circuit has also refused to hold that unilaterally obtained polygraph examinations are admissible, but not on FRE 702 grounds. Instead, the district court may exclude the evidence under FRE 403 regardless of the admissibility of the evidence under FRE 702. The general rule in the Circuit is “that unilaterally obtained polygraph evidence is almost never admissible under [FRE] 403” because the probative value of the exam is “substantially less” since the accused does not have an adverse interest in a deceptive result.<sup>57</sup> Additionally, this circuit has held that “the use of a polygraph solely to bolster a witness’ credibility is ‘highly prejudicial,’ especially where credibility issues are central to the verdict.”<sup>58</sup>

The Eleventh Circuit maintains a hybrid approach to the admissibility of polygraph evidence. The court modified its *per se* rule excluding polygraph evidence in *United States v. Piccinonna*.<sup>59</sup> After reviewing the current

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insufficient to permit the court to conduct a *Daubert* analysis and the examination was more prejudicial than probative under Fed. R. Evid. 403.

<sup>55</sup> *United States v. Oliver*, 525 F.2d 731, 736 (8th Cir. 1975) (citing *Frye v. United States*, 293 F. 1013, 1014 (1923)), *cert. denied*, 424 U.S. 973 (1976).

<sup>56</sup> *Id.* at 737.

<sup>57</sup> *United States v. Sherlin*, 67 F.3d 1208, 1216-17 (6th Cir. 1995) (citing *Conti v. Commissioner*, 39 F.3d 658, 663 (6th Cir. 1994), *cert. denied*, 115 U.S. 1793, 115 S. Ct. 1793, 131 L. Ed. 2d 722 (1995)), *cert. denied*, 116 S. Ct. 795 (1996). The court has indicated that in limited circumstances, polygraph-related evidence may be admissible “if it is relevant to the proof developed by the probative evidence.” *United States v. Blakeney*, 942 F.2d 1001, 1014 (6th Cir. 1991), *cert. denied*, 502 U.S. 1035 (1992). The basis of the Sixth Circuit’s opinion is the “Friendly Examiner Theory.” For a discussion of the “Friendly Examiner Theory,” see Appendix notes 561-62 and accompanying text.

<sup>58</sup> *United States v. Sherlin*, 67 F.3d at 1217 (citing *Barnier v. Szentmiklosi*, 810 F.2d 594, 597 (6th Cir. 1987)).

<sup>59</sup> *United States v. Piccinonna* 885 F.2d 1529 (11th Cir. 1989), *aff’d*, 925 F.2d 1474 (11th Cir. 1991). See generally W. Thomas Halbeib, *United States v. Piccinonna: The Eleventh Circuit Adds Another Approach to Polygraph Evidence in the Federal System*, 80 Ky. L.J. 225 (1991); Note, *Reexamining Polygraph Admissibility*, *United States v. Piccinonna*, *Underwood v. Colonial Penn Insurance Co.*, 56 Mo. L. Rev. 143 (1991).

literature and rules followed by the federal and state jurisdictions, the court concluded that polygraph examinations met *Frye's* “general acceptance” test.<sup>60</sup> However, the court was unable to locate any case in which a court admitted, absent stipulation, polygraph expert testimony offered to prove the substantive truth of the statement made at the time of the exam.<sup>61</sup>

The court in *United States v. Piccinonna* outlined two circumstances in which polygraph evidence may be admitted at trial. First, polygraph expert testimony would be admissible if “both parties stipulate in advance as to the circumstances of the test and the scope of its admissibility.”<sup>62</sup> The parties must agree to the material matters, such as the testing procedures, the nature of the questions asked, and the identity of the examiner.<sup>63</sup> In making the admissibility determination under FRE 702, the court instructed trial judges to consider if the examiner’s qualifications are acceptable, the test procedure was administered fairly, and whether the test questions were relevant and proper.<sup>64</sup>

The court also held that polygraph expert testimony could be admitted to impeach or corroborate a witness’ testimony.<sup>65</sup> However, the party who wishes to utilize the evidence must provide adequate notice to the opposing party of his intention. The opposing party must also be given a “reasonable opportunity” to administer its own polygraph test covering “substantially the same questions.”<sup>66</sup> Finally, the court made clear that all the applicable FREs still apply. For example, the court pointed out that under FRE 608, “evidence that a witness passed a polygraph examination, used to corroborate that witness’s in-court testimony” would not be admissible unless the credibility of that witness was attacked.<sup>67</sup>

### 3. Substantive Right To Admit Upon Stipulation

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<sup>60</sup> *Id.* at 1535 (“There is no question that in recent years polygraph testing has gained increasingly widespread acceptance as a useful and reliable scientific tool”).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 1536.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 1537.

<sup>65</sup> *Id.* at 1536.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* Five judges dissented from the Court’s finding that polygraph testing had gained “general acceptance” and the majority’s decision concerning admissibility of these results under Fed. R. Evid. 608. After reviewing the basic theory underlying the polygraph and the studies offered in its support, Circuit Judge Johnson explained that the statistics are misleading and a number of extrinsic factors affect the accuracy of the results. Relying heavily upon the reasoning of the Ninth Circuit opinion in *Brown v. Darcy*, 783 F.2d 1389 (9<sup>th</sup> Cir. 1986), which has since been overruled, CJ Johnson concluded that the Fed. R. Evid. 403 balancing test should preclude admission of the evidence even if the requirements of Fed. R. Evid. 608 were met. *Id.* at 1537-1541.

The Seventh Circuit has held that the accused had a substantive right to admit the results of a polygraph examination previously stipulated to by the prosecutor.<sup>68</sup> The court was interpreting Wisconsin's stipulation requirement, which the court concluded had created a general right to introduce polygraph evidence unless the prosecutor refused to stipulate. After finding the state rule was based on reliability considerations rather than the consent and waiver arguments, the court ruled that the polygraph evidence is "materially exculpatory" for due process purposes in cases where the accused's credibility is crucial.<sup>69</sup> Therefore, the prosecutor must give a reason for the refusal to stipulate which goes to the reliability of the exam or the accused's constitutional right to due process would be implicated. It should be noted that Justice Rehnquist expressed his opinion that this was a "dubious constitutional holding."<sup>70</sup> The value of this holding as precedent is unclear, and Wisconsin soon reverted to a *per se* exclusion rule.<sup>71</sup>

#### 4. Admissible at the Trial Judge's Discretion

Finally, the Fifth,<sup>72</sup> Seventh,<sup>73</sup> and Ninth<sup>74</sup> Circuits commit the admissibility determination under the FRE to the sole discretion of the trial judge. The state legislature of New Mexico permits the trial judge to make the determination subject to specific conditions.<sup>75</sup> Two Ninth Circuit district

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<sup>68</sup> *McMorris v. Israel*, 643 F.2d 458, 466 (7th Cir. 1981), *cert. denied*, 455 U.S. 967 (1982).

<sup>69</sup> *Id.* at 462.

<sup>70</sup> *Id.* at 970 (Rehnquist and O'Connor, JJ., dissenting from the denial of cert.).

<sup>71</sup> *State v. Dean* 103 Wis. 2d 228, 307 N.W.2d 628 (Wis. 1981).

<sup>72</sup> *See, e.g., United States v. Posado*, 57 F.3d 428, 436 (5th Cir. 1995).

<sup>73</sup> *See, e.g., United States v. Pulido*, 69 F.3d 192, 205 (7th Cir. 1995).

<sup>74</sup> *See, e.g., United States v. Cordoba*, 104 F.3d 225, 1997 WL 3317 (9th Cir. 1997), *modified*, \_\_\_ F.3d \_\_\_, 1997 WL 54578 (1997).

<sup>75</sup> *See State v. Sanders*, 117 N.M. 452, 459, 872 P.2d 870, 877 (1994) ("In New Mexico, the trial court has discretion to admit results of polygraph tests into evidence if certain conditions, designed to ensure the accuracy and reliability of the test results, are met.").

New Mexico Rule of Evidence, Rule 11-707 outlines the following conditions which the proponent of the evidence must show: the polygraph examiner must meet the minimum qualifications to testify as an expert, 11-707(B); the examiner is qualified as an expert witness and the proper testing procedures were used in the specific tests, 11-707(C); the examinee was fit to be tested, 11-707(C); at least two relevant questions were asked and three charts produced, 11-707(C); both the pretest interview and examination were either video or audio recorded, 11-707(E). Any party intending to use polygraph test evidence must also give written notice to the other party of his or her intention at least thirty days before trial, and provide a list of all previous polygraph examinations taken by the examinee; 11-707(D). No witness may be compelled to take a polygraph; 11-707(G). However, upon a showing of good cause, the court may compel a witness who seeks to introduce the results of a previously taken polygraph to submit to yet another test. 11-707(G). If the witness refuses, "opinions of other polygraph examiners as to the truthfulness of the witness shall be inadmissible as evidence;" 11-707 (G).

courts<sup>76</sup> and the District Court for the Eastern District of Michigan<sup>77</sup> have also permitted the introduction of polygraph evidence at the discretion of the trial judge. However, the courts have not based their holdings on the Constitution, but have merely re-examined their interpretation of the FREs in light of *Daubert*.

The Fifth Circuit has abandoned its *per se* rule against the admission of polygraph evidence, holding that under certain circumstances, the evidence may be admissible under *Daubert*. In *United States v. Posado*,<sup>78</sup> the accuseds were indicted for drug trafficking after 44 kilograms of cocaine were recovered from their luggage during an airport search.<sup>79</sup> The government argued that the accuseds consented to the luggage search prior to their arrest. The accuseds contended that at the time of the search they had been placed under arrest and were unaware that they had a right to refuse consent until after the fact.

Realizing that it would be their word against those of the federal agents at trial, the accuseds arranged for a polygraph.<sup>80</sup> They invited the prosecution to participate in the exam and agreed to stipulate that the government could utilize the results in any way, to include admission at trial.<sup>81</sup> The government refused to agree to the stipulation. At the hearing to suppress the cocaine, the District Court refused to consider the polygraph evidence and denied the defense motion to suppress.

On appeal, the Fifth Circuit held that the trial court's failure to conduct a *Daubert* hearing was reversible error, and remanded the case. Acknowledging that the "flexible inquiry" standard for the admissibility of scientific evidence which the Supreme Court enumerated in *Daubert* superseded the "general acceptance" test of *Frye*, the Court of Appeals held that the trial court must consider the "evidentiary reliability and relevance of the polygraph evidence proffered by the defendants under the principles

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<sup>76</sup> Both cases involved polygraph examinations given by Dr. David Raskin. See Appendix note 512. The United States District Court for the District of New Mexico, in *United States v. Galbreth*, 908 F. Supp 877, 890-95 (D.N.M. 1995), permitted the introduction of Dr. Raskin's testimony after finding that the DLCQ technique has been tested, subject to peer review and publication, has a known or potential error rate, is subject to existing standards controlling the technique's operation, is generally accepted within the relevant scientific community, was properly applied in this specific case, and would assist the trier of fact in deciding an issue in dispute.

Utilizing a similar analysis, the District Court for the District of Arizona, in *United States v. Crumby*, 895 F. Supp.1354 (D. Ariz. 1995), also found that the *Daubert* test for admission of scientific evidence was met and permitted the introduction of the polygraph results. See generally Case Note, *United States v. Crumby: A Potential Revolution in the Admission of Polygraph Evidence*, 23 Am. J. Crim. L. 479 (1996).

<sup>77</sup> *United States v. Ridling*, 350 F. Supp. 90 (E.D. Mich. 1972).

<sup>78</sup> *United States v. Posado*, 57 F.3d 428 (5th Cir. 1995).

<sup>79</sup> 57 F.3d at 429.

<sup>80</sup> *Id.* at 430.

<sup>81</sup> *Id.* at 431.

embodied in the Federal Rules of Evidence and *Daubert*.<sup>82</sup> Significantly, the court refused to hold that polygraph examinations are scientifically valid, will always assist the trier of fact as required by FRE 702, or will survive the balancing test of FRE 403. However, it did “remove the obstacle of the *per se* rule against admissibility,” concluding it was based on antiquated concepts of the technical ability of polygraph and legal precepts that have been expressly overruled by the Supreme Court.<sup>83</sup>

Like the Fifth Circuit, the Ninth Circuit Court of Appeals had initially held in *Brown v. Darcy*<sup>84</sup> that polygraph evidence offered to establish the truth of statements made during the exam<sup>85</sup> were inadmissible absent stipulation. The court stated that polygraph evidence has an “overwhelmingly prejudicial effect when it is inaccurate, interferes with the jury’s authority to determine credibility, and imposes a burden on district courts to review the reliability of polygraph evidence in each case.”<sup>86</sup> Once the parties had stipulated to the admission of the polygraph exam and it was actually administered, the court still had to be satisfied that the examination was administered in a reliable manner under the FREs.<sup>87</sup> However, the court carefully distinguished polygraph evidence that is admissible as an operative fact, introduced either because it is relevant that a polygraph was administered regardless of the results,<sup>88</sup> or because the examination was the basis of the cause of action.<sup>89</sup>

In a surprisingly brief opinion announced in early 1997, the Ninth Circuit in *United States v. Cordoba*<sup>90</sup> abandoned the *per se* inadmissibility rule announced in *Brown*. Cordoba was charged with possession of cocaine with intent to distribute, and took an unstipulated polygraph.<sup>91</sup> The examiner concluded that Cordoba was truthful when he answered “no” to questions regarding his awareness of the cocaine in his van.<sup>92</sup> The government moved to

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<sup>82</sup> *Id.* at 434.

<sup>83</sup> *Id.*

<sup>84</sup> *Brown v. Darcy*, 783 F.2d 1389 (9<sup>th</sup> Cir. 1986).

<sup>85</sup> The polygraph examiner in this case, Gy Gilson, was trained at the Bachelor School of Lie Detection, and testified that he had conducted approximately 6,000 examinations. *Brown v. Darcy*, 783 F.2d 1389, 1393 n.3 (9<sup>th</sup> Cir. 1986), *overruled by* *United States v. Cordoba*, 1997 WL 3317 (9<sup>th</sup> Cir. 1997). Despite his extensive experience, one of the main issues at trial was whether the control questions were appropriately worded. 783 F.2d at 1392.

<sup>86</sup> *Id.* at 1391.

<sup>87</sup> *Id.*

<sup>88</sup> For example, if the defendant attempted to admit the polygraph examination to establish that he was questioned after invoking his right to counsel.

<sup>89</sup> 783 F.2d at 1397.

<sup>90</sup> *United States v. Cordoba*, 1997 WL 3317 (9<sup>th</sup> Cir. 1997). It also may be noted that the Ninth Circuit accepted submission of the case without oral argument.

<sup>91</sup> *Id.* at \*4.

<sup>92</sup> *Id.*



exclude the polygraph and Cordoba argued that the polygraph should be admissible to rehabilitate his credibility if it was attacked by the government.<sup>93</sup>

Reinterpreting its standard of admissibility under FRE 702 and FRE 401-403 in light of *Daubert*,<sup>94</sup> the Ninth Circuit vacated Cordoba's conviction and remanded the case to the district court. Citing *United States v. Rincon*,<sup>95</sup> the court held that the district court must strike the appropriate balance under FRE 702 between admitting reliable, helpful expert testimony and excluding misleading or confusing testimony to achieve the flexible inquiry mandated by *Daubert*.<sup>96</sup> The court also concluded that it was the trial judge's task to conduct the initial weighing of probative value against the prejudicial effect as outlined in FRE 403.<sup>97</sup>

Quoting from the Fifth Circuit's ruling in *United States v. Posado*, the court made clear that it was "not expressing new enthusiasm for admission of unstipulated polygraph evidence," and acknowledged that "polygraph evidence has grave potential for interfering with the deliberative process."<sup>98</sup> However, the court stressed that the ultimate determination of admissibility was to be left to the sound discretion of the trial judge.<sup>99</sup>

The recent reversals in the Fifth and Ninth Circuits, undoubtedly a reconsideration of their earlier precedents in light of *Daubert*, highlight at least three points. First, courts have realized that the stipulation requirement is either unworkable or unsound, or both. While it may have been hoped that the stipulation requirement would ensure agreement over the test's reliability and the examiner's qualifications while minimizing court room disagreement and battling, recurring prosecutorial "abuses" may have prompted the Circuits to reclaim the "gatekeeper" role as mandated by *Daubert*.

Second, the circuit courts based their decisions on an application of the FREs as interpreted by *Daubert*, not on the accused's constitutional rights. In fact, the *Rock* holding was not mentioned in any of these opinions. That no constitutional holding was invoked may not be surprising since the issues could be adequately addressed through an analysis of the FREs, which did not include a FRE similar to MRE 707.

Finally, it must be realized that, in weighing the judicial burden against the rights of the accused, the circuits faced a much different legal landscape than that encountered by the military courts. As one member of the Court of Appeals for the Armed Forces has stated, "the federal courts have not faced the

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at \*3.

<sup>95</sup> *United States v. Rincon*, 28 F.3d 921, 926 (9th Cir. 1994), *cert. denied*, 513 U.S. 1029 (1994).

<sup>96</sup> *United States v. Cordoba*, 1997 WL 3317 at \*2.

<sup>97</sup> *Id.* at 3.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

same issue of a rule precluding admissibility of polygraph evidence in a world-wide system of justice.”<sup>100</sup>

<sup>100</sup> United States v. Scheffer, 44 M.J. 442, 451 (C.A.A.F. 1996) (Crawford, J., dissenting), cert. granted, 117 U.S. 1817 (1997).

In order to compare the number of criminal cases filed in each state with the respective polygraph admissibility rule, the following table is provided. This data was reported in Brain J. Ostrom & Neal B. Kauder, *Examining the Work of State Courts*, 1995, National Center for State Courts, Criminal Caseloads in State Trial Courts, p. 53.

**Table 1.** Number of Criminal Filings for State Courts, 1995

STATE	Criminal Filings	Polygraph Rule	Type of Court
Illinois	595,257	Per Se Exclusion	Unified
Massachusetts	344,561	Per Se Exclusion	Unified
Minnesota	226,097	Per Se Exclusion	Unified
Florida	188,682	Stipulation	General Jurisdiction
California	162,177	Stipulation	General Jurisdiction
Missouri	157,816	Per Se Exclusion	Unified
Texas	155,641	Per Se Exclusion	General Jurisdiction
Connecticut	139,953	Per Se Exclusion	Unified
Indiana	132,252	Stipulation	General Jurisdiction
Wisconsin	127,914	Per Se Exclusion	Unified
Virginia	125,234	Per Se Exclusion	General Jurisdiction
North Carolina	123,681	Per Se Exclusion	General Jurisdiction
Louisiana	121,166	Per Se Exclusion	General Jurisdiction
South Carolina	109,419	Per Se Exclusion	General Jurisdiction
Oklahoma	91,239	Per Se Exclusion	General Jurisdiction
Iowa	89,156	Stipulation	Unified
Michigan	69,508	Per Se Exclusion	General Jurisdiction
New York	68,326	Per Se Exclusion	General Jurisdiction
Maryland	68,321	Per Se Exclusion	General Jurisdiction
Ohio	67,266	Stipulation	General Jurisdiction
Tennessee	61,977	Per Se Exclusion	General Jurisdiction
Alabama	54,672	Stipulation	General Jurisdiction
New Jersey	49,107	Stipulation	General Jurisdiction
Arkansas	48,389	Stipulation	General Jurisdiction
Oregon	44,977	Per Se Exclusion	General Jurisdiction
Kansas	44,811	Stipulation	Unified
Washington	33,965	Stipulation	General Jurisdiction
Arizona	32,520	Stipulation	General Jurisdiction
North Dakota	28,555	Per Se Exclusion	General Jurisdiction
Colorado	28,172	Per Se Exclusion	General Jurisdiction
South Dakota	27,522	Per Se Exclusion	Unified
Kentucky	19,275	Per Se Exclusion	General Jurisdiction
Vermont	17,633	Not Clear	General Jurisdiction
New Mexico	15,723	Trial Judge's Discretion	General Jurisdiction
New Hampshire	15,352	Per Se Exclusion	General Jurisdiction

### III. THE SIXTH AMENDMENT AND THE POLYGRAPH

The primary constitutional arguments surrounding the admission of polygraph testimony involve the accused's Sixth Amendment right to present a defense. The Sixth Amendment to the United States Constitution provides in pertinent part that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor. . . ." <sup>101</sup> Although a historical examination of the early interpretation of the clause is beyond the scope of this paper, <sup>102</sup> the Supreme Court has expanded its application during the last thirty years in three fundamental cases.

The Court has not defined the accused's Sixth Amendment to present either scientific expert testimony or polygraph evidence. However, the federal circuit and state courts have heard challenges to both the *per se* exclusion rule and the stipulation requirement. With few exceptions, the courts have rejected these constitutional arguments.

#### A. The Supreme Court's Interpretation of the Compulsory Process Clause

The Supreme Court has outlined the accused's Sixth Amendment right to present a defense in three fundamental cases. In *Washington v. Texas*, <sup>103</sup> the Court for the first time held that the Sixth Amendment was applicable to the states through the Fourteenth Amendment. In *Chambers v. Mississippi*, <sup>104</sup> the Court ruled that the application of a state hearsay rule which prevented the

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Idaho	11,357	Stipulation	Unified
Utah	11,076	Stipulation	General Jurisdiction
Hawaii	10,120	Per Se Exclusion	General Jurisdiction
Maine	9,785	Per Se Exclusion	General Jurisdiction
West Virginia	7,975	Per Se Exclusion	General Jurisdiction
Nebraska	7,943	Per Se Exclusion	General Jurisdiction
Delaware	7,253	Stipulation	General Jurisdiction
Rhode Island	6,779	Per Se Exclusion	General Jurisdiction
Montana	5,025	Per Se Exclusion	General Jurisdiction
Alaska	2,778	Per Se Exclusion	General Jurisdiction
Wyoming	1,958	Stipulation	General Jurisdiction
Georgia	N/A	Stipulation	
Mississippi	N/A	Per Se Exclusion	
Nevada	N/A	Stipulation	
Pennsylvania	N/A	Per Se Exclusion	

<sup>101</sup> U.S. CONST. amend. VI.

<sup>102</sup> For a thorough discussion of the early history of the compulsory process clause see Peter Westen, *The Compulsory Process Clause*, 73 Mich. L. Rev. 71 (1974)

<sup>103</sup> *Washington v. Texas*, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).

<sup>104</sup> *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

accused from calling certain witnesses infringed upon his constitutional rights, holding that the state's interest must be balanced against an accused's right to present a defense. Finally, the Court in *Rock v. Arkansas*<sup>105</sup> declared that a *per se* rule against hypnotically refreshed testimony was unconstitutional because it prevented the accused from presenting her version of the events surrounding the crime.

### 1. *Washington v. Texas*

The Supreme Court first addressed whether the Fourteenth Amendment incorporates the Sixth Amendment's compulsory process clause in *Washington v. Texas*.<sup>106</sup> Washington was convicted of murder with malice and sentenced to 50 years in prison.<sup>107</sup> At trial, Washington attempted to call Charles Fuller, who had been convicted as a co-participant in the same murder and also sentenced to confinement for 50 years.<sup>108</sup> The record indicated that Fuller would have testified that Washington tried to persuade him to leave, and that Washington had ran before Fuller shot the victim.<sup>109</sup> It was undisputed that "Fuller's testimony would have been relevant and material, and vital to the defense."<sup>110</sup>

Two Texas statutes prevented Fuller from testifying on Washington's behalf even though the same prohibition did not apply to the prosecution.<sup>111</sup> Apparently, the statutes were intended to prevent co-defendants from testifying in each other's behalf since each would have an incentive to exonerate the other. The Court held that Washington was denied his right to compulsory process because "the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events he had personally observed, and whose testimony would have been relevant and material, and that it was vital to the defense."<sup>112</sup>

In applying the holding of *Washington* to polygraph evidence, it is important to analyze the specific deficiencies of the Texas statutes. The Court emphasized that the statutes applied only to the defense, thereby excluding a whole category of defense witnesses from testifying. Although the statutes' purpose was to prevent witnesses from committing perjury, the Court noted the "absurdity of the rule," since witnesses often have a greater interest in lying for the prosecution, especially if still awaiting trial or sentencing.<sup>113</sup> Additionally,

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<sup>105</sup> *Rock v. Arkansas*, 483 U.S. 44, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987).

<sup>106</sup> 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).

<sup>107</sup> *Id.* at 15.

<sup>108</sup> *Id.* at 16.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 23.

<sup>113</sup> *Id.* at 22.

if the co-defendant was acquitted, the statute permitted the witness to testify despite the fact that he still had an incentive to lie since he was protected from double jeopardy.<sup>114</sup>

In his concurring opinion, Justice Harlan stressed the lack of justification for such a one-handed rule. He noted that the state, by allowing the same witness to testify on behalf of the state, had recognized the testimony as “relevant and competent,” yet had arbitrarily denied its use to the accused.<sup>115</sup> He further commented that the state had not determined, “as a matter of valid state evidentiary law, on the basis of general experience with a particular class of persons . . . that the pursuit of the truth is best served by an across-the-board disqualification as witnesses persons of that class.”<sup>116</sup>

## 2. *Chambers v. Mississippi*

In *Chambers v. Mississippi*, the Supreme Court invalidated an application of the state’s hearsay rule on the grounds that it abridged the accused’s right to “present witnesses in his defense.”<sup>117</sup> Leon Chambers was charged in the shooting death of a deputy sheriff.<sup>118</sup> However, another man, Gable McDonald, had confessed to three different people that he had committed the crime, though he repudiated these confessions after being arrested.<sup>119</sup> The prosecutor proceeded to trial against Chambers and refused to call McDonald as a witness.<sup>120</sup> Chambers called McDonald to testify for the defense, and admitted into evidence McDonald’s sworn confession.<sup>121</sup> Upon cross-examination, the State elicited McDonald’s testimony explaining the circumstances surrounding the confession as well as his whereabouts at the time of the crime.<sup>122</sup>

The trial court denied Chambers’ motion to treat McDonald as an adverse witness. The trial judge agreed that the witness was “hostile” but not “adverse” because “nowhere did he point the finger at Chambers.”<sup>123</sup> Chambers then sought to introduce the testimony of the three individuals to whom McDonald had confessed.<sup>124</sup> The state objected on the grounds that the testimony was hearsay, and the trial judge sustained each objection.<sup>125</sup>

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<sup>114</sup> *Id.* at 23.

<sup>115</sup> *Id.* at 25 (Harlan, J., concurring).

<sup>116</sup> *Id.* at 24-25 (Harlan, J., concurring) (footnotes omitted).

<sup>117</sup> *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

<sup>118</sup> *Id.* at 288.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 291.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 292 (internal quotation omitted).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 293. Mississippi did not recognize the declaration against penal interest exception to the hearsay rule. *Id.* at 299.

Consequently, Chambers was prevented by the state's "voucher rule" from cross-examining McDonald, and was prevented by the hearsay rule from presenting witnesses who would have attacked McDonald's reputation.<sup>126</sup> Chambers was convicted and sentenced to life imprisonment, and the conviction was affirmed by the Mississippi Supreme Court.

The Supreme Court reversed, finding that the combination of the two limitations constituted a denial of due process.<sup>127</sup> Recognizing that the right to confront and cross-examine witnesses has long been recognized as fundamental to due process, the Court reiterated that it is "implicit in the constitutional right to confrontation, and helps assure the 'accuracy of the truth-determining process.'"<sup>128</sup> This right, however, "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process."<sup>129</sup> Finding that the right to cross-examine does not depend on which party calls the witness to the stand, the Court concluded that the voucher rule, as applied, interfered with Chambers' right to present a defense.<sup>130</sup>

The Court then turned to the state's application of the hearsay rule to the witnesses' testimony. While acknowledging that the hearsay rule is "grounded in the notion that untrustworthy evidence should not be presented to the triers of fact," the Court concluded that the specific hearsay statements were made under circumstances that "provided considerable assurances for their reliability."<sup>131</sup> The Court explained that in exercising the right to present witnesses, "the accused, as is required of the State, must comply with the established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence."<sup>132</sup> The Court found this testimony was "well within the basic rationale of the exception for declarations against interest," and was critical to Chambers' defense.<sup>133</sup>

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<sup>126</sup> *Id.* at 294. The common-law "voucher rule" in Mississippi prevented a party from impeaching his own witness because it was presumed that the calling party vouched for the witness' credibility. *Id.* at 295.

<sup>127</sup> *Id.* at 302. Justice White filed a concurring opinion which addressed whether the case was properly before the Court. *Id.* at 303. Then Justice Rehnquist dissented, arguing that the case was not. Addressing the merits, however, he stated that "I would have considerable difficulty in subscribing to the Court's further constitutionalization of the intricacies of the common law evidence." *Id.* at 308.

<sup>128</sup> *Id.* at 295 (quoting *Dutton v. Evans*, 400 U.S. 74, 89, 91 S. Ct. 210, 220, 27 L. Ed. 2d 213 (1970); *Bruton v. United States*, 391 U.S. 123, 135-37, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968)).

<sup>129</sup> *Id.* at 295.

<sup>130</sup> *Id.* at 298.

<sup>131</sup> *Id.* at 298-300. The Court listed four reasons for its conclusion: 1) McDonald made the statements to close friends shortly after the murder; 2) the statements were corroborated by other evidence; 3) the confessions were against McDonald's interest; and 4) McDonald was present in court, could be cross-examined and his demeanor weighed by the jury. *Id.* at 300-01.

<sup>132</sup> *Id.* at 302.

<sup>133</sup> *Id.*

Consequently, “where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.”<sup>134</sup>

The Court stressed that “we establish no new principles of constitutional law,”<sup>135</sup> and cautioned that its holding was not a signal of “any diminution in the respect traditionally accorded to the states in the establishment and implementation of their own criminal trial rules and procedures.”<sup>136</sup> The holding was limited to the facts and circumstances of the particular case.<sup>137</sup>

### 3. *Rock v. Arkansas*

The issue in *Rock v. Arkansas* was whether the state could prohibit an accused from giving hypnotically refreshed testimony.<sup>138</sup> Vickie Rock was convicted of manslaughter in the death of her husband.<sup>139</sup> Seeking to refresh her memory concerning the exact details of the shooting, she underwent two hypnotic sessions. Afterwards, Rock was able to recall that her finger was not

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<sup>134</sup> *Id.* The Court also relied upon this principle in *Green v. Georgia*, 442 U.S. 95, 99 S. Ct. 2150, 60 L. Ed. 2d 738 (1979). Roosevelt Green and Carzell Moore were both charged but tried separately for rape and murder. Both received capital sentences. *Id.* at 95. During the sentencing phase, Green sought to introduce the testimony of a witness to whom Moore had confessed that he shot the victim. Although the witness had previously testified for the state at Moore’s trial, the trial court ruled that the witness’ statement was inadmissible hearsay. *Id.* at 97 (citation omitted).

The Supreme Court found that under the facts of the case the exclusion of the testimony was a violation of due process. Despite Georgia’s hearsay rule, the testimony was “highly relevant to a critical issue in the punishment phase of the trial” and “substantial reasons existed to assume its reliability.” *Id.* In fact, it was so reliable that the state used the testimony against Moore and based a death sentence upon it. *Id.* at 96. The Court concluded that “[I]n these unique circumstances, ‘the hearsay rule may not be applied mechanistically to defeat the ends of justice.’” *Id.* (citing *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)).

Justice Rehnquist dissented, stating that the Court “takes another step toward embalming the law of evidence in the Due Process Clause . . . I think it impossible to find any justification in the Constitution for today’s ruling.” *Id.* at 98 (Rehnquist, J., dissenting). Furthermore, he concluded that “[n]othing in the [Constitution] gives this Court any authority to supersede a State’s code of evidence because its application in a particular situation would defeat what this Court conceives to be ‘the ends of justice.’” *Id.*

<sup>135</sup> 410 U.S. at 302.

<sup>136</sup> *Id.* at 302-303.

<sup>137</sup> *Id.* at 303.

<sup>138</sup> *Rock v. Arkansas*, 483 U.S. 44, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987).

<sup>139</sup> *Id.* at 45.

on the trigger when the gun went off.<sup>140</sup> Upon learning of the hypnosis sessions, the prosecution filed a motion to exclude Rock's testimony.<sup>141</sup>

After a pre-trial hearing on the matter, the trial judge limited Rock's testimony to the sketchy notes which the examiner had taken prior to the hypnosis since it was nearly impossible to discern what she had remembered before the session. The Supreme Court of Arkansas affirmed, following a *per se* exclusion rule for all hypnotically refreshed witness testimony. The Supreme Court disagreed, vacated the conviction, and remanded the case.

The Court in a 5-4 decision, per Justice Blackmun, held that the Arkansas prohibition unconstitutionally infringed upon Rock's ability to testify in her own defense.<sup>142</sup> Speaking to the compulsory process clause of the Sixth Amendment, the Court noted that included "in the accused's right to call witnesses whose testimony is material and favorable to [her] defense" is the right to testify on her own behalf.<sup>143</sup> Significantly, the Court further stated that cross-examination could adequately test the truthfulness and veracity of the witness' testimony.<sup>144</sup>

The *Rock* opinion is often cited for the following statement. "A State's legitimate interest in barring unreliable evidence does not extend to *per se* exclusions that may be reliable in an individual case."<sup>145</sup> The Court's choice of the word "reliable" should be contrasted with the word "accurate." Reliability is defined as "trustworthy" or "dependable."<sup>146</sup> Any testimony may be correct or accurate in a particular case, if for no other reason than pure chance. However, even if the testimony is accurate, it may not be reliable. For example, suppose that one flips a coin and asks a stranger to guess the result. The stranger guesses heads, which is correct. While the guess is accurate, it is nevertheless untrustworthy, and therefore, unreliable.

Regardless of the language, once the sentence is placed into context, it is clear that the Court was referring to limitations which the state places on the accused's ability to testify on her own behalf.<sup>147</sup> The Court, reiterating that the right to present relevant testimony may bow to other legitimate state interests, explained that a state must evaluate "whether the interest served by a rule

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<sup>140</sup> *Id.* at 47. An inspection of the gun revealed that it was defective and prone to misfire.

<sup>141</sup> *Id.* Individuals may have one of three inaccurate reactions to hypnosis: suggestibility, confabulation, or memory hardening. *Id.* at 59-60.

<sup>142</sup> *Id.* at 62.

<sup>143</sup> *Id.* at 52 (citing *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867, 102 S. Ct. 3440, 3446, 73 L. Ed. 2d 1193 (1982)).

<sup>144</sup> *Id.* at 52 (citing *Westen*, *supra* note 102, at 119-120).

<sup>145</sup> *Id.* at 61.

<sup>146</sup> AMERICAN HERITAGE DICTIONARY 1044 (2d College ed. 1985).

<sup>147</sup> However, one commentator has argued that *Rock* is "logically read to establish a Sixth Amendment right to call exculpatory witnesses whose testimony may be subject to a known, but manageable, risk of inaccuracy." James R. McCall, *Misconceptions and Reevaluation—Polygraph Admissibility After Rock and Daubert*, U. Ill. L. Rev. 1996, at 408, No.2 (1996).



justify the limitation imposed on the constitutional right to testify.”<sup>148</sup> In fact, the Supreme Court of Arkansas has explained that “Rock applies to testimony of the defendant, not to witness testimony.”<sup>149</sup>

Furthermore, noting that many states prohibit only the testimony of a witness but not the accused, the Court found that the Supreme Court of Arkansas had “failed to perform the constitutional analysis that is necessary when a defendant’s right to testify is at stake.”<sup>150</sup> Again emphasizing the accused’s right to testify, the Court stated that Arkansas had not demonstrated that the testimony was “so untrustworthy and so immune to the traditional means of evaluating credibility that it should disable a defendant from presenting her version of the events for which she is on trial.”<sup>151</sup>

A thorough analysis of the possible constitutional standards for scientific evidence and the polygraph are presented in Part V. A few initial observations may be made from the Court’s holdings, however, before the state and federal applications of the Sixth Amendment to the polygraph evidence are examined. First, *Washington v. Texas* proclaims that a state may not arbitrarily limit the accused’s right to present relevant and material testimony. If the state determines that the witness’ testimony is reliable enough for it to rely upon, it cannot limit the accused’s right to call the witness without a valid justification.

*Chambers v. Mississippi* supports the proposition that a state cannot prevent an accused from presenting critical testimony that complies with the established rules of procedure and evidence—i.e., those that ensure that the testimony is reliable—without the state establishing a valid reason for excluding the testimony. Without explaining why the testimony was unreliable, the state had prevented the accused from presenting critical testimony through the application of two separate rules of evidence. This exclusion was deemed to be arbitrary. Therefore, according to at least four Justices, the holding in *Chambers* was not that the accused is “denied ‘a fair opportunity to defend against the State’s accusations’ whenever ‘critical evidence’ favorable to him is excluded, but rather that erroneous evidentiary rulings can, in combination, rise to a level of a due process violation.”<sup>152</sup>

Finally, the holding in *Rock v. Arkansas* makes abundantly clear that the state may not prevent an accused from presenting her own version of the crime, unless the state can forward legitimate interests justifying the exclusion. At least five Justices found the state’s interests lacking, and concluded that the

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<sup>148</sup> 483 U.S. at 56.

<sup>149</sup> *Misskelley v. State*, 323 Ark. 449, 474 (1996).

<sup>150</sup> 483 U.S. at 57-58. (“Wholesale inadmissibility of a defendant’s testimony is an arbitrary restriction on the right to testify in the absence of clear evidence by the State repudiating the validity of all posthypnosis recollections”) (emphasis added). *Id.* at 61.

<sup>151</sup> *Id.* at 61.

<sup>152</sup> *Montana v. Egelhoff*, 116 S. Ct. 2013, 2022, 135 L. Ed. 2d 361, 64 U.S.L.W. 4500 (1996).

credibility of the accused's account could be tested through cross-examination. Whether the Court will similarly reject the state justifications for the exclusion of scientific expert testimony is uncertain.

## **B. Federal and State Applications of the Compulsory Process Clause**

Accuseds have challenged the federal and state treatment of polygraph evidence, arguing that both the *per se* exclusion rule and the stipulation requirement violate the constitutional right to present a defense. These arguments have been rejected by the respective jurisdictions with few exceptions. Only two state courts, New Mexico<sup>153</sup> and Ohio,<sup>154</sup> have held that the exclusion of a reliable polygraph examination which was critical to the accused's case violated the Due Process Clause.

Courts have invoked two primary rationales in defending the *per se* or stipulation admissibility standards: 1) polygraph tests are deemed unreliable by either the state legislature, the state's highest court, or the Circuit Court of Appeals; and 2) the polygraph testimony infringes upon the province of the jury. This second objection has been raised in many other expert testimony contexts, including evidence of rape trauma syndrome. Concern about the role of the jury supports exclusion of the polygraph evidence either to protect the integrity of the process or because the evidence has little probative value and tends to confuse the jury.

The Ninth Circuit and the state courts of Connecticut, Michigan, Oklahoma, and Texas have upheld their *per se* exclusion rules against compulsory process arguments. The Fourth and Eighth Circuits as well as the state courts of California, Indiana, Iowa, and Washington have also held that the requirement to stipulate does not violate the accused's right to present a defense.

### *1. Per se Jurisdictions*

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<sup>153</sup> The Court of Appeals of New Mexico, in *State v. Dorsey*, 87 N.M. 323, 532 P.2d 912 (1975), *aff'd*, 88 N.M. 184 (1975), held that the polygraph was reliable and critical to the defense, and therefore met the requirements of *Chambers*.

<sup>154</sup> The Cuyahoga Court of Common Pleas of Ohio, in *State v. Sims*, 52 Ohio Misc. 31, 369 N.E.2d 24 (Ohio Com. Pl. 1977) held that the defendant's right to compulsory process had been violated. *Sims* was denied the presence of a material witness and a polygraph examination. The Court held that the defendant was denied compulsory process "for witnesses in his favor [because the witness did not appear] and/or the testimony of a qualified polygraph examiner. . ." *Id.* at 42 (emphasis added). In light of the fact that Ohio currently admits only stipulated polygraphs, it appears that the exclusion of the polygraph evidence by itself would not have violated the defendant's rights. *See supra* note 100.

The Ninth Circuit addressed an accused's right to present a defense while denying a *habeas* petition in *Bashor v. Risley*.<sup>155</sup> The accused was prevented by a Montana trial judge from introducing the results of a witness' polygraph examination. Montana excludes polygraph evidence on grounds that it is unreliable and invades the province of the jury when used to bolster the credibility of a witness. The court adopted a balancing test to weigh the state's interest in reliable and efficient trials against the accused's right to present a defense.<sup>156</sup> Finding that the polygraph would only serve to bolster the witness' testimony, the Ninth Circuit concluded that the jury could hear the witness' testimony and determine his "credibility from his demeanor as a witness."<sup>157</sup> Consequently, the exclusion of the evidence did not deprive the accused of a fair trial.

The Appellate Court of Connecticut has also addressed the constitutional implications of that state's *per se* exclusionary rule. In *State v. Porter*, the court refused to hold that *Chambers* or *Washington* mandated that the constitutional right to present a defense included the "opportunity to make an offer of proof regarding the polygraph evidence."<sup>158</sup> Likewise, the Court of Criminal Appeals of Oklahoma has refused to find that the *per se* exclusion rule adversely affected the accused's right to present mitigating evidence in violation of *Rock*.<sup>159</sup>

Actually relying on *Washington* and *Chambers*, the Michigan Court of Appeals has concluded that it is precisely because polygraph results are so untrustworthy that the application of the state's *per se* rule did not deny the accused due process.<sup>160</sup>

The Texas Court of Appeals has also rejected such arguments, claiming that the accused's right to present evidence as outlined in *Rock v. Arkansas* "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process."<sup>161</sup> The court adopted the *Rock* framework to guide the determination, stating that

[r]ules for the admission and exclusion of evidence should be found offensive to notions of fundamental fairness embodied in the United States

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<sup>155</sup> 730 F.2d 1228, 1238 (9th Cir. 1984), *cert. denied*, 469 U.S. 838 (1984).

<sup>156</sup> *Id.* (citing *Perry v. Rushen*, 713 F.2d 1447, 1449-52 (9th Cir. 1983), *cert. denied*, 469 U.S. 838 (1984)).

<sup>157</sup> *Id.*

<sup>158</sup> 39 Conn. App. 800, 802, 668 A.2d 725, 727 (1995) ("The trial court, like this court, is bound by the Connecticut precedent which bars the admission of polygraph results." *Id.* at 803), *cert. granted in part*, 236 Conn. 908 (1996); *See also* *State v. Mitchell*, 169 Conn. 161, 170, 362 A.2d 808 (1975).

<sup>159</sup> *Paxton v. State*, 867 P.2d 1309, 1323-24 (Okl. Crim. App. 1994), *cert. denied*, 513 U.S. 886 (1984).

<sup>160</sup> *People v. Williams*, 123 Mich. App. 752, 758, 333 N.W.2d 577, 580 (1983); *But see* *People v. Paquette*, 114 Mich. App. 773, 776-79, 319 N.W.2d 390 (1982).

<sup>161</sup> *Perkins v. State*, 902 S.W.2d 88 (Tex. App. 1995).

Constitution only when, (1) without a rational basis, they disadvantage the accused more severely than they do the State, or (2) arbitrarily exclude reliable defensive evidence without achieving a superior social benefit.<sup>162</sup>

In applying the *Rock* guidelines to polygraph examinations, the court explained that

we first observe that there is no evidence that the exclusion of polygraph evidence disadvantages the defendant more severely than the State. In fact, the State would be greatly benefited if it could bolster the credibility of its witnesses at trial through the use of expert testimony. Second, there is no showing that the rule arbitrarily excludes reliable defensive evidence without achieving a superior social benefit.<sup>163</sup>

The court was careful to note that the decision to exclude the evidence was not based primarily on the evidence's unreliability. Instead, the decision was based on the conclusion that polygraph evidence "impermissibly decides the issues of credibility and guilt for the trier of fact and supplants the jury's function."<sup>164</sup>

## 2. *Stipulation Jurisdictions*

In interpreting North Carolina's stipulation requirement, the Fourth Circuit has held that the restrictions are "matter(s) of state law and procedure not involving federal constitutional issues."<sup>165</sup> The court further held that "[t]he exclusion of polygraph evidence did not negate the fundamental fairness of the petitioner's trial or violate a specific constitutional right."<sup>166</sup>

In denying a habeas petition, the Eighth Circuit also refused to find that Iowa's stipulation requirement deprived the accused of a fair trial.<sup>167</sup> Relying on *Chambers*, the accused claimed that the polygraph results were critical to his defense and asserted a constitutional right to introduce the evidence absent a stipulation, based on either due process or the right to compulsory process.<sup>168</sup> The Circuit held that, given the "lack of agreement in the scientific community as to the accuracy of polygraph techniques we cannot say that the trial court's

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<sup>162</sup> *Id.* at 94.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Jackson v. Garrison*, 677 F.2d 371, 373 (4th Cir. 1981) (citing *Grundler v. North Carolina*, 283 F.2d 798, 802 (4th Cir. 1960), *cert. denied*, 454 U.S. 1036 (1981)); *Milano v. Garrison*, 677 F.2d 374, 375 (4th Cir. 1981).

<sup>166</sup> 677 F.2d at 373.

<sup>167</sup> *Conner v. Auger*, 595 F.2d 407, 411 (8th Cir.), *cert. denied*, 444 U.S. 851 (1979). *See also* *United States v. Bohr*, 581 F.2d 1294, 1303 (8th Cir. 1978), *cert. denied*, 439 U.S. 958 (1978).

<sup>168</sup> *Id.*

exclusion of the unstipulated polygraph evidence deprived Conner of a fair trial.”<sup>169</sup>

California’s Evidence Code §351.1,<sup>170</sup> which is identical to MRE 707 except for the stipulation requirement, has also been upheld against Sixth Amendment attacks. The leading case from the California Court of Appeals is *People v. Kegler*,<sup>171</sup> which held that the accused did not have a right to present exculpatory polygraph evidence. The decision, however, did not address whether the rule was facially unconstitutional, because the court acknowledged that neither *Washington* nor *Chambers* held the respective evidentiary rules facially unconstitutional. Instead, the court limited its task to deciding the constitutionality of the rule as applied to the case before it.<sup>172</sup> In making this determination, the court balanced the significance of the exculpatory evidence to the accused against the state interest in maintaining the stipulation requirement.

Noting that the right of the accused to present relevant and competent evidence may be overcome if the competing state interest is “substantial,” the court first determined the exculpatory significance of the polygraph test.<sup>173</sup> It concluded that the polygraph was cumulative and not pertinent to the other evidence in the case, and therefore not “critical” to the defense.<sup>174</sup> Next, it turned to a review of the state interests in excluding the polygraph testimony, which closely parallel the rationale contained in the Drafters’ Analysis to MRE

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<sup>169</sup> *Id.* (citing *United States v. Alexander*, 526 F.2d 161, 166 (8th Cir. 1975)). The Iowa rule was based on both fairness and reliability considerations. On appeal, the Iowa Supreme Court had concluded “that Conner’s right to present evidence in his defense cannot override such an evidentiary rule.” *Id.* (citing *State v. Conner*, 241 N.W.2d 447, 458 (Iowa 1976)).

<sup>170</sup> California Evidence Code § 351.1 provides:

(a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence in any criminal proceeding. . . unless all parties stipulate to admission of such results.

(b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.

<sup>171</sup> *People v. Kegler*, 197 Cal. App. 3d 72, 242 Cal. Rptr. 897, 905-09 (1987). *See also* *People v. Price*, 1 Cal. 4th 324, 419, 821 P.2d 610, 663, 3 Cal. Rptr. 2d 106, 159 (1991) ([W]e reject defendant’s contention that excluding evidence of the polygraph test results denied him his due process right to a fair trial under the Fifth and Fourteenth Amendments to the United States Constitution. A party has no due process right to present evidence of test results if the tests used scientific techniques not generally accepted as reliable in the scientific community), *cert. denied*, 506 U.S. 851 (1992).

<sup>172</sup> 242 Cal. Rptr. at 906.

<sup>173</sup> *Id.* at 905-906.

<sup>174</sup> *Id.* at 906.

707.<sup>175</sup> The court concluded that the statute “rests on considerations of reliability and integrity” and that it could not conclude the state’s interest were not “legitimate or compelling.”<sup>176</sup> Given that the policy considerations are more compelling than those advanced in *Chambers*, coupled with the weak significance of the evidence to the accused, the court concluded that the accused was not denied his due process or compulsory process rights.<sup>177</sup> Other state courts have agreed.

The Supreme Court of Iowa summarily dismissed the accused’s arguments that his constitutional right to compulsory process and due process were violated by the stipulation rule.<sup>178</sup> The Supreme Court of Indiana has also distinguished *Rock* and refused to find a constitutional violation when the trial court refused to admit polygraph evidence absent stipulation.<sup>179</sup>

Finally, the Washington Court of Appeals has rejected arguments that the court’s stipulation requirement violates the accused’s Sixth Amendment right to present a defense.<sup>180</sup> After acknowledging the Supreme Court’s ruling in *Rock* and *Chambers*, the Court of Appeals noted that the stipulation requirement did not prevent the accused from taking the stand “to deny his guilt and fully present his version of the facts.”<sup>181</sup> Therefore, the polygraph testimony would have only served to bolster his testimony on the ultimate issue before the court. While such evidence is admissible, the “underlying basis for that opinion must be sound.”<sup>182</sup> Finding that polygraph testimony was not generally accepted in the scientific community as reliable and trustworthy, the court ruled “the defendant’s right to present relevant polygraph evidence must bow to accommodate the State’s legitimate interest in excluding inherently unreliable testimony.”<sup>183</sup>

#### IV. THE POLYGRAPH AND THE MILITARY COURT-MARTIAL

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<sup>175</sup> See *infra* notes 259-68 and accompanying text.

<sup>176</sup> 242 Cal. Rptr. at 909.

<sup>177</sup> *Id.*

<sup>178</sup> *State v. Marti*, 290 N.W.2d 570, 586 (Iowa 1980), *reaff’g*, *State v. Conner*, 241 N.W.2d 447, 457-58 (Iowa 1976).

<sup>179</sup> *Perry v. State*, 541 N.E.2d 913, 915 (Ind. 1989).

<sup>180</sup> *State v. Ahlfinger*, 50 Wash. App. 466, 749 P.2d 190 (1988).

<sup>181</sup> *Id.* at 472.

<sup>182</sup> *Id.* (citing *State v. Black*, 109 Wash. 2d 336, 346-47, 745 P.2d 12 (1987) (in a rape prosecution where the defense is consent, testimony regarding “rape trauma syndrome” was held inadmissible because it is not “scientifically reliable” and therefore not probative on the issue of whether the victim was raped)).

<sup>183</sup> *Id.*

Consistent with the federal courts, the military initially adopted the common law “*Frye* test” to govern the admissibility of scientific evidence.<sup>184</sup> The *Frye* test effectively barred the introduction of polygraphs in military courts-martial until the introduction of paragraph 142e, Manual for Courts-Martial, 1969 (Rev.).<sup>185</sup> Departing from the general scientific standard of *Frye*, paragraph 142e specifically prohibited the admissibility of polygraph evidence.<sup>186</sup> Finding that the Manual for Courts-Martial was a proper and valid exercise of executive authority, trial judges repeatedly denied the defense’s request to lay the foundation for expert testimony based on the results of polygraph examinations.<sup>187</sup> However, paragraph 142(e) was superseded by the Presidential enactment of the Military Rules of Evidence, effective 1 April 1981.<sup>188</sup>

The adoption of the MREs in 1980 provided little guidance for the courts in deciding the admissibility of polygraph evidence.<sup>189</sup> Noting the advisory committee had stated only that MRE 702 “may be broader and may supersede *Frye v. United States*,”<sup>190</sup> many military judges nevertheless resurrected the former common law standard of “general acceptance” and refused to admit polygraph evidence.<sup>191</sup> Meanwhile, both counsel and scholars debated the conflicting standards of the *Frye* test and the “helpfulness” standard of MRE 702.<sup>192</sup>

### A. *United States v. Gipson*

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<sup>184</sup> *United States v. Gipson*, 24 M.J. 246, 250 (C.M.A. 1987) (citing *United States v. Hulen*, 3 M.J. 275, 276 (C.M.A. 1977); *United States v. Ford*, 4 U.S.C.M.A. 611, 16 C.M.R. 185 (1954)).

<sup>185</sup> Donald F. O’Conner, Jr., *The Polygraph: Scientific Evidence at Trial*, 37 *Naval L. Rev.* 97, 99 (1988).

<sup>186</sup> *United States v. Gipson*, 24 M.J. at 250 (citing *United States v. Ledlow*, 11 U.S.C.M.A. 659, 663, 29 C.M.R. 475, 479 (1960)). Paragraph 142e provided: “The conclusions based upon or graphically represented by a polygraph test . . . are inadmissible in evidence in a trial by court-martial.” 24 M.J. at 250.

<sup>187</sup> See O’Conner, Jr., *supra* note 186, at 98-99 n.6, 8 (1988) (citing *United States v. Helton*, 10 M.J. 820 (A.F.C.M.R. 1981) and *United States v. Martin*, 9 M.J. 731 (N.M.C.M.R. 1979), *aff’d*, 13 M.J. 66 (1982)).

<sup>188</sup> *Id.* at 99 n.13 (citing *United States v. Bothwell*, 17 M.J. 684, 686 n.2 (A.C.M.R. 1983)).

<sup>189</sup> 24 M.J. at 250-51.

<sup>190</sup> *Id.* at 251 (quoting MANUAL FOR COURTS-MARTIAL, *United States, Drafters’ Analysis*, A18-93, (1969 ed. Rev.)).

<sup>191</sup> O’Conner, Jr., *supra* note 185, at 102.

<sup>192</sup> Mil. R. Evid. 702 provides: “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” MCM, *supra* note 2, Mil. R. Evid. 702.

In a decision that pre-dated *Daubert* by six years, the COMA in *United States v. Gipson*<sup>193</sup> concluded that “*Frye* has been superseded and ‘should be rejected as an independent controlling standard of admissibility.’”<sup>194</sup> Speaking to the specific facts before it, the court held that the accused was entitled to lay the foundation for admission of favorable polygraph evidence. The court did not invoke a constitutional argument as the basis of its holding. Instead, it merely clarified the application of MREs 401-403 and MRE 702.

Boiler Technician Second Class Gipson was charged with three specifications of possession, transfer, and sale of lysergic acid diethylamide (LSD).<sup>195</sup> The Government’s evidence included the testimony of two servicemen who claimed that they had purchased the drugs from the accused.<sup>196</sup> Gipson was subjected to two polygraphs, one *ex parte* and one conducted by the Naval Investigative Service.<sup>197</sup> The *ex parte* examination which Gipson secured at his own initiative and expense indicated that his denial of the charge was truthful.<sup>198</sup> Conversely, the Naval Investigative Service (NIS) examiner conducted a separate polygraph examination and concluded that Gipson was deceptive in answering the relevant questions.<sup>199</sup>

At trial, Gipson made a motion *in limine* to admit the “exculpatory” polygraph evidence.<sup>200</sup> While the Government was willing to stipulate to the examiner’s expertise, it objected to the defense’s attempt to lay the foundation arguing “that case law . . . points out that such evidence is not reliable at this—at least has not been shown to be reliable and scientifically acceptable.”<sup>201</sup> The judge ruled that neither party would be permitted to lay the foundation to admit the polygraph evidence, reasoning that the polygraph field was insufficiently developed in the scientific community and that an examination “more or less, takes that function from the fact finder.”<sup>202</sup>

After being affirmed by the Navy-Marine Court of Military Review (hereinafter NMCMR), the COMA reversed and remanded. The court concluded that “depending on the competence of the examiner, the suitability of the examinee, the nature of the particular testing process employed, and such other factors as may arise” polygraph evidence was as reliable and helpful as other evidence routinely admitted in criminal trials.<sup>203</sup> Additionally,

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<sup>193</sup> *United States v. Gipson*, 24 M.J. 246 (C.M.A. 1987).

<sup>194</sup> *Id.* at 251 (quoting *United States v. Downing*, 753 F.2d 1224, 1233-37 (3rd Cir. 1985)).

<sup>195</sup> *Id.* at 247.

<sup>196</sup> *Id.* at 248.

<sup>197</sup> *Id.* at 247. The record does not indicate which test was administered first.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 253.



the court was not convinced that the evidence was so collateral, confusing, time-consuming, or prejudicial that it required exclusion.<sup>204</sup>

The court divided scientific evidence into three levels. The highest level constituted evidence for which “the principles underlying the expertise are so judicially recognized that it is unnecessary to reestablish those principles in each case.”<sup>205</sup> It was therefore possible to take judicial notice of the general principles supporting this category of evidence, in which the court included “fingerprints, ballistics, or x-ray evidence.”<sup>206</sup> The lowest level, commonly termed “junk science,” is composed of “contraptions, practices, techniques, etc.” which are so discredited that a trial judge may as a matter of law decline to consider them.<sup>207</sup> In this category the court placed phrenology, astrology, and voodoo.<sup>208</sup> To the middle level, composed of “scientific and technical endeavor that can neither be accepted nor rejected out of hand,” the court assigned polygraph evidence.<sup>209</sup>

Acknowledging the scientific arguments on both sides of the polygraph debate, the court noted that “the consensus of experts seems to be that, under the best of conditions, and especially in the criminal context, competent operators can identify truth and deception at rates significantly better than chance, i.e., 50 percent.”<sup>210</sup> Addressing the reliability of the evidence, the court endorsed claims that *ex parte* examinations may have higher rates of false negatives; because the suspect knows deceptive results will be discarded “he has little to fear.”<sup>211</sup>

The court next reviewed the four pertinent rules of evidence, concluding that “[t]aken together, the rules seem to describe a comprehensive scheme for processing expert testimony.”<sup>212</sup> The first three, MRE 401,<sup>213</sup> MRE 402,<sup>214</sup> and MRE 403,<sup>215</sup> are referred to as “legal relevance.”<sup>216</sup> Experts

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<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 249.

<sup>206</sup> *Id.* (quoting *United States v. Downing*, 753 F.2d 1224, 1234 (3d Cir. 1985)).

<sup>207</sup> *Id.* at 249.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 248.

<sup>211</sup> *Id.* at 249. This concern, commonly referred to as the “Friendly Examiner Hypothesis,” has not been supported by any study. See Appendix notes 561-62 and accompanying text.

<sup>212</sup> *Id.* at 251.

<sup>213</sup> Mil. R. Evid. 401 provides:

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence.

MCM, *supra* note 2, Mil. R. Evid. 401.

<sup>214</sup> Mil. R. Evid. 402 provides:

are also permitted by MRE 702 to testify in the form of an opinion or otherwise . . . if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.<sup>217</sup> In deciding whether the testimony would be “helpful” under MRE 702, the COMA cited the balancing test utilized in *United States v. Downing*:

(1) the soundness and reliability of the process or technique used in generating the evidence, (2) the possibility that admitting the evidence would overwhelm, confuse, or mislead the jury, and (3) the proffered connection between the scientific research or test result to be presented, and particular disputed factual issues in the case.<sup>218</sup>

The court made clear that it placed little weight on the argument that factfinders will be overwhelmed by polygraph testimony.<sup>219</sup> While citing a “number of recent studies” that concluded juries are generally capable of evaluating and giving due weight to the evidence,<sup>220</sup> the court conceded that if the polygraph evidence was admitted, the jury may be provided a “range of accuracy that a qualified operator might be able to attain.”<sup>221</sup>

The court further acknowledged that some degree of reliability is implicit in the logical relevance determination and that the “helpfulness” standard of MRE 702 requires an additional “quantum of reliability.”

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All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States as applied to members of the armed forces, the code, these rules, this Manual, or any Act of Congress applicable to members of the armed forces. Evidence which is not relevant is not admissible.

MCM *supra* note 2, Mil. R. Evid. 402.

<sup>215</sup> Mil. R. Evid. 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

MCM *supra* note 2, Mil. R. Evid. 403.

<sup>216</sup> Chief Justice Everett lists the following factors which he would take into account in the reliability determination: acceptance of the relied upon theories in the scientific community; the training, experience, and skill of the operator; whether the polygraph was the first one taken; and whether the adverse party was permitted to observe the examination. 24 M.J. at 255 (Everett, C.J., concurring).

<sup>217</sup> *Id.* at 251.

<sup>218</sup> *Id.* (citing 753 F.2d at 1237).

<sup>219</sup> *Id.* at 253 n.11.

<sup>220</sup> *Id.* (citing Imwinkelried, *The Standard for Admitting Scientific Evidence: A Critique From the Perspective of Juror Psychology*, 100 Mil. L. Rev. 99, 114-15 (1983)).

<sup>221</sup> 24 M.J. at 253 n.11.

However, the court failed to provide trial judges with specific guidelines to use in making the MRE 702 determination. Instead, the court stated that the *Frye* test was but one factor to be considered, and a judge should use his “own experience, his general knowledge, and his understanding of human conduct and motivation” to determine if the scientific evidence has a tendency to prove a fact or will assist the factfinder.<sup>222</sup> In essence, the trial judge was given considerable latitude in making this judgment.<sup>223</sup>

After analyzing the applicable MREs, the court addressed the due process arguments supporting an independent constitutional right to present favorable polygraph evidence. After discussing the underlying rationale and Supreme Court decisions cited in its support,<sup>224</sup> the court expressly rejected this theory by reasoning that “there can be no right to present evidence—however much it purports to exonerate an accused—unless it is shown to be relevant and helpful.”<sup>225</sup> This statement should not be over emphasized, as it merely reasons that all evidence, including exculpatory scientific evidence, must comply with the minimum requirements of the MREs. However, although the basic relevancy and helpfulness requirements apply to both the prosecution and defense evidence, the court did note that due process might suggest military judges give the accused the benefit of the doubt.<sup>226</sup>

The *Gipson* court next outlined the permissible uses of polygraph evidence at trial. First, concluding that polygraph evidence goes to the examinee’s credibility but not character,<sup>227</sup> the court stated that at best the expert can provide an opinion regarding the deceptiveness of the examinee in making a particular assertion at the time of the exam.<sup>228</sup> Any inference concerning the truthfulness of the examinee’s in-court testimony is left to the fact-finder.<sup>229</sup>

Second, assuming that the examinee’s statement is offered as a basis for the polygraph examiner’s opinion and not for the truth of the matter asserted,<sup>230</sup> the court reasoned that an expert’s opinion as to the truthfulness of statements made during an exam could support a direct inference of guilt or

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<sup>222</sup> *Id.* at 251-52 (citing McCormick on Evidence (E. Cleary, 3d ed. 1984) at 544).

<sup>223</sup> *Id.* at 251.

<sup>224</sup> *See supra* notes 103-134 and accompanying text.

<sup>225</sup> 24 M.J. at 252.

<sup>226</sup> *Id.*

<sup>227</sup> This distinction is relevant to the Mil. R. Evid. 608 argument presented by the Government in both *Gipson* and *Scheffer*. The Government argued that Mil. R. Evid. 608(a) and (b) bars the admission of polygraph evidence because it is “evidence of truthful character” and the character of the witness was not attacked. However, the Court concluded that since polygraph results do not reveal character, the rule is inapposite and one must continue an analysis under Mil. R. Evid. 401-403 and Mil. R. Evid. 702.

<sup>228</sup> 24 M.J. at 253.

<sup>229</sup> *Id.* at 253.

<sup>230</sup> *Id.* (citing Mil. R. Evid. 703 and 801(c)).

innocence. However, in order to preserve the role of the fact-finder, the declarant would have to provide consistent testimony.<sup>231</sup>

Writing in dissent, Judge Sullivan concluded that the court had failed to address the particular issue before the court: whether the military judge abused his discretion by refusing the defense an opportunity to lay the foundation for the polygraph evidence to be admitted.<sup>232</sup> Expressing misgivings about the general reliability of the polygraph evidence and understanding the potential for confusion that would result from a battle of the opposing counsels' experts, Judge Sullivan concluded that the judge's use of a pre-emptive strike as authorized by MRE 403 was justified.<sup>233</sup>

As one might expect, the *Gipson* opinion sparked a great deal of debate in both the academic and legal communities.<sup>234</sup> The court was aware of the battle raging in the scientific community over the reliability of polygraph examinations and the limited number of forums which would entertain the debate. Invoking the spirit of the adversarial process, the court provided the experts with a forum to proffer the competing arguments before the trial judges. In light of the recent failures of similar state experiments,<sup>235</sup> at least one commentator suggested as an alternative that the Rules for Courts-Martial be amended to forbid the introduction of polygraph examinations into evidence.<sup>236</sup> In the words of that author, the military should "[l]et [the battle] rage somewhere else."<sup>237</sup>

## B. Post-*Gipson* Decisions

The so-called battle over the admissibility of the polygraph was a rout. Even though the gatekeeping function was placed back in the hands of the trial judge during the post-*Gipson* period, the ultimate admissibility determinations

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<sup>231</sup> *Id.* In a final footnote, the Court noted that under Mil. R. Evid. 302(d), the declarant may be required to submit to a government administered polygraph. Any refusal to do so could be interpreted as a refusal to cooperate, and provide grounds for the exclusion of the defense proffered polygraph. *Id.* at 253 n.12.

<sup>232</sup> *Id.* at 255.

<sup>233</sup> *Id.* But see O'Conner, Jr., *supra* note 185, at 113 (arguing that "whether the pre-emptive strike is the result of a *per se* prohibition or patently absurd evidence, the strike is authorized by rule 702, not rule 403.").

<sup>234</sup> See generally O'Conner, Jr., *supra* note 186; Randy V. Cargill, *United States v. Gipson: A Leap Forward or Impetus For A Step Back*, *Army Law.*, November 1988 at 27; Ronald J. Simon, *Adopting A Military Approach to Polygraph Evidence Admissibility: Why Federal Evidentiary Protections Will Suffice*, 25 *Tex. Tech L. Rev.* 1055 (1994).

<sup>235</sup> Cargill, *supra* note 234, at 31 (noting that in 1981 Wisconsin ended its seven year experiment that allowed for the admission of stipulated polygraph evidence. The Wisconsin Supreme Court stated that the "burden on the trial court to assess the reliability of stipulated polygraph evidence may outweigh any probative value the evidence may have.") (citing *State v. Dean*, 103 Wis. 2d 228, 307 N.W.2d 628, 653 (1981)).

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

remained the same. While DoD conducted over 30,000 polygraph examinations during this period,<sup>238</sup> only six reported cases came before the military appeal courts in which the trial judge had refused the admission of potentially exculpatory results. Not once did the trial judge's refusal to admit the results of an exculpatory polygraph examination constitute an abuse of discretion. Likewise, in the two cases in which the trial judge did permit the introduction of testimony that the accused had failed a polygraph, the court found reversible error.

### 1. Exculpatory Polygraph Results

Six cases came before military appeal courts in which the trial judge refused to admit potentially exculpatory polygraph results. In the first two cases, the court found that the testimony was irrelevant because the accused did not testify.<sup>239</sup> In the third, *United States v. McKinnie*, the Army Court of Military Review (hereinafter ACMR) refused to find an abuse of discretion when the trial judge permitted the laying of a foundation but ultimately denied the introduction of a potentially exculpatory polygraph examination.<sup>240</sup> On review, COMA held that the relevancy requirements of MRE 401 and 402 were met despite the fact that the accused did not take the stand.<sup>241</sup> Citing its holding in *Abyeta*,<sup>242</sup> the court noted that unless the accused takes the stand and places his credibility in issue, polygraph evidence showing lack of deception is usually not relevant. However, the charges against McKinnie included false swearing. Because it tended to prove that the statements either were not false or were not believed to be false, the polygraph evidence showing a lack of deception was considered relevant.<sup>243</sup>

The court also found that since the defense polygraph examiner was "highly qualified and used accepted polygraph techniques and reliable equipment," his expert testimony regarding the appellant's lack of deception met the requirements of MRE 702.<sup>244</sup> However, the court refused to find that the trial judge's MRE 403 balancing test constituted an abuse of discretion. The judge provided four reasons for his decision: 1) lack of reliability of an *ex*

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<sup>238</sup> *Annual Polygraph Report to Congress*, Department of Defense Polygraph Program, Office of the Assistant Secretary of Defense (Command, Control, Communications, and Intelligence) Fiscal Years 1987-1991.

<sup>239</sup> *United States v. Abyeta*, 25 M.J. 97, 98 (C.M.A. 1987), *cert. denied*, 484 U.S. 1027 (1988); *United States v. Berg*, 44 M.J. 79, 80 (C.A.A.F. 1996) ("Since [Berg] elected not to testify at the re-hearing, it is not apparent what rule of evidence would permit the receipt of these out-of-court statements offered presumably to prove the truth of the matters asserted.").

<sup>240</sup> *United States v. McKinnie*, 29 M.J. 825, 826 (A.C.M.R. 1989), *aff'd*, 32 M.J. 141 (C.M.A. 1991).

<sup>241</sup> *Id.* at 827.

<sup>242</sup> 25 M.J. 97 (C.M.A. 1987).

<sup>243</sup> 29 M.J. at 827.

<sup>244</sup> *Id.*

*parte* exam, 2) the likelihood of misleading or confusing the court members, 3) wasting time, and 4) delaying the trial. The court only explicitly agreed with the first reason, citing the unreliability of *ex parte* examinations and the declining reliability of subsequent tests.<sup>245</sup>

In the fourth case, *United States v. Howard*, the Coast Guard Court of Military Review also found that the judge did not err by denying the admission of appellant's exculpatory polygraph examination after permitting an opportunity for a foundation to be laid. The judge stated, with respect to the ambiguous wording of the polygraph questions, "I am not satisfied as to the soundness and reliability of the polygraph process,"<sup>246</sup> and concluded that "the helpfulness test under MRE 702 is not met and that under MRE 403 confusion would be created and the [m]embers would be misled."<sup>247</sup>

The final two cases were decided on similar grounds. In *United States v. Jensen*, the COMA simply stated that the exclusion was within the discretion of the trial judge.<sup>248</sup> In *United States v. Pope*, the COMA also determined that the trial judge had met the mandate of *Gipson* and had, therefore, exercised proper judicial discretion.<sup>249</sup>

## 2. Inculpatory Polygraph Results

In the two cases involving inculpatory examinations, the COMA found reversible error. In *United States v. Rodriguez*, the COMA held that the Government had failed to lay the proper foundation needed to satisfy the reliability components of MREs 401-403 and MRE 702.<sup>250</sup> In the second case, *United States v. Baldwin*, the military judge allowed the Government to

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<sup>245</sup> *Id.* at 828. While the polygraph examination was *ex parte*, the defendant was willing to undergo a second test conducted by the Government. However, the Government refused to provide the exam because of the previous postponements of the trial date. *Id.*

<sup>246</sup> *United States v. Howard*, 24 M.J. 897, 905 (C.G.C.M.R. 1987), *review denied*, 26 M.J. 231 (C.M.A. 1988).

<sup>247</sup> *Id.* at 906.

<sup>248</sup> *United States v. Jensen*, 25 M.J. 284, 289 (C.M.A. 1987).

<sup>249</sup> *United States v. Pope*, 30 M.J. 1188, 1193 (A.F.C.M.R. 1990), *review denied*, 32 M.J. 249 (C.M.A. 1990). The trial judge had concluded that "in light of the controversy regarding the validity of the test, the *ex parte* nature of the test results, the lack of stipulations by the parties as to the test results, the lack of independent quality control, the absence of fear of detection on the part of the accused, and the dearth of evidence as to the acceptance of polygraph evidence in the scientific community, I will not admit the proffered defense polygraph evidence." *Id.*

<sup>250</sup> *United States v. Rodriguez*, 37 M.J. 448, 452 (C.M.A. 1993). The COMA found that the foundation was lacking for three reasons. First, the polygraph examiner included questions which did not address the criminal conduct in question, preventing the examiner to identify the source of deception. Second, although the examiner testified that it was "normally required," no post-test interview was conducted. Third, the examiner had committed a typographical error in marking one of the control questions, which did "nothing to prop up the reliability of this examination." *Id.* at 452-453.

elicit testimony from the accused that he had failed a polygraph examination.<sup>251</sup> This testimony was presented after the jury had deliberated and recalled the accused to the stand, although the member's questions did not include inquires into the existence of the polygraph examination.<sup>252</sup> The COMA held under these circumstances the testimony was unduly prejudicial and constituted reversible error.<sup>253</sup>

### C. Military Rule of Evidence 707

After almost four years, the "battle of the polygraph" was ended. In 1991, President Bush promulgated MRE 707, which adopted "a bright-line rule that polygraph evidence is not admissible by any party to a court-martial even if stipulated to by the parties."<sup>254</sup> The President acted pursuant to the power delegated by Congress under Article 36(a), UCMJ, the authority to prescribe the modes of proof before trial by courts-martial, "in regulations, which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with [the UCMJ]."<sup>255</sup> The CAAF has held such action by the President to be a lawful delegation of power.<sup>256</sup> The question remained, however, whether this particular *per se* exclusion violated the accused's constitutional right to due process or Sixth Amendment right to present a defense.

With the promulgation of MRE 707, the COMA holding in *Gipson* was specifically overruled as it applied to polygraph evidence. In the Drafters'

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<sup>251</sup> United States v. Baldwin, 25 M.J. 54 (C.M.A. 1987).

<sup>252</sup> *Id.* at 55-56.

<sup>253</sup> *Id.* at 56.

<sup>254</sup> Mil. R. Evid. 707 provides:

(a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence.

(b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.

MCM, *supra* note 2, Mil. R. Evid. 707.

Mil. R. Evid. 707 did not prohibit the use of the results at the pre-trial or post-trial stages of the criminal trial, nor to Article 15 proceedings. *See* United States v. Rodriguez, 37 M.J. 448, 454 (C.M.A. 1993) (Crawford, J., concurring in the result).

<sup>255</sup> Article 36 (a), UCMJ, 10 U.S.C. § 836(a) (1994).

<sup>256</sup> United States v. Scheffer, 41 M.J. 683, 686 (citing United States v. Smith, 13 U.S.C.M.A. 105, 32 C.M.R. 105, 118-19, 1962 WL 4459 (1962); United States v. Weiss, 36 M.J. 224, 238 (C.M.A. 1992) (Crawford, J., concurring in the result), *aff'd*, 510 U.S. 163 (1994)), *rev'd*, 44 M.J. 442 (C.A.A.F. 1996), *cert. granted*, 117 S. Ct. 1817 (1997).

Analysis<sup>257</sup> accompanying the rule, the Drafters were careful to note that MRE 707 was not intended to accept or reject the applicability of *Gipson* toward the admissibility of any other evidence under MRE 702.<sup>258</sup>

The Drafters' analysis provided four policy grounds for the new rule, which have been repeatedly invoked and endorsed independently by a majority of federal and state courts.<sup>259</sup> The first concern is the "real danger that court members will be misled by polygraph evidence that 'is likely to be shrouded with an aura of near infallibility,'"<sup>260</sup> and relatedly, that "to the extent that the members accept polygraph evidence as unimpeachable or conclusive, despite cautionary instructions from the military judge, the members' 'traditional responsibility to collectively ascertain the facts and adjudge guilt or innocence is preempted.'"<sup>261</sup> The Drafters' rationale is in stark contrast to the court's rationale in *Gipson*, which placed little weight in this argument in analyzing the helpfulness of MRE 702.<sup>262</sup>

The trial judge typically considers whether the jury will treat the evidence as dispositive, or alternatively, assign the evidence "undue weight" while conducting the balancing test of MRE 403. However, it has been argued that the "prejudicial effect" language of FRE 403 applies only to "the arousal of impulses leading the trier of fact to decide factual issues on an irrelevant, usually highly emotional, basis."<sup>263</sup> Therefore, it is arguable whether the trial judge may properly exclude the evidence under MRE 403 because of the "undue weight" which the jury may give it. Instead, the "undue weight" argument may be persuasive in the determination of helpfulness under MRE 702, as outlined by the *Gipson* court's balancing test utilized first in *United States v. Downing*. For the purposes of a constitutional analysis, this analysis must be qualified. Even if there is no specific MRE which the judge can invoke as a ground to exclude the evidence based on the members' ability to objectively evaluate it, the Constitution may not preclude the President from promulgating such a rule.

Second, the Drafters were concerned that polygraph evidence would confuse the trial issues, diverting the members' attention away from the ultimate determination of guilt or innocence, resulting in "the court-martial

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<sup>257</sup> The introduction to the Drafters' Analysis indicates that Military Rules of Evidence were drafted by the Evidence Working Group of the Joint-Service Committee on Military Justice. MCM *supra* note 2, Drafters' Analysis, at A22-1.

<sup>258</sup> *Id.* at A22-48 (1995).

<sup>259</sup> See *supra* notes 30-67, 155-183, and accompanying text.

<sup>260</sup> MCM *supra* note 2, Drafters' Analysis, at A22-48 (quoting *United States v. Alexander*, 526 F.2d 161, 168-69 (8th Cir. 1975).

<sup>261</sup> *Id.*

<sup>262</sup> See *supra* notes 219-21 and accompanying text.

<sup>263</sup> McCall, *supra* note 147, at 376 (citing the Fed. R. Evid. 403 advisory committee notes).



degenerating into a trial of the polygraph machine.”<sup>264</sup> This concern is closely related to the Drafters’ third policy rationale; the “substantial waste of time” involved in litigating the “reliability of the particular test and qualifications of the specific examiner . . . in every case.”<sup>265</sup> This concern is also inherently ruled upon by the trial judge under the balancing test of MRE 403. If the evidence’s probative value is substantially outweighed by the potential for “misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence,”<sup>266</sup> the court is free to reject it.

Finally, the Drafters stated that the “reliability of polygraph evidence has not been sufficiently established and its use at trial impinges upon the integrity of the judicial system.”<sup>267</sup> The first segment of this rationale is an argument against admissibility under the “helpfulness” test of MRE 702, as it relates to the “soundness and reliability of the technique used in generating the evidence.”<sup>268</sup> The second segment highlights a recurring theme in the debate about the polygraph; that the determination of a witness’ credibility is within the sole province of the jury.

It may be argued that the practical effect of MRE 707 was to relegate polygraph evidence to *Gipson’s* third category composed of “junk science” which the trial judge may reject as a matter of law. However, the ultimate question is whether the President may exclude evidence which is assigned to the middle category of evidence. In enacting MRE 707, the President acted pursuant to the power delegated him by Congress, and the determination of the MRE’s constitutionality should not be determined solely by an analysis of evidence under any one rule. In other words, whether the evidence would be admissible absent MRE 707 is not determinative of the rule’s validity under the Constitution. Instead, the President was directed to promulgate the MREs as he saw “practical,” which involves a determination not only of the accused’s constitutional right to present evidence but also the compelling interest weighing against admissibility.

It is clear that MRE 707 applies equally to the Government and an accused. While many have focused on the limitation the rule imposed on the accused’s right to present evidence, the same limitation is imposed on the Government. MRE 707 does not prevent the accused from testifying in his defense. Instead, it prevents both the Government and the defense from presenting expert evidence concerning the accused’s belief in his innocence at the time of the polygraph examination. The accused is still afforded the other

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<sup>264</sup> MCM *supra* note 2, Drafters’ Analysis, at A22-48 (citing *State v. Grier*, 300 S.E.2d 351 (N.C. 1983).

<sup>265</sup> *Id.*

<sup>266</sup> See Mil. R. Evid. 403.

<sup>267</sup> MCM *supra* note 2, Drafters’ Analysis, at A22-48 (citing *People v. Kegler*, 242 Cal. Rptr. 897, 197 Cal. App. 3d 72 (1987).

<sup>268</sup> See *supra* notes 217-18 and accompanying text.

means of rebutting attacks on his credibility, including cross-examination of the Government's witnesses.

A number of commentators immediately questioned the Drafters' stated policy justifications for the new rule, as well as the potential constitutional concerns it presented.<sup>269</sup> Specifically, one writer has stated that in order to accept the Drafters' rationale, the assumptions must be made that "the adversarial process is a failure and the competent use of pre-trial preparation and effective cross-examination pales in comparison to the testimony of the polygraph examiner," that the members are incapable of following or understanding the judge's instructions in this area, and that the military judge is "incapable of applying long-established evidentiary rules to polygraph evidence."<sup>270</sup> In short, many felt the new rule displayed a lack of confidence in the military justice system and the individuals who are vital to its efficient functioning.

#### **D. Constitutional Challenges to MRE 707**

While military trial judges consistently invoked MRE 707 to preclude any attempt by an accused to lay the foundation for the admission of polygraph evidence, by 1995 it was clear that the CAAF would address the constitutionality of the new rule. The CAAF was provided its first opportunity when the case of *United States v. Williams*<sup>271</sup> was appealed from the Army Court of Military Review.

##### *1. United States v. Williams*

Specialist James Williams was a Chaplains' Funds Clerk who, with others, was responsible for collecting and disbursing funds.<sup>272</sup> During the time period of August 1991 to February 1992, eighteen unauthorized disbursements were made from the fund account.<sup>273</sup> Williams admitted to three of the unauthorized disbursements but denied stealing the rest.<sup>274</sup> In July 1992, Williams consented to taking a polygraph examination conducted by the

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<sup>269</sup> See, e.g., John J. Canham, Jr., *Military Rule Of Evidence 707: A Bright-Line Rule That Needs to Be Dimmed*, 140 Mil. L. Rev. 65 (1993); Mark D. Maxwell, et. al., *Recent Developments Concerning The Constitutionality of Military Rule of Evidence 707*, Army Law. 13 (Dec. 1994); Major Andrew M. Warner, *The New Rule Against Polygraphs*, Army Law., September 1991, at 31.

<sup>270</sup> Canham, Jr., *supra* note 269, at 74.

<sup>271</sup> *United States v. Williams*, 43 M.J. 348 (C.A.A.F. 1995), *cert. denied*, 116 S. Ct. 925 (1996).

<sup>272</sup> *Id.* at 349.

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

Army's Criminal Investigation Command (CID).<sup>275</sup> The examiner's relevant questions focused on whether Williams stole from the fund. In the opinion of the examiner, no deception was indicated.<sup>276</sup> When the polygraph charts were sent to the CID quality control center, the reviewing examiner concluded the tests were inconclusive.<sup>277</sup>

At Williams' request, he was re-tested in August 1992 by the original CID examiner. Again the examiner opined that no deception was indicated to the relevant questions.<sup>278</sup> After the charts were read by the examiner's immediate supervisor, they were forwarded to quality control. Quality control concluded that the non-deceptive result was "strong."<sup>279</sup>

At his court-martial, Williams filed a motion asking that he be permitted to lay the foundation for the admission of the two exculpatory examinations.<sup>280</sup> The military judge denied his request, finding that MRE 707 was a proper exercise of the President's rule-making authority and violated neither the Fifth or Sixth Amendments. Williams did not testify at trial, and claimed that the denial of the motion "impacted greatly" on his decision.<sup>281</sup> A general court-martial convicted Williams of all charges and specifications.<sup>282</sup> The ACMR remanded and ordered an additional hearing on the admissibility of the polygraph evidence.<sup>283</sup>

The CAAF set the decision of the ACMR aside, holding that before it was necessary to answer the constitutionality of MRE 707, some exception to the hearsay rule under the MREs must be present.<sup>284</sup> The court ruled that Williams had "no right to introduce the polygraph evidence without taking the stand and testifying consistently, or without offering some other plausible evidentiary basis."<sup>285</sup>

After citing the rationale of its prior holding in *Gipson*, the CAAF noted that neither *Gipson* nor *Daubert*<sup>286</sup> governed the admissibility of polygraph evidence post MRE 707.<sup>287</sup> In both cases, the legal analysis began

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<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> *Id.* at 350. Despite the polygraph results, Williams was charged with forging checks in violation of Article 123, UCMJ, and one charge of stealing the cumulative value of the checks in violation of Article 121, UCMJ. He pleaded guilty to a lesser offense of wrongful appropriation, but plead not guilty to the forgery and larceny specifications. *Id.* at 349.

<sup>280</sup> *Id.* at 350.

<sup>281</sup> *Id.*

<sup>282</sup> *Id.* at 349.

<sup>283</sup> *Id.* (citing 39 M.J. 555, 559 (1994)).

<sup>284</sup> *Id.* at 355.

<sup>285</sup> *Id.*

<sup>286</sup> *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

<sup>287</sup> 43 M.J. at 351.

with the relevancy determination outlined in MRE 402, and then moved to the helpfulness determination of MRE 702. However, the court noted that with the promulgation of MRE 707, the operation of MRE 402's exclusionary clause now expressly bars the introduction of the polygraph evidence.<sup>288</sup> Consequently, the court stated that the federal cases applying the *Daubert* holding to polygraph evidence were "not germane to our inquiry."<sup>289</sup>

Having held that the MREs effectively precluded the admission of the polygraph evidence, the court re-focused the analysis to the question of "whether, and under what circumstances, the *per se* prohibition of polygraph evidence in courts-martial might violate servicemembers' constitutional rights."<sup>290</sup> The court simply determined that the case before it did not require it to answer this question.<sup>291</sup>

The court reviewed the potential applicability of the two primary Supreme Court decisions which have addressed an accused's Sixth Amendment right to present evidence in his defense,<sup>292</sup> *Washington*<sup>293</sup> and *Chambers*.<sup>294</sup> However, the court observed that since Williams did not take the stand and "submit himself to the crucible of cross-examination" the polygraph evidence was "not just hearsay, but super-enriched hearsay."<sup>295</sup> The court further reasoned that by allowing the accused to "testify by proxy" through the polygraph examiner, "without at the same time allowing the opposition an opportunity to cross-examine or the fact-finder an opportunity to observe and make its own evaluation of the party's credibility," the adversarial process would be subverted.<sup>296</sup> In the end, the court concluded that the case before it did not require an answer to the constitutional question.

While Williams' conviction was ultimately upheld, the court made clear that "in the appropriate case" it would rule "whether the proffered polygraph evidence is sufficiently reliable and necessary that its automatic exclusion [under MRE 707] violates the accused's constitutional trial rights."<sup>297</sup> The court was finally presented with such a case in *United States v. Scheffer*.

## 2. *United States v. Scheffer*

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<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> *Id.* at 352.

<sup>291</sup> *Id.* at 355.

<sup>292</sup> *Id.* at 352.

<sup>293</sup> See *supra* notes 106-16 and accompanying text.

<sup>294</sup> See *supra* notes 117-37 and accompanying text.

<sup>295</sup> 43 M.J. at 354.

<sup>296</sup> *Id.* Judge Wiss reserved the question of whether a non-testifying defendant, after having lost a motion *in limine* to admit the expert testimony, may preserve the issue for appellate review. *Id.* at 355 (Wiss, J., concurring).

<sup>297</sup> *Id.* at 353.

Airman Scheffer began working as an AFOSI informant in March of 1992. He was advised that informants were subject to periodic urinalysis and polygraph testing.<sup>298</sup> On 7 April 1992, Scheffer was asked to provide a urine sample.<sup>299</sup> He asked to submit the sample the next day. On 10 April 1992, appellant submitted to an AFOSI polygraph examination concerning his use of illegal drugs and his status as an informant.<sup>300</sup> After evaluating the charts, the examiner concluded that deception was not indicated in Scheffer's negative responses to the relevant questions.<sup>301</sup> Four days later, AFOSI agent's learned that Scheffer's urine sample had tested positive for methamphetamine.<sup>302</sup>

Scheffer moved at trial to admit the results of the potentially exculpatory polygraph.<sup>303</sup> The prosecution objected. As in *Williams*, the military judge denied the request and declared that the Constitution did not preclude the President from promulgating MRE 707.<sup>304</sup>

The Air Force Court of Criminal Appeals (hereinafter AFCCA), *en banc*, found the military judge had not abused his discretion, and affirmed the findings and sentence as modified.<sup>305</sup> Reviewing the source of executive authority to promulgate MRE 707, the court concluded that it could not declare MRE 707 unconstitutional absent "a clear showing that the President exceeded the discretionary powers conferred upon him by Article 36 (a)."<sup>306</sup>

After reviewing *Washington, Chambers*, and *Rock*, as well as the CAAF case law, the court outlined the framework to guide its constitutional analysis. This framework closely follows the criterion utilized by the federal and state courts in applying the compulsory process clause to their polygraph rules.<sup>307</sup> In order for MRE 707 to survive constitutional scrutiny, AFCCA asserted that:

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<sup>298</sup> *United States v. Scheffer*, 41 M.J. 683 (A.F.Ct.Crim.App. 1995), *rev'd*, 44 M.J. 442, 443 (C.A.A.F. 1996), *cert. granted*, 117 S. Ct. 1817 (1997).

<sup>299</sup> 41 M.J. at 685.

<sup>300</sup> *Id.*

<sup>301</sup> The relevant questions were: "1) Since you've been in the Air Force, have you used any illegal drugs?; 2) Have you lied about any of the drug information you've given to OSI?; 3) Besides your parents, have you told anyone else you're assisting OSI?" *Id.* at 685. Note that since the third question does not implicate the criminal conduct for which Scheffer was charged, if the results had indicated deception the examiner would not be able to differentiate the source of the deception because an examiner's opinion is based upon the entire test, not a specific question. *See* Appendix note 491.

<sup>302</sup> 41 M.J. at 686.

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> The modification to Scheffer's sentence was a day of pretrial confinement credit. *Id.* at 694.

<sup>306</sup> *Id.* at 687 (citing *United States v. White*, 14 C.M.R. 84, 88, 3 U.S.C.M.A. 666, 1954 WL 2095 (1954)).

<sup>307</sup> *See supra* notes 155-83 and accompanying text.

1) *The expert testimony must meet the relevancy requirements of MRE 401 and 402 and be vital to the defense “when evaluated in the context of the entire record.”*<sup>308</sup> Acknowledging that polygraph evidence may be relevant to the credibility of the accused, the court stated that “we do not believe presentation of polygraph evidence was vital to the court member’s assessment of appellant’s credibility.”<sup>309</sup>

2) *The MRE must not “arbitrarily limit the accused’s ability to present reliable evidence.”*<sup>310</sup> The court ruled that MRE 707 did not arbitrarily limit this ability for five reasons:

- the President’s decision was based on sound policy grounds, given the uncertainty as to the polygraph’s general reliability,<sup>311</sup> and the potential battle of experts which would outweigh the evidence’s probative value;<sup>312</sup>
- MRE 707 applies a rule of evidence generally recognized, since the majority of federal circuit courts of appeal hold that polygraph evidence may not be introduced to “prove the truth of statements made during the polygraph examination”;<sup>313</sup>
- the fact that military judges typically resolve issues similar to those provided as rationale for MRE 707 “does not bar the President from determining that the probative value of polygraph evidence is substantially outweighed by more compelling factors”;<sup>314</sup>
- the court did not believe it was arbitrary for the President to prohibit scientific techniques which fall into the middle or lower level as announced in *Gipson*;<sup>315</sup>
- the court could not locate any federal case, before or after enactment of the FREs, which suggests that MRE 707, or any similar state rule, “unconstitutionally interferes with an accused’s right to due process or to present a defense.”<sup>316</sup>

3) *“[I]f the rule permits the admission of the evidence for some purpose but not others,” it may not limit admission by the defense more than the prosecution.*<sup>317</sup> The court found that MRE 707’s comprehensive prohibition was equally applicable to both defense and prosecution.<sup>318</sup>

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<sup>308</sup> 41 M.J. at 690.

<sup>309</sup> *Id.* at 691.

<sup>310</sup> *Id.*

<sup>311</sup> This rationale is supported by the COMA’s decision in *Gipson* to place polygraph evidence in the middle category of scientific evidence. Note this is a Mil. R. Evid. 401-402 reliability argument.

<sup>312</sup> Note this is a Mil. R. Evid. 403 argument.

<sup>313</sup> 41 M.J. at 691 (citing *United States v. Bounds*, 985 F.2d 188, 192 n.2 (5th Cir. 1993), *cert. denied*, 510 U.S. 845 (1993)).

<sup>314</sup> *Id.*

<sup>315</sup> *Id.* at 692.

<sup>316</sup> *Id.*

<sup>317</sup> *Id.* at 691.

<sup>318</sup> *Id.* at 692.

4) *The rule of evidence may not arbitrarily infringe upon the defendant's right to testify on his own behalf.*<sup>319</sup> The court found nothing in MRE 707 which would infringe on this right.<sup>320</sup>

The AFCCA's, finding that MRE 707 met this four factor test, concluded that MRE 707 "is a permissible rule 'designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'"<sup>321</sup>

Upon review, the CAAF held that the "*per se* exclusion of polygraph evidence, offered by an accused to rebut an attack on his credibility, without giving him an opportunity to lay a foundation under MRE 702 and *Daubert*, violates his Sixth Amendment right to present a defense."<sup>322</sup> The record was returned for a hearing at which time the accused would be permitted to lay the foundation for the admission of the polygraph evidence. The court's debate did not focus on whether polygraph evidence has obtained a level of reliability which would permit its admissibility. Instead, the issue became whether the President has the authority to promulgate a *per se* exclusion rule for evidence assigned to the middle level of the *Gipson* framework.

In the majority opinion, the court quickly distinguished between the case's statutory and constitutional dimensions. The statutory question was whether the President complied with Article 36 in promulgating the rule.<sup>323</sup> Noting that the issue was neither briefed nor argued, the court assumed that the President acted in accordance with the article when he "determined that the prevailing federal rule is not 'practicable' for courts-martial."<sup>324</sup> The court's language deserves comment. Apparently, the court equated the Article 36 phrase "generally recognized in the trial of criminal cases in the United States district courts" with the practice of the "majority" of federal jurisdictions. It is not clear that this is a fair reading of the Article. Arguably, since six of the thirteen federal circuits and forty-eight state courts still adhere to a *per se* exclusion rule absent stipulation,<sup>325</sup> no "generally recognized" rule exists.

Turning to the constitutional issue, the CAAF reviewed the Supreme Court decisions that address the accused's Sixth Amendment right to present a defense. The court quoted the Supreme Court's language in *Rock* that a "legitimate interest in barring unreliable evidence does not extend to *per se*

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<sup>319</sup> *Id.* at 691.

<sup>320</sup> *Id.* at 692.

<sup>321</sup> *Id.* (quoting *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038, 1049, 35 L. Ed. 2d 297 (1973)).

<sup>322</sup> 44 M.J. at 686.

<sup>323</sup> 44 M.J. at 444. The Court also remanded two additional cases because the defendant was not provided the opportunity to lay the foundation for the exculpatory polygraph. See *United States v. Mobley*, 44 M.J. 453 (C.A.A.F. 1996), *petition for cert. filed*, 65 U.S.L.W. 3518 (Jan 16, 1997) (NO. 96-1134); *United States v. Nash*, 44 M.J. 456 (C.A.A.F. 1996), *petition for cert. filed*, 65 U.S.L.W. 3518 (Jan 16, 1997) (NO. 96-1134).

<sup>324</sup> 44 M.J. at 445.

<sup>325</sup> See *supra* notes 30-67 and accompanying text.

exclusions that may be reliable in a particular case.”<sup>326</sup> While the exclusion in *Rock* concerned the ability of the accused to testify in her own defense, the court perceived “no significant constitutional difference” between this type of testimony and the presentation of polygraph evidence to support an accused’s testimony.<sup>327</sup> Given the unprecedented nature of the holding, it is disappointing that the CAAF provides no further analysis or explanation for why MRE 707 violates the accused’s Sixth Amendment right to present a defense.

The court then turned to a brief restatement of the applicable rules of evidence. Quoting from MRE 702, the court reiterated that expert testimony is subject to the “relevance requirements of MRE 401 and MRE 402 and the balancing requirements of MRE 403.”<sup>328</sup> It then noted that in *Daubert* the Supreme Court entrusted the gatekeeper function for the admissibility of scientific evidence to the trial judge.<sup>329</sup>

The court also addressed the proper scope of the polygraph examiner’s testimony. The expert may not testify that the accused was telling the truth.<sup>330</sup> Instead, the court held that “a properly qualified expert, relying on a properly administered examination, may be able to opine that an accused’s physiological responses to certain questions did not indicate deception.”<sup>331</sup>

Like the Fifth Circuit in *Posado*, the court did not hold that polygraph examinations would always, or ever, be admissible. However, the accused must be permitted the opportunity to lay the foundation for the admission of the evidence. In laying this foundation, the court provided the accused some guidance. First, it must be established that “the underlying theory—that a deceptive answer will produce a measurable physiological response—is scientifically valid.”<sup>332</sup> Second, evidence should be presented that the theory can be applied to the specific examination, which must include “evidence that the examiner is qualified, that the equipment worked properly and was properly used, and that the examiner used valid questioning techniques.”<sup>333</sup>

The court read *Daubert* to require that the military judge act as the evidentiary gatekeeper, who must weigh probative value against prejudicial impact in accordance with MRE 403.<sup>334</sup> The trial judge is to have wide

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<sup>326</sup> 44 M.J. at 446 (citing *Rock v. Arkansas*, 483 U.S. 44, 61 (1987)).

<sup>327</sup> *Id.*

<sup>328</sup> *Id.*

<sup>329</sup> *Id.*

<sup>330</sup> *Id.*

<sup>331</sup> *Id.*

<sup>332</sup> *Id.* at 446-47 (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-93, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)).

<sup>333</sup> *Id.* at 447.

<sup>334</sup> *Id.*



discretion in the ruling on admissibility, which will not be reversed unless a clear abuse of discretion is shown.<sup>335</sup>

The court specifically rejected the argument that the accused's ability to lay the foundation for the admission would "generate an unreasonable burden on the services."<sup>336</sup> Instead, it claimed that the introduction of polygraph evidence might actually prevent "needless litigation" by avoiding both mistaken prosecutions as well as "bogus claims of innocent [drug] ingestion."<sup>337</sup> Additionally, the court stated that it was unaware of any such dramatic increase in the number of polygraph cases following *Gipson*.<sup>338</sup> Finally, the court exclaimed that "our measure should be the scales of justice, not the cash register."<sup>339</sup>

Judge Sullivan dissented for reasons stated in his concurring opinion in *United States v. Williams*.<sup>340</sup> In that opinion, he provided his framework for addressing the constitutionality of MRE 707. First, he explained that the Fifth and Sixth Amendments apply to the military, and require "admission of relevant and reliable evidence as long as it applies to the crime, the witnesses, and the legal defenses to the crime."<sup>341</sup> However, Judge Sullivan explained that the Constitution "does not require admission of machine-generated evidence that only shows whether the defendant believes that his claim of innocence is truthful."<sup>342</sup> While it is uncertain whether he objected to either the reliability or relevance of the test, Judge Sullivan did state that polygraph testimony infringes upon the jury's role in determining credibility as well as raising "serious questions under MRE 608."<sup>343</sup> It should be noted in supporting the first contention, he quoted from the Ninth Circuit's opinion in *Brown v. Darcy*,<sup>344</sup> which has since been overruled.<sup>345</sup>

In her dissent, Judge Crawford did not specifically argue that polygraph evidence is no longer reliable or relevant.<sup>346</sup> Instead, she noted that an accused has a right to present legally and logically relevant evidence at trial, but that this right is not absolute and may yield to valid policy considerations.<sup>347</sup> Even

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<sup>335</sup> *Id.* (quoting *United States v. Piccinonna*, 885 F.2d 1529, 1537 (11th Cir. 1989), *aff'd*, 925 F.2d 1474 (11th Cir. 1991)).

<sup>336</sup> *Id.* at 448.

<sup>337</sup> *Id.*

<sup>338</sup> *Id.*

<sup>339</sup> *Id.*

<sup>340</sup> *Id.* at 449 (Sullivan, C.J., dissenting) (citing to *United States v. Williams*, 43 M.J. 348, 356 (C.A.A.F. 1995), *cert. denied*, 116 S. Ct. 925 (1996) (Sullivan, C.J., concurring in the result)).

<sup>341</sup> 43 M.J. at 356 (Sullivan, C.J., concurring in the result).

<sup>342</sup> *Id.*

<sup>343</sup> *Id.*

<sup>344</sup> *Brown v. Darcy*, 783 F.2d 1389 (9th Cir. 1986), *overruled by United States v. Cordoba*, 1997 WL 3317 (9th Cir. 1997).

<sup>345</sup> See *supra* notes 90-99 and accompanying text.

<sup>346</sup> 44 M.J. at 449 (Crawford, J., dissenting).

<sup>347</sup> *Id.*

assuming that polygraph evidence is relevant and reliable, Judge Crawford opined that “there is ample justification for [MRE 707].”<sup>348</sup>

In support of her conclusion, Judge Crawford stated that the policy justifications for MRE 707 contained in the Drafters’ Analysis, which in her opinion were not exclusive, satisfy the provisions set forth in Article 36(a), UCMJ.<sup>349</sup> To this list, she added the “practical consequences” of such a rule on the world-wide military justice system.<sup>350</sup> Citing statistics which reveal that the services annually conduct 4,000 court-martials and 100,000 criminal actions, 20% of which are drug cases, Judge Crawford reasoned that a “concomitant right of presenting evidence is the right to demand a polygraph examination during the investigative stage.”<sup>351</sup> This burden may well prove to be a “practical impossibility on the services.”<sup>352</sup> After noting that the federal courts are split on the issue, these considerations led her to conclude that a valid governmental interest, in light of the discretion delegated to the President by Article 36(a), validate MRE 707.<sup>353</sup> In fact, if the majority’s logic is correct, Judge Crawford noted that it calls into question the viability of MRE 502-12 and 803(6).

## V. THE SIXTH AMENDMENT AND MILITARY RULE OF EVIDENCE 707

Is the CAAF correct that an accused has a constitutional right to lay the foundation for the admission of an exculpatory polygraph examination in order to rebut an attack on his credibility? As Parts II and III of this article indicate, six federal circuits and forty-eight state jurisdictions that employ a *per se* exclusion rule absent stipulation do not think so, since the accused is not provided an opportunity to lay the foundation for the evidence before the trial judge in these jurisdictions.<sup>354</sup> It is entirely possible, of course, that the CAAF’s logic is correct and the Constitution requires a wholesale alteration in the treatment of polygraph evidence, and perhaps scientific evidence in general.

The issue is now before the Supreme Court. Although the Court has not articulated the applicability of the compulsory process clause to either polygraph evidence or scientific expert testimony, as early as 1977 members of the Court expressed their growing concern about the inconsistent treatment of

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<sup>348</sup> *Id.*

<sup>349</sup> *Id.* at 451. *See supra* notes 259-68 and accompanying text.

<sup>350</sup> *Id.*

<sup>351</sup> *Id.*

<sup>352</sup> *Id.* at 452.

<sup>353</sup> *Id.*

<sup>354</sup> *See supra* notes 30-67 and accompanying text.

the evidence amongst the circuits.<sup>355</sup> In 1982, then Justice Rehnquist opined that “[i]n a given case, this Court’s decisions may require that exculpatory evidence be admitted into evidence despite state evidentiary rules to the contrary.”<sup>356</sup>

The constitutional analysis of MRE 707 begins and ends with the following question: “Does the exclusion of an accused’s polygraph evidence result in an arbitrary restriction on his right to present relevant and material evidence?” Consequently, to support the holding in *Scheffer*, the CAAF must have made two findings. First, the polygraph evidence must be relevant and material. Second, the President’s justifications for the exclusion of the evidence are arbitrary.

It is indisputable that Congress, and by delegation the President, may impose limitations upon an accused’s right to present exculpatory evidence.<sup>357</sup> Announcing the judgment of the Court in *Montana v. Egelhoff*,<sup>358</sup> Justice Scalia, joined by Chief Justice Rehnquist, Justice Kennedy and Justice Thomas, explained that an accused “does not have an unfettered right to offer [evidence] that is incompetent, privileged, or *otherwise inadmissible under standard rules of evidence*.”<sup>359</sup> Although much of the controversy surrounding MRE 707 has focused on whether the evidence is otherwise inadmissible under the MREs, this statement does not necessarily imply that the accused *has* an unfettered right to offer evidence that is otherwise *admissible* under standard rules of evidence. The MREs may prevent the accused from presenting certain

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<sup>355</sup> *United States v. Masri*, 434 U.S. 907, 98 S. Ct. 309, 54 L. Ed. 2d 195 (1977) (White and Marshall, JJ., dissenting from the denial of cert.).

<sup>356</sup> *McMorris v. Israel*, 455 U.S. 967, 969, 102 S. Ct. 1479, 1480, 71 L. Ed. 2d 684 (1982) (Rehnquist and O’Connor, JJ., dissenting from the denial of cert.).

<sup>357</sup> Compare Prof. Westen’s conclusion that the language and purpose of the compulsory process clause mandates that “[t]he defendant has a constitutional right to call any material ‘witness,’ including himself.” Westen, *supra* note 102, at 120. In analyzing the rules of evidence which disqualify witnesses to avoid untrustworthy testimony, Prof. Westen concludes that “the defendant has a right to present any witness whose credibility is genuinely at issue, and that witnesses cannot be barred from testifying on his behalf unless they are so untrustworthy as to provide no basis short of pure speculation for evaluating their testimony.” *Id.* at 136. After examining the requirements of competency, relevancy, materiality, and favorableness, Prof. Westen also concluded that “the constitutional standard that governs the timely request of a nonindigent defendant to subpoena available witnesses from within the jurisdiction” is “the right to produce, and thus implicitly present, any witness who is capable of giving testimony that could reasonably tend to persuade a jury to return a verdict in the defendant’s favor.” Peter Westen, *Compulsory Process II*, 74 Mich. L. Rev. 191, 234 (1974).

<sup>358</sup> *Montana v. Egelhoff*, 116 S. Ct. 2013, 135 L. Ed. 2d 361, 64 U.S.L.W. 4500 (1996). Both the majority’s opinion and J. Crawford’s dissent in *Scheffer* discussed the proper interpretation of this case.

<sup>359</sup> *Id.* at 2017 (quoting *Talyor v. Illinois*, 484 U.S. 400, 410, 108 S. Ct. 646, 653, 98 L. Ed. 2d 798 (1988), *reh’g denied*, 485 U.S. 983 (1988)) (emphasis added). Although dissenting from the Court’s holding, Justice O’Connor, Justice Stevens, Justice Souter and Justice Breyer agree with this position. *Id.* at 2026.

evidence or may afford him special privileges. However, whether the accused has a constitutional right from or to such treatment is a separate analysis.

Consequently, if the results of the accused's polygraph exam are otherwise inadmissible under the standard rules of evidence, then MRE 707 cannot violate the accused's right to present a defense. If, on the other hand, the polygraph evidence is otherwise admissible, then it becomes necessary to consider whether the President has advanced "good and traditional policy support,"<sup>360</sup> i.e. non-arbitrary reasons, for excluding the evidence.

In *Scheffer*, the CAAF concluded that MRE 707 was unconstitutional as applied to the accused because it prevented the trial judge from applying MRE 401-403 and MRE 702. However, if polygraph evidence is inadmissible under the remaining rules of evidence, then it is immaterial whether the requirements of MRE 702 are met. Additionally, even assuming that the trial judge would determine that polygraph evidence meets the standard of MRE 702, the President may still exclude the evidence if legitimate interests are advanced.<sup>361</sup>

### **A. Is Polygraph Evidence Otherwise Inadmissible?**

The first requirement under the standard rules of evidence is that the evidence must be relevant as defined by MRE 401. For the purposes of this article, it will be assumed that the polygraph evidenced offer by the accused is relevant.<sup>362</sup> Once the evidence is determined to be relevant, then it is generally admissible under MRE 402. However, an accused does not have a right to present all relevant evidence. MRE 402 provides that relevant evidence is "admissible, except as otherwise provided by the Constitution. . . , the [UCMJ], these rules, this Manual, or any Act of Congress applicable to members of the armed forces."<sup>363</sup> As Justice Scalia has further noted, "the proposition that the Due Process Clause guarantees the right to introduce all relevant evidence is simply indefensible."<sup>364</sup>

Justice Scalia highlighted two "familiar and unquestionably constitutional evidentiary rules" which exclude relevant evidence.<sup>365</sup> The first rule is FRE 403 (and MRE 403), which permits the trial judge to exclude evidence "if its probative value is substantially outweighed by the danger of

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<sup>360</sup> *Id.* at 2017 n.1.

<sup>361</sup> This reasoning is true unless the CAAF has determined that the Sixth Amendment incorporates the remaining military rules of evidence, thereby "embalming the law of evidence in the Due Process Clause." *Green v. Georgia*, 442 U.S. 95, 98, 99 S. Ct. 2150, 60 L. Ed. 2d 738 (1979) (Rehnquist, J., dissenting). *See supra* note 134.

<sup>362</sup> One commentator has questioned how the defendant's credibility at the time of the exam becomes a disputed fact at issue. Canham, *supra* note 269, at 88.

<sup>363</sup> MCM *supra* note 2, Mil. R. Evid. 402.

<sup>364</sup> 116 S. Ct. at 2017.

<sup>365</sup> *Id.*

unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”<sup>366</sup> The second example is the hearsay rules, which exclude relevant evidence which is “deemed insufficiently reliable.”<sup>367</sup>

If MRE 403 is “unquestionably constitutional,” then the accused can not have a “right to call exculpatory witnesses whose testimony may be subject to a known, but manageable, risk of inaccuracy.”<sup>368</sup> The witness’ testimony, even if subject to a known risk of inaccuracy, may still be excluded under MRE 403, MRE 802 or any other standard rule of evidence. At least two other military rules of evidence, MRE 702 and MRE 608, present a serious challenge to the admissibility of polygraph evidence.<sup>369</sup>

*Military Rule of Evidence 702:* Before examining whether polygraph evidence is otherwise inadmissible under MRE 702, it is necessary to examine whether it is a standard rule of evidence. Since the CAAF held that the accused had a right to lay the foundation for admission under *Daubert’s* interpretation of MRE 702, it appears the court implicitly determined that MRE 702 is a standard rule. However, one could argue that since the *Frye* test has historically controlled the admission of expert testimony since 1923, MRE 702 is not a standard rule of evidence.

Additionally, the polygraph does not appear to meet at least one of *Daubert’s* criteria. The underlying theory does not have an error rate. This shortcoming has been obscured in the literature as well as the applicable court opinions.<sup>370</sup> Recall that the polygraph examiner does not opine, nor does the machine indicate, whether the examinee is innocent or guilty. Instead, the examiner interprets the charts produced by the polygraph machine and forms an opinion as to whether the examinee either is or is not indicating deception.

It is critical, therefore, to distinguish between evidence which supports the scientific conclusion that the examinee is practicing deception in responding to questions concerning the alleged conduct and evidence which supports the scientific conclusion that the examinee actually committed the crime. In support of the polygraph’s reliability, studies are cited that confirm the examinee was guilty or innocent of the crime, either through subsequent

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<sup>366</sup> *Id.* (emphasis omitted). *Accord*, *United States v. Lech*, 895 F. Supp. 582, 586 (S.D.N.Y. 1995) (“Lech has no [Sixth Amendment] right to introduce evidence whose probative value is substantially outweighed by its tendency to confuse and mislead a jury.”)

<sup>367</sup> *Id.*

<sup>368</sup> McCall, *supra* note 147, at 408.

<sup>369</sup> Because the application of these to rules to the polygraph are considered extensively in a companion article in this issue of the Air Force Law Review, only a brief examination will be conducted here. See J. Jeremiah Mahoney & Christopher C. vanNatta, *Jurisprudential Myopia: Polygraphs in the Courtroom*, 43 A.F. L. Rev. 95 (1997).

<sup>370</sup> See, e.g., *United States v. Galbreth*, 908 F. Supp. 877 (D.N.M. 1995). The district court in *Galbreth* found that the offered polygraph met the *Daubert* reliability threshold.

confessions or mock lab experiments.<sup>371</sup> However, the underlying assumption that guilt or innocence is correlated to this physiological reaction appears to remain untested, and possibly, untestable.

Finally, while it is conceivable that a military judge could find the polygraph admissible under MRE 702, a strong argument can be made that the President is as competent as the trial judge to make the admissibility determination under *Daubert's* guidance. Under MRE 104(a), the trial judge is not bound by the rules of evidence on preliminary matters and may consult whatever sources he deems appropriate.<sup>372</sup> But unlike many case-specific circumstances the trial judge encounters when applying MRE 403, the *Daubert* interpretation of FRE 702 calls for an estimation of the scientific validity of the underlying methodology. This determination is not fact specific, and the trial judge was actually instructed not to consider the ultimate test results.<sup>373</sup> Consequently, it appears that the trial judge, President, circuit court of appeals, state court, or state legislature are each qualified to make the admissibility determination.<sup>374</sup>

*Military Rule of Evidence 608*: Assuming that MRE 608 is a standard rule of evidence, MRE 608(a) provides that credibility evidence which supports the accused's character for truthfulness is admissible only after the accused's character has been attacked. Consequently, if an attack never occurs, this evidence is inadmissible, no matter how "helpful" it would be in bolstering the accused's credibility. On the other hand, the CAAF has clearly stated that the polygraph examiner's opinion "relates to the credibility of a certain statement . . . not . . . to the declarant's character."<sup>375</sup> The court therefore concluded that since the evidence does not reveal character, it is not

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<sup>371</sup> *Id.* at 886-89. For example, examining the error rate for the CQT polygraph technique, the court relied upon field studies that indicated that the polygraph was 94-95% accurate at identifying guilty accuseds. Guilt was confirmed either through subsequent confessions or physical evidence. *Id.* at 887. The study seems to confirm not that 94-95% of the individuals were practicing deception at the time of the exam, but instead that the polygraph was able to detect the guilty 94-95% of the time. Consequently, it appears that the polygraph expert might be qualified to express an opinion about the accuseds ultimate guilt or innocence, but not whether the accused was deceptive or non-deceptive.

<sup>372</sup> Mil. R. Evid. 104(a) provides in pertinent part:

Preliminary questions concerning the qualifications of a person to be a witness . . . the admissibility of evidence . . . shall be determined by the military judge. In making these determinations the military judge is not bound by the rules of evidence except those with respect to privileges.

MCM *supra* note 2, Mil. R. Evid. 104.

<sup>373</sup> "The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate." 113 S. Ct. at 2797.

<sup>374</sup> One could imagine Congress constructing a list of unreliable scientific methodologies and enacting a *per se* ban of the evidence into a Fed. R. Evid..

<sup>375</sup> 24 M.J. at 252.

subject to MRE 608.<sup>376</sup> However, since no other MRE provides for the admission of credibility evidence which does not relate to the accused's character for truthfulness, it could be argued that such polygraph testimony is inadmissible.<sup>377</sup>

Even if the court finds that the polygraph evidence supports the accused's character for truthfulness, significant evidentiary problems still remain. For instance, the rules require an opinion, rather than testimony on specific instances of conduct.<sup>378</sup> Moreover, extrinsic evidence, i.e., the polygraph results or the examiner's report, is inadmissible under MRE 608(b).<sup>379</sup> Consequently, whether polygraph evidence is otherwise inadmissible under MRE 608 is debatable.

### **B. If Admissible, Has the President Justified Exclusion?**

If it is determined that polygraph evidence is otherwise admissible under the standard rules of evidence, then it is necessary to consider whether the President has articulated legitimate interests to justify its exclusion. In order to find MRE 707 unconstitutional as applied to the accused, the CAAF must find that the President's policy rationales are arbitrary, not simply that the court disagrees or would reach an opposite conclusion. Furthermore, it must be realized that unlike the federal circuits, the President administers a world-wide system of military justice that "requires far more stability than civilian law."<sup>380</sup>

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<sup>376</sup> *Id.* at 253 n.8.

<sup>377</sup> Despite its characterization of polygraph evidence, the Court's holding in *Scheffer* is consistent with the rationale of Mil. R. Evid. 608(a). The character evidence is not admissible unless the defendant's character for truthfulness is attacked, and the defendant is not permitted the opportunity to lay the foundation for admission of the polygraph until his credibility is attacked.

<sup>378</sup> *See* Mil. R. Evid. 608(a).

<sup>379</sup> Mil. R. Evid. 608(b), "specific instances of conduct," provides in pertinent part:

Specific instances of conduct of a witness, for the purposes of attacking or supporting the credibility of the witness . . . may not be proved by extrinsic evidence.

MCM *supra* note 2, Mil. R. Evid. 608.

<sup>380</sup> The unique nature of the military justice system is highlighted in the Drafters' Analysis to Mil. R. Evid. 501, General Rule for Privileges:

The Committee deemed the approach taken by Congress in the Federal Rules impracticable within the armed forces. Unlike the Article III court system, which is conducted almost entirely by attorneys functioning in conjunction with permanent courts in fixed locations, the military criminal legal system is characterized by its dependence upon large numbers of laymen, temporary courts, and inherent geographical and personnel instability due to the worldwide deployment of military personnel. Consequently, military law requires far more stability than civilian law.

The Supreme Court cases examined in Part II provide examples of state justifications that were deemed arbitrary. In *Washington*,<sup>381</sup> the state had prevented a whole category of defense witnesses from taking the stand because it felt the testimony was unreliable. However, since it found that the testimony was reliable enough to support its own case, the state had failed to explain why it could not be used by the accused. Of course, MRE 707 prohibits both the government and the accused from introducing polygraph evidence.

In *Chambers*,<sup>382</sup> the state prevented the accused from presenting critical testimony through the application of two rules of evidence without explaining why the testimony was unreliable. At least four Justices have stressed critical evidence may be excluded, but a combination of erroneous evidentiary rulings may violate the accused's Sixth Amendment rights.<sup>383</sup> Finally, in *Rock*,<sup>384</sup> the state had successfully prevented the accused from presenting her version of the crime. The Court concluded that this was an impermissible limitation on her Sixth Amendment right to testify in her own defense. MRE 707 does not prevent the accused from testifying in his defense.

### *1. Reliability of the Polygraph*

The President undoubtedly has an interest in ensuring that only reliable evidence is admitted during a court-martial proceeding. This interest justifies both MRE 802 and MRE 702. However, assuming that polygraph evidence meets the reliability requirements of MRE 702, the President may require that certain forms of evidence meet a higher reliability standard so long as legitimate interests are advanced.

This contention is true unless MRE 702 is the constitutional standard for scientific evidence; meaning that if the evidence is admissible under MRE 702 then the Constitution requires that it be admitted. At least three reasons suggest that MRE 702 is not the constitutional standard. First, a significant number of states have refused to adopt the *Daubert* holding or any equivalent standard.<sup>385</sup> Second, the *Daubert* standard is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental."<sup>386</sup> Since the

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This is particularly true because of the significant number of non-lawyers involved in the military criminal legal system. Commanders, convening authorities, non-lawyers, investigating officers, summary court-martial officers, or law enforcement personnel need specific guidance as to what material is privileged and what is not.

MCM, *supra* note 2, Drafters' Analysis, at A22-36.

<sup>381</sup> See *supra* notes 106-16 and accompanying text.

<sup>382</sup> See *supra* notes 117-37 and accompanying text.

<sup>383</sup> See *supra* note 152.

<sup>384</sup> See *supra* notes 138-51 and accompanying text.

<sup>385</sup> See *supra* note 17.

<sup>386</sup> *Patterson v. New York*, 432 U.S. 197, 202 (1977).



traditional standard for the admission of scientific evidence is the *Frye* test, it can be argued that this test represents the constitutional standard. If correct, then federal and state jurisdictions can maintain a *per se* exclusion rule, or a stipulation requirement, until the polygraph technique is generally accepted within the relevant scientific community.

Finally, there is evidence that the Supreme Court does not believe the Constitution requires the trial judge to apply the *Daubert* analysis to scientific evidence. Speaking for the four dissenters in *Rock*,<sup>387</sup> Chief Justice Rehnquist argued that, although the majority had recognized the “inherently unreliable nature of [hypnotically refreshed testimony],” it “nevertheless concludes that a state trial court must attempt to make its own scientific assessment of reliability in each case it is confronted with a request for the admission of [this] testimony. I find no justification in the Constitution for such a ruling.”<sup>388</sup> Understanding that the “sole motivation” behind the Arkansas rule was to facilitate the truth-seeking process, the dissenters believed that the *per se* exclusion rule was “an entirely permissible response to a novel and difficult question.”<sup>389</sup> Finally, the dissenters cited the “serious administrative difficulties” that would arise if every trial judge had to consider the matter *res nova* in every trial and concluded that “until there is much more of a consensus on the use of hypnosis than there is now, the Constitution does not warrant this Court’s mandating its own view of how to deal with the issue.”<sup>390</sup>

Of course, *Daubert* instructs the trial judge to make an individual determination of a scientific method’s reliability. The majority in *Rock* concluded that the state must make an individual determination when the accused’s right to testify is implicated, but the *per se* exclusion is still applied to witness testimony.<sup>391</sup> If, instead, the President advances legitimate interests for the exclusion of the polygraph expert’s testimony, then it is uncertain whether the Court would have reached the same conclusion.

Therefore, the question is not only what the reliability standard is, but which actor is permitted to make the reliability determination. In *Scheffer*, the CAAF expressed concern that trial judges would be unable to discern whether significant advances had been made in the field of polygraph examinations unless accuseds were provided the opportunity to lay the foundation for the admission of the polygraph evidence. However, it is the President’s responsibility to make this determination under the power delegated by Congress to promulgate the MREs. Like any of the other federal or state jurisdictions that follow a *per se* rule, when the President determines that the

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<sup>387</sup> *Rock v. Arkansas*, 483 U.S. 44, 62, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987). Chief Justice Rehnquist, joined by Justice White, Justice O’Connor, and Justice Scalia dissented from the Court’s holding.

<sup>388</sup> *Id.* at 62-63.

<sup>389</sup> *Id.* at 65.

<sup>390</sup> *Id.*

<sup>391</sup> *Misskelley v. State*, 323 Ark. 449, 474 (1996).

concerns expressed in the Drafters' Analysis are no longer present, MRE 707 may be rescinded.<sup>392</sup>

It is important to realize who has the authority to determine that hearsay is insufficiently reliable, thereby effectively eliminating judicial discretion.<sup>393</sup> Although the rule has common law origins, Congress made the determination when it enacted FRE 802. While dictum, Justice Scalia's statement that the hearsay rule was "unquestionably constitutional" is significant.<sup>394</sup> Recall that it was the application of Mississippi's hearsay rule to a specific fact pattern which was disputed in the case of *Chambers v. Mississippi*.<sup>395</sup> In *Chambers*, the Court held that the application of the hearsay rule to a situation within the basic rationale of a hearsay exception, combined with the refusal of the trial court to allow Chambers to treat McDonald as an adverse witness, constituted a denial of due process. If the hearsay rule is unquestionably constitutional, then, as in *Chambers*, only when the effect of the rule is combined with a second evidentiary restriction does the potential for a constitutional violation arise.

Moreover, the CAAF's concern that trial judges would be unable to discern whether significant advances had been made in the field holds true for any scientific evidence which the court placed in the category of "junk science," even though a trial judge may reject it as a matter of law.<sup>396</sup> If the CAAF's logic is correct, then any blanket exclusionary rule is inappropriate; even one barring admission of "junk science."<sup>397</sup> For example, if the accused

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<sup>392</sup> The introduction to the Analysis of the Rules for Courts-Martial states:

Subsequent modification of [civilian sector] sources of law may provide useful guidance in interpreting the rules . . . At the same time, the user is reminded that the amendment of the Manual is the province of the President. Developments in the civilian sector that affect the underlying rationale for a rule do not affect the validity of the rule except to the extent otherwise required as a matter of statutory or constitutional law. . . . Once incorporated into the Executive Order, such matters have an independent source of authority and are not dependent upon continued support from the judiciary.

MCM, *supra* note 2, Analysis of Rules for Courts-Martial, at A21-3 (1995).

<sup>393</sup> However, if the statement is not covered by any of the hearsay exceptions but has "equivalent circumstantial guarantees of trustworthiness" and is offered to prove a material fact, then it may be admissible if the other requirements of Mil. R. Evid. 802(24) are met. Finding that the opinion of the polygraph examiner had a "high degree of trustworthiness," a district court has held that the exception is applicable to rebut a charge of perjury. *United States v. Ridling*, 350 F. Supp. 90, 99 (E.D. Mich. 1972).

<sup>394</sup> 116 S. Ct. at 2017.

<sup>395</sup> See *supra* notes 117-37 and accompanying text.

<sup>396</sup> *United States v. Gipson*, 24 M.J.246, 249 (C.M.A. 1987).

<sup>397</sup> It may be argued that since in most federal and state jurisdictions the *per se* or stipulation rules have been established by common law rather than a statutory rule of evidence, judges maintain a closer proximity to the scientific developments within the field. This contact would permit the rule to be adapted in the appropriate circumstances.

is not permitted the opportunity to lay the foundation for admission of astrological evidence, then the trial judge cannot determine if significant advances have been made in this field. Consequently, if a significant number of accuseds sought to introduce the results of an astrological prediction as exculpatory evidence, the Government would be required to provide testimony which refutes the underlying methodology of astrology. Regardless of the burden on the services, or the consistent rejection of the arguments by the trial judge, the accused must be provided the opportunity in each instance to lay the proper foundation.<sup>398</sup>

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<sup>398</sup> The Court may respond to this argument by stating that the defendant only has a constitutional right to lay the foundation for scientific evidence that lies in the middle category of reliability. However, this response would not answer the question of why the Court rather than the President may determine in which category the evidence should be placed.

## 2. Integrity of the Criminal Justice System

If MRE 702 is not the constitutional standard for admission, then it becomes necessary to consider whether the President has a legitimate interest in requiring a higher degree of reliability for polygraph evidence. There are at least two reasons why the President may require this higher level of reliability. First, polygraph evidence occupies a unique category of scientific evidence offered solely to bolster the accused's credibility. Second, it is questionable whether the information conveyed by the expert to the members significantly supplements their ability to judge the accused's credibility.

In response to the first argument, the CAAF stated in *Scheffer* that it could not perceive "any significant Constitutional difference" between the exclusion of the accused's testimony and the "exclusion of evidence supporting the truthfulness of a defendant's testimony."<sup>399</sup> As the Supreme Court has explained, though, the defendant's "opportunity to testify is . . . a necessary corollary to the Fifth Amendment's guarantee against compelled testimony"<sup>400</sup> and is an "exercise of the constitutional privilege."<sup>401</sup> Furthermore, the Court has often "proceeded on the premise that the right to testify on one's own behalf in defense to a criminal charge is a fundamental constitutional right."<sup>402</sup> Although the Supreme Court in *Rock* found that a *per se* exclusion of the defendant's testimony violated the Constitution, this holding has not been applied to witness testimony.<sup>403</sup> Additionally, while the case law indicates that the accused's right to present a defense may reach the right to call material and relevant witnesses, it is unclear that this right extends to scientific evidence which merely bolsters the accused's credibility for truthfulness. The accuseds in *Washington*<sup>404</sup> and *Chambers* sought to admit

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<sup>399</sup> 44 M.J.at 446. It is clear that Mil. R. Evid. 707 does not, in any way, prevent the defendant from testifying. To the contrary, Scheffer actually took the stand. The CAAF has held that if the defendant does not take the stand and his credibility is not disputed, then the polygraph evidence is irrelevant. See *United States v. Abeyta*, 25 M.J. 97 (C.M.A. 1987), *cert. denied*, 484 U.S. 1027 (1988).

<sup>400</sup> 483 U.S. at 52.

<sup>401</sup> *Id.* at 53 (quoting *Harris v. New York*, 410 U.S. 222, 230, 91 S. Ct. 643, 35 L. Ed. 2d 201 (1971) (emphasis removed)).

<sup>402</sup> *Id.* at 53 n.10.

<sup>403</sup> The Supreme Court consistently emphasized that the Arkansas rule impermissibly limited the defendant's ability to testify on her behalf. 483 U.S. at 61. See *supra* notes 138-51 and accompanying text. Only if *Rock* sought to have the doctor testify as an expert witness would the testimony have to meet the requirements of Fed. R. Evid. 702. See also *Haakanson v. State* 760 P.2d 1030, 1034 n.3 (Alaska. Ct. App. 1988) ("In contrast [to *Rock*], *Haakanson* was not prohibited from presenting his own version of the facts through his testimony. He was merely precluded from presenting evidence of his polygraph examination. Unlike the defendant in *Rock*, *Haakanson's* right to testify was not abridged") (citations omitted). Arkansas still applies a *per se* exclusion rule to hypnotically refreshed testimony of a witness. *Misskelley v. State*, 323 Ark. 449, 474 (1996).

<sup>404</sup> The Court's holding in *Washington v. Texas* may not be applicable to an analysis of Mil. R.

the testimony of defense witnesses. In both instances, however, a lay-witness was prevented from testifying to events which he *physically observed*, and which was material and relevant to the defense. Ultimately, the constitutional analysis depends upon the state interests that are advanced by the exclusion of the evidence.

A number of courts have concluded that polygraph evidence should be treated like any other type of scientific testimony. After all, urinalysis results are routinely admitted to prove a material fact even if the accused testifies that he did not ingest drugs. Although the jury may judge the credibility of the accused while he is on the stand, they are also permitted to hear material scientific evidence which indirectly implicates the accused's credibility. The Supreme Court of Wyoming has invoked a similar argument, stating that because "the polygraph deals with mind and body reactions should not subject it to exclusion from consideration any more than other testimony of a scientific nature."<sup>405</sup>

Although overruled, the District Court for Western District of North Carolina has also analogized the polygraph machine to other forms of evidence. In *Jackson v. Garrison*, the court addressed the constitutionality of North Carolina's stipulation requirement.<sup>406</sup> Finding polygraph machines are like other instruments which are not completely reliable but are encountered everyday, the court concluded that the shortcomings of the machines "affect the weight we give to the enlightenment we receive from machines, but they do not move us to reject such mechanical aids out of hand."<sup>407</sup> Since courts permit witnesses "to testify as to reputation, shiftiness of eyes or clarity of gaze, it is unfair to prohibit the introduction of the more reliable method of measuring external responses which the polygraph represents."<sup>408</sup> Therefore,

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Evid. 707. The rule does not "prevent whole categories of defense witnesses from testifying," but prohibits both the prosecution and defense from presenting polygraph testimony. As such, it is even-handed. Concedingly, if empirical evidence existed which illustrated that the majority, or perhaps vast majority, of polygraph evidence was offered by the defendant, then the rule might be found offensive in practice. However, there is no evidence that this situation, in fact, exists.

Additionally, the policy concerns articulated in the Drafters' Analysis coupled with the post-*Gipson* court decisions might lend credence to the conclusion that based on the "general experience with a particular class of person," namely polygraph examiners, "the truth is best served by an across the board disqualification." *Washington v. Texas*, 388 U.S. 14, 24-25, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967) (Harlan, J., concurring) (footnotes omitted).

<sup>405</sup> *Cullin v. State*, 565 P.2d 445, 458 (Wyo. 1977).

<sup>406</sup> *Jackson v. Garrison*, 495 F. Supp. 9 (W.D.N.C. 1979), *rev'd*, 677 F.2d 371 (4th Cir.), *and cert. denied*, 454 U.S. 1036 (1981).

<sup>407</sup> *Id.* at 11.

<sup>408</sup> *Id.* The Court of Common Pleas of Ohio, Cuyahoga County has also favorably compared polygraph evidence to eyewitness testimony. In *State v. Sims*, 52 Ohio Misc. 31, 47, 369 N.E.2d 24, 34 (1977), the court stated that it did not know of "a single intelligent person, who has seriously investigated the polygraph technique, who has not concluded that a qualified

polygraph evidence should be presented to the jury with the proper jury instructions.<sup>409</sup>

Other courts, however, have concluded that polygraph evidence is unique not because of its form but because of the limited purpose for which it is offered. The Supreme Court of Oregon, *en banc*, has stated that

[p]olygraph evidence is not just another form of scientific evidence presented by experts such as ballistics analysis, fingerprint and handwriting comparisons, blood typing and neutron analysis. These other tests do not purport to indicate with any degree of certainty that the witness was or was not credible. By its very nature the polygraph purports to measure truthfulness and deception, the very essence of the jury's role.<sup>410</sup>

Much of the disagreement appears to turn on whether juries or polygraph examiners are considered experts in determining the credibility of the witnesses. An Ohio court has concluded that the polygraph examination "is far superior to any other technique now known in determining deception or lack of it in the testimony of a witness."<sup>411</sup> Other courts disagree and have determined that the members of the jury are the only "credibility experts." For example, the Supreme Court of Montana has distinguished the unique place of polygraph testimony in the trial setting. The court has stated that "[t]he only acceptable lie detection methods in Montana court proceedings reside with the court in bench trials, the jury in jury trials, and the skill of counsel in cross-examination in all trials."<sup>412</sup>

The Texas Court has given strong indication that the nature of the polygraph testimony will prohibit its introduction at trial regardless of the level of reliability which it obtains. Commenting on society's interest in excluding the evidence, it stated that

society has a legitimate interest in insuring that the credibility of witnesses, and ultimately, the guilt of an accused person, is decided only after the trier of fact has given due consideration to *all the evidence* in a case. Until such time that polygraph evidence is so reliable that we are willing to allow it to take the place of the trier of fact, then this exclusion of polygraph evidence under Rule 702 should remain intact.<sup>413</sup>

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examiner's opinion, after examination. . . is many times more credible. . . than much eye-witness testimony to the contrary given in court or elsewhere."

<sup>409</sup> The Fourth Circuit Court of Appeals summarily rejected the district court's ruling and held that North Carolina's stipulation requirement did not involve federal constitutional issues and did not violate a specific constitutional right of the defendant. *Jackson v. Garrison*, 495 F. Supp. 9 (W.D.N.C. 1979), *rev'd*, 677 F.2d 371 (4th Cir. 1981), *and cert. denied*, 454 U.S. 1036 (1981).

<sup>410</sup> *State v. Brown*, 297 Or. 440-41, 687 P.2d 751 (1987).

<sup>411</sup> 52 Ohio Misc. at 49.

<sup>412</sup> *State v. Staat*, 248 Mont. 291, 293, 811 P.2d 1261 (1991).

<sup>413</sup> *Perkins v. State* 902 S.W.2d 88, 94 (Tex. App. 1995) (emphasis added).

The Missouri Supreme Court has also endorsed this view of the role of the jury:

[I]t has long been the law in Missouri that "opinion testimony of expert witnesses should never be admitted *unless it is clear that the jurors themselves are not capable, for want of experience or knowledge of the subject, to draw correct conclusions from the facts proved.*" The exclusion of the interpretation and results of polygraph tests would be in keeping with this principle, for it cannot be said that the jury is incapable of performing its duty to weigh the facts, consider the credibility of witnesses, and determine guilt or innocence. We will not be a party to doing anything to displace the jury in its constitutional role of determining whether or not the accused is guilty. We have always relied on the jury, made up of individuals with diverse backgrounds, viewpoints and knowledge, by use of its common sense and collective wisdom and judgment, to determine who is telling the truth and what the facts are. There is no place in our jury system for a machine or an expert to tell the jury who is lying and who is not.<sup>414</sup>

The language of the Missouri court is significant. The argument is often raised that allowing experts to testify that an individual exhibits the typical characteristics of a rape or child abuse victim is analogous to the testimony provided by the polygraph examiner.<sup>415</sup> However, at least two responses to this argument are possible. First, if the President could advance legitimate reasons to exclude both rape trauma evidence and polygraph evidence, then it is not arbitrary for the President to allow for the introduction of one but not the other. Second, a properly qualified expert may provide testimony in a child abuse case that significantly supplements the members' understanding of the testimony provided by the other witnesses. It is not clear that a similar supplement is provided by a polygraph expert.

Under this rationale, the controlling distinction should be the relative expertise of the jury members. A juror is not an expert in the behavioral patterns of a rape victim, and this testimony might serve to dispel otherwise prejudicial concerns, i.e., why the victim did not report the rape for a week, that might contradict common experience. In *United States v. Snipes*, the COMA stated:

[b]ecause the jurors said they had no experience with victims of child abuse, we assume they would not have been exposed to the contention that it is common for children to report familial sexual abuse and then retract the story. Such evidence might well help a jury make a more informed decision in evaluating the credibility of a testifying child.<sup>416</sup>

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<sup>414</sup> *State v. Biddle*, 599 S.W.2d 182, 191 (Mo. 1980) (quoting *Sampson v. Missouri Pacific R. Co.*, 560 S.W.2d 573, 586 (Mo. 1978) (en banc) (internal quotes omitted) (emphasis added)).

<sup>415</sup> *See, e.g., United States v. Snipes*, 18 M.J. 172, 176 (C.M.A. 1984).

<sup>416</sup> 18 M.J. at 178.

As this example illustrates, the expert in a child abuse case provides testimony concerning whether the witness exhibits the characteristics of a victim. The polygraph expert, on the other hand, provides testimony addressing whether the accused exhibits the characteristics of a deceptive individual. Absent a specific condition which contradicts common experience, a juror is expected to be able to evaluate the credibility of the accused's testimony while he is on the stand. In his concurrence, then Chief Judge Everett echoed this position, realizing that "hearing a purported expert give his opinion about the credibility of a witness may hinder the factfinder by distracting him from using his own experience and common sense, which provide the best means for him to determine the truthfulness of the testimony he has heard."<sup>417</sup> If this conclusion is correct, then the President may advance a legitimate interest in excluding the results of a scientific test which provide no information other than the examiner's interpretation of the physiological reactions of the accused when he denies the crime.

### 3. *Ability of Members to Weigh Scientific Evidence*

Numerous courts have refused to admit polygraph evidence for fear that the jury will attach it either "undue weight" or will defer arbitrarily to the expert's opinion. The Drafters' Analysis echoes this concern, citing the Eighth Circuit opinion of *United States v. Alexander*.<sup>418</sup> In that opinion, the court explained:

[w]hen polygraph evidence is offered in evidence at trial, it is likely to be shrouded with an aura of near infallibility, akin to the ancient oracle of Delphi. . . . [P]resent day jurors, despite their sophistication and increased educational levels and intellectual capacities, are still likely to give significant, if not conclusive, weight to the polygraphist's opinion . . . [T]he juror's traditional responsibility to collectively ascertain the facts and adjudge guilt or innocence is preempted.<sup>419</sup>

In *Gipson*, the COMA clearly stated that it placed little weight on the argument that factfinders will be overwhelmed by polygraph testimony.<sup>420</sup> It supported this statement by citing a "number of recent studies" that concluded that juries are generally capable of evaluating and giving due weight to the

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<sup>417</sup> *Id.* at 179 (Everett, C.J., concurring in the result).

<sup>418</sup> *United States v. Alexander*, 526 F.2d 161 (8th Cir.1975).

<sup>419</sup> *Id.* at 168.

<sup>420</sup> 24 M.J. at 253 n.11.



evidence.<sup>421</sup> The “number of recent studies” were cited in an article by Professor Edward Imwinkelried.<sup>422</sup>

In a paper presented to the members of the COMA four years before the *Gipson* decision was announced, Imwinkelried refutes the proposition that jurors are incapable of objectively evaluating the proper weight of scientific evidence.<sup>423</sup> He acknowledges the critics who claim that “lay people sitting in the jury and the lay person presiding as judge are not sophisticated enough to detect the errors in the scientific analysis.”<sup>424</sup> In response, Imwinkelried advances two arguments. First, errors rate in lay witness eyewitness testimony are as high and less controllable than those of scientific evidence. Second, there is little to no empirical evidence that jurors are incapable of evaluating scientific evidence.

In support of his first argument, Imwinkelried cites “hundreds of studies” from the United States, Germany and Japan which have found high levels of error in eye-witness identifications.<sup>425</sup> For example, a study by Doctor Buckout discovered that only 15 percent of observers in a mock crime experiment were able to correctly identify the perpetrator a few days later.<sup>426</sup> Additionally, Imwinkelried points out that the primary cause of these inaccuracies is the “inherent weaknesses in the human processes of perception and memory.”<sup>427</sup>

To support his second argument, Imwinkelried also cites a number of studies. The first was conducted by Robert Peters of the Crime Laboratory Bureau, Wisconsin Department of Justice. Eleven trials were examined in which polygraph evidence had been admitted. Seventeen of the nineteen lawyers who responded to the survey concluded that the polygraph evidence was “reasonable and intelligible.” Only four believed that the jury “disregarded significant evidence because of the polygraph testimony.”<sup>428</sup>

At least two experimental tests using mock juries have also been conducted. In the first study, conducted at Yale, “only 14.5 percent of the mock jurors reported that they thought the polygraph evidence was more

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<sup>421</sup> *Id.* at 253 (citing Imwinkelried, *supra* note 220, at 114-15).

<sup>422</sup> Prof. Imwinkelried is published extensively in the area of scientific evidence. He is a Professor at the University of California, at Davis, and served as a Judge Advocate in the United States Army.

<sup>423</sup> Imwinkelried, *supra* note 220, at 113.

<sup>424</sup> *Id.* at 109.

<sup>425</sup> *Id.* at 112.

<sup>426</sup> *Id.* (citing Buckout & Greenwald, *Witness Psychology*, in *Scientific & Expert Evidence* 1291 (2d ed. 1981).

<sup>427</sup> *Id.* (citation omitted).

<sup>428</sup> *Id.* (citing Peter Roberts, *A Survey of Polygraphic Evidence in Criminal Trials*, 68 A.B.A.J. 162, 164-65 (1981)). It is unclear how the lawyers were able to discover what the jury disregarded.

significant than the lay testimony in the case.”<sup>429</sup> The second study cited, conducted in Canada, reported that sixty-one percent of the mock jurors surveyed thought that the polygraph evidence was less persuasive than the remaining scientific evidence.<sup>430</sup>

Upon close examination, the evidence cited by Imwinkelried’s does not provide any support, much less compelling justification, for the proposition that jurors are capable of objectively evaluating scientific evidence. He may be correct that eye-witness testimony is unreliable. If this is true, then the jury may not be justified in deferring to the lay witness testimony. Yet one is at a loss to understand what significance this discovery has in determining whether the jury can properly weigh scientific evidence.<sup>431</sup>

Professor Imwinkelried’s second argument is even more puzzling. The cited studies do not support the belief that jurors are capable of objectively evaluating scientific evidence. Admittedly, the studies also do not indicate that they can not. The studies do indicate that jurors may not consistently defer to the conclusions of scientific experts. But this observation supports two conclusions. First, jurors are critically evaluating the evidence. The COMA accepted this conclusion, although it is unclear why. The second conclusion is that the jurors are arbitrarily assigning weight to the scientific evidence. The studies do not provide an basis for choosing between these two possible conclusions. Consequently, it does not appear that studies support the contention that juries can evaluate scientific evidence.

One further proposition advanced by Prof. Imwinkelried must be investigated. He suggests that “the court-martial is more likely to have better educated, sophisticated jurors.”<sup>432</sup> Consequently, Imwinkelried posits that the members should be competent in evaluating the scientific evidence. At least one commentator has also concluded that “[a] military jury is a sophisticated group of individuals that is more able to understand and properly use polygraph evidence as it applies to a case than a typical jury.”<sup>433</sup>

It is not clear that a high level of education is pertinent to the member’s ability to weigh scientific evidence. This argument does not imply that the members suffer from “certain intellectual infirmities.”<sup>434</sup> Instead, the member

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<sup>429</sup> Imwinkelried, *supra* note 220, at 115 (citing Carlson, et al., *The Effect of Lie-Detector Evidence on Jury Deliberations: An Empirical Study*, 5 J. POL. SCI. & ADMIN. 148, 153 (1977)).

<sup>430</sup> *Id.* (citing Markwart & Lynch, *The Effect of Polygraph Evidence on Mock Jury Decision-making*, 7 J. POL. SCI. & ADM. 324, 333 (1979)).

<sup>431</sup> Perhaps Imwinkelried’s contention is that if jurors regularly consider unreliable lay witness testimony, then they should be permitted to consider unreliable scientific testimony. This conclusion may be sound as a practical matter, but does not support the contention that jurors are epistemically competent to objectively weigh such scientific evidence.

<sup>432</sup> Imwinkelried, *supra* note 220, at 117.

<sup>433</sup> Canham, *supra* note 269, at 88.

<sup>434</sup> Michael S. Jacobs, *Testing the Assumptions Underlying the Debate About Scientific Evidence: A Closer Look at Juror “Incompetence” and Scientific “Objectivity,”* 25 Conn. L.

cannot distinguish between the testimony of competing polygraph experts because he is not an expert in the science of forensic psychophysiology. Without a thorough understanding of the scientific technique underlying the polygraph, that itself rises to the level of expertise, how can the member chose one explanation over another when the experts in the relevant field do not agree? A distinction may be made based upon the expert’s credentials or demeanor on the stand, but not on the scientific validity of the expert’s opinion. If credentials and demeanor are highly correlated to the reliability of the expert’s opinion, then this deference is not a concern. Regardless of their level of education, however, unless the members are themselves experts it is arguable whether they can adequately evaluate scientific evidence.

#### 4. *Practical Effect on the Military Justice System*

In analyzing the military’s interest in maintaining a *per se* exclusion rule, it is necessary to consider the practical effects of a “concomitant right of presenting evidence [that becomes] the right to demand a polygraph examination during the investigative stage.”<sup>435</sup> While any prediction of the practical effect of the holding in *Scheffer* on the military justice system is uncertain, if the analysis in Part V is correct the military should witness a dramatic increase in the number of exculpatory requests. Since the admissibility standards have varied over the last decade, an examination of the statistics permit general observations. First, the number of courts-martial conducted by DoD has decreased significantly and steadily since 1984.<sup>436</sup>

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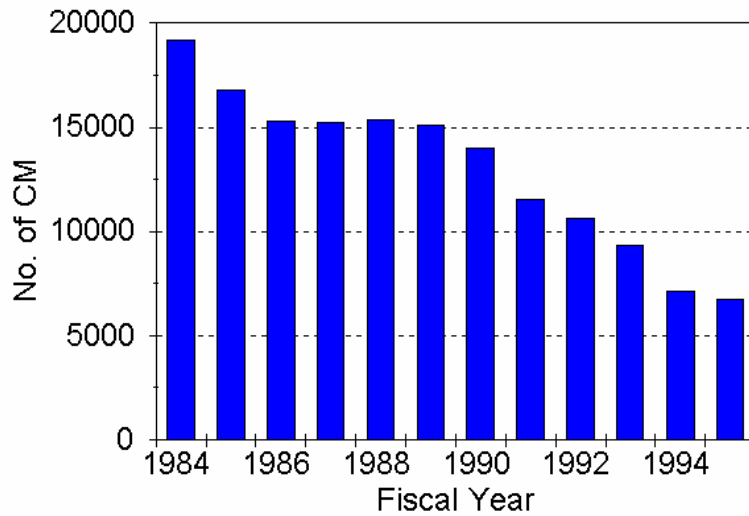
Rev. 1083 (1993). Prof. Jacobs refutes the argument that “[j]udges and juror . . . suffer from certain intellectual infirmities that critically compromise their utility as fact finders in matters of complex science.” *Id.* at 1084.

<sup>435</sup> 44 M.J. at 449 (Crawford, J., dissenting).

<sup>436</sup> The total annual number of courts-martial conducted by DoD was calculated from the Annual Reports of each service as reprinted in the Military Justice Reporter. The total number of general courts-martial, special courts-martial, and summary courts-martial for each service were summed. The results are contained in Table 2:

<b>Year</b>	<b>Number of Courts-martial</b>
1984	19,011
1985	16,641
1986	15,208
1987	15,152
1988	15,260
1989	15,034
1990	13,908
1991	11,471
1992	10,552
1993	9,258
1994	7,055

## Total No. of DoD Court-Martials



**Graph 1—Number of DoD Courts-Martial**

While the number of court-martials has decreased, it is still substantial when compared to the number of trials conducted in state courts. Of course, the military must confront the additional burdens of administering a “world-wide system of justice.”<sup>437</sup> In order to place the numbers in perspective, Table 3 ranks the number of trials in the military justice system in comparison to the number of criminal trials in state systems.

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1995	6,705
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<sup>437</sup> 44 M.J. at 451 (Crawford, J., dissenting).

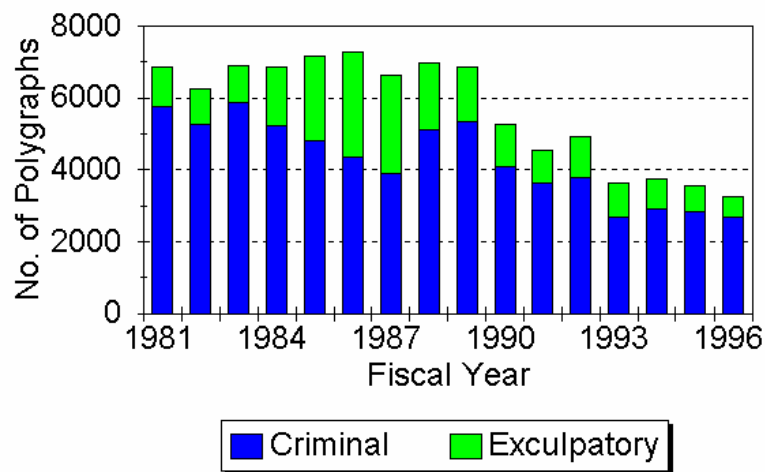
<b>STATE</b>	<b>No. of Criminal Trials</b>	<b>Polygraph Rule</b>
Indiana	8534	Stipulation
California	7413	Stipulation
Oklahoma	6361	Per Se Exclusion
<b>Military</b>	<b>6705</b>	Trial Judge's Discretion
Texas	5469	Per Se Exclusion
New York	4741	Per Se Exclusion
Florida	4570	Stipulation
Michigan	4383	Per Se Exclusion
Iowa	3266	Stipulation
Missouri	2988	Per Se Exclusion
North Carolina	2952	Per Se Exclusion
Ohio	2691	Stipulation
Washington	2194	Stipulation
New Jersey	2155	Stipulation
Arkansas	2128	Stipulation
Kansas	1952	Stipulation
New Mexico	980	Trial Judge Discretion
Maine	456	Per Se Exclusion
South Dakota	443	Per Se Exclusion
Hawaii	340	Per Se Exclusion
Vermont	269	Not Clear
Delaware	175	Stipulation
Alaska	173	Per Se Exclusion

**Table 3. Number of Criminal Trials in State Courts, 1995<sup>438</sup>**

<sup>438</sup> The number of criminal trials for each state was calculated for each state by taking the number of cases disposed multiplied by the percentage of cases that went to either a bench or jury trial. The data was reported in Brain J. Ostrom and Neal B. Kauder, *Examining the Work of State Courts, 1995*, National Center for State Courts, Criminal Caseloads in State Trial Courts, p. 57.

The data does not indicate that the number of DoD polygraphs administered in the course of criminal investigations is highly correlated to the number of court-martials conducted. As illustrated by Graph 2, the number of combined criminal and exculpatory polygraph tests administered prior to the *Gipson* decision in 1987 remained fairly constant. Except for a brief increase in 1988, and again in 1992, the number has steadily decreased. Of course, the increase in 1988 followed the *Gipson* decision, and the increase in 1992 followed the passage of MRE 707.

## DoD Polygraph Program

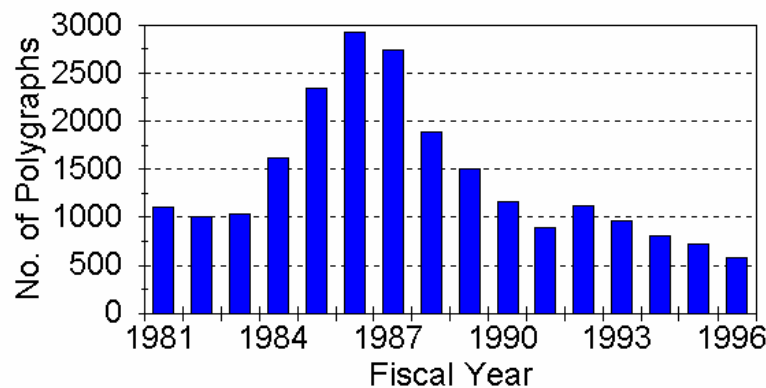


Graph 2—Total Number of Criminal and Exculpation Requests<sup>439</sup>

<sup>439</sup> DoD Polygraph Program, *Annual Polygraph Report to Congress*, Fiscal Years 1986-1996.

As illustrated by Graph 3, the number of exculpatory requests increased sharply from 1981 until the *Gipson* decision. Then, from 1987 until 1991, during the time period when polygraphs were admissible, the number decreased just as sharply. This observation appears to support the theory that neither innocent nor guilty accuseds were eager to obtain a polygraph examination for fear that it would be admissible.

## DoD Polygraph Program Exculpation Requests



**Graph 3—Number of Exculpation Requests<sup>440</sup>**

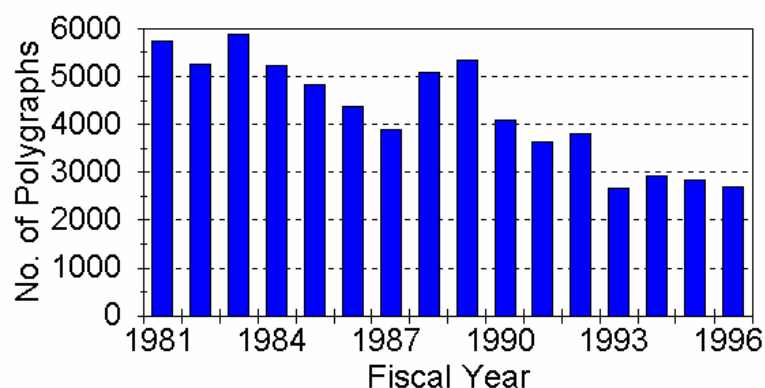
Finally, Graph 4 shows that the number of polygraphs conducted during criminal investigations similarly increased significantly after 1987 and decreased in 1990.

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<sup>440</sup> *Id.*

# DoD Polygraph Program

## Criminal Investigations



**Graph 4—Number of Criminal Requests<sup>441</sup>**

In conclusion, strong arguments can be made that MRE 707 does not represent an arbitrary restriction on the defendant's right to present relevant and material testimony. First, polygraph testimony may not be otherwise admissible under the standard rules of evidence. Second, even if the testimony is otherwise admissible, the President appears to advance a number of legitimate interests that justify exclusion of the evidence. Federal and state jurisdictions have relied upon similar interests to justify their respective polygraph rules. When the President's interest in the consistent administration of the military justice system is added to this list, MRE 707 should pass constitutional muster.

## **VI. WHAT REMAINS OF MILITARY RULE OF EVIDENCE 707?**

Unless reversed by the Supreme Court, the *Scheffer* requirements for the admission of polygraph evidence represent the controlling law. While a comprehensive examination of the questions left unresolved by the opinion are beyond the scope of this article, a number of initial comments may be provided.

### **A. Admissibility of an Accused's Exculpatory Polygraph Examination**

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<sup>441</sup> *Id.*



The plain language of the CAAF's holding in *Scheffer* indicates that three requirements must be met before the accused may lay the foundation for the admission of a polygraph examination: 1) the examination must be exculpatory, meaning that the relevant questions directly address the criminal conduct for which he is charged; 2) the accused must place his credibility at issue by taking the stand and proclaiming his innocence; and 3) the Government must attack his credibility.

It is, of course, significant that the court limited its ruling to the presentation of "exculpatory" test results. Exculpatory is defined as "acting or tending to clear of guilt or blame."<sup>442</sup> Therefore, to be admissible, the polygraph examination must focus on the specific criminal conduct with which the accused is charged. For instance, in *Scheffer*, the polygraph addressed the accused's use of methamphetamines. In both *Nash* and *Mobley*, the questions concerned the accuseds' use of cocaine.<sup>443</sup>

A subsequent case follows this reasoning. In *United States v. Baker*,<sup>444</sup> the accused attempted to introduce the results of two *ex parte* examinations in support of two motions to suppress urinalysis results. The testimony would support his contention that he had asked for an attorney when questioned by AFOSI and had not voluntarily consented to a urinalysis.<sup>445</sup> The AFCCA ruled that since Baker did not testify as to his guilt or innocence, but only that he did not consent to the chemical test, the results were not exculpatory. Unaware of any case law which established a constitutional right to present evidence in support of a preliminary ruling, the court found no basis for allowing the accused to lay the foundation for the admission of the polygraph results.<sup>446</sup>

When analyzed in light of the above discussion, the second requirement essentially becomes that the accused must place his credibility at issue by denying the charge on the stand. The CAAF has held that if he does not testify at all, the expert's opinion concerning the polygraph examination is irrelevant.<sup>447</sup> However, since the examination is only considered "exculpatory" if it addresses the ultimate issue of the accused's guilt or innocence, the accused must also testify as to his guilt or innocence. As the AFCCA indicated in *Baker*, if the accused does not deny the crime while on the stand, then he has not placed his credibility as to truthfulness at issue.<sup>448</sup>

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<sup>442</sup> AMERICAN HERITAGE DICTIONARY 473 (2d College ed. 1985).

<sup>443</sup> *United States v. Mobley*, 44 M.J. 453 (C.A.A.F. 1996), *petition for cert. filed*, 65 U.S.L.W. 3518 (Jan. 16, 1997) (NO. 96-1134); *United States v. Nash*, 44 M.J. 456 (C.A.A.F. 1996), *petition for cert. filed*, 65 U.S.L.W. 3518 (Jan. 16, 1997) (NO. 96-1134). Both cases were handed down with the CAAF's decision in *Scheffer*.

<sup>444</sup> *United States v. Baker*, 45 M.J. 538 (A.F.Ct.Crim.App. 1996).

<sup>445</sup> *Id.* at 541.

<sup>446</sup> *Id.* at 542.

<sup>447</sup> See *supra* note 239 and accompanying text.

<sup>448</sup> 45 M.J. at 542.

The third requirement is that the Government must specifically attack the accused's credibility. The attack on Scheffer's credibility was unmistakable. Trial counsel's cross-examination focused on previous inconsistent statements and the lack of symptoms normally associated with the innocent ingestion of methamphetamine.<sup>449</sup> Trial counsel demonstrated squarely the role of credibility in the case when he argued in closing, "He lies. He is a liar. He lies at every opportunity he gets and he has no credibility. Don't believe him. He knowingly used methamphetamine."<sup>450</sup>

The two cases handed down with *Scheffer* present similar scenarios. In *United States v. Mobley*, trial counsel conducted an extensive cross-examination of the accused, confronted him with the testimony against him, and argued during the closing argument that Mobley lied "because he's got everything at stake in this court-martial."<sup>451</sup> In *United States v. Nash*, trial counsel offered evidence during rebuttal that Nash had a motive to lie in order to protect a separation bonus totaling approximately \$24,000.00.<sup>452</sup> Trial counsel argued during the closing argument this motive evidence supported the conclusion that Nash had lied on the stand.

## **B. Admissibility of an Accused's Inculpatory Polygraph Examination**

Assuming the accused has successfully laid the foundation for the admission of his exculpatory polygraph exam, the next issue concerns the Government's use of an inculpatory polygraph results. The court stated in *Mobley* that since the accused's polygraph was *ex parte*, the military judge could require as a condition of its admission that the accused submit to a test by a government examiner.<sup>453</sup> The accused's polygraph examination will be considered *ex parte* unless the government examiner conducts the test in his official capacity.<sup>454</sup> Since this condition would be meaningless unless the Government was permitted to introduce the results of this examination, it seems that the court is implicitly authorizing the admission of an inculpatory result offered to rebut the accused's exculpatory examination.<sup>455</sup>

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<sup>449</sup> 44 M.J. at 444.

<sup>450</sup> *Id.*

<sup>451</sup> 44 M.J. at 454. Mobley submitted to three separate *ex parte* polygraph examinations conducted by a private examiner. *Id.*

<sup>452</sup> 44 M.J. at 457.

<sup>453</sup> 44 M.J. at 455 (citing *United States v. Piccinonna*, 885 F.2d 1529, 1536 (11th Cir. 1989)). The Court appears to base this recommendation on Mil. R. Evid. 302(d), which it first noted in *Gipson*. See *supra* note 231.

<sup>454</sup> See, e.g., *United States v. Hall*, 45 M.J. 255, 1996 WL 790772, \*2 (C.A.A.F. 1996).

<sup>455</sup> However, the Court's decision in *Nash* is not consistent with this line of reasoning. 44 M.J. at 457. The decision indicates that Nash submitted to an *ex parte* exam conducted by the same examiner in *Mobley* with results indicating non-deception, and then underwent an AFOSI exam which indicated deception. The Court's instructions to the trial judge on remand makes no mention of the possibility that the AFOSI exam may be admitted. The absence of such an

Whether the Government can introduce an inculpatory result in the absence of a defense offered exculpatory test remains unanswered.<sup>456</sup> Nonetheless, a strong argument based upon the “Friendly Examiner Theory” can be made that unless the inculpatory result is admitted, the reliability of the exculpatory result is seriously undermined. The argument follows this logic. If the accused passes an *ex parte* exam, then the trial judge may require the accused to submit to a government test. However, if the accused initially submits to a government exam, then the government is precluded from admitting the results if deception is indicated. Consequently, the suspect knows that when he submits to a government exam that deceptive results will be discarded, and “he has little to fear.”<sup>457</sup> If he has little to fear, then the “Friendly Examiner Theory” suggests that the accused’s level of apprehension toward the relevant questions will be reduced, and the exam is unreliable.

### **C. Admissibility of a Polygraph Examination of a Witness**

If an accused has a constitutional right to lay the foundation for the admission of his exculpatory polygraph examination, then does it follow that he has a constitutional right to impeach a prosecution witness with the deceptive results of an exam? An argument can be made that if a witness takes the stand and challenges the accused’s denial of the crime, then the accused should be permitted to lay the foundation for the admission of the witness’ deceptive polygraph test.

For instance, assume that the witness testifies that he saw the accused remove money from the squadron fund, place it into a duffel bag, and leave the room. However, the accused takes the stand and denies taking any money from the fund. The accused has testified, thereby placing his credibility at issue. The testimony of the witness appears to challenge his credibility, and has a direct bearing on the guilt or innocence of the accused. It is unclear, however, if the CAAF would extend the holding in *Scheffer* and allow the credibility of the witness to be challenged by this type of evidence.

### **D. Evidence a Witness Refused or Requested a Polygraph Examination**

The military courts of review have consistently held that both refusals and requests to take polygraph examinations are irrelevant. The Air Force

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instruction may be due to the court granting review on the admissibility of the *exculpatory* exam, only. But, the review granted in *Mobley* was limited to the same issue. See *Mobley*, 44 M.J. at 454.

<sup>456</sup> Since the Sixth Amendment protects the rights of the defendant but not the Government, it does not appear that any constitutional argument can be made which would allow for the unilateral introduction of a polygraph examination by the prosecution.

<sup>457</sup> *United States v. Gipson*, 24 M.J. 246, 249 (C.M.A. 1987). For an explanation of the “Friendly Examiner Theory,” see *infra* notes 562-63 and accompanying text.

Court of Military Review denied admission of evidence that the accused refused to take a polygraph examination in *United States v. Jackson*.<sup>458</sup> Likewise, in *United States v. Tyler*, the accused sought to introduce evidence that government informant refused to take a polygraph examination. The AFCMR held that neither the willingness nor the unwillingness of a witness to take a polygraph test is admissible because it has no bearing upon the guilt or innocence of the accused.<sup>459</sup> The COMA has also held that testimony that the accused was willing to take a polygraph on the condition that the charges be dismissed if he passed is inadmissible because it is irrelevant.<sup>460</sup> However, the court reserved the question of whether an accused would be able to testify that he made an unconditional offer, agreeing to the admissibility of the result regardless of the outcome, and the Government refused to provide the exam.<sup>461</sup>

This last reservation is especially troublesome if Judge Crawford's observation in *United States v. Scheffer* that the accused has a right to request a polygraph examination is correct. It would *always* be in the accused's interest to request an exam. If it is not provided, he may be able to testify that he requested one but was refused. Conversely, if the military provides an examiner, the accused can refuse to take the exam at any time before it is actually completed, and the Government is barred from making any reference to the fact that the accused refused to take the exam even though he initially requested it. The burdens this scenario would create on the military services are obvious.

## VII. CONCLUSION

One can easily understand why both court observers and practitioners have characterized the admissibility of polygraph evidence as a legal Pandora's box. Fierce debate still rages among the relevant scientific communities over the reliability of the once called "lie detector." While the debate continues, polygraph evidence presents unique challenges to the administration of our criminal justice system. Whether this evidence should be admitted and weighed by the jury implicates not only the reliability of the

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<sup>458</sup> 23 M.J. 841, 842 (A.F.C.M.R. 1987).

<sup>459</sup> *United States v. Tyler*, 26 M.J. 680 (A.F.C.M.R. 1987) ("There may be many reasons entirely consistent with truthfulness as to why a witness may not submit to an examination with the aid of a "lie detector") (citing *United States v. Cloyd*, 25 C.M.R. 908 (A.F.B.R. 1958) (Error for police officer to testify that prosecution witness had submitted to a lie detector examination but that the accused refused to do so), *aff'd*, 28 M.J. 253 (C.M.A. 1989), and *cert. denied*, 493 U.S. 814 (1989). *But, cf.*, *State v. Hoffman*, 106 Wis. 2d 185, 217, 316 N.W.2d 143, 160 (1982) (offer to take polygraph examination relevant to assessment of the offeror's credibility and may be admissible for that purpose).

<sup>460</sup> *United States v. West*, 27 M.J. 223, 225 (C.M.A. 1988).

<sup>461</sup> *Id.* at 225 ("Such an assertion may well be probative depending upon the state of the evidence").

theory and technique, but also which actor in the criminal justice system should make the decision.

The majority of state and federal courts—as well as those state legislatures that have addressed the issue—have determined that polygraph evidence may be excluded without violating the accused’s constitutional right to present a defense. The decisions have rested on the unreliability of the exam, the effect on the trial process, the probative value of the evidence, and the amount of court time needed to present the evidence. These concerns may have an added measure of legitimacy within the military’s world-wide criminal justice system.

The CAAF may agree with these concerns when applied to a specific case. In *Gipson*, the court rejected arguments that the jury could not adequately evaluate the scientific testimony. However, the post-*Gipson* decisions indicate that military courts remain skeptical about the reliability and evidentiary value of polygraph evidence. But in each case, a trial judge applied the MREs to a specific fact pattern. It’s important to remember that the effect of the court’s decision in *Scheffer* was to remove MRE 707 as an impediment to the admissibility of polygraph evidence. The court did not rule on the ultimate admissibility decision.

The fate of MRE 707 is now in the hands of the Supreme Court. In order to affirm the CAAF’s holding in *Scheffer*, the Court will first have to find that the policy rationales relied upon by the President are arbitrary. If the Court does so find that the President acted arbitrarily, then secondly, the Court will have to hold that polygraph evidence is otherwise admissible under the standard rules of evidence. Given these hurdles, it is questionable whether the Court can uphold *Scheffer*.

If the Court does uphold the decision in *United States v. Scheffer*, similar constitutional challenges to the state and federal treatment of polygraph testimony will undoubtedly follow. The courts may decide that the accused has a constitutional right to lay the foundation for the admission of the polygraph evidence in each case, making the trial judge the sole “gatekeeper” to the admission of this scientific evidence. The CAAF has certainly reached this conclusion. The larger question, however, is who will determine whether the gate should be open at all? If during this debate, the President has lost the ability to establish the standards to guide the trial judge in opening the gate, the balance of judicial power in the military justice system has shifted and the proper constitutional roles brought into question.

## APPENDIX—DoD Use of Polygraph Examinations<sup>462</sup>

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<sup>462</sup> The author would like to thank Mr. John R. Schwartz, former Deputy Director of the DoD Polygraph Institute and Special Agent Charles E. Fisher, Jr., AFOSI Forensic Psychophysicologist, for their assistance in completing this appendix. All opinions remain those of the author unless otherwise noted. Where possible, the actual language of the

Agents from the Air Force Office of Special Investigations (AFOSI) are assigned to support Air Force installations within a specific geographic region, and are authorized to use the polygraph during three types of investigations: counterintelligence, personal security clearance, and criminal.<sup>463</sup> AFOSI is also authorized to conduct polygraph examinations upon a suspect's request for the purposes of exculpation.

### A. Training of DoD Examiners

AFOSI agents are responsible for administering polygraph examinations for the Air Force.<sup>464</sup> The agents are trained at the Department of Defense Polygraph Institute (hereinafter DoDPI), which provides instructional and research support for all federal agencies. DoDPI is officially funded and maintained by the Army at Fort McClellan, Alabama.<sup>465</sup> Each potential candidate must meet a series of minimum requirements including: a degree from an accredited 4-year college, completion of a DoD-approved course of instruction, and two years as an investigator with a recognized U.S. Government or other law enforcement agency.<sup>466</sup>

The course of instruction at the DoDPI is at the graduate level. During the 12 to 14 weeks of instruction, examiners complete 15 hours of graduate credit in Psychology, Physiology, Ethics, Psychometric Reliability and Validation, and Research Design. Training also includes the administration of exams and interpretation of charts, as well as the detection of the examinee's use of countermeasures.<sup>467</sup> This coursework represents the academic requirements for DoD Certification.

Upon graduation from the DoDPI, the examiner enters a six-month to a year probationary period under the supervision of a certified examiner, during which she must conduct at least 25 polygraph examinations.<sup>468</sup> Thereafter, the

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Department of Defense Directives and Air Force Instructions cited within this appendix is provided.

<sup>463</sup> Department of Defense Directive 5210.48, *Department of Defense Polygraph Program*, Ch 1(B) (Dec. 24, 1984) [hereinafter DoD Directive 5210.48].

<sup>464</sup> Air Force Instruction 71-101, *Special Investigations*, Vol. 1 § 4.2 (July 22, 1994) [hereinafter AFI 71-101].

<sup>465</sup> Department of Defense Directive 5210.78, *Department of Defense Polygraph Institute (DoDPI)* (Sept. 18, 1991). The Central Intelligence Agency's training program was terminated following the Ames spy case, and those agents are now trained by DoD. Telephone Interview with John R. Schwartz, Deputy Director of the DoD Polygraph Institute (Jan. 7, 1997). With the closing of Fort McClellan, DoDPI will be moving to Fort Jackson, South Carolina in the future.

<sup>466</sup> DoD Directive 5210.48, *supra* note 463, at Ch 3(A)(1)(c).

<sup>467</sup> Telephone Interview with John R. Schwartz, Deputy Director of the DoD Polygraph Institute (Jan. 7, 1997).

<sup>468</sup> DoD Directive 5210.48, *supra* note 462, at Ch 3(B)(2).

examiner must conduct 18 examinations semiannually,<sup>469</sup> and obtain refresher training every two years.<sup>470</sup> Active duty DoD polygraph examiners are prohibited from performing or participating in polygraph-related activities in connection with non-duty employment without Air Force approval.<sup>471</sup>

## B. Training of Private Examiners

Although the DoDPI training program and standards for federal agents are uniform, the regulation and training of private examiners varies substantially among state jurisdictions. Twenty-nine states require that polygraph examiners be licensed,<sup>472</sup> with fewer requiring a formal course of study at a professional school specializing in polygraph training.<sup>473</sup> Many commentators have questioned the average field examiner's training and competency,<sup>474</sup> emphasizing that an examiner should be questioned concerning his basic knowledge of psychology, psychophysiological measurement, and validation problems.<sup>475</sup> In particular, it has been stressed that the competence of an examiner unfamiliar with the specific scientific literature concerning polygraph testing should be suspect.<sup>476</sup>

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<sup>469</sup> *Id.* at Ch 3(C)(1).

<sup>470</sup> *Id.* at Ch 3(B)(2).

<sup>471</sup> *Id.* at Ch 3(D)(4).

<sup>472</sup> Matthew Mariani, *You're a What? Forensic psychophysiologicalist*. 3/1/96 Occupational Outlook Q. 46, 1996 WL 11849952. For example, Virginia license requirements include: 5 years of investigative experience (college education in criminal justice or psychology can substitute), specialized training in conducting exams, an internship of 6 months, a clean police record, and successful completion of a licensing test. *Id.* According to a list provided by the American Polygraph Association, the following states maintain licensing boards: Alabama, Arkansas, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, and West Virginia (list on file with the author).

<sup>473</sup> In addition to the DoDPI, eleven American Polygraph Association (APA) accredited polygraph schools existed as of January 16, 1996. James Allan Matte, Ph.D., *Forensic Psychophysiology: Using the Polygraph*, app. P at 679 (1996).

<sup>474</sup> Charles R. Honts & Mary V. Perry, *Polygraph Admissibility: Changes and Challenges*, 16 LAW & HUM. BEHAV. 357, 369 (1992). See also Paul C. Giannelli & Edward J. Imwinkelried, *Scientific Evidence*, 2ed. Vol.1 at § 8-2(A) (1993) ("Others have observed that 'polygraph examiners in the United States, as a whole, are poorly trained'") (quoting Honts and Perry, *Polygraph Admissibility*, 16 LAW & HUM. BEHAV. 357, 375 (1992)).

<sup>475</sup> *Id.* at 371.

<sup>476</sup> Charles R. Honts & Bruce D. Quick, *The Polygraph in 1995: Progress in Science and the Law*, 71 N.D. L. Rev. 987, 999 (1995). Likewise, in *United States v. Williams*, 95 F.3d 723, 728-29 (8th Cir. 1996), the FBI examiner was unable to answer questions concerning the current literature in the field and did not recognize the name of a leading polygraph expert. The district court found that the examiner was qualified as a polygraph examiner, but not an expert in the field of forensic psychophysiology capable of providing testimony to the elements of *Daubert*.

While the exact number of private examiners is unknown, the American Polygraph Association reports 1,800 professional members, the American Association of Police Polygraphists 650, and the National Polygraph Association, 500.<sup>477</sup>

### C. Requesting a Polygraph Examination

Air Force organizations responsible for security, law enforcement, or criminal justice administration may request polygraph examinations by contacting the nearest AFOSI unit.<sup>478</sup> AFOSI then forwards the request to AFOSI Investigative Operations Center, Polygraph Office (IOC/PLG) for approval.<sup>479</sup>

For the purposes of a criminal investigation, AFOSI may authorize a polygraph examination for an offense punishable under Federal law, to include the UCMJ, by death or confinement for a term of a year or more.<sup>480</sup> This requirement may be waived by the Commander, AFOSI.<sup>481</sup> Additionally, the subject must have been interviewed and reasonable cause established that he has knowledge of, or was involved in, the crime.<sup>482</sup> Finally, authorities are directed to utilize examinations when investigation by other means has been as thorough as circumstances permit;<sup>483</sup> and as a supplement to, and not a substitute for, other forms of investigation that may be required.<sup>484</sup>

The subject of a criminal investigation may also request to undergo a polygraph examination for the purposes of exculpation.<sup>485</sup> Authorization may be granted if the examination is determined to be “essential to the just and equitable resolution of the matter under investigation.”<sup>486</sup> The Area Defense Counsel may request the examination using the same procedures as the government. While the regulation does not stipulate that the accused must be represented by counsel, he would not qualify as an “Air Force organization” and it would appear that a waiver to the polygraph program must be submitted to the Commander, AFOSI.<sup>487</sup>

Finally, the accused must consent in writing to the polygraph examination and be advised of his right to consult with legal counsel.<sup>488</sup> Legal

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<sup>477</sup> Mariani, *supra* note 472.

<sup>478</sup> AFI 71-101, *supra* 464, at 4.2.

<sup>479</sup> *Id.* at 4.2.1.2 (containing a list of the pertinent information which should be included in the request).

<sup>480</sup> DoD Directive 5210.48, *supra* note 463, at Ch 1(4)(B)(1)(a)

<sup>481</sup> AFI 71-101, *supra* note 464, at Ch 4.2.2.

<sup>482</sup> DoD Directive 5210.48, *supra* note 463, at Ch 1(B)(1)(b).

<sup>483</sup> *Id.* at Ch 1(B)(1)(b).

<sup>484</sup> *Id.* at Ch 1(A)(3).

<sup>485</sup> *Id.* at Ch 1(B)(5).

<sup>486</sup> *Id.* at Ch 1(B)(5).

<sup>487</sup> AFI 71-101, *supra* note 464, at Ch 4.2.2.

<sup>488</sup> DoD Directive 5210.48, *supra* note 463, at Ch 2(A)(2)(a).



counsel may also be available for consultation during the examination.<sup>489</sup> Once the accused has exercised his right to counsel, the Government is not permitted to ask the accused to consent to a polygraph examination.<sup>490</sup> If the examinee refuses to submit to a polygraph examination, no unfavorable administration action may be taken based upon the refusal.<sup>491</sup> However, the threat of administering the polygraph may be used to encourage a confession.<sup>492</sup>

#### **D. The Control Question Technique and the Directed Lie Control Question Technique**

Arguably, the most critical decision impacting the validity and reliability of the polygraph examination is the formulation of the test questions.<sup>493</sup> The AFOSI examiner, who is usually not the investigative officer, reviews the report of investigation and formulates the questions to be asked during the exam. The Control Question Technique (hereinafter CQT) is the primary testing technique utilized by AFOSI in criminal investigations.<sup>494</sup> A second technique, the Directed Lie Control Question Technique (hereinafter DLCQ), is used solely for Counterintelligence Security Polygraph examinations. Both techniques consist of up to ten questions which are designed to elicit a “yes” or “no” response.<sup>495</sup>

Using either technique, the examiner will ask three types of questions: irrelevant or neutral, control, and relevant. Irrelevant questions are those to which the examinee would normally tell the truth, for example “Is your name John Smith?” If the CQT is used, a control question will address a topic

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<sup>489</sup> *Id.* at Ch 1(A)(2).

<sup>490</sup> *United States v. Applewhite*, 23 M.J. 196 (C.M.A. 1987) (government asked to consent five days after accused exercised right to counsel).

<sup>491</sup> DoD Directive 5210.48, *supra* note 463, at Ch 1(A)(7) (privileged against self-incrimination under the Fifth Amendment or Article 31(b), UCMJ, if a member of the U.S. Armed Forces). *See also Id.* at Ch 1(D)(4) (Mention of refusal to submit to an exam is not permitted in the person’s official evaluation report; nor is it considered in determining eligibility for promotion or awards.).

<sup>492</sup> *United States v. Bostic*, 35 C.M.R. 511 (A.B.R. 1964). *But see* DoD Directive 5210.48, *supra* note 463, at Ch 1(A)(5) (The Government is authorized to deny access, employment, assignment, or detail upon refusal to undergo a polygraph examination for special access programs.).

<sup>493</sup> *See, e.g., United States v. Pope*, 30 M.J. 1188, 1190 (A.F.C.M.R. 1990) (Experts criticized the polygraph examiner, *inter alia*, for “significant flaws in the critical formulation of ‘control’ and ‘relevant’ questions for the exam”); *United States v. Rodriguez*, 37 M.J. 448, 452 (C.M.A. 1993) (Relevant questions, which focused on knowledge of both criminal and innocent conduct, did not permit the examiner to differentiate source of deception and undermined the reliability of the evidence.).

<sup>494</sup> Interview with Special Agent Charles E. Fisher, Jr., AFOSI Forensic Psychophysicologist (Jan. 8, 1997).

<sup>495</sup> *Id.*

similar to the matter under investigation and is designed to be used as the baseline for comparison to relevant questions.<sup>496</sup> An example of a control question is: “Before January 4, 1994, did you ever hit anyone with your fist?” The control questions are formulated so that the examinee is either uncertain about the truthfulness of the “no” answer or outright deceptive.<sup>497</sup> Finally, relevant questions specifically address the matter under investigation and for which the examinee is being tested, although questions calling for a legal conclusion should be avoided.<sup>498</sup> An example of a relevant question is: “On January 4, 1996, did you hit John Doe in the face with your fist?”<sup>499</sup>

The CQT is premised upon the Psychological Set theory. The rationale of this theory is two-fold. The Psychological Set theory posits that the results of the examination are dependent upon the attention factor of the examinee. First, it is theorized that the guilty examinee will focus his attention on the relevant questions, thereby exhibiting a more pronounced physiological response when presented with the relevant questions than the control questions.<sup>500</sup> Alternately, the innocent person will focus his attention on the control questions rather than the relevant questions.<sup>501</sup> Why? Because although the innocent individual will be steered into answering the control question “no,” he will actually be uncertain about the answer, possibly remembering someone that he did “hit” and display a pronounced physiological reaction. When presented with the relevant question, however, the innocent individual will display a less severe reaction to the relevant question since the answer “no” is truthful.

The underlying theory of the polygraph technique may strike one as problematic. From the proceeding discussion, it appears that the physiological results are more dependent upon apprehension than on the truthfulness of the response. For example, while the Psychological Set theory states that the innocent person will focus more attention on the control questions than the relevant questions, this proposition seems strange. If an innocent individual is a suspect in a murder case and faces a death sentence, it is difficult to imagine how the control questions could ever be formulated in such a way to distract his attention from the question which he knows is about to be posed: “Did you

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<sup>496</sup> Honts & Quick, *supra* note 476, at 991.

<sup>497</sup> Charles R. Honts & David C. Raskin, *A Field Study of the Validity of the Directed Lie Control Question*, JOURNAL OF POLICE SCIENCE AND ADMINISTRATION, Vol. 19 n.1 at 56 (March 1988).

<sup>498</sup> An example is “Did you steal X?” Not only is “steal” a legal term, it is also easy for the suspect to rationalize that he did not steal. Instead, the question should focus on physical conduct, such as “Did you remove X from the safe?” Interview with Special Agent Charles E. Fisher, Jr., AFOSI Forensic Psychophysicologist (Jan. 8, 1997). *See also* United States v. Cato, 44 M.J. 82, 83 (C.A.A.F. 1996) (military judge faulted examiner’s use of the legal term “steal” in two of the four questions because it involved legal implications).

<sup>499</sup> Honts & Quick, *supra* note 476, at 992.

<sup>500</sup> *Id.* at 991.

<sup>501</sup> *Id.*

insert a knife in John Doe's back?" Conversely, if a crafty criminal has committed the perfect crime, so that he knows there is no evidence, he may have little if any concern for the relevant questions.

Consequently, the rationale of the CQT has been criticized by a number of commentators who doubt the competency of field examiners to properly draft and administer the control questions.<sup>502</sup> First, a guilty suspect may be more threatened by the control questions if they are not properly formulated, allowing him to respond more severely and resulting in a false negative.<sup>503</sup> Additionally, innocent individuals may find the control questions offensive and refuse to answer.<sup>504</sup> In response to these criticisms, the DLCQ technique was developed.

The DLCQ is similar to the CQT, and the rationale still rests on a comparison of the control questions to the relevant questions. However, the individual's reaction to the control question is controlled by direct manipulation of the response.<sup>505</sup> During the pre-test interview the examinee is instructed to lie to the control question, which can be nearly any question which the individual agrees to answer deceptively.<sup>506</sup> The subject is told that if the reaction to the control question is not sufficiently strong, the test will be inconclusive. It is reasoned that the innocent individual, who is concerned about a false positive or an inconclusive result, will be more threatened by the control question. Conversely, guilty subjects are expected to remain focused on the relevant questions.<sup>507</sup>

### **E. Administering the Polygraph Examination**

The polygraph examination has five distinct phases: 1) the pre-test; 2) in-test or data collection; 3) data analysis; 4) post-test; and 5) quality control. While the first three phases usually last from 1 ½ to 2 ½ hours, the post-test may last many hours.<sup>508</sup>

#### *1. Pre-test Phase*

During the pre-test interview, the examinee completes a written form affirming voluntary consent to the exam and acknowledging that he or she is

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<sup>502</sup> Honts & Raskin, *supra* note 497, at 56 (citing D.T. Lykken, *A Tremor in the Blood* (1981)).

<sup>503</sup> *Id.*

<sup>504</sup> *Id.*

<sup>505</sup> *Id.* at 57.

<sup>506</sup> *Id.*

<sup>507</sup> *Id.*

<sup>508</sup> Interview with Special Agent Charles E. Fisher, Jr., AFOSI Forensic Psychophysicologist (Jan. 8, 1997). *See also* United States v. Martinez, 38 M.J. 82, 83 (C.M.A. 1993) (Polygraph pre-test lasted 1 hour and 50 minutes, with 5 minute break. Test phase lasted 40 minutes. Post-test phase lasted "many hours").

privileged against self-incrimination.<sup>509</sup> The examinee is also advised that he or she has the right to obtain legal counsel which may be available for consultation during any phase of the examination.<sup>510</sup> While the examinee may terminate the exam either at his own initiative or upon advice of counsel,<sup>511</sup> defense counsel is typically not allowed in the room while the test is being administered.<sup>512</sup>

The examiner then explains how the subject will be physically connected to the polygraph machine and the procedures to be followed during the test.<sup>513</sup> Perhaps most importantly, the AFOSI examiner reviews with the examinee all questions which will be asked during the test. Since, in theory, the accuracy of the polygraph is dependent upon the focus of the examinee's attention to either the relevant or control questions, familiarity with these questions will only magnify the effect.

Finally, the polygraph examiner conducts a visual evaluation and questions the subject to ensure that he or she is fit to be tested.<sup>514</sup> The examiner looks for evidence that the examinee is mentally or emotionally fatigued, known to be addicted to narcotics, suffers from a mental disorder, or is experiencing physical discomfort or disabilities which would cause abnormal responses.<sup>515</sup> Once the examiner is satisfied that none of the

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<sup>509</sup> DoD Directive 5210.48, *supra* note 463, at Ch 2(A)(2).

<sup>510</sup> *Id.* at Ch 2(A)(2)(4).

<sup>511</sup> *Id.* at Ch 2(A)(2)(4).

<sup>512</sup> Interview with Special Agent Charles E. Fisher, Jr., AFOSI Forensic Psychophysicologist (Jan. 8, 1997). Apparently this prohibition is justified on the grounds that it affects the reliability of the test. However, if evidence indicates that the "Friendly Examiner Theory" is unfounded, then the defense attorney's presence should also not impact the test's reliability. See *supra* notes 563-64 and accompanying text. As a practical point, defense counsel should request to be in the room or behind a one-way mirror, and have the examination taped, preferably with a video camera to allow other experts to accurately opine on the validity of the procedures.

<sup>513</sup> DoD Directive 5210.48, *supra* note 463, at Ch 2(A)(2)(c)(1).

<sup>514</sup> This determination includes not only the mental and physical state of the examinee, but also his age. For example, Dr. Raskin, a Professor of Psychology at the University of Utah and a leading expert on the conduct of polygraph examinations, has stated that he would not perform a test on a child of 12 years or younger because it is contrary to the prevailing practice in the field. Nancy Hollander & David Raskin, *Using the Polygraph to Avoid Prosecution*, presented at the ATLA's National College of Advocacy and the National Association of Criminal Defense Lawyers Conference "The Deadliest Accusation: Child Abuse in the 90s" (May 21-22, 1993) (on file with the author). Consequently, it would not be possible to conduct polygraph examinations on children who allege child abuse, although the test may be available for an accused adult. The author would like to thank Dr. Charles Honts, Psychology professor, Boise State University, for providing copies of this and other relevant resources.

<sup>515</sup> DoD Directive 5210.48, *supra* note 463, at Ch 3(D)(6). See also *United States v. Berg*, 44 M.J. 79, 80 (C.A.A.F. 1996) (Government polygraph expert criticized private examiner's decision to conduct "the test without medical or psychological clearance, given [Berg's] admission during the pretest interview that he had been suffering from depression and had taken sleeping pills several hours earlier").

aforementioned conditions exists, the examiner will begin to attach the individual to the polygraph machine.

A number of sensors link the individual to the polygraph machine: two pneumatic sensors are attached to the upper and lower thoracic area to record respiration, galvanic skin resistance sensors are placed on the finger tips to record changes in electrodermal activity, and a standard blood pressure cuff is placed around the upper arm to measure blood volume changes.<sup>516</sup> The examinee is seated facing the opposite direction of the examiner, and is therefore unable to view the polygraph chart as it exits the machine.<sup>517</sup> The machine is then turned on and the questioning begins.

## 2. Data Collection

The test phase of the polygraph examination lasts approximately twenty minutes.<sup>518</sup> The polygraph examiner will ask the same set of questions at least three times, producing at least three separate charts.<sup>519</sup> If the examinee terminates the test before the three charts are completed, the examiner's evaluation will be "No Opinion."<sup>520</sup> Once the three charts are completed, the test portion of the exam is finished and the equipment is removed from the examinee. An opinion regarding the examinee's physiological reaction can now be rendered regardless of whether a post-test interview is conducted.<sup>521</sup>

## 3. Data Analysis

The next step for the AFOSI examiner is to "read" or evaluate the charts. Requiring the exercise of subjective judgment, the examinee's responses to the relevant and control questions are measured and compared on each of the three charts. The scale utilized for the evaluation of versions of the Modified General Question Test<sup>522</sup> dictates that responses greater than -3 are "Deception Indicated," -3 to 3 are "Inconclusive," and greater than 3 are "No Deception Indicated." The final score is a cumulative total of all charts on all components.<sup>523</sup>

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<sup>516</sup> *Id.*

<sup>517</sup> *Id.*

<sup>518</sup> Interview with Special Agent Charles E. Fisher, Jr., AFOSI Forensic Psychophysicologist (Jan. 8, 1997).

<sup>519</sup> *Id.* The most compelling reason that the questions are asked three times is to ensure the responses are consistent. If the physiological responses are consistent and specific for each chart, then it is possible to classify the responses as reliable. *Id.*

<sup>520</sup> *Id.* See also New Mexico Rule of Evidence, Rule 11-707(C) (expert opinion of polygraph examiner admissible only if, *inter alia*, at least three charts were taken of the examinee).

<sup>521</sup> *Id.* See also Honts & Quick, *supra* note 476, at 990.

<sup>522</sup> *Id.* Both the Zone Comparison Test and the Bi-Zone Question Technique have a different scale.

<sup>523</sup> *Id.* For example, consider the following scoring of four relevant questions:

If in the examiner's opinion the test is inconclusive, a re-test with different questions is usually considered.<sup>524</sup> The re-test may be conducted by the original examiner without obtaining additional approval from the official who granted the first request.<sup>525</sup> Of course, the examinee may choose not to participate in the subsequent examination, and the requirements for physical and mental astuteness still apply.

In an effort to remove the polygraph examiner's subjective evaluation in the interpretation of the polygraph charts, both DoD and private sector specialists have developed computer algorithms to analyze the data. DoDPI's version, developed in conjunction with John Hopkins University Applied Physics Laboratory, is currently utilized by AFOSI and is in its fourth version.<sup>526</sup> Three hundred sets of confirmed NDI and confirmed DI charts were used to standardize the algorithm. While AFOSI maintains a high

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	Question #1	Question #2	Question #3	Question #4
<b>CHART 1</b>				
Respiration	+1	0	+1	0
Perspiration	+1	-1	+1	+1
Blood Volume	-1	-2	-1	+1
<b>Total</b>	<b>+1</b>	<b>-3</b>	<b>+1</b>	<b>+2</b>
<b>CHART 2</b>				
Respiration	+1	+1	+1	-1
Perspiration	+1	-1	+1	-1
Blood Volume	+1	+1	+1	+1
<b>Total</b>	<b>+3</b>	<b>+1</b>	<b>+3</b>	<b>-1</b>
<b>CHART 3</b>				
Respiration	+1	0	+1	0
Perspiration	+1	+1	+1	+1
Blood Volume	-1	+1	0	+1
<b>Total</b>	<b>+1</b>	<b>+2</b>	<b>+2</b>	<b>+2</b>
<b>TOTALS</b>	<b>+5</b>	<b>0</b>	<b>+6</b>	<b>+3</b>

Because the scoring of question #2 is between -3 and +3, the examiner would render an "inconclusive" opinion concerning the entire test. Absent this result, questions #1, #3, and #4 would lead to an opinion of "No Deception Indicated" on this test.

<sup>524</sup> *Id.*

<sup>525</sup> DoD Directive 5210.48, *supra* note 463, at Ch 3(C)(6).

<sup>526</sup> Telephone Interview with John R. Schwartz, Deputy Director of the DoD Polygraph Institute (Jan. 7, 1997); *Polygraph Data Evaluation Program SOL DABT02-96-R-0010*, 6/10/96 Com. Bus. Daily, 1996 WL 10514611.

concurrency rate between the algorithm and evaluator field data,<sup>527</sup> many in the scientific community claim the algorithm has not been subjected to the intense peer review normally required for acceptance in the scientific community.

In addition to the DoDPI algorithm, John Kircher<sup>528</sup> has developed a computer program which matches the examinee's physiological responses to those of a convicted murderer.<sup>529</sup> Dr. Charles Honts<sup>530</sup> claims that the program can conclude with approximately 90 percent accuracy whether the test subject is telling the truth, while the accuracy rate for regular polygraph tests is approximately 80 percent.<sup>531</sup> The research which formed the basis for the program has been subjected to extensive peer review, and has been published in scientific journals.<sup>532</sup> Undoubtedly, the accuracy and utility of computer models will continue to be contested, both in the courtroom and the scientific community.

#### 4. *Post-test Interview*

If the examiner reads the charts "NDI," the examinee is so informed and the session is usually terminated.<sup>533</sup> If on the other hand the charts indicate deception, the AFOSI agent will attempt to gain an explanation for the deceptive result during a post-test interview. The interview provides the examinee an opportunity to explain past events which might have affected the test but were not conveyed during the pre-test interview. Many have claimed that this interview takes the form of an interrogation.<sup>534</sup> Regardless of the actual form of the interview, it often results in the accused confessing to the crime.<sup>535</sup>

If the accused is represented by counsel, the post-test interview will

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<sup>527</sup> Interview with Special Agent Charles E. Fisher, Jr., AFOSI Forensic Psychophysicologist (Jan. 8, 1997).

<sup>528</sup> Mr. Kircher is a computer programmer at the University of Utah. Dan Gallagher, *Software Will Make Lies More Detectable*, 3/24/96 Idaho Statesman, 1996 WL 9218090.

<sup>529</sup> *Id.*

<sup>530</sup> Psychology professor, Boise State University. Prof. Honts teaches classes annually at the Canadian Police College in Ottawa, Canada, and was a staff member for DoDPI from 1988-1990. He has worked closely with defense attorneys on the John DeLorean cocaine trial and the Mark Hoffman bombing case in Salt Lake City.

<sup>531</sup> Dan Gallagher, *Software Will Make Lies More Detectable*, 3/24/96 Idaho Statesman, 1996 WL 9218090.

<sup>532</sup> See Kircher & Raskin, *Human Versus Computerized Evaluations of Polygraph Data in a Laboratory Setting*, 73 J. Applied Psychol. 291 (1988).

<sup>533</sup> Interview with Special Agent Charles E. Fisher, Jr., AFOSI Forensic Psychophysicologist (Jan. 8, 1997).

<sup>534</sup> *Id.* Special Agent Fisher strongly disagreed with this contention.

<sup>535</sup> See *Annual Polygraph Report to Congress*, Department of Defense Polygraph Program, Office of the Assistant Secretary of Defense (Command, Control, Communications, and Intelligence) Fiscal Years 1986-1996.

rarely occur.<sup>536</sup> Defense counsel has the opportunity to speak with the suspect after the test, and will simply advise the client to withdraw consent and terminate the interview. The defense counsel may also enter into an agreement before the test is taken that if a deceptive result is indicated, no post-test interview will occur.<sup>537</sup>

The significance of the post-test interview is disputed. While the examiner can typically render an opinion after three charts are made, the post-test interview may be “helpful to differentiate the basis for the [examinee’s] deception to the relevant questions.”<sup>538</sup> Consequently, if testimony is elicited during the court-martial that the interview is “normally required,” then it will be “incumbent on the proffering party to demonstrate that the omission does not undermine the examination’s reliability.”<sup>539</sup>

If the examinee chooses to continue with a post-test interview, then any subsequent confession is admissible regardless of the polygraph examiner’s accuracy in interpreting the charts. The highest military court has long ruled that the use of the polygraph does not render subsequent confessions involuntary.<sup>540</sup> Additionally, it is permissible for AFOSI to use phony polygraph results during an interrogation.<sup>541</sup>

### 5. *Quality Control*

A misinterpretation of the polygraph results can, of course, be either intentional or unintentional. Both professional ethics and the DoD Directive<sup>542</sup> prevents the intentional misuse of polygraph results. Additionally, the Quality Control procedure utilized by AFOSI guards against the possibility of unintentional errors in the interpretation of the charts.<sup>543</sup> Once the field examiner has analyzed the charts, they are forwarded to the Regional Polygraph Chief and then HQ AFOSI Quality Control for independent readings.<sup>544</sup> While the number of field examiners who are overruled is

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<sup>536</sup> Interview with Special Agent Charles E. Fisher, Jr., AFOSI Forensic Psychophysicologist (Jan. 8, 1997).

<sup>537</sup> *See, e.g.*, United States v. Rodriguez, 37 M.J. 448, 453 (C.M.A. 1993) (interview omitted under agreement between the defense counsel and the polygraph examiner).

<sup>538</sup> *Id.* at 453.

<sup>539</sup> *Id.*

<sup>540</sup> United States v. Lane, 34 C.M.R. 744 (C.G.B.R. 1964).

<sup>541</sup> United States v. Bostic, 35 C.M.R. 511 (A.B.R. 1964). The author in no way implies that this type of action is either presently practiced or condoned. Instead, it is merely noted that a subsequent confession could be admissible.

<sup>542</sup> DoD Directive 5210.48, *supra* note 463, at Ch 2(D)(4) (“The polygraph instrument shall not be utilized as a psychological prop in conducting interrogations”).

<sup>543</sup> Unless recanted or challenged as involuntary, once the signed confession is obtained from the accused, the results of the polygraph are no longer needed as evidence.

<sup>544</sup> Interview with Special Agent Charles E. Fisher, Jr., AFOSI Forensic Psychophysicologist (Jan. 8, 1997).



small,<sup>545</sup> the three step quality control procedure provides an important check to the continued credibility of AFOSI examiners. Alternatively, private examiners rarely employ quality control procedures, which may call into question the reliability of their results.<sup>546</sup>

### F. How Reliable is the Polygraph and the CQT?

As one member of the CAAF has penned, “Few subjects in the law have generated as much controversy as the polygraph.”<sup>547</sup> After being labeled “lie detectors” and peddled by a cottage industry of untrained examiners, many claim polygraphs are making a comeback in the public eye.<sup>548</sup> However, horror stories of honorable men and women falsely implicated by a polygraph examination are repeated on the floor of the Congress,<sup>549</sup> and former polygraph examiners sell thousands of books that purport to teach the guilty how to “beat the machine.”<sup>550</sup> Consequently, both prosecution and defense attorneys need to have a basic understanding of: 1) the scientific estimations of the general reliability of the polygraph; 2) the specific effectiveness of countermeasures employed during the examination; and 3) the existence of the “friendly examiner” hypothesis.

Fierce debate continues amongst the scientific community over the reliability and validity of the polygraph.<sup>551</sup> The two present means of scientific testing, field studies and mock crime experiments, both have

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<sup>545</sup> *Id.*

<sup>546</sup> *See, e.g.,* United States v. Pope 30 M.J. 1188, 1190 (A.F.C.M.R. 1990) (Government rebuttal expert attacked reliability of polygraph exam, *inter alia*, for lack of quality control of testing procedures and results).

<sup>547</sup> United States v. Gipson, 24 M.J. 246, 248 (C.M.A. 1987).

<sup>548</sup> Anthony Flint, *Polygraph Come Back in Search of the Truth*, 2/11/96 Com. Appeal, 1996 WL 3203398.

<sup>549</sup> 131 Cong.Rec. H5953-01 (daily ed. July, 18, 1985) (statement of Rep. Neal). Mr. Neal quotes from George Wilson, *I Know the Polygraph Lied*, 6/18/85 Washington Post, and acknowledges the deterrent effect of polygraph examinations, but noting that with only a 90% accuracy rate, “[w]e also would humiliate, embarrass, and possibly ruin the careers and lives of perfectly innocent people.” The cited Washington Post editorial discusses the case of John Tillson, a civilian executive in the defense manpower and logistics office of the Pentagon and a decorated Army combat officer. Tillson submitted to a polygraph examination during a Pentagon investigation of the source of a news leak. Tillson’s exam indicated deception, although George Wilson claimed Tillson neither gave him information nor spoke to him, and that he did not even know Tillson was in attendance at the meeting.

<sup>550</sup> John Dorschner, *To Tell the Truth? Polygraph is very popular and very controversial*, 5/6/86 Dallas Morning News 1C, 1986 WL 4317384. (Doug Williams, a former Oklahoma City police polygraph examiner, is the author of “How to Sting the Polygraph.” He is quoted as saying, “It’s not that I’m interested in cheating. But it’s this: If I can prove it can be manipulated, controlled at will by the subject, then it shows that polygraph is worthless”).

<sup>551</sup> For an extensive review of the history and current scientific status of the polygraph, see James Allan Matte, Ph.D., *Forensic Psychophysiology: Using the Polygraph*, (1996).

significant drawbacks.<sup>552</sup> While field studies using actual cases present the most realistic testing conditions, it is difficult to verify the accuracy of the test result; i.e., whether the examinee was actually deceptive or not.<sup>553</sup> Alternatively, while the results of the controlled laboratory experiments are easily verified, a realistic testing environment may not be replicated.<sup>554</sup>

Despite these limitations, scientific studies claim to give some indication of the general reliability and accuracy of the polygraph. First, the Control Question Technique appears to result in more false positives than false negatives;<sup>555</sup> “more accurate at detecting the deception of the guilty person than detecting the truthfulness of the innocent person.”<sup>556</sup> Second, studies indicate that false positives are more frequent if the examinee is the victim rather than a suspect.<sup>557</sup> Finally, examinations which involve “specific issues produce more valid results than those involving mental state issues.”<sup>558</sup>

A second important concern in both the eyes of the court and the public involves the use of countermeasures during the examination. Countermeasures can be divided into three categories: mental imagery, physical, and pharmaceutical. Mental imagery and physical countermeasures appear to be the most frequently encountered. Mental imagery involves the redirection of concentration and reaction from the relevant questions to the control questions. Physical countermeasures included such tactics as a suspect pressing his toes against the floor or clenching his biceps. One study has concluded that using this technique during the neutral questions reduced the rate of detection from 75% to 10%.<sup>559</sup> Another study concluded that countermeasures were ineffective.<sup>560</sup> Regardless, many examiners attach motion sensors to the testing chair to indicate if the examinee is attempting to employ physical countermeasures.

AFOSI examiners are specifically instructed in countermeasure

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<sup>552</sup> Giannelli, *supra* note 13, at § 8-2(C).

<sup>553</sup> *Id.* at 226.

<sup>554</sup> *Id.*

<sup>555</sup> *Id.* at 222 (citing Bull, “What is the Lie-Detection Test?,” in *The Polygraph Test: Lies, Truth and Science* 14 (A. Gale ed. 1988)).

<sup>556</sup> *Id.* at 227 (quoting Barland, “The Polygraph Test in the USA and Elsewhere,” in *The Polygraph Test: Lies, Truth and Science* 73 (A. Gale ed. 1988)).

<sup>557</sup> Giannelli, *supra* note 13, at §8-2(C) (quoting Barland, “The Polygraph test in the USA and Elsewhere,” in *The Polygraph Test: Lies, Truth and Science* 73, 83 (A. Gale ed. 1988)).

<sup>558</sup> *Id.* (quoting *Id.* at 83-84)).

<sup>559</sup> See *United States v. Piccinonna*, 885 F.2d 1529, 1538 n.3 (11th Cir. 1989) (Johnson, C.J., concurring in part and dissenting in part) (citing Gudjonsson, *How to Defeat the Polygraph Tests*, in *The Polygraph Test*, at 129 (citing Kubis, *Studies in Lie Detection: Computer Feasibility Considerations* (Technical Report 62-205, prepared for Air Force Systems Command) (1962))).

<sup>560</sup> *Id.* (citing *Id.*) (citing More, *Polygraph Research and the University*, 14 *Law and Order* 73-78 (1996)).

detection and identification in the curriculum at the DoDPI.<sup>561</sup> Additionally, one expert has noted that the computer algorithms currently employed “identify few countermeasures,” while the examiner who “manually analyzes and quantifies the physiological data is capable of identifying most known countermeasures.”<sup>562</sup>

Finally, both courts and prosecutors frequently cite the “Friendly Examiner Theory” to support claims that *ex parte* polygraphs are inherently unreliable. Recall that the underlying theory of the polygraph rests on the examinee’s fear of detection which prompts different reactions to the control and relevant questions. Hence, Dr. Martin Orne first suggested that when the examinee knows that a “failed” test will not be admissible, the fear of detection is not realistic and the test is unreliable.<sup>563</sup> Similar to the use of countermeasures, this theory would result in an increased number of false negatives. Although still advanced, the claim has been made that “the only research bearing upon this hypothesis does not support it.”<sup>564</sup>

Despite the arguable reliability and accuracy of the polygraph examination, it remains an important and effective investigative tool.<sup>565</sup> Regardless of the test results, AFOSI may draw a logical inference from either a suspect’s request to take or refusal to submit to a polygraph examination which permits it to concentrate organizational effort and resources. For example, suppose that money has been taken from a certain fund to which five individuals have regular access. If four contact AFOSI and request an exculpatory polygraph examination, then an inference may be drawn concerning upon whom the investigation should focus. Of course, the examinations given to the four individuals may have different degrees of reliability. However, since the DoD Directive clearly states that the examination is to serve as a supplement to and not a substitute for other forms of investigation, this tool would still serve as a valuable aid.

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<sup>561</sup> Telephone Interview with John R. Schwartz, Deputy Director of the DoD Polygraph Institute (Jan. 7, 1997). *See also* United States v. Berg, 44 M.J. 79, 80 (C.A.A.F. 1996) (Government polygraph experts detected evidence in private examiner’s charts that Berg was employing countermeasures).

<sup>562</sup> James Allan Matte, Ph.D., *Forensic Psychophysiology: Using the Polygraph*, at 576 (1996).

<sup>563</sup> Giannelli, *supra* note 474, at § 8-2(C), (citing Orne, “Implications of Laboratory Research for the Detection of Deception,” in *Legal Admissibility of the Polygraph* 94, 96 (N. Ansley ed. 1975)). It may be noted that Dr. Orne’s study outlining the use and misuse of hypnosis in court is also cited in *Rock v. Arkansas*.

<sup>564</sup> Giannelli, *supra* note 474, at § 8-2(C), (quoting Barland, *Standards for the Admissibility of Polygraph Results as Evidence*, 16 U. West L.A. L. Rev. at 49).

<sup>565</sup> *See, e.g.,* State v. Dean, 103 Wis. 2d 228, 280, 307 N.W.2d 628, 654 (1981) (“[T]he minority concludes that polygraphy in its present state may be useful as an investigative tool, but that its limitations and potential for misleading factfinders are such that it should not be part of evidentiary system.”) (Day, J., concurring) (quoting *McLemore v. State*, 87 Wis. 2d 739, 751, 275 N.W.2d 692 (1979)).

Once the test is taken and the suspect is informed that the results indicate deception, the next question is why would the suspect confess to the crime during the post-test interview? This question is especially compelling since the law is clear that the suspect may terminate the interview at any time and the results may not be admitted at trial. An innocent suspect may feel pressured to confess to the crime, or a guilty suspect may just feel that it is best to end the charade at this point and try to arrange a plea bargain. At this stage of the investigation, however, it is important to note that it is the suspect's estimation of the exam's reliability which is determinative, not the opinion of AFOSI, the court, or a jury. If the suspect concludes that the exam is 100% accurate, then it may seem pointless to continue denying the crime.

One further reason for submitting to a polygraph exam must be addressed.<sup>566</sup> If the investigators ask a guilty suspect during the course of the interrogation whether he is willing to submit to a polygraph, the suspect may feel he is "caught between a rock and a hard place." It is likely that he does not have the familiarity with either the legal implications of refusing to submit to the exam, or the scientific arguments concerning the reliability of the test. Furthermore, the suspect may believe that submitting to the exam will provide a temporary respite from intense questioning which he is currently enduring.

## G. Conclusion

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<sup>566</sup> If the test is 100% accurate, then it would always be rationale for an innocent suspect to submit to or request a polygraph examination, regardless of whether it may be used at trial. The test would always indicate that he was non-deceptive in his responses, and, consequently would always exonerate him from the crime. Likewise, a guilty suspect would never agree to take the test.

However, if the polygraph examination is only 95% accurate, then the innocent suspect must now take into account the 5% chance of a false positive result. If the results could not be used at trial and the suspect knows that there is no other circumstantial or material evidence which would incriminate him, then it would appear that he should submit to or request the test. However, if the results can be used at trial, then his decision is uncertain. Even if no other evidence exists, the prosecution may admit the incriminating polygraph results. The decision would then seem to turn on the weight which the suspect thinks that the jury will place on the polygraph results. This weight would be balanced against the suspect's ability to refute the test results on the stand as well as attacking the testing procedures through cross-examination of the examiner.

If the suspect is guilty, then it would appear that the same result as just discussed would be reached. However, the suspect would be weighing the discovery of other incriminating evidence against the 5% chance that the test would show he was non-deceptive. Of course, the person might wish to be caught but he can not forthrightly admit to the offense. Alternatively, the individual may know that the police will inevitably discover enough evidence to convict so he has nothing to lose by taking the test and hoping it is a false negative. The false negative might forestall the investigation and impede the discovery of additional incriminating evidence. Finally, the person may simply believe that although the test is generally 95% accurate, he can somehow "beat" the test.

The department of defense continues to rely upon polygraph examinations as an investigative tool despite prohibiting its use as evidence during court-martial proceedings. After completing a rigorous training program, OSI agents perform the five-phase examination primarily utilizing the control question technique. The reliability of the expert opinions of both DOD and private examiners continues to be debated with much of the attention focused upon the underlying rationale of the psychological set theory, the effectiveness of countermeasures, and the validity of the friendly examiner hypothesis. Although the scientific and legal communities may long discuss the merits of these objections with respect to admissibility of polygraph results and expert opinion evidence, it is settled that the polygraph will continue to serve as a valuable tool in both criminal and counterintelligence investigations.

# Jurisprudential Myopia: Polygraphs in the Courtroom

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## I. INTRODUCTION

The authors believe the polygraph is a valuable investigative tool that—like profile evidence and psychics—should be kept out of the courtroom. Much has been written about the validity of the polygraph theory, and about the technological advancements in the application of that theory.<sup>1</sup> It is not our purpose to refute or support the scientific basis of polygraph opinion testimony. We accept, *arguendo*, the validity of the theory, and the potential validity of its application in a given case. What gives us pause for concern is the larger jurisprudential question not yet addressed by the appellate courts. That is: Shall the jury be displaced in its role as the judge of credibility?

Until the promulgation of the Military Rules of Evidence, the opinion of a polygrapher was inadmissible in military courts.<sup>2</sup> In 1987, the highest

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<sup>1</sup> See generally SCIENTIFIC VALIDITY OF POLYGRAPH TESTING: A RESEARCH REVIEW AND EVALUATION—A TECHNICAL MEMORANDUM (Washington D.C.: U.S. Congress, Office of Technology Assessment, November 1983) [hereinafter OTA STUDY]; *Polygraph Control and Civil Liberties Protection Act: Hearings on S. 1845 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 95th Cong., 1st & 2d Sess. (1977-78); James R. McCall, *Misconceptions and Reevaluation—Polygraph Admissibility After Rock and Daubert*, 2 U. ILL. L. REV. 363 (1996); Charles R. Honts & Mary V. Perry, *Polygraph Admissibility*, 16 LAW AND HUM. BEHAV. 357 (1992); David C. Raskin, *The Polygraph in 1986: Scientific, Professional, and Legal Issues Surrounding Application and Acceptance of Polygraph Evidence*, 1 UTAH L. REV. 29, 42 (1986); Gordon H. Barland, *Standards for the Admissibility of Polygraph Results as Evidence*, 16 U. WEST L.A. L. REV. 37 (1984); D.T. LYKKEN, A TREMOR IN THE BLOOD (1981); Fred E. Inbau & John E. Reid, *The Lie Detector Technique: A Reliable and Valuable Investigative Aid*, 50 A.B.A. J. 470 (1964).

<sup>2</sup> The Military Rules of Evidence, which closely follow the Federal Rules of Evidence, were implemented on 1 September 1980 as Chapter XXVII of the Manual for Courts-Martial 1969 (Rev.). MANUAL FOR COURTS-MARTIAL, United States, Analysis of the Military Rules of Evidence, Appendix 22 (1995 ed.) [hereinafter MCM]. Among the evidence rules deleted in the change was Paragraph 142e, which had prohibited the admission in evidence of the results of a polygraph test. That proscription had been based upon the military precedent. *United States v. Ledlow*, 11 U.S.C.M.A. 659, 29 C.M.R. 475 (1960); *United States v. Massey*, 5 U.S.C.M.A. 514, 18 C.M.R. 138 (1955).

military court set aside a conviction because the accused was not permitted to attempt to lay the foundation for the admissibility of his successful polygraph test. In its decision, the Court of Military Appeals stated:

A few courts have experimented with the notion that an accused has an independent, constitutional right to present favorable polygraph evidence. We do not subscribe to this theory of admissibility because there can be no right to present evidence—however much it purports to exonerate an accused—unless it is shown to be relevant and helpful. When evidence meets these criteria, no additional justification for admissibility is necessary.”<sup>3</sup>

To be relevant,<sup>4</sup> the evidence must, perforce, be valid. In the case of polygraph, that means the underlying theory must be shown to be scientifically valid. If it is, then the application of the theory to the case at hand must also be valid. If valid, both in theory and application, then the polygraph evidence would be relevant under Rule of Evidence [hereinafter Rule] 401,<sup>5</sup> and eligible for admission under Rule 402. Additionally, however, it must also be determined that any relevant evidence is “helpful.” For scientific evidence—involving the opinion testimony of an expert—that means that it must “assist” the factfinder under Rule 702.<sup>6</sup>

Superficially, the “helpfulness” requirement for scientific evidence appears redundant with the underlying relevance requirement that any evidence have a “tendency” to make the existence of any fact that is of consequence to the determination of an issue more or less probable than it would be without the evidence. Thus, unfortunately, some appellate courts appear to assume the “tendency” of any relevant evidence to make the existence of a fact more or less likely means the evidence is “helpful” and that it will “assist” the factfinder.

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<sup>3</sup> United States v. Gipson, 24 M.J. 246, 252 (C.M.A. 1987). Following the *Gipson* case, the President promulgated Mil. R. Evid. 707, which specifically prohibited the introduction of polygraph evidence in courts-martial. For the text of Rule 707 see *infra*, note 39. In a September 1996 decision – not published until January 1997 – the United States Court of Appeals for the Armed Forces (formerly the Court of Military Appeals) invalidated Rule 707 as unconstitutionally infringing upon the accused’s right to call witnesses and put on a defense. See United States v. Scheffer, 44 M.J. 442 (C.A.A.F. 1995). Subsequently, on 19 May 1997, the United States Supreme Court granted *certiorari* to determine the validity of the prohibition.

<sup>4</sup> Relevant evidence is that evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. MCM, *supra* note 2, Part III, Mil. R. Evid. 401.

<sup>5</sup> The phrase “Rule of Evidence,” as used above, is meant to refer to both the Federal and the Military Rule of Evidence. In addition, since this issue cuts across jurisdictional boundaries, references to the Federal and Military Rules of Evidence, court members and juries, and military judges and trial judges, will be interchangeable, except as otherwise noted.

<sup>6</sup> See *infra* note 39, for the text of Mil. R. Evid. 707.

This logical leap is inconsequential for most types of scientific evidence, where the factfinders have no special knowledge or skill. But, as this article will show, it is exactly the opposite for the polygraph—or any other device that purports to perform the very same function as the factfinder. In such cases, the “tendency” of relevant evidence to “help” needs to be weighed against the innate ability of the factfinder to perform the identical task. The polygrapher purports to determine the credibility of a witness’ statements concerning the facts of the case. Polygraph evidence cannot “assist” the factfinder unless its tendency in determining deception is more reliable than the factfinder’s own ability to determine which in-court testimony to believe.

This article examines the specific problem created by the in-court use of polygraph evidence and offers a solution that will avoid the need to revisit the issue every time there is some new development in the field of polygraphy. We begin with a brief discussion of the science behind the polygraph to provide a background for consideration of the larger jurisprudential question. The article then moves to an evaluation of some of the more important military cases concerning polygraph evidence, and a brief discussion of the constitutional implications of excluding polygraph evidence from the courtroom. We then explore the requirements for expert testimony under Rule 702 to determine whether polygraph evidence really assists the factfinder. The last part of the article focuses upon the relationship between the expert opinion of a polygrapher and other expert opinions concerning credibility and the difficulty experienced by courts trying to reconcile polygraph evidence and Rule 608.<sup>7</sup> Finally, the authors propose an amendment to both the Federal Rules of Evidence [hereinafter F.R.E.] and Military Rules of Evidence [hereinafter M.R.E.] that will bring jurisprudence back into focus.

## II. THE SCIENCE OF THE POLYGRAPH

A polygraph examination is a type of psychological testing. Although there is no universal agreement on precisely what theory is involved in use of the polygraph, the most commonly accepted theory is that the person being examined fears detection of deception. It is this fear that produces autonomic (“involuntary”) physiological responses, captured by the polygraph instrument, which the polygraph operator can identify as attempts at deception.<sup>8</sup> The polygraph instrument itself does not detect deception. Rather, the instrument measures and records physiological responses to questions asked by the polygrapher. By comparing the responses to several different questions asked of the subject, the polygrapher will detect a pattern of arousal that serves as the

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<sup>7</sup> For the text of this rule see *infra* note 171 and accompanying text.

<sup>8</sup> OTA STUDY, *supra* note 1, at 6. A polygraph operator is commonly called a polygrapher.



basis for inferring the subject's deception or lack thereof.<sup>9</sup> The conclusion in this regard is the opinion of the polygraph operator.

For purposes of polygraph testing the most important reactions include a change in the rate and pattern of breathing, blood pressure, rate and volume of blood flow, and moisture on the skin. By contrast, truthful answers, even to stressful questions, do not generate the same reactions. The polygraph instrument generally used today consists of a central unit that collects information from components which measure three physiological functions in the body. The cardiograph or blood pressure cuff monitors changes in blood pressure and heart rate; a device called the pneumograph monitors respiratory activity in both the abdominal and thoracic area of the body; and a galvanograph measures palmar sweating—often called galvanic skin response or skin conductivity. Any changes in the physiological measurements are transmitted to a computerized or electronic analog central unit that records the physiological changes electronically or on chart paper.<sup>10</sup>

In order to generate the sought after reactions, the polygrapher asks carefully structured questions of the subject concerning the facts of the alleged incident. The questions, which the polygrapher and the subject discuss beforehand, are posed while the subject is attached to the instrument. There are many different questioning techniques used to test the subject, but the most common is the control question test.<sup>11</sup> The control question test involves a comparison of arousal to “control” questions with arousal to “relevant” questions. A relevant question is one that concerns the facts of the alleged incident and is accusatory in nature. The “control” question is a general question that has little to do with the alleged event but that is designed to generate a lie reaction.<sup>12</sup> A deceptive subject is supposed to show greater arousal to the relevant question than to the control question because of a greater psychological response to the relevant question. A nondeceptive subject would show more arousal to the control question. In the end, the goal of a properly conducted polygraph examination is an opinion the accused is or is not being deceptive in response to questions material to a determination of “guilty” or “not guilty.” The polygrapher’s opinion in this regard becomes an expert opinion about the truthfulness of the accused concerning the events that led to the court-martial.<sup>13</sup>

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<sup>9</sup> OTA STUDY, *supra* note 1, at 95. For a general discussion of recent developments in the science of polygraph see Charles R. Honts & Bruce D. Quick, *The Polygraph in 1995: Progress in Science and the Law*, 71 N.D. L. REV. 987 (1995).

<sup>10</sup> OTA STUDY, *supra* note 1, at 11.

<sup>11</sup> OTA STUDY, *supra* note 1, at 14-23.

<sup>12</sup> For example, a relevant question in an assault case might be: Did you hit Mr. X with a baseball bat? A control question used for comparison might be: Have you ever hit anyone in anger? The control question is designed to make the subject respond negatively with a lie.

<sup>13</sup> As a practical matter, a psychophysiological will also render an opinion based on an independent review of the polygraph charts. A psychophysiological is one who practices an

The validity or reliability of the polygraph is a matter of intense debate. Proponents of polygraph testing claim accuracy rates anywhere from 70% to 95% based on several recent studies.<sup>14</sup> Although some of the studies involved comparisons to jury determinations, many of the studies concerned mock crimes and cash awards to any subject who could defeat the polygraph.<sup>15</sup> There are no studies comparing the accuracy of polygraphs to that of juries.<sup>16</sup> Nor are there any studies comparing the polygraph results to ground truth.<sup>17</sup> Practically, such studies are not possible. Opponents of courtroom use of polygraph testing have two major concerns. First, they dispute the validity of the studies, claiming accuracy rates only slightly better than chance.<sup>18</sup> The second criticism is accurately summed up in one federal circuit court decision:

There is no 'lie detector.' The polygraph machine is not a 'lie detector,' nor does the operator who interprets the graph detect 'lies.' The machine records physical responses which may or may not be connected with an emotional reaction—and that reaction may or may not be related to guilt or innocence. Many, many physiological factors make it possible for an individual to "beat" the polygraph without detection by the machine or its operator.<sup>19</sup>

The critics claim that since there is no unique lie response, it is a mere leap of faith for the polygrapher to render an opinion that the person is or is not being deceptive.<sup>20</sup>

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emerging subdiscipline of psychology called psychophysiology, which concerns the study of the psychological and physiological dynamics of polygraph testing. It is the psychophysicologist who will describe the methodology and science behind the polygraph. Most polygraph operators are technicians and are not experts in psychology, physiology, or psychophysiology.

<sup>14</sup> See OTA STUDY, *supra* note 1, at 29-43; *see also* Brown v. Darcy, 783 F.2d 1389, 1395 n.12 (9<sup>th</sup> Cir. 1986) (listing numerous studies of the accuracy and validity of polygraph). *See* Record of Trial at 33, United States v. Goldwire, (ACM 32840) (Mar. 4-6, 1997) (testimony of Dr. Gordon Barland) [hereinafter Goldwire].

<sup>15</sup> Raskin, *supra* note 1, at 42.

<sup>16</sup> *See* Goldwire, *supra* note 14, at 36, 40 (testimony of Dr. Barland).

<sup>17</sup> Leonard Saxe et al., *The Validity of Polygraph Testing*, 40 AMERICAN PSYCHOLOGIST 355, 359 (1985); Meyers v. Arcudi, 947 F. Supp. 581, 587 (D.Conn. 1996). 'Ground truth' is the term used to describe the actual truth of what happened, as opposed to what someone determined was probably the truth, for example. *See* Goldwire, *supra* note 14, at 37 (testimony of Dr. Barland).

<sup>18</sup> *See* Saxe et al., *supra* note 17.

<sup>19</sup> United States v. Alexander, 526 F.2d 161, 165 (8<sup>th</sup> Cir. 1975) (quoting H.R. Rep. No. 198, at 13 (1965)). *See* Goldwire, *supra* note 14, at 26 (testimony of Dr. Barland). While these sources may strike the reader as somewhat dated, the basic theory of the polygraph has remained unchanged for over seven decades. Today's polygraph instrument is technologically sophisticated by comparison to the blood pressure cuff used in the early days, or even the analog equipment of ten years ago. However, the dazzle and precision of the computerized laptop version of the polygraph instrument does nothing to enhance or validate the underlying theory, which remains substantially the same today as it was in the 1930's.

<sup>20</sup> Raskin, *supra* note 1, at 31. *See also* OTA STUDY, *supra* note 1, at 6, 29-43.

### III. THE LEGAL EVOLUTION OF THE POLYGRAPH

#### A. A Military Case History

Polygraph or “lie detection” evidence first saw the light of the courtroom over seventy years ago in *Frye v. United States*.<sup>21</sup> Mr. Frye was on trial for robbery and murder. The defense counsel attempted to show the possibility of Frye’s innocence by introducing evidence at trial that Frye had passed a polygraph exam about the murder. The polygraph instrument, used by Dr. William Marston, which consisted of little more than a blood pressure cuff, was very crude in comparison to the equipment used today. The evidence, which included the results of a systolic blood pressure deception test and Dr. Marston’s expert testimony, was not admitted and Frye was convicted of the murder. Ironically, that polygraph case served as a vehicle for the D.C. Court of Appeals to establish what became the universal standard for the admissibility of scientific evidence and expert witness testimony in the United States. Under what came to be known as the *Frye* standard, scientific evidence was admissible only if the theory upon which it was based enjoyed “general acceptance” in the scientific community.<sup>22</sup> In the decades since that decision, polygraph evidence has never been able to achieve this standard.<sup>23</sup>

However, in the early 1980s, courts in every jurisdiction experienced a resurgence in attempts to use polygraph results as exculpatory evidence. Fueled by what were touted as recent technological improvements in polygraphy, defense counsel in many jurisdictions began offering “exculpatory” polygraph results<sup>24</sup> as evidence supporting their client’s

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<sup>21</sup> *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

<sup>22</sup> *Id.* at 1014.

<sup>23</sup> Notwithstanding the fact that criminal trial courts in some jurisdictions have admitted the results of polygraph examinations, the plain fact is that the polygraph has never enjoyed “general acceptance” except among its proponents. Those proponents consist of technicians (polygraph operators) and behaviorists (psychophysicologists) who rely on empirical data rather than basic scientific research. Many psychologists and other scientists dispute the validity of this theory, and there is no “general acceptance” of the polygraph theory among scientists in relevant fields of scientific endeavor. Indeed, there is no psychological, medical, or other scientific research that directly establishes the theoretical basis for the polygraph. See Goldwire, *supra* note 14, at 60-61 (testimony of Dr. Leonard Saxe). Those studies that do support the theory are based upon empirical data. They rely on subjective indicators (such as court verdicts, confessions, or panel evaluations) to corroborate the polygraph results. See OTA STUDY, *supra* note 1, at 37-43, 47-56. See *supra* notes 14-15 and accompanying text.

<sup>24</sup> Use of the word “exculpatory” to describe the results of a polygraph examination indicating the accused was non-deceptive is misleading. Exculpatory evidence typically refers to independent substantive evidence tending to disprove guilt. See, e.g., BLACK’S LAW DICTIONARY 566 (6<sup>th</sup> ed. 1990). A polygraph only measures the accused’s physiological responses to certain limited questions, and the polygrapher’s opinion is derived from those physiological responses. Opinion evidence based upon what the accused believed or felt at the

credibility or as evidence of lack of guilt. In its first major post-resurgence case, *United States v. Gipson*,<sup>25</sup> the Court of Military Appeals, applying M.R.E. 702 and rejecting the *Frye* standard, held that the defense should be permitted to attempt to lay a foundation for the admission of such evidence.<sup>26</sup> With noteworthy prescience, the court ruled that M.R.E. 702 superseded *Frye* and, therefore, *Frye* would no longer be viewed as establishing an independent test for admissibility of scientific evidence.<sup>27</sup> The court also ruled trial judges had the responsibility to exercise their judgment to determine, based on the facts before them, whether scientific evidence should be admitted.<sup>28</sup> In other words, the military judge was to act as the gatekeeper for the admission of scientific evidence.

On the specific issue of polygraph evidence, the court declined to support an independent constitutional basis for the admission of the evidence, relying instead upon a standard of relevance and helpfulness.<sup>29</sup> With regard to how polygraph evidence could be used, the court felt the expert could, at best, opine whether the examinee was being truthful or deceptive in making a specific assertion when the polygraph exam was administered.<sup>30</sup> Moreover, the evidence would not be permitted absent testimony in court from the accused consistent with the testimony of the polygrapher.<sup>31</sup> Despite repeated refusal to permit such opinions in the past, the court stated it was for the factfinder to decide whether to use the polygrapher's opinion to gauge the truthfulness of the accused's consistent in-court testimony.<sup>32</sup> The court pushed

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time of the examination says nothing about the facts of the alleged offense. The truthfulness of a witness' testimony is purely subjective, and frequently unrelated to the ultimate and objective facts that must be determined by the court. *See United States v. Alexander*, 526 F.2d 161 (8th Cir. 1965). Three brief examples are illustrative of the problem: an "innocent" accused may lie about his whereabouts merely to avoid having to explain his presence at the scene of a crime; an "eyewitness" may testify truthfully about his observations, even though he misperceived the events; and a "guilty" accused may have so rationalized his actions as to "truthfully" deny complicity in the offense.

<sup>25</sup> *United States v. Gipson*, 24 M.J. 246 (C.M.A. 1987).

<sup>26</sup> *Id.* at 253.

<sup>27</sup> *Id.* at 251.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 252 (noting there was no constitutional right to present evidence unless it is relevant and helpful).

<sup>30</sup> *Id.* at 253.

<sup>31</sup> Court members are asked to detect deception in the form of false testimony. Of course, the deception detected by a polygrapher is not testimony in the strict sense of the word because it concerns a statement made out of court. But, since the accused is required to testify consistent with the polygrapher, the polygrapher's opinion will ultimately concern the in-court testimony of the accused.

<sup>32</sup> 24 M.J. at 253. This whole notion seems to fly in the face of a host of rulings, both before and after *Gipson*, which expressly exclude the opinions of highly competent, very experienced experts as to the credibility of a witness or victim. Never before had an expert been permitted to opine as to the credibility of a witness about the specific event that gave rise to the trial. *See, e.g., United States v. Cameron*, 21 M.J. 59 (C.M.A. 1985); *United States v. Hill-Dunning*,

the point further when it commented that the “[polygrapher’s] opinion about the truthfulness of a statement made during a polygraph exam could even support a direct inference as to the guilt or innocence.”<sup>33</sup>

The *Gipson* opinion also involved a lengthy discussion concerning the application of the Federal and Military Rules of Evidence, and specifically M.R.E. 702. Addressing the helpfulness prong of the analysis under M.R.E. 702, the court relied on a three part balancing test that focused largely on the reliability and complexity of the evidence.<sup>34</sup> There was virtually no discussion concerning the factfinder’s responsibility to determine credibility, or whether this evidence invaded that function. Similarly, the applicability of M.R.E. 608 was rejected with minimal discussion. The one limitation imposed by the court was the accused’s testimony as a precondition to admissibility. The court was concerned the absence of the accused’s consistent testimony would leave the court members with only the polygrapher’s conclusion about the believability of the accused’s hearsay statement. This, the court feared, would usurp the role of the factfinder.<sup>35</sup>

In response to *Gipson*,<sup>36</sup> and out of concern for the highly prejudicial nature of polygraph evidence,<sup>37</sup> the President of the United States, pursuant to

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26 M.J. 260 (C.M.A. 1988); *see also infra* notes 142-167 and accompanying text. The inescapable parallel between the opinion offered by a polygrapher as described by the court in *Gipson* and opinions of credibility offered by other experts is discussed in much greater detail later in this article.

<sup>33</sup> 24 M.J. at 253. This extraordinary statement is especially troubling, given the existence of Mil. R. Evid. 704. Mil. R. Evid. 704, which is identical to its federal counterpart, permits experts to render opinions on ultimate issues, but it does not allow opinions concerning the guilt or innocence of the accused. *See* STEVEN A. SALTZBURG, ET AL., MILITARY RULES OF EVIDENCE MANUAL 747 (3<sup>rd</sup> ed. 1996). In their Editorial Comment, Professors Saltzburg, Schinasi, and Schluter make it clear that this rule does not permit an expert to render an opinion on guilt or innocence. *Id.* at 743 (quoting drafter’s Analysis for Mil. R. Evid. 704). If, as the Court of Military Appeals seems to believe, the polygrapher’s opinion could support a direct inference as to guilt or innocence, the rationale behind Rule 704 provides an even greater reason to exclude the polygrapher’s opinion.

<sup>34</sup> 24 M.J. at 251. According to the court, the determination of the helpfulness of scientific evidence involved balancing three factors: (1) the soundness and reliability of the process or technique; (2) the possibility that admitting the evidence would overwhelm, mislead, or confuse the factfinder; (3) the proffered connection between the scientific research or test result to be presented, and the specific disputed facts in the case. *Id.* (citing *United States v. Downing*, 753 F.2d 1224, 1237 (3<sup>rd</sup> Cir. 1985)).

<sup>35</sup> 24 M.J. at 253. The court did not elaborate on their concern in this regard, but the alternative would permit bolstering of the accused’s credibility without his credibility being placed in issue and it would leave the factfinder with an exculpatory hearsay statement.

<sup>36</sup> The drafters deny there was any intent to accept or reject *Gipson* concerning the admissibility of scientific evidence. *See* SALTZBURG ET AL., *supra* note 33, at 215 (3<sup>rd</sup> ed. Supp. 1996).

<sup>37</sup> *See id.* at 211. An additional concern might be the effect of widespread knowledge of the admission of polygraphs favorable to the accused: what message would be conveyed to the jury about the accused if there was no evidence she passed a polygraph?

his rule making authority,<sup>38</sup> enacted M.R.E. 707. That rule prohibits not only the admission, but also the mere mention, of polygraph evidence of any sort at a court-martial.<sup>39</sup> The drafters of M.R.E. 707 felt that polygraph evidence would be, among other things, too confusing, of limited reliability, and impermissibly invasive of the province of the court-martial panel. There was also concern that court members would view this evidence as infallible, unimpeachable, and conclusive of trial issues.<sup>40</sup> M.R.E. 707 withstood its first constitutional challenge in *United States v. Williams*,<sup>41</sup> where the court sidestepped the issue of the constitutional viability of M.R.E. 707 by finding that the accused's failure to testify nullified any right to present polygraph evidence.<sup>42</sup> The ruling did not necessarily contradict or overrule the *Gipson* opinion, but the court stated that *Gipson* no longer controlled the admissibility of polygraph evidence.<sup>43</sup> The court did not take the opportunity to answer any of the evidentiary questions left over from *Gipson*, such as which rules concerning credibility evidence governed polygraph evidence. Nor did the

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<sup>38</sup> Article 36(a), Uniform Code of Military Justice, 10 U.S.C. § 836(a) (1983). For a discussion of the constitutionality of Mil. R. Evid. 707 and the President's power to promulgate that rule of evidence, see First Lieutenant John A. Carr, *The Admissibility of Polygraph Evidence in Court-Martial Proceedings: Does the Constitution Mandate the Gatekeeper*, 43 A.F.L. REV. 1 (1997).

<sup>39</sup> Mil. R. Evid. 707 is similar to CAL. EVID. CODE 351.1 (West 1988 Supp.) and states:

**Rule 707. Polygraph Examinations**

(a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph exam, shall not be admitted into evidence.

(b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.

MCM, *supra* note 2, Mil. R. Evid. 707. For a general discussion of Mil. R. Evid. 707 see Major John J. Canham, Jr., *Military Rule of Evidence 707: A Bright Line That Needs To Be Dimmed*, 140 MIL. L. REV. 65 (1993).

<sup>40</sup> SALTZBURG ET AL., *supra* note 33, at 211 (3<sup>rd</sup> ed. Supp. 1996).

<sup>41</sup> *United States v. Williams*, 43 M.J. 348 (C.A.A.F. 1995). In that case, the accused was charged with forgery of personal checks, larceny, and wrongful appropriation. He took two U.S. Army Criminal Investigation Division polygraph examinations, both of which ultimately indicated no deception. That information was not permitted before the court members, and the accused was convicted. *Id.* at 349-50.

<sup>42</sup> *Id.* at 354-55.

<sup>43</sup> *Id.* at 351. The court noted, perhaps with a degree of frustration, that the promulgation of Mil. R. Evid. 707 changed the function of the Military Rules of Evidence in the area of polygraph evidence. Rather than providing a framework for the admissibility of helpful and relevant evidence, the Rules simply prohibited this type of evidence. Noting that both *Daubert v. Merrell Dow Pharmaceutical, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Gipson* concerned interpretations of rules of evidence other than Mil. R. Evid. 707, the court conceded these cases no longer controlled the issue of the admissibility of polygraph evidence.

majority engage in any analysis under M.R.E. 702. For the first time, however, one member of the court questioned the applicability of M.R.E. 608 as a bar to this evidence.<sup>44</sup> Expressing his concern the evidence would infringe on the jury's role to determine credibility, Chief Judge Sullivan recognized a parallel between polygraph opinion testimony and the testimony of child abuse experts that the victim was telling the truth in her pretrial complaints.<sup>45</sup> For him, the logic of excluding such opinion testimony from a child abuse expert extended to opinion testimony regarding polygraph results. Although M.R.E. 707 promised an end to the use of scientific evidence of questionable value on an issue within the province of the factfinder, its effect would be short lived.<sup>46</sup>

In 1993, in response to years of criticism of *Frye*, the Supreme Court finally rejected the "general acceptance" test as the means of assessing the admissibility of expert scientific testimony. In *Daubert v. Merrill Dow Pharmaceutical, Inc.*,<sup>47</sup> the Court found that F.R.E. 702 superseded the *Frye* test and was the only standard trial judges could use to determine the admissibility of expert scientific testimony.<sup>48</sup> The Court reasoned that the *Frye* standard was too narrow and F.R.E. 702's more liberal thrust better accommodated today's rapidly evolving scientific evidence. The Court, however, did not abandon *Frye* altogether. Rather, the *Frye* standard became one of several factors the Court proposed for use in evaluating the reliability of scientific evidence. A non-exhaustive list of factors set forth by the Court was specifically designed to aid trial judges in their evaluations.<sup>49</sup> The Court's primary concern in *Daubert* was with the evidentiary reliability or "trustworthiness" of the scientific or technical knowledge underlying the

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<sup>44</sup> 43 M.J. at 356 (Sullivan, C.J., concurring in the result).

<sup>45</sup> *Id.* at 356-57 (Sullivan, C.J., concurring in the result).

<sup>46</sup> Any discussion concerning the validity of Mil. R. Evid. 707 as an exercise of the President's rule making authority is beyond the scope of this article. The authors recognize, however, that this position and these suggestions concerning the jurisprudential treatment of opinion testimony concerning the credibility of other's statements would, if adopted, have the same practical effect on the polygraph as Rule 707. By focusing on the evidentiary status of such opinion testimony, rather than isolating the polygraph as the single prohibited source of such evidence, the Constitutional issue would be more clearly framed: Does the accused's right to present a defense include a right to call any witness to offer an opinion as to the believability of the accused's out-of-court account of the events?

<sup>47</sup> *Daubert v. Merrell Dow Pharmaceutical, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) (this case did not involve the polygraph, but pharmaceuticals).

<sup>48</sup> *Id.* at 2794-95.

<sup>49</sup> The factors included (1) whether a theory or technique can be and has been tested, (2) whether the theory or technique has been subject to peer review and publication, (3) the known or potential rate of error of a particular technique, and (4) whether the theory or technique enjoys "general acceptance" in the scientific community. The Court made clear other factors would bear on the issue and that the enumerated factors were not the only ones the trial judges could consider. *Id.* at 2796-97.

expert testimony.<sup>50</sup> A separate inquiry, briefly addressed in *Daubert*, concerned whether the theory or science would actually be helpful to or assist the factfinder.<sup>51</sup> For the Court, the resolution of that question was tied to relevance.<sup>52</sup>

On the heels of *Daubert*, the Court of Appeals for the Armed Forces (formerly the United States Court of Military Appeals) revisited the issue of the admissibility of polygraph evidence. In *United States v. Scheffer*,<sup>53</sup> the majority removed the *per se* exclusion of polygraph evidence by ruling M.R.E. 707 unconstitutional. The court stated that preventing the defense from attempting to lay a foundation for the admissibility of polygraph evidence under M.R.E. 702 and *Daubert*, violated an accused's Sixth Amendment right to offer witnesses on his behalf and his fundamental right to present a defense.<sup>54</sup> In its analysis concerning the admissibility of scientific evidence, the majority failed to articulate any consideration of the issue of assistance to the factfinder.<sup>55</sup> Despite Judge Sullivan's dissenting opinion, there was also

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<sup>50</sup> *Id.* at 2795 n.9.

<sup>51</sup> It is not within the scope of this article to engage in *Daubert* type, Rule 702 analysis because our focus on the polygraph and the resulting opinion is whether it will *assist* the factfinder. For a thorough examination and analysis of *United States v. Daubert*, see G. Michael Fenner, *The Daubert Handbook: The Case, Its Essential Dilemma, and Its Progeny*, 29 CREIGHTON L. REV. 939 (1996).

<sup>52</sup> For further discussion on the Court's approach to the "helpfulness" requirement, see *infra* notes 82-84 and accompanying text.

<sup>53</sup> *United States v. Scheffer*, 44 M.J. 442 (C.A.A.F. 1996).

<sup>54</sup> *Id.* at 445. With the decision in *Scheffer*, it appears the admission of polygraph evidence has become a battle between, on the one hand, some heretofore undiscovered constitutional right of the accused to have witnesses come in to assess his credibility as to his version of the events and, on the other, the fair administration of justice. Assuming, for the sake of argument, we adopt the Court of Appeals for the Armed Force's constitutional argument, then how does the court rule when the accused calls a friend, relative, or clergyman to testify that they discussed the facts of the case with the accused, he denied culpability, and they believe his denial? Is there a constitutional right to call these witnesses? If not, why should the injection of science into the equation make any difference? Would not a friend or relative who has known the accused all his life be better at detecting deception than some stranger who is making an inference based on readings from a machine?

<sup>55</sup> The court, using the approach taken by the Federal Appeals Court in *United States v. Posado*, 57 F.3d 428 (5<sup>th</sup> Cir. 1995), claimed they were not holding polygraphs would always assist the factfinder. That disclaimer actually highlights the misunderstanding in the assessment of this evidence in two ways. First, courts, like in *Scheffer*, only conduct half of the analysis. The other half of the requirement for the admission of scientific evidence is that it must assist the trier of fact. Despite a denial to the contrary, the court appears to assume, without analysis, that any valid scientific evidence will assist the factfinder. Second, it is not clear whether the courts are treating "helpfulness" as something distinct from the "assist" requirement or if the terms are supposed to mean the same thing. If the terms are intended to mean the same thing, then this disclaimer is meaningless. By using relevance as the benchmark for evaluating helpfulness, the courts have to be saying polygraphs will always assist the factfinder because credibility is always relevant. If, on the other hand, the terms



no discussion at all regarding the evidentiary issues presented by polygraph evidence under M.R.E. 608, though the majority did attempt to explain away the parallel between polygraph expert testimony and child abuse expert testimony. The gist of the majority's rationale seems to be if polygraph opinion evidence can meet the standard for admissibility as scientific evidence, there is no reason to treat it differently than any other type of scientific evidence. What this court and many others failed to consider is that the in-court purpose served by this kind of scientific evidence is *fundamentally* different than that served by any other type of scientific evidence. For this reason, even if polygraph evidence could meet the standards for legal reliability and scientific validity, sound jurisprudence demands this evidence be treated differently.

## B. The Constitutional Issue

The Sixth Amendment to the Constitution<sup>56</sup> guarantees an accused the right to present a defense.<sup>57</sup> This includes the right, under the Compulsory Process Clause,<sup>58</sup> to call witnesses in his favor<sup>59</sup> and the right to present relevant and material evidence favorable to the defense.<sup>60</sup> Those rights, however, are not unlimited.<sup>61</sup> Indeed, as the Court of Appeals for the Armed

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hold two separate meanings, it clearly demonstrates both courts failed to actually engage in an assessment of whether the evidence would *assist* the factfinder.

<sup>56</sup> U.S. CONST. amend. VI.

<sup>57</sup> *Rock v. Arkansas*, 483 U.S. 44, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987) (citing *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (8th Cir. 1975)).

<sup>58</sup> U.S. CONST. amend. VI.

<sup>59</sup> 107 S. Ct. at 2709. The appellant was denied her right to be heard in her own defense by the state's *per se* exclusion of hypnotically refreshed testimony which prevented her from showing her recovered memory was accurate. The Supreme Court viewed the rule as an arbitrary prohibition of the accused's right to testify on her own behalf. The arbitrary and disproportionate application made the rule unconstitutional despite the rule's purpose of keeping unreliable evidence out of trials.

<sup>60</sup> *Washington v. Texas*, 388 U.S. 14, 82 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). In that case, the appellant attempted to call a co-participant to the stand to testify that he, not the appellant, was the person who actually killed the victim. At that time, state law prohibited co-participants from testifying for each other, though they could testify for the state. The state law was grounded in the concern for reliability of courtroom evidence. The Court concluded the state law *arbitrarily* denied the accused his right to call witnesses that would have provided testimony that was relevant and material to the defense. *See also* *United States v. Valenzuela-Bernal*, 458 U.S. 858, 102 S. Ct. 3440, 73 L. Ed. 2d 1193 (1982). In *United States v. Woolheater*, 40 M.J. 170 (C.M.A. 1994), the Court of Military Appeals held that the accused has the right to present logically and legally relevant evidence.

<sup>61</sup> *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). The appellant's due process rights were violated by state law that prevented him from cross-examining, as a hostile witness, another man who had confessed to the murder for which appellant was being tried. *See also* 40 M.J. at 173 (finding that the right to present relevant and material evidence is not unlimited).

Forces stated, “the constitutional rights of the accused are designed to assure a fair trial, not to subvert the adversary process.”<sup>62</sup> The rights of the accused must yield to other legitimate evidentiary and procedural rules in the criminal trial process designed to assure fairness and reliability in the judgment of guilt or innocence.<sup>63</sup> Any restrictions of the accused’s rights in this regard cannot be arbitrary or disproportionate to their intended purpose.<sup>64</sup> To the extent some restriction or any other evidentiary or procedural rule advances legitimate concerns, the appropriate exercise of these rules would never be called arbitrary.<sup>65</sup> The question then is whether the exclusion of polygraph evidence, in order to assure fairness and reliability in the trial process, is an arbitrary or disproportionate denial of the accused’s right to present witnesses in his favor and his fundamental right to present a defense.

The Supreme Court will take the opportunity to address the constitutionality of M.R.E. 707 in *Scheffer*. The issue will be whether a *per se* ban on the admissibility of the polygraph violates the accused’s constitutional right to call witnesses in his favor and the right to present a defense.<sup>66</sup> To the extent the rule prevents an accused from presenting evidence in the form of an expert opinion that he is telling the truth about what happened, M.R.E. 707 should not be ruled unconstitutional. The exclusion of polygraph evidence is appropriate because the substance of the testimony—an opinion the accused is telling the truth—has not been proven helpful to the factfinder. Precluding the use of polygraph for this reason is neither arbitrary nor disproportionate to the purpose it was designed to serve. But, M.R.E. 707 focuses on a particular mechanism rather than the evil to be avoided. A more appropriate approach, and one more likely to survive constitutional scrutiny, is a narrowly tailored rule designed to prevent opinions that a particular witness is telling the truth about what happened. To better understand the jurisprudential implications of this issue, a discussion of the nature of expert opinion evidence follows.

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<sup>62</sup> United States v. Williams, 43 M.J. 348, 354 (C.A.A.F. 1995).

<sup>63</sup> 93 S. Ct. at 1049; *see also* United States v. West, 27 M.J. 223 (C.M.A. 1988). Such rules include, among others, those that prevent either side from presenting evidence that is not helpful to the factfinder under Rule 702, irrelevant evidence under Rule 402, unfairly prejudicial evidence under Rule 403, and certain types of credibility evidence under Rule 608.

<sup>64</sup> 107 S. Ct. at 2711.

<sup>65</sup> The authors recognize that the appellant in the *Chambers* case was denied due process because a rule of evidence concerning hearsay and impeachment, called the “voucher rule,” unfairly prevented the accused from effectively questioning a hostile witness who had confessed to the accused’s crime and, thereby, from presenting a defense. The Court ruled that this result stemmed from an *inappropriate and arbitrary* exercise of an otherwise permissible rule of evidence. 93 S. Ct. at 1049. *See also*, United States v. Scheffer, 44 M.J. 442, 450 (C.A.A.F. 1995) (Crawford, J., dissenting).

<sup>66</sup> The military’s highest court already ruled there is no independent constitutional right to introduce polygraph evidence. United States v. Gipson, 24 M.J. 246, 252 (C.M.A. 1987). The Supreme Court, through *dicta* and implicit holdings, appears to have taken this position as well. 44 M.J. at 449 (Crawford, J. dissenting).

## IV. EXPERT TESTIMONY AND THE POLYGRAPH

### A. Rule of Evidence 702

M.R.E. 702 permits the introduction of scientific, technical, or other specialized knowledge if it will assist the trier of fact to understand the evidence or determine a fact in issue. The rule in its entirety reads:

#### **Rule 702. Testimony by Experts**

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of opinion or otherwise.<sup>67</sup>

The determination of whether evidence qualifies for admission under M.R.E. 702 rests solely with the military judge and, in that sense, he or she is the “gatekeeper.”<sup>68</sup> The military judge is required to evaluate the evidence under M.R.E. 104(a).<sup>69</sup> If the evidence qualifies for admission, then to the extent the witness is properly qualified, she may provide testimony and state her opinion concerning the matter at issue. An expert witness may even give her opinion as to an ultimate issue to be decided by the trier of fact.<sup>70</sup> The expert witness

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<sup>67</sup> MCM, *supra* note 2, Mil. R. Evid. 702. Mil. R. Evid. 702 was taken from the federal rule verbatim. SALTZBURG ET AL., *supra* note 33, at 727.

<sup>68</sup> *Daubert v. Merrell Dow Pharmaceutical, Inc.*, 113 S. Ct. 2786, 2796 (1993) (“The trial judge must determine at the outset, pursuant to [Fed. R. Evid.] 104(a), whether the expert is proposing to testify to [matters that] will assist the trier of fact to understand or determine a fact in issue.”); *see also* 24 M.J. at 251.

<sup>69</sup> Mil. R. Evid. 104(a) states in the relevant portion “[p]reliminary questions concerning the qualification of a person to be a witness . . . [and] the admissibility of evidence . . . shall be determined by the military judge.” MCM, *supra* note 2, Mil. R. Evid. 104(a).

<sup>70</sup> Mil. R. Evid. 704 reads:

#### **Rule 704. Opinion on Ultimate Issue**

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

MCM, *supra* note 2, Mil. R. Evid. 704. As an example, a properly qualified expert might testify: “The accused’s choking of the victim caused her death.” However, this rule is not without limitation. *United States v. Farrar*, 25 M.J. 856 (A.F.C.M.R. 1988), *aff’d* 28 M.J. 387 (C.M.A. 1989) (citing *United States v. Wagner* 20 M.J. 758 (A.F.C.M.R. 1985)). The Rule does not permit opinions that invade the jury’s domain. *United States v. Arruza*, 26 M.J. 234 (C.M.A. 1988). Rule 704 will not be the focus of detailed discussion for two reasons. First, the Rule does not permit opinions about credibility. *United States v. Hill-Dunning*, 26 M.J. 260, 262 (C.M.A. 1988) (noting that Rule 704 does not open the door to any and all opinions and it does not permit one witness to opine as to the believability of another witness). Second,

is supposed to describe the general principles and procedures relied on by people in her particular field, and then make inferences and draw conclusions the jury would be unable to draw themselves. The purpose of expert testimony is to provide the factfinders with information and insight they do not possess because it is outside their common experience.<sup>71</sup>

The use of expert testimony under M.R.E. 702 has two primary policy goals. First, the use of such testimony promotes the search for the truth by helping the factfinder understand certain evidence and determine the facts in dispute.<sup>72</sup> Second, the rule preserves the factfinder's traditional role to assess the credibility of witnesses and determine guilt.<sup>73</sup> To achieve these goals, expert testimony must meet, among others, two important requirements before it can be admitted. The testimony must relate to specialized knowledge in that the subject matter must be based on something more than subjective belief or unsupported speculation,<sup>74</sup> and the testimony must assist the factfinder to understand the evidence.

### *1. Expert Testimony Must "Assist" the Factfinder*

The requirement for scientific evidence to assist the factfinder is generally considered the most important aspect of the Rule 702.<sup>75</sup> In its note accompanying F.R.E. 702, the Advisory Committee acknowledged the decision whether to permit expert testimony should focus on whether the evidence will assist the factfinder.<sup>76</sup> According to the Advisory Committee,

There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue

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under a proper analysis of Rule 702, polygraph evidence would be excluded and evaluation under Rule 704 would be unnecessary. The military rule is identical to the federal rule. SALTZBURG ET AL., *supra* note 33, at 747.

<sup>71</sup> Some commentators have referred to these matters as being "beyond the ken" of the average jury. SALTZBURG ET AL., *supra* note 33, at 725. "There is no requirement under the Rule that an expert be absolutely necessary or that the subject matter of expert testimony be totally beyond the ken of the court members. The test is whether the expert can be helpful." *Id.*

<sup>72</sup> 29 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE § 6262, at 178 (1997).

<sup>73</sup> *Id.*; *see also* United States v. Binder, 769 F.2d 595 (9<sup>th</sup> Cir. 1985) (finding that expert testimony should not be admitted if it concerns an improper matter such as one that invades the province of the jury).

<sup>74</sup> 113 S. Ct. at 2795.

<sup>75</sup> Kopf v. Skyrn, 993 F.2d 374 (4<sup>th</sup> Cir. 1993) (stating that helpfulness to the factfinder is the "touchstone"); United States v. Brown, 7 F.3d 648 (7<sup>th</sup> Cir. 1993) (explaining that under Rule 702, the crucial inquiry is whether expert testimony will be helpful to the factfinder).

<sup>76</sup> 3 JACK B. WEINSTEIN, ET AL., WEINSTEIN'S EVIDENCE, at 702-2 (1995).

without enlightenment from those having a specialized understanding of the subject involved in the dispute.<sup>77</sup>

The federal courts are in agreement.<sup>78</sup> The drafters of the military rule also recognized the importance of the helpfulness of expert testimony and commented “[t]he Rule’s sole explicit test is whether the evidence in question ‘will assist the trier of fact to understand the evidence or determine a fact in issue.’”<sup>79</sup> The military’s highest court took this position in *United States v. Snipes*,<sup>80</sup> in which it upheld the military judge’s decision to admit evidence concerning the behavior of sexually abused children. The court read all of the expert testimony rules as expanding the admissibility of expert testimony, but cautioned that the “essential limiting parameter” was whether the testimony would assist the factfinder.<sup>81</sup> If the judge’s role in passing on the admissibility of scientific evidence is that of “gatekeeper,” then the term “assist” is the gate. The term “assist” can be characterized as the gate because the requirement that the scientific evidence assist the factfinder actually pervades the entire rule and ultimately controls whether the testimony is admitted.

Despite the importance of the “assist” requirement, issues concerning validity and reliability garner infinitely more attention. Of course, unreliable or invalid scientific evidence will not assist the court members. Consequently, the trial judge’s primary focus in passing on admissibility is almost always on the “reliability” of the proffered scientific evidence. The unstated assumption is that, if reliable, the evidence will be helpful to the factfinder. In the vast majority of cases, this is a safe assumption because the subject of an expert’s opinion is usually one with which the factfinder is unfamiliar and needs help to understand. However, with regard to polygraph evidence or any other science that purports to detect deception, simply assuming the evidence will assist the factfinder is a mistake.

Whether reliable scientific evidence will actually assist the factfinder depends upon the facts of the case, the type of scientific evidence involved, and the purpose the evidence will serve. In the context of the *Daubert* opinion, which was focused on the reliability of new, “fast track” sciences, the Supreme Court’s requirement as to the helpfulness of the evidence was whether it is relevant.<sup>82</sup> The Court’s helpfulness standard requires a valid scientific

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<sup>77</sup> *Id.* (quoting Advisory Committee Note on Rule 702, which quoted Mason Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 418 (1952)).

<sup>78</sup> *United States v. Fosher*, 590 F.2d 381 (1<sup>st</sup> Cir. 1979) (citing with approval the advisory committee’s note); *Pelster v. Ray*, 987 F.2d 514 (8<sup>th</sup> Cir. 1993) (citing with approval the advisory committee’s note).

<sup>79</sup> SALTZBURG ET AL., *supra* note 33, at 727.

<sup>80</sup> *United States v. Snipes*, 18 M.J. 172 (C.M.A. 1984).

<sup>81</sup> *Id.* at 178 (citing with approval SALTZBURG ET AL., *MILITARY RULES OF EVIDENCE MANUAL* 324 (1981 ed.)).

<sup>82</sup> *Daubert v. Merrell Dow Pharmaceutical, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 2795, 125 L. Ed. 2d 469 (1993).

connection to the pertinent inquiry as a prerequisite for admission.<sup>83</sup> The lower federal and military courts ordinarily employ this standard when evaluating helpfulness.<sup>84</sup> However, relevance is not the sole consideration. If it were, then the “assist” requirement for expert testimony would be redundant with the requirements for relevancy, which is that the evidence have some tendency to make the existence of a fact more or less probable.<sup>85</sup> Any evidence more probable than a coin-toss fulfills this requirement. To “assist,” expert testimony must also add something to the factfinder’s considerations the factfinder itself could not supply.<sup>86</sup>

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<sup>83</sup> *Id.* at 2796. The Court, as an example, pointed out that knowledge of the study of phases of the moon would assist the trier of fact if the issue was darkness and the scientific knowledge concerned whether a particular evening was dark. But knowledge of the phases of the moon would not be useful to help the trier of fact determine whether a person may have been more likely to behave irrationally on a night with a full moon. Absent logical grounds to support the latter use of such evidence, the evidence simply would not be relevant. *See also* United States v. Galbreth, 908 F. Supp. 877 (D.N.M. 1995) (finding the testimony concerning the polygraph related to an issue in dispute and that it had a valid scientific connection to the pertinent inquiry).

<sup>84</sup> *See, e.g.,* United States v. Posado, 57 F.3d 428, 432-33 (5<sup>th</sup> Cir. 1995). The relevance requirement is often couched in terms of increased reliability. United States v. Rodriguez, 37 M.J. 448, 452 (C.M.A. 1993) (noting that the helpfulness requirement of Rule 702 implies a quantum of reliability beyond what is required to meet a standard of bare relevance).

<sup>85</sup> This point is particularly important when the evidence concerns credibility, because credibility is always relevant. If the assist requirement meant nothing more than relevance, then any expert scientific opinion on credibility would be admissible.

<sup>86</sup> 29 WRIGHT & GOLD, *supra* note 70, at 184. The polygrapher and the court members both purport to achieve the same goal—determination of truthfulness—but they take different paths. The polygrapher relies upon inferences he draws from charts produced by the polygraph instrument. The jury relies upon their observation of the witness’ demeanor and manner on the stand; the acuteness of the witness’ powers of observation; the accuracy and extent of the witness’ memory; the witness’ interest in the outcome of the case; the witness’ character for truthfulness (if raised), and any other circumstances that shed light on the witness’ credibility; taking into account the juror’s own experience in dealing with people. MILITARY JUDGES BENCHMARK, Department of the Army Pamphlet 27-9, Chapter 2, Section IV, 30 September 1996. Informing the jury of the polygrapher’s ultimate conclusion will not assist the jury unless his conclusion is more reliable than theirs. Informing the jury of the charts considered by the polygrapher will not assist them because real people do not rely on a witness’ pulse, respiration or sweat gland output to determine credibility. In order for the polygraph operator’s conclusion to be helpful to the factfinder, it must be more reliable (valid) than their conclusion in assessing witness credibility. If his conclusion is not more reliable (valid) than theirs, it cannot assist them. Consider the following tangible examples: (1) you have a solution of brine containing a certain percentage of salt, in which you wish to increase the salt concentration. If you add brine containing a lesser concentration of salt, you will dilute the salt concentration in your sample. Even adding brine containing exactly the same percentage of salt will not assist you. Only adding brine containing a greater concentration of salt will increase the salt concentration in your sample; (2) if you wish to determine your precise location and you have a Global Positioning System (GPS) receiver which is accurate to within 10 meters, why would you wish to consult, or rely upon, another GPS receiver which is only accurate to within 100 meters?

The degree to which the evidence must add to the factfinder's understanding has changed over the years. Initially, at common law, expert testimony was admissible only if the subject matter was beyond the common knowledge and experience of lay people.<sup>87</sup> The "assist" requirement under Rule 702 is perceived to be less demanding and the drafters of the federal rule seem to have intended that to be the case.<sup>88</sup> The more liberal or "modern" position is that, if the expert's opinion adds to the factfinder's understanding in any way, it should be admitted.<sup>89</sup> Both the federal courts and the military courts adopted this view of the "assist" requirement.<sup>90</sup>

Expert testimony in the form of scientific or technical evidence is routinely admitted to explain some fact or some theory the jury will need to understand in order to determine guilt. For example, forensic toxicology in a urinalysis case and DNA testing in a murder case are admitted because the areas of scientific knowledge are beyond the common understanding of the jury. The evidence is required to help them determine, for example, what substance was in the urine or whose blood was found at the scene of the crime. These are purely factual issues the jury cannot ascertain on its own but must determine in order to decide whether the accused is "guilty" or "not guilty."

Expert testimony is also commonly used in cases to explain facts or circumstances contrary to normal human experience.<sup>91</sup> Such evidence includes what are often referred to as the "soft sciences," such as psychology. This evidence is helpful to the factfinders because it compensates for their own misunderstandings, misconceptions, and erroneous assumptions about human

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<sup>87</sup> 29 WRIGHT & GOLD, *supra* note 70 § 6264, at 206. This was viewed as a more rigorous standard, not unlike the *Frye* test.

<sup>88</sup> 29 *Id.*, at 206-208; *United States v. Kwong*, 69 F.3d 663, 667 (2<sup>nd</sup> Cir. 1995) (Fed. R. Evid. 702 is more liberal than the *Frye* standard).

<sup>89</sup> 29 WRIGHT & GOLD, *supra* note 70 § 6264, at 206 n.5. The polygraph data can't assist the members, because it is not the type of information considered by the members in determining credibility. The conclusion of the polygraph operator (and the underlying data) will not help the members' understanding unless the proponent shows it is more reliable (valid) than the member's determination of credibility. *See supra* note 83 and *infra* notes 101-102 and accompanying text.

<sup>90</sup> *United States v. Brown*, 7 F.3d 648, 651-52 (7<sup>th</sup> Cir. 1993) (determination of helpfulness of expert testimony requires evaluation of the present state of knowledge the jury possesses on the subject in light of the facts of the case); *see also* *United States v. Fosher*, 590 F.2d 381, 383 (1<sup>st</sup> Cir. 1979). The Air Force Court of Military Review stated that in military trials, judges should view liberally the requirement that expert testimony assist the factfinder. *United States v. Garcia*, 40 M.J. 533, 536 (A.F.C.M.R. 1994). This liberalized approach to the assist requirement is consistent with the liberal approach to the admissibility of expert testimony discussed by the Supreme Court in *Daubert*.

<sup>91</sup> *See, e.g.,* *United States v. Snipes*, 18 M.J. 172, 180 (C.M.A. 1984) (Everett, C.J., concurring) ("Experts may testify that a victim's behavior, however unusual it might first appear, actually is typical of those persons who have undergone trauma like that which the victim claims to have endured."); *Bachman v. Leapley*, 953 F.2d 440 (8<sup>th</sup> Cir. 1992) (dealing with expert testimony concerning the behavior of victims).

behavior. In this sense, it assists the factfinder to understand the evidence by providing information outside of the normal human experience. This, for example, is the basis for the admission of testimony about the Child Sexual Abuse Accommodation Syndrome.<sup>92</sup> Evidence that children who have been sexually abused sometimes fail to report the abuse; act relatively normally; and sometimes recant their allegations is admitted because this behavior is counter-intuitive. This background information merely explains that it is possible for a child to be abused and yet show no outward manifestations.<sup>93</sup> For this type of

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<sup>92</sup> United States v. Suarez, 35 M.J. 374 (C.M.A. 1992) (holding some forms of this type of testimony are admissible to explain why sexually abused children delay reporting the abuse and later recant the allegations and claim nothing occurred).

<sup>93</sup> The following instruction, given in one child sexual abuse case, serves to illustrate this point:

**Child Sex Abuse Accommodation Syndrome Testimony**

You have heard the testimony of Ms. Linda Cordisco and Dr. Harry Kropp. They were permitted to express their opinions on child behavior because their knowledge, skill, training, education, experience in their field may assist you in understanding the evidence, or in determining a fact in issue. You are not required to accept the testimony of these witnesses, nor to give it more weight than the testimony of any other witness. You should, however, consider the qualifications of these witnesses in determining the weight you will accord their testimony.

The testimony of these witnesses was presented for a limited purpose. Neither testified about the facts in this case, and neither testified about any conclusions to be drawn from those facts. Their testimony was merely intended to assist you in evaluating the evidence and determining the facts.

Ms. Cordisco testified about a study based upon empirical data concerning child behavior under the influence of sexual abuse. In effect she was simply saying that certain factors, as described in the "accommodation syndrome," do not preclude the existence of sexual abuse in a given case, even if, to adults, they seem intuitively inconsistent with such abuse. Dr. Kropp disagreed with the acceptability of the study testified to by Ms. Cordisco, but did agree that several of the factors in the study were of educational value for persons not extensively familiar with child behavior. The presence or absence of these factors, as both witnesses testified, is not a diagnostic criteria for child sex abuse. On the other hand, both witnesses also testified that the presence of those factors was not inconsistent with child sex abuse.

In another case, a civilian defense counsel made a good analogy—it is like bowling alleys on Air Force bases. Imagine a jury of civilians, totally unfamiliar with Air Force bases. A witness tells them of a particular event occurring at a bowling alley on a particular base. The attorney, noting an incredulous reaction among the jurors at the suggestion that there might be a bowling alley on an Air Force base, calls another witness who testifies that, in fact, there are bowling alleys present on some Air Force bases. The testimony of this second witness neither confirms nor refutes what the first witness said happened in the bowling alley, but it does suggest the



evidence to be of assistance, it must come from individuals who are more aware of how children behave when abused.<sup>94</sup>

Courts even allow testimony, in the form of lay opinions, on matters within the common experience of the factfinder but only if it will assist them with a particular factual issue. For example, lay witnesses are often qualified to testify as to their opinion of the speed of a car or that someone appeared drunk or sleepy. While these subjects are within the common experience of most people, the evidence is admitted because the members of the jury were not present at the scene of the event and a mere recitation of the facts observed by the witness would be insufficient to permit the jury to draw any conclusion. In that sense, the opinion assists them in understanding a fact in issue beyond what the witness' factual description would provide. Put another way, the person who actually saw the car can make a better assessment about the speed of the car than the factfinder can from a mere recitation of the observed facts. However, the usefulness of such testimony only goes so far. For example, on the issue of competency to testify, the court would not allow a layman, or expert for that matter, to testify that he was sitting in the courtroom while a witness testified, and that it appeared the witness was too tired or sleepy to accurately state what happened. This testimony is inadmissible because jury members normally draw their own conclusions from such observations in their daily lives.

## 2. *Expert Testimony Does Not Always "Assist"*

Expert testimony is considered unhelpful and inadmissible under Rule 702 if the factfinder has no need for the opinion.<sup>95</sup> Courts have consistently

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possibility that there was a bowling alley on the base, and thus that the events testified to by the first witnesses could have happened.

Instruction given by Colonel J. Jeremiah Mahoney, Military Judge, in *United States v. Hogins*, Apr. 25-27, 1995, Maxwell Air Force Base, Alabama (on file with author).

<sup>94</sup> Unlike their daily experience in determining credibility of people they deal with, most jurors have little or no experience with (knowingly) observing the behavior of abused children. Those that do have such experience are generally removed from the jury panel. Thus, jurors tend to assume that abused children will act abnormally. Experts in this field tend to base their conclusions to the contrary on case studies of abused children, scientific literature, and, perhaps, their own experiences dealing with and treating abused children.

<sup>95</sup> *See infra* notes 96-99. There are other ways in which substance of the scientific evidence can fail to assist the factfinder. First and perhaps most obvious, expert testimony fails to assist if the science or technology behind the testimony is unreliable. Second, expert testimony concerning scientific evidence is unhelpful if the subject matter is unrelated to the facts of the case. Third, expert testimony will not assist if the testimony is unfairly prejudicial because it is too confusing or misleading. Polygraph testimony has been excluded on this ground. *See Meyers v. Arcudi*, 947 F. Supp. 581 (D.Conn. 1996). Fourth, an expert opinion is also not considered helpful to the factfinder if it merely tells the factfinder what result to reach. *See United States v. Whitted*, 11 F.3d 782 (8<sup>th</sup> Cir. 1993) (citing Advisory Committee's Note on

found that expert testimony on matters within the common knowledge or experience of the factfinder is superfluous,<sup>96</sup> troubling,<sup>97</sup> unhelpful,<sup>98</sup> and of no assistance to the factfinder.<sup>99</sup> Exclusion is warranted because the factfinder is already able, “to the best possible degree”,<sup>100</sup> to determine whatever fact the expert testimony is offered to prove. For example, in *Beech Aircraft v. United States*,<sup>101</sup> an expert in linguistics and an expert in electronic sound enhancement were not allowed to give their opinions as to what was actually being said on a garbled audiotape. The court disallowed what it felt was unhelpful testimony because it was within the ability and experience of the factfinder to make the determination for itself.<sup>102</sup> The court arrived at this conclusion by focusing not on the scientific process alone, but on the purpose the evidence would serve. Similarly, in *Scott v. Sears, Roebuck & Co.*,<sup>103</sup> the court upheld the exclusion of expert testimony concerning the unsafe condition of a sidewalk outside a Sears store. The court stated, “[F.R.E.] 702 makes inadmissible expert testimony as to a matter which obviously is within the common knowledge of jurors because such testimony, almost by definition, can be of no assistance.”<sup>104</sup>

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Fed. R. Evid. 704). Although Fed. R. Evid. 702 permits expert opinions and Fed. R. Evid. 704 allows those opinions to embrace the ultimate issues, an opinion that tells them what result to reach goes too far because it risks usurping the role of the factfinder. 11 F.3d at 785.

<sup>96</sup> *Pelster v. Ray*, 987 F.2d 514, 526 (8<sup>th</sup> Cir. 1993) (finding that jury did not need an expert to testify that the difference between the odometer reading on a certificate and the subsequent lower odometer reading in the car meant the odometer had been rolled back; the jury could see that for themselves).

<sup>97</sup> *See, e.g., Scott v. Sears, Roebuck & Co.*, 789 F.2d 1052, 1055 (4<sup>th</sup> Cir. 1986) (deciding that testimony from a “human factors” expert that the crumbling sidewalk curb was not visible from certain points on the sidewalk was not helpful because the jury could see that for themselves).

<sup>98</sup> In *United States v. Cruz*, 981 F.2d 659 (2<sup>nd</sup> Cir. 1992), the court found the trial court erred in admitting expert testimony that drug traffickers use intermediaries to conceal their identities. The expert testimony was not necessary because the facts would have been evident to the average juror. *Id.* at 663-64.

<sup>99</sup> *United States v. Brown*, 540 F.2d 1048, 1054 (10<sup>th</sup> Cir. 1976) (citing 31 Am. Jur. 2d, *Expert and Opinion Evidence* § 21 [now at 31A Am. Jur. 2d, *Expert and Opinion Evidence* §§ 44-46 (1989)]) (excluding an expert on eyewitness testimony).

<sup>100</sup> 3 WEINSTEIN, ET AL., *supra* note 74, at 702-2 (quoting Fed. R. Evid. 702 Advisory Committee’s Note); *see also United States v. Washington*, 106 F.3d 983, 1009 (7<sup>th</sup> Cir. 1997) (noting that where a jury is as capable of drawing the correct conclusions as an expert witness, the expert’s testimony is not needed); *United States v. Fosher*, 590 F.2d 381, 383 (1<sup>st</sup> Cir. 1979).

<sup>101</sup> *Beech Aircraft v. United States*, 51 F.3d 834 (9<sup>th</sup> Cir. 1995).

<sup>102</sup> *Id.* at 842. Although the court did not mention this, there was even a danger the expert testimony would have detracted from the jury’s ability to determine the content of the tape by providing wrong information the jury would use in place of its collective judgment. *See also United States v. Devine*, 787 F.2d 1086 (7<sup>th</sup> Cir. 1986).

<sup>103</sup> *Scott v. Sears, Roebuck & Co.*, 789 F.2d 1052 (4<sup>th</sup> Cir. 1986).

<sup>104</sup> *Id.* at 1055.

The evidence in these cases was relevant, but the testimony did not assist the jury. There was no indication the sound and linguistics experts or the safety expert were any better at determining the facts than the jury exercising its own common sense and ability. In other words, the factfinder was, to the best possible degree, able to determine the issue itself.<sup>105</sup>

The determination concerning credibility is one important area in which the courts have already decided the factfinder does not require assistance. Notwithstanding the Supreme Court's statement that helpfulness is tied to relevance, opinions concerning witness believability have long been considered unhelpful. Former Chief Judge Everett of the Court of Military Appeals offered extensive commentary on this point. He stated that "[i]n evaluating someone's credibility, 'scientific, technical, or other specialized knowledge' is of limited assistance to the trier of fact."<sup>106</sup> To permit such testimony also runs afoul of the policy behind M.R.E. 702, which is to preserve the factfinder's role in determining credibility and, ultimately, guilt. Perhaps in recognition of this policy concern, Chief Judge Everett went on to state that "to allow an 'expert' to offer his opinion on the resolution of a credibility dispute goes too far . . . . The court members must decide whether a witness is telling the truth."<sup>107</sup> Finally, the Chief Judge, writing a majority opinion, stated, "opinion testimony on whether or not to believe a particular witness' testimony simply is not deemed helpful to the factfinder, for the factfinders are perfectly capable of observing and assessing a witness' credibility. *This is especially so where the testimony of the accused is involved.*"<sup>108</sup> Many courts have acknowledged that credibility is an issue that must and should only be resolved by the factfinder.<sup>109</sup> So well grounded is this rule that one Court of Military Review noted that "[i]t is hornbook law that the credibility of a witness and the weight to be given his testimony rests

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<sup>105</sup> Of course, one might argue that the admission of such opinions at trial would be harmless because the jury would simply ignore the opinion. See 29 WRIGHT & GOLD, *supra* note 70 § 6264, at 215 n.29; 789 F.2d at 1055. In the area of witness credibility and polygraphs, this simply is not true. In fact, one of the biggest criticisms of the polygraph is that the factfinder will give too much weight to the expert's opinion and follow the opinion blindly without exercising their own independent judgment on the matter. See SALTZBURG ET AL., *supra* note 33, at 211 (3<sup>rd</sup> ed. Supp. 1996).

<sup>106</sup> United States v. Snipes, 18 M.J. 172, 180 (C.M.A. 1984) (Everett, C.J., concurring).

<sup>107</sup> United States v. Cacy, 43 M.J. 214 (C.A.A.F. 1995) (quoting United States v. Cameron, 21 M.J. 59, 64-65 (C.M.A. 1985)). Judge Cox (then Associate Judge on the Court of Appeals for the Armed Forces), writing for the majority, went on to state that Chief Judge Everett's opinion in this regard was consistent with the precedents of the Court of Appeals for the Armed Forces and the Federal Courts of Appeals. 43 M.J. at 217.

<sup>108</sup> 21 M.J. at 63 (emphasis added).

<sup>109</sup> 43 M.J. at 217 ("The court members must decide who is telling the truth."); United States v. Harrison, 31 M.J. 330, 332 (C.M.A. 1990) ("exclusive function"); Bachman v. Leapley, 953 F.2d 440, 441 ("It is the exclusive province of the jury to determine the believability of the witness."); 11 F.3d at 786 (it is for the jury to decide the credibility of the victim).

exclusively with the jury.”<sup>110</sup> The jury system, which is non-existent in most of the rest of the world, came to us as a common law alternative to trial by fire, trial by water, and trial by ordeal. We assume, and rightfully so, it to be more reliable than its predecessors. It is in this jury system that the citizens of the United States have placed their confidence, and years of experience suggest that, whether or not it’s perfect, it works better than the existing alternatives.

## B. The Jury vs. The Polygraph

The reason evidence concerning the outcome of a polygraph exam and the resulting opinion should be categorically excluded from trials is that this type of evidence is fundamentally different than any other type of expert testimony. The polygraph—or any other scientific endeavor that purports to find truth or detect deception<sup>111</sup>—concerns a topic distinctly different from every other scientific, technical or specialized subject matter. The opinion of a polygrapher goes to the very heart of the factfinder’s deliberative role; the assessment of credibility and believability. Since determining credibility is well within the understanding of jurors, courts cannot simply assume polygraph evidence will assist the factfinder or that the subject matter is appropriate for their consideration. Nor should they ignore established evidentiary rules in an effort to make the road a “tad wider”<sup>112</sup> merely because it is the accused who wishes to introduce the evidence.<sup>113</sup> Such approaches would ignore the unique nature of this subject and jeopardize the fairness of the trial process.<sup>114</sup>

As with any scientific evidence, the evaluation of polygraph evidence involves a two-part analysis of the reliability and helpfulness of the evidence.<sup>115</sup> With practically every form of scientific evidence, theory, or

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<sup>110</sup> United States v. Cox, 23 M.J. 808, 815 (N.M.C.M.R. 1986) (quoting United States v. Azure, 801 F.2d 336, 340 (8<sup>th</sup> Cir. 1986)). It has been said, “the jury is the lie detector in the courtroom.” United States v. Awkard, 597 F.2d 667, 671 (9<sup>th</sup> Cir. 1979) (quoting United States v. Barnard, 490 F.2d 907, 912 (9<sup>th</sup> Cir. 1973).

<sup>111</sup> Other claimed lie detection techniques include voice stress analysis, truth serums, pupil dilation and body language analysis. Taken to its logical extreme, these experts could even sit in the courtroom and render their “expert” opinion about the in-court testimony of the witness, accused, or victim. *See infra* note 252.

<sup>112</sup> United States v. Gipson, 24 M.J. 246, 252 (C.M.A. 1987).

<sup>113</sup> If we welcome the polygraph for the accused, can we deny it for the victim or the eyewitness? The court conveniently leaves this little question for the day some trial judge—at its invitation—violates what remains of Mil. R. Evid. 707. *See* United States v. Scheffer, 44 M.J. 442, 447 (C.A.A.F. 1995).

<sup>114</sup> *See supra* note 37.

<sup>115</sup> Daubert v. Merrell Dow Pharmaceutical, Inc., 509 U.S. 579, 113 S. Ct. 2786, 2796, 125 L. Ed. 2d 469 (1993); United States v. Snipes, 18 M.J. 172, 178 (C.M.A. 1984); United States v. Pettigrew, 77 F.3d 1500, 1514 (5<sup>th</sup> Cir. 1996) (explaining that the evaluation of evidence under rule 702 requires the court to focus on the “twin precepts” of the rule—the scientific validity of the method and its ability to assist the factfinder); United States v. Green, 548 F.2d 1261,

technology, courts assume the scientific evidence, if relevant, will actually assist the factfinder. Courts generally permit scientific testimony without distinctly or consciously performing an analysis of whether or not it will assist the factfinder.<sup>116</sup> In most cases, such an approach is warranted because the information being presented is well beyond the common understanding of most jurors. The historical problem with expert testimony concerning polygraph results is that courts routinely engage in only half of the two-part analysis. After focusing on the science and evaluating reliability, they tend to assume, without analysis, the evidence will assist the jury.<sup>117</sup> An example of this “one-step” approach can be found in the case of *United States v. Posado*.<sup>118</sup> Using relevance as the standard by which helpfulness is judged, the Fifth Circuit Court of Appeals noted that scientific evidence is helpful to the factfinder if it possesses validity when applied to the pertinent factual inquiry.<sup>119</sup> In the context of polygraph evidence, that meant that if polygraphy was a reliable measure of truthfulness, then it would be relevant.<sup>120</sup> Consistent with its finding in this regard, the court focused almost all of its attention on the validity of the polygraph and very clearly assumed the polygraph evidence would be helpful. There was no discussion at all as to the effect of this evidence on the jury, the jury’s sole responsibility to decide credibility, or whether the jury even needs help in this regard. This “one-step” approach is jurisprudentially unsound for the very basic reason that it overlooks a patent distinction that separates polygraph evidence from any other scientific evidence to which it may be compared. Determining believability is well within the understanding of the jurors and, more importantly, it is the key task with which they have been entrusted and with which they do not need help.<sup>121</sup>

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1268 (6<sup>th</sup> Cir. 1977) (stating the court must first determine whether the expert testimony will assist the factfinder to understand the evidence or determine an issue and the court determines reliability).

<sup>116</sup> In other words, expert testimony is presumed to be helpful to the factfinder. “Testimony from an expert is presumed to be helpful unless it concerns matters within the everyday knowledge and experience of a lay juror.” *Kopf v. Skyrum*, 993 F.2d 374, 377 (4<sup>th</sup> Cir. 1993).

<sup>117</sup> 44 M.J. at 447; 24 M.J. at 251; *United States v. Posado*, 57 F.3d 428, 432-33 (5<sup>th</sup> Cir. 1995); *United States v. Galbreth*, 908 F. Supp. 877, 895 (D.N.M. 1995).

<sup>118</sup> 57 F.3d 426; *see also* 908 F. Supp. 877. The *Galbreth* case provides an excellent example of this point. In that case, the court felt the evidence would assist the factfinder because it was reliable and relevant. 908 F.Supp. at 895. In what is nearly a twenty-page decision, the court devotes a fraction of its opinion, barely one column, to the discussion of the assist requirement. The overwhelming majority of the opinion focused on the reliability of the evidence.

<sup>119</sup> 57 F.3d at 432-33.

<sup>120</sup> *Id.* at 433.

<sup>121</sup> *United States v. Alexander*, 526 F.2d 161, 168 (8<sup>th</sup> Cir. 1975) (commenting the collective evaluation of credibility and guilt is the hallmark of our jury system, which was created because of “public reluctance to entrust plenary power over the life and liberty of the citizens” to the government).

When the evidence concerns matters within the everyday knowledge and experience of a juror, helpfulness cannot be presumed.<sup>122</sup>

The opinion offered by a polygrapher goes directly to the credibility of the accused as to the key factual issues in the trial. The obvious purpose of the polygraph operator's testimony is to vouch for the credibility of an out-of-court exculpatory statement by the accused. That is precisely the substance of the polygrapher's testimony. In *Scheffer*, the Court of Appeals for the Armed Forces noted the polygrapher would only opine that the subject showed no indications of deception.<sup>123</sup> But, to claim a polygrapher is testifying only as to a lack of indicia of deception is to engage in semantics. From the standpoint of the jury's function to find facts, there is no meaningful difference between saying a person is being truthful about an event and a person is not being deceptive about an event.<sup>124</sup> Indeed, in *Gipson* the court acknowledged that polygraph evidence related to the credibility of a statement made by the declarant, and that the opinion concerns whether the "examinee was being truthful or deceptive in making a particular assertion."<sup>125</sup> For that matter, the polygrapher was at one time viewed by the court as "something of a credibility medium."<sup>126</sup> Ultimately, there can be little doubt that the opinion rendered by a polygrapher relates specifically to the credibility of the accused.

It is this fact that ultimately distinguishes this type of testimony from other types of expert testimony. To be sure, the scientific aspects of polygraphy are not significantly different from the scientific aspects of DNA testing, urine drug testing, or any other purely scientific process—except that, with the possible exception of handwriting analysis, polygraph testing embodies more subjectivity than most.<sup>127</sup> It is the substance of the opinion and the manner in which the opinion will be used in court that is the problem

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<sup>122</sup> 993 F.2d at 377.

<sup>123</sup> 44 M.J. at 446.

<sup>124</sup> Of course, a person may be truthful but mistaken. It is certainly worth noting, however, that at one time the court thought it was "*obvious* that when a party offers a polygrapher's opinion that a certain assertion did not indicate deception, *the party is offering evidence to prove the assertion is true.*" United States v. Williams, 43 M.J. 348, 354 (C.A.A.F. 1995) (emphasis added).

<sup>125</sup> 24 M.J. at 252-53.

<sup>126</sup> *Id.* at 253 n.9.

<sup>127</sup> Some polygraph proponents claim that the opinion of the examiner is based solely on the charts, and that properly obtained, the charts should yield the same conclusion by any other qualified operator. Some, in fact, propose computerized evaluation of the charts to enhance the consistency of interpretation. The whole theory of polygraphy counts on different reactions to different questions. On the other hand, other proponents of the polygraph readily admit that part of the examiner's evaluation of the charts is based on impressions and observations gained through interaction with the subject before, during, and after the examination. Each of these impressions and observations made by one examiner are the very same thing each juror will ultimately use to collectively evaluate the credibility of the subject at trial. Aside from the obvious problem of substituting the judgment of one for the judgment of many, the examiner's observations and impressions are never conveyed to the factfinder.

with polygraph evidence. It is not used to determine a fact in issue, but rather to determine the believability of the accused's out-of-court statement about the events which led to the trial. The Ninth Circuit Court of Appeals stated the problem well in *Brown v. Darcy*:

The introduction of polygraph evidence also infringes on the jury's role to determine credibility. Our adversary system is built on the premise that the jury reviews the testimony and determines which version of the events it believes. Allowing a polygraph expert to analyze responses to a series of questions and then testify that one side is telling the truth interferes with that function. Polygraph evidence is different from other scientific evidence such as ballistics, fingerprints, or voice analysis, because it is an opinion regarding the ultimate issue before the jury, not just one issue in dispute.<sup>128</sup>

Since the polygrapher will comment on the same facts the accused is required to testify to in court, the polygrapher's opinion will doubtless be used to evaluate the accused's in-court testimony, as well. Most judges will probably acknowledge, based on long observation, that juries are good at detecting deception. Juries do not like to believe anyone would lie to them in court, but when confronted by irreconcilable versions of the same events, they are better at collectively determining truth, mistake, and deception than a single factfinder such as a judge or a polygraph operator. The polygraph, unlike other scientific evidence, is uniquely situated to supplant that collective determination.<sup>129</sup>

Simply put, we cannot say that polygraph evidence will assist the factfinder unless we first determine the polygraph is more reliable than the collective assessment of the factfinder in evaluating credibility. The genesis of this approach as applied to polygraph evidence in courts-martial was the case of *United States v. Helton*.<sup>130</sup> The court stated "[u]ntil it can be demonstrated that the opinion testimony resulting from polygraph testing is generally more reliable than the . . . fact-finder in determining truthfulness, it cannot be

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<sup>128</sup> *Brown v. Darcy*, 783 F.2d 1389, 1396 (9<sup>th</sup> Cir. 1986) (citations omitted). These other types of scientific tests also "do not purport to indicate with any degree of conclusiveness that the defendant who is so identified or connected with the [subject of the test] actually committed the crime." 526 F.2d at 169. Polygraph does. The Court of Military Appeals has stated that the polygraph could support a direct inference of guilt or innocence. 24 M.J. at 253.

<sup>129</sup> The polygraph has the capacity to cause serious damage to the justice system because, as previously noted, it is not possible to tell whether the polygrapher is better at detecting deception than the jury. The citizens and government of the United States have put their faith in the jury to determine credibility, believing that assemblage to be best equipped to detect deception and determine the truth. The introduction of polygraph evidence would severely undermine the process if it were less accurate than the jury.

<sup>130</sup> *United States v. Helton*, 10 M.J. 820 (A.F.C.M.R. 1981).

determined that such evidence will aid the court in performance of its function.”<sup>131</sup> Therefore, such evidence cannot be admitted.<sup>132</sup>

Although the *Helton* case was decided almost twenty years ago, this rationale is no less applicable today than it was when the case was first tried.<sup>133</sup> Since that time there have been a number of studies designed to test the validity of the polygraph.<sup>134</sup> In most cases, experimenters use mock crime scenarios coupled with monetary awards to test the reliability of the polygraph.<sup>135</sup> Some experimenters claim to have been able to achieve rates of accuracy as high as 95%. Yet, even if we take at face value a figure of 95% validity for the well conducted polygraph, and discount entirely the extraneous factors that might diminish that figure, we cannot assume this is better than the factfinder at determining credibility and separating truth, mistaken belief, rationalized belief, and deception. To date, there has never been a single study or evaluation that indicated the polygrapher or the polygraph instrument was better than the jury in determining credibility.<sup>136</sup>

If the expert offering the evidence, or if the theory and methodology upon which the expert’s opinion is based, cannot be shown to be better at determining an issue or fact than the factfinder, then the scientific evidence, by definition, cannot assist the factfinder. With every form of admissible scientific testimony, there is the tacit acknowledgment that the experts, who are said to have “specialized knowledge,” are better at doing the thing about which they are testifying than the factfinder.<sup>137</sup> Expert testimony is presumed

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<sup>131</sup> *Id.* at 824.

<sup>132</sup> *Id.*

<sup>133</sup> At least one federal court has taken a similar approach to the admissibility of polygraph evidence under Fed. R. Evid. 702. In *Brown v. Darcy*, the court held that polygraph evidence was inadmissible under Rule 702 because it was too unreliable to assist the factfinder to understand the evidence or determine a fact in issue. Concerned with a lack of accuracy and the possibility of unreliable application, the court balked at allowing a determination of the credibility that could well be wrong. 783 F.2d at 1395-97. Despite claimed accuracy rates of 95%, it was not enough to permit infringement upon the jury’s role to determine credibility. The import of the decision is that lack of proof the polygrapher was better than the factfinder meant the evidence could not assist the factfinder.

<sup>134</sup> For a list of studies assessing the validity of the polygraph, see 783 F.2d at 1395 n.12.

<sup>135</sup> See *supra* note 14. Opponents claim that one of the problems with these studies is that they do not test the polygraph under real life conditions. The reason this is a problem is because the artificial fear of detection experienced by the test subjects is not the same as the real fear of detection experienced by the accused. This would affect the physiological responses of the test subjects and yield results that raise questions about the validity of the test in real life situations where the accused has a great deal more at stake. See Saxe et al., *supra* note 17.

<sup>136</sup> See Goldwire, *supra* note 14, at 40, 46 (Testimony of Dr. Barland). Likewise, the authors are unaware of any studies that compare the ability of child abuse experts to evaluate credibility and the ability of juries to evaluate credibility. As a result, we cannot say which is better at making that determination. Thus, it cannot be said that the opinion of a child abuse expert concerning credibility will assist the jury.

<sup>137</sup> 18 M.J. at 179; *United States v. Benedict*, 27 M.J. 253, 259 (C.M.A. 1988).



to be helpful to the factfinder<sup>138</sup> for that very reason. This is what enables experts to add to the factfinder's understanding, explain a complex process, or give the factfinder information they do not possess.<sup>139</sup> One area in which experts have never been shown to be better than juries is the assessment of credibility. Experts do not possess specialized knowledge in this area.<sup>140</sup> It may be that a polygrapher has specialized knowledge about the polygraph instrument and the science of polygraphy, but the result rendered by that scientific process has never been proven better than the result rendered by the collective process employed by the factfinder.<sup>141</sup> That is why courts have never allowed an expert to render an opinion that a particular witness is telling the truth.

### C. Expert Opinions Concerning Credibility

#### 1. Victims and Witnesses

The courts most often address this issue in the context of opinions concerning the believability of victims or other witnesses. No court has ever permitted an expert to opine that the victim is believable or that she is telling the truth about what happened. Generally, there are three reasons courts exclude this testimony. First, there is a substantial possibility the use of polygraph evidence would mislead and confuse the jury enough to outweigh the probative value of the testimony.<sup>142</sup> The basis for the exclusion of the

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<sup>138</sup> 993 F.2d at 377.

<sup>139</sup> Interestingly enough, courts will even "subordinate" the knowledge of a single juror to that of the expert to insure the expert's in-court opinion guides the entire jury. For example, if a medical doctor serves on a jury, the doctor is instructed that she is bound by the evidence in the case, including the evidence presented by the expert. While she is allowed to use her knowledge of medicine to pose questions to a forensic pathologist, she, like the other jurors, must decide the factual issues based solely on the evidence presented in court. She would even be cautioned not to bring up areas of specialized knowledge not presented in court while in closed session deliberations.

<sup>140</sup> A rationale advanced in such cases is that it is beyond the scope of the witness' expertise to testify as to the believability of a witness. *United States v. Arruza*, 26 M.J. 234, 237 (C.M.A. 1988).

<sup>141</sup> Even if the polygrapher could claim to be 100% accurate, the proponent still must prove the jury is *less* than 100% accurate in order to establish polygraph opinion testimony will *assist* the jury.

<sup>142</sup> *United States v. Kwong*, 69 F.3d 663 (2<sup>nd</sup> Cir. 1995); *Conti v. C.I.R.*, 39 F.3d 658 (6<sup>th</sup> Cir. 1994); *but see United States v. Posado*, 57 F.3d 428, 435 (5<sup>th</sup> Cir. 1995) (listing factors that counterbalance the potential for prejudicial harm caused by the use of polygraph evidence). Several courts have cautioned that opinion testimony as to the specific credibility of a witness could likely cause the jury to throw out its collective judgment of the witness' credibility in favor of the opinion of an "expert." *See Kopf v. Skyrm* 993 F.2d 374, 377 (4<sup>th</sup> Cir. 1993) (stating trouble is encountered when we allow the evaluation of the common place by an expert to supplant the jury's independent exercise of common sense); *United States v. Roy*,

evidence for this reason is Rule 403.<sup>143</sup> Second, this testimony goes beyond what is permitted by Rule 608.<sup>144</sup> Third, such testimony is not necessary because it is not helpful to the factfinder, which can make its own determination of credibility.<sup>145</sup>

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843 F.2d 305 (8<sup>th</sup> Cir. 1988) (commenting there is a real danger jurors would abandon their own common sense evaluation of credibility in favor of the expert's); *United States v. Snipes*, 18 M.J. 172, 180 (C.M.A. 1984) (Everett, C.J., concurring) (explaining that hearing a purported expert give an opinion about the credibility of a witness will distract the factfinder from using his own common sense and experience which is the best means for determining credibility). This is especially troubling in the area of credibility where the expert polygrapher's stamp of believability will be viewed with an aura of scientific certainty as something "akin to the ancient oracle at Delphi." *United States v. Alexander*, 526 F.2d 161, 168 (8<sup>th</sup> Cir. 1975); *United States v. Helton*, 10 M.J. 820, 824 n.16 (A.F.C.M.R. 1981). Some commentators and judges claim the jury would not be overwhelmed by polygraph evidence. *See United States v. Galbreth*, 908 F. Supp. 877, 895 (D.N.M. 1995); *United States v. Crumby*, 895 F. Supp. 1354, 1362 (D.Ariz. 1995); Honts & Perry, *supra* note 1, at 365-66; Charles M. Sevilla, *Polygraph 1984: Behind the Closed Door of Admissibility*, 16 U. WEST L.A. L. REV. 5, 16-18 (1984). Actually, nothing could be further from the truth. Polygraph evidence is generally offered when the entire case hinges on credibility. Even though qualified by virtue of their life experiences to determine credibility, jurors are generally not comfortable with the task of having to choose who in a one-on-one battle is lying. Better they should find someone is merely mistaken. Thrown the lifeline of expert opinion on the credibility of a key witness, the members will cling to the aura of scientific certainty instead of relying on the more subtle indicators right under their collective noses. There are three reasons why jurors would put aside their judgment in favor of the expert's. First, they have little or no experience as jurors. Second, the consequences of their decision may be greater than most they will ever make in their own lives. Third, jurors have no reason to trust their own ability to detect deception. Therefore, presented with a scientific instrument that "detects deception" and is anywhere from 70%-95% accurate, the temptation to just "take the expert's word for it" would be too great. *See also Brown v. Darcy*, 783 F.2d 1389, 1391 (9<sup>th</sup> Cir. 1986) (overwhelming prejudice possible because jurors, despite their ability, are likely to give conclusive weight to a polygrapher's opinion of the accused's believability).

<sup>143</sup> Mil. R. Evid. 403 states "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members . . ." MCM, *supra* note 2, Mil. R. Evid. 403. Although the authors believe this polygraph evidence is indeed too prejudicial, this article will not discuss further the applicability of Rule 403 for two reasons. First, it is beyond the scope of this article. Second, since the evidence is not admissible under Rule 702 for failure to assist the factfinder, it would never be necessary to address the issue under Rule 403.

<sup>144</sup> *United States v. Arruza*, 26 M.J. 234, 237 (C.M.A. 1988) (citing *United States v. Cameron*, 21 M.J. 59, 62 (C.M.A. 1985) (finding it violated Mil. R. Evid. 608(a) for witness to testify victim was telling the truth about what happened)). In their analysis of *United States v. Helton*, 10 M.J. 820 (A.F.C.M.R. 1981), Professors Saltzburg, Schinasi, and Schluter, noted that the court, as part of its analysis, could have found that nothing in Mil. R. Evid. 608 permits testimony of a witness' opinion concerning truthfulness of another witness on a particular occasion. SALTZBURG ET AL., *supra* note 33, at 730. The applicability of this rule is discussed in greater detail *infra* notes 163-227 and the accompanying text.

<sup>145</sup> *United States v. Hill-Dunning*, 26 M.J. 260, 262 (C.M.A. 1988); 26 M.J. 234; 21 M.J. 59 (not helpful); *United States v. Azure*, 801 F.2d 336 (8<sup>th</sup> Cir. 1986); *United States v. Toledo*, 985 F.2d 1462 (10<sup>th</sup> Cir. 1993) (finding it was inappropriate for an expert to testify he "knew"

The prejudicial effect of this evidence is thought to be so great the military's highest court found that even inferences were not permitted. In *United States v. Cacy*,<sup>146</sup> the Court of Appeals for the Armed Forces held that expert testimony about the treatment given to a child victim of sexual abuse was improper because it amounted to an opinion the child was to be believed. The court stated,

[to] allow an "expert" to offer his opinion on the resolution of a credibility dispute goes too far, and it makes no difference whether the opinion is express or *follows inferentially* . . . . The court members must decide whether a witness is telling the truth. Expert insights into human nature are permissible, but lie detector evidence – *whether human or mechanical* – is not.<sup>147</sup>

With the boundaries established, the court noted that an expert's opinion a child victim did not appear coached or rehearsed was permissible.<sup>148</sup> The rationale to support the admissibility of this evidence as opposed to opinions on believability was that the former amounted to evidence of human behavior.<sup>149</sup> However, evidence concerning the treatment of the victim was not permitted because, even though the factfinder certainly would not know much about treatment, the inference the victim was telling the truth went too far. Similarly, in *United States v. Marrie*,<sup>150</sup> the court excluded evidence from an expert in child abuse that it was extremely rare for little boys to make false reports of sexual abuse.<sup>151</sup> Of this testimony the court stated, "the *inference* is very clear, and it is prohibited by our cases which have clearly held testimony regarding credibility to be inadmissible."<sup>152</sup>

The federal courts have also expressed their reluctance to permit an expert witness to opine as to the credibility or believability of a witness. In

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what the victim said was true and that there was a "high likelihood" her description of the events did occur); *United States v. Binder*, 769 F.2d 595 (9<sup>th</sup> Cir. 1985); *United States v. Brien*, 59 F.3d 274 (1<sup>st</sup> Cir. 1995).

<sup>146</sup> *United States v. Cacy*, 43 M.J. 214 (C.A.A.F. 1995).

<sup>147</sup> *Id.* at 217 (quoting with approval 21 M.J. at 64-65) (emphasis added).

<sup>148</sup> 43 M.J. at 218 (citing *United States v. Brenton*, 24 M.J. 562, 565 (A.F.C.M.R. 1987), *pet. denied*, 25 M.J. 393 (1987)).

<sup>149</sup> 43 M.J. at 218-19. The court gave other examples of behavior testimony that would be permissible and they included discussions of patterns of consistency in the stories of child victims, symptoms of abused children as compared to the victim's symptoms, and a child victim's ability to separate truth from fantasy. In and of themselves, they say nothing about whether the child is actually telling the truth about what happened. For an example of how limiting instructions can be used to prevent the jury from using the evidence improperly, see *supra* note 93.

<sup>150</sup> *United States v. Marrie*, 43 M.J. 35 (C.A.A.F. 1995).

<sup>151</sup> *Id.* at 41.

<sup>152</sup> *Id.* at 41-42 (emphasis added).

*United States v. Binder*,<sup>153</sup> the court stated that expert testimony should not be admitted if it concerns an improper subject. Noting that such a subject would be one that invades the province of the jury, the court went on to say that credibility was a matter to be decided by the jury.<sup>154</sup> Hence, the court disallowed expert testimony that particular witnesses were truthful. In *United States v. Azure*,<sup>155</sup> the Eighth Circuit Court of Appeals started its analysis by noting that under the Federal Rules of Evidence, opinion testimony is limited to character and that all other opinions concerning credibility were for the factfinder to form.<sup>156</sup> According to the court, the expert's testimony that the victim was believable and that she had no reason to lie went well beyond an opinion of character and was more appropriately described as an opinion on the specific believability of the witness. As such, the opinion was not admissible as expert testimony under Rule 702 or as an opinion concerning the witness' character for truthfulness under Rule 608.<sup>157</sup>

## 2. *The Accused*

This rationale has also been applied to cases involving opinions of the specific believability of the accused. In fact, there is authority to suggest that when it comes to determining the believability of the accused's testimony, the factfinder is in the best position to make the most accurate judgment. In *United States v. Wagner*,<sup>158</sup> the Air Force Court of Military Review did not allow an investigator to testify the accused was truthful when he confessed to the crime. Of note was the court's recognition that the testimony might have been admissible if it had been offered to assist the members in the area of criminal investigation.<sup>159</sup> This was an area in which the investigator had greater knowledge and experience than the factfinder. Since the evidence was offered to assist the members in making a determination about credibility, the court disallowed the expert testimony because it was unhelpful.<sup>160</sup> Then, as if

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<sup>153</sup> 769 F.2d 595.

<sup>154</sup> *Id.* at 602.

<sup>155</sup> 801 F.2d 336.

<sup>156</sup> *Id.* at 340 (quoting *United States v. Awkard*, 597 F.2d 667, 671 (9<sup>th</sup> Cir. 1979)). *Accord* 985 F.2d 1462.

<sup>157</sup> 801 F.2d at 340-41. The same court revisited this issue in *United States v. Whitted*, 11 F.3d 782 (8<sup>th</sup> Cir. 1993). Citing *Azure* and employing its rationale, the court held that an expert could not opine as to the believability of the victim. 11 F.3d at 785-86 (citing 801 F.2d at 339-41). The court also noted that Rule 704 did not save the opinion of the child abuse expert even though that rule permits opinions that reach the ultimate issue. Citing the Advisory Committee's Note on Rule 704, the court stated that an opinion that tells the factfinder what result to reach is not deemed helpful and is not admissible. 11 F.3d at 785.

<sup>158</sup> *United States v. Wagner*, 20 M.J. 758 (A.F.C.M.R. 1985).

<sup>159</sup> *Id.* at 761.

<sup>160</sup> *Id.* *Accord* *United States v. Farrar*, 25 M.J. 856 (A.F.C.M.R. 1988). In that case, the counselor's testimony was that based on his vast experience he could tell from the mannerisms

to make sure the point was clear, the court commented that the court members' superior ability to divine credibility was particularly applicable to the testimony of the accused.<sup>161</sup> The Court of Military Appeals reiterated this point in *Cameron* when it described the jury's role in evaluating credibility. Recognizing the significance of the Air Force court's comment in *Wagner* the court stated, "opinion testimony on whether or not to believe a particular witness' testimony simply is not deemed helpful to the factfinder, for the factfinders are perfectly capable of observing and assessing a witness' credibility. This is especially true where the testimony of the accused is involved."<sup>162</sup>

In another case that concerned the accused's credibility, *United States v. Hill-Dunning*,<sup>163</sup> the Court of Military Appeals disallowed an expert's opinion the accused was being truthful because it was not relevant or helpful testimony.<sup>164</sup> The court, with an eye toward the policy goals of M.R.E. 702, indicated the rules of evidence were designed to provide for expert testimony the factfinder could use to evaluate the evidence.<sup>165</sup> Under this rationale, the court would permit testimony if the expert's opinion was predicated upon the assumption the accused was truthful, but the expert was not permitted to actually state an opinion in that regard.<sup>166</sup> As to the specific issue of the accused's credibility, the court stated the "question of the [accused's] credibility is left with the finders of fact where it appropriately belongs."<sup>167</sup>

The evaluation of the courts' collective approach to opinion evidence concerning the specific believability of victims, witnesses, and even the

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of the accused that she was telling the truth when she denied using drugs. With little analysis, the court noted that while the counselor's opinion might be useful to determine whether entry into a drug rehabilitation program is appropriate, it had no place in the courtroom. *Id.* at 858.

<sup>161</sup> 20 M.J. at 762. Similarly, it is common in cross-examination of physicians or psychologists to ask if, in reaching their opinions, they accepted as true the account of their patient or subject. The purpose, of course, is not to establish the truth of the matters stated by the patient or subject, but rather to undercut the weight of the opinion based upon those matters.

<sup>162</sup> *United States v. Cameron*, 21 M.J. 59, 63 (C.M.A. 1985) (quoting 20 M.J. at 762). The court did not explain exactly what it meant by that last sentence. It could be that when it comes to the accused's testimony, the factfinder is even better at assessing the credibility of the testimony than it would be with an ordinary witness. Conversely, the court may have felt that testimony as to whether the accused is telling the truth is even less helpful than it would be if the testimony concerned an ordinary witness. Either way, it is apparent that at one time this court would not permit any testimony or opinions concerning the believability of the accused's version of the facts.

<sup>163</sup> *United States v. Hill-Dunning*, 26 M.J. 260 (C.M.A. 1988).

<sup>164</sup> *Id.* at 262.

<sup>165</sup> *Id.* at 263.

<sup>166</sup> *Id.* The court also noted that Rule 704 did not save this opinion on an ultimate issue because that rule did not open the door to all opinions and certainly not opinions that called on "oath-helpers."

<sup>167</sup> *Id.*

accused begs one inescapable question. Why have not the highest military court and a number of federal district and appellate courts applied this reasoning to polygraph evidence? After all, polygraph evidence is exactly the same type of opinion evidence concerning specific believability offered by expert witnesses that the courts have consistently excluded for years. The courts have not really attempted to answer the question or draw a distinction between the two types of opinion evidence. In addition, it has never been shown that polygraph operators are any better than other expert witnesses, be it a child abuse expert or a police investigator, at evaluating the credibility of a person. Nor have the courts provided any reason or justification that would warrant permitting expert testimony as to the specific believability of a witness from the defense while at the same time denying it to the prosecution, which was an approach suggested by the military's highest court in *Gipson* and, later, in *Scheffer*.

There may be at least two important reasons courts have ignored the inescapable parallel between the two kinds of evidence. First, too many courts are willing to assume the polygrapher's expert testimony will be helpful to the factfinder. They engage in only half the analysis and fail to consider whether this evidence really can help the factfinder at all. Second, there is a clear bias in favor of expert testimony that can be "backed-up" with tangible scientific data as opposed to intangible opinions from experts dealing in the "soft sciences" or non-scientific disciplines such as police interrogations. Such a bias is evident from the continued focus by the vast majority of courts on the *process* of the evidence rather than the *purpose* of the evidence. Unfortunately, it is the purpose of the evidence which ought to, and in the case of all other scientific evidence does, control admissibility.

## **V. CREDIBILITY EVIDENCE AND THE POLYGRAPHER'S OPINION**

Taking into consideration the purpose of polygraph testimony, Rule 608 must be involved in any discussion of the admissibility of the testimony. As an opinion that concerns credibility or evidence that would effect the factfinder's view of the accused's credibility, testimony the accused passed a polygraph would, at first blush, seem to implicate the restrictions of Rule 608. However, as a review of past cases demonstrates, the application of Rule 608 to polygraph evidence is anything but settled. The current language of this rule is open to differing interpretation,<sup>168</sup> and the rule fails to address the real issue in these cases because it is incomplete. There is a solution that will put the debate about polygraph evidence to rest, but a more thorough understanding of the problem with the application of Rule 608 is necessary.

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<sup>168</sup> 28 WRIGHT & GOLD, *supra* note 72 § 6113, at 40.

Every trial is a search for the truth and, naturally, the credibility of each witness and the accused, should he or she testify, is an issue at every trial. Witness credibility becomes particularly important where there is significant conflict in the evidence, very little physical evidence, or only a few witnesses. Perforce, it is in these closely contested cases where evidence of a polygraph will carry the most weight with the factfinder. The rules concerning credibility become critically important as tools to evaluate the admissibility of polygraph evidence.<sup>169</sup> “Mil. R. Evid. 608 enumerates the method of attacking or bolstering the credibility of witnesses.”<sup>170</sup> M.R.E. 608 states:

**Rule 608. Evidence of Character, Conduct, and Bias of Witness**

**(a) Opinion and reputation evidence of character.** The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

**(b) Specific instances of conduct.** Specific instances of conduct of a witness, for the purpose of attacking or supporting the credibility of the witness, other than conviction of a crime as provided in Mil. R. Evid. 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the military judge, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning character of the witness for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined testified.

**(c) Evidence of Bias.** Bias, prejudice, or any motive to misrepresent may be shown to impeach the witness either by examination or by evidence otherwise adduced.<sup>171</sup>

Under Rule 608(a), only evidence of the accused’s character for truthfulness or untruthfulness may be presented on the issue of credibility, and the form of

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<sup>169</sup> Methods of impeachment include evidence as to bad character for truthfulness, evidence of a prior inconsistent statements or acts, evidence of bias, prejudice, or motive to misrepresent, evidence of contradiction, and evidence of a conviction. *United States v. Robertson*, 39 M.J. 211 (C.M.A. 1994). Case law and Mil. R. Evid. 603, Mil. R. Evid. 607, Mil. R. Evid. 609, and Mil. R. Evid. 613 address these other forms of impeachment. *See generally* SALTZBURG ET AL., *supra* note 33, at 624-707.

<sup>170</sup> *United States v. Hill-Dunning*, 26 M.J. 260, 262 (C.M.A. 1988). In *United States v. Peterson*, 24 M.J. 283 (C.M.A. 1987), the court stated “[t]he credibility of a witness and the permissible evidence pertaining thereto is restricted by Mil.R.Evid 608.” *Id.* at 285. *But see* *United States v. Gipson*, 24 M.J. 246, 252 n.8 (C.M.A. 1987) (stating that since the opinion of a polygrapher concerning the deception, or lack thereof, of the accused was not character evidence, Mil. R. Evid. 608(a) did not apply).

<sup>171</sup> Subsection (a) of the military rule is taken verbatim from subsection (a) of the federal rule. Subsection (b) of the military rule is taken from the federal rule without substantial change. Subsection (c) does not exist in the federal rules. *See* SALTZBURG ET AL., *supra* note 33, at 648-49.

proof is restricted to opinion or reputation evidence.<sup>172</sup> Rule 608(b) then appears to limit further the evidence available to prove credibility. That subdivision prohibits extrinsic evidence of specific instances of the past conduct of a witness offered to attack or support the witness' credibility. It is, however, permissible to ask about specific instances of truthfulness or untruthfulness on cross-examination to test an opinion provided by a character witness,<sup>173</sup> but if the matter is collateral, the examiner is stuck with the answer, and extrinsic evidence of specific instances of conduct is not permitted.

If credibility evidence is that which encompasses the truthfulness or untruthfulness of a witness, then it is clear testimony from a polygrapher concerns the credibility of the accused. It is, after all, testimony as to whether or not the accused was being deceptive.<sup>174</sup> Some attempts have been made to introduce this testimony as exculpatory evidence.<sup>175</sup> Exculpatory evidence is that which clears or tends to clear the accused of fault or guilt or that establishes innocence.<sup>176</sup> Polygraph evidence does not tend to establish innocence. The only thing a polygrapher can do is infer from the readings on the machine whether or not the accused was deceptive.<sup>177</sup> Thus, polygraph evidence is not exculpatory evidence; it is credibility evidence. As evidence of credibility, it should be subject to Rule 608.

An evaluation of the cases dealing with polygraph evidence does not, however, provide support for the application of Rule 608 to polygraph evidence. The vast majority of federal and military courts either ignore the potential application of Rule 608 or find that the rule does not exclude polygraph evidence.<sup>178</sup> Only a few courts recognize the applicability of Rule 608. One part of the problem, as noted above, is that courts consistently fail to analyze the purpose for which the evidence is offered. Choosing instead to focus on the scientific process, they get bogged down in issues that relate to

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<sup>172</sup> *Id.* at 644-45; *see also* United States v. Awkard, 597 F.2d 667, 670 (9<sup>th</sup> Cir. 1979) (explaining that Fed. R. Evid. 608(a) limits opinion evidence concerning witness credibility to evidence of character only).

<sup>173</sup> Mil. R. Evid. 608(b)(1) allows cross-examination of the principle witness whose character is in issue, and Mil. R. Evid. 608(b)(2) allows cross-examination of the character witness who testified as to another witness' character. *See* SALTZBURG ET AL., *supra* note 33, at 644.

<sup>174</sup> Being deceptive means to deceive. To deceive means to lie or to make a person believe that which is not true. WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 469 (2<sup>nd</sup> Ed. 1979).

<sup>175</sup> *See, e.g.*, United States v. Alexander, 526 F.2d 161 (8<sup>th</sup> Cir. 1975); United States v. Scheffer, 44 M.J. 442 (C.A.A.F. 1995).

<sup>176</sup> BLACK'S LAW DICTIONARY 566 (6<sup>th</sup> ed. 1990).

<sup>177</sup> The only legitimate conclusion the polygrapher can draw is that the subject believes what he is saying, not that it is true. *See* United States v. Lech, 895 F. Supp. 582, 585 (S.D.N.Y. 1995).

<sup>178</sup> 24 M.J. 246 (Rule 608 not applicable); United States v. Posado, 57 F.3d 428 (5<sup>th</sup> Cir. 1995) (no mention of applicability of Rule 608); United States v. Crumby, 895 F. Supp. 1354 (D.Ariz. 1995) (Rule 608 does not exclude).



how the evidence is developed rather than how it will be used. Another aspect of the problem stems from whether Rule 608(a) is a rule of inclusion or a rule of exclusion. If it is the former, then it simply permits evidence concerning the character of the witness for truthfulness in the form of opinions, but does not apply to other opinion testimony concerning credibility. The Court of Military Appeals took this view in *Gipson* when it stated that Rule 608(a) did not apply because polygraph testimony did not concern character.<sup>179</sup> If it is the latter, then the Rule permits evidence of opinions in the form of character and prohibits all other opinions of credibility that do not relate to character. The Court of Military Appeals, in a later opinion, seemed to adopt this view as well. In *United States v. Arruza*,<sup>180</sup> the court stated that an expert's opinion the victim was telling the truth about the allegations was not allowed under Rule 608 because it was not evidence dealing with character.<sup>181</sup> This inconsistent approach suggests the language of the rule requires clarification.

### A. Rule of Evidence 608(a)

There are two aspects of Rule 608(a) that bear consideration when evaluating the applicability of this rule. The first issue concerns whether the opinion rendered by a polygrapher even qualifies as an opinion within the meaning of the rule. The second issue deals with the qualification of the evidence as character evidence. Traditionally, evidence concerning the credibility of a witness had to be evaluated under both parts of subsection (a) of Rule 608.

Rule 608(a) does not distinguish between lay opinions and expert opinions, suggesting that both Rules 701 and 702, which govern the admissibility of opinion testimony, must be considered.<sup>182</sup> Polygraph evidence, as opinion evidence, does not appear to satisfy either. The polygrapher's opinion is an improper lay opinion under Rule 701 because the opinion would be based only on a "particular assertion *at the time of the polygraph exam*"<sup>183</sup> and would relate only to "the credibility of a certain

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<sup>179</sup> 24 M.J. at 252.

<sup>180</sup> *United States v. Arruza*, 26 M.J. 234 (C.M.A. 1988).

<sup>181</sup> *Id.* at 237.

<sup>182</sup> 28 WRIGHT & GOLD, *supra* note 72 § 6114, at 52-3. The admissibility of lay opinions for purposes of Rule 608(a) is controlled by Rule 701, which is specifically designed to deal with lay opinions. Mil. R. Evid. 701 provides for the admission of lay opinions that are "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue." MCM, *supra* note 2, Mil. R. Evid. 701. This rule is identical to Fed. R. Evid. 701. SALTZBURG ET AL., *supra* note 33, at 721.

<sup>183</sup> 24 M.J. at 253.

statement.”<sup>184</sup> This is problematic for three reasons. First, there would not be enough time for the polygrapher to gain sufficient personal knowledge to form a rational opinion.<sup>185</sup> Second, the circumstances of a polygraph examination concerning an alleged crime would not be ideal for the formation of a rational opinion.<sup>186</sup> Finally, one instance of truthful conduct does not say anything about the accused’s character for truthfulness. Thus, the polygrapher’s lay opinion could not be rationally based on his or her perception and it would not be helpful for the factfinder.<sup>187</sup> With regard to opinions under Rule 702, the opinion testimony of an expert that any witness, including the accused, told the truth about what happened has never been permitted. Such opinion testimony does not assist the factfinder and, as discussed above, polygraph evidence is no different.<sup>188</sup> The polygrapher has never been shown to be better at determining credibility than the jury and, as a result, there is no way the polygrapher’s opinion could assist the jury. If a polygrapher’s opinion does not qualify as an opinion under either Rule 701 or Rule 702, then it appears that laying a foundation for the admissibility of the opinion under Rule 608(a) would not be possible.<sup>189</sup>

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<sup>184</sup> *Id.* at 252. Ordinarily, a psychophysicologist would never be able to provide a lay opinion under Rule 701 because he or she would never have had sufficient personal acquaintance with the accused.

<sup>185</sup> Generally, there is no requirement under Fed. R. Evid. 608 that the acquaintance be of long duration or that the information about the person be recently obtained. *See* 3 WEINSTEIN, ET AL., *supra* note 76 ¶ 608[4], at 608-30; *United States v. Thomas*, 768 F.2d 611 (5<sup>th</sup> Cir. 1985). Nor is there such a requirement under Mil. R. Evid. 608. *United States v. Williams*, 26 M.J. 487, 490 (C.M.A. 1988). *But Cf.* *United States v. Jenkins*, 27 M.J. 209, 211 (C.M.A. 1988) (upholding trial judge’s decision to exclude opinion testimony of a witness that the accused was truthful; the witness, a mental healthcare provider, was going to testify as to the accused’s ability to tell the truth after “seeing appellant in *only* four or five [marital] counseling sessions and speaking with him a couple of times over the phone” and conducting a personality screening test; the court noted that a character witness must have a sufficiently close acquaintance upon which to base an opinion the accused was a truthful person).

<sup>186</sup> The way in which the witness formed the opinion and the circumstances under which the opinion was formed are more important in assessing the reliability of the opinion. *See* 3 WEINSTEIN, ET AL., *supra* note 76 ¶ 608[4], at 608-32; *see also* 26 M.J. at 490. In *Williams*, the Court of Military Appeals ruled that a character witness did not have a sufficient basis upon which to render an opinion about the truthful character of the victim because she lacked personal knowledge of the victim’s character. The witness, a paralegal, was present for two interviews of the seven-year-old victim that totaled an hour and a half. Focusing on the nature of the acquaintance, the court stated that an hour and a half “stint” as a disinterested witness would not be enough time to render a reliable character assessment. *Id.*

<sup>187</sup> Certainly, as a lay witness, a polygrapher could not testify that he interviewed the accused about what happened and he personally believes the accused was truthful when he denied committing the offense. *See United States v. Farrar*, 25 M.J. 856 (A.F.C.M.R. 1988).

<sup>188</sup> *See supra* notes 142-167 and accompanying text.

<sup>189</sup> Under the Federal and Military Rules of Evidence, there are only two types of opinions – lay opinions and expert opinions. Nothing in Rule 608(a) or any other rule of evidence suggests the existence of a third kind of opinion. If a witness’ opinion does not meet the

The second aspect of the use of polygraph evidence under Rule 608(a) concerns the character of the accused. If character is defined as a person's tendency as demonstrated to others by his habits,<sup>190</sup> then evidence the accused showed no deception on a polygraph examination is not character evidence. Indeed, one short meeting between the polygrapher and the accused would not by itself reveal anything about the accused's tendencies and, therefore, it would say nothing about his character.<sup>191</sup> This reasoning played a small part in the decision in *Gipson*, where the court stated that polygraph evidence did not relate to the character of the subject.<sup>192</sup> Likewise, a statement or opinion relating to truthfulness or untruthfulness on a specific occasion is also not character evidence.<sup>193</sup>

The split of authority, however, concerns the application of Rule 608(a).<sup>194</sup> According to the court in *Gipson*, Rule 608(a) is inapplicable.<sup>195</sup> The court determined that polygraph evidence was not character evidence because the polygrapher's testimony related only to the credibility of a certain statement.<sup>196</sup> No further explanation or analysis was provided as to the inapplicability of Rule 608. Nor was there any comment as to which rule concerning credibility might apply to this evidence, if one applies at all. Although that portion of *Gipson* was cited in subsequent opinions,<sup>197</sup> there has been no further elaboration on the point since.<sup>198</sup> In *United States v. Piccinonna*,<sup>199</sup> the Eleventh Circuit Court of Appeals simply decided, without engaging in any analysis, that Rule 608 did not prevent the admissibility of the polygrapher's opinion as long as the accused's credibility was first attacked.<sup>200</sup> The court apparently assumed polygraph evidence concerned character and that the polygrapher's testimony was an appropriate opinion in that regard.

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requirements in either one of these rules, it is hard to see how the opinion could otherwise be admitted. If, on the other hand, it did assist the factfinder to hear an expert's opinion that a witness told the truth, the question would be whether this was character evidence. Since the courts tend to simply assume this evidence assists the factfinder, the focus of the Rule 608 debate concerns whether polygraph evidence is character evidence and whether that even matters.

<sup>190</sup> BLACK'S LAW DICTIONARY 232 (6<sup>th</sup> ed. 1990).

<sup>191</sup> *United States v. Piccinonna*, 729 F. Supp. 1336, 1338 (S.D. Fla. 1990). *But see* *United States v. Crumby*, 895 F. Supp. 1354, 1363-64 (D.Ariz. 1995) (finding that the polygrapher's opinion qualified as character evidence and for that reason was admissible under Fed. R. Evid. 608).

<sup>192</sup> 24 M.J. at 252 n.8.

<sup>193</sup> 28 WRIGHT & GOLD, *supra* note 72 § 6113, at 43.

<sup>194</sup> 28 *Id.* § 6115, at 65.

<sup>195</sup> 24 M.J. at 252 n.8.

<sup>196</sup> *Id.*

<sup>197</sup> *See* *United States v. Rodriguez*, 37 M.J. 448, 452 (C.M.A. 1993).

<sup>198</sup> *See* *United States v. Scheffer*, 44 M.J. 442 (C.A.A.F. 1995). The court in *Scheffer* does not mention Rule 608 or any other rule remotely concerned with credibility.

<sup>199</sup> *United States v. Piccinonna*, 885 F.2d 1529 (11<sup>th</sup> Cir. 1989), *on remand* 729 F. Supp. 1336.

<sup>200</sup> 885 F.2d at 1536 (the court focused its analysis on Rule 608(a)(2)).

The contrary view is that Rule 608(a) excludes the evidence because the testimony concerning a polygraph result does not relate to the character. Interestingly, on remand the federal district court in *United States v. Piccinonna*<sup>201</sup> held that one polygraph examination was insufficient contact upon which to base an opinion of character for truthfulness. It was “inconceivable” to the court that “anyone, expert or not, could form a valid, reliable, and admissible opinion as to the ‘character’ of a witness” during one single polygraph examination.<sup>202</sup> In *United States v. Thomas*,<sup>203</sup> the Fifth Circuit Court of Appeals noted that F.R.E. 608 applied where the accused attempted to use the opinion of the polygrapher to bolster his own credibility. The court questioned the admissibility of the polygrapher’s opinion under F.R.E. 608 because it did not relate to character.<sup>204</sup>

Not unexpectedly, there are more cases concerning Rule 608(a)’s applicability to expert opinions about the specific believability of a witness. Although, many cases dealing with this issue hold that it is not an appropriate opinion under Rule 702, some cases do rely on Rule 608(a) as a bar for such opinions because they are not opinions of character. In one important Federal case, *United States v. Azure*,<sup>205</sup> the Eighth Circuit Court of Appeals found that expert opinions concerning the specific believability of the victim’s story were not admissible under Rule 608(a)<sup>206</sup> because such opinions did not concern character. In more than one case the Court of Military Appeals has actually contradicted its position in *Gipson* concerning the scope of Rule 608(a). In *United States v. Peterson*,<sup>207</sup> the court stated that they have categorically rejected testimony as to the specific believability and truthfulness of a witness’ version of the events because that type of testimony fell outside the ambit of Rule 608.<sup>208</sup> Writing for the majority, Judge Cox stated “[t]he credibility of a witness and the *permissible evidence pertaining thereto* is restricted by Mil. R. Evid. 608.”<sup>209</sup> Additionally, in *Aruzza*, the court held that opinions from experts “as to the credibility or believability of victims or other witnesses . . .

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<sup>201</sup> 729 F. Supp. 1336.

<sup>202</sup> *Id.* at 1338. The court also felt the evidence was unfairly prejudicial but actually ruled it was inadmissible under Fed. R. Evid. 402 and Fed. R. Evid. 608.

<sup>203</sup> *United States v. Thomas*, 768 F.2d 611 (5<sup>th</sup> Cir 1985).

<sup>204</sup> *Id.* at 618.

<sup>205</sup> *United States v. Azure*, 801 F.2d 336 (8<sup>th</sup> Cir. 1986).

<sup>206</sup> *Id.* at 341. *Accord* *United States v. Cecil*, 836 F.2d 1431, 1442 (4<sup>th</sup> Cir. 1988) (stating that opinions of credibility not related to character are for the jurors to form); *United States v. Awkard*, 597 F.2d 667, 670 (9<sup>th</sup> Cir. 1979) (stating that Rule 608(a) strictly limits opinion evidence concerning credibility to character).

<sup>207</sup> *United States v. Peterson*, 24 M.J. 283 (C.M.A. 1987).

<sup>208</sup> *Id.* at 285. *Accord* 26 M.J. 487, 490 n.1 (stating again that a witness’ opinion as to the specific believability and truthfulness of the victim’s story was not admissible at all under Mil. R. Evid. 608(a)). Although the court only mentioned the victim’s story, there is no reason the same rule of law would not apply to the accused’s story.

<sup>209</sup> 24 M.J. at 285 (emphasis added).

‘goes beyond the area of inquiry permitted by Mil. R. Evid. 608(a),’ dealing with evidence of truthful character.”<sup>210</sup> In that case, the court found that the combination of Rule 608(a), Rule 403, and the rules concerning expert opinion testimony, worked together to prohibit opinions on the specific believability of a witness’ version of the events.<sup>211</sup> These cases not only demonstrate the courts’ inconsistent approach to Rule 608(a), but they also serve to illustrate the trouble caused by polygraph evidence when the purpose of that evidence is overlooked.

The Court of Appeals for the Armed Forces’ unwavering focus on the science behind the polygraph and its resulting failure—or unwillingness—to see the parallel between this expert testimony and other expert opinions regarding credibility has yielded further inconsistent reasoning. In *Scheffer*, the Court of Appeals for the Armed Forces attempted to distinguish the opinion of the polygrapher from the legion of military and federal cases prohibiting opinions concerning the specific believability of the victim. The polygrapher’s opinion was permissible, the court said, because the polygrapher was merely testifying that the accused’s answers did not *indicate* deception, not that the accused was telling the truth.<sup>212</sup> In an effort to support their conclusion in this regard, the court cited *United States v. Cacy*<sup>213</sup> for the proposition that experts can testify as to indicia of deception.<sup>214</sup> The court also relied on its holding in *United States v. Suarez*<sup>215</sup> in which an expert was allowed to provide testimony that counter-intuitive conduct, such as failure to report and recantation, is not inconsistent with a truthful accusation.<sup>216</sup> Cases in which experts were permitted to testify that a child could distinguish fact from fantasy were also cited for their supposed precedential value.<sup>217</sup> However, the court’s reasoning suffers from several serious flaws.

First and most conspicuously, there is an inescapable inference that if the accused did not indicate deception, then he must be telling the truth about

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<sup>210</sup> 26 M.J. at 237 (quoting *United States v. Cameron*, 21 M.J. 59, 62 (C.M.A. 1985)).

<sup>211</sup> 26 M.J. at 238. The court noted that several theories had been advanced as to why such testimony was inappropriate. In addition to the non-character nature of this testimony, the court noted the evidence has been found to exceed the specialized knowledge of the expert, the evidence usurps the jury’s function to weigh credibility, and it is unfairly shrouded with an aura of scientific certainty. *Id.* at 237. The differing rationale listed by the court helps illustrate the problem.

<sup>212</sup> 44 M.J. at 446 (emphasis added).

<sup>213</sup> *United States v. Cacy*, 43 M.J. 214 (C.A.A.F. 1995).

<sup>214</sup> 44 M.J. at 446 (citing 43 M.J. at 218). The court focused on its holding in *Cacy* that an expert could testify that the victim’s version of the events did not appear to be feigned or rehearsed. 44 M.J. at 446.

<sup>215</sup> *United States v. Suarez*, 35 M.J. 374 (C.M.A. 1992).

<sup>216</sup> 44 M.J. at 446 (citing 35 M.J. at 376).

<sup>217</sup> 44 M.J. at 446 (citing *United States v. Palmer*, 33 M.J. 7, 12 (C.M.A. 1991); *United States v. Tolppa*, 25 M.J. 352, 354-55 (C.M.A. 1987)).

what happened.<sup>218</sup> The court's own language in cases prior to *Scheffer* suggests that this court at one time subscribed to this reasoning.<sup>219</sup> As to the polygrapher, the court previously acknowledged he was a "credibility medium" and, as to his opinion, the court stated it concerned whether the accused "was being truthful or deceptive in making a particular assertion."<sup>220</sup> In addition, this court at one time "[took] it as *obvious* that when a party offers a polygrapher's opinion that a certain assertion did not indicate deception, the party is offering the evidence to prove the assertion is true."<sup>221</sup> The court's previous comments certainly seem to be at odds with their claim in *Scheffer* that the polygrapher merely testifies to a lack of indicia of deception.

Second, the cases cited by the court can be readily distinguished. The expert's opinion in *Cacy*, that the victim appeared rehearsed, says nothing about the truthfulness of the victim's version or whether the expert believed the victim. A version of an incident can be rehearsed or coached and still be true because rehearsal says nothing, in and of itself, about truthfulness. Deception does.<sup>222</sup> The same rationale can also be applied to the cases where courts have upheld expert testimony concerning the child's ability to distinguish fact from fantasy. The child's ability to make such a distinction says nothing about whether they are actually telling the truth or not. A child might have great difficulty distinguishing fact and fantasy and, yet, testify very truthfully. On the other hand, the child might have no problem with reality and might still be lying. None of the examples of expert opinion testimony in the cases cited rise to the level of the opinion testimony provided by the polygrapher.<sup>223</sup> The evidence in those cases can be used by the factfinders to arrive at their own decision as to the credibility of the victim. A polygrapher's opinion, on the other hand, tells the factfinders what result to reach. The difference between character testimony that a witness can or does tell the truth and testimony concluding the witness is telling the truth is fundamental.

Third, it is even more difficult to understand the court's position in light of its decision in *United States v. Marrie*.<sup>224</sup> In *Marrie*, the court specifically prohibited expert testimony that little boys very rarely falsify

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<sup>218</sup> The converse, that if the accused was not truthful he would indicate deception, is equally apparent.

<sup>219</sup> We note that there was no indication, express or implied, in *Scheffer* that the court was rejecting its earlier reasoning.

<sup>220</sup> 24 M.J. at 253.

<sup>221</sup> *United States v. Williams*, 43 M.J. 348, 354 (C.A.A.F. 1995) (emphasis added).

<sup>222</sup> This might have something to do with the fact that to deceive is to lie and telling a lie is the opposite of telling the truth. There is no such linguistic relationship between the word "rehearse" and the word "truth."

<sup>223</sup> Testimony concerning counter-intuitive conduct is routine human behavior evidence, and it says nothing about whether the witness is actually telling the truth. *See supra* notes 91-94 and accompanying text.

<sup>224</sup> *United States v. Marrie*, 43 M.J. 35 (C.A.A.F. 1995).

allegations of sexual abuse.<sup>225</sup> According to the court, the inference was so great it amounted to testimony that the victim was telling the truth.<sup>226</sup> The court, for reasons that are not clear, did not apply this rationale when evaluating the testimony of a polygrapher.<sup>227</sup> Yet, the inference to be drawn from the polygrapher's testimony seems indistinguishable from the inference left by the expert's testimony in *Marrie*. If expert testimony like that discussed in *Marrie* is not permitted, then the same type of testimony from a polygrapher also should not be permitted, for the same reasons.

### B. Rule of Evidence 608(b)

An analysis of the impact of Rule 608 on polygraph evidence would be incomplete without considering subsection (b). There has been almost no discussion by federal courts concerning the application of Rule 608(b) to polygraph evidence. Yet, the language in the first sentence of Rule 608(b) applies any time extrinsic evidence<sup>228</sup> is used to attack or support the credibility of a witness. Evidence of a successful polygraph examination would appear to fall within the definition of a specific instance of conduct because it is an "isolated act" of the accused.<sup>229</sup> The court in *United States v. Gipson*<sup>230</sup> seemingly categorized evidence of a polygraph examination as a specific instance of conduct by describing it as evidence relating to a "certain statement" and a "particular assertion [made] at the time of the polygraph exam."<sup>231</sup>

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<sup>225</sup> *Id.* at 41.

<sup>226</sup> *Id.* at 41-42. In *Marrie*, the court stated that experts are not allowed to testify concerning the credibility of the victim. *Id.* at 41. Although the court did not specifically mention Mil. R. Evid. 608, it did cite to *Peterson*, 24 M.J. 283, to support that proposition. 43 M.J. at 41. In *Peterson*, the court found that an expert's opinion the victim was telling the truth violated Mil. R. Evid. 608. 24 M.J. at 285.

<sup>227</sup> To be sure, the court ignored the rationale and the *Marrie* case. That case is not mentioned in the *Scheffer* opinion.

<sup>228</sup> Extrinsic evidence can be defined as external evidence or evidence from an outside source. BLACK'S LAW DICTIONARY 588-89 (6<sup>th</sup> ed. 1990). In other words, if A provides testimony during direct examination about something B did, that would be extrinsic evidence. It is worth noting that based on the opinions of both military and civilian courts, the accused could not discuss evidence of his own polygraph until his credibility has been attacked and then only if some expert opinion was to follow that could explain the evidence.

<sup>229</sup> See *United States v. Piccinonna*, 729 F. Supp. 1336, 1338 (S.D.Fla. 1990). The rule does not define that phrase but one commentator described a specific instance of conduct as "the isolated act of the person whose character is in issue." 28 WRIGHT & GOLD, *supra* note 72 § 6117, at 79. As such, any incident or event that related to truthfulness might serve as the basis for an opinion of character, but could not itself be admitted as direct proof. 28 *Id.* § 6117, at 79.

<sup>230</sup> *United States v. Gipson*, 24 M.J. 246 (C.M.A. 1987).

<sup>231</sup> *Id.* at 253.

As extrinsic evidence of a specific instance of conduct that relates to credibility,<sup>232</sup> polygraph evidence should be addressed by subsection (b). On remand, the district court in *Piccinonna*, focusing on the role served by polygraph evidence and invoking the plain language of the rule, found that Rule 608(b) did indeed exclude the specific instance of truthfulness from a single polygraph examination.<sup>233</sup> But, another district court found that Rule 608(b) did not exclude the evidence. In *United States v. Crumby*,<sup>234</sup> the court refused to read Rule 608(b) to preclude a defendant from supporting his credibility with polygraph evidence once it had been attacked.<sup>235</sup> Expressly disagreeing with the *Piccinonna* court's analysis, the court in *Crumby* held that the evidence was admissible under the impeachment by contradiction exception to Rule 608(b).<sup>236</sup> The Court of Appeals for the Armed Forces considered the matter but rejected the idea that Rule 608(b) even applied to polygraph evidence.<sup>237</sup> The court provided no real analysis except to state that, because specific instances of conduct are offered for the inferences that might be drawn about character and because polygraph evidence did not concern character, Rule 608(b) did not apply.<sup>238</sup>

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<sup>232</sup> "Polygraph evidence relates to the credibility of a certain statement." *United States v. Rodriguez*, 37 M.J. 448, 452 (C.M.A. 1993) (quoting 24 M.J. at 252-53).

<sup>233</sup> 729 F. Supp. at 1338; *see also* *United States v. Early*, 505 F. Supp. 117 (S.D.Iowa 1981).

<sup>234</sup> *United States v. Crumby*, 895 F. Supp. 2354, 1364 (D.Ariz. 1995).

<sup>235</sup> *Id.* at 1364. The court, choosing to read subsection (b) narrowly, said that a polygraph exam is admissible because it is "highly probative evidence of a criminal defendant's propensity for truthfulness *with respect to the issues in the case.*" *Id.* (emphasis added). This kind of analysis makes an even better case for a new clear rule.

<sup>236</sup> Most federal and military courts recognize this exception, but it is unclear how it applies in this situation. Contradiction evidence is normally admitted because it contradicts a specific statement or fact already testified to. *United States v. Trimper*, 28 M.J. 460 (C.M.A. 1989), *cert. denied*, 493 U.S. 965, 110 S. Ct. 409, 107 L. Ed. 2d 374 (1989). In *Crumby*, the polygraph evidence did not specifically contradict anything, though it did generally contradict the evidence of the crime and the general impeachment evidence to be presented to the jury. *See* 895 F. Supp. at 1364. The trouble is that the "contradiction" the defense sought to introduce was a specific instance of truthfulness. This is exactly what Mil. R. Evid. 608(b) prohibits. The contradiction exception is supposed to be narrow, but with the stroke of a pen, the *Crumby* court created an exception big enough to swallow the rule. And, in that case it did. This treatment of Mil. R. Evid. 608(b) renders the Rule meaningless—a result which was neither intended nor desired.

<sup>237</sup> 24 M.J. at 252 n.8. In *United States v. Rodriguez*, 37 M.J. 448 (C.M.A. 1993), the court did not even list Mil. R. Evid. 608 as a rule to be considered. Referring only to Mil. R. Evid. 401, Mil. R. Evid. 402, Mil. R. Evid. 403, and Mil. R. Evid. 702, the court's attention was focused only on the admissibility of the evidence as expert testimony. *Id.* at 452.

<sup>238</sup> 24 M.J. at 252 n.8. The mere fact that polygraph evidence is not character evidence would not necessarily have anything to do with admissibility of extrinsic evidence. The second part of subsection (b) does address character evidence, but only to the extent it permits the use of specific instances of conduct to cross-examine a witness about a person's character. It is the first sentence of subsection (b) that operates to exclude extrinsic evidence of specific conduct and its application seems clear.



The explanation for the different approaches to the applicability of Rule 608(b) is not clear. One reason for the varied results may be the extensive focus on the Rule 702 issue. As noted above, most courts concentrate on evidentiary reliability to determine if expert testimony concerning the polygraph is relevant and helpful. To the extent the courts find the testimony satisfies Rule 702, it is often admitted without regard to Rule 608(b). Another reason may be the approach taken by a majority of federal courts to avoid a literal reading of the language of the first part of Rule 608(b). Most federal courts allow extrinsic evidence of specific conduct to be used to prove bias, prejudice, motive to misrepresent, and contradiction.<sup>239</sup> Under the federal rules, this approach finds some justification because there is no rule that specifically provides for the use of extrinsic evidence of conduct to impeach in this manner. By contrast, M.R.E. 608(c) specifically provides for the introduction of evidence for these purposes.<sup>240</sup> Under the military rules, it would not be necessary to adopt the approach taken by a majority of federal courts. Therefore, the liberal reading of subsection (b) adopted by the federal courts does not fully explain the tri-polar<sup>241</sup> application of Rule 608(b) to polygraph evidence or the lack of comment regarding its applicability. In light of the federal courts' relative silence on the applicability of Rule 608(b) to polygraph evidence, and the military courts' unwillingness to even apply Rule 608(b), another approach is warranted.

### C. A Proposed Rule—Rule of Evidence 608(d)

To properly deal with the issues addressed by polygraph or any other form of testimony amounting to an opinion as to the specific believability of a witness, a clarification of the evidence rules provides the best solution. A new rule of evidence based on well-settled case law dealing with the prohibition of opinions regarding the credibility of a witness should explicitly codify the law. Such a rule would appropriately resolve the issue for a number of reasons.

First, this rule would reflect the current state of the law. The prohibition of opinions concerning the specific believability of a witness is, for the most part, a creature of case law and judicial interpretation of imprecise rules. There is no written rule that strictly embodies the concept. Nor is there a single theory the courts rely upon to justify exclusion. Some courts rely solely on Rule 702, while others rely on a combination of Rule 702, Rule 608,

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<sup>239</sup> 28 WRIGHT & GOLD, *supra* note 72 § 6113, at 40-41.

<sup>240</sup> The introduction of evidence to demonstrate contradiction is possible only under very narrow circumstances. *See* 28 M.J. 460. Given subsection (c), a more literal interpretation of the first part of subsection (b) by military courts would seem appropriate. Any other approach under the military rules would effectively render the first sentence in Mil. R. Evid. 608(b) meaningless. But, if the first part of subsection (b) is read literally, then it is hard to explain the court's position in *Gipson*.

<sup>241</sup> Three different approaches were taken by the courts in *Piccinonna*, *Crumby*, and *Gipson*.

and the rules regarding relevance.<sup>242</sup> Despite this varied approach, all courts agree that these opinions are not admissible. Polygraph testimony is the very same type of opinion as those already excluded, except that a mechanical lie detector has replaced the human one. Yet, the courts continue to struggle with the admissibility of an opinion that the accused is not being deceptive concerning the very events for which he is being tried. The proposed rule would specifically and consistently address both sources of the improper opinion.

Second, such a rule would address the real problem raised by the use of polygraph evidence—that unhelpful testimony will improperly infringe upon the function of the jury to determine the believability of the witnesses. Even in the face of semantic attempts to change the substance of the polygrapher’s opinion, in its most basic form, the polygrapher is being asked to render an opinion on whether or not the accused was deceptive when discussing the incident. More to the point, the factfinder will almost certainly see the opinion as conclusive on the issue of the accused’s credibility and possibly his guilt. Properly considered, Rules 608 and 702 would seem to apply to the problem, but these restrictions have not been thoroughly embraced by the courts because they have taken their eyes off the judicial ball. The proposed rule offers the precision necessary to maintain fairness that is critical to the criminal justice process.

Finally, a new rule of evidence will avoid the need for a *per se* rule regarding polygraphs. *Per se* rules are generally disfavored because of their overly mechanical application.<sup>243</sup> The new rule would focus only on the real evil to be avoided and, in that regard, it would be narrowly tailored to achieve its purpose. Although the rule would exclude all improper believability opinions, in the context of our system of justice, the prohibition is necessary and legitimate. It is necessary because we must maintain the factfinder’s function to determine credibility, and it is legitimate because it is the logical outgrowth of rules of evidence and procedure designed to ensure fairness. Moreover, the risk of disproportionate application will be nonexistent because the proposed rule would apply equally to all parties to the trial without any possibility of favoring one side or the other.

Since the issue of polygraph evidence is one of credibility, it makes sense that the proposed rule of evidence be added to the existing rule on the subject, Rule 608. The proposed rule, entitled M.R.E. 608(d)<sup>244</sup> would read as follows:

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<sup>242</sup> See *United States v. Arruza*, 26 M.J. 234, 237 (C.M.A. 1988) (citations omitted).

<sup>243</sup> See *Rock v. Arkansas*, 483 U.S. 44, 107 S. Ct. 2704, 2711 n.12, 97 L. Ed. 2d 37 (1987).

<sup>244</sup> The authors suggest a similar addition to Fed. R. Evid. 608, and suggest also that adding the language of Mil. R. Evid. 608(c) would help to further clarify the evidence rules regarding character and credibility.

**(d) Opinion as to the specific believability of a witness**

Except as provided in Mil. R. Evid. 608(b), no witness shall be permitted to express an opinion concerning the credibility or believability of any statement made by any other person, in or out of court.

It could be argued that if the prohibition of polygraph evidence is so clear from the rules, that a new rule is not necessary. That argument is misplaced for several reasons. First, we should always strive for clarity in the law. Second, uniformity in the law is also highly desirable. The proposed rule addresses the purpose the evidence is designed to serve rather than the process used to make the determination. The problem is use of an opinion concerning the believability of a witness' statement. Despite judicial misunderstanding to the contrary, it is immaterial how the witness arrived at that conclusion. Whether it is a psychologist whose years of experience and knowledge served as the tool used to evaluate the victim, the polygrapher engaged with electronic gadgets designed to detect deception, or the voice stress analyst who concentrates on the sound patterns of the witness, it is their ultimate conclusion—that the witness is or is not truthful—which offends the law. A rule that focuses on the proscribed outcome ensures uniformity in its approach. It serves as notice to practitioners and expert witnesses that, if their technique renders an opinion about believability, it will not be admissible. Third, the proposed rule protects a fundamental aspect of our system of jurisprudence; that the factfinder alone determines credibility. Very often those determinations provide answers to questions bearing upon guilt or innocence, the resolution of which is the function of the jury or court-martial panel. In the absence of proof that the polygrapher, psychologist, or body language expert is better than the jury at performing this function, it would be folly to take this decision out of the factfinder's hands. Perhaps the collective wisdom of members of the community is not perfect at assessing believability, but that is hardly the point. The point is that they still make that determination because that is what the Constitution requires and nothing has been proven better.<sup>245</sup> As the court in *United States v. Alexander*<sup>246</sup> stated,

'The most important function served by a jury is in bringing its accumulated experience to bear upon witnesses testifying before it, in order to distinguish truth from falsity. Such a process is of enormous complexity, and involves an almost infinite number of variable factors. It is the basic premise of the jury system that twelve men and women can harmonize those variables and decide, with the aid of examination and cross-examination, the truthfulness of a witness.'<sup>247</sup>

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<sup>245</sup> U.S. CONST. amend. VI.

<sup>246</sup> *United States v. Alexander*, 526 F.2d 161 (8th Cir. 1975).

<sup>247</sup> *Id.* at 168-69 (quoting *United States v. Stromberg*, 179 F. Supp. 278, 280 (S.D.N.Y.), *rev'd in part on other grounds*, 268 F.2d 256 (2<sup>nd</sup> Cir. 1959).

If ever there comes a time when human or mechanical lie detectors are shown to be better than actual juries, a rule prohibiting their use in court will hardly be an issue. The real issue will be the development of a new system of justice.

#### **D. Constitutional Validity**

The proposed rule of evidence better accomplishes the objectives of Rule 707 without infringing upon the constitutional rights of the accused. As a narrowly tailored rule, it does not arbitrarily prevent the accused from presenting a defense or calling witnesses in his favor, but it does avoid the pitfalls of a *per se* rule like Rule 707. The rules regarding expert testimony and credibility place legitimate restrictions upon the presentation of certain types of evidence. These rules, which have enjoyed long-standing application, are designed to insure reliable, trustworthy, and helpful information is presented to the factfinders in their quest for the truth. Opinion testimony concerning the specific believability of a particular witness is uniformly excluded by the dual application of these rules and by case law because such opinions are neither reliable nor helpful.<sup>248</sup> Polygraph evidence is no different because it too is nothing more than an opinion concerning the specific believability of the subject. Therefore, there is no reason to treat polygraph evidence any differently.

The accused, having no constitutional right to introduce evidence that is not relevant or helpful,<sup>249</sup> is not unfairly prejudiced by the exclusion of polygraph opinion testimony.<sup>250</sup> If, as the military's highest court has said, expert opinions about whether the jury should believe a witness are not relevant or helpful, then the opinion of a polygrapher and the underlying scientific evidence can be constitutionally excluded. There can be no arbitrary

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<sup>248</sup> See *supra* notes 142-167 and accompanying text.

<sup>249</sup> *United States v. Gipson*, 24 M.J. 246, 252 (C.M.A. 1987). The Supreme Court recently held that polygraph evidence, inadmissible under state law even for impeachment purposes, had no independent and inherent evidentiary value mandating disclosure under *Brady v. Maryland*, 373 U.S. 83, 83, S. Ct. 1194, 10 L. Ed. 2d 215 (1968). *Wood v. Bartholomew*, \_\_\_ U.S. \_\_\_, 116 S. Ct. 7, 133 L. Ed. 2d 1 (1995). In *Wood*, the prosecution failed to reveal polygraph results showing their two key witnesses were deceptive. The polygraphs would have been offered to undermine their credibility at trial. See also *Jackson v. Garrison*, 677 F.2d 371 (4<sup>th</sup> Cir. 1981) (holding that the defendant's constitutional rights were not violated and the fairness of the trial was not jeopardized where prosecutor refused to stipulate to the admissibility of a polygraph result and state law prohibited admissibility absent stipulation). *But see* *McMorris v. Israel*, 643 F.2d 458 (7<sup>th</sup> Cir. 1981) (holding the prosecution impermissibly refused to stipulate to admission of a polygraph because polygraph evidence may be materially exculpatory within the meaning of the Constitution).

<sup>250</sup> Moreover, the accused cannot claim exclusion infringes on his right to testify on his own behalf as it did the appellant in *Rock*. See 107 S. Ct. 2704. He is simply being denied the opportunity to present evidence intended to bolster his credibility. The accused is not constitutionally entitled to have a witness testify that what the accused said about the incident is true.

denial of the right to present witnesses or a defense when the proffered evidence runs afoul of established rules of evidence and procedure that serve to protect the fairness and reliability of the trial process.<sup>251</sup> The proposed rule, which is based on established rules of evidence and on well-settled case law, justifies the restriction placed on the accused's right to present witnesses. Unlike Rule 707, the suggested amendment is focused only upon the exclusion of unhelpful opinions regarding credibility. Designed to promote fairness and reliability by preserving the jury's function to evaluate credibility without being hindered by unhelpful evidence, the application of the proposed rule is clearly not arbitrary or disproportionate.

## VI. CONCLUSION

The jurisprudential question concerning polygraph opinion testimony remains largely ignored by the appellate courts. Instead of focusing (short-sightedly) on the science involved, the appellate courts should focus on the role being served in court by the proffered testimony. If the role is not to explain a fact or issue, but to provide a credibility assessment of another witness concerning the facts of the very case before the court, then alarm bells should sound. Sadly, none have, despite the obvious fact that polygraphy, and other deception detection sciences, purport to perform the very same function as the jury.<sup>252</sup> At the very least, the appellate courts should require the proponent to show that the science is better than the jury, and no proponent has yet done that. Better yet, the appellate courts need to ask the question posed at the beginning of this article: Shall the jury be displaced in its role as the judge of credibility? The authors believe the time is not yet ripe for that leap in jurisprudence, and suggest that—until such time as it may be appropriate to redefine or replace the jury—it is important to exclude witness' opinions about the believability of other people's statements.

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<sup>251</sup> *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 1049, 35 L. Ed. 2d 297 (1973); 107 S. Ct. at 2711.

<sup>252</sup> If the polygraph is welcomed, what other scientific advancements might expect invitations into the courtroom to "assist" the jury? Perhaps body language analysts could be allowed to recount their "expert" assessment of the believability of each of the witnesses after they testify. Or, experts seated in the back of the courtroom with telescopes trained on the eyes of the witnesses to determine their pupil dilation at the time of responding to each question could be called to testify as to their opinion. Maybe we could even use voice stress analyzers to display audio charts during the testimony of each witness. And finally, we could just connect every witness to a polygraph, in the *courtroom*, and allow the jury to observe the charts projected real-time on a large screen while any witness—including a polygrapher—testifies.

# How “Exclusive” is “Exclusive”?

## The Federal Employees’ Compensation Act and Compensatory Damages in Discrimination Cases

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### I. INTRODUCTION

The Federal Tort Claims Act<sup>1</sup> (hereinafter FTCA) was created to be a limited waiver of the federal government’s sovereign immunity<sup>2</sup> from claims by individuals. Federal employees face an additional limitation under the Federal Employees’ Compensation Act<sup>3</sup> (hereinafter FECA). The FECA, which created the U. S. Government’s workmen’s compensation program, is the exclusive remedy for workplace injuries suffered by federal sector employees. Over time, the Secretary of Labor, who has decisional authority on the scope of the FECA, has determined that the FECA covers emotional injuries and, if caused by harassment or discrimination, the program can compensate such injuries.

However, it is not an uncommon practice for federal employees to file FECA claims for injuries arising from alleged discriminatory practices and pursue (simultaneously or sequentially) a claim for compensation for the same injuries in a discrimination case under the FTCA. In these cases, the government has consistently alleged that such a claim is barred because the FECA is the exclusive remedy for workplace injuries. In response, federal courts have engaged in “judicial engineering” by ruling that the FECA either (1) does not cover emotional injuries and (2) even if it did cover such harms, it is not the exclusive remedy for harms suffered due to discrimination. The end result is FECA is only exclusive when the courts say it is. This is clearly not the intent of the law, and has resulted in cases where the same issues are litigated several times, each time being judged by a different standard in a different forum.

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<sup>1</sup> 28 U.S.C. §§ 2671-2680 (1994).

<sup>2</sup> The doctrine of sovereign immunity prevents suits against the United States except where Congress has specifically allowed exemptions. See *Block v. North Dakota*, 461 U.S. 273, 287 (1983).

<sup>3</sup> 5 U.S.C. §§ 8101-8152 (1994).

This article discusses the evolution of the law in this area and explores possible alternatives to the present system.

## II. THE FEDERAL TORT CLAIMS ACT

The Federal Tort Claims Act provides a limited waiver of the United States' sovereign immunity in cases of

injury or loss of property or personal injury caused by the negligent or wrongful act or commission of any employee . . . while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.<sup>4</sup>

As a prerequisite to suit under the FTCA, a claimant must first present the claim to the appropriate federal agency and have it formally denied or have the agency fail to act on the claim within the statutory time frame.<sup>5</sup> The statute further provides that the

acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.<sup>6</sup>

Even though a waiver of governmental liability for tortious injuries, the FTCA has restrictions. Among the specific exemptions are: (1) Any claim based upon an act or omission of an employee in the execution of their statutory or regulatory duties, or based upon the exercise or performance (or failure to exercise or perform) of a discretionary function or duty; (2) Any claim for which a remedy is provided by statute under admiralty; (3) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract (law enforcement officers excluded); (4) Any claims from combatant activities during time of war; and (5) Any claim arising in a foreign country.<sup>7</sup> Within these parameters, the FTCA provides the exclusive means for pursuing tort claims against the federal government. Federal employees face a further limitation on the waiver of sovereign immunity from the FECA.

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<sup>4</sup> 28 U.S.C. § 2672 (1994).

<sup>5</sup> *Id.* § 2675.

<sup>6</sup> *Id.* § 2672.

<sup>7</sup> *Id.* § 2680.

### III. THE FEDERAL EMPLOYEES' COMPENSATION ACT

#### A. Overview

The Federal Employees' Compensation Act is designed to address "the need of compensating federal employees who become injured or disabled in the course of their employment."<sup>8</sup> The Act establishes a comprehensive program to address these claims.

In 1949, Congress revised the Act to provide greater benefits and to address the large number of claims being filed under the Federal Tort Claims Act. The need for this revision was clearly explained in the Senate Report:

Some 80,000 of our federal men and women workers suffer accidents every year. In about 11,000 of these cases benefits for disability or death are payable. The present act affords only illusory security for most workers or their families. The present bill is therefore of vital importance to all federal workers, not only to those injured, but to those who face the possibility of injury in their employments involving varying hazards. With the knowledge that if injured or killed, they or their families will have a measure of security which will not require solicitation of charity or outside help of friends, the employees of our Government will have the support of a strong moral factor.

....

The savings to the Government by the elimination of costly and needless claims and litigation under the Federal Tort Claims Act, Suits in Admiralty Act, Public Vessels Act, and the like, which presently weigh heavily upon the Government and involve considerable expense to defend will be eliminated, offsetting in substantial part the increased cost in compensation benefits.<sup>9</sup>

#### 1. *The Procedural Structure of the FECA*

Procedurally, the FECA requires employees,<sup>10</sup> or eligible beneficiaries,<sup>11</sup> to submit a claim following a certain format<sup>12</sup> and time

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<sup>8</sup> S. REP. NO. 93-1081 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5341.

<sup>9</sup> S. REP. NO. 81-836 (1949), *reprinted in* 1949 U.S.C.C.A.N. 2125. *See* Woodruff v. U.S. Dept. of Labor, 954 F.2d 634, *reh'g denied*, 961 F.2d 224 (11<sup>th</sup> Cir. 1992); Wallace v. United States, 669 F.2d 947 (4<sup>th</sup> Cir. 1982).

<sup>10</sup> Employees are broadly defined by the Act. 5 U.S.C. § 8101 (1994). Even individuals rendering services similar to covered civil service jobs may be considered employees. *See* Lance v. United States, 70 F.3d 1093 (9<sup>th</sup> Cir. 1995).

<sup>11</sup> Such beneficiaries are generally family members. For a list of eligible members, see 5 U.S.C. § 8109 (1994).

<sup>12</sup> 5 U.S.C. § 8121 (1994).



period,<sup>13</sup> and provides for the review and award on the claim.<sup>14</sup> Of particular note is that the agency cannot request a hearing, question the claimant, or make argument.<sup>15</sup> If the agency requests a copy of the transcript, it is allowed fifteen days to submit comments or additional materials for inclusion in the record, which the claimant is allowed to review and comment upon.<sup>16</sup> In short, the FECA was designed to be a non-adversarial process for limited recovery which would be readily accessible to federal employees.

The Act specifies the conditions under which compensation will be paid<sup>17</sup> and the types of benefits available.<sup>18</sup> It details the levels of disability and the compensation schedules for each type of injury,<sup>19</sup> as well as the types of compensation payable in the event of the death of the employee.<sup>20</sup> The Act also specifically provides for the retention of the employee's rights under the Civil Service system.<sup>21</sup> This particular provision states that if an individual resumes employment with the federal government, "the entire time during which the employee was receiving compensation under this chapter shall be credited to the employee for the purposes of within-grade step increases, retention purposes, and other rights and benefits based upon length of service."<sup>22</sup> If an employee can return to work, the Act provides specific terms for either returning to an earlier position or to a reasonable alternative position.<sup>23</sup>

## 2. Defining "Injury"

The FECA defines an "injury" as including injury by accident, a disease proximately caused by the employment, damage to or destruction of medical braces, artificial limbs, and other prosthetic devices; and the lost time to repair or replace such devices.<sup>24</sup> Over the course of time, the Secretary of Labor, through the Employees Compensation Appeal Board (hereinafter ECAB), has viewed the term "injury" to include a variety of physical and emotional conditions, such as post traumatic stress disorder caused by sexual

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<sup>13</sup> *Id.* at § 8122.

<sup>14</sup> *Id.* at § 8124.

<sup>15</sup> Employing agency attendance at hearings and submission of evidence, 20 C.F.R. § 10.135 (1996).

<sup>16</sup> *Id.*

<sup>17</sup> 5 U.S.C § 8102 (1994).

<sup>18</sup> *Id.* §§ 8103-04.

<sup>19</sup> *Id.* §§ 8105-16.

<sup>20</sup> *Id.* §§ 8133-34 .

<sup>21</sup> *Id.* § 8151.

<sup>22</sup> *Id.* § 8151(a).

<sup>23</sup> *Id.* § 8151(b).

<sup>24</sup> *Id.* § 8101(5).

harassment;<sup>25</sup> intentional infliction of emotional distress brought on by harassment;<sup>26</sup> and chronic depression resulting from sexual harassment.<sup>27</sup>

### 3. *Judicial Review*

Judicial review of any decision to grant or deny compensation under the FECA is specifically precluded.<sup>28</sup> The statute provides:

The action of the Secretary or his designee in allowing or denying a payment under this subchapter is

(1) final and conclusive for all purposes and with respect to all questions of law and fact; and

(2) not subject to review by another official of the United States or by a court by mandamus or otherwise.<sup>29</sup>

This provision has helped the FECA maintain itself as a non-adversarial process focused on providing a prompt remedy for workplace injuries. Addressing this aspect of the FECA, as it relates to discrimination claims, the courts have repeatedly bumped up against this provision,<sup>30</sup> as will be seen later in this article.

### 4. *The FECA as an Exclusive Remedy*

Of specific importance to this discussion is that the FECA limits governmental liability by providing the exclusive means of recovery for federal employees. The Act provides:

The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative . . . and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding in a civil action, or in admiralty, or

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<sup>25</sup> *Nichols v. Frank*, 42 F.3d 503 (5th Cir. 1994); *Sheenan v. United States*, 896 F.2d 1168, 1173 (9th Cir. 1990).

<sup>26</sup> *Jones v. Tennessee Valley Auth.*, 948 F.2d 258, 261 (6th Cir. 1991); *McDaniel v. United States*, 970 F.2d 194 (6th Cir. 1992).

<sup>27</sup> *Swafford v. United States*, 998 F.2d 837 (10th Cir. 1993).

<sup>28</sup> For an opposing view on the preclusion of judicial review, see *Czerkies v. Department of Labor*, 73 F.3d 1435 (7th Cir. 1996).

<sup>29</sup> 5 U.S.C. § 8128(b) (1994).

<sup>30</sup> *Cobia v. United States*, 384 F.2d 711 (10th Cir. 1967); *Bailey v. United States Army*, 451 F.2d 963, 965 (5th Cir. 1971); and *Grijalva v. United States*, 781 F.2d 472, 474 (5th Cir. 1986).

by an administrative or judicial proceeding under a workmen's compensation statute or under a federal tort liability statute.<sup>31</sup>

The United States Senate, in enacting the exclusivity provision, gave the following rationale:

Workmen's compensation laws, in general, specify that the remedy therein provided shall be the exclusive remedy. The basic theory supporting all workmen's compensation legislation is that the remedy afforded is a substitute for the employee's (or dependent's) former remedy at law for damages against the employer. With the creation of corporate instrumentalities of Government and with the enactment of various statutes authorizing suits against the United States for tort, new problems have arisen. Such statutes as the Suits in Admiralty Act, the Public Vessels Act, the Federal Tort Claims Act and the like, authorize in general terms the bringing of civil actions for damages against the United States. The inadequacy of the benefits under the Employees' Compensation Act has tended to cause federal employees to seek relief under these general statutes. Similarly, corporate instrumentalities created by the Congress among their powers are authorized to sue and be sued, and this, in turn, has resulted in filing of suits by employees against such instrumentalities based upon accidents in employment.

This situation has been of considerable concern to all Government Agencies and especially to the corporate instrumentalities. Since the proposed remedy would afford employees and their dependents a planned and substantial protection, to permit other remedies by civil action or suits would not only be unnecessary, but would in general be uneconomical, from the standpoint of both the beneficiaries and the Government.<sup>32</sup>

The Supreme Court has repeatedly addressed the exclusivity provision. As the Court noted in *Weyerhaeuser S.S. Co. v. United States*,<sup>33</sup> the

concern of the Congress was to provide federal employees a swift, economical, and assured right of compensation for injuries arising out of the employment relationship, regardless of the negligence of the employee or his fellow servants, or the lack of fault on the part of the United States. The purpose of section 7(b) [now section 8116(c)], added in 1949, was to establish that, between the government on the one hand, and its employees and their representatives or dependents on the other, the statutory remedy was to be exclusive.<sup>34</sup>

In *Lockheed Aircraft Corp. v. United States*,<sup>35</sup> the Court stated:

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<sup>31</sup> 5 U.S.C. § 8116(c) (1994).

<sup>32</sup> S. REP. NO. 93-108, (1974) reprinted in 1974 U.S.C.C.A.N. 2136.

<sup>33</sup> *Weyerhaeuser S.S. Co. v. United States*, 372 U.S. 597, 10 L. Ed. 2d 1, 83 S.Ct. 926 (1963).

<sup>34</sup> *Id.* at 601.

<sup>35</sup> *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190 (1983).

In enacting this provision, Congress adopted the principle compromise—the “*quid pro quo*”—commonly found in worker’s compensation legislation: employees are guaranteed the right to receive immediate, fixed benefits, regardless of fault and without the need for litigation, but in return they lose the right to sue the government.<sup>36</sup>

The concept that employees covered by FECA for injuries suffered on the job lose their right to pursue suits under the FTCA has been uniformly noted by the circuit and district courts.<sup>37</sup> As the court in *Gill v. United States*<sup>38</sup> stated so concisely, “[t]he heart of the system is an implicit bargain: employees are granted surer and more immediate relief in return for foregoing more expensive awards outside the system.”<sup>39</sup>

As discussed earlier, Congress had very clear goals in pursuing this course. By ensuring adequate compensation of injuries, it sought to preclude the necessity of reaching beyond the FECA’s coverage, and at the same time, sought to model the FECA after the various state workmen’s compensation laws. What is imminently clear is congressional intent to make the FECA the *exclusive remedy* for workplace injuries in the federal sector.

## B. Reviewing Compensation Claims

In assessing federal workmen’s compensation claims, the standard used by the ECAB and the Office of Workmen’s’ Compensation Programs (hereinafter OWCP) is, “whether the actual conditions of employment are the proximate cause of a disability.”<sup>40</sup> One of the clearest explanations of the causation standard can be found in *In the Matter of Joseph S. Heller and Department of the Air Force, San Antonio Air Materiel Area, Kelly Air Force Base, Texas*.<sup>41</sup> In *Heller*, the claimant sought compensation for a disabling condition which he claimed was the result of mistreatment by his supervisors and coworkers; working in an unheated building; and religious discrimination.<sup>42</sup> The appeals board stated that, “[i]t is the appellant’s burden to prove, by reliable, probative and substantial evidence that the conditions of

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<sup>36</sup> *Id.* at 193 (citation omitted).

<sup>37</sup> See *Avasthi v. United States*, 608 F.2d 1059, 1060 (5th Cir. 1979); *Smith v. Office of Personnel Management*, 778 F.2d 258, 261 (5th Cir. 1985); *Johnson v. Merit Sys Protection Bd.*, 812 F.2d 705, 708 (Fed. Cir. 1987); *Swafford v. United States*, 998 F.2d 837 (10th Cir. 1993); *Czerkies v. Department of Labor*, 73 F.3d 1435, 1437 (7th Cir. 1996); *Metz v. United States*, 723 F. Supp. 1133, 1137 (D. Md. 1989).

<sup>38</sup> *Gill v. United States*, 641 F.2d 195 (5th Cir. 1981).

<sup>39</sup> *Id.* at 197.

<sup>40</sup> *In the Matter of Shedrick N. Jackson and Veterans Administration, Veterans Administration Hospital, N. Little Rock, Arkansas*, 8 Em. Comp. App. Bd. 119 (1955).

<sup>41</sup> *In the Matter of Joseph S. Heller and Department of the Air Force, San Antonio Air Materiel Area, Kelly Air Force Base, Texas*, 13 Em. Comp. App. Bd. 199 (1961).

<sup>42</sup> *Id.*

employment were competent<sup>43</sup> to and did cause or materially aggravate the physical or other impairments giving rise to his disability.”<sup>44</sup> The mere concurrence of a disability within a period of employment is not sufficient to make such disability compensable.<sup>45</sup>

The causation requirement has been applied with equal force in cases of emotional injury. *In the Matter of Hurley Furr and Navy Department, U.S. Naval Shipyard, Charleston, S.C.*,<sup>46</sup> the claimant sought compensation for an anxiety neurosis, which he claimed was the result of suddenly losing the lights while he was working inside a fuel oil tank. The appeals board stated that the “fact that the existing disability . . . is psychogenic in nature does not defeat the claim, provided such disability is in fact the proximate result of the employment incident.”<sup>47</sup>

In 1976, the seminal case on causation and emotional injuries was decided by the ECAB—*In the Matter of Lillian Cutler and Department of Labor, Office of Workmen's Compensation Programs, Chicago, Ill.*<sup>48</sup> Ms. Cutler, a GS-7, applied for two vacancies that were to be filled at either GS-9 or GS-11, but she was not selected for either. She found out about the selection decision through a notice that was released in her office.<sup>49</sup> The issue presented to the ECAB was “whether appellant’s disability, caused by her disappointment in not receiving a promotion for which she had applied, constituted an injury sustained while in the performance of duty.”<sup>50</sup> Appellant claimed she suffered a “shock to her system” when she found out about the non-selection decision by receiving an office memo without being personally told. The disability, an anxiety neurosis and temporary elevation in blood pressure, allegedly resulted from her reaction to not being selected for promotion.<sup>51</sup> During her hearing, appellant also alleged racial, religious, and personal prejudice were involved in the non-selection decision.<sup>52</sup>

Ms. Cutler’s claim was denied. In its decision, the Board set forth the limits for recovery in emotional injury claims under the FECA, addressing first the standard for what is to be considered compensable:

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<sup>43</sup> Read as meaning “capable of or consistent with. . . .”

<sup>44</sup> 13 Em. Comp. App. Bd. at 200; *See also* *In the Matter of Estelle M. Kasprzak and Veterans Administration, VA Hospital, Wood, Wisconsin*, 27 Em. Comp. App. Bd. 339, 342 (1976).

<sup>45</sup> 13 Em. Comp. App. Bd. at 200.

<sup>46</sup> *In the Matter of Hurley Furr and Navy Department, U.S. Naval Shipyard, Charleston, S.C.*, 13 Em. Comp. App. Bd. 42 (1961).

<sup>47</sup> *Id.* at 44.

<sup>48</sup> *In the Matter of Lillian Cutler and Department of Labor, Office of Workmen's Compensation Programs, Chicago, Ill.*, 28 Em. Comp. App. Bd. 125 (1976).

<sup>49</sup> *Id.* at 126.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 127.

<sup>52</sup> *Id.* at 128 n.1.

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. As pointed out in the recent *Compendium on Workmen's Compensation*, issued by the National Commission on State Workmen's Compensation Laws appointed by the President, "Workmen's compensation is presently intended to provide coverage for certain work-related conditions, not all of the workers' health problems."

There are situations where an injury or illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers' compensation. . . .

There are injuries that occur in the course of the employment and have some kind of causal connection with it but nevertheless are not covered because they are found not to have arisen out of the employment. . . .

Where an employee experiences emotional stress in carrying out his employment duties, or has fear and anxiety regarding his ability to carry out his duties, and the medical evidence established that the disability resulted from his emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of the employment.<sup>53</sup>

The Board then turned to what did not qualify as compensable:

In contrast, the Board has held that "a disabling condition resulting from an employees' feeling of job insecurity *per se* is not sufficient to constitute 'a personal injury sustained while in the performance of duty' within the meaning of . . . the Federal Employees' Compensation Act." Likewise, "assuming that appellant was unhappy doing inside work, desired a different job, brooded over the failure to give him the kind of work he desired for which the establishment considered him unsuitable, and as a result of such brooding appellant became emotionally disturbed, causing an out-break of dermatitis, this does not establish 'a personal injury sustained while in the performance of duty' within the meaning of . . . the Federal Employees' Compensation Act."<sup>54</sup>

The *Cutler* case clearly set forth the limits of the FECA in cases concerning emotional injuries. Unlike physical injuries, where it is usually easy to pinpoint causation, emotional injuries evade such precise identification. Having established that such injuries are compensable, and under what circumstances such claims will be compensated, the ECAB began to address emotional injuries based upon discrimination and harassment.

### **C. Discrimination Based Injuries under the FECA**

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<sup>53</sup> *Id.* at 129.

<sup>54</sup> *Id.* at 131.

The ECAB standards for assessing claims of emotional injuries arising from harassment have evolved over time. *In the Matter of Stanley Smith, O.D. and Department of the Navy, Philadelphia Naval Shipyard*,<sup>55</sup> the claimant alleged his hypertension was the result of “harassment from supervisors over a prolonged period of time.”<sup>56</sup> The ECAB stated that the issue in such cases was “not whether, in fact, there was harassment but whether the employee’s disabling emotional reaction was precipitated or aggravated by the conditions of employment.”<sup>57</sup>

Five years later, the claimant in the case *In the Matter of Anna J. Backman and Department of the Navy, Puget Sound Naval Shipyard*<sup>58</sup> alleged that her emotional distress was “caused by ‘discrimination, [and] retaliation in the form of harassment for my attempts to resolve my complaints of discrimination.’”<sup>59</sup> The OWCP rejected the claim, ruling that the evidence failed to show that the disability was the result of her emotional reaction to her regular or specially assigned work duties, or to the requirements imposed by the employment; and that the disability was not due to, aggravated, precipitated, accelerated, or proximately caused by conditions of her employment.<sup>60</sup> Appellant sought reconsideration, and submitted the findings to an equal employment opportunity complaints examiner. The examiner’s findings included resentment of the claimant by other employees; that she was the victim of a sexually explicit practical joke early in her career; and that she was regarded as a disruptive force because she was a female in an otherwise all-male workforce. The OWCP advised the claimant that the issue was “not whether appellant was discriminated against but whether there was a causal relation between the disability claimed and the conditions of employment.”<sup>61</sup>

The case then went to the ECAB which found that it was “not in a posture for decision,” citing both *Cutler* and *Smith*.<sup>62</sup> The ECAB ruled that the OWCP needed to make detailed findings of fact with respect to the claimant’s allegations. The issue was which findings dealt with conditions of regular or specifically assigned work duties, and whether the OWCP should take account of the findings of the EEO complaint examiner. The ECAB held this whole package should be given to an impartial medical specialist to determine if “appellant’s emotional condition was precipitated or aggravated by the

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<sup>55</sup> *In the Matter of Stanley Smith, O.D. and Department of the Navy, Philadelphia Naval Shipyard*, 29 Em. Comp. App. Bd. 652 (1973).

<sup>56</sup> *Id.* at 653.

<sup>57</sup> *Id.* at 656.

<sup>58</sup> *In the Matter of Anna J. Backman and Department of the Navy, Puget Sound Naval Shipyard*, 30 Em. Comp. App. Bd. 118 (1978).

<sup>59</sup> *Id.* at 120.

<sup>60</sup> *Id.* at 123.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 124.

conditions of her employment, and if so, whether the condition caused disability for work during the period in issue.”<sup>63</sup>

In *In the Matter of Joseph R. Wilson and Department of Transportation, Federal Aviation Administration, Air Traffic Control Center*,<sup>64</sup> the claimant alleged that his “‘acute anxiety, irritability, and depression’ were caused by ‘racial harassment.’”<sup>65</sup> In support of the claim, he submitted a statement describing general pressures on the job, and specifically alleged he was referred to by a racial slur and was otherwise targeted by his supervisors and coworkers. The OWCP rejected the claim, stating the factual and medical evidence “failed to establish that he had sustained any disability in the performance of duty.”<sup>66</sup>

Affirming the OWCP decision, the ECAB reiterated the position that, in cases of emotional injury caused by harassment or discrimination, “the issue, generally speaking, is not whether in fact there was harassment or discrimination, but whether the disabling emotional reaction was precipitated or aggravated by conditions of employment.”<sup>67</sup> Stating that the claimant bore the burden to present “reliable, probative and substantial medical evidence”<sup>68</sup> establishing the causal relationship between the conditions of employment and the claimed injury, the ECAB held the claimant had not carried his burden.<sup>69</sup>

Prior to the *Wilson* case, the ECAB had remained true to its role as a non-adversarial forum for review of workmen’s compensation claims. The only factor relevant to them was the connection between the employee’s duties and conditions of employment, and the injury claimed. This all changed with the case of *Pamela Rice and U.S. Postal Serv.*<sup>70</sup> In *Rice*, the claimant filed for compensation for acute bowel dysfunction. Claimant alleged that she was harassed by her co-workers because of her condition. Among the evidence submitted were medical records that showed the claimant was diagnosed as having “a schizophrenic reaction with paranoid features.”<sup>71</sup> The OWCP denied the claim, finding that claimant had not met her burden to show that the condition was causally related to her employment. The hearing representative also noted that the claim of harassment was moot because, even if it occurred,

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<sup>63</sup> *Id.* at 125.

<sup>64</sup> *In the Matter of Joseph R. Wilson and Department of Transportation, Federal Aviation Administration, Air Traffic Control Center*, 30 Em. Comp. App. Bd. 384 (1979).

<sup>65</sup> *Id.* at 385.

<sup>66</sup> *Id.* at 388.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *In the Matter of Pamela R. Rice and United States Postal Serv., Post Office, Sacramento, CA*, 38 Em. Comp. App. Bd. 838 (1987).

<sup>71</sup> *Id.* at 840.



it did not constitute a factor of employment for compensation purposes under the FECA.<sup>72</sup>

On appeal, the ECAB found that the claimant had not met her burden regarding either the physical or mental condition relying on the harassment and discrimination standards set out in *Cutler* and *Smith*. The ECAB then addressed the issue of harassment by stating:

An Office hearing representative in an October 14, 1986 decision improperly interpreted this principle as meaning that harassment, even if it occurred, did not constitute a factor of employment<sup>73</sup> for purposes of compensation under the Act. Actions of an employee's supervisor which the employee characterizes as harassment can constitute factors of employment giving rise to coverage under the Act, and the Board's function in such cases is to determine whether the evidence establishes that the supervisor's actions contributed to the employee's disabling reaction.<sup>74</sup>

This position was further clarified in *Kathleen Walker and Department of the Air Force*,<sup>75</sup> where the claimant alleged she had contracted a cardiac and emotional condition caused by her work environment that was aggravated by harassment from her supervisors. Affirming the OWCP's decision to deny benefits, the ECAB took the opportunity to clarify its position in *Rice*, explaining:

To the extent that disputes and incidents alleged as constituting harassment by co-workers and supervisors are established as occurring and arising from appellant's performance of her regular duties, these could constitute employment factors.

The Board notes, however, that unfounded perceptions of harassment . . . do not constitute employment factors. Consequently, these are not considered to be employment factors.<sup>76</sup>

In 1992, the issue of evidence of harassment or discrimination was "clarified" again in *In the Matter of William P. George and U.S. Postal Serv.*,

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<sup>72</sup> *Id.* at 841.

<sup>73</sup> The ECAB has never clearly identified what qualified as a "factor of employment," beyond stating that an employee has to provide "a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition. . . ." *Id.* at 846.

<sup>74</sup> *Id.* at 842. See also *In the Matter of Georgia F. Kennedy and Department of the Air Force, McClellan AFB, Cal.*, 35 Em. Comp. App. Bd. 1151 (1984).

<sup>75</sup> *In the Matter of Kathleen D. Walker and Department of the Air Force, Air Force Logistics Center, Tinker AFB, Oklahoma*, 42 Em. Comp. App. Bd. 603 (1991).

<sup>76</sup> *Id.* at 608. See also *In the Matter of David W. Shirey and U.S. Postal Serv., Post Office, Erie, Pa.*, 42 Em. Comp. App. Bd. 783 (1991); *In the Matter of George A. Ross and U.S. Postal Serv., Post Office, Los Angeles, Cal.*, 43 Em. Comp. App. Bd. 346 (1991); *In the Matter of Donna Faye Cardwell and Veterans Administration, Regional Office and Insurance Center, Philadelphia, Pa.*, 41 Em. Comp. App. Bd. 730 (1990).

*Post Office, Anniston, Ala.*<sup>77</sup> In *George*, the claimant alleged that job-related stress and harassment had resulted in depression and anxiety. In affirming the decision to deny the claim, the ECAB stated that, “for harassment or discrimination to give rise to a compensable disability under the Act, *there must be evidence that harassment or discrimination did in fact occur*. Mere perceptions of harassment or discrimination are not compensable under the Act.”<sup>78</sup>

This “clarification” altered the FECA’s historic role. Originally, the FECA had provided a non-adversarial process designed to provide “immediate, fixed benefits, regardless of fault,”<sup>79</sup> with the focus on the nexus between injury and workplace factors. This role was now changed to one in which the FECA imposed on claimants the duty to not only show a disability and a causal connection to their employment, but also actual discrimination or harassment, without any standard upon which to judge that evidence. Further, this change very likely provoked more agency responses in an attempt to avoid any finding of discriminatory conduct for since FECA actions are often filed concurrently with equal employment opportunity claims.

In *In the Matter of Abe E. Scott and Department of the Navy, Long Beach Naval Shipyard, Long Beach, Cal.*,<sup>80</sup> the ECAB gave a concrete example of conduct that might qualify for coverage under the Act. The claimant sought coverage for a stress condition. He alleged the condition was caused by, among other job-related factors,

racial discrimination by the foreman; use of racial epithets by the foreman; use of such racial epithets as “ape,” “brownie,” and “nigger” by coworkers (who put pictures of apes on his locker); the foreman’s referring to blacks as “you people” and saying that “you people ought to be satisfied with being allowed to work in the field at all,” and attempts to provoke a confrontation with the claimant.<sup>81</sup>

Finding insufficient evidence had been presented, and that use of the term “apes” was applied to all apprentices, regardless of race or ethnic origin, the OWCP denied the claim<sup>82</sup>

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<sup>77</sup> *In the Matter of William P. George and U.S. Postal Serv., Post Office, Anniston, Ala.*, 43 Em. Comp. App. Bd. 1159 (1992).

<sup>78</sup> *Id.* at 1169 (emphasis added). See also *In the Matter of Frederick D. Richardson and U.S. Postal Serv., Post Office, Mobile, Ala.*, 45 Em. Comp. App. Bd. 454 (1994); *In the Matter of Eileen P. Corigliano and Department of the Treasury, U.S. Mint, West Point, N.Y.*, 45 Em. Comp. App. Bd. 581 (1994).

<sup>79</sup> *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 193, 74 L. Ed. 2d 911, 103 S. Ct. 1033 (1983).

<sup>80</sup> *In the Matter of Abe E. Scott and Department of the Navy, Long Beach Naval Shipyard, Long Beach, Cal.*, 45 Em. Comp. App. Bd. 165 (1993).

<sup>81</sup> *Id.* at 166-167.

<sup>82</sup> *Id.* at 170.

On appeal, the ECAB found the case was “not in a posture for decision,” explaining that “error or abuse by the employing establishment in an administrative or personnel matter, or evidence that the employing establishment acted unreasonably in the administration of a personnel matter, may afford coverage.”<sup>83</sup> The Board went on to state two instances where the claimant had submitted evidence of error or abuse. The first was when a supervisor attempted to provoke a fight with claimant. The second was in the use of the term “ape.”<sup>84</sup> In finding that this conduct might be compensable, the ECAB wrote that, “remarks which are established by the evidence of record need not be racial in nature for coverage to apply. Under the circumstances of this case, the Board finds the use of the epithet “apes” was derogatory and constituted harassment.”<sup>85</sup> In making this finding, the Board sent the case back to OWCP to have a physician determine what connection, if any, existed between these facts and the claimant’s condition.<sup>86</sup>

The cases discussed above show the evolution of FECA coverage as it was extended beyond simple physical disability cases into the realm of emotional disorders. As a result of this process, it began to be applied to claims of emotional harm based upon harassment and discrimination. Initially, the ECAB attempted to ignore the issue of discrimination or harassment, and tried to focus solely on seeking a causal relationship between the alleged condition and a condition of employment. Later, it began to require proof of harassment or discrimination to establish a basis for coverage. Strangely enough, these changes occurred without issuance of any clear standards for analyzing such claims, and despite the fact that, in an area as rich in disputed facts and issues as discrimination claims, these changes were applied to a process designed to be non-adversarial.

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<sup>83</sup> *Id.* at 171.

<sup>84</sup> *Id.* at 166.

<sup>85</sup> *Id.* at 173.

<sup>86</sup> *Id.* at 174.

#### IV. Title VII of the Civil Rights Act of 1964

The Civil Rights Act of 1964,<sup>87</sup> makes it illegal to discriminate against any person in any matter affecting hiring; terms or conditions of employment; efforts to seek employment; membership in a labor organization; or participation in a training program.<sup>88</sup> This, along with the creation of the Equal Employment Opportunity Commission,<sup>89</sup> (hereinafter EEOC) form the contents of what is now commonly known as Title VII. In enacting Title VII, the House of Representatives stated:

The purpose of this title is to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment based on race, color, religion, or national origin. The title authorizes the establishment of a Federal Equal Employment Opportunity Commission and delegates to it the primary responsibility for preventing and eliminating unlawful employment practices as defined under the title.<sup>90</sup>

##### A. Procedural Structure and Standards of Proof.

The procedural steps for a federal employee to pursue a complaint before the EEOC are set out in the Code of Federal Regulations.<sup>91</sup> Essentially, the employee must first file an administrative complaint with the respective agency.<sup>92</sup> Following the agency's investigation, if no settlement is reached, the complainant may request an administrative hearing.<sup>93</sup> Once the agency head has made a final decision (termed a Final Agency Decision), the complainant has the option of filing an appeal with the EEOC or filing suit in federal district court.<sup>94</sup>

Title VII sets the standards for proving different types of employment discrimination.<sup>95</sup> In cases of allegations of impermissible consideration of race, color, religion, sex or national origin in employment practices, the complainant must demonstrate that a prohibited factor (i.e. race, sex, age) "was a motivating factor for any employment practice, even though other factors

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<sup>87</sup> The Civil Rights Act of 1964, 42 U.S.C. §§ 1975-1981 (1994).

<sup>88</sup> 42 U.S.C. § 2000e-2 (1994).

<sup>89</sup> 42 U.S.C. § 2000e-4 (1994). The EEOC provides oversight and direction to federal agencies concerning employment discrimination complaints. *See* Procedural Regulations, 29 C.F.R. §1601.1 (1996).

<sup>90</sup> H. Rep. No. 914 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2401.

<sup>91</sup> Federal Sector Equal Employment Opportunity, 29 C.F.R. § 1614 (1994).

<sup>92</sup> *Id.* § 1614.105.

<sup>93</sup> *Id.* §§ 1614.108(f) and 109.

<sup>94</sup> *Id.* § 1614.110.

<sup>95</sup> For an excellent review of Title VII claims in the federal sector, see Robert E. Sutemeier, *Theories of Discrimination in Federal Sector Employee Litigation*, 35 A.F. L. REV. 19 (1991).

motivated the practice.”<sup>96</sup> The standard of proof in these cases is proof by preponderance of the evidence. There are two types of theories of employment discrimination a claimant may pursue: disparate-treatment and disparate impact.<sup>97</sup> Both can be divided into single-motive or mixed-motive cases. The Supreme Court first recognized the single motive disparate treatment concept in *McDonnell Douglas Corp. v. Green*.<sup>98</sup> The Court later recognized that a company may have acted for both legal and illegal reasons, introducing the mixed motive concept in *Price Waterhouse v. Hopkins*.<sup>99</sup>

Cases of individual disparate-treatment occur when the claimant alleges the employer treated him or her less favorably than others due to his race,<sup>100</sup> religion, color, national origin or sex.<sup>101</sup> In such cases the complainant must prove, (a) that a pattern of harassment or intimidation exists; (b) that the employer knew or should have known of the illegal conduct; and (c) the employer failed to take reasonable steps to cure the conduct.<sup>102</sup> In order for the action to be harassment, it must be shown that it was “sufficiently pervasive so as to alter the conditions of the victim’s employment and creates a hostile work environment.”<sup>103</sup>

The second type of discrimination claim is based on “disparate impact,” where it is alleged that an employer’s policy or practice resulted in the complainant being treated differently from others because of race, color, religion, sex or national origin.<sup>104</sup> The analytical model for disparate impact and for age discrimination claims<sup>105</sup> originated with the disparate treatment analysis in *McDonnell Douglas*. The Court originally established a three step

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<sup>96</sup> 42 U.S.C. § 2000e-2 (m) (1994).

<sup>97</sup> *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335-36 (1977); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

<sup>98</sup> *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973).

<sup>99</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 232 (1982). Note, the passage of the Civil Rights Act of 1991 amended Title VII and reversed part of the *Price Waterhouse* holding. See Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

<sup>100</sup> See *Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987); *Snell v. Suffolk Co.*, 782 F.2d 1094 (2d Cir. 1986); *Walker v. Ford Motor Co.*, 684 F.2d 1355 (11th Cir. 1982).

<sup>101</sup> *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 20 (1993) citing *Meritor Savs Bank v. Vinson*, 477 U.S. 57 (1986). For a good overview on handling sexual discrimination claims in the Air Force, see Gail D. Reinhart, *Sex Discrimination*, 35 A.F. L. REV. 53 (1991).

<sup>102</sup> See *Davis v. Monsanto Chemical Co.*, 858 F.2d 345 (6th Cir. 1988); *Walker v. Ford Motor Co.*, 684 F.2d 1355 (11th Cir. 1982); *Vaughn v. Pool Offshore Co.*, 683 F.2d 922 (5th Cir. 1982).

<sup>103</sup> 42 U.S.C. § 2000e-5 (g) (1994).

<sup>104</sup> *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335-36 (1977); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

<sup>105</sup> For a good introduction to age discrimination cases, see Marilyn A. Gordon, *Age Discrimination in Employment*, 35 A.F. L. REV. 63 (1991).

model, which time and precedent have turned into a four step model for mixed-motive cases.<sup>106</sup>

The *McDonnell Douglas* model first requires the complainant to establish a *prima facie* case. This requires proof that the complainant is (a) a member of a protected class under Title VII; (b) that he/she applied for, and was qualified for, a position for which applicants were sought; (c) that he or she was not selected; and (d) that applicants are still being sought, or the selectee is not in the same group as the complainant. Second, the employer must prove that the motives for its decisions were non-discriminatory. Third, the complainant seeks to prove that the employer's proffered reason is merely a pretext to mask its actual, discriminatory reason.<sup>107</sup> Finally, the employer seeks to show that, even if a discriminatory motive was present, it would have taken the same action for other, non-discriminatory reasons.<sup>108</sup>

## B. Remedies under Title VII

In redressing the effects of discrimination, the powers provided under Title VII are extensive. These powers include enjoining the employer from engaging in unlawful employment practices, and ordering "such affirmative action as may be appropriate, which may include but is not limited to, reinstatement or hiring employees, with or without backpay, or any other equitable relief deemed appropriate."<sup>109</sup>

The EEOC was not given the power to award compensatory damages to successful plaintiffs until the passage of the Civil Rights Act of 1991.<sup>110</sup> This Act provided for an award of up to \$300,000 in cases against the federal government, filed under either Title VII<sup>111</sup> or the Rehabilitation Act of 1973.<sup>112</sup> The damage award is meant to compensate for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of

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<sup>106</sup> Jean Calhoun Brooks, Note, *Employment Discrimination – The Supreme Court Liberates Title VII Mixed Motive Cases from the Procrustean Bed. Of the McDonnell Douglas/Burdine Pretext Model – Price Waterhouse v. Hopkins*, 25 WAKE FOREST L. REV. 345, 345-46 (1990).

<sup>107</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Ablemarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

<sup>108</sup> This fourth step is explained in depth in Brooks, *supra* note 106. For a thorough analysis of the first three steps, see Sutemeier, *supra* note 95.

<sup>109</sup> 42 U.S.C. § 2000e-5(g) (1994).

<sup>110</sup> 42 U.S.C. § 1981a(b) (1994). For a comprehensive discussion of the EEOC's cases on Compensatory Damages, see Comment, *Grasping the Intangible: A Guide to Assessing Non-Pecuniary Damages in the EEOC Administrative Process*, 46 AM. U. L. REV. 189 (1996).

<sup>111</sup> 42 U.S.C. § 1981a (b)(3)(D) (1994).

<sup>112</sup> 29 U.S.C. § 791 *as amended by* 42 U.S.C. § 1981A(c)(2) (1991). The Act provides coverage for handicap discrimination. For an in-depth introduction to the Act, see Richard F. Richards, *Handicap Discrimination in Employment: The Rehabilitation Act of 1973*, 39 ARK. L. REV. 1 (1985).

enjoyment of life, and other nonpecuniary losses.”<sup>113</sup> Punitive damages are available, but may not be imposed against the United States.<sup>114</sup> Addressing the definition of “compensatory damages,” the EEOC has viewed them as damages to “compensate” a complainant for losses or suffering inflicted due to intentional discriminatory conduct.<sup>115</sup> In explaining its reasons for providing for compensatory damages, the House of Representatives Report stated:

Victims of *intentional* discrimination often endure terrible humiliation, pain, and suffering while on the job. This distress often manifests itself in emotional disorders and medical problems, which in turn cause victims of discrimination to suffer out-of-pocket expenses and other economic losses as a result of the discrimination. That is the basis for the extension of monetary remedies for intentional discrimination to cover women and minorities. The Committee intends to confirm that the principle of anti-discrimination is as important as the principle that prohibits assaults, batteries and other intentional injuries to people.<sup>116</sup>

Explaining its decision in more detail, the House Report focused on the desire to make victims of discrimination whole for “injury to their careers, mental and emotional health, and self-respect and dignity.”<sup>117</sup> The report further noted that, prior to the enactment of the legislation, the out-of-pocket expenses suffered were not compensable through equitable remedies. “The limitation of relief under Title VII to equitable remedies often means that victims of intentional discrimination may not recover for the very real effects of discrimination.”<sup>118</sup>

In the report’s six page discussion of the issue, the FECA and its provisions are not mentioned once, either as being applicable or inapplicable. The clear focus of the report, and the legislation, was on addressing the inequity of forms of compensation available based upon the type of discrimination claimed. The Congress was not focusing on “alternative means” of addressing such a claim, although the report recognizes and encourages alternative means of dispute resolution.<sup>119</sup> It is curious that Congress did not consider the FECA as a partial source of available compensation, since the ECAB had ruled that emotional harms were compensable under the FECA as far back as 1961,<sup>120</sup> and that harassment and

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<sup>113</sup> 42 U.S.C. § 1981a (b)(3) (1994).

<sup>114</sup> 42 U.S.C. § 1981a (b)(1) (1994).

<sup>115</sup> EEOC Policy Guidance on Compensatory and Punitive Damages Under 1991 Civil Rights Act, (July 7, 1992).

<sup>116</sup> H. Rep. No. 102-40(I) (1991), *reprinted in* 1991 U.S.C.C.A.N. 552.

<sup>117</sup> *Id.* at 604.

<sup>118</sup> H. Rep. No. 102-40(II) (1991), *reprinted in* 1991 U.S.C.C.A.N. 718.

<sup>119</sup> *Id.* at 735.

<sup>120</sup> *In the Matter of Hurley Furr and Navy Department, U.S. Naval Shipyard, Charleston, S.C.*, 13 Em. Comp. App. Bd. 42 (1961).

discrimination could form a possible basis for work-related injury as early as 1987.<sup>121</sup>

### C. THE EEOC'S COMPENSATORY DAMAGES STANDARD

Having been vested with the power to grant compensatory damages to federal employees, the EEOC was now faced with analyzing when compensatory damages were appropriate and how much to award without benefit of specific standards of proof. In *Roundtree v. Department of Agriculture*,<sup>122</sup> the EEOC started laying the ground work for a set of standards by ruling that compensatory damages were awardable for past and future pecuniary losses, and for non-pecuniary losses which are directly or proximately caused by the discriminatory conduct. *Roundtree* also defined pecuniary and non-pecuniary losses, stated that the complainant had a duty to mitigate any loss, and further determined that pain and suffering were compensable.<sup>123</sup> In *Jackson v. United States Postal Serv.*, the EEOC placed the duty to prove damages on the complainant, "by objective evidence."<sup>124</sup> What qualifies as "objective evidence" was explained in *Carle v. Department of the Navy*<sup>125</sup> which stated it includes such things as statements from witnesses, medical reports and records, and a statement from the complainant. In *Adesanya v. U.S. Postal Serv.*,<sup>126</sup> the Commission held that past pecuniary losses can be proven by any type of objective evidence showing the need for the cost and its value. Examples given included receipts, canceled checks or copies of bills.

The EEOC addressed the issue of causation in *Carpenter v. Glickman*,<sup>127</sup> where it ruled that an agency's liability was limited to damages clearly shown to be caused by the discriminatory conduct. If the agency sought to contest the damages, then it carried the burden to prove that outside factors were the cause for the damages and not the discrimination.<sup>128</sup> *Carpenter* also provided that any award for compensatory damages must meet

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<sup>121</sup> In the Matter of Pamela R. Rice and United States Postal Serv., Post Office, Sacramento, CAU., 38 Em. Comp. App. Bd. 838 (1987).

<sup>122</sup> *Roundtree v. Department of Agriculture*, EEOC Appeal No. 01941906 (July 7, 1995) 95 FEOR 3223 (citing *Jackson v. United States Postal Serv.*, EEOC Appeal No. 01923399 (Nov. 12, 1992) (which required the complainant to prove by objective evidence that he incurred compensatory damages, and that the damages were proximately caused by the discriminatory conduct)).

<sup>123</sup> *Id.* at 7-9.

<sup>124</sup> *Jackson v. United States Postal Serv.*, EEOC Appeal No. 01923399 (Nov. 12, 1992).

<sup>125</sup> *Carle v. Department of the Navy*, EEOC Appeal No. 01922369 (Jan. 5, 1993).

<sup>126</sup> *Adesanya v. U.S. Postal Serv.*, EEOC Appeal No. 01933395 (July 21, 1994).

<sup>127</sup> *Carpenter v. Glickman*, EEOC Appeal No. 01945526 (July 17, 1995).

<sup>128</sup> *Id.* at 11 n.5.



two goals – that it must not be “monstrously excessive” standing alone, and that it be consistent with similar awards made in similar cases.<sup>129</sup>

## V. COMPARING FECA AND TITLE VII

### A. Reviews by the Appellate Courts

#### 1. *The FECA in general*

Despite the statutory prohibition on judicial review of FECA decisions, the federal courts have often found themselves reviewing cases where the FECA is involved. In the earliest cases, the courts were focusing on “whether there was a substantial question as to whether or not the injury occurred in the performance of the employee’s duty.”<sup>130</sup> It was universally accepted that the FECA was the exclusive remedy for federal employees, and that the decision of the Secretary of Labor was non-reviewable.<sup>131</sup> As the Fifth Circuit noted in *Benton v. United States*,<sup>132</sup>

The structure of the FECA and the language of section 8128(b) convince us that Congress’ intent was that the courts not be burdened by a flood of small claims challenging the merits of compensation decisions . . . and that the Secretary should be left free to make the policy choices associated with disability decisions.<sup>133</sup>

Even attempts to avoid FECA coverage, either by returning compensation checks,<sup>134</sup> by rejecting the FECA process entirely,<sup>135</sup> or by presenting diverse theories of possible recovery,<sup>136</sup> have not succeeded in piercing its exclusivity.

In 1979, the 5th Circuit decided *Avasthi v. United States*,<sup>137</sup> where the plaintiff alleged he had slipped and fallen on the steps of his office building on

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<sup>129</sup> EEOC Appeal No. 01922369 (Jan. 5, 1993) (citing *Cygnar v. City of Chicago*, 865 F.2d 827, 848 (7<sup>th</sup> Cir. 1989).)

<sup>130</sup> *Bailey v. Department of the Army*, 451 F.2d 963 (5<sup>th</sup> Cir. 1971); *Avasthi v. United States*, 608 F.2d 1059 (5<sup>th</sup> Cir. 1979); *Bruni v. United States*, 964 F.2d 76 (1<sup>st</sup> Cir. 1992).

<sup>131</sup> See 42 U.S.C. § 2000e-2 (m) (1994); see also *Gill v. United States*, 641 F.2d 195 (5<sup>th</sup> Cir. 1981), *Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (10<sup>th</sup> Cir. 1987), *Snell v. Suffolk Co.*, 782 F.2d 1094 (2<sup>d</sup> Cir. 1986); *Walker V. Ford Motor Company*, 684 F.2d 1355 (11<sup>th</sup> Cir. 1982).

<sup>132</sup> *Benton v. United States*, 960 F.2d 19 (5<sup>th</sup> Cir. 1992).

<sup>133</sup> *Id.* at 22 (citing *Rodrigues v. Donovan*, 769 F.2d 1344 (9<sup>th</sup> Cir. 1985)).

<sup>134</sup> *Gill v. United States*, 641 F.2d 195 (5<sup>th</sup> Cir. 1981).

<sup>135</sup> See *Avasthi v. United States*, 608 F.2d 1059 (5<sup>th</sup> Cir. 1979).

<sup>136</sup> *Saltzman v. United States*, 104 F.3d 787 (6<sup>th</sup> Cir. 1997) (“Plaintiffs cannot avoid the exclusive and limited nature of relief under FECA by labeling their various damages as an array of different claims to which defendant is subject, some covered by FECA and some not.”).

<sup>137</sup> *Avasthi v. United States*, 608 F.2d 1059 (5<sup>th</sup> Cir. 1979).

the way to his vehicle. Plaintiff wanted nothing to do with the FECA and refused to apply for coverage. He argued that he wanted to use the FTCA because it provided “damages that greatly exceed any potential award of FECA benefits.”<sup>138</sup> The court focused on “whether there was at least a substantial question that Avasthi’s injury occurred ‘in the performance of his duty.’”<sup>139</sup> The court allowed for the possibility of non-exclusivity by holding that a substantial question did exist regarding FECA coverage and that resolution of that question belonged to the Secretary of Labor.<sup>140</sup> In the end, Avasthi was required to pursue the FECA remedies first, and if the FECA was held to be applicable, it would be his exclusive remedy.<sup>141</sup>

In *Grijalva v. United States*,<sup>142</sup> a federal employee was involved in an accident with a U.S. Army vehicle and, after obtaining FECA coverage, filed suit under the FTCA.<sup>143</sup> The district court ruled against the plaintiff, holding (a) that the FECA is the exclusive remedy for federal employees; and (b) that the Secretary of Labor’s decision to cover injuries is final and non-reviewable.<sup>144</sup> In an attempt to gain access to the FTCA, the plaintiff alleged she was not “in performance of her duties” at the time of the accident; that her supervisor gave erroneous information to the OWCP; and that the accident affected her mental capacity to make an informed and voluntary application under the FECA. The court swept all this aside, ruling that the Secretary’s decision was dispositive, non-reviewable, and final. Any appeal would have to be to the Secretary through the Department of Labor’s administrative process.<sup>145</sup>

## 2. Discrimination Cases

Despite the apparently conclusive holdings in cases like *Avasthi* and *Grijalva*, in discrimination cases, the goal of the federal circuit courts has seemingly been to craft broad remedies, regardless of the exclusivity language in the FECA. While this approach has preserved the goals of Title VII, it completely undermines the congressional intent behind the FECA’s exclusivity provisions.

In 1983, the Sixth Circuit decided *DeFord v. Secretary of Labor and the Tennessee Valley Auth.*<sup>146</sup> Plaintiff, a Tennessee Valley Authority

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<sup>138</sup> *Id.* at 1061.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Avasthi v. United States*, 781 F.2d 472 (5th Cir. 1986).

<sup>143</sup> *Id.* at 473.

<sup>144</sup> *Id.* at 474.

<sup>145</sup> *Id.*

<sup>146</sup> *DeFord v. Secretary of Labor and the Tennessee Valley Auth.*, 700 F.2d 281 (6th Cir. 1983).

(hereinafter TVA) engineer, provided information during a Nuclear Regulatory Commission investigation into alleged problems in the energy division. Shortly thereafter, DeFord was moved to his old branch, with the loss of supervisory status. Illness forced him to stop working for the TVA. He filed an administrative discrimination complaint, based upon his treatment following the investigation and the illness, he claimed, resulted from that treatment. The Secretary of Labor ruled in DeFord's favor, and ordered remedial action, including placing DeFord on administrative leave with pay for the period he lost as a result of his illness.<sup>147</sup> Both DeFord and the TVA appealed, and the Administrative Law Judge (ALJ) ruled in favor of DeFord. The Secretary of Labor adopted the ALJ's findings and remedies, except for payment of damages. Both sides appealed.

In addressing the administrative leave remedy, the TVA argued that it amounted to an invention of "terms, conditions, and privileges" which were not previously available to DeFord. . . ."<sup>148</sup> After noting that this remedy was not one provided for by Congress in enacting 42 U.S.C. Section 5851,<sup>149</sup> the court described the TVA's position: if this remedy was struck down, "DeFord might either have the option of exercising or be compelled to exercise certain rights under the [FECA]."<sup>150</sup> The Secretary of Labor raised three concerns regarding the application of the FECA to this case. First, that the FECA only assures reinstatement to a particular job when an employee recovers from a disability. Second, that compensation awarded under the FECA is not premised on fault, is not reviewable, and may not be adequate in a given case; and third, because FECA entitlements are not dependent upon fault, the deterrent effect of fault-based orders issued by the Secretary might be lost.

In its review, the appellate court wrote that a "hybrid remedy" between FECA and the Employee's Protection statute was not appropriate. The court reasoned that FECA was "little or nothing more than a workmen's compensation act . . ." and in analyzing the two statutes, decided that since section 5851 provided for full compensation, a hybrid remedy was inappropriate.<sup>151</sup> The court continued by stating that the FECA only compensated disability or death due to personal injury, and that this did not appear to cover claims for discrimination, mental distress or loss of employment. The court wrote, "[n]either the language of the statute itself nor the policy foundations underlying the workmen's compensation acts support a conclusion that intentional discrimination is to be viewed as causing an 'injury' subject to FECA coverage."<sup>152</sup> Finally, the court noted as an aside

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<sup>147</sup> *Id.* at 284.

<sup>148</sup> *Id.* at 289.

<sup>149</sup> Energy Sources Development, Employee Protection, 42 U.S.C. § 5851 (1995).

<sup>150</sup> 700 F.2d at 289.

<sup>151</sup> *Id.* at 290.

<sup>152</sup> *Id.* at 290.

that the Secretary of Labor has the statutory power to decide the FECA's coverage and, since the Secretary had "strenuously" argued it did not apply in this case, the court saw no interest to be served by requiring DeFord to file an FECA claim. "He obviously made an election between the two and we are aware of no reason why he should not be allowed to do so."<sup>153</sup>

Three years later, the Third Circuit addressed the same issue in *Miller v. Bolger*.<sup>154</sup> Plaintiff, a white postal employee, testified at a Civil Service Commission hearing on behalf of a black co-worker. Miller alleged that, as a result of his testimony, he became the subject of harassment, abuse, and physical attack from co-workers and supervisors. He alleged that he suffered physical injuries that disabled him and he applied for, and received, FECA benefits. In 1982, Miller filed suit under Title VII alleging retaliation for testifying.<sup>155</sup> Defendant Postmaster General filed a motion for summary judgment, arguing that the court did not have jurisdiction as the FECA was the exclusive remedy for the plaintiff, and that certain damages sought were compensatory and not available under Title VII.<sup>156</sup> The district court considered only the exclusivity issue, and ruled the FECA did not preclude Title VII action.<sup>157</sup>

On appeal, the court discussed in some detail the statutory framework of the FECA and the remedies available under Title VII. In focusing on the FECA's exclusivity provision, the court held that the FECA was not designed to exclude liability under Title VII. It cited, in support of this position, the FECA's legislative history and noted that Title VII does not address the FECA as limiting recovery for discrimination.<sup>158</sup> The court also cited *DeFord's* holding that FECA did not compensate claims arising out of discrimination.<sup>159</sup> The court considered it "particularly significant" that the relief available to Miller under the two statutes was not identical and that the FECA does not provide for recovery of any pay for periods prior to a finding of physical disability, whereas Title VII does so provide. The court also noted the difference in pay recoverable and the recovery of attorney's fees.<sup>160</sup> Finally, the court wrote:

[I]f we were to agree with the Postmaster General's theory that FECA recovery constitutes an election by the employee and divests the federal court of subject matter jurisdiction in Title VII cases, there would be no vehicle by which a federal employee could secure an order directing

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<sup>153</sup> *Id.* at 291.

<sup>154</sup> *Miller v. Bolger*, 802 F.2d 660 (3d Cir. 1986).

<sup>155</sup> *Id.* at 661.

<sup>156</sup> *Id.*

<sup>157</sup> 802 F.2d at 661.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 664-665.

<sup>160</sup> *Id.*

reinstatement, if warranted. Such a result would defeat the important amelioratory public purpose expressed in Title VII of eliminating discrimination. Given the dissimilarity of relief available under FECA and Title VII, it is evident that exclusivity would leave Miller without full compensation for his Title VII injuries.<sup>161</sup>

The defendant's argument that such a ruling usurped the Secretary of Labor's power to decide the scope of FECA's coverage was also not persuasive. The court held that the ruling on FECA's applicability in this case was not affected by its opinion. The relief sought was "additional and different."<sup>162</sup> This finding came despite the fact, as the court *itself* noted, that FECA had paid benefits to the plaintiff and that FECA coverage is statutorily exclusive.

In 1990, the Ninth Circuit had its first say on the issue. In *Sheehan v. United States*,<sup>163</sup> the plaintiff, an army civilian employee, alleged she was the victim of sexual harassment by her supervisor. Sheehan filed suit under the FTCA, alleging (1) that her immediate supervisor's conduct caused humiliation and emotional distress, and (2) that her supervisors failed to take action to stop the harassment, resulting in a claim of negligent infliction of emotional distress.<sup>164</sup> The district court granted defendant's motion for summary judgment on the first claim and dismissed the second cause of action, finding intentional infliction of emotional distress was excluded from the FECA and that the FECA was her exclusive remedy.<sup>165</sup>

After remanding the first claim,<sup>166</sup> the circuit court addressed the government's argument of FECA preemption. The court noted that the district court had dismissed the second claim because the Secretary of Labor had ruled that, while the FECA covers such claims, Sheehan's injury was not causally related to her employment and therefore not covered.<sup>167</sup> The court went on to hold that, consistent with *DeFord* and *Guidry v. Durkin*,<sup>168</sup> emotional distress is *not* covered by the FECA, and neither are injuries from intentional discrimination. Further, the court held it could review the Secretary's decision that FECA covered claims for emotional distress because "this interpretation of the statute [has] been foreclosed by *Guidry*. The Secretary's decision was therefore precluded by FECA. We have appellate jurisdiction where the Secretary 'is charged with violating a clear statutory mandate or

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<sup>161</sup> *Id.* at 665.

<sup>162</sup> *Id.* at 666.

<sup>163</sup> *Sheehan v. United States*, 896 F.2d 1168 (9th Cir. 1990).

<sup>164</sup> *Id.* at 1169.

<sup>165</sup> *Id.* at 1168-69.

<sup>166</sup> The court remanded, holding that the district court *was* the appropriate forum for the intentional infliction of emotional distress claim. *Id.* at 1173.

<sup>167</sup> *Id.* at 1173.

<sup>168</sup> *Guidry v. Durkin*, 834 F.2d 1465 (9th Cir. 1987).

prohibition.”<sup>169</sup> It appears that the Ninth Circuit overlooked the fact that it is the Secretary who is given the sole authority to determine the scope of the FECA, without that determination being subject to judicial review. Later, the court recognized its oversight and, in an attempt to correct it, stated that it was “withdrawing” the proclamation in its entirety.<sup>170</sup>

The Tenth Circuit weighed in on the debate three years later in *Swafford v. United States*,<sup>171</sup> where a Postal Service employee alleged sexual harassment by another employee, and failure of the Postal Service to prevent or stop that harassment. Plaintiff first filed a FECA claim, and received compensation because “the claimant’s chronic depression was aggravated by [her federal] employment.”<sup>172</sup> Two months later Swafford filed administrative FTCA claims on behalf of herself and her husband. The claims were denied and suit was filed. The district court granted summary judgment to the government on the grounds that Title VII was the exclusive remedy for sex discrimination, including sexual harassment, and the plaintiff appealed.<sup>173</sup>

On the appeal, the United States argued that Swafford’s claim was barred because (1) the decision by the Secretary of Labor, granting FECA coverage, blocked the FTCA claim; (2) the Civil Service Reform Act and the Postal Reorganization Act are the exclusive avenues for challenging Postal Service personnel actions; and (3) Title VII is the exclusive remedy for sexual discrimination cases.<sup>174</sup> The court recognized that the FECA is the exclusive remedy for the workplace injuries of federal employees. In doing so, it cited its earlier ruling in *Cobia v. United States*, where it had ruled that the Secretary’s decision in FECA cases is final, is not subject to judicial review, and is the exclusive remedy.<sup>175</sup> The court also cited similar holdings from *Lockheed Aircraft Corp. v. United States*, *Jones v. Tennessee Valley Auth.*, and *Avasthi v United States*.<sup>176</sup>

In opposition, the plaintiff cited *Sheehan* to support her argument that the FECA does not bar an FTCA claim. The court, however, stated it was not persuaded by *Sheehan*’s reasoning, noting *Sheehan*’s reliance on *DeFord* for the proposition that the FECA did not cover claims for discrimination or

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<sup>169</sup> *Id.* at 1474 (citations omitted).

<sup>170</sup> *Sheehan v. United States*, 917 F.2d 424 (9th Cir. 1990) (Of course, a court doesn’t “withdraw” language from an earlier opinion; it overrules it.).

<sup>171</sup> *Swafford v. United States*, 998 F.2d 837 (10th Cir. 1993).

<sup>172</sup> *Id.* at 838.

<sup>173</sup> *Id.* at 838-39.

<sup>174</sup> *Id.* at 841.

<sup>175</sup> *Id.* (citing *Cobia v. United States*, 384 F.2d 711 (10th Cir. 1967), *cert. denied*, 390 U.S. 986, 88 S.Ct. 1182, 19 L.Ed.2d. 1290 (1968)).

<sup>176</sup> 998 F. 2d at 839-841 (citing *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190 (1983), *Jones v. Tennessee Valley Auth.*, 948 F.2d 258 (6th Cir. 1991), *Avasthi v. United States*, 608 F.2d 1059 (5th Cir. 1979)).

mental distress.<sup>177</sup> It then noted that the Sixth Circuit “in a later opinion [*McDaniel v. United States*<sup>178</sup>], recanted the position taken in *DeFord*.”<sup>179</sup> The court adopted the logic in *McDaniel* stating, “[t]he Secretary of Labor, not the Tenth Circuit, has the final say as to the scope of FECA.”<sup>180</sup> Having so decided, the court ruled that Swafford’s FTCA suit was barred by FECA, and it declined to address the other arguments advanced by the government.<sup>181</sup>

The Ninth Circuit again addressed the issue in *Nichols v. Frank*.<sup>182</sup> In *Nichols*, the plaintiff alleged she was subjected to sexual abuse and harassment by her supervisor for about six months. She filed an EEO complaint and was diagnosed as having Post Traumatic Stress Disorder (PTSD). She sought and received compensation under the FECA. The district court found for plaintiff, and awarded back pay for two and a half years - minus the benefits she received under FECA. The Postal Service, found liable for the supervisor’s misconduct, appealed the finding that it was liable for the supervisor’s misconduct as well as the damage award. It argued that the exclusivity provisions under the FECA barred additional awards for damages beyond the FECA award previously received.<sup>183</sup>

In rejecting the postal service’s argument, the appeals court held that, while the FECA precluded additional awards for harms arising from the work-related injury, it did not block additional awards for “harms that fall *outside* FECA’s definition of ‘injury.’”<sup>184</sup> The court reasoned that the harms suffered by sex discrimination were (1) not an “injury by accident;” (2) “not a disease proximately caused by the employment;” and (3) not damage to a prosthetic device, all of which are enumerated injuries compensated by FECA. It stated that since the relief sought did not fall within these criteria, an additional award was appropriate. Further, it stated that “[o]ur conclusion is not only compelled by the plain language of FECA and Title VII, but also by common sense.”<sup>185</sup> The court explained that under the Postal Service’s argument, if victims of discrimination developed PTSD, they could only seek relief under the FECA, but if no disorder developed, they could seek greater relief under Title VII, an “unjust result” never intended by Congress.<sup>186</sup> Finally, the court concluded that relief under Title VII, in the form of back pay, was “equitable” but under FECA since it qualified as “compensation.”<sup>187</sup>

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<sup>177</sup> 998 F.2d at 840 (discussing *Sheehan v. United States*, 917 F.2d 424 (9<sup>th</sup> Cir. 1990)).

<sup>178</sup> *McDaniel v. United States*, 970 F.2d 194 (6<sup>th</sup> Cir. 1992).

<sup>179</sup> 998 F.2d at 840.

<sup>180</sup> *Id.* at 841.

<sup>181</sup> *Id.*

<sup>182</sup> *Nichols v. Frank*, 42 F.3d 503 (5<sup>th</sup> Cir. 1994).

<sup>183</sup> *Id.* at 507-508.

<sup>184</sup> *Id.* at 515.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 516.

These decisions, with the exception of *Swafford*, show a pattern in the circuit courts of giving FECA a very narrow construction<sup>188</sup> and clearly favoring the broader remedies of Title VII. This attempt at judicial engineering ignores what the Supreme Court in *Lockheed* called the *quid pro quo*<sup>189</sup>—that the FECA, which OWCP and ECAB had interpreted to include emotional injuries arising from workplace discrimination, was designed to provide a “surer and more immediate relief in return for foregoing more expensive awards outside the system.”<sup>190</sup> Persons who chose to seek the more immediate relief available through the FTCA, in lieu of pursuing the discrimination issue and the possibility of higher awards under the FECA, should be left to make the choice. Instead, the courts have sought to engineer a result that would insure a broad remedy and advance Title VII’s goals at the same time by allowing access to both Acts.

The distinctions made by the courts to support their decisions, such as the finding in *Nichols* that back pay was “equitable,” under Title VII but “compensatory” under the FECA, are ones without a difference.<sup>191</sup> Clearly, the FECA does not compensate all harms suffered by discrimination, but plaintiffs seeking relief under FECA face a lower standard of proof with surer and immediate recovery. If they wish to pursue greater relief, they should be free to forego FECA and pursue Title VII, as was proposed in *DeFord*. Pursuing such a course would subject them to the higher standard of proof imposed by the EEOC, but that is the *quid pro quo* for the substantially greater relief that the EEOC can provide.

### 3. Emotional Injury Cases

In *Guidry v. Durkin*,<sup>192</sup> a Department of the Navy civilian employee filed suit in state court against Durkin, another Navy civilian employee. The suit alleged that Durkin had libeled Guidry by stating that he did not want Guidry assigned to work for him. The case was removed to federal district court, where a motion for summary judgment was sought and granted to the defendant. Plaintiff appealed, alleging that four statutes could provide a basis for his claims. The first two were the FTCA and the FECA. The Ninth Circuit first dismissed the FTCA as a basis, ruling that defamation actions are expressly barred by the statute.<sup>193</sup> Turning to the FECA, the court started by noting that it was only a workmen’s compensation statute which would bar

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<sup>188</sup> Note the language in *DeFord*: “[I]t is little or nothing more than a workmen’s compensation act.” *DeFord v. Secretary of Labor and the Tennessee Valley Auth.*, 700 F.2d 281, 290 (6<sup>th</sup> Cir. 1983).

<sup>189</sup> *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 193, 103 S. Ct. 1033, 74 L. Ed. 2d 911 (1983).

<sup>190</sup> *Gill v. United States*, 641 F.2d at 197.

<sup>191</sup> 42 F.2d at 515-516.

<sup>192</sup> *Guidry v. Durkin*, 834 F.2d 1465 (9<sup>th</sup> Cir. 1987).

<sup>193</sup> *Id.* at 1471.



recovery for any other type of injury or death. However, the court also stated that the FECA does not cover claims for emotional distress, and therefore FECA was inapplicable to this case and not an exclusive remedy.<sup>194</sup>

Three years later, in 1990, the Ninth Circuit decided *Sheehan v. United States*, discussed above.<sup>195</sup> While mainly focusing on the discrimination issue, the court did address the issue of FECA's coverage of emotional injuries. In doing so, the court relied on *DeFord* and *Guidry* in deciding that such injuries were not within the scope of FECA's provisions.<sup>196</sup>

Just one year later, the Sixth Circuit addressed the scope of FECA's coverage in *Jones v. Tennessee Valley Auth.*<sup>197</sup> In *Jones*, a TVA employee filed suit alleging his supervisors harassed and intimidated him in order to force him to suppress his findings of alleged safety violations. As a result of this conduct, plaintiff contended he suffered from PTSD.<sup>198</sup> Suit was filed in May 1987. By March 1990, the district court had dismissed or granted summary judgment to defendants on all the counts of plaintiff's complaint. In July 1990, the OWCP awarded plaintiff coverage under FECA for work related stress. In addressing the FECA claim, the Court of Appeals held that the FECA applied to the TVA and that the compensation for "work related stress," was therefore the exclusive remedy for plaintiff's injury.<sup>199</sup>

In 1992, the Sixth Circuit returned to the issue of FECA's coverage of emotional injuries in *McDaniel v. United States*.<sup>200</sup> Plaintiff, a middle management postal employee, alleged he was the victim of harassment and intimidation by a new postmaster. This harassment allegedly continued until McDaniel was transferred to a different office and shift. This alleged conduct brought on a psychological condition requiring hospitalization, and he filed claims under the FECA and FTCA. Both claims were denied. Plaintiff filed suit in 1991 under the FTCA, seeking compensation for intentional infliction of emotional distress. The U.S. filed for dismissal, alleging that the case was pre-empted by the Civil Service Reform Act and the FECA. The district court dismissed, ruling FECA pre-empted the FTCA suit and the plaintiff appealed. While the appeal was pending, the Secretary of Labor vacated his earlier FECA orders and sought further examination of the case by a psychiatrist, after which there would be a *de novo* review.<sup>201</sup>

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<sup>194</sup> *Id.* at 1472.

<sup>195</sup> *Sheehan v. United States*, 896 F.2d 1168 (9th Cir. 1990). *See supra*, text accompanying notes XX-XX.

<sup>196</sup> *Id.* at 1174.

<sup>197</sup> *Jones v. Tennessee Valley Authority*, 948 F.2d 258 (6th Cir. 1991).

<sup>198</sup> *Id.* at 260.

<sup>199</sup> *Id.* at 265.

<sup>200</sup> *McDaniel v. United States*, 970 F.2d 194 (6th Cir. 1992).

<sup>201</sup> *Id.* at 196.

McDaniel, citing *DeFord*, argued that FECA did not cover claims based upon non-physical emotional distress.<sup>202</sup> After first noting that *DeFord* dealt with discrimination, and therefore the language relied upon was dicta, the court stated that, “the Secretary of Labor, not the Sixth Circuit, has the final say as to the scope of FECA. . . .”<sup>203</sup> Finding the Secretary had decided that McDaniel’s claim was cognizable under FECA, the court observed that this was consistent with its ruling in *Jones v. Tennessee Valley Auth.* The court explained that “[t]he Secretary’s award of benefits conclusively established the applicability of FECA; thus, the Jones court did not err in omitting discussion of *DeFord*’s contrary position.”<sup>204</sup> Similarly, the court rejected plaintiff’s second argument, that the case should have been stayed, or remanded, pending action by the Secretary of Labor. The court stated that, “[w]hether the Secretary ultimately grants coverage is irrelevant for our purposes in the instant case. ‘[O]nce an injury falls within the coverage of FECA, its remedies are exclusive and no other claims can be entertained by the court.’”<sup>205</sup>

The broader result of *McDaniels* was to implicitly overrule every case that had cited *DeFord* for the proposition that emotional injuries are not covered by FECA, and to set the stage for courts to recognize that FECA can be an alternative remedy for claims of injuries suffered in discrimination cases.

Finally, in 1993, the Ninth Circuit re-examined its *Sheehan* decision in *Figueroa v. United States*.<sup>206</sup> Plaintiff, one of 25 employees injured in the rupture and clean-up of an electrical transformer on Navy property, filed an FTCA action against the United States and 12 individuals who supervised the toxic clean-up. They sought damages for current and potential future injuries and for emotional distress. The United States moved to dismiss, claiming FECA barred the FTCA action. The district court agreed that the question of FECA coverage should be resolved by the Secretary of Labor and dismissed.

In addressing the FECA argument, the Ninth Circuit said that there were two types of FECA coverage questions. One type addressed whether FECA covered a particular type of injury, a question of scope of coverage.<sup>207</sup> The second type focused on whether or not FECA coverage was available based upon the facts surrounding when the injury occurred. The court stated that it did “not read *Sheehan* as altering the general rule that when a claim arguably falls under FECA, the question of coverage should be resolved by the Secretary.”<sup>208</sup> In this case, it ruled that *Figueroa*’s claim was colorable under FECA. In doing so, the court noted the Department of Labor had already held

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<sup>202</sup> *Id.* (citing *DeFord v. Secretary of Labor*, 700 F.2d 281, 290 (6th Cir. 1983)).

<sup>203</sup> 970 F.2d. at 196.

<sup>204</sup> *Id.* at 197 (discussing *Jones v. Tennessee Valley Auth.*, 948 F.2d 258, 261 (6th Cir. 1991).

<sup>205</sup> *Id.* at 197.

<sup>206</sup> *Figueroa v. United States*, 7 F.3d 1405 (9th Cir. 1993).

<sup>207</sup> *Id.* at 1407.

<sup>208</sup> *Id.* at 1408.

emotional distress may be a disability when it is causally related to a claimant's federal employment in *In the Matter of Lillian Cutler and Department of Labor, Office of Workmen's Compensation Programs, Chicago, Ill.* Accordingly, it held, the district court properly dismissed the FTCA claim to allow the Secretary of Labor to decide the FECA issue.

A review of these cases which focused on FECA's coverage of emotional injuries shows the courts started out following the logic of *DeFord*, ruling that the FECA did not cover such claims. Then, *McDaniel* cut away that pillar, signifying a return to the earlier view that the Secretary of Labor, not the courts, are vested with the authority to decide FECA's scope. In total, while there is no clear, unified position on the interaction between FECA and emotional injuries arising from discrimination, there is at least room to argue that alternative means of addressing these types of claims should be considered.

### **B. Reviews by the District Courts**

To close this section, it is appropriate to review how some of the district courts in this area have approached the issue of FECA exclusivity. While the majority (8 of 14 cases) take the position that FECA is not the exclusive remedy when claims of discrimination or emotional harm are involved, several courts have ruled to the contrary, and two chose to sit on the fence and leave the decision to the Secretary of Labor. While each group will be briefly discussed here, what is significant is not so much the result, but the rationale.

## 1. Discrimination Cases

Most of the district courts which have held FECA was not the exclusive remedy in cases of discrimination or emotional harm based their decisions on the circuit decisions in *DeFord*, *Sullivan*, and *Miller*.<sup>209</sup> In *George v. Frank*,<sup>210</sup> the plaintiff, a postal employee, filed suit alleging sex discrimination under Title VII. The defendant, arguing that the court lacked subject matter jurisdiction to decide plaintiff's claim for damages because FECA was the exclusive remedy, moved to dismiss. The court ruled that FECA does not foreclose the plaintiff's claim for damages.<sup>211</sup> In discussing its rationale, the court wrote that

the genesis of this litigation is Title VII gender discrimination . . . which is not limited to remedies such as reinstatement and back pay, and may include such things as front pay, medical expenses and attorneys fees. . . . The question as to FECA coverage, which is most commonly associated with work-related accidents and diseases, clearly fails to preclude George's request to pursue her *discrimination* claim under the umbrella of equitable remedies available under Title VII.<sup>212</sup>

In *Gergick v. Austin*,<sup>213</sup> plaintiff filed suit alleging retaliation for supporting an EEO claim filed by several co-workers. The fourth count of the complaint sought compensation for intentional infliction of emotional distress. The defendant, citing the FECA's exclusivity provision, contended that the claim in count four was barred.<sup>214</sup> In upholding the claim in Count IV, the court cited *DeFord*, *Guidry*, *Sheehan*, and *Newman*, to support its position that emotional injuries fell outside of FECA's coverage.<sup>215</sup> The court further stated, "[i]n the instant case I have concluded that mental distress is not an injury which is cognizable under FECA."<sup>216</sup>

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<sup>209</sup> See *Karnes v. Runyon*, 912 F. Supp. 280 (S.D. Ohio 1995); *Callanan v. Runyon*, 930 F. Supp. 1285 (D. Minn. 1994); *Underwood v. United States Postal Serv.*, 742 F. Supp. 968 (M.D. Tenn. 1990); *Newman v. Legal Serv. Corp.*, 628 F. Supp. 535 (D.D.C. 1986); *Sullivan v. United States*, 428 F. Supp. 79 (E.D. Wisc. 1977).

<sup>210</sup> *George v. Frank*, 761 F. Supp. 256 (S.D. NY 1991).

<sup>211</sup> *Id.* at 259 (relying upon *Miller v. Bolger*, 802 F.2d 660 (3d Cir. 1986), and *Nichols v. Frank*, 42 F.3d 503 (5<sup>th</sup> Cir. 1994)).

<sup>212</sup> *Id.*

<sup>213</sup> *Gergick v. Austin*, 764 F. Supp. 580 (W.D. Mo. 1991).

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 581 (citing *DeFord v. Secretary of Labor*, 700 F.2d 281, 290 (6th Cir. 1983), *Guidry v. Durkin*, 834 F.2d 1465 (9th Cir. 1987), *Sheehan v. United States*, 896 F.2d 1168 (9th Cir. 1990), *Newman v. Legal Serv. Corp.*, 628 F. Supp. 535 (D.D.C. 1986)).

<sup>216</sup> 764 F. Supp. at 581.

Finally, while the court in *Johnson v. Sullivan*<sup>217</sup> also held that FECA was not the exclusive remedy, it noted that recovery received under the FECA would offset the ultimate damages award under the discrimination claim.

Two cases have straddled the fence on FECA's exclusivity in these types of cases: *Williams v. United States*,<sup>218</sup> and *Eure v. United States Postal Serv.*<sup>219</sup> In *Williams*, the court, citing *Avasthi*, sent the case back to the Secretary of Labor to determine the issue of FECA coverage.<sup>220</sup> In *Eure*, the court took the same action, noting that FECA "is a substitute for the tort suit."<sup>221</sup>

## 2. Emotional Injury Cases

A number of district courts have held that FECA bars a claim for emotional injuries, starting with *Metz v. United States*.<sup>222</sup> In *Metz*, the wife of a deceased federal employee filed an FTCA suit alleging that she and her husband suffered emotional and physical harm as a result of his being exposed to the disease Anthrax during secret tests conducted at his workplace. The husband had received FECA coverage during his lifetime as a result of the injuries he suffered from the disease. The government argued that FECA's coverage was exclusive, and the claim should be dismissed. The plaintiff countered by arguing that intentional infliction of emotional distress was not covered by FECA, and cited *Deford*, *Sullivan*, and *Newman* to support the point. The court granted the government's motion to dismiss on the grounds that the injury was caused by the disease, and such injuries were clearly covered by the terms of FECA. As such, the emotional harms were derivative of that injury, and therefore FECA was the exclusive remedy.<sup>223</sup>

In 1991, the Northern District of Texas addressed this area in *Alexander v. Frank*.<sup>224</sup> The plaintiff filed suit against the Postal Service alleging age, handicap, sex discrimination, and reprisal. Plaintiff had previously filed for, and received, FECA compensation for the alleged injuries and for later relapses she had suffered. In filing suit, plaintiff sought the difference between the 75% of wages she received from FECA and what she would have gotten had she continued to work. The Postal Service argued that the court lacked jurisdiction to hear the claim for compensatory damages.<sup>225</sup>

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<sup>217</sup> *Johnson v. Sullivan*, 764 F. Supp. 1053 (D. Md. 1991).

<sup>218</sup> *Williams v. United States*, 565 F. Supp. 59 (N.D. Miss.1983).

<sup>219</sup> *Eure v. United States Postal Serv.*, 711 F. Supp. 1365 (S.D. Miss. 1989).

<sup>220</sup> 565 F. Supp. At 60.

<sup>221</sup> 711 F. Supp. At 1365.

<sup>222</sup> *Metz v. United States*, 727 F. Supp. 1133 (D. Md. 1989).

<sup>223</sup> *Id.* at 1137.

<sup>224</sup> *Alexander v. Frank*, 777 F. Supp. 516 (N.D. Tex. 1991).

<sup>225</sup> *Id.* at 525.

The court agreed with the Postal Service, citing *Lockheed* and *Grijvala*. In explaining its decision, the court wrote:

The law forbids the Court from awarding such a remedy because FECA provides that an employee may receive no other remuneration from the United States while she receives workmen's compensation. Accordingly, to award Alexander the remedy she seeks in this case would "irreconcilably conflict with the federal worker's compensation statutory scheme established by the Federal Employees' Workmen's Compensation Act."<sup>226</sup>

Also decided in 1991 was the case of *Castro v. United States*,<sup>227</sup> in which the plaintiff, a postal employee, brought an FTCA action alleging intentional infliction of emotional distress and unlawful imprisonment. Plaintiff claimed she was brought into work when she was ill and not allowed to leave her supervisor's office.<sup>228</sup> Plaintiff had filed for and received FECA coverage for the emotional injuries she claimed to have suffered from the incident. The United States argued that, having received FECA coverage, plaintiff was barred from seeking further compensation. The plaintiff responded by citing *Sheehan*, arguing that emotional injuries were outside the scope of FECA.<sup>229</sup>

The court ruled against the plaintiff citing *Cutler*.<sup>230</sup> The court said that the Secretary of Labor had the ultimate authority to decide the scope of FECA's coverage, and had decided that plaintiff's emotional injuries could be covered. The court explained plaintiff had sought and received coverage for her emotional injury, and that the FECA award was her exclusive remedy.<sup>231</sup> This case was the first and only time a district court cited the ECAB as authority on the scope of FECA's coverage.

In *Staubler v. Runyon*,<sup>232</sup> plaintiff had brought suit under the Rehabilitation Act,<sup>233</sup> seeking compensation for harms suffered as a result of discrimination she faced because of her disability. At trial, the jury ruled for plaintiff, but the court set aside the jury's verdict and ruled for defendant, based upon its earlier motion for judgment. In its opinion, the court ruled that the Rehabilitation Act was not applicable in the case since plaintiff was seeking compensation for the same injury for which she had received FECA coverage. FECA, the court held, was clearly the exclusive remedy, and the

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<sup>226</sup> *Id.* at 524 (citations omitted).

<sup>227</sup> *Castro v. United States*, 757 F. Supp. 1149 (W.D. Wash. 1991).

<sup>228</sup> *Id.* at 1150.

<sup>229</sup> *Id.* at 1151.

<sup>230</sup> *Id.* (citing *In the Matter of Lillian Cutler and Department of Labor, Office of Workmen's Compensation Programs*, Chicago, Ill., 28 Em. Comp. App. Bd. 125 (1976)).

<sup>231</sup> 757 F. Supp. at 1151.

<sup>232</sup> *Staubler v. Runyon*, 892 F. Supp. 228 (W. D. Mo. 1994).

<sup>233</sup> 29 U.S.C. § 701.

decision to grant coverage in this case was not subject to judicial review.<sup>234</sup>  
The court went on to say:

It would be an abuse of the purpose and meaning of both the FECA and the Rehabilitation Act to allow an employee to claim FECA benefits, including prolonged assignments of limited duty, on the basis of an “injury,” and then claim that the “injury” was in fact a “handicap” under the Rehabilitation Act.<sup>235</sup>

Plaintiff sought to counter this argument by citing *Miller*.<sup>236</sup> The court rejected this approach, stating that plaintiff’s claim of discrimination was based upon the same on-the-job injuries for which the FECA had paid benefits.<sup>237</sup> The court noted that, in cases like *Miller*, where the injury followed some form of discrimination, the FECA would not be the exclusive remedy because the injury would have arisen from prohibited discrimination. In this case, however, the injury came first and the discrimination arose out of that injury. As such, FECA was the exclusive remedy.<sup>238</sup>

The court’s logic in the *Staubler* case is curious, in that it made discrimination cases based upon handicap potentially different from all other kinds of discrimination claims, including other handicap discrimination cases, depending upon when the condition occurred. The logic is sort of a hybrid of the inquiry in earlier FECA cases, wherein the issue was when and where the injury occurred. If the injury occurred on the job, and discrimination followed because of that injury, this opinion would bar compensation beyond what FECA provided. If the injury was not workplace related or if it followed as a result of discrimination, the FECA was not the claimant’s exclusive remedy. This was true even though, in the latter case, FECA may very well have paid such a claim.

Overall, what can be seen from the district court cases is a tendency to follow the circuit courts in providing the broadest remedies possible in cases of discrimination. Currently lacking among the federal courts is a consistent approach to determining the exclusivity of the FECA remedy for emotional injuries. Also needed is a recognition of the Secretary of Labor’s exclusive right to determine the scope of FECA’s coverage. Despite the decisions that FECA can cover emotional injuries, even when the injury is caused by discrimination in the workplace, the courts have been less than willing to recognize the FECA’s clear mandate to the Secretary of Labor in this area.

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<sup>234</sup> 892 F. Supp. at 231.

<sup>235</sup> *Id.* at 229.

<sup>236</sup> *Id.* at 231 (citing *Miller v. Bolger*, 802 F.2d 660 (3d Cir. 1986)).

<sup>237</sup> *Id.* at 230 (The court ruled that this case was more analogous to *Alexander v. Frank*, 777 F. Supp. 516 (N.D. Tex. 1991), than it was to the decision in *Miller*.)

<sup>238</sup> 892 F. Supp. at 231.

### C. The EEOC and FECA

The EEOC has addressed the FECA and compensatory damages in two cases. In *Jackson v. Runyon, Postmaster General, United States Postal Serv.*,<sup>239</sup> plaintiff was a postal employee who filed a formal EEO complaint alleging sex, color, age, and physical handicap discrimination, and reprisal. In responding to the claim, the agency argued that the FECA was the exclusive remedy for federal employees seeking compensatory damages in work-related injuries. After reviewing the provisions of the FECA, and discussing the Supreme Court decision in *Lockheed Aircraft*, the EEOC ruled that FECA was not the exclusive remedy. The Commission stated that “by its very language” the FECA is limited to a worker’s compensation statute or federal tort liability statute.<sup>240</sup> Further, the Commission stated that prior court decisions, and one other Commission decision, had held that FECA was not the exclusive remedy for injuries in discrimination cases.<sup>241</sup> The Commission concluded: “we find that Congress did not intend this worker’s compensation statute to be the exclusive remedy for a federal employee bringing a complaint alleging discrimination and harassment, including a request for compensatory damages related to mental stress and high blood pressure.”<sup>242</sup>

In the footnotes, the Commission discussed the EEOC case of *Davis v. United States Postal Serv.*,<sup>243</sup> where the Commission had ruled that recovery of FECA benefits did not preclude a back pay claim under Title VII, as it viewed the remedy to be “an equitable one.” In a later footnote, the Commission noted that while the FECA is not the exclusive remedy, an award of compensatory damages is not intended to provide double recovery to an EEO complainant.<sup>244</sup> In discussing this decision, it is worth noting that the EEOC’s review of case law in this area is hardly comprehensive, and it ignores the fact that a decision of the Secretary of Labor as to the scope of FECA is “not subject to review by another official of the United States or by a court by mandamus or otherwise.”<sup>245</sup> The EEOC, however, in a desire to maintain its private domain, makes short work of “the usurper.” A further analysis of the value FECA can provide to the EEOC process shows that it may not be wise to discard it outright.

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<sup>239</sup> *Jackson v. Runyon, Postmaster General, United States Postal Serv.*, EEOC Petition No. 05930306 (Feb. 1, 1993).

<sup>240</sup> *Id.* at 4.

<sup>241</sup> *Id.* (citing *Miller v. Bolger*, 802 F.2d 660 (3d Cir. 1986), *Nichols v. Frank*, 42 F.3d 503 (5<sup>th</sup> Cir. 1994), *Davis v. United States Postal Serv.*, EEOC Petition No. 04900010 (Dec. 29, 1990)).

<sup>242</sup> EEOC Petition No. 05930306 (Feb. 1, 1993) at 4.

<sup>243</sup> *Id.* n.4 (discussing *Davis v. United States Postal Serv.*, EEOC Petition No. 04900010 (Dec. 29, 1990)).

<sup>244</sup> *Id.* at n.6.

<sup>245</sup> 5 U.S.C. § 8128(b)(2).



In *Finlay v. United States Postal Serv.*,<sup>246</sup> the appellant filed a claim for sexual harassment, alleging injuries of post-traumatic stress disorder and major depression. The OWCP accepted her claim for compensation for these injuries under the FECA, and began to pay compensation benefits. The agency accepted the administrative judge's finding of discrimination, but modified the scope of recovery. Appellant was awarded \$25,000 in nonpecuniary compensatory damages, and denied front and back pay, and past and future compensatory damages by the agency. On appeal, the EEOC rejected the agency's position that appellant was not entitled to back pay because she had received the FECA benefits. The EEOC held that the FECA was not the exclusive remedy for losses from unlawful discrimination, but that the agency could offset the amount paid under the FECA from what was due in back pay. The EEOC made a similar ruling regarding front pay, but found that, in this case, front pay was not available because appellant was totally disabled and therefore not available for work.

In looking at the claim for compensatory damages, the EEOC held that appellant was entitled to an award because the emotional harms were causally related to the sexual harassment. In determining the amount, the EEOC said that since OWCP's payments were reimbursed by the agency, they could be used to offset the pecuniary damages awarded to appellant. Accordingly, appellant's claim for past pecuniary damages for psychotherapy were denied, since medical expenses were paid by the FECA. Similarly, future pecuniary damages for psychotherapy were also denied because the FECA covered them. Finally, the EEOC ruled that appellant was entitled to compensation for future loss of pay and benefits. In order to avoid double recovery, however, the amount of the future damages could be offset by the amount the FECA paid for wage-replacement.

A review of the EEOC decisions in these cases finds it holding firm to its view that the FECA and discrimination actions are mutually exclusive processes meant to compensate different harms. Of interest, though, is the EEOC's recognition that the FECA does compensate some aspects of the same harms that the EEOC is designed to redress, namely, emotional injuries arising from discrimination. As such, it will reduce the award to the complainant in those areas where it believes the EEOC and the FECA overlap (payment of medical bills and wage replacement, etc.). Apparently, this is all the EEOC is prepared to concede to the FECA. In doing so however, the EEOC ignores two important facts. First, that FECA is the statutorily exclusive remedy for workplace injuries received by federal employees, and that any other form of compensation for these injuries is prohibited; and second, that the decision is not subject to review by any official or court. Consequently, if FECA

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<sup>246</sup> *Finlay v. United States Postal Serv.*, EEOC Appeal No. 01942985 (Apr. 29, 1997).

coverage is granted, the EEOC is precluded from addressing the exclusivity or applicability of the FECA to any claim.

## **V. ALTERNATIVES**

Several things are clearly apparent from the prior discussion of the case law in this area. First, the Department of Labor is under the impression that emotional injuries, even if arising from discrimination, are compensable under the FECA. Second, the federal courts are divided as to the issue of FECA's interaction in discrimination cases, but largely have ruled that it is not the exclusive remedy. Third, the EEOC is not prepared to concede to the FECA any involvement in compensating discrimination based emotional injuries, except where it is obvious that the two systems will overlap. Finally, the present system of multiple litigation in different forums with different standards of proof is ineffective, a waste of judicial resources, and is not properly effectuating the purpose of either statute. The focus now shifts to what would be a better, more efficient alternative. In that vein, two options come to mind.

### **A. Alternative One**

The first alternative is that the EEOC be required to use the standards set forth under the FECA in assessing and compensating the physical and emotional injuries occurring from workplace discrimination and harassment. This would impose a limit on compensation for injuries claimed in discrimination cases, and any expenses arising from them, to those levels established under the FECA. Compensation for harms not covered by FECA, such as back pay, as well as equitable remedies (reinstatement, corrections to personnel records, etc.), could be obtained from the remedies available under Title VII and its implementing regulations. Between the two systems, claimants could be "made whole" without multiple litigation and while still recognizing the role of the FECA. It is important to note that this alternative would not effect a "simple, straight-forward" workmen's compensation case, where no discriminatory act is alleged. Absent an allegation of discrimination, this alternative would not apply.

#### *1. Required Legislative Action*

Several legislative actions would be required to effect this alternative. First, the EEOC would have to be vested with the exclusive jurisdiction in all cases where injury is claimed in conjunction with, or resulting from, a claim of discrimination. Second, an amendment would be needed to require the EEOC to assess emotional and physical injuries according to the standards set

out by the FECA, and to compensate them based upon the scale devised under the FECA. Third, the EEOC would have to be precluded from granting any monetary awards for the injury portion of the claim, to include pain and suffering, beyond what FECA would compensate. The amendment should also make clear that the EEOC is still free to employ any equitable remedies necessary to effectuate the purpose of eliminating discriminatory conduct.

Legislative enactments would also be required to amend the administrative process under the FECA. First, the OWCP would need to be precluded from hearing cases of workplace injuries based upon discrimination. Second, the amendment would have to require the OWCP to forward the claim to the EEOC. Third, an amendment would be required to prevent the ECAB from reviewing the decision to transfer the claim to the EEOC, or to limit any review to whether the injury is alleged to be causally related to discriminatory treatment.

There are a number of points both for and against this alternative, each of which will be addressed in its respective groups.

## *2. Arguments Supporting this Alternative*

### *a. Conforms with FECA's exclusivity provision*

Adopting this alternative would be consistent with the statutory provision that FECA is the exclusive remedy for workplace injuries. It would also be consistent with the statutory grant of power to the Secretary of Labor to determine FECA's scope. The previously cited decisions of the ECAB, that FECA can compensate injuries resulting from proven discrimination, places FECA squarely into this process.

This alternative has found support in a number of federal courts. Cases such as *Alexander v. Frank*, *Castro v. United States*, and *Staubler v. Runyon*, have uniformly held that FECA's exclusivity provision clearly limits recovery for the emotional injuries suffered from incidents in the workplace. Several circuit courts have concurred in this view in cases like *McDaniel v. United States*, *Figueroa v. United States*, and *Jones v. Tennessee Valley Auth.*, where allegations of harassment or discrimination were added.

It is also consistent with the fact that "compensation acts are habitually given a liberal construction in order to effectuate their intended purposes," and that "such a rule of construction is for the benefit of the employee so that liberal coverage under the Act may be provided."<sup>247</sup> The exclusivity provision in FECA does not specifically include discrimination cases. Nor, for that matter, does the Civil Rights Act of 1964 mention FECA's role in addressing harms from discrimination. These facts do not work to bar FECA's

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<sup>247</sup> *DeFord v. Secretary of Labor*, 700 F.2d 281, 290 (6th Cir. 1983) (citing *United States v. Udy*, 381 F.2d 455, 456 (10th Cir. 1967); *DeSousa v. Panama Canal Co.*, 202 F.Supp. 22, 25 (S.D.N.Y. 1962)).

application in this area, and to rule they do runs counter to the liberal reading normally accorded such statutes and takes an unnaturally narrow view of the interaction of the two statutes. The Secretary of Labor has repeatedly ruled that FECA applies to these types of harms. The fact that Congress was silent on the matter does not, in and of itself, dictate that the FECA is inapplicable, nor do the EEOC's rulings create such a result. A review of the EEOC's decisions in this area shows its research into case law is seriously lacking and its rejection of the FECA appears to be more parochial than analytical.

The matter comes to a simple point—"exclusive" should be allowed to mean "exclusive." Where the issue is injury caused by workplace discrimination, the FECA should dictate the level and amount of compensation. Where the remedy required is based on equitable harms from discrimination, which the FECA clearly does not compensate, then the equitable remedies under Title VII should prevail.

#### *b. Advances Judicial Economy*

The current process has claimants filing claims before the OWCP and the EEOC. The result is two different processes, two different standards of proof, both seeking to compensate harms arising from the same allegedly discriminatory conduct. This is the same type of conduct decried in *Staubler v. Runyon* as being "an abuse of the purpose and meaning of both the FECA and the Rehabilitation Act."<sup>248</sup>

Vesting exclusive jurisdiction in the EEOC would allow for a single adjudication of all issues before a single body. A review of the FECA's case law shows it lacks any standard by which to analyze allegations of discrimination, even though the ECAB's decisions require the claimant to prove discrimination actually occurred.<sup>249</sup> The EEOC is obviously better suited to review these types of claims. Such a review would be consistent with the FECA's proof requirement. As the ECAB has held, if there is no discrimination, then there was no causation between the injury and the workplace conduct, and therefore no basis for recovery under FECA. The EEOC can easily make this determination. What the EEOC lacks is a clearly defined standard for compensating such harms when discrimination is found. FECA can instantly provide that.

This approach also brings several benefits to potential claimants. First, it reduces the legal expense of pursuing a claim, since counsel will not have to duplicate the case before two different forums. Second, it will streamline and simplify the process, creating a faster means of recovery, consistent with FECA's original goal, and make for a better understanding by the claimants.

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<sup>248</sup> 892 F. Supp. at 229.

<sup>249</sup> In the Matter of William P. George and U.S. Postal Serv., Post Office, Anniston, Ala., 43 ECAB 1159 (1992).

Third, a clear standard for compensating these types of harms will foster settlement by injecting a certain degree of “realism” on the part of all parties engaged in the process.

*c. Provides a Quantifiable Standard of Recovery*

In granting the EEOC the power to award compensatory damages, the Congress neglected to require, or supply, a standard upon which to assess what would be an appropriate amount of compensation in discrimination cases. Many would rightly argue this is consistent with other types of tort cases, wherein a jury or court would decide an appropriate award given the specific facts of each case.<sup>250</sup> In the case of discrimination claims, however, we find ourselves in what some practitioners call “the comp damages lottery.” The absence of case law precedent, combined with the absence of a clear standard for assessing claims, results in complainants seeking the full \$300,000, regardless of scope or extent of their injuries, and refusing to settle for less.

The EEOC, to date, has been of little help in this realm, having ruled the standard of review for compensatory damages is “that the award not be monstrously excessive.”<sup>251</sup> This kind of standard does little to assist parties in assessing claims or negotiating a settlement.

Using FECA’s compensation standards would serve to remedy this. The use of this system would serve to promote realistic case assessment and would foster serious settlement negotiations. The FECA, through the published decisions of the ECAB, has a significant body of case law<sup>252</sup> to call upon in assessing claims. The FECA also possesses clear standards of proving damages and causation, which the EEOC lacks. The benefit of adopting this system of assessment would be almost immediate and substantial.

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<sup>250</sup> Of course, this would then run afoul of courts holding that discrimination cases are not tort actions. If they were, the FTCA would apply. If the FTCA applied, then FECA would be the exclusive remedy for federal employees.

<sup>251</sup> *Carpenter v. Glickman*, EEOC Appeal No. 01945526 (July 17, 1995).

<sup>252</sup> The complete set currently contains over 45 volumes.

*d. Precludes Double Recovery*

Although the courts and EEOC recognize the potential for double recovery and allow for offset to prevent it, the potential for persons to file actions in both forums and receive double compensation still exists. Unifying the system into one action would eliminate this opportunity for abuse.

A review of the EEOC's caselaw leaves one with a fuzzy feeling as to how the EEOC arrives at the amount of compensation awarded. Once claimants clear the obvious "reimbursement" aspects of the claim, the ultimate award amounts are scattered like stars in the heavens, with no apparent rhyme or reason.<sup>253</sup> The unification of the system, utilizing FECA's standards of compensation and EEOC's analysis of discrimination and equitable remedies, would bring some order while decreasing the potential for abuse.

*e. Permits Parties to Obtain "Whole Relief"*

One of the biggest objections raised by the federal courts to recognizing FECA as an exclusive remedy in discrimination cases has been their concern that its limited damages provisions would not permit "whole relief" for the complainant,<sup>254</sup> or worse, would deprive some of relief but not others.<sup>255</sup> While one must concede the FECA's limitations, joining FECA's compensation provisions to the EEOC's equitable powers would ensure full compensation, while still making FECA the exclusive remedy for the emotional injuries suffered. Limits on the action rights of federal employees is hardly new, so the limitation on the amount of compensation available to a federal employee has precedent behind it.

Some federal courts, for example in *Nichols v. Frank*, have argued that imposing FECA limits on one who suffers emotional injuries, but not on one who does not, would be inherently unfair. The fact is that anyone who is compensated in an EEO case is being compensated for "pain and suffering" –

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<sup>253</sup> A brief review of the EEOC decisions in this area shows awards ranging from \$1,000, *Mullins v. Runyon*, EEOC 01954362, May 22, 1997, through \$100,000, *Finlay v. Runyon*, EEOC 01942985, Apr. 29, 1997. As the EEOC noted in *Roquemore v. Runyon*, EEOC 01951930, Mar. 31, 1997:

The Commission reminds the parties that there are no precise formulas for determining the amount of damages for non-pecuniary losses. An award of compensatory damages for non-pecuniary losses, including emotional harm, should reflect, however, the extent which appellant has established that the agency's actions directly or proximately caused the harm. . . .

<sup>254</sup> See *George v. Frank*, 761 F. Supp. 256 (S.D. Md. 1991); *Miller v. Bolger*, 802 F.2d 660 (3d Cir. 1986).

<sup>255</sup> See *Staubler v. Runyon*, 892 F. Supp. 228 (W.D. Mo. 1994); *Nichols v. Frank*, 42 F.3d 503 (9th Cir. 1994).

whether from a quantifiable emotional harm or from the “harm” caused by having to endure discriminatory treatment. The fairness comes in treating everyone with a uniform standard of compensation. Under this alternative, the standard would be FECA’s. Compensation in discrimination cases is not meant to be a “cash cow” or lottery, but to remedy harms. Applying a consistent standard will effect that purpose.

Other federal courts, such as in *Miller v. Bolger*, have argued that if the “FECA is exclusive” argument prevails, “there would be no vehicle by which a federal employee could secure an order directing reinstatement, if warranted. Such a result would defeat the important amelioratory public purpose expressed in Title VII of eliminating discrimination.”<sup>256</sup> Such an “all or nothing” position is not at issue here, as this proposed alternative combines FECA’s and the EEOC’s powers, advancing the goals of both statutes.

*f. Preserves the Goals of Title VII and FECA*

Another concern advanced by the federal courts is that making FECA the exclusive remedy will sacrifice the objective of Title VII – to eliminate discrimination. This concern is based upon the courts’ perception that people will not seek to pursue a discrimination claim if the ultimate recovery is limited to FECA’s standards alone. If FECA is the only remedy, the lack of equitable remedies will prevent full recovery and FECA’s focus on financial compensation for injuries makes it totally unsuited to addressing discrimination.

In response, this alternative would combine the remedies of the EEOC and FECA, so the only real effect would be to limit the amount of financial compensation available to federal employees in redressing emotional injuries. The ability to receive both equitable and financial remedies would remain essentially intact, and would thereby adequately respond to these concerns. If the concern is that people will not seek to fight discrimination unless there is a sufficient “profit motive,” then one should question both the motive and the desirability of crafting a remedy scheme that appeals to such a motive.

*g. Puts Discrimination Cases Before the Proper Agency*

One of the distinct advantages of this alternative is that the EEOC is unquestionably more competent to assess discrimination claims than the OWCP or ECAB is. As shown earlier in this article, the evolution of case law under FECA has placed the burden on the claimant to prove that discrimination actually occurred, and to show that the injury and the conduct are causally related. What is readily apparent is that FECA has no standard to

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<sup>256</sup> *Miller v. Bolger*, 802 F.2d 660, 665 (3rd Cir. 1986).

assess a claim of discriminatory conduct. Placing the claim before the EEOC eliminates the need to prove discrimination twice, as well as taking advantage of the EEOC's vast experience and case law in assessing and fully compensating these claims.

### *3. Arguments Opposing this Alternative*

#### *a. Opposition from EEOC and Department of Labor*

The first level of resistance to this proposed alternative is likely to be “turf-oriented.” More specifically, the current position of the parties is to preserve their jurisdiction—and the funding that goes with it. The case law previously reviewed sets out the two sides fairly clearly. The Department of Labor believes the FECA covers emotional injuries, no matter how they are suffered, so long as they arise out the workplace. The EEOC disagrees that FECA is the exclusive remedy for injuries appearing to have arisen from discriminatory conduct.

Having stated its position, the Department of Labor would contend that FECA is, by law, the exclusive remedy for any workplace injury suffered by federal employees, and the cause of the injury is irrelevant to the issue of jurisdiction. As such, emotional or physical injuries arising from discrimination are with the FECA's penumbra, and such cases should not be taken from its jurisdiction.

The EEOC, on the other hand, would contend that neither the Civil Rights Act of 1964 nor the Federal Employees' Compensation Act gave the Department of Labor exclusive jurisdiction in discrimination cases. The EEOC would further contend that the Civil Rights Act of 1964 did not make the FECA applicable to the EEOC's analysis of injuries in discrimination cases. As such, the EEOC is not bound by the FECA in any way when addressing compensation in discrimination claims. The EEOC would point out that FECA is not able to adequately analyze discrimination claims, and if discrimination is found, it cannot properly remedy such conduct. The EEOC would specifically cite FECA's narrow compensation options and the absence of any equitable or injunctive remedies. In light of all this, the EEOC would argue that FECA plays no role in discrimination cases at all.

#### *b. FECA is Supposed to be “Non-Reviewable”*

Another area of opposition would be to FECA's “non-reviewability clause.” If the EEOC were required to apply the FECA's compensation standards, would that cloak the EEOC's judgment on all aspects of the complaint in FECA's non-reviewable status? It could be argued that the EEOC's finding of discrimination, upon which FECA compensation is based, would be exempt from review, in the same manner that FECA's evaluation of



evidence is sacrosanct. There would be two ways of dealing with this issue and both would require a legislative instruction. One method would be to dictate that the underlying decision of discrimination could be reviewed, but if discrimination were found, the award of compensatory damages would not be reviewable. The other option is that the entire EEOC decision, in cases where injuries are alleged, would not be subject to review. In light of the nature of discrimination cases and the many complex facets of both facts and statutory rules, the former option seems better suited to addressing this aspect of the proposal.

Another issue would be jurisdictional. Would the EEOC have automatic jurisdiction of all discrimination cases where any harm is alleged, or only emotional harms? What if the injury is not rooted in discriminatory conduct, but is a concurrent issue? Since the EEOC can provide compensation for “pain and suffering,” will this still be permitted once FECA is implemented, or will this counter FECA’s “exclusivity”?

In looking at these questions, the FECA covers all workplace injuries. It was handling physical harms long before it ever accepted emotional injuries, so it is likely that any harm, based upon a claim of discrimination, would go to the EEOC under this alternative. If the claimed harm is not rooted in a discrimination claim, then FECA would retain primary and exclusive jurisdiction. The final issue, on “pain and suffering” compensation, is resolved by the proposal itself. Since this proposal inserts FECA as the exclusive form of monetary compensation for injuries, then a separate award for “pain and suffering” would not be warranted, since it would be covered by the FECA’s overall compensation. Of course, this presents us with the situation discussed in *Nichols v. Frank*.<sup>257</sup>

### *c. The Remedy Would be Based upon Harm Alleged*

Under the argument discussed in *Nichols*, if a victim of discrimination developed an emotional injury, he could only be compensated under FECA. If, however, he did not develop any emotional or physical harm, he would be entitled to the greater relief available under Title VII. Addressing this issue requires one to adopt one of two points of view. In the first point, people who do not develop a “condition” as a result of discriminatory conduct could still be compensated under FECA by altering the FECA to cover the pain and suffering aspect of their claim. The second point of view is that compensatory damages are meant to compensate for injuries and harm. If a complainant does not suffer an injury or harm, then no compensation is merited. It is not unfair to deny compensation to someone who does not suffer an injury and to compensate a person who does. In fact, the EEOC has recognized that an

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<sup>257</sup> *Nichols v. Frank*, 42 F.3d 503 (9<sup>th</sup> Cir. 1994).

agency “takes the victim as [it] find[s] them,”<sup>258</sup> so if the victim suffers no injury, or bears a heightened sensitivity to discriminatory treatment, the agency and the complainant must live with that fact.

*d. Forces Complainant to meet the Higher Burden of Proof*

Some would argue that making the EEOC the exclusive forum for cases of injuries arising from discrimination would deprive a claimant of the benefit of the lower burden of proof and swifter recovery available under the FECA. This argument would contend that those who might forego an EEOC case, out of lack of resources or fear of being unable to meet the higher burden of proof that the EEOC imposes, would be precluded from obtaining the relief they otherwise could get if they could petition FECA alone.

In response, vesting the EEOC with primary jurisdiction insures that meritorious claims will be brought and addressed. If a claimant has a meritorious claim, then there should be no fear of raising it. If the claim will not withstand the scrutiny of the EEOC, then it is unlikely to meet the FECA’s requirement to prove actual discrimination either. In point of fact, since the FECA lacks any written standard of proof for showing discrimination, it is speculation at best to say that FECA’s “standard” is lower than the EEOC’s. While some may lose as a result of this alternative, the overall benefit to judicial resources, promotion of settlement, and streamlining of the process will more than outweigh those who would lose from this aspect of the alternative.

*4. Additional Issues Regarding Changing Forums*

Before leaving this alternative it is necessary to discuss two possible scenarios regarding the operation of this proposed system. The first entails what happens when a claimant, having filed a FECA claim not linked to any discriminatory treatment, at some point changes its theory and alleges that the injury arose from discrimination. According to this alternative, the claim would then be transferred to the EEOC as its would be the agency with primary jurisdiction over such claims. The focus of this alternative is to adjudicate all claims in one forum. Raising the discrimination claim is beyond FECA’s ability to redress, and therefore transferring the case to the EEOC makes possible a complete settlement of the claims before a single forum.

The second scenario entails a situation where the complainant has filed before the EEOC and does not prevail. Is he then able to turn the case into a simple workplace injury claim before FECA? According to this alternative, a decision by the EEOC would be dispositive, beyond pursuing the appeals one would normally have available through the EEOC. The complainant would

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<sup>258</sup> April v. Glickman, EEOC Appeal No. 01963775.

not be able to pursue the claim through the FECA process, as his claim would have been adjudicated by the EEOC. This is necessary to prevent people from trying to “forum shop” in an attempt to find some agency that will grant them redress.

## **B. Alternative Two**

The second alternative allows the claimant to choose where to raise his claim—either before the EEOC or the FECA. Claimants would be bound to follow the procedural rules and standards of the forum they chose, however, their choice would be final and binding. No one would be permitted to file in both forums, and once a judgment was rendered, the claimant would be foreclosed from pursuing the claim in the other arena.

### *1. Required Legislative Action*

Effectuating this alternative would also require legislative action. Both the EEOC and FECA would need to be amended to preclude them from accepting any claim for injuries based upon, or arising out of a claim of discrimination, once the claimant had filed a claim in either forum. Such a provision is not without precedent, as the EEOC binds complainants when they elect between the EEOC process and a negotiated grievance procedure.<sup>259</sup> Whether the claim was finally adjudicated, or was dismissed on procedural grounds, would not alter the prohibition. No further alteration would be required, as the claimant would simply be following the rules and procedures of the chosen forum.

### *2. Arguments Supporting this Alternative*

#### *a. Provides Claimant Maximum Control*

One of the strongest points in favor of this alternative is it gives the claimant maximum control over his claim. This was a point strongly favored in *DeFord v. Secretary of Labor*, where the court wrote, “Even if the FECA could be read such that it might otherwise apply to this case, DeFord should be allowed to make an election between alternative payments and benefits due him under administrative frameworks provided by Congress.”<sup>260</sup> As such, since both agencies would claim to assert jurisdiction in this area, the individual claimant should have the right to choose the forum he feels will best suit his needs and interests. Having chosen the forum themselves, claimants can have little legitimate complaint for being held to their choice. The further

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<sup>259</sup> Federal Sector Equal Employment Opportunity, 29 C.F.R. § 1614.301.

<sup>260</sup> *DeFord v. Secretary of Labor*, 700 F.2d 281, 290 (6th Cir. 1983).

advantage to claimants in having the choice is that both forums offer different remedies.

*b. Claimants can Choose the Forum Best Suited to Their Claim*

In the case of the EEOC, the available remedies are both compensatory and equitable, and can compensate all aspects of the harms suffered. The FECA, while limited in the scope of compensation, carries a lower standard of proof, and the compensation can be almost indefinite in duration. Further, while the EEOC will not order reinstatement if a complainant is unable to work because of his condition, the FECA specifically provides for reinstatement should the claimant recover within one year, and for priority consideration after that period. There is an additional advantage to choosing the FECA – no appeal of the decision. Unlike the EEOC, the FECA is non-reviewable, therefore the award would be more immediate and could not be held hostage to appeals in an attempt to overturn the decision or force a smaller, negotiated settlement.

Allowing claimants to choose forums also gives recognition to what the Supreme Court recognized as the *quid pro quo* Congress established in creating the FECA, namely a non-adversarial process with a lower standard of proof and speedy resolution in exchange for limited recovery.<sup>261</sup> Since the claimant is presumably capable of making an educated decision, he should be allowed to understand and to elect to make the trade off.

*c. Eliminates Potential for Multiple Litigation and Double Recovery*

Since the decision of the claimant would be binding, the choice of forum would eliminate the potential for multiple litigation with potentially conflicting results. This would prevent a situation where the FECA would deny a claim for injuries based upon discrimination, only to see the EEOC find discrimination and then grant compensation. The election would be a more efficient use of judicial resources and be more cost efficient for the claimants, who would only need to litigate the claim once.

This election would also prevent the possibility of double recovery. Since one forum would handle the claim, there would be no chance for obtaining recovery in a subsequent claim before the other agency. This would eliminate the issue of offsetting one award when paying another as well.

*3. Arguments Against this Alternative*

*a. Ignores FECA's Exclusivity and Objective*

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<sup>261</sup> Lockheed Aircraft Corp. v. United States, 460 U.S. 190 (1983).

The FECA was designed to be a limitation on the government's waiver of sovereign immunity, which was created by the Federal Tort Claims Act. Allowing parties with a work-related injury to circumvent the FECA and choose to pursue the claim before the EEOC would be to ignore FECA's exclusivity and the reason for its existence. Supporters of FECA would also point to the EEOC's lack of a system for determining compensation for such claims.

Further objections could be raised against the FECA and its components. First would be the lack of a basis to analyze discrimination claims, and the fact that FECA, as a non-adversarial process, is not suited to handling something as contentious as a discrimination claim. Even further, the limited recovery system set forth in the FECA makes it ill suited to adequately compensate claims of discrimination. Finally, FECA's limited scope would make it totally ineffective in dealing with the discriminatory conduct itself. It is even possible that a claimant, who has a legitimate discrimination claim, might file under FECA because it is without an appeals process and has a lower standard of proof. This would create a disservice to the claimant, who's claim might be better served by the EEOC; and the system at large, because a FECA claim would leave the allegedly discriminatory conduct unaddressed.

While this alternative allows for the possibility that the underlying discrimination could remain unaddressed, there are other methods to address discriminatory behavior besides a suit by employees. To believe that everyone who is discriminated against will opt for the FECA process over the EEOC is not only taking a limited view toward society's tolerance of discrimination, but is also ignoring the role class action suits play in the EEO arena. There is no provision for a class action FECA suit, since FECA is an individualized remedy. While not primarily designed to analyze discrimination cases, FECA is building a body of case law on the standard of proof and analysis of these types of claims, and the causation standard for linking injury to conduct is already well established.

*b. Objectives of Title VII would not be Advanced*

As noted above, there is a fear that this alternative would cause so many plaintiffs to choose FECA's "path of least resistance," that the objectives of Title VII would begin to suffer. Some would express concerns that meritorious cases of discrimination would not be addressed because the claimant lacked the funds necessary to pursue a claim in the face of the EEOC's higher standards of proof. Others would point to the FECA's lack of equitable remedies as proof that it is not suited to address discrimination, and that those claims it did address would partially compensate the claimant while leaving discrimination intact.

Not only does the general trend of EEO cases militate against this, as does the class action process, but also the fact that people alleging a physical or mental injury from discrimination would still be drawn to the EEOC's process and greater levels of recovery. It is a rare thing indeed for a complainant to file a discrimination case seeking only monetary compensation. They often seek a host of other remedies, from corrections of records to reinstatement. These forms of compensation not available under the FECA will continue to draw plaintiffs to this process. Further, the EEOC's well established process of informal investigations and internal agency procedures are likely to continue to be the first resort for those who feel they are victims of discrimination. The FECA is totally lacking in this sort of informal process.

The real threat posed by this alternative is that plaintiffs will completely abandon the FECA's remedies in favor of the larger recovery available before the EEOC, despite the higher standard of proof and appeal rights. Further, the willingness of the plaintiff's bar to front the costs of pursuing such claims would ensure that that goals of Title VII would always have an ample number of advocates. While some will likely be drawn by the simpler standard of proof and swifter recovery, the number FECA would likely draw away would be small. In many cases, discrimination is one of several factors being alleged, and not necessarily the primary cause of the injury.

*c. Potential for Agency Abuse*

Some might argue that since the claimant can choose the forum for his claim, the agency may seek to bind the claimant to choosing one forum or the other by the terms of the employment contract. The FECA's limited damages, the absence of a finding by the EEOC of discrimination, along with the remedial orders that may go with it, and the speed of the process would likely find agencies favoring the FECA and seeking to bind employees to that forum upon hiring.

The immediate counter argument to this concern is the substantial amount of caselaw which holds that waiver of future discrimination claims is

violative of public policy and therefore void.<sup>262</sup> As such, there is no opportunity for the agency to impose such a binding contractual condition.

#### *4. Additional Issues Regarding the Choice of Forums*

As with the first alternative it is necessary to discuss possible scenarios regarding the operation of this proposed system. The first scenario involves a claimant, having filed an FECA claim not linked to any discriminatory treatment, and at some point changing his theory and alleging that the injury arose from discriminatory conduct. Under this alternative, would plaintiffs be foreclosed from changing forums and pursuing a claim before the EEOC? While the basic format of this alternative would state they could not, it would be necessary to decide whether there is a strong enough public demand to address discrimination so as to allow a person to change forums in this situation.

One possible suggestion would be to require that the OWCP determine whether the conduct, as initially alleged by the claimant in making his claim for compensation, could have been characterized as being based in discrimination. If the claimed conduct would lead one to believe he had a basis for a discrimination claim, then no change in forum should be permitted. If the evidence revealed during the FECA process creates a belief that discriminatory conduct was the cause of the injury, then a change in forum to the EEOC could be permitted. It would be incumbent upon Congress to clearly address this scenario in making the legislative changes necessary to implement this alternative.

The second scenario entails a situation where the complainant has filed before one forum and failed. Is he then able to turn the case into a simple workplace injury claim before FECA? As under the first alternative, a decision by either agency would be dispositive, beyond pursuing whatever appeals one would normally have available through that agency's process. Adjudication by one agency would be total and final as regards the other agency. This would prevent people from trying to "forum shop" in an attempt to find some agency that will grant them redress and, since claimants chose the forum to begin with, there would be little basis for complaint should they be denied the right to raise the issue somewhere else.

## **VI. CONCLUSION**

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<sup>262</sup> See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 39 L.Ed. 2d 147, 94 S.Ct. 1011 (1974); *Rogers v. General Elec. Co.*, 781 F.2d 452 (5th Cir. 1986); *EEOC v. Cosmair, Inc.*, 821 F.2d 1085 (5th Cir. 1987); *Royal v. Secretary of Health and Human Serv.*, EEOC Appeal No. 01903626 (1990).

This article has reviewed the evolution of the FECA and the EEOC as they interact in the area of workplace injuries. The political forces which resulted in the creation of the Civil Rights Act of 1964, and its later amendment to provide for compensatory damages, left us with two systems addressing the same injury from different angles. The end result is that the “exclusive” remedy for workplace injuries of federal employees – the FECA – is not “exclusive” in the eyes of the EEOC. The FECA is exclusive in this area in the eyes of the people who run the FECA process, and the courts are split, with most engineering a result to favor of fighting discrimination. On the same account, the EEOC has now been thrust into the realm of compensating injuries caused by workplace discrimination without any standard for assessing the appropriate level of compensation. Six years after the power has been granted to them, they have advanced little on the road to setting forth an identifiable standard. There is a better way of dealing with this situation that will aid both the claimants, the agencies and the overall goals of both statutes. The question is, will anyone take the steps necessary to “tweak the process” and bring the needed relief?



# The Fifth Amendment Takings Implications of Air Force Aircraft Overflights and the Air Installation Compatible Use Zone Program

MAJOR WALTER S. KING\*

## I. INTRODUCTION

Although many Air Force bases were originally sited in remote areas in order to have the least consequence on land owners and businesses, the rapid growth and spread of major metropolitan areas has resulted in the regular and expanding encroachment by private property owners in the vicinity of Air Force bases. This encroachment could have a serious operational impact at some Air Force installations where flying is an active part of the mission. As this encroachment continues with development in areas overflowed by Air Force aircraft, the Air Force can expect to see an increase in the number of Fifth Amendment<sup>1</sup> claims of inverse condemnation<sup>2</sup> due to overflights.<sup>3</sup>

In order to lessen the impact of encroachment on DoD facilities, the Air Installation Compatible Use Zone program was developed to provide local governmental authorities with information on aircraft accident potential and the impact of aircraft noise on the lands surrounding air installations. The aim of the program is for local governments to use this information to zone the land surrounding air installations in such a way as to prevent development that is incompatible with the flying operations of the installation.<sup>4</sup>

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<sup>1</sup> The Fifth Amendment to the United States Constitution provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." U.S. CONST. amend V.

<sup>2</sup> Inverse condemnation is a cause of action against a government agency to recover the value of property taken by the agency, though no formal exercise of the power of eminent domain has been completed. BLACK'S LAW DICTIONARY 424 (5th ed. 1983).

<sup>3</sup> See *Persyn v. United States*, 935 F.2d 69 (5<sup>th</sup> Cir. 1991). The plaintiffs in *Persyn* argued that the increased decibel levels and risks associated with the introduction of C-5 and B-1 aircraft to Kelly AFB, TX had diminished the value of their property and resulted in a taking. The court dismissed the claim based on the statute of limitations. In *Jensen v. United States*, 305 F.2d 444 (Ct. Cl. 1962) the court found a taking had occurred based on the increase in the number of flights of B-47 aircraft at McConnell AFB, Kansas. See also *Branning v. United States*, 654 F.2d 88 (Ct. Cl. 1981); *Bacon v. United States*, 295 F.2d 936 (Ct. Cl. 1961); *A.J. Hodges Indus., Inc. v. United States*, 355 F.2d 592 (Ct. Cl. 1966); *Aaron v. United States* 311 F.2d 798 (Ct. Cl. 1963).

<sup>4</sup> See Air Installation Compatible Use Zone Program, Air Force Instruction 32-7063 ¶ 1.2.3. (Mar. 31 1994) [hereinafter AFI 32-7063].

The Air Force's challenge will be to minimize potential takings litigation while accomplishing its mission in the face of demands placed upon it by encroachment. This article addresses the development of the law governing Fifth Amendment takings for overflights of aircraft, examines the potential impact that the Supreme Court's decision in *Lucas v. South Carolina Coastal Commission*<sup>5</sup> will have on future litigation in this area, and discusses the defenses available to the Air Force in such cases. The Air Force's Air Installation Compatible Use Zone Program (hereinafter AICUZ), and the takings implications of the program, are then discussed.

## II. DEVELOPMENT OF THE FIFTH AMENDMENT JURISPRUDENCE OVERFLIGHT TAKINGS

### A. The Common Law Approach

The law governing U. S. airspace has undergone significant changes in the past 50 years. Early American common law doctrine governing the ownership of airspace was based on the Roman law maxim *cujus est solum, ejus est usque ad coelum* (whoever has the land possesses all the space upwards to an indefinite extent). This maxim became part of the English common law and was eventually accepted as the predominant common law airspace property rule in English courts.<sup>6</sup> Like many common law rules, this maxim became part of the American tradition<sup>7</sup> and remained the uncontested rule in airspace property rights until after the turn of the century.<sup>8</sup>

With the increase in military and civil aviation, American courts soon faced a plethora of airspace trespass and nuisance cases.<sup>9</sup> These cases caught the American courts without a coherent legal doctrine with which to address the clashes between landowners and aviators. "To hold that every overflight was an actionable trespass would hamper the young industry and the military's ability to train; yet, to allow every low-flying barnstormer to terrorize rural communities with no consequence seemed an equally bad alternative."<sup>10</sup>

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<sup>5</sup> *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

<sup>6</sup> See R. WRIGHT, *THE LAW OF AIRSPACE* 11-30 (1968).

<sup>7</sup> See Colon Cahoon, *Low Altitude Airspace: A Property Rights No-Man's Land*, J. AIR L. & COM., Fall 1990, at 157, 161.

<sup>8</sup> See *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922) (holding that every firing of artillery projectiles over claimant's land constituted a trespass).

<sup>9</sup> Cahoon, *supra* note 7, at 162.

<sup>10</sup> *Id.* at 161.

## B. Air Commerce Act of 1926—Navigable Airspace Established

Congress attempted to clarify the issue of airspace property rights in the Air Commerce Act of 1926,<sup>11</sup> which was initially proposed in order “to encourage and regulate the use of aircraft in commerce and for other purposes.”<sup>12</sup> As part of the Act, Congress established the “navigable airspace” to provide the public with rights to the airspace above the United States analogous to those enjoyed by the public in the use of navigable waters.<sup>13</sup> In fact, most of the provisions of the law were modeled on and often paraphrased from existing maritime laws. The House Report accompanying the bill stated:

This is natural for the reason the airspace, with its absence of fixed roads and tracks and aircraft with their ease of maneuver, present as to transportation practical and legal problems similar to those presented by transportation by vessels upon the high seas. The declaration of what constitutes navigable air space is an exercise of the same source of power, the interstate commerce clause, as that under which Congress has long declared in many acts what constitute navigable or nonnavigable waters. The public right of flight in the navigable air space owes its source to the same constitutional basis which, under the decisions of the Supreme Court, has given rise to a public easement of navigation in the navigable waters of the United States regardless of the ownership of the adjacent or subjacent soil.<sup>14</sup>

Relying on this power, Congress declared that the United States has “complete and exclusive sovereignty in the air space.”<sup>15</sup> By defining the navigable airspace in terms of minimum safe altitudes of flight, Congress left the specific determination of what constitutes such airspace to the Civil Aeronautics Authority, which defined the minimum safe altitude of flight to be 500 feet above ground level.<sup>16</sup>

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<sup>11</sup> Air Commerce Act of 1926, Pub. L. No. 69-254, 44 Stat. 568 (1926).

<sup>12</sup> 67 CONG. REC. 9386 (1926).

<sup>13</sup> *Id.* at 9391.

<sup>14</sup> H.R. Rep. No. 572, 69th Cong., 1st Sess. 9-10 (1926).

<sup>15</sup> Air Commerce Act of 1926, Pub. L. No. 69-254, 44 Stat. 568 (1926).

<sup>16</sup> The Federal Aviation Administration has succeeded the Civil Aeronautics Authority regarding the authority to designate minimum safe altitudes of flight. Although the minimum safe altitude of flight has changed over the years, most recently it has been defined as:

(b) Over congested areas. Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.

(c) Over other than congested areas. An altitude of 500 feet above the surface except over open water or sparsely populated areas. In that case, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.

### C. State Law Approaches

In response to the widespread use of aircraft and Congress' action in declaring the airspace to be within the complete and exclusive sovereignty of the United States, the States have also limited the scope of a landowner's interest in airspace.<sup>17</sup> For example, in Arkansas "the ownership of the space over and above the lands and waters" of the state are vested in the "owner of the surface beneath, but this ownership extends only so far as is necessary to the enjoyment of the use of the surface without interference and is subject to the right of passage or flight of aircraft."<sup>18</sup> Oklahoma defines airspace owned by the surface owner as that which lies within the "vertical upward extension of his or their surface boundaries."<sup>19</sup> This definition, however, is qualified – "in no way contravene, supersede, amend, or alter . . . other provisions of statutory or common law pertaining to aviation . . . ."<sup>20</sup> Similarly, California defines land to include "free or occupied space for an indefinite distance upwards as well as downwards, subject to limitations upon the use of airspace imposed, and rights in the use of airspace granted by law."<sup>21</sup>

Other states limit the ownership of airspace by implication by codifying limits of lawful flight. For example, in North Carolina, flight in aircraft over the lands and waters is lawful, "unless at such low altitude as to interfere with the then existing use to which the land or water, or the space over the land or water, is put by the owner . . . ."<sup>22</sup> In addition, there is a vast amount of state case law which addresses the property owner's rights in airspace. Although the states have adopted differing approaches to the restrictions placed on the ownership of airspace, there is agreement among the states and with Congress that an individual's property interest in airspace is limited.

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Federal Aviation Administration, 14 C.F.R. § 91.119 (1985). The statutory definition of navigable airspace was amended by the Federal Aviation Act of 1958 to read: "Navigable airspace means airspace above the minimum altitudes of flight prescribed by regulations issued under this act, and shall include airspace needed to insure safety in take-off and landing of aircraft." 49 U.S.C. § 1301(29) (1982).

<sup>17</sup> See Ark. Code Ann. § 27-116-102 (1995); CAL. CIV. CODE § 659 (1995); GA. CODE ANN. § 6-2-5 (1995); *Delta Air Corp. v. Kersey*, 193 Ga. 862, 20 S.E.2d 245 (1942); IDAHO CODE § 55-101A (1995); IND. CODE ANN. § 8-21-4-3 (1995); MD. CODE ANN. TRANSP. § 5-104 (1995); MICH. STAT. ANN. § 10.111 (1994); MONT. CODE ANN. § 67-1-203 (1995); 60 OKLA. STAT. tit. 60, § 802; *Antonik v. Chamberlain*, 78 N.E.2d 752 (1947).

<sup>18</sup> Ark. Code Ann. § 27-116-102 (1995).

<sup>19</sup> 60 OKLA. STAT. tit. 60, § 902 (1995).

<sup>20</sup> *Id.*

<sup>21</sup> Cal. Civ. Code § 659 (1995).

<sup>22</sup> N.C. Gen. Stat. § 63-13 (1995).

#### D. The Supreme Court Acts—*United States v. Causby*

In 1946, the Supreme Court was presented with its first case dealing with an overflight taking. In *United States v. Causby*,<sup>23</sup> the plaintiff's property was overflowed during landing and takeoff by large numbers of heavy bombers and smaller fighter aircraft. The overflights were at very low levels just above the tree tops of plaintiff's property. The Court found that the overflights interfered with the normal use of the property as a chicken farm and with the owner's night rest, thereby constituting a taking so as to give the owner a constitutional right to compensation.

In *Causby*, the Court was called upon to weigh the conflicting interests, on one hand, of the government (and, by implication, the public) for the need to use the airspace for the passage of aircraft, and on the other hand, of the owners of subjacent private property to use and enjoy the subjacent land. The Court determined that the landowner does have a property interest in the superadjacent airspace.<sup>24</sup> However, it noted that the airplane is part of modern life and that "the inconveniences which it causes are not normally compensable under the Fifth Amendment."<sup>25</sup> The Court also found the common law doctrine that ownership of the land extended to the periphery of the universe "has no place in the modern world."<sup>26</sup> In reaching this decision, the Court deferred to Congress' conclusion that the airspace above the United States is a valuable public resource analogous to the navigable waters of the United States, an area where Congress' vast authority to regulate is clearly recognized. The Supreme Court described Congress' authority to regulate the navigable waters under the Commerce Clause, in *Scranton v. Wheeler*.<sup>27</sup>

It is commerce, and not navigation, which is the great object of constitutional care. The power to regulate commerce is the basis of the power to regulate navigation and navigable waters and streams, and these are so completely subject to the control of Congress, as subsidiary to commerce, that it has become usual to call the entire navigable waters of the country the navigable waters of the United States. It matters little whether the United States has or has not the theoretical ownership and dominion in these waters, or the land under them; it has, what is more, the regulation and control of them for the purposes of commerce.<sup>28</sup>

Similarly, the Court in *Causby*, when addressing the common law doctrine that the landowner possessed the airspace from the surface to the heavens found that:

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<sup>23</sup> *United States v. Causby*, 328 U.S. 256 (1946).

<sup>24</sup> Superadjacent airspace is the airspace directly above the land at low altitudes. *See Id.* at 265.

<sup>25</sup> *Id.* at 266.

<sup>26</sup> *Id.* at 260.

<sup>27</sup> *Scranton v. Wheeler*, 179 U.S. 141 (1900).

<sup>28</sup> *Id.* at 160.

[T]his doctrine has no place in the modern world. The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts against this idea. To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim.<sup>29</sup>

In addition, the Court in discussing the Air Commerce Act of 1926<sup>30</sup> as amended by the Civil Aeronautics Act of 1938<sup>31</sup> found that under these statutes:

[T]he United States has complete and exclusive sovereignty in the air space over this country. They grant any citizen of the United States a public right of freedom of transit in air commerce through the navigable airspace of the United States. And it is provided that such navigable airspace shall be subject to a public right of freedom of interstate and foreign navigation.<sup>32</sup>

The Court also found that the navigable airspace which Congress has placed in the public domain is “airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority.”<sup>33</sup> As mentioned previously, the Civil Aeronautics Authority established 500 feet above ground level as the minimum safe altitude of flight. The Court stressed that “the flights in question were not within the navigable airspace which Congress placed in the public domain.”<sup>34</sup> Thus, by implication, the Court made clear that flights above that level, because they are in the public domain, would not result in a taking.

In *Causby*, “the United States conceded on oral argument that if the flights over respondent’s property rendered it uninhabitable, there would be a taking compensable under the Fifth Amendment.”<sup>35</sup> Accordingly, the Court held: “Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land.”<sup>36</sup> The Court also held that continuous invasions of the superadjacent airspace at low altitudes affect the use of the surface itself. Landowners were determined to have an incident of ownership in the superadjacent airspace such that invasions of it were “in the same category as

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<sup>29</sup> 328 U.S. at 261.

<sup>30</sup> Air Commerce Act of 1926, Pub. L. No. 69-254, 44 Stat. 568 (1926).

<sup>31</sup> Civil Aeronautics Act of 1938, 52 Stat. 973, 49 U.S.C. 401.

<sup>32</sup> 328 U.S. at 260 (citations omitted).

<sup>33</sup> *Id.* at 261.

<sup>34</sup> *Id.* at 264.

<sup>35</sup> *Id.* at 261.

<sup>36</sup> *Id.* at 266.

invasions of the surface.”<sup>37</sup> The Court then noted that it “is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking.”<sup>38</sup> The Court found that the facts in *Causby* established that there was a diminution in value of the property and that the frequent, low-level flights were the direct and immediate cause. These low level flights were found to impose a servitude upon the land which amounted to the taking of an easement. The case was remanded to the Court of Claims to determine an accurate description of the easement which vested in the United States. Although the Court clearly deferred to Congress’ authority to regulate airspace under its Commerce Clause authority, it also recognized landowners retain a property interest in the airspace immediately above their property.

The Court in *Causby* clearly deferred to Congress’ attempt to define the limits of a landowner’s property interest. However, the Court noted that “while the meaning of property as used in the Fifth Amendment was a federal question, it will normally obtain its content by reference to local law.”<sup>39</sup> It also noted that under North Carolina law the flight of aircraft is lawful “unless at such a low altitude as to interfere with the then existing use to which the land or water, or the space over the land or water, is put by the owner, or unless so conducted as to be imminently dangerous to person or property lawfully on the land or water beneath.”<sup>40</sup> North Carolina law also stated that “sovereignty in the airspace rests in the State except where granted to and assumed by the United States.”<sup>41</sup> Although it is clear that the Court in *Causby* did not base its decision on North Carolina law, but on an act of Congress, it found “if we look to North Carolina law, we reach the same result.”<sup>42</sup>

### **E. Limits on the Government’s Ability to Define the Scope of Fifth Amendment Protection**

The Court’s deferral to Congress in establishing the limits of a landowner’s interest in airspace raises the issue of what limits should be placed on a government’s ability to legislatively define the scope of Fifth Amendment protection. This issue was addressed by the Court in *Ruckelhaus v. Monsanto Co.*<sup>43</sup> and in *Lucas v. South Carolina Coastal Council.*<sup>44</sup> In both of these cases, it was necessary for the Court to determine the extent of the plaintiff’s property interest. In *Ruckelhaus*, the Court determined that “property interests

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<sup>37</sup> *Id.* at 265.

<sup>38</sup> *Id.* at 266.

<sup>39</sup> *Id.* at 265.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Ruckelhaus v. Monsanto Co.*, 467 U.S. 986 (1984).

<sup>44</sup> *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

. . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.”<sup>45</sup> In *Lucas* the Court stated:

In light of our traditional resort to existing rules or understandings that stem from an independent source such as state law to define the range of interests that qualify for protection as property under the Fifth (and Fourteenth) Amendments, this recognition that the Takings Clause does not require compensation when an owner is barred from putting land to a use that is proscribed by those existing rules or understandings is surely unexceptional.<sup>46</sup>

Both of these holdings require that a property interest be defined by independent sources such as state law. These independent sources can include common law and federal laws.<sup>47</sup> *Lucas* places an emphasis on the fact that these “existing rules and understandings”<sup>48</sup> generally provide an objective standard by which the landowner can determine the nature of his property right. This approach is based on the theory that the common law and recently enacted prospective legislation embody traditions which a landowner should be aware of when he acquires property.<sup>49</sup>

In contrast, the Court in *Causby* rejected outright the common law doctrine as having “no place in the modern world.”<sup>50</sup> As a result, the independent source, absent state law,<sup>51</sup> for determining one’s property interest in airspace was essentially destroyed. The Court then deferred to Congress’ definition of the relevant property interest. It allowed Congress to restrict the common law notion of property in airspace by declaring that airspace above a certain level was in the public domain. Congress was essentially allowed to define the limit of a constitutional right.

Although courts should resist allowing the use of the legislative process to define the scope of a constitutional liberty, when one considers the compelling situation with which the Court was presented, this outcome is not surprising. The common law doctrine that granted the landowner ownership of all the airspace up to the heavens was apparently created by men who never envisioned the airplane. In addition, as discussed above, in light of the development of air commerce, the airspace above the United States is very much analogous to the use of boats on the navigable waterways. In light of

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<sup>45</sup> *Id.* at 1001.

<sup>46</sup> *Id.* at 1029.

<sup>47</sup> *Presault v. United States*, 27 Fed. Cl. 69 (1992).

<sup>48</sup> 505 U.S. at 1029.

<sup>49</sup> *Id.* at 1027.

<sup>50</sup> 328 U.S. at 261.

<sup>51</sup> At the time the Air Commerce Act of 1926 was passed, those states that had codified a definition of land generally applied the common law approach considering the property to include the upper reaches of the airspace above it. Thus, state law at the time was consistent with the common law approach.



Congress' vast authority pursuant to the Commerce Clause it was probably no great leap for the Court when it determined that Congress possessed the authority to declare that the United States had "complete and exclusive sovereignty in the air space"<sup>52</sup> over this country, and that there was "a public right of freedom of transit in air commerce through the navigable airspace of the United States."<sup>53</sup>

#### **F. The Federal Aviation Act of 1958**

Following the decision in *Causby*, and faced with the rapid post-war expansion of aviation, Congress in the Federal Aviation Act of 1958 reconsidered the regulation of airspace as contained in the Air Commerce Act of 1926. In this new Act, Congress redefined navigable airspace to mean "airspace above the minimum altitude of flight prescribed by regulation (500 feet) and airspace needed to ensure safety in takeoff and landing of aircraft."<sup>54</sup> The definition of navigable airspace was expanded to include that airspace below 500 feet needed for takeoff and landing. This new definition of airspace raised the issue of whether flights within the navigable airspace below 500 feet during takeoff and landing could result in a taking of the land beneath.

#### **G. The Limits of the Supreme Court's Deference to Congress—*Griggs v. Allegheny County***

In *Griggs v. Allegheny County*,<sup>55</sup> the Court dealt with Congress' expansion of the definition of navigable airspace. In *Griggs*, the flight pattern at the county airport required planes to takeoff and land by passing within 30 to 300 feet above plaintiff's house. The noise was "comparable to that of a noisy factory."<sup>56</sup>

Although all the flights on takeoff and landing were within the navigable airspace defined by Congress, the Court found that a taking of an air easement had occurred. In reaching its decision the Court noted that:

At the time of the *Causby* case, Congress had placed the navigable airspace in the public domain, defining it as "airspace above the minimum safe altitudes of flight prescribed" by the C.A.A. 44 Stat. 574. We held that the path of the glide or flight for landing or taking off was not the downward reach of the "navigable airspace."<sup>57</sup>

The Court then noted that the Act was amended in response to its holding that the airspace needed for takeoff and landing was not included in the navigable airspace. Although this airspace was now included in the definition of

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<sup>52</sup> 328 U.S. at 260.

<sup>53</sup> *Id.*

<sup>54</sup> Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 739 (1958).

<sup>55</sup> *Griggs v. Allegheny County*, 369 U.S. 84 (1962).

<sup>56</sup> *Id.* at 86.

<sup>57</sup> *Id.* at 88 (citing *United States v. Causby*, 328 U.S. 256, 264 (1946)).

navigable airspace, the Court referred to that portion of its holding in *Causby* which states: “use of land presupposes the use of some of the airspace above it otherwise no home could be built, no tree planted, no fence constructed, no chimney erected . . . .”<sup>58</sup> “An invasion of the superadjacent airspace will often affect the use of the surface of the land itself.”<sup>59</sup> The Court in *Griggs*, by reference to *Causby*, made a point of distinguishing between the impact of flights within the navigable airspace above 500 feet and those below 500 feet. Although the Court in *Causby* was willing to defer to Congress in its judgment of what constitutes navigable airspace, its refusal to defer to Congress’ expanded definition of airspace made clear that there were limits to that deference.

## H. The Court’s Test for Overflight Takings

*Causby* and *Griggs* essentially established the test now followed in virtually all subsequent overflight takings cases.<sup>60</sup> This test has been interpreted to require a consideration of four factors: (1) a flight directly over the claimant’s land; (2) flights which were low and frequent; (3) the flights directly and immediately interfered with the claimant’s enjoyment and use of the land; and (4) the interference with enjoyment and use was substantial.<sup>61</sup> In *A.J. Hodges Indus., Inc. v. United States*,<sup>62</sup> the court articulated this test as follows:

[T]he courts have held that when regular and frequent flights by Government-owned aircraft over privately owned land at altitudes of less than 500 feet from the surface of the ground constitute a direct, immediate, and substantial interference with the use and enjoyment of the property, there is a taking by the Government of an avigation easement,<sup>63</sup> or easement of flight, in the airspace over the property, and that this taking is compensable under the Fifth Amendment to the Constitution.<sup>64</sup>

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<sup>58</sup> 328 U.S. at 264.

<sup>59</sup> *Id.* at 265.

<sup>60</sup> See *Matson v. United States*, 171 F. Supp. 283 (Ct. Cl. 1959); *Aaron v. United States*, 311 F.2d 798 (Ct. Cl. 1963); *A.J. Hodges Indus., Inc. v. United States*, 355 F.2d 592 (Ct. Cl. 1966); *Lacey v. United States*, 595 F.2d 614 (Ct. Cl. 1979); *Brown v. United States*, 73 F.3d 1100 (Fed. Cir. 1996).

<sup>61</sup> *Brown v. United States*, 73 F.3d 1100 (Fed. Cir. 1996).

<sup>62</sup> *A. J. Hodges Indus., Inc. v. United States*, 355 F.2d 592 (1966).

<sup>63</sup> Takings that result from overflights are often referred to as “avigation easements” (by analogy to the sovereign’s right of navigational servitude in navigable waters of the sovereignty) and as an “easement of flight” (by analogy to easements taken by the sovereign in the airspace over land for public purposes). See *Branning v. United States*, 654 F.2d 88, 91 n.1 (Ct. Cl. 1981).

<sup>64</sup> 355 F.2d at 594. See also *Bacon v. United States*, 295 F.2d 936 (Ct. Cl. 1961); *Lacey v. United States*, 595 F.2d 614, 616 (Ct. Cl. 1979); *Bodine v. United States*, 210 Ct. Cl. 687, 688 (1976); *Mid-States Fats & Oils Corp. v. United States*, 159 Ct. Cl. 301, 309 (1962).

## I. The Impact of the 500 Foot Rule—*Aaron v. United States*

In contrast to *Causby*, *Griggs*, and *Hodges*, which all dealt with flights below the 500 feet minimum safe level of flight, the court in *Aaron v. United States*,<sup>65</sup> was squarely presented with the issue of the effect of Congress' definition of "navigable airspace" to include airspace over 500 feet. In *Aaron*, the Air Force took over operation of a Los Angeles County airport and began using it to conduct flight-testing of Air Force aircraft being produced at the adjacent Air Force Plant No. 42. The flights from the airport passed over some of the plaintiff's parcels below 500 feet, while the flights over other parcels were above 500 feet.<sup>66</sup> The court determined that only plaintiffs who complained of overflights under the 500 foot level had stated a proper cause of action. In reaching its decision, the court found:

It is true that the inconvenience and annoyance experienced from the passage of a plane at 501 feet above a person's property is hardly distinguishable from that experienced from the passage of a plane at, say, 490 feet, but the extent of a right-of way, whether on the ground or on water or in the air, has to be definitely fixed. Congress has fixed 500 feet as the lower limit of navigable air space: what may be permissible above 500 feet is forbidden below it, unless compensation is paid therefore.<sup>67</sup>

Plaintiffs may not recover for flights above the 500 minimum altitude of flight which are in the public domain. Claims for a taking below 500 feet, where aircraft are taking off and landing, although statutorily part of the public airspace, may be compensable if the flights are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land.

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<sup>65</sup> *Aaron v. United States*, 311 F.2d 798 (Ct. Cl. 1963).

<sup>66</sup> *Id.* at 801.

<sup>67</sup> *Id.*

## J. The Exception to the Rule—*Branning v. United States*

The notable exception to this rule is *Branning v. United States*.<sup>68</sup> “The novelty of this decision is in its holding that defendant’s use of airspace at altitudes above 500 feet, and independent of landing and takeoff, may be a taking of land beneath if the use is peculiarly burdensome.”<sup>69</sup> In *Branning*, the plaintiff, a land developer, sought recovery from the United States for the diminution in value of his land due to regular and frequent overflights by Marine Corps F-4 aircraft. The flights were from a Marine Corps training field for simulated aircraft carrier landings.<sup>70</sup> In order to perform this maneuver, trainees were required to fly F-4 jets with their nose up and tails down, with near maximum power applied, as they approached the simulated carrier deck at low speeds and altitudes. Since training was conducted squadron-by-squadron, and each plane repeated the maneuver several times, the air traffic to the runway was virtually nose-to-tail over a period of several days during each month in which the training was conducted.<sup>71</sup> The plaintiff in *Branning* owned 525 acres over which these F-4 aircraft flew while practicing at the Marine field.<sup>72</sup> A claim was brought against the United States for the taking of an avigation easement over the plaintiff’s land.<sup>73</sup> The overflights complained of were at 600 feet above the plaintiff’s property, while the minimum safe altitude for that airspace was 500 feet.<sup>74</sup>

According to the rationale of *Causby* and its progeny, which held that a landowner had no property interest in the navigable airspace over 500 feet, *Branning* should have been dismissed. The court, however, concluded: “It is clear that the Government’s liability for a taking is not precluded merely because the flights of Government aircraft are in what Congress has declared to be navigable airspace and subject to its regulation.”<sup>75</sup> The court determined that the flights over the plaintiff’s land resulted in “unavoidable damage (reduction of the highest and best use) occasioned by the noise created during travel in the navigable airspace which was so severe as to amount to a practical destruction of the land.”<sup>76</sup> In support of this conclusion the court stated:

The question thus raised is whether the 500-foot altitude is so critical a measure of the avigational servitude that liability can be avoided simply by flying noisier aircraft at an altitude of 501 feet. Minimum safety altitude and minimum noise levels are concerned with two different things. While safety

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<sup>68</sup> *Branning v. United States*, 654 F.2d 88 (Ct. Cl. 1981).

<sup>69</sup> *Id.* at 90.

<sup>70</sup> *Id.* at 91.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 90-91.

<sup>74</sup> *Id.* at 91-92.

<sup>75</sup> *Id.* at 99.

<sup>76</sup> *Id.* at 102.

may be measured in terms of altitude, a reasonable noise level cannot be measured solely in terms of altitude. . . . Since the subjacent property owner has suffered a diminution of the value<sup>77</sup> of his property . . . it is abundantly clear that under the law established by *Causby*, *Griggs*, and *Aaron* a taking has occurred in this case.<sup>78</sup>

Although the *Branning* decision conflicted with that of *Aaron*, the court refused to reject *Aaron* outright. The per curium opinion in *Branning* very carefully explained that the holding was limited to the specific facts of the case. “This hesitancy to reject the *Aaron* opinion meant that *Branning* would have little influence on airspace property issues in the future.”<sup>79</sup> In fact, courts can simply treat *Branning* as the exception to the rule.

### III. POTENTIAL IMPACTS OF THE SUPREME COURT’S DECISION IN *LUCAS V. SOUTH CAROLINA COASTAL COMMISSION*

#### A. *Lucas v. South Carolina Coastal Commission*—An Overview

Having reviewed the development of the law in the area of overflight takings, the Supreme Court’s decision in *Lucas v. South Carolina Coastal Council*<sup>80</sup> must be examined to determine its impact on future litigation in the area of overflight takings. In *Lucas*, the plaintiff bought two residential lots on a South Carolina barrier island, intending to build single-family homes similar to those on the immediately adjacent property.<sup>81</sup> At the time plaintiff bought the lots, they were not subject to any coastal zone building permit requirements.<sup>82</sup> In 1988, however, the state enacted a statute which barred the plaintiff from erecting any permanent habitable structures on his property.<sup>83</sup> Plaintiff filed suit contending that the statute deprived him of all “economic viable use” of his property and therefore effected a taking under the Fifth and Fourteenth Amendments.<sup>84</sup>

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<sup>77</sup> It should be noted that the court in *Branning* did not rely on diminution of value alone to reach its decision. The court focused on the impacts that the flights had on the land and the owner’s use of the land. The court also relied heavily on the fact that the Marine Corps had published a study which indicated that the noise from that aircraft made the land unsuitable for residential use. Thus, the court’s reference to “diminution in value” does not conflict with the Supreme Court’s decisions in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), and *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978), which establish that mere diminution in value alone will not constitute a taking.

<sup>78</sup> 654 F.2d at 102.

<sup>79</sup> Cahoon, *supra* note 7, at 191.

<sup>80</sup> *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

<sup>81</sup> *Id.* at 1006-07.

<sup>82</sup> *Id.* at 1007.

<sup>83</sup> *Id.* at 1008.

<sup>84</sup> *Id.*

### 1. *The Logical Antecedent Inquiry*

In *Lucas*, the Supreme Court was interested in the “pre-existing” limitations on the landowner’s title to determine the extent of his property interest. The Court’s focus was on the “landowner’s expectations as of the date on which he acquired his interest.”<sup>85</sup> Pursuant to *Lucas*, a state may resist compensating property owners for burdensome regulation:

[O]nly if the logically antecedent inquiry into the nature of the owner’s estate shows that the proscribed use interest were not part of his title to begin with. This accords, we think, with our “takings jurisprudence,” which has traditionally been guided by the understandings of our citizens regarding the content of, and the State’s power over, the “bundle of rights” that they acquire when they obtain title to property. . . .<sup>86</sup>

The court, in *M&J Coal Co. v. United States*,<sup>87</sup> interpreted *Lucas* to create a two-tiered approach to analyzing takings claims:

First a court must determine whether the claimant held a property right that is compensable under the Fifth Amendment. A compensable right does not exist if it was not part of the claimant’s title at the time the claimant took title to the property. For example, if at the time of sale an existing law or regulation precluded a certain use, that use was never a “stick” in the purchaser’s “bundle of rights.” Second, if the claimant establishes the existence of a compensable right, the court must determine whether the governmental action constituted a taking of that right.<sup>88</sup>

Under the “logically antecedent inquiry” required by these cases, the court must first inquire into the “nature of the owner’s estate” to determine if the uses of the land proscribed by regulation were originally part of the owner’s title. As mentioned earlier, in determining what is included in the owner’s “bundle of rights,” the court looks to existing rules or understandings that stem from an independent source such as state law to define the range of interests that qualify for protection as property under the Fifth and Fourteenth Amendments. These decisions attempt to define compensable property according to the objective understandings of the property owners themselves. In other words, the property must be defined based on the objective manifestation of traditions found in the common law or recently enacted prospective legislation. The Supreme Court believes that these are

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<sup>85</sup> *Presault v. United States*, 27 Fed. Cl. 69, 86 (1992).

<sup>86</sup> 505 U.S. at 1026.

<sup>87</sup> *M&J Coal Co. v. United States*, 30 Fed. Cl. 360 (1994). In *M&J Coal*, the court held that enforcement actions of the Office of Surface Mining did not amount to a taking of the mine operators property.

<sup>88</sup> *Id.* at 367.

manifestations and principles that owners should be aware of when they acquire property.<sup>89</sup>

## 2. *Per Se Takings*

In addition to its emphasis on the logical antecedent inquiry, the Court in *Lucas* created a standard for a *per se* taking in cases involving a physical invasion of land. The Court found:

“Where permanent physical occupation of land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted public interests involved - though we assuredly would permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner’s title.”<sup>90</sup>

The Court also created a standard for a *per se* confiscatory regulatory taking (“*i.e.*, regulations that prohibit all economically beneficial use of land”).<sup>91</sup> “The new rule is that a regulation depriving a landowner of all economically viable use of his property will be deemed a taking without regard to the public interest served, except when a nuisance or limitation on title imposed by [pre-existing] state [or federal] law is involved.”<sup>92</sup> Thus, if a compensable property interest is not established by the logically antecedent analysis, then *Lucas’ per se* takings would not apply.

## 3. *Applicability of the Penn Central Tripartite Test*

If the facts of a case do not meet the test of either of these *per se* takings, the court examines the three factors set out in *Penn Central Transportation Co. v. New York City*<sup>93</sup> to ascertain if public action works a taking. The factors to be examined include: the character of the government action; the extent to which the regulation interferes with reasonable investment-backed expectations; and the economic impact of the government

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<sup>89</sup> See *Ruckelhaus v. Mansanto Co.*, 467 U.S. 986, 1001, 1005 (1984); *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980); *Board of Regents v. Roth*, 408 U.S. 564, 577 (1980); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); *Pennsylvania Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

<sup>90</sup> 505 U.S. at 1028.

<sup>91</sup> *Id.* at 1029.

<sup>92</sup> 27 Fed. Cl. at 86 (1992). In *Presault*, Plaintiff’s claimed compensation for efforts by the federal government to use portions of a railroad right of way as a bicycle path. Applying the Supreme Court’s *Lucas* analysis, the court held that the plaintiff’s could have no reasonable expectation of compensation at the time they acquired the property. This was based on the historic extensive federal regulation of the railroad industry and the nature of the easement. See also *M&J Coal Co. v. United States*, 30 Fed. Cl. 360 (1994).

<sup>93</sup> 438 U.S. at 124.

action.<sup>94</sup> However, once again, the logically antecedent inquiry must first be addressed to determine if the landowner possesses a property right compensable under the Fifth Amendment.

## **B. Applicability of Lucas' *Per se* Takings to Overflights**

### *1. Physical Invasion*

Having reviewed the Supreme Court's holding in *Lucas* and other modern cases which applied its test, *Lucas'* impact on the *Causby* test must be analyzed. Because Congress has declared the airspace above 500 feet to be within the "complete and exclusive sovereignty of the United States" it is clear that the *per se* takings under *Lucas* would have no applicability to flights over 500 feet that occurred after enactment of the Air Commerce Act of 1926. *Lucas* established that the government is allowed to assert as a defense to a *per se* physical occupation claim the fact that there is a permanent easement that was a pre-existing limitation upon the landowner's title.<sup>95</sup>

The Court cited *Scranton v. Wheeler*<sup>96</sup> as an example where a permanent easement was a pre-existing limitation on the landowner's title. In *Scranton*, the Court found that even where the riparian owner's<sup>97</sup> title extends to the middle line of a lake or stream under state law, his rights are subject to the "public easement of servitude of navigation."<sup>98</sup>

As discussed previously, the legislative history surrounding the Air Commerce Act of 1926 clearly indicates that Congress determined navigable airspace to be analogous to navigable waters. This is reflected in its finding that "the public right of flight in the navigable air space owes its source to the same constitutional basis which . . . has given rise to a public easement of navigation in the navigable waters of the United States."<sup>99</sup> In fact, the legislation creating and regulating the navigable airspace was patterned after that controlling the navigable waters. Thus, it is logical to conclude that a public easement for navigation of flight for flights above 500 feet should be afforded the same status as the navigational servitude in *Scranton*. The government, therefore, should be able to assert as a defense a permanent easement regarding flights within the navigable airspace over 500 feet.

### *2. Confiscatory Regulation*

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<sup>94</sup> *Id.*

<sup>95</sup> H.R. Rep. No. 572, 69th Cong., 1st Sess. 9-10 (1926).

<sup>96</sup> *Scranton v. Wheeler*, 179 U.S. 141 (1900).

<sup>97</sup> A riparian owner is "one who owns land on bank of river, or one who is owner of land along, bordering upon, bounded by, fronting upon, abutting or adjacent and contiguous to and in contact with river." BLACK'S LAW DICTIONARY 690 (5th ed. 1983).

<sup>98</sup> 179 U.S. at 161.

<sup>99</sup> H.R. Rep. No. 572, 69th Cong., 1st Sess. 9-10 (1926).



*Lucas*' other *per se* exclusion protects the landowner from confiscatory regulations; that is, regulations that prohibit all economically beneficial use of land. "Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restriction that background principles of the State's law of property and nuisance already place upon land ownership."<sup>100</sup> Once again, it could be argued that pursuant to pre-existing federal law, the limitation on the use of airspace over 500 feet inheres in the title itself; therefore, the government also has a defense to this *per se* taking for flights over 500 feet.

However, the applicability of the *per se* takings tests remains an issue for flights below 500 feet. Because overflights are not an actual occupation of the land, it is hard to imagine that the *per se* physical occupation test would have any applicability to an overflight case. This follows the Supreme Court's analysis of overflight takings—the *Causby* test must first be applied to determine if the overflights have resulted in interference with the land that is essentially equivalent to physical occupation.

The application of the *per se* taking test for a confiscatory taking, however, would appear to be consistent with *Causby*. This test requires that a taking be found when regulation results in destruction of all economically viable use of the property. A review of the cases reveals that the use of this test and the "substantial interference" test under *Causby* could yield similar results. In *Causby* and *Griggs*, the flights so interfered with the land as to destroy its use for agricultural or residential uses. While the Court in these cases did not find that the plaintiff was denied all economically beneficial use of the land, it is possible that flights could be so low and frequent as to have such an effect. Thus, it is only logical to conclude that, if an overflight denies a property owner all beneficial use of his property, the overflights are no doubt causing a direct, immediate and substantial interference with the enjoyment and use of the land as required by *Causby*.

### **C. *Lucas*' Applicability to Cases That Do Not Constitute a *Per se* Taking**

Having discussed the effects of *Lucas*' *per se* takings test in the area of overflights, the focus now turns to its application to overflights which do not constitute *per se* takings. The courts have rejected the common law doctrine, *ad coelum*, and deferred to Congress' definition of navigable airspace as that which is above 500 feet.<sup>101</sup> In light of these findings, for flights above 500 feet,<sup>102</sup> the "logical antecedent inquiry" into the existence of compensable

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<sup>100</sup> 505 U.S. at 1029.

<sup>101</sup> H.R. Rep. No. 572, 69th Cong., 1st Sess. 9-10 (1926).

<sup>102</sup> This would be the case in non-congested areas. For congested areas, the navigable airspace is defined to be 1000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft. See 14 C.F.R. § 91.119, *supra* note 16.

property must be answered in the negative. Certainly Congressional action, followed by years of deference by the courts, creates a principle of law which serves as an objective manifestation to landowners that the airspace over 500 feet is not part of their “bundle of rights.” This conclusion is also supported by *Lucas*’ finding that the government, in a case of physical occupation, may “assert a permanent easement that was a pre-existing limitation upon the landowner’s title.”<sup>103</sup> If, however, the flights in question are below 500 feet, the “logical antecedent inquiry” necessarily requires a finding that the landowner does possess a compensable property interest. Once it is established that the landowner does in fact have a compensable property interest, the second test required by *Lucas*, as articulated by *M&J Coal*, must be answered: Is the governmental action a taking of that right?

#### ***D. Penn Central’s Applicability to Overflight Takings***

As discussed above, normally the *Penn Central* test should be applied if a claim is not a *per se* taking. However, the United States Court of Appeals’ for the Federal Circuit post-*Lucas* decision in *Brown*,<sup>104</sup> suggests use of *Causby* as the takings test for overflight cases. A comparison of the two tests, however, reveals that they would often produce similar results when applied to overflight cases. The *Penn Central* test requires an analysis of the character of the government action; the extent to which the regulation interferes with reasonable investment-backed expectations; and the economic impact of the government action.<sup>105</sup> The *Causby* test requires that aircraft interference must be directly overhead, at low levels, frequent, and represent a substantial interference with the use and enjoyment of one’s property.

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<sup>103</sup> 505 U.S. at 1028.

<sup>104</sup> *Brown v. United States*, 73 F.3d 1100 (Fed. Cir. 1996). *Brown* is the only reported overflight taking case decided in federal court since the Court’s *Lucas* decision. The court in *Brown* continued to apply the *Causby* test post-*Lucas*. The Browns owned a 6,858 acre ranch near Del Rio, in West Texas. The Air Force since January 1991 used a small airfield, Wizard Auxiliary Airfield, near the Browns’ ranch, to train its pilots. Flights out of Laughlin Air Force Base, about 25 miles to the northwest of Wizard, conducted “touch and go” exercises on the Wizard airstrip. On take off and landing from Wizard’s airstrip, planes flew less than 500 feet above ground level over at least 100 acres of the Browns’ property. At trial, the U.S. Court of Federal Claims held that pursuant to *Causby*, “the Browns could not recover as a matter of law, because although the occurrence of frequent and low overflights was undisputed, the Browns had not shown substantial interference with their present enjoyment and use of the overflowed surface property.” *Brown v. United States*, 30 Fed. Cl. 23, 26 (1995). On appeal, the court determined that summary judgment was improperly granted. The court found that the proper test to be applied was indeed the *Causby* test. The case was remanded for further findings regarding *Causby*’s requirement that the flights directly, immediately, and substantially interfered with the claimant’s enjoyment and use of the land. 73 F.3d at 1106.

<sup>105</sup> *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

Referring to *Causby*, the Court in *Penn Central*, while discussing the character of governmental action, found that “a taking may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.”<sup>106</sup> As the basis for an overflight taking is a physical invasion, the *Penn Central* Court implies that it would more readily find a taking in an overflight case than in a case involving a state’s authority to zone property.

In addition, *Penn Central*’s test regarding interference with investment-backed expectations is capable of yielding the same result as *Causby*’s requirement for substantial interference with the use and enjoyment of one’s property. For example, in *Causby* there is little doubt that the landowner’s investment-backed expectation of using his land for a residence and chicken farm were destroyed by the government’s actions. Although these two test are capable of yielding similar results, it is clear that *Causby*’s definition of a taking is narrower and more objective than that found in *Penn Central*. *Penn Central* provides a broader, more subjective test which could theoretically lead to a finding of a taking in more circumstances than *Causby*. However, as illustrated above, when the *Penn Central* test is applied to an overflight takings case, it is essentially equivalent to *Causby*’s “substantial interference with use” test. In fact, it could be argued that *Penn Central*’s emphasis on the financial impact of the government’s action is essentially another method of determining whether the overflight’s interference with the property is or isn’t “substantial.”

#### **IV. FIFTH AMENDMENT DEFENSES AVAILABLE POST-LUCAS**

##### **A. Statute of Limitations**

Having reviewed the law governing compensation for overflights and the potential impacts of *Lucas*, defenses available to the government in such cases must be examined. One procedural defense of particular importance is the statute of limitations. Claims that the United States has taken an avigation easement must be brought within six years of the date of the alleged taking.<sup>107</sup> Such claims in overflight cases begin to accrue, and the 6-year period of limitations begins to run, when regular and frequent intrusions by noisy aircraft into the airspace above the land in question begin to interfere seriously with the use and enjoyment of such land.<sup>108</sup>

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<sup>106</sup> *Id.*

<sup>107</sup> 28 U.S.C. § 2501; *See Powell v. United States*, 1 Cl. Ct. 669 (1983); *Hero Lands v. United States*, 1 Cl. Ct. 102, 106-07 (1984).

<sup>108</sup> *See Brin v. United States*, 159 Ct. Cl. 332, 339 (1962). The courts have also recognized that there may be a prior, or incremental taking. This is to say that if aircraft flights occurring before the six year statute of limitations created substantially the same level of interference, the action would be barred. If, however, there has simply been an increase in the amount of

## B. Direct Invasion of Airspace Required

In addition to the statute of limitations defense, the four elements of the *Causby* test necessarily create four substantive defenses. The first element requires that aircraft “directly” invade the airspace over the property. In *Batten v. United States*,<sup>109</sup> plaintiffs resided next to an active military installation. Operations at the base produced “[S]ound and shock waves which cross plaintiffs’ properties and limit the use and enjoyment thereof. . . . Strong vibrations cause windows and dishes to rattle. Loud noises frequently make conversation and use of the telephone, radio, and television facilities impossible and also interrupt sleep.”<sup>110</sup> The *Batten* court found a substantial diminution in the value of the plaintiff’s homes, however, there were no flights over the plaintiffs’ property. Noting that recovery had been uniformly denied “absent invasion,” the court dismissed the complaint.<sup>111</sup> The same result was reached where flights were “alongside” plaintiff’s property,<sup>112</sup> and where engine test cell operations adjacent to plaintiffs’ property interfered with the subject properties.<sup>113</sup> Thus, even though the particular activity complained of may interfere substantially with the use and enjoyment of the property, the courts will not find a taking unless the airspace over the property has been directly invaded.<sup>114</sup>

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interference over that which existed prior to the six years, the courts may find only a partial taking, and compensation would be calculated accordingly. See *Hero Lands v. United States*, 1 Cl. Ct. 102, 106-107 (1984); *Hodges Indus., Inc. v. United States*, 355 F.2d 592, 594 (Ct. Cl. 1966).

<sup>109</sup> *Batten v. United States*, 306 F.2d 580 (10th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963).

<sup>110</sup> *Id.* at 582.

<sup>111</sup> *Id.* at 584.

<sup>112</sup> *Freeman v. United States*, 167 F. Supp. 541 (W.D. Okla. 1958).

<sup>113</sup> *Pope v. United States*, 173 F. Supp. 36 (N.D. Tex. 1959).

<sup>114</sup> Plaintiffs would not be able to recover under the Federal Tort Claims Act (FTCA), 28 U.S.C.A. §§ 1346(b) (1976), 2671-2680 (1994), if the overflights are within the navigable airspace or conducted pursuant to other Federal Aviation Administration (FAA) regulations. The FTCA only allows recovery

for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. 28 U.S.C.A. § 1346(b) (1976).

Flights conducted within the navigable airspace, or pursuant to FAA regulations, are lawful and would not satisfy the FTCA’s requirement that the damage or injury result from a negligent or wrongful act. For a thorough discussion of the FTCA’s applicability to aircraft operations, see Robert A. Shapiro, *Federal Tort Claims Act: Claims Arising Out of Operation of Aircraft*, 5 A.L.R. FED. 440 (1970).

### C. Low and Frequent Flights Required

The second element of the *Causby* test requires that the flights be “low” and “frequent.” As discussed above, *Causby* and its progeny clearly indicate that flights above 500 feet are in the public domain, therefore; a landowner would not have a compensable property interest in airspace above 500 feet. The government has a defense in cases where the flights involved are above 500 feet. However, where these flights are below the navigable airspace, the landowner may be found to have a compensable property interest and the “low” element of the *Causby* test is present. Although the law is clear on what constitutes “low” flight, there is little case law as to what constitutes “frequent” flying. In addition, frequency only becomes an issue if the other *Causby* elements are present. While it was evident in *Jensen v. United States*, that seven hundred flights daily with a takeoff and landing every two minutes was a taking,<sup>115</sup> other cases have not been as evident. For example, in *Aaron*, two flights per day under 500 feet were determined not to have substantially interfered with plaintiff’s property.<sup>116</sup> However, a dozen was enough to establish a taking where flights continued to increase daily.<sup>117</sup> As *Aaron* demonstrates, there is no ready rule as to how frequently a plaintiff’s property must be directly overflowed at low levels to constitute a taking, but it clearly indicates that an occasional direct overflight is insufficient.

### D. Direct, Immediate and Substantial Interference Required

The third and fourth elements of the *Causby* test require that the flights, having met all the other criteria, must result in “a direct and immediate interference with the enjoyment and use of the land”<sup>118</sup> and that such

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<sup>115</sup> *Jensen v. United States*, 305 F.2d 444, 445 (Ct. Cl. 1962). In *Jensen*, the Government argued that the statute of limitations should bar the plaintiff’s claim. The Government contended that flights of B-47 aircraft from McConnell Air Force Base began to interfere with plaintiff’s land in 1951. The plaintiff asserted that the interference did not take place until sometime after 1952. The court found that in 1950, 1951 and early 1952, there were only about two tests of new aircraft a day at the base. The court compared that to the daily average of 700 flights per day occurring in 1958. In reaching its decision the court found:

“There is, unfortunately, no simple litmus test for discovering in all cases when an aviation easement is first taken by overflights. Some annoyance must be borne without compensation. The point when that stage is passed depends on a particularized judgment evaluating such factors as the frequency and level of the flights; the type of planes; the accompanying effects, such as noise or falling objects; the uses of the property; the effect on values; the reasonable reactions of the humans below; and the impact upon animals and vegetable life.” *Id.* at 446.

<sup>116</sup> *Aaron v. United States*, 311 F.2d 798, 800 (Ct. Cl. 1963).

<sup>117</sup> *Id.*

<sup>118</sup> 328 U.S. at 266.

interference be substantial.<sup>119</sup> In *Causby*, the highest and best use of the property as a chicken farm was destroyed. In *Speir v. United States*<sup>120</sup> the standard was “a direct, immediate, and substantial interference with the use and enjoyment of property.”<sup>121</sup> It is apparent that the language used to describe interference in these cases is necessarily general, but a useful analogy can be drawn to regulatory takings cases. These cases hold that diminution in value alone, even if substantial, does not constitute a taking.<sup>122</sup> Arguably, plaintiffs must prove a substantial interference with the use and enjoyment of their property that extends beyond the simple diminution of property values. As discussed in the comparison of the *Penn Central* and *Causby* tests, the *Causby* test is generally consistent with these regulatory takings cases which require substantial diminution in economic viability.

### **E. Applicability of Defenses and *Causby* Test to Lands Purchased before 1926.**

These defenses assume application of the *Causby* test to cases in which the property was purchased after Congress exerted control over the navigable airspace in the Air Commerce Act of 1926. Under a *Lucas* analysis into the logical antecedent inquiry, this raises the issue of what the rights are of those individuals who acquired property prior to the government’s exerting its control over the navigable airspace. Under the logical antecedent inquiry, if the property was purchased prior to 1926, the owner under common law would have a protected property interest in the airspace above his land;<sup>123</sup> therefore,

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<sup>119</sup> 305 F.2d at 447-48.

<sup>120</sup> *Speir v. United States*, 485 F.2d 643 (1973). In *Speir*, the court found that flights by Army helicopters at altitudes as low as 250 feet and generally below 500 feet over the plaintiffs residence and 683 acre farm constituted a taking. The helicopters involved overflow plaintiff’s land to reach a temporary training strip constructed for use during the Vietnam war. During the 4 1/2 year period that the temporary landing site was in use the flights averaged between 9,434 to 11,533 flights per month. The court found that the flights interfered with television reception, telephone conversations and personal conversations. In addition, because the noise from the helicopters caused dove and quail to leave the land, the hunting on the land was ruined. The court found that this evidence supported a finding that there was a direct, immediate, and substantial interference with the land. Although the taking was temporary (4 1/2 years) the court found that it was compensable under the fifth amendment.

<sup>121</sup> *Id.* at 646.

<sup>122</sup> See *Agins v. City of Tiburon*, 447 U.S. 255, 261-62 (1980) (zoning that greatly reduced value of property not a taking where plaintiff could still build up to five homes on property); see also, *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978) (diminution in value alone does not affect a taking); *Deltona v. United States*, 657 F.2d 1184 (Cl. Ct. 1981) (diminution in value by itself cannot establish a taking).

<sup>123</sup> Prior to 1926, all the states essentially followed the common law doctrine, relying on state law to determine a property owner’s compensable property interest. However, after the Air Commerce Act of 1926, Congress pre-empted regulation of the airspace; therefore, any state laws conflicting with the federal statute after that point would not serve to define the compensable property interest of the landowner.

theoretically the proper test to be applied to overflight takings cases involving property purchased before 1926 would be *Lucas*. However, on a practical level, one should expect the courts to continue to apply the well-established *Causby* test to all overflight cases regardless of the date the property interest was acquired.

As encroachment continues, the Air Force will continue to have changing operational needs. This, coupled with ever changing technological advances and tactics that often require changes in operations, will no doubt mean that the Air Force will continue to face inverse condemnation claims as a result of overflights. The outcome of future overflight litigation, however, should be more predictable as a result of the Supreme Court's holdings in *Lucas*, which combined with the *Causby* test provides the modern framework for analyzing overflight taking claims.

## V. AIR INSTALLATION COMPATIBLE USE ZONE (AICUZ) PROGRAM

### A. The Problem—Encroachment

In response to ever increasing encroachment by local communities, the Air Force, in 1970, created the “greenbelt program” to provide a protective rectangular buffer area of about one mile on each side and two and a half miles from the end of base runways.<sup>124</sup>

This concept was later refined into the AICUZ program which was initiated by the Department of Defense in 1974.<sup>125</sup> AICUZ is a planning program that attempts to determine the impact of aircraft operations on the communities around flying bases and then transmits this information to the local planning and zoning commissions to assist them in making local comprehensive planning and zoning decisions. The program has a twofold purpose: first, to protect Air Force installation operational capability from the effects of incompatible land use, and second, to assist local, state, and federal officials in protecting and promoting public welfare and safety by providing information on aircraft accident potential and noise.<sup>126</sup>

Each military department is required to develop, implement, and maintain an AICUZ program for each installation with a flying mission.<sup>127</sup> The aim of the program is for local governments to use the information provided by the base to zone the lands surrounding air installations in such a way as to prevent development that is incompatible with the flying operations of the installation.

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<sup>124</sup> C. V. Glines, *Closing in on the Airfields*, A. F. MAG., Jan. 1989, at 74.

<sup>125</sup> Air Installations Compatible Use Zones, 32 C.F.R. § 256 (1977) [hereinafter AICUZ].

<sup>126</sup> AFI 32-7063, *supra* note 4, ¶ 1.2.3.

<sup>127</sup> See AICUZ, *supra* note 125.

Air Force bases were typically constructed with plenty of open space between the base and the local communities.<sup>128</sup> However, since these bases are employment centers for the surrounding communities, nearby land holdings are attractive investments for housing developments, supportive business activities, and service industries.<sup>129</sup> This typically results in the expansion of local communities in the direction of bases. Historically, bases that were once far removed from nearby communities have been encroached upon by shopping centers, condominiums, industries, schools, hospitals, hotels, and residential areas.

This steady encroachment has often progressed to the point where bases find themselves involved in confrontations with local residents who are concerned with the noise emanating from Air Force bases and potential aircraft accidents. Complaints from local residential and business owners have caused such actions as reduced takeoff weight, restriction of hours of operation, reduction of the number of flights, changes in takeoff and landing patterns, and noise abatement procedures.<sup>130</sup> “This type of action results in declining operating efficiencies which sometimes lead to closure or reduction in mission capability of multimillion dollar installations.”<sup>131</sup>

In fact, encroachment by civilian communities has resulted in the cessation of flying operations at a number of bases. For example, during the 1970s and 80s, Chanute, Lowry, Hamilton, and Laredo Air Force Bases all ceased flying operations, in part, as a result of encroachment.<sup>132</sup> All of these bases have since been closed. More recently the Air Force, during the base closure process, used current and probable future encroachment as well as current incompatible development existing in areas covered by AICUZ as factors in considering recommendations for base closure.<sup>133</sup>

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<sup>128</sup> See Glines, *supra* note 124.

<sup>129</sup> *Siting of HUD Assisted Projects in Runway Clear Zones at Civil Airports and Clear Zones and Accident Potential Zones at Military Airfields*, 24 C.F.R. § 51, subpart D (1984) [hereinafter *Siting of HUD Projects*].

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> See Glines, *supra* note 124.

<sup>133</sup> See 5 DEPARTMENT OF DEFENSE, BASE CLOSURE AND REALIGNMENT REPORT, DEPARTMENT OF THE AIR FORCE ANALYSES AND RECOMMENDATIONS at 8 (Mar. 1995) (on file with author). DoD considered eight selection criteria to determine which bases to recommend for closure or realignment. The first four of these criteria were classified as “military value.” They consisted of:

The current and future mission requirements and the impact on operational readiness of the DoD’s total force; 2) The availability and condition of land, facilities and associated airspace at both existing and potential receiving locations; 3) The ability to accommodate contingency, mobilization, and future total force requirements at both existing and potential receiving locations; 4) The cost and manpower implications. *Id.* at 5-1.



## B. AICUZ—Planning and Implementation

The AICUZ program makes use of graphic contours placed on a map of the installation and surrounding areas. These maps depict those areas impacted by noise from aircraft and areas within which accidents are most likely to occur, known as the Accident Potential Zone (hereinafter APZ). AICUZ studies also include matrices of minimum compatible land uses, which are based on the amount of noise and/or the aircraft accident potential of the area. In general, AICUZ plans advise reduced population density in APZs and elimination of noise sensitive activities in areas exposed to maximum overflight activity. Each Air Force Major Command<sup>134</sup> Civil Engineer (hereinafter MAJCOM/CE) is given primary responsibility for ensuring that installations prepare and update AICUZ studies.<sup>135</sup> Although the data needed for completion of an AICUZ study is collected by base personnel or contractors, MAJCOM/CE gathers, updates, and analyzes installation AICUZ data and certifies its accuracy. At the discretion of MAJCOM/CE, the final AICUZ study is prepared by either MAJCOM/CE, the Air Force Center for Environmental Excellence (hereinafter AFCEE), or a contractor.<sup>136</sup> The Air Force requires that all AICUZ studies be reviewed at least every two years to determine if changes in aircraft or operations require an AICUZ update.<sup>137</sup> When developing an AICUZ plan, there are three areas of overlapping concern that planners must address: obstructions, accident risks, and noise.

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These four criteria were given priority consideration by the Commission. *Id.* The remaining four criteria included:

5) The extent and timing of potential costs and savings, including the number of years, beginning with the date of completion of the closure or realignment, for the savings to exceed the costs; 6) The economic impact on communities; 7) The ability of both the existing and potential receiving communities' infrastructure to support forces, missions and personnel; The environmental impact. In order to evaluate these selection criteria, the Air Force identified 250 sub-elements to be considered. *Id.*, app. 1 at 57.

The sub-elements for the second criteria include, in part, existing local community encroachment and future local community encroachment, each of which require evaluation of development in each of the AICUZ zones.

<sup>134</sup> A major command is an Air Force command that is established by the authority of, specifically designated by, and directly subordinate to, Headquarters, Department of the Air Force.

<sup>135</sup> See AFI 32-7063, *supra* note 4, ¶ 1.3.4.3.

<sup>136</sup> *Id.*

<sup>137</sup> See AFI 32-7063, *supra* note 4 at ¶ 1.3.5.1., which requires that: "Each MAJCOM/CE and Director of Operations (MAJCOM/DO) reviews AICUZ aircraft operational and maintenance data at least every two years or as part of an Environmental Impact Analysis Process (EIAP) evaluation to determine the need for an AICUZ update." *Id.* (citations omitted).

## 1. Obstructions

Obstructions are natural objects, man-made structures, and activities which present safety hazards to takeoff and landing operations because they penetrate into the navigable airspace surrounding a base. An object such as a factory smokestack, a powerline, antenna or a tall building may be an obstruction based on its height.<sup>138</sup>

Other forms of obstructions include visible emissions and electronic emissions. For example, a visible emission could result from a factory smokestack that is under the height limitations but emits smoke that reduces visibility in the airspace concerned. Electronic emissions, though invisible, can also be obstructions because they can interfere with the safe operation of and communication with aircraft, or set off explosive devices in or being carried by the aircraft.

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<sup>138</sup> AICUZ, *supra* note 125, § 256.3(b) references the regulatory criteria for determining height restrictions. *See also*, 32-7063, *supra* note 4, ¶ 2.2., which directs that AICUZ study preparers are to use the land area and height restrictions explained in AFI 32-1026, Planning and Design of Air Fields, for determining airspace obstructions. The Federal Aviation Administration's 14 C.F.R., FAR Part 77, Subpart C (1965) establishes standards for determining obstructions in navigable airspace.

## 2. Accident Potential Zones

Another planning consideration is potential accident zones. The Air Force has conducted studies to determine the likely locations of aircraft accidents in the area of Air Force runways.<sup>139</sup> These studies revealed that most accidents occur at the ends of the runway, with the number of accidents decreasing as the distance from the runway increases. The most recent update of the Air Force's accident studies,<sup>140</sup> revealed that 28.1 percent of all the accidents studied occurred in the Clear Zone (hereinafter CZ),<sup>141</sup> a zone 3000 feet long and wide at both ends of the runway. The next zone, APZ I,<sup>142</sup> measures 5000 feet long and 3000 feet wide and accounts for 10.4 percent of all the accidents. APZ II,<sup>143</sup> an area 7000 feet long and 3000 feet wide, accounts for 5.6 percent of the accidents studied. The statistics also revealed that 24.7 percent of the accidents occurred on the runway; and 31.2 percent occurred outside the runway, CZ, and APZs, but within a 10 nautical mile radius of the airfield. APZs (which include the CZ) are based on accident data collected and accumulated at the DoD level and do not reflect the actual accident patterns occurring at the individual installation preparing an AICUZ study.<sup>144</sup>

As a result of these studies, the boundaries of the CZ, APZ I and APZ II have become formalized as the accident potential zones within which development should be discouraged.<sup>145</sup> Referring to these areas, 32 C.F.R. 256.3(c) states that:

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<sup>139</sup> Bernard K. Schafer, *The Air Installation Compatible Use Zone Program: The Science and the Law*, A.F. L. REV. 165, 166 (1989).

<sup>140</sup> The location and size of APZs was initially determined based on the results of an Air Force study of 369 aircraft mishaps from 1968 to 1972 that occurred within a 10 nautical mile radius of airfields. This study was updated in 1990. There were, however, no changes made to the geographical parameters of APZs as a result of the updated information. Telephone Interview with John Baie, Program Manager, Air Force Environmental Planning Division, HQ USAF/CEVP, (May 29, 1996).

<sup>141</sup> The area immediately beyond the end of a runway is the "Clear Zone," an area which possesses a high potential for accidents, and has traditionally been acquired by the Government in fee and kept clear of obstructions to flight. *See* AICUZ, *supra* note 125, § 256.3(c)(2)(i).

<sup>142</sup> Accident Potential Zone I is the area beyond the clear zone which possesses a significant potential for accidents. *See* AICUZ, *supra* note 125, § 256.3(c)(2)(ii).

<sup>143</sup> Accident Potential Zone II is the area beyond APZ I having a measurable potential for accidents. *See* AICUZ, *supra* note 125, § 256.3(c)(2)(iii).

<sup>144</sup> Schafer, *supra* note 139, at 170.

<sup>145</sup> The location and size of an APZ depends on whether the runway is Class A or B. The only Class A runway currently operated by the Air Force is at Patrick AFB, FL. *See* AICUZ, *supra* note 125, § 256.3(c). DoD Fixed wing runways are separated into two types for the purpose of defining accident potential areas. Class A runways are those restricted to light aircraft and which do not have the potential for development for heavy or high performance aircraft use or for which no foreseeable requirement for such use exists. *See* AICUZ, *supra* note 125 § 256.6. Typically, these runways have less than 10% of their operations involving Class B

Areas immediately beyond the ends of runways and along primary flight paths are subject to more aircraft accidents than other areas. For this reason, these areas should remain undeveloped, or if developed should be only sparsely developed in order to limit, as much as possible, the adverse effects of a possible aircraft accident.

In order to limit development in the most dangerous of these areas, the CZ, the DoD policy establishes as a first priority “the acquisition in fee and/or appropriate restrictive easements of lands within the clear zones whenever practicable.”<sup>146</sup> As for APZ I and APZ II, the DoD policy is to acquire these areas “only when all possibilities of achieving compatible use zoning, or similar protection, have been exhausted and the operational integrity of the air installation is manifestly threatened.”<sup>147</sup> In addition, only the minimum property interest needed to protect the Government is to be acquired.<sup>148</sup>

In order to assist local governments in making land use decisions, DoD has developed “Land Use Compatibility Guidelines for Accident Potential”<sup>149</sup> which categorize possible land uses as compatible or incompatible with the CZ, APZ I or APZ II. These guidelines are included in the final AICUZ document. Only very limited forms of development, (e.g., railroads and two lane highways) are allowed in the clear zone. Generally, residential development is incompatible in the CZ or APZ I. Single family dwellings, however, may be compatible in APZ II subject to any necessary noise abatement procedures.

### 3. Noise Contours

The third parameter of consideration in AICUZ development is the impact of aircraft noise on the areas surrounding the installation. The Department of Housing and Urban Development (hereinafter HUD) has determined that noise is a major source of environmental pollution which represents a threat to the serenity and quality of life in population centers and that noise exposure is a cause of adverse physiological and psychological effects as well as economic losses.<sup>150</sup>

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aircraft and are less than 8000 feet long. *Id.* Class B runways are all other fixed wing runways. As for Class A runways, the dimensions of these zones were reduced to reflect the equally reduced size and danger of the aircraft operating there. As a result, for Class A runways, the CZ is 3000 feet long, but only 1000 feet wide; APZ I is 2500 feet long and 1000 feet wide; and APZ II is 2500 feet long and 1000 feet wide. *See* Schafer, *supra* note 139, at 170.

<sup>146</sup> AICUZ, *supra* note 125, § 256.4(b)(2)(ii)(A).

<sup>147</sup> *Id.* § 256.4(b)(2)(ii)(B).

<sup>148</sup> *Id.* § 256.4.

<sup>149</sup> *Id.* § 256.8.

<sup>150</sup> Environmental Criteria and Standards, 24 C.F.R. § 51.100 (1979).

On a physiological level, temporary shifts in hearing thresholds and sleep loss have been documented.<sup>151</sup> Studies have also implicated noise as a factor producing stress-related health effects such as heart disease, high-blood pressure, and ulcers.<sup>152</sup> “On a behavioral level, interruptions in human activities, such as work or speech, that result in greater stress”<sup>153</sup> have been documented. The scientific evidence on noise impacts clearly points to noise as not simply a nuisance but as an important health and welfare concern.<sup>154</sup>

Studies conducted on the impacts of noise, however, often assess the impacts of noise based on annoyance. For example, studies on the effects of noise on people in residential areas have revealed significant, severe, and very severe annoyance in areas of day-night average decibel levels of 65, 70, and 75 decibels, respectively.<sup>155</sup> To determine the extent of the noise generated at DoD air installations, the amount and location of noise surrounding an airfield is computed using the “Ldn” method,<sup>156</sup> a method recommended by the Environmental Protection Agency.<sup>157</sup> Ldn is the yearly day-night sound level in decibels and results from the yearly average of daily traffic and use of runways and flight paths. It measures ambient noise including aircraft noise and other noises within the same community setting and imposes a penalty for nighttime (10 P.M. - 7 A.M.) operations, the duration of noise events, and aircraft noise that is above the ambient background level.<sup>158</sup> It measures noise in terms of decibels.<sup>159</sup>

In response to concerns regarding the impacts of noise, the Federal Interagency Committee on Urban Noise was established in 1979 to coordinate various federal programs, including an “interagency program designed to encourage noise sensitive development, such as housing, to be located away from major noise sources.”<sup>160</sup> The Committee members included the Environmental Protection Agency, DoD, Department of Transportation (hereinafter DoT), HUD, and the Veterans Administration (hereinafter VA).

In June, 1980, the Committee published the *Guidelines for Considering Noise in Land Use Planning and Control* (Noise Guidelines). These guidelines attempt to orchestrate the activities of the major federal agencies and their programs that are either sources of noise (e.g. DoD and DoT) or

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<sup>151</sup> See Schafer, *supra* note 139, at 172.

<sup>152</sup> Federal Interagency Committee on Urban Noise, *Guidelines for Considering Noise in Land Use Planning and Control*, Table D-1, Note (1980) (on file with author) [hereinafter *Guidelines*].

<sup>153</sup> Schafer, *supra* note 139, at 172.

<sup>154</sup> *Guidelines*, *supra* note 152, at 1.

<sup>155</sup> *Id.* at Table D-1.

<sup>156</sup> Schafer, *supra* note 139, at 172.

<sup>157</sup> *Id.*

<sup>158</sup> See J. Scott Hamilton, *Allocation of Airspace as a Scarce National Resource*, 22 *TRANSP. L.J.* 251, 260 (1994).

<sup>159</sup> *Id.*

<sup>160</sup> *Guidelines*, *supra* note 152, at iii.

sources of noise sensitive development (e.g. HUD and VA). These Noise Guidelines contain a list of land use compatibility guidelines based on noise zones.<sup>161</sup> Land use compatibility is expressed as being “compatible,” “compatible with restrictions,” and “incompatible.”<sup>162</sup> For example, virtually all forms of development are compatible with noise levels below 65 Ldn. Levels of 66 Ldn to 75 Ldn, with certain restrictions, are compatible with most forms of development. Levels of 76 to 85 are not compatible with most types of development that involve residential uses or access by the general public. Very few forms of development are compatible with noise levels above 85 Ldn.

The first step in defining the noise aspect of an AICUZ study is data collection. Installation personnel or a contractor collect data regarding a wide range of activities including the type of aircraft, number of flights, flight tracks, time of day, atmospheric conditions and ground operations. At MAJCOM/CE’s discretion, all of this data is then submitted to AFCEE; a contractor; or MAJCOM/CE for preparation of a noise contour map.<sup>163</sup> At a minimum, contours for Ldn 65, 70, 75, and 80 must be plotted on maps as part of the AICUZ study.<sup>164</sup>

The noise contour maps in conjunction with the APZs form the basis to determine what type of development is compatible with flying operations in the areas surrounding the base. In areas where the noise and accident areas overlap, the more stringent guideline is applied.<sup>165</sup>

### C. AICUZ Implementation—Coordination with Local Authorities

The AICUZ program objective is to “assist local, regional, state, and federal officials in protecting and promoting the public health, safety, and welfare by promoting compatible development within the AICUZ area of influence.”<sup>166</sup> Similarly, “DoD policy is to work toward achieving compatibility between air installations and neighboring civilian communities by means of a compatible land use planning and control process conducted by the local community.”<sup>167</sup> Federal Management Circular 75-2, *Compatible Land Uses at Federal Air Fields*,<sup>168</sup> provides that:

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<sup>161</sup> *Id.* at Table 2.

<sup>162</sup> *Id.* at Table D-2.

<sup>163</sup> See AFI 32-7063, *supra* note 4, ¶ 1.3.4.3. The noise contour maps are generated by placing the data related to a specific base into a standard computer model.

<sup>164</sup> AICUZ, *supra* note 125, § 256.3(d)(2)(i). See also AFI 32-7063, *supra* note 4, ¶ 2.4.

<sup>165</sup> Telephone Interview with John Baie, Program Manager, Air Force Environmental Planning Division (HQ USAF/CEVP) (May 29, 1996).

<sup>166</sup> AFI 32-7063, *supra* note 4, ¶ 1.2.3.

<sup>167</sup> AICUZ, *supra* note 125, § 256.4(b)(1)(i).

<sup>168</sup> *Compatible Land Uses at Federal Airfields*, Federal Management Circular 75-2, (Sept. 30, 1975).

Operating agencies shall develop procedures for coordinating airfield plans with the land use planning and regulatory agencies in the area. Developing compatible land use plans may require working with local governments, local planning commissions, special purpose districts, regional planning agencies, state agencies, as well as other regional, and state agencies to assist them in developing their land use planning and regulatory processes, to explain an airfield plan and its implications, and to generally work towards compatible planning and development in the area of the airfield.<sup>169</sup>

Thus, the AICUZ program is implemented through the local government's powers over land use, planning, zoning ordinances and building codes. The air installation gives the AICUZ study to the local community planners<sup>170</sup> and encourages them to incorporate the recommendations into the overall local land use planning process and into their comprehensive plan, if they have one.

The publication of the AICUZ plan by itself has no legal effect; but the Air Force, as an interested landowner, is entitled to participate in the local zoning process and to attempt to persuade the local government to accept its recommendations.<sup>171</sup> The Air Force's goal, however, is that the Air Force not have to "sell" the program, but "to assist local, regional, state and federal officials in protecting and promoting public health, safety and welfare, by promoting compatible development within the AICUZ area of influence."<sup>172</sup>

To assess the effectiveness of an AICUZ study, the Air Force requires that a review be conducted every two years to determine in detail how the local government has used the most recent AICUZ study recommendations. The review contains a thorough analysis of the successes, actions and policies by local communities to implement the AICUZ study recommendations. This review, at a minimum, includes a review and synopsis of all affected local government comprehensive land use plans, development plans, zoning plans, zoning maps and ordinances. It also includes transportation plans, subdivision plots, and other proposals within the airfield area pertinent to the AICUZ study.

If the Air Force discovers that AICUZ development guidelines are not being properly implemented, the Air Force has no direct means of requiring implementation. There are, however, several limited checks on local communities that fail to incorporate an AICUZ study into local planning. "The

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<sup>169</sup> *Id.* ¶ 4.b.

<sup>170</sup> See AFI 32-7063, *supra* note 4, ¶ 1.3.4.3. "MAJCOM/CE releases the installation AICUZ update study in a public meeting with local and areawide officials. HQ USAF/CEV coordinates with the congressional delegations (before public release) and federal officials (after public release) in Washington D.C." The Air Force Center for Environmental Excellence, Regional Compliance Office "coordinates the study with federal regional offices after public release. The MAJCOM/CE ensures coordination of the study with the Executive Order (EO) 12372, Interagency Review of Federal Programs, state single point of contact immediately after public release." *Id.*

<sup>171</sup> See *De-Tom, Enters., Inc. v. United States*, 552 F.2d 337 (Ct. Cl. 1977).

<sup>172</sup> AFI 32-7063, *supra* note 4, ¶ 1.2.3.

Noise Guidelines evidence both HUD's and VA's intention to follow DoD's accident potential zones, and noise contour studies."<sup>173</sup> HUD and the VA, therefore, refuse to provide assistance for construction within accident potential zones, and noise contour areas 65 Ldn and higher.<sup>174</sup> Federal agencies can also formally oppose inconsistent sitings through local zoning boards or other regulatory agencies (e.g. FAA, FCC).

## **D. Fifth Amendment Takings Claims Resulting From AICUZ**

### *1. Applicability of Lucas*

Landowners whose lands are zoned by local authorities based on an AICUZ study may have a claim against the zoning authority for a regulatory taking under the Fifth Amendment. The proper test to apply to determine if such a taking has occurred is the analysis articulated by the Supreme Court in *Lucas*.<sup>175</sup> As previously discussed, the court must first examine the owner's estate to determine if the proscribed use interest was originally part of the title.<sup>176</sup> If the interest was part of the owner's title, then the court addresses the question of whether the regulation of the land affects a *per se* confiscatory taking of the land. If it does not, then the court applies the *Penn Central*<sup>177</sup> tripartite analysis to determine if a taking has occurred. Historically, however, the Court has presumed zoning ordinances to be valid unless the plaintiff can show them to be arbitrary, unreasonable and lacking a substantial relationship to public health, safety, morals or welfare.<sup>178</sup> Generally, if the land can economically be used for some purpose, then a taking will not be found.<sup>179</sup>

In some circumstances, a local zoning authority may require a developer to give land or an easement to the local government. The courts have generally held that there must be a nexus between the proposed development and the dedication of land or exaction. For example, the developer may be required to give land for a park or a school site to fulfill the need created by his development and for the benefit of the development. However, if that nexus is not present, a local government may not require a

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<sup>173</sup> Schafer, *supra* note 139, at 178.

<sup>174</sup> See, *Siting of HUD Projects*, *supra* note 129. There is, however, a limited exception to this policy if noise attenuation construction techniques are used to reduce decibel levels. See *supra* note 158 and accompanying text for an explanation of Ldn.

<sup>175</sup> *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

<sup>176</sup> *Id.* at 1027.

<sup>177</sup> *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

<sup>178</sup> See *Nectow v. City of Cambridge*, 277 U.S. 183 (1928).

<sup>179</sup> See *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), in which the Supreme Court upheld an ordinance that prohibited the operation of a brickyard in residential neighborhoods. The effect of the ordinance was a dramatic reduction of the value of plaintiff's property. The Court held there was no taking, even though the plaintiff's brick yard pre-dated the residential neighborhood. As a result, the plaintiff received no compensation.



property owner to give a property interest without compensation as a condition for a rezoning or building permit.<sup>180</sup>

2. *Air Force Liability for Local Government Zoning Decisions:  
De-Tom Enterprises, Inc v. United States*

Landowners not only bring suit against the local zoning authority, but on occasion they will also file suit against the Air Force alleging inverse condemnation. In such a case, the landowner usually argues that the Air Force, in its attempts to have its AICUZ study implemented, exerted undue influence over the local zoning authority. *De-Tom Enterprises, Inc. v. United States* is an example of such a case.<sup>181</sup> In *De-Tom*, the plaintiff argued that the United States should be held liable for a taking of its property because the Air Force influenced Riverside County, California, to refrain from changing the zoning of an area based on recommendations set out in the AICUZ report from nearby March AFB. De-Tom's argument was that the Air Force prevented the company from obtaining a change of zoning that would have

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<sup>180</sup> See *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). In *Nollan*, the California Coastal Commission granted a permit to appellants to replace a small bungalow on their beach front lot with a larger house upon the condition that they allow the public an easement to pass across their beach, which was located between two public beaches. The Court found that although the outright taking of an uncompensated, permanent, public-access easement would violate the Takings Clause, conditioning appellants' rebuilding permit on their granting such an easement would be a lawful land-use regulation if it substantially furthered governmental purposes that would justify denial of the permit. The government's power to forbid particular land uses in order to advance some legitimate police power purpose includes the power to condition such use upon some concession by the owner, even a concession of property rights, as long as the condition furthers the same governmental purpose advanced as justification for prohibiting the use. *Id.* In *Nollan*, the Court found that none of the State's justifications for requiring the easement were plausible. The State had argued that the easement was necessary to protect the public's ability to see the beach; to assist the public in overcoming a perceived "psychological barrier to using the beach; and to prevent beach congestion." *Id.* at 835. See also *Dolan v. City of Tigard*, 572 U.S. 374 (1994). In *Dolan*, the plaintiff challenged the decision of the Oregon Supreme Court which held that the City of Tigard could condition the approval of her building permit on the dedication of a portion of her property for flood plain control and for a pedestrian/ bicycle pathway. The Court in *Dolan* found that the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development. The Court called this a "rough proportionality" test. The Court found that the first issue to be determined is whether the essential nexus exists between the legitimate state interest and the permit condition exacted by the city. The second part of the analysis requires a determination whether the degree of the exaction demanded by the city's permit conditions bears the required relationship to the projected impact on petitioner's proposed development. The Court found that the city's justifications did not show the required reasonable relationship between the floodplain easement and the petitioner's proposed new building. The case was remanded for further proceedings consistent with the Court's opinion.

<sup>181</sup> *De-Tom Enters., Inc. v. United States*, 552 F.2d 337 (Ct. Cl. 1977).

permitted the property to be developed for high density residential purposes.<sup>182</sup> De-Tom petitioned the Riverside County Board of Supervisors for a change of zoning for the property from that designating the land as residential/agricultural to residential/single-family dwellings.<sup>183</sup> The County Planning Commission and the local Airports Land use Commission approved the application, but the Riverside County Board of Supervisors denied De-Tom's request to rezone the area.<sup>184</sup>

The only property owner to appear before the Board of Supervisors to voice opposition to the rezoning was the United States Air Force, represented by the Staff Judge Advocate (hereinafter SJA) from March AFB.<sup>185</sup> The SJA reminded the Board of the large amounts of money invested by the Air Force in the base itself, and of the millions spent on operations at the base. He noted that if the area adjacent to the base were to be developed for high-density residential use, complaints about noise might compel the Air Force to curtail, or even discontinue, operations at the base.<sup>186</sup> The March AFB commander also submitted a letter to the Board of Supervisors expressing the view that because of the high level of noise at that end of the base, the property adjacent to it would be "highly undesirable for any type of residential use."<sup>187</sup>

The Court found that: "If plaintiff's position is that the Air Force necessarily took plaintiff's property (in the constitutional sense) simply by persuading the County board not to change the zoning of the property, we must reject such a claim on its merits."<sup>188</sup> Contrasting the case with a situation in which the Government has taken land through its own extensive or intrusive regulatory activity, the court found that:

[I]t is quite different when neither Congress nor a federal agency puts any regulatory burden on the owner but the agency, as an interested landowner, does no more than convince a state or local agency to impose such a burden, in the same way as might any other neighboring property owner or citizen. Here the Air Force was a powerful adjoining landholder, but so could be a large private manufacturer or comparable enterprise, or an organized group of citizens intent on preserving the environment or the character of their locality. In none of these cases would the intervention of the neighbor to persuade a county entity against rezoning the claimant's land constitute an eminent domain taking by the neighbor-whatever else it might be. The United States is thought to be a deep pocket and it is tempting for owners to try to shift to it the cost which they cannot or do not wish to impose on the local entity which actually undertakes the zoning, but the fundamental point is that it is that agency (here the County Board) which adopts, and has the power to adopt, the allegedly injurious course, and the federal agency (here

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<sup>182</sup> *Id.* at 341.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 339.

the Air Force) is only playing the role of an influential affected landowner trying to persuade the county body to accept its position.<sup>189</sup>

As a result of this case and others like it, it is well-established that the Air Force can participate in local land use proceedings and stands in the position of any other landowner who attempts to persuade the local legislative body to regulate land uses in a manner which is consistent with his use of the land.<sup>190</sup> As long as there has been no overreaching or improper conduct, such as denying a property owner the due process of a zoning hearing by entering into an outcome-influencing Memorandum of Understanding with the county before a zoning hearing is held, plaintiffs are generally unsuccessful.<sup>191</sup> On a few occasions, however, federal agencies have been held liable where they have gone beyond mere participation in the zoning process and taken affirmative egregious steps to lower property values.<sup>192</sup>

### 3. *Air Force Liability for Publication of AICUZ Studies*

In some cases, plaintiff's base their claims on a theory that publication of AICUZ study data itself accomplishes a denial of their property rights under the Fifth Amendment. AICUZ studies, however, are planning efforts and do

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<sup>189</sup> *Id.* at 339-40.

<sup>190</sup> See *Blue v. United States*, 21 Cl. Ct. 359 (1991); *De-Tom Enters., Inc. v. United States*, 552 F.2d 337, 339 (Ct. Cl. 1977); *Lynch v. United States*, 221 Ct. Cl. 979, 981 (1979); *Nalder v. United States*, 217 Ct. Cl. 686 (1978); *Gilliland v. United States*, 215 Ct. Cl. 953 (1977).

<sup>191</sup> See *Gilliland v. United States*, 228 Ct. Cl. 709 (1981). In *Gilliland*, the plaintiffs owned a 33 acre tract close to an Air Force Base near Palmdale, California, known as plant 42. The court found that although the Air Force strenuously objected to the plaintiffs' applications in 1973 to the authorities in the county of Los Angeles and the City of Palmdale for a rezoning from agricultural to commercial, no improprieties were shown. See also *NBH Land Co. v. United States*, 576 F.2d 317 (Ct. Cl. 1978). In *NBH Land Co.*, the plaintiffs claimed that announced plans by the Army to expand Fort Carson, Colorado, by acquiring plaintiffs' land, and the Army's public opposition to zoning changes which would allow the plaintiffs to develop their lands as a private subdivision, amounted to a taking of their land. The court found that "use and exploitation of local zoning along with other acts and omissions, can make up a combination that, all taken together, effectively deprives the owner of the benefit and use of his property, and constitutes a taking." *Id.* at 314. However, the court found that the Army's actions did not rise to this level, and no taking occurred. The court stressed the fact that the plans to expand the Fort had been abandoned as a result of Congress' refusal to fund the project. *Id.*

<sup>192</sup> See *Drakes Bay Land Co. v. United States*, 424 F.2d 574 (Ct. Cl. 1970). In this case, the plaintiff, a corporation, purchased a tract of land in 1960 with the intention of subdividing it. In November 1962, legislation was passed which authorized the National Park Service to acquire lands for the creation of the Point Reyes National Seashore. The legislation specifically set out the metes and bounds for the seashore which included the plaintiff's land. The National Park Service, however, took no action to acquire the property. The court found that where "Congress authorized the acquisition of lands by purchase, exchange or otherwise to create a national seashore and where the government refused to purchase plaintiff's land contrary to the intent of the Act, the government effectively acquired the use of the land without payment, and must pay just compensation." *Id.*

not control or regulate the use of private lands. In *Stephens v. United States*<sup>193</sup> the court recognized that AICUZ studies are “advisory only” and that the authority to permit or restrict development or use of private lands is left to the local jurisdiction. Other courts have specifically held that the publication and dissemination of AICUZ plans did not violate private landowner’s Fifth Amendment rights.<sup>194</sup> In such cases the plaintiffs cannot seriously dispute the advisory nature of an AICUZ study or any of the study elements. Obviously, the noise study itself does not zone or regulate land. It is merely part of the AICUZ planning document that contains the Air Force’s recommendation to state and local land use planning authorities for compatible land uses around the installation that state and local land use planning officials are free to disregard or voluntarily adopt in whole or in part.

In *Branning*,<sup>195</sup> discussed previously, the court in its analysis of the nature and purpose of the AICUZ program, found that:

The Air Installation Compatible Use Zone Program has been instituted in an effort to coordinate the requirements of the missions of military air installations, with the development of the surrounding communities. The AICUZ is a concept of identifying compatible and incompatible land use around an air station, the purpose being to guide compatible private development through the cooperation with local jurisdictions in order to minimize public exposure to aircraft noise and accident potential, while at the same time maintaining the operational capability of the station.<sup>196</sup>

Although the court in *Branning* found that the manner, frequency and number of Marine Corps aircraft flights over plaintiff’s land did constitute a taking, it specifically held that publication of the AICUZ study, in and of itself, was not sufficient to violate plaintiff’s Fifth Amendment rights.<sup>197</sup>

The treatment of AICUZ studies in these cases is consistent with the treatment of Fifth Amendment claims in cases based on other planning efforts. Courts have had frequent occasion to consider whether the publication of a local government’s comprehensive plan, an acquisition plan, a proposed condemnation plan, or an urban renewal plan, by itself, constitutes a taking. Although private property may suffer a diminution in value as a result of the publication of these planning efforts, courts have routinely recognized the

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<sup>193</sup> *Stephens v. United States*, 11 Cl. Ct. 352, 363 (1986). In *Stephens*, the plaintiff alleged that overflights from nearby Hill AFB had resulted in a taking of his land. In determining that there was no taking, the court examined the noise impacts on the plaintiff’s land as recorded in the base’s AICUZ study. In discussing the impacts of an AICUZ study, the court noted that “[t]he reports are advisory only, and the determination to build is ultimately left to the local jurisdiction.” *Id.* at 363.

<sup>194</sup> See *Branning v. United States*, 654 F.2d 88 (Ct. Cl. 1981).

<sup>195</sup> See *supra* notes 68-78 and accompanying text.

<sup>196</sup> 654 F.2d at 95.

<sup>197</sup> *Id.* at 96.

importance of informing the public of proposed projects and have refused to find that the publication of such plans by themselves constitutes a taking.<sup>198</sup>

### **E. Potential Impact of AICUZ Studies in Overflight Takings Cases**

Although an AICUZ study does not in and of itself constitute a taking, courts have allowed AICUZ information to be used as evidence to prove the last two elements of the *Causby* test. Although the *Branning* decision is considered to be the exception to the rule that flights above 500 feet are not compensable, the case also raised the issue of AICUZ studies as evidence in an overflight taking case. In *Branning*, the plaintiff asserted that flights by Marine Corps aircraft over its land reduced or destroyed the value of the property for its highest and best use, namely, for single family residential use and development as provided in plaintiff's master plan for development of its lands. In support of its position the plaintiff relied on AICUZ studies published by the Marine Corps. These studies established that portions of the plaintiff's land had been listed as "clearly unacceptable"<sup>199</sup> for low, medium, or high density residential use as a consequence of aircraft overflights. Other portions of the plaintiff's property had been declared "normally unacceptable"<sup>200</sup> for residential use. The court held that the information in the AICUZ study "is not, in and of itself, sufficient to establish a taking of plaintiff's property by the defendant. It does, however, constitute valuable evidence of the impact of defendant's aircraft operations on that part of plaintiff's property over which defendant's A-4 and F-4 jet aircraft were operating."<sup>201</sup>

The court also held in its listing of ultimate facts that:

Defendant has not only intruded upon plaintiff's property but has also given public notice of the adverse effect thereof upon plaintiff's property by adopting, publishing, and approving for implementation the AICUZ study of 1976 in which at least part of plaintiff's property has been designated as unsuitable or unacceptable for medium density housing.<sup>202</sup>

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<sup>198</sup> See *Mesa Ranch Partnership v. United States*, 2 Cl. Ct. 700 (1983); *Sayre v. United States*, 282 F. Supp. 175 (N.D. Ohio 1967); *NBH Land Co. v. United States*, 576 F.2d 317 (Ct. Cl. 1979); *Barsky v. City of Wilmington*, 578 F. Supp. 170, 174 (D. Del. 1983).

<sup>199</sup> 654 F.2d at 92 n.4 ("Clearly Unacceptable—The noise exposure at the site is so severe that construction costs to make indoor environment acceptable for performance of activities would be prohibitive. [Residential areas: The outdoor environment would be intolerable for normal residential use.]").

<sup>200</sup> *Id.* n.5 ("Normally unacceptable—The noise exposure is significantly more severe so that unusual and costly building constructions are necessary to insure adequate performance of activities.").

<sup>201</sup> *Id.* at 96.

<sup>202</sup> *Id.*

Based on this holding, it would appear that plaintiff's in overflight cases may use an AICUZ study to prove the last two prongs of the *Causby* test; that is, that the flights directly and immediately interfered with the claimant's enjoyment and use of the land, and that the interference was substantial.

Although the AICUZ study was permitted as evidence supporting plaintiff's claim in *Branning*, the purpose of the AICUZ program, to achieve compatible use of public and private lands, is not served by permitting introduction of the AICUZ as evidence against the government in litigation. In fact, some have argued that as a result of the *Branning* court's reliance on the AICUZ study to find a taking occurred, the DoD should seek an exclusionary rule prohibiting the use of AICUZ studies in litigation against the United States.<sup>203</sup> Such an exclusionary rule, however, would probably have very little impact on the outcome of overflight takings cases. It is likely that in most cases, where an AICUZ study categorizes lands as unacceptable for residential development because of noise, the plaintiff's would be able to produce sufficient evidence of substantial interference with the use of land for residential purposes without relying on AICUZ data.

While AICUZ studies have the potential to be used as evidence against the United States to prove a taking due to overflights, they can also serve to reduce potential overflight takings cases when they are used in the zoning process. Zoning pursuant to AICUZ should limit land uses that are incompatible with the noise generated from overflying aircraft. This in turn limits uses of land to those that would not normally be disturbed by overflying aircraft.

#### **F. Acquiring Property Interests as a Result of AICUZ or Overflights**

As mentioned above, with the exception of the CZ,<sup>204</sup> the Air Force policy is generally not to acquire property interests in land.<sup>205</sup> DoD guidance

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<sup>203</sup> See Charles W. Gittins, *Branning v. United States: The Sound of Freedom or Inverse Condemnation*, NAVAL L. REV., Winter 1986, at 109.

<sup>204</sup> AFI 32-7063, *supra* note 4, ¶ 4.1. states:

MAJCOM/CE must acquire real property interest over all property within the clear zone. . . . The only real property interests acquired are those necessary to prevent incompatible land use in the end-of-runway clear zone. MAJCOM/CE is responsible for identifying private lands within the clear zone, for determining the real property interests in accordance with AFI 32-9001, Acquisition of Real Property. *Id.*

<sup>205</sup> AICUZ, *supra* note 125, § 256.4(b)(iii)(d)(1) states that:

Any actions taken with respect to safety of flight, accident hazard, or noise which involve acquisition of interests in land must be examined to determine the necessity of preparing an environmental impact statement in

allows for the acquisition of lands in APZ I and APZ II and in high noise areas, but “only when all possibilities of achieving compatible use zoning, or similar protection, have been exhausted and the operational integrity of the air installation is manifestly threatened.”<sup>206</sup> In addition, under DoD policy only the minimum property interest needed to protect the Government is to be acquired.<sup>207</sup> DoD guidance also cautions that “the acquisition of property rights on the basis of noise . . . may not be in the long-term interest of the United States.”<sup>208</sup> When it is determined to be necessary for the government to acquire interest in land, the interest acquired is not necessarily a fee simple interest. For example, it may only be necessary to acquire an easement to make low and frequent flights over said land and to generate noise.<sup>209</sup>

The military’s ability to acquire real property not currently owned by the United States is generally prohibited unless the acquisition is specifically authorized by law,<sup>210</sup> as such an acquisition of a real property interest normally requires authorization and appropriation by Congress. This is generally accomplished as part of the military construction process.<sup>211</sup>

There is, however, one notable exception to this rule that is occasionally used to acquire land within an APZ or land affected by overflights. 10 U.S.C. §2672 provides that: “The Secretary of a military department may acquire any interest in land that the Secretary determines is needed in the interest of national defense; does not cost more than \$200,000, exclusive of administrative costs and the amounts of any deficiency judgments.” The funds used to acquire lands under this authority come from the military department’s operating and maintenance funds. Although used sparingly, this authority gives the Air Force the flexibility within its prescribed limits to deal with unique situations that may arise. For example, Altus AFB, OK, recently began flying operations on a newly constructed runway. After flying operations began on the runway, a nearby landowner began complaining about the flights of the Air Force’s C-5, C-141, and KC-135 aircraft which passed some 385-415 feet over his residence. Because the flights satisfied the requirements for a taking under the *Causby* test, relying on the authority

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accordance with DoD Directive 6050.1, Environmental Considerations in DoD Actions, March 19, 1974 (32 C.F.R. part 214). *Id.*

<sup>206</sup> AICUZ, *supra* note 125, § 256.4(b)(2)(ii)(B).

<sup>207</sup> *Id.* § 256.4.

<sup>208</sup> *Id.* § 256.4(b)(2)(i).

<sup>209</sup> *Id.* § 256.9 contains a listing of possible interests which should be examined for applicability.

<sup>210</sup> *See* 10 U.S.C. § 2676 (1996).

<sup>211</sup> This limitation, however, does not apply “to the acceptance by a military department of real property acquired under the authority of the Administrator, General Services, to acquire property by the exchange of Government property pursuant to the Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 471 et seq.).” 10 U.S.C. § 2676(a) (1996).

contained in 10 U.S.C. § 2672, the Air Force purchased the property in order to avoid the cost of litigation.<sup>212</sup> However, the Air Force is currently only exercising this discretion when it is faced with serious litigation jeopardy involving overflights of residential structures. In cases involving vacant lands, the Air Force continues to apply its policy of requiring landowners to prove their case in court.<sup>213</sup>

## VI. CONCLUSION

The Air Force will continue to face takings claims associated with the effects of encroachment. However, the future of litigation in these cases should be predictable. The Supreme Court's holding in *Lucas* should strengthen the Government's argument that inverse condemnation claims for flights above 500 feet are not compensable. For those cases below 500 feet, *Causby* and its progeny provide a well-defined body of case law which should allow the Air Force to determine, with some predictability, the legal consequences of its actions when flying low over private lands.

In order to lessen the potential for overflight takings claims, the Air Force must continue to aggressively augment the AICUZ program. The program's land use compatibility guidelines, when implemented as part of the local zoning process to limit incompatible development in the area of air bases, serve to reduce the Air Force's potential liability for overflight takings claims that arise on lands covered by the program. The AICUZ program also serves to protect air installations from encroachment by local communities. An active AICUZ program, coordinated effectively with local government officials can serve to greatly reduce potential tension between air installations and local development. If the program is not coordinated effectively, or if local authorities fail to implement AICUZ findings, the potential for conflicts between the installation and the local community are greatly increased.

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<sup>212</sup> Telephone Interview with Ronald A. Forcier, Chief, Real Property Branch, Air Force Legal Services Agency, Environmental Litigation Division (May 3, 1996).

<sup>213</sup> *Id.*



# Best Value Source Selection In The A-76 Process

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## I. INTRODUCTION

Office of Management and Budget (hereinafter OMB) Circular A-76<sup>1</sup> describes executive policy which requires federal agencies, in certain cases, to contract out activities to commercial firms rather than perform them in-house. Activities which are frequently contracted out include base operations and motor pool maintenance.<sup>2</sup> After a dormant period,<sup>3</sup> the Department of Defense (hereinafter DoD) is once again placing strong emphasis on the A-76 program. The main reason is quite simply money, or a lack thereof.<sup>4</sup> The Defense Science Board<sup>5</sup> recently reported the DoD could save \$30 billion by outsourcing support activities.<sup>6</sup> In these times of shrinking budgets and increased operating tempo, the DoD is looking to save money anywhere it can.<sup>7</sup>

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<sup>1</sup> OFFICE OF MANAGEMENT AND BUDGET CIRCULAR A-76 (Aug. 4, 1983) [hereinafter Circular A-76, or A-76].

<sup>2</sup> *Id.*, attach. A, at 7.

<sup>3</sup> According to the Government Accounting Office [hereinafter GAO], the dormant period was due to administrative and legislative constraints. In August 1995, the Deputy Secretary of Defense initiated a renewed emphasis on the contracting of commercial services by chartering a Privatization Integrated Policy Team, which had the task of identifying contracting out opportunities. The Team is focusing its efforts in six support areas: base support, material management, depot maintenance, finance and accounting, education and training, and data centers. GENERAL ACCOUNTING OFFICE, GAO/NSIAD-97-86, BASE OPERATIONS: CHALLENGES CONFRONTING DOD AS IT RENEWS EMPHASIS ON OUTSOURCING 5 (Mar. 11, 1997).

<sup>4</sup> *Id.*

<sup>5</sup> The Defense Science Board provides objective and independent advice on technology and management issues to the Secretary of Defense, the Deputy Secretary of Defense, the Under Secretary of Defense (Acquisition and Technology), the Chairman of the Joint Chiefs of Staff, and the Vice Chairman. It is composed of representatives from academia, industry, and research institutions. *Hearings on Improving Defense Inventory Management Before the Subcomm. on National Security, International Affairs, and Criminal Justice of the House Comm. on Gov't Reform and Oversight*, 105<sup>th</sup> Cong. (1977) (statement of Dr. Jacques S. Gansler, Vice Chairman, Defense Science Board).

<sup>6</sup> Richard J. Newman, *Operation Fix-My-Bifocals Or, Why the Pentagon Cuts Combat Forces While Saving the PX*, U.S. NEWS & WORLD REP., Mar. 17, 1997, at 32.

<sup>7</sup> It is Air Force policy that 100% of its activities will be reviewed for potential contracting out by the year 2003. Air Force Policy Directive 38-6, Outsourcing and Privatization ¶ A1.2.

The OMB has recently completed a radical change in the methods federal agencies may use to determine if an activity will remain in-house. On 1 April 1996, the OMB published a revised supplement to Circular A-76.<sup>8</sup> The 1996 Supplement provides that the decision whether to contract out a commercial activity can now be based on “best value” to the government. Prior to this change, the decision to contract out was based solely upon cost and cost related factors. No specific explanation for this change is given by the OMB in the introductory section of the 1996 Supplement. One could conclude that the OMB enacted this change to bring A-76 procedures in conformity with current procurement practices; practices which have changed greatly since the enactment of the Competition in Contracting Act of 1984 (hereinafter CICA), which eliminated the preference for sealed bidding and formal advertising, and also permitted the use of competitive negotiations.<sup>9</sup>

The introduction of best value source selection into the A-76 process is, however, not without its problems. Using non-cost factors to evaluate in-house versus commercial performance may create conflict of interest problems, lead to increased litigation, and be practically difficult. This article will discuss the A-76 process and the introduction of best value source selection into that process. In addition, it will also identify potential problems and discuss some suggested remedies.

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(Sep. 1, 1997) [hereinafter AFPD 38-6]. Included within AFPD 38-6 is the “Air Force Outsourcing and Privatization Strategic Plan” which, *inter alia*, identifies the application of new Air Force acquisition practices to outsourcing and privatization as a “major challenge” and states “[g]iven the expected time and monetary savings linked to new approaches to service contracts, acquisition streamlining procedures or reform must be aggressively applied Air Force-wide for optimum O&P [outsourcing and privatization].” *Id.* at attach. 4. In 1996, the Air Force conducted 66 cost comparison studies at 42 installations. Department of Defense, Department of the Air Force, Cost Comparison Studies, 61 Fed. Reg. 53,723 (Oct. 15, 1996).

<sup>8</sup> OFFICE OF MANAGEMENT AND BUDGET CIRCULAR A-76, REVISED SUPPLEMENTAL HANDBOOK, PERFORMANCE OF COMMERCIAL ACTIVITIES (Mar. 1996) [hereinafter 1996 Supplement]. Circular A-76 provides broad guidance on A-76 procedures whereas the 1996 Supplement provides very detailed, practical guidance.

<sup>9</sup> Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 1175 (1984). CICA requires that each solicitation clearly identify all evaluation factors, their relative importance, and that those factors be adhered to in making the award decision. *Id.* National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 924(a)(2), 100 Stat. 3933 (1987) added a section to CICA requiring that solicitations for competitive proposals clearly establish the “relative importance of the quality of the services to be provided (including technical capability, management capability, and prior experience of the offeror).” *Id.* The purpose of the amendment was to “specifically recognize the importance of quality as a factor in professional and technical services procurement.” S. REP. NO. 99-331, at 266 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6413, 6462.

## II. A-76 PUBLIC POLICY AND PROCEDURES

### A. The Public Policy Behind Circular A-76

The general premise behind Circular A-76 is that agencies should rely on private enterprise “if the product or service can be procured more economically from a commercial source.”<sup>10</sup> Along those lines, the 1996 Supplement expands that premise by stating the A-76 program is necessary because Americans want a government that is “more businesslike and better managed.”<sup>11</sup> Circular A-76 is part of a larger effort to “reinvent” government by considering a wide range of options including “the conversion of recurring commercial activities to or from in-house, contract or interservice support agreement (hereinafter ISSA) performance.”<sup>12</sup> Circular A-76 is not merely a contracting out procedure, rather it is intended to balance the interests of all the parties by providing a level playing field between private offerors and public workers. In addition, the A-76 program “encourage[s] competition and choice in the management and performance of commercial activities.”<sup>13</sup> Finally, it provides federal managers the mechanism to make sound, defensible business decisions.<sup>14</sup>

### B. Circular A-76 Procedures

Circular A-76 establishes a mandatory process that executive agencies must follow.<sup>15</sup> Military departments periodically review their activities to determine whether their own operation is the most economical provider of commercial services and supplies or whether a private offeror could provide those services and supplies more economically.<sup>16</sup> However, activities which are inherently governmental functions must always be performed by government employees and are excluded from the A-76 process.<sup>17</sup> Activities which are not governmental functions are commercial activities<sup>18</sup> and may be performed by

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<sup>10</sup> Circular A-76, *supra* note 1, ¶ 5c.

<sup>11</sup> 1996 Supplement, *supra* note 8, at iii.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Circular A-76, *supra* note 1, ¶ 7. However, small commercial activities which have ten or fewer full-time employees may be converted to or from in-house performance without the need for a cost comparison. 1996 Supplement, *supra* note 8, at pt. I, ch. 1, ¶ C.

<sup>16</sup> In order to accomplish this task, federal agencies have developed commercial activities programs to implement Circular A-76. *See, e.g.*, Air Force Instruction 38-203, Commercial Activities Program (Apr. 26, 1994) [hereinafter AFI 38-203].

<sup>17</sup> 1996 Supplement, *supra* note 8, at pt. I, ch. 1, ¶ B.

<sup>18</sup> The 1996 Supplement defines commercial activity as “the process resulting in a product or service that is or could be obtained from a private sector source. Agency missions may be

government employees or by contract, dependent upon the results of an A-76 cost comparison.<sup>19</sup>

Office of Federal Procurement Policy (hereinafter OFPP) Policy Letter 92-1, provides detailed guidance in determining which government functions are “inherently governmental.”<sup>20</sup> This policy letter states that inherently governmental functions can normally be broken into two categories: (1) acts requiring discretionary authority; and, (2) acts involving monetary authority and entitlements.<sup>21</sup> The policy letter provides lists of factors government officials should consider when determining which government activities are inherently governmental.<sup>22</sup> Excluded functions relevant to the DoD are: The command of military forces, especially the leadership of military personnel who are members of the combat, combat support, or combat service support

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accomplished through commercial facilities and resources, Government facilities and resources, or mixes thereof, depending upon the product, service, type of mission and the equipment required.” *Id.* at app. 1.

<sup>19</sup> However, in time of war, Circular A-76 does not apply to the DoD. Circular A-76, *supra* note 1, ¶ 7. In addition, some commercial activities staffed by military members are exempt from the A-76 process under the “national defense exemption” if the activity is: (1) essential for training or experience in required military skills; (2) needed to provide appropriate work assignments for a rotation overseas or sea-to-shore assignment, or (3) necessary to provide career progression to needed military skills levels. Dep’t of Defense Instruction 4100.33, Commercial Activities Program Procedures, ¶ E (9 Sep. 1985) [hereinafter DODI 4100.33].

<sup>20</sup> Policy Letter on Inherently Governmental Functions, 57 Fed. Reg. 45,096 (Sep. 30, 1992). This policy letter is included as an appendix to the 1996 Supplement. 1996 Supplement, *supra* note 8, at app. 5.

<sup>21</sup> Policy Letter on Inherently Governmental Functions, 57 Fed. Reg. at 45,100.

<sup>22</sup> The policy letter provides:

An inherently governmental function involves, among other things, the interpretation and execution of laws of the United States so as to: (a) bind the United States to take or not to take some action by contract, policy, regulation, authorization, order or otherwise; (b) determine, protect, and advance its economic, political, territorial, property, or other interests by military or diplomatic action, civil or judicial proceedings, contract management, or otherwise; (c) significantly affect the life, liberty, or property of private persons; (d) commission, appoint, direct, or control officers or employees of the United States; or (e) exert ultimate control over the acquisition, use, or disposition of the property, real or personal, tangible or intangible, of the United States, including the collection, control, or disbursement of appropriated and other Federal funds. Inherently governmental functions do not normally include gathering information for or providing advice, opinions, recommendations, or ideas to Government officials.

*Id.*

role; the direction and control of intelligence and counter-intelligence operations; and the direct conduct of criminal investigations.<sup>23</sup>

When a federal agency determines an activity it performs is not inherently governmental and is subject to A-76,<sup>24</sup> it develops a Performance Work Statement (hereinafter PWS) which analyzes the task to be done, serves as the scope of the work, and is the basis for all compared costs.<sup>25</sup> The agency then prepares a Management Plan which describes the government's Most Efficient Organization (hereinafter MEO).<sup>26</sup> The MEO fully describes the manner in which the agency will most efficiently perform the work described in the PWS.<sup>27</sup> The agency then calculates the cost estimate for government's in-house performance based on the MEO.<sup>28</sup> After arriving at its own cost estimate, the agency solicits bids from the private sector.<sup>29</sup> The lowest, technically acceptable bid is selected and is adjusted by the agency to arrive at the real cost of contracting out.

### C. Cost Adjustments

The 1996 Supplement (as did the previous 1983 Supplement<sup>30</sup>) sets out the requirements for comparing in-house costs with those of the best commercial offeror.<sup>31</sup> The agency is required to make various adjustments to the best offer to obtain the real cost of the product or service.<sup>32</sup> For example, the agency must increase the commercial offer by adding one-time conversion costs such as labor

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<sup>23</sup> *Id.* at app. A.

<sup>24</sup> In addition to the national defense exemption, commercial activities at government owned hospitals or health care facilities that are necessary to maintain the quality of direct patient care are also exempt. Further, whenever the acquisition planning process reveals that there is no satisfactory commercial source available to compete against a commercial activity subject to the A-76 process, that activity is exempt from Circular A-76. 1996 Supplement, *supra* note 8, at pt. I, ch. 1, ¶ G.

<sup>25</sup> A performance work statement is defined as "a statement of the technical, functional and performance characteristics of the work to be performed, identifies essential functions to be performed, determines performance factors, including the location of the work, the units of the work, the quantity of work units, and the quality and timeliness of the work units." *Id.* at app. 1.

<sup>26</sup> *Id.* at pt. I, ch. 3, ¶ E.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at pt. II.

<sup>29</sup> *Id.* at pt. II, ch. 3, ¶ G.

<sup>30</sup> OFFICE OF MANAGEMENT AND BUDGET CIRCULAR A-76, SUPPLEMENTAL HANDBOOK, PERFORMANCE OF COMMERCIAL ACTIVITIES (Aug. 1983) [hereinafter 1983 Supplement]. This is the first supplement to Circular A-76, *supra* note 1. The 1996 Supplement, *supra* note 8, substantially changed the 1983 supplement.

<sup>31</sup> 1996 Supplement, *supra* note 8, at pt. II.

<sup>32</sup> *Id.* at pt. II, ch. 3, ¶ A.

related expenses, including severance pay and retraining expenses.<sup>33</sup> The agency also must subtract from the commercial offer the estimated federal income tax the offeror would have to pay over the performance period.<sup>34</sup> Circular A-76 requires an independent review of the in-house cost estimates. In the Air Force, this review is provided by comptroller offices at either the major command or wing/installation level depending on the number of full-time equivalents<sup>35</sup> under review.<sup>36</sup>

#### **D. Cost Differential**

After adjusting the in-house and commercial offeror's calculations so as to arrive at the real cost, the agency compares the in-house and private offeror's cost figures. If the private offeror's bid is ten percent or more below in-house cost, the agency awards the contract to the private offeror. The ten percent margin is added "to ensure that the Government will not convert for marginal estimated savings."<sup>37</sup> An activity will not be converted from contract or ISSA performance unless the ten percent cost differential is met.<sup>38</sup> In instances where there are no qualified offerors or the lowest offeror's bid exceeds the in-house bid, the commercial activity will be kept in-house.

#### **E. Change in Policy**

The 1996 Supplement now allows consideration of factors other than price in determining whether the in-house MEO or a private offer will be selected to perform the commercial activity under review. The 1996 Supplement states:

1. All competitive methods authorized by the Federal Acquisition Regulation are now appropriate for cost-comparison under the Circular and this Supplement. This includes sealed bid, two-step source selection and other competitive qualifications-based or negotiated procurement techniques.
2. In selecting the method of procurement, and contract type, the contracting officer analyzes the PWS and applies the guidance contained in OFPP Policy Letter 91-2 and FAR Part 16 [and] . . .

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<sup>33</sup> *Id.* at pt. II, ch. 3, ¶ E.

<sup>34</sup> *Id.* at pt. II, ch. 3, ¶ G.

<sup>35</sup> A full-time equivalent is normally comparable to one full-time employee. AFPD 38-6, *supra* note 7, at attach. 1.

<sup>36</sup> Air Force Instruction 65-504, Independent Review of Commercial Activity Cost Comparisons ¶¶ 6-7 (Feb. 25, 1994) [hereinafter AFI 65-504].

<sup>37</sup> 1996 Supplement, *supra* note 8, pt. II, ch. 4, ¶ A.

<sup>38</sup> *Id.*

3c. The [Source Selection] Authority reviews contract and ISSA offers and identifies that offer which offers the “**best overall value** to the government.” This contract offer competes with the Government’s in-house estimate.<sup>39</sup>

### III. BEST VALUE SOURCE SELECTION

Best value source selection is a basis for award in which the agency reserves the right to trade-off cost and technical considerations in selecting the successful offeror. Although the Federal Acquisition Regulation (hereinafter FAR) does not specifically define “best value,” it does state that in negotiated procurements, “[t]he solicitation should be structured to provide for the selection of the source whose proposal offers the greatest value to the Government in terms of performance, risk management, cost or price, and other factors.”<sup>40</sup> The Air Force Supplement to the FAR defines best value as “the most advantageous offer, price and other factors considered, providing the best mix of utility, technical quality, business aspects, risks, and price for a given application.”<sup>41</sup>

Contracting officers weigh several factors in making the decision to use best value source selection. Generally, contracting officers use best value source selection when the government needs high technical capability, expects benefits from multiple solutions, or the relevant technology is rapidly changing. Best value source selection often gives the contracting officer or source selection authority maximum flexibility.<sup>42</sup> As with all requests for proposals (hereinafter RFPs), negotiations are required unless “a statement is included in the RFP that the proposals are intended to be evaluated, and award made, without discussions with the offerors (other than minor clarification), unless discussions are determined to be necessary.”<sup>43</sup> Some factors, such as cost or price<sup>44</sup> and past performance<sup>45</sup> must be evaluated in RFPs.

When the decision to use best value is made by the government, relevant evaluation factors and subfactors must be developed during the acquisition planning stage based upon the specifications and the statement of work. Only factors and subfactors which would be expected to reveal

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<sup>39</sup> *Id.* at pt. I, ch. 3. ¶ H (emphasis added).

<sup>40</sup> GEN. SERVS. ADMIN. ET. AL., FED. ACQUISITION REG. part 15.605(d)(1) (Apr. 1, 1984) [hereinafter FAR].

<sup>41</sup> DEP’T OF AIR FORCE, AIR FORCE FED. ACQUISITION REG. SUPP. app. AA-103 (May 1, 1996) [hereinafter AFFARS].

<sup>42</sup> RALPH C. NASH, JR. & JOHN CIBINIC, JR., *COMPETITIVE NEGOTIATION: THE SOURCE SELECTION PROCESS* 9 (1993).

<sup>43</sup> Competition in Contracting Act, 10 U.S.C. § 2305(a)(2)(B)(ii)(I) (1994).

<sup>44</sup> FAR, *supra* note 40, at 15.605.

<sup>45</sup> In contracts of \$1 million or above. *See* Letter from Eleanor R. Spector, Director, Defense Procurement, to Directors of Defense Agencies, et al., (Dec 20, 1996), *reprinted in* FAR, *supra* note 40, at 15.605 (authorizes deviation from the requirements of FAR part 15.605(b)(1)(ii)).

variances among the proposals should be chosen<sup>46</sup> and the factors may be weighted to reflect requirement priorities.<sup>47</sup> An objective baseline should be developed along with evaluation factors. Finally, a rating system needs to be established. Ratings systems are normally numerical, adjectival, or based upon color coding.<sup>48</sup>

After the contracting officer receives proposals from the offerors, the contracting officer has to determine which of the responsible offerors are in the competitive range and hold discussions with those offerors.<sup>49</sup> Although contracting officers are not allowed to auction one offeror against another during discussions,<sup>50</sup> it is quite appropriate during negotiations for the government to let the offeror know that the submitted proposal is above the government estimate or disclose the amount of available funds.<sup>51</sup> After completion of discussions, offerors will normally submit best and final offers.<sup>52</sup> Finally, the Source Selection Authority makes a tradeoff analysis (cost versus non-cost factors) and makes the decision as to which proposal offers the overall best value to the government.<sup>53</sup>

The best value procedures described above will have to be adapted to the A-76 process. The 1996 Supplement does discuss the adaptation of best value source selection into the A-76 process. Unfortunately, the guidance the 1996 Supplement provides is cursory and somewhat confusing. Below are the additional procedures listed by the 1996 Supplement which must be followed in best value procurements.

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<sup>46</sup> FAR, *supra* note 40, at 15.605(a).

<sup>47</sup> *Id.* at 15.605(d)(1).

<sup>48</sup> *See, e.g.*, AFFARS *supra* note 41, at app. AA-304, which discusses color ratings for major acquisitions.

<sup>49</sup> Unless the solicitation stated that award could be made on the initial proposals without discussion. FAR, *supra* note 40, at 15.609.

<sup>50</sup> Prohibited auction techniques include:

- (i) Indicating to an offeror a cost or price that it must meet to obtain further consideration;
- (ii) Advising an offeror of its price standing relative to another offeror (however, it is permissible to inform an offeror that its cost or price is considered by the Government to be too high or unrealistic); and
- (iii) Otherwise furnishing information about other offerors' prices.

FAR, *supra* note 40, at 15.610(e)(2).

<sup>51</sup> *Id.*

<sup>52</sup> FAR, *supra* note 40, at 15.611.

<sup>53</sup> FAR, *supra* note 40, at 15.611(d).



## IV. BEST VALUE IN THE A-76 PROCESS

Policy Letter 91-2 from Office of Federal Procurement Policy reflects the Congressional policy in CICA<sup>54</sup> and is cited by the 1996 Supplement<sup>55</sup> as guidance to follow in contracting out determinations. This policy letter states that agencies shall use competitive negotiations for acquisitions where performance above the minimal acceptable level will enhance mission accomplishments to such an extent that the corresponding increase in cost will be warranted. When those situations exist “contracting activities shall give careful consideration to developing evaluation and selection procedures that utilize quality related factors such as: [t]echnical capability, management capability, cost realism, and past performance.”<sup>56</sup> Given this preference, best value source selections in the A-76 process should become much more common.

### A. Cost Comparison Study Team

After an activity is identified by a military department<sup>57</sup> and the appropriate notifications are made,<sup>58</sup> the cost comparison study team is formed.<sup>59</sup> The cost comparison study team is responsible for developing the PWS and the Management Plan describing the MEO. Members of the cost comparison study team who draft the PWS should not include the same employees who may lose their jobs if the activity is contracted out.<sup>60</sup> In order to avoid conflict of interest issues, special care must be taken by the cost comparison team to ensure the PWS does not manipulate the process by limiting outside competition, or otherwise violate an industry service or service

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<sup>54</sup> Policy Letter on Service Contracting, 56 Fed. Reg. 15,110, 15,113 (Apr. 15, 1991).

<sup>55</sup> 1996 Supplement, *supra* note 8, at pt. I, ch. 3, ¶ C.

<sup>56</sup> Policy Letter on Service Contracting, 56 Fed. Reg. at 15,113.

<sup>57</sup> Military departments are required to identify their commercial activities, and the results of any reviews and direct conversions they have accomplished, in a yearly inventory supplied to the DoD. DODI 4100.33, *supra* note 19, at ¶ E.

<sup>58</sup> Military departments shall not proceed with any A-76 cost-comparison involving more than 45 DoD personnel unless Congress is notified. In addition, all affected DoD employees must be consulted at least monthly during the development of the PWS and the management study. *Id.*

<sup>59</sup> 1996 Supplement, *supra* note 8, at pt. I, ch. 3, ¶ B. The 1996 Supplement recommends individuals with experience in “management analysis, position classification, work measurement, value engineering, . . . industrial engineering, cost analysis, procurement and the technical aspects of the activity under study.” *Id.*

<sup>60</sup> Members of the team who have a financial interest in the outcome of the cost comparison risk violating the Ethics in Government Act of 1978, 18 U.S.C. § 208 (1994). *See also* Christopher N. Patterson, *The Commercial Activities Process—Lessons Learned*, ARMY LAW., Dec. 1989, at 11.

grouping norm.<sup>61</sup> For example, evaluation criteria could be improperly established that match a particularly strong ability of the in-house work force or management. For this reason, it is imperative that legal counsel be added to the cost comparison team to act as an honest broker.

The PWS defines what is being requested<sup>62</sup> and includes the performance standards, measures, and time frames. It is at this point where the best value non-cost factors and subfactors will be developed. The PWS is provided by the cost comparison team to the contracting officer for review and provides the technical performance sections of the RFP that the contracting officer will develop and issue to the private sector.<sup>63</sup>

The 1996 Supplement lists specific procedures for negotiated source selections. Under these procedures, the cost comparison team must complete the Management Plan and the Technical Performance Plan.<sup>64</sup> The Management Plan reflects the PWS and includes the in-house cost estimate. It also identifies the “organizational structures, staffing and operating procedures, equipment and transition plans, and inspection plans necessary to ensure that the in-house activity is performed in an efficient and cost effective manner.”<sup>65</sup> The Technical Performance Plan, which is only required for negotiated source selections, describes the government’s management capabilities, personnel qualifications, performance history, delivery schedule compliance, and technical capability to perform the workload specified in the PWS. The Technical Performance Plan should reflect the MEO.<sup>66</sup>

## **B. The Independent Review Officer**

To ensure equity in the cost comparison process, both the Management and Technical Performance Plans are sealed after completion and delivered to an A-76 Independent Review Officer (hereinafter IRO). The 1996 Supplement specifies that the IRO must be an impartial person from an “impartial activity that is organizationally independent of the commercial activity being studied and the activity preparing the cost comparison.”<sup>67</sup> The 1996 Supplement does not discuss what “organizationally independent” means.<sup>68</sup> The IRO must certify, in writing, that the government’s cost estimate is in full compliance

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<sup>61</sup> 1996 Supplement, *supra* note 8, pt. 1, ch. 3, at ¶ C.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at pt. I, ch. 3, ¶ H.

<sup>65</sup> *Id.* at pt. I, ch. 3 (private offerors are also required to submit Technical Performance Plans in negotiated procurements).

<sup>66</sup> *Id.* at pt. 1, ch. 3, ¶ H.

<sup>67</sup> *Id.* at pt. I, ch. 3, ¶ I.

<sup>68</sup> AFI 65-504, *supra* note 36, allows the IRO to be from the same wing/installation as the activity being studied and those preparing the cost comparison. *Id.* ¶ 7.

with the procedures and requirements of the 1996 Supplement. In addition, the IRO reviews the Management and Technical Performance Plans to ensure they contain data which “reasonably establish the Government’s ability to perform the PWS within the resources provided by the MEO.”<sup>69</sup> The IRO performs the certification and review before those documents (with the exception of the PWS) are submitted to the contracting officer. Since the IRO may be from the same installation as the activity being studied, installation counsel should ensure this person is truly independent yet knowledgeable of the process, and should be available to advise the IRO on any legal issues that may arise.

### **C. The Source Selection Authority**

The 1996 Supplement requires that a Source Selection Authority (hereinafter SSA) be established in accordance with the FAR, including “assurances that there are no potential conflicts of interest in the membership of the authority.”<sup>70</sup> This language is somewhat imprecise but seems to indicate that a SSA and a separate Source Selection Advisory Council (hereinafter SSAC) be established.<sup>71</sup> The SSA is responsible for determining which of the competitive offers represents the “best overall value” to the government.<sup>72</sup> The best competitive offer is then evaluated by the SSA against the government’s in-house Management Plan, provided to the SSA by the contracting officer.<sup>73</sup> The Management Plan must comply with the technical proposal requirement of the solicitation.<sup>74</sup> The SSA then evaluates the in-house offer to determine if it meets the “same level of performance and performance quality” as the best competitive offer.<sup>75</sup> The SSA does not review the in-house cost estimate at this stage.

Based on the SSA’s evaluation of the in-house offer, the government makes all changes necessary to meet the performance standards accepted by the SSA. The government submits revised cost estimates to the Independent Review Officer for re-certification. These steps are taken to “assure that the Government’s in-house cost estimate is based upon the same scope of work and performance levels as the best value contract offer.”<sup>76</sup> After all the necessary adjustments have been made to ensure the best private offer and the government’s in-house cost estimate are based upon the same scope of work

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<sup>69</sup> 1996 Supplement, *supra* note 8, at pt. I, ch. 3, ¶ I.

<sup>70</sup> *Id.* at pt. I, ch. 3, ¶ H.

<sup>71</sup> FAR, *supra* note 40, at 15.612. *See also*, FAR, *supra* note 40, part 7.304(d) for further guidance on the conduct of source selections.

<sup>72</sup> 1996 Supplement, *supra* note 8, pt. I, ch. 3, ¶ H.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

and performance standards, the contracting officer opens the government's cost estimate and calculates the cost adjustments on the cost comparison form.<sup>77</sup> The A-76 cost adjustment procedures discussed above<sup>78</sup> are not suspended in best value source selection but are only applied to the cost factors. The 1996 Supplement does not attempt to add any type of non-cost factor differential to the private offeror's successful proposal in addition to the ten percent differential on cost related factors. The complete government in-house offer and the best private offer are then evaluated by the SSA to determine which will offer the best overall value to the government.

The procedure by which the SSA evaluates the best competitive offer against the in-house Management Plan in order to allow the government to meet the performance standards accepted by the SSA is problematic and could lead to protests. Allowing the government an opportunity to amend its Management Plan based upon the SSA's evaluation of the best offeror's proposal could be viewed by offerors as violating both the FAR and Section 27 of the Office of Federal Procurement Policy Act, as amended.<sup>79</sup> FAR 15.610 states:

(d) The contracting officer and other Government personnel shall not engage in technical leveling (i.e. helping an offeror to bring its proposal up to the level of other proposals through successive rounds of discussion, such as by pointing out weaknesses resulting from the offeror's lack of diligence, competence, or inventiveness in preparing the proposal.

(e) The following conduct may constitute prohibited conduct . . .

(1) Technical transfusion (i.e., Government disclosure of technical information pertaining to a proposal that results in improvement of a competing proposal) . . . .<sup>80</sup>

An offeror who submits the best competitive proposal and then loses out to the in-house offer after the SSA has given the government the opportunity to adjust its offer to meet the same level of performance and performance quality as the best offer, will most likely protest to the General Accounting Office (hereinafter GAO) or the appropriate courts, citing this FAR provision. The GAO may review protests alleging issues of technical transfusion during A-76 source selections "since the competitive procurement system is involved."<sup>81</sup> SSAs should proceed very cautiously in this area.

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<sup>77</sup> *Id.*

<sup>78</sup> See *supra* notes 30-34 and accompanying text.

<sup>79</sup> Office of Federal Procurement Policy Act, 10 U.S.C. § 423 (1994).

<sup>80</sup> FAR, *supra* note 40, at 15.610. Improper disclosure of source selection information can result in civil and criminal penalties, as well as administrative remedies. 41 U.S.C. § 423(e) (1994).

<sup>81</sup> Dynalectron Corp., B-216201, 85-1 CPD ¶ 525, at 3, (May 10, 1985). See also Inter-Con Security Systems, Inc., B-257360.3, 94-2 CPD ¶ 187, at 6 (Nov. 15, 1994), where the

It addition to the technical leveling/transfusion issue, there are other reasons that the activities of SSAs and SSACs could become the focal point of legal disputes much more often than in non-A-76 best value source selections. Quite possibly, the SSA or members of the SSAC may be directly responsible, be in the chain of command, or be related to employees who work for the commercial activity under review. Thus, it is conceivable the SSA or SSAC may evaluate best value factors in an atmosphere clouded with personal interest or bias.<sup>82</sup> For example, in an A-76 best value source selection which includes past performance as an evaluation factor, the SSA or SSAC could inflate the score of the government's past performance if the SSA or members of the SSAC have rated, supervised, or personally known the affected employees. Conversely, if the affected employees are members of a union that the SSA or members of the SSAC have had poor past relationships with, that factor, or for that matter any best value factor, could be unfairly scored lower.

## V. RELEVANT CASE LAW

Improprieties in the source selection process can lead to aggrieved contractors filing protests. Conversely, federal employees, or their unions, who face loss of employment have ample opportunities to challenge agency A-76 procedures via the agency's administrative appeal process and in federal district court. The following are cases which help illustrate potential legal issues which are particularly relevant to best value source selections in the A-76 process.

### A. Protests

The procedures for evaluating proposals and award of contracts (either in-house or to a commercial offeror) may be reviewed by the GAO,<sup>83</sup> federal district court,<sup>84</sup> and as of 1996, the Court of Federal Claims,<sup>85</sup> under an agency's protest procedures.

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Comptroller General held "[o]ur review of agency decisions to retain services in-house instead of contracting for them is solely to ascertain whether the agency followed the announced 'ground rules' for the cost comparison." *Id.* One could argue this holding conflicts with *Dynalectron*; however, *Inter-Con Security* dealt merely with allegedly unclear contract requirements, not a matter where the competitive procurement system was threatened, as was the case in *Dynalectron*.

<sup>82</sup> Risking violation of the Ethics in Government Act of 1978, 18 U.S.C. § 208 (1994).

<sup>83</sup> Deficit Reduction Act of 1984, 31 U.S.C. § 3551(1) (1994).

<sup>84</sup> Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 12, 110 Stat. 3870, 3874 (1996).

<sup>85</sup> *Id.*

In *U.S. Department of Navy v. Latecoere International, Inc.*,<sup>86</sup> the protester, a French corporation, submitted a RFP to build a training system for the Navy to train pilots of high performance jet aircraft. The protester's was initially deemed to be the best value by the SSAC but because of improper considerations involving perceived political pressure to "buy American," the acquisition process was manipulated to eventually award to another bidder, Environmental Tectonics Corporation (hereinafter ETC). The protester's specific allegations were (1) the advisory council increased ETC's rating in three critical areas of the procurement from "marginal" to "acceptable" without reevaluation of these areas; (2) the SSA determined cost to be the most important factor, in contradiction to the terms of the solicitation; and, (3) the SSA failed to adequately justify his decision.

The Eleventh Circuit Court of Appeals upheld the protest, holding that while contracting officers are entitled to reasonable discretion, that discretion is not absolute. The court stated that proof an award lacks a reasonable basis, or was awarded in bad faith, generally establishes arbitrary and capricious action which, in this case, deprived the protester of a fair and honest consideration of its proposal.<sup>87</sup> The court reversed the district court's affirmation of the award to ETC and remanded the case back to the district court.

In *Dynacorp*,<sup>88</sup> the protester challenged the Air Force's decision to convert military personnel operated aircraft maintenance services at Laughlin AFB to in-house performance by civilian employees, rather than contract out for the services.<sup>89</sup> The protester's main argument was that the Air Force failed to include numerous costs in the in-house bid as required by Circular A-76 and its 1996 Supplement. The Comptroller General agreed, determining that the Air Force failed to include the costs of recruiting, hiring, relocating, certifying, and training its new in-house employees, while requiring the protester to include such costs as part of its bid. The Comptroller General stated "we have consistently held that contractors and the government should compete on the

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<sup>86</sup> U.S. Dep't of Navy v. Latecoere Int'l, Inc., 19 F.3d 1342 (11th Cir. 1994).

<sup>87</sup> *Id.* at 1356.

<sup>88</sup> *Dynacorp*, B-233727.2, 89-1 CPD ¶ 543 (Jun. 9, 1989). See also *Redstone Technical Services*, B-259222, 95-1 CPD ¶ 181 (Mar. 17, 1995), where the Comptroller General stated:

In best value procurements like these, where the contracting officer awards to higher cost, higher technically rated offerors, the award decisions must be supported by a rational explanation of why the technical superiority of the higher-cost offerors warrants the additional costs involved, even where, as in these cases, cost is weighted less heavily than the technical and management areas combined.

*Redstone*, ¶ 181 at 9.

<sup>89</sup> The protester had the lowest price of the eight private bidders but was \$620,871 over the in-house bid.

basis of the same scope of work on an A-76 procurement.”<sup>90</sup> In best value A-76 source selections this will be even more of a challenge.

## **B. Federal Employee Actions**

In past years, aggrieved federal employees had limited redress to challenge outsourcing determinations made under Circular A-76. The 1996 Supplement (as did the 1983 Supplement<sup>91</sup>) provides an appeal process. The administrative appeal authority is an individual who serves within the agency.<sup>92</sup> The 1996 Supplement does not provide much guidance on the form, substance, or appellant’s burden in such an appeal; the Supplement merely states the appellant<sup>93</sup> must “demonstrate that the items appealed, individually or in aggregate, would reverse the tentative position.”<sup>94</sup> Unsuccessful appellants may renew their appeal at federal district court. Until recently, such appeals were unsuccessful.<sup>95</sup>

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<sup>90</sup> *Id.* at 4.

<sup>91</sup> 1983 Supplement, *supra* note 30, at pt. 1, ch. 2, para I.

<sup>92</sup> 1996 Supplement, *supra* note 8, at pt. I, ch. 3, ¶ K. The appeal authority is appointed by the individual given authority by the agency head to implement A-76.

The individual(s) selected must be (a) two levels above the official who signed the waiver, in the case of a cost-comparison waiver . . . or (b) independent of the activity under review or at least two organizational levels above the official who certified the Government’s Management Plan and MEO, in the case of a tentative cost comparison plan.

*Id.*

<sup>93</sup> Eligible appellants consist of:

- a. Federal employees (or their representatives) and existing Federal contractors affected by a tentative decision to waive cost-comparison;
- b. Federal employees (or their representatives) and contractors that have submitted formal bids or offers who would be affected by a tentative decision to convert to or from in-house, contract or ISSA performance as a result of a cost comparison; or
- c. Agencies that have submitted formal offers to compete for the right to provide services through ISSAs.

*Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *See American Federation of Government Employees v. Hoffman*, 427 F. Supp 1048, 1082 (N.D. Ala. 1976) (holding that Circular A-76 and the Army regulations which implement it are essentially managerial and policy directives governing the procurement of goods and services, thus provide no right of action to Army civil service employees suffering a reduction in force due to an adverse cost comparison study); *American Federation of Government Employees Local 1668 v. Dunn*, 561 F.2d 1310, 1315 (9th Cir. 1977) (holding that the method by which the Air Force conducts its cost comparison studies is solely within the discretion of that

*Local 2855 v. United States*<sup>96</sup> is illustrative of what was once the clear majority rule. In *Local 2855*, a group of federal employees and their union filed a class action suit challenging the Army's decision to contract out stevedoring and terminal services as a result of an A-76 cost comparison. In affirming the district court, the Third Circuit Court of Appeals held the plaintiff lacked standing under the Administrative Procedures Act (hereinafter APA)<sup>97</sup> because the Army's decision to contract out those services fell within the "committed to agency discretion" exception to reviewability under the APA.<sup>98</sup> The court's rationale was that the "absence of fixed standards [in the A-76 process] reflects an understanding that the type of decision made by the Army here is necessarily a matter of judgment and managerial discretion . . . ."<sup>99</sup>

The court in *Diebold v. U.S.*<sup>100</sup> declined to follow the *Local 2855* line of cases. In *Diebold*, civilian employees of the Army brought suit challenging the Army's decision via the A-76 process to privatize food service operations at Fort Knox, Kentucky. The district court dismissed the suit stating that it had no jurisdiction to review the Army's decision because the issue was committed to agency discretion. The Sixth Circuit Court of Appeals reversed the district court, holding that outsourcing cases are reviewable in federal district court because those cases are essentially cases requiring an accounting, and courts have long dealt with disputes where one party required an accounting by another. The court acknowledged the Third Circuit's ruling in *Local 2855*, but held it did not apply because those earlier cases dealt with a "less formal, and highly discretionary version of Circular A-76, prior to the Circular's setting out mandatory criteria . . . ." <sup>101</sup> The court added that because of those

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department); *cf.* *Perkins v. Rumsfeld*, 577 F.2d 366, 368 (6th Cir. 1978) (holding that "the authority to transfer functions from one military establishment to another is vested in the Secretary of Defense by Congress . . . . In exercising this authority the Secretary is performing a discretionary and not a ministerial function. The Courts have no jurisdiction to interfere.").

<sup>96</sup> *Local 2855 v. United States*, 602 F.2d 574 (3d Cir. 1979).

<sup>97</sup> Administrative Procedures Act, 5 U.S.C. §§ 701-706 (1994). Section 702 of the Administrative Procedures Act states "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a *relevant statute*, is entitled to judicial review thereof" unless, according to § 701(a), the statute precludes judicial review or the "agency action is committed to agency discretion by law." 5 U.S.C. § 702 (emphasis added).

<sup>98</sup> 602 F.2d at 583.

<sup>99</sup> *Id.* at 582-83. See also *Hawaii Federal Lodge No. 1998, Int'l Assoc. of Machinists and Aerospace Workers*, B-214104, 84-1 CPD ¶ 109 (Feb. 7, 1984) (GAO review of Circular A-76 determinations "does not extend to nonbidders such as federal employees or union locals that represent federal employees."); *Nat'l Assoc. of Gov't Employees, Local R5-87*, B-212735.2, 84-1 CPD ¶ 37 (Dec. 29, 1983).

<sup>100</sup> *Diebold v. United States*, 947 F.2d 787 (6th Cir. 1991).

<sup>101</sup> *Id.* at 790.



“mandatory criteria” the APA provides a “compelling policy decision” in favor of judicial review of agency A-76 determinations.<sup>102</sup>

The *Diebold* court also determined that the plaintiffs had legal standing to bring suit. Although the court conceded that Circular A-76 is not a statute and cannot form a basis for standing under section 702 of the APA (which requires plaintiffs’ interests be within the “zone of interests” of a relevant statute), it found the plaintiffs’ interests did fall within the zone of interests of the Office of Federal Procurement Policy Act Amendments (hereinafter OFPPAA) of 1979.<sup>103</sup> The court cited the first section of the OFPPAA, which states congressional policy is to promote “economy, efficiency and effectiveness in the procurement of property and services by the executive branch of the United States Government.”<sup>104</sup> The court further noted the OFPPAA establishes within the OMB an “Office of Federal Procurement Policy,” whose job is to oversee the implementation of the efficiency goal of OFPPAA, by contracting out government products and services to the private sector.<sup>105</sup> Concluding their analysis, the court held that since the efficiency goals of OFPPAA are reflected in Circular A-76, OFPPAA is a “relevant statute” within the meaning of the APA.<sup>106</sup> Based on *Diebold*, plaintiffs may now gain standing under the APA to challenge Circular A-76 outsourcing decisions under this Act.<sup>107</sup>

### C. Analysis

*Latecoere*<sup>108</sup> is an effective example of what can happen if bias is permitted in the A-76 process. Circular A-76 best value source selections are ripe for bias issues because the personnel involved in the process, i.e., cost comparison study team, PWS, SSA, SSAC, are either more likely, or more likely *to be perceived*, as having a personal interest in the outcome, unlike the typical non-A-76 best value source selections where government personnel are less likely to have ties with the private offerors.

*Dynacorp*<sup>109</sup> and *Redstone*<sup>110</sup> are important cases for practitioners as they demonstrate the basic rule that the Government’s MEO and the

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<sup>102</sup> *Id.*

<sup>103</sup> Office of Federal Procurement Policy Act Amendments of 1979, Pub. L. No. 96-83, 93 Stat. 648, (codified as amended at 41 U.S.C. §§ 401-430 (1989)).

<sup>104</sup> 947 F.2d at 796.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 810-11.

<sup>107</sup> *See also* National Air Traffic Controllers Assoc. v. Pena, No. 95-3016, 1996 U.S. app. LEXIS 8258 (6th Cir. Mar. 7, 1996) The court reaffirmed its analysis in *Diebold* and added, “[o]ur decision is in accord with the long line of Supreme Court precedent which, prior to *Air Courier Conference of America*, has never dismissed a case for lack of standing,” *Id.* at \*18 (citing *Air Courier Conference of Am.*, 498 U.S. 517 (1991)).

<sup>108</sup> U.S. Dep’t of Navy v. *Latecoere Int’l, Inc.*, 19 F.3d 1342 (11<sup>th</sup> Cir. 1994).

<sup>109</sup> *Dynacorp*, B-233727.2, 89-1 CPD ¶ 543 (Jun. 9, 1989).

competitive proposal must be based upon the same requirements, and that the basis for award must be thoroughly justified in writing. Thus, it is important not only to avoid protests but labor disputes as well.

Legal challenges by federal employees may prove to be the most contentious issues related to introducing best value source selection to the A-76 process. Before *Diebold*,<sup>111</sup> the only due process afforded to federal employees adversely affected by Circular A-76 decisions was the agency administrative appeal. Now, at least in the Sixth Circuit, federal employees have standing to challenge A-76 decisions in federal district court. Undoubtedly, labor unions will subject A-76 determinations that result in the loss of jobs held by unionized federal employees to the highest scrutiny. Agency administrative appeals and suits in federal court are likely to rise. Government litigators should continue to argue the favorable holding of *Local 2855*<sup>112</sup> in the remaining circuits.

## VI. ANALYSIS AND RECOMMENDATIONS

The major deficiency of the 1996 Supplement with respect to best value source selections is its overly broad guidance, which seems to create more questions than it answers. Presumably, OMB has left the task of providing detailed guidance to the various federal agencies through their implementing regulations. Along those lines, I propose the following. First, the DoD/military department regulations and instructions which implement Circular A-76 should be amended to require involvement by legal counsel during all stages of the process, including the cost comparison study team. Involvement by counsel should include not only legal advice but written legal reviews of all plans and documents, including the PWS, Management and Technical Performance Plans, the in-house cost estimate, and, particularly, the SSA's written justification for award. Legal counsel should stress to SSAs and SSACs the importance of fully documenting their actions to create a full administrative record that reflects well-grounded, reasonable decisions.

Second, A-76 training sessions should be instituted for all personnel who are to participate in Circular A-76 cost comparisons and evaluations. This training should be mandatory and should focus on the changes contained in the 1996 Supplement, as well as other legal issues, such as the consequences of bias in the process, inaccurate and incomplete proposal evaluations, failure to develop a proper administrative record, and other conflicts of interest.<sup>113</sup>

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<sup>110</sup> Redstone Technical Services, B-259222, 95-1 CPD ¶ 181 (Mar. 17, 1995).

<sup>111</sup> *Diebold v. United States*, 947 F.2d 787 (6<sup>th</sup> Cir. 1991).

<sup>112</sup> *Local 2855 v. United States*, 602 F.2d 574 (3d Cir. 1979).

<sup>113</sup> This training could be part of the mandatory training and education program now required for those in the acquisition career path. See National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 4307, 110 Stat. 666 (1996).

Third, I recommend the FAR and the 1996 Supplement be amended to specifically address potential conflicts of interest for all government personnel involved in the A-76 process. Unfortunately, the recent amendments to the Procurement Integrity Act by the Clinger-Cohen Act do not discuss the A-76 process.<sup>114</sup> However, the new FAR 3.104-3 states:

Generally, an individual will not be considered to have personally and substantially participated in a procurement solely by participating in the following activities: . . . (iv) For procurement to be conducted under the procedures of OMB Circular A-76, participation of management studies, preparation of in-house cost estimates, preparation of the “most efficient organization” analysis, and furnishing of data or technical support to be used by selection information before the award of a Federal agency procurement contract to which the information reflects.<sup>115</sup>

This FAR provision is similar to the language included in the 1996 Supplement which states that the term “procurement official,” with respect to the A-76 process does not include “[e]mployees who participate or provide data to support the development of the various study elements . . . .”<sup>116</sup> Essentially, FAR 3.104-3 and the 1996 Supplement exempt much of the A-76 process from the Procurement Integrity Act.<sup>117</sup> This is not good policy. In Circular A-76 best value source selections, involvement in the PWS, the MEO, and Management and Technical Plans can lead to improper conduct. Individuals participating in the above listed activities should be treated as having personally and substantially participated in a procurement in accordance with the Procurement Integrity Act.

The recommendations listed above should help avoid conflicts of interest, educate source selection authorities and others involved in the Circular A-76 process, and result in a better articulation of the government’s evaluations and decisions. Further, it is my belief that including all individuals involved in the A-76 process under the Procurement Integrity Act will lead to more professional behavior and more thoughtful actions.

## VII. CONCLUSION

Best value source selection in the Circular A-76 process will undoubtedly cause some initial difficulty and confusion since no one in the field has experience comparing in-house activities against private offerors on

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<sup>114</sup> Office of Federal Procurement Policy Act Amendments of 1988 § 27 *amending the Procurement Integrity Act, as amended by the Clinger-Cohen Act*, Pub. L. No. 104-106, §§ 4001-4402, 110 Stat. 186, 659-665 (1996).

<sup>115</sup> Dep’t of Defense Federal Acquisition Regulation, Procurement Integrity, 62 Fed. Reg. 226, 228 (Jan. 2, 1997).

<sup>116</sup> 1996 Supplement, *supra* note 8, at pt. I, ch. 3, ¶ B.

<sup>117</sup> FAR, *supra* note 40, at 3.104-3.

the basis of best value. Best value source selection in the A-76 process has the potential to transform the cost comparison process into a result-oriented exercise where source selection officials predetermine the outcome. Legal counsel must guard against this and ensure that decisions by SSAs are reasonable and fully supported.

Commentators have lauded best value source selection as making good business sense which will ultimately result in more creative and flexible alternatives.<sup>118</sup> Best value source selections in the A-76 process can prove just as successful, although some growing pains may have to be suffered along the way. When properly conducted, best value source selection in the A-76 process will result in the government obtaining higher quality services tailored to its specific needs.

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<sup>118</sup> Christopher A. Barnes, *New Improved Awards Without Discussion or Foreign Competition*, 20:4 PUB. CONT. L.J. 532, 554 (1991).

# TDRL and the *Feres* Doctrine

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## I. INTRODUCTION

There is apprehension among the military services about asserting the *Feres*<sup>1</sup> doctrine in cases arising out of allegations of medical malpractice, when the negligence complained of occurs while service members are on the Temporary Disabled Retired List (hereinafter TDRL).<sup>2</sup> The reason for this concern is the conflict among the district and circuit courts on whether medical care received while the service member is on TDRL is “incident to service,” and therefore barred under the *Feres* doctrine. There is also apprehension over having the Supreme Court decide a *Feres* case.<sup>3</sup>

## II. CURRENT SPLIT AMONG THE COURTS

The Fifth Circuit was the first appellate court to rule on this issue. In *Cortez v. United States*,<sup>4</sup> the Court held that the *Feres* doctrine did not bar the medical malpractice claim of the widow of a service member on the TDRL

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<sup>1</sup> In *Feres v. United States*, 340 U.S. 135 (1950), the Supreme Court held that service members were barred from recovering against the government where those injuries “arise out of or are in the course of activity incident to service.” 340 U.S. at 146.

<sup>2</sup> 10 U.S.C. § 1202 (1983). The statute states:

Upon a determination by the Secretary concerned that a member described in section 1201(c) of this title would be qualified for retirement under section 1201 of this title but for the fact that his disability is not determined to be of a permanent nature and stable, the Secretary shall, if he also determines that accepted medical principles indicate that the disability may be of a permanent nature, place the member’s name on the temporary disability retired list, with retired pay computed under section 1401 of this title.

<sup>3</sup> The last two cases upholding *Feres* were *United States v. Johnson*, 481 U.S. 681 (1987), and *United States v. Stanley*, 483 U.S. 669 (1987). Both cases were 5-4 decisions. Since these two cases were decided, there have been five new appointments to the Court (Justices Kennedy, Thomas, Souter, Ginsburg, and Breyer). The remaining four Justices have not been consistent in upholding *Feres*. In *Johnson*, Justice Scalia dissented and filed an opinion in which Justice Stevens joined. In *Stanley*, Justice O’Connor filed an opinion concurring in part and dissenting in part, and Justice Stevens joined in part in the dissenting opinion filed by Justice Brennan.

<sup>4</sup> *Cortez v. United States*, 854 F.2d 723 (5<sup>th</sup> Cir. 1988).

who committed suicide while at a military hospital. The Appellate Court rejected the government's argument that all members of the armed forces who are not permanently retired are barred under the *Feres* doctrine.<sup>5</sup> The court stated that a member on the TDRL was in a type of "limbo" status, which was not the equivalent of active duty since the service member on the TDRL is not in active service.<sup>6</sup>

Before *Cortez*, the cases most analogous involved plaintiffs on terminal leave or medical hold status. In the Tenth Circuit case of *Madsen v. U.S. ex rel. U.S. Army, Corps of Engineers*, the court said that negligent treatment received at a military hospital for injuries sustained in a motorcycle accident while the service member was on terminal leave pending retirement, and while subsequently placed on medical hold, was barred under the *Feres* doctrine, as the medical treatment was incident to military service.<sup>7</sup> The court concluded that during terminal leave and while on medical hold status, plaintiff was on active duty status as he received active duty pay, accrued annual leave, and accumulated credit for active duty time later used in computing his military retirement pay.<sup>8</sup>

In contrast, the Fifth Circuit held in *Harvey v. United States*,<sup>9</sup> that a service member whose initial injuries warranting medical treatment occurred while on terminal leave, and whose cause of action for medical malpractice began while the member was on medical hold status, was not barred under the *Feres* doctrine. As rationale for its holding, the Fifth Circuit, unlike the Tenth Circuit, held that even though being on medical hold status extended the period of active duty, like the TDRL, it was a position in limbo. Further, the court explained that although the member received military pay while on medical hold, the "several casual and partial payments" the member received "[did] not amount to benefits sufficient to warrant a *Feres* bar."<sup>10</sup>

At first blush the *Harvey* decision might be construed as being contrary to the Tenth Circuit's ruling in *Madsen*. But in *Madsen*, the service member limited his cause of action to the hospitalization which occurred before being placed on medical hold, and the parties did not dispute the fact that the member was on active duty at the time of that hospitalization. Conversely, in *Harvey*, the cause of action was for medical malpractice which accrued while the member was on medical hold, beyond his date of separation. Nonetheless, the Fifth Circuit noted in *Harvey* that a cause of action accruing while the service member is on terminal leave might not necessarily be barred under the *Feres* doctrine, if the member's terminal leave was not tantamount to

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<sup>5</sup> *Id.* at 726.

<sup>6</sup> *Id.*

<sup>7</sup> *Madsen v. U.S. ex rel. U.S. Army Corps of Engineers*, 841 F.2d 1011 (10<sup>th</sup> Cir. 1987).

<sup>8</sup> *Id.* at 1013.

<sup>9</sup> *Harvey v. United States*, 884 F.2d 857 (5<sup>th</sup> Cir. 1989).

<sup>10</sup> *Id.* at 861.

discharge.<sup>11</sup> The Fifth Circuit noted that in *Bankston v. United States*,<sup>12</sup> it held that the *Feres* doctrine may not bar a service member's cause of action which accrued while on terminal leave, if the member's status was tantamount to discharge. That case was remanded for factual findings to determine whether the member had been discharged at the time of the alleged negligence, or whether his terminal leave status was tantamount to discharge.

In an opinion diametrically opposed to the Fifth Circuit's holdings and rationales in *Cortez* and *Harvey*, the Eleventh Circuit in *Ricks v. United States*,<sup>13</sup> joined the Tenth Circuit and affirmed the lower court's holding that the *Feres* doctrine barred the widow of a service member from bringing a medical malpractice cause of action while the member was on the TDRL with a 100% disability rating. The court noted that the "statutory language establishing the temporary disability retired list reflects a congressional intent that personnel on the list are still members of the armed forces."<sup>14</sup> In finding that the medical care was "incident to service," the Eleventh Circuit found that Ricks had not been discharged or placed on the permanent disability retired list, was subject to military law and a possible return to duty, and as such, had taken full advantage of benefits to which he was entitled, such as medical care.

Like the Eleventh Circuit in *Ricks*, the Fourth Circuit held in *Kendrick v. United States*,<sup>15</sup> that a cause of action for medical malpractice while the service member is on the TDRL is barred under the *Feres* doctrine. The Fourth Circuit rejected plaintiff's argument that medical care he received while on the TDRL was not "incident to service." Although reaching the same conclusion as the Eleventh Circuit, the Fourth Circuit focused on when and under what circumstances the negligent act occurred, instead of focusing on when the injury occurred or on the member's status while on the TDRL.<sup>16</sup> The Fourth Circuit held that because the alleged negligent act commenced while Kendrick was on active duty, (the prescribing of anti-convulsant medication without proper monitoring), and continued throughout his subsequent course of treatment, all of his medical treatment arose out of an activity incident to service.<sup>17</sup>

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<sup>11</sup> *Id.* at 860.

<sup>12</sup> *Bankston v. United States*, 480 F.2d 495 (5<sup>th</sup> Cir. 1973).

<sup>13</sup> *Ricks v. United States*, 842 F.2d 300 (11<sup>th</sup> Cir. 1988), *cert. denied*, 490 U.S. 1031 (1989).

<sup>14</sup> *Id.* at 301. The court cited 10 U.S.C.A. § 1210(a) ("A physical examination shall be given at least once every 18 months to each member of the armed forces whose name is on the temporary disability retired list. . . ."); and 10 U.S.C.A. § 1376(b) ("The Secretary concerned shall maintain a temporary disability retired list containing the names of members of the armed forces under his jurisdiction placed thereon. . . .").

<sup>15</sup> *Kendrick v. United States*, 877 F.2d 1201 (4<sup>th</sup> Cir. 1989), *cert. dismissed*, 493 U.S. 1065 (1990).

<sup>16</sup> *Id.* at 1203.

<sup>17</sup> *Id.* at 1203-1204.

The Fourth Circuit distinguished the Fifth Circuit's opinion in *Cortez*, noting that Cortez's suicide at a military hospital while on the TDRL was "an isolated act independent of any service-connected injury."<sup>18</sup> The court also distinguished *United States v. Brown*,<sup>19</sup> noting that Kendrick was not a civilian at the time of the alleged negligent act, as he was still subject to military discipline throughout his course of medical treatment.<sup>20</sup>

The Tenth Circuit has not had the opportunity to rule on this issue since *Madsen*, but within the circuit, the District Court of Kansas issued two recent opinions on cases arising out of medical care while the member was on the TDRL. In *Whitham v. United States*,<sup>21</sup> the district court held that a cause of action for negligent discharge from the psychiatric unit at a Veterans Administration Medical Center, the alleged cause of the service member's suicide while on the TDRL, was barred under the *Feres* doctrine. Citing *Madsen*, the court held that whether an injury from medical malpractice is "incident to service," depended on whether the service member was on active duty at the time of the injury.<sup>22</sup> The court noted that the Tenth Circuit had found that the legal relationship created by the member's active duty status is not set aside because the member is unable to perform actual military duties.<sup>23</sup>

In *Berry v. United States*,<sup>24</sup> the same court held that injury from medical malpractice arising out of treatment the service member received at a military medical facility while on the TDRL with a 30% disability rating was barred under the *Feres* doctrine. The court, noting that the circuits were divided on this issue, found the analysis of the Fourth and Eleventh Circuits more persuasive to the facts at hand. In an attempt to distinguish *Harvey* and *Cortez*, the court found that the Fifth Circuit's description of being on the TDRL as being in a "limbo status" and at a "processing point on the road to either separation or disability discharge," was not applicable to Berry.<sup>25</sup> Unlike *Harvey* and *Cortez*, Berry had requested to be placed on the TDRL so that she could undergo the reconstructive surgery which would return her to active duty status.<sup>26</sup> Moreover, the court held that since Berry was admitted to the military hospital solely because of her military status, her alleged injury occurred "in the course of activity incident to service."<sup>27</sup>

Neither the Second Circuit nor the Eighth Circuit has ruled on the TDRL issue. But within those circuits, the district courts have been divided.

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<sup>18</sup> *Id.* at 1204 n.2.

<sup>19</sup> *United States v. Brown*, 348 U.S. 110 (1954).

<sup>20</sup> 877 F.2d at 1204.

<sup>21</sup> *Whitham v. United States*, 765 F. Supp. 674 (D.Kan. 1991).

<sup>22</sup> *Id.* at 677.

<sup>23</sup> *Id.*

<sup>24</sup> *Berry v. United States*, 772 F. Supp. 563 (D.Kan. 1991).

<sup>25</sup> *Id.* at 565.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* (citing *Kendrick v. United States*, 877 F.2d at 1206).



Within the Second Circuit, the district court in *Rinelli v. United States*,<sup>28</sup> held that the *Feres* doctrine did not preclude a service member from bringing an action for medical malpractice for injuries sustained at a Veterans Administration hospital while on the TDRL. The court found that although the service member had not been discharged from the military and could have been returned to active service, he was for all practical purposes a civilian because when he was injured he “was not directly subject to military control; he was not under the compulsion of military orders; he was not performing any military mission.”<sup>29</sup> In a footnote, the court distinguished *Ricks* by noting that *Ricks* was treated in a military medical facility, which arguably could trigger the applicability of the *Feres* doctrine.<sup>30</sup>

In the Eighth Circuit, the district court in *Anderson v. United States*,<sup>31</sup> held that medical treatment while on the TDRL was “incident to service,” because the plaintiff received military care for the initial injury for over a year before being placed on the TDRL, and was entitled to continue to receive treatment while on the TDRL.<sup>32</sup> The court found that the injuries for which plaintiff sought treatment, a gastrointestinal condition he developed when he ingested toxic fumes and gasses in the course of fighting fires on a Navy vessel, were the result of “an active duty military incident.”<sup>33</sup> The court also noted several factors crucial to the “incident to service” finding, such as while on the TDRL the plaintiff was still subject to military law and discipline, was required to submit to periodic physical examinations by military physicians, was subject to return to active duty, and was entitled to care at a military facility because of his military status.<sup>34</sup> The court rejected plaintiff’s argument that negligent treatment complained of following placement on the TDRL, rather than while still on active duty, was determinative of the “incident to service” issue. The court viewed plaintiff’s claim as a “skillful reformulation of a complaint for in-service negligence.”<sup>35</sup>

Indicative of which direction the Eighth Circuit might go is the case *Lampitt v. United States*.<sup>36</sup> *Lampitt* did not involve the TDRL, but rather concerned injuries which occurred while the member was on “convalescence leave” prior to being placed on the TDRL. In *Lampitt*, the plaintiff alleged that surgery was performed by military doctors without his consent because he was assured that a civilian doctor would be participating and supervising, but the surgery was eventually performed without the assistance of the civilian

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<sup>28</sup> *Rinelli v. United States*, 706 F. Supp. 190 (E.D.N.Y. 1988).

<sup>29</sup> *Id.* at 194.

<sup>30</sup> *Id.* at 195 n.4.

<sup>31</sup> *Anderson v. United States*, 575 F. Supp. 470 (E.D.Mo. 1983).

<sup>32</sup> *Id.* at 471.

<sup>33</sup> *Id.* at 470-71.

<sup>34</sup> *Id.* at 472-473 (citations omitted).

<sup>35</sup> *Id.* at 473 (citation omitted).

<sup>36</sup> *Lampitt v. United States*, 753 F.2d 702 (8<sup>th</sup> Cir. 1985), *cert. denied*, 472 U.S. 1029 (1985).

doctor.<sup>37</sup> The Circuit Court held that the medical care received at the military facility was “incident to service.” Rejecting plaintiff’s argument that he was not on active duty at the time, the court found that even while on convalescent leave, plaintiff received orders and assignments from his superiors.<sup>38</sup> Of interest, the Eighth Circuit distinguished *Parker v. United States*,<sup>39</sup> and *Johnson v. United States*,<sup>40</sup> two cases involving fatal automobile accidents which occurred while the victims were involved in nonmilitary activities, as they did not involve allegations by service members of medical malpractice by military doctors in military hospitals.

Finally, the case *Katta v. United States*,<sup>41</sup> another case not involving the TDRL, shows how courts often interpret *Feres*’ incident to service requirement. *Katta* was a cause of action for medical malpractice in the treatment of a Vietnam veteran’s post-traumatic stress disorder at a Veterans Administration hospital, the alleged cause of his suicide. The court held that *Katta*’s cause of action was barred under the *Feres* doctrine. The court reasoned that his post-traumatic stress disorder was the result of his combat experience occurring while on active duty. Thus, even though he did not commit suicide until long after his discharge from the military, his suicide nonetheless resulted from his service-related post-traumatic stress disorder.

### III. WHERE DO WE GO FROM HERE?

Among the circuit courts, the conflicts are among the Fifth, Fourth and Eleventh Circuits. The Fifth Circuit has held that a cause of action for medical malpractice while a service member is on the TDRL is not *Feres* barred because being on the TDRL is tantamount to being discharged from active service.<sup>42</sup> The Fourth and Eleventh Circuit Courts, on the other hand, have held the opposite, but for different reasons. The Fourth Circuit has reasoned that the cause of action is barred by *Feres* if the alleged negligence for which plaintiff seeks compensation occurred while plaintiff was on active duty. The Eleventh Circuit reasoned that being on the TDRL *per se* is akin to still being on active duty, and medical care received while on the TDRL is therefore “incident to service.”

One can reasonably predict that the Tenth Circuit, given its opinion in *Madsen v. U.S. ex rel. U.S. Army Corps of Engineers*,<sup>43</sup> and the district court’s interpretations thereof, will likely rule the medical care “incident to service.”

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<sup>37</sup> *Id.* at 702-703.

<sup>38</sup> *Id.* at 703.

<sup>39</sup> *Parker v. United States*, 611 F.2d 1007 (5<sup>th</sup> Cir. 1980).

<sup>40</sup> *Johnson v. United States*, 704 F.2d 1431 (9<sup>th</sup> Cir. 1983).

<sup>41</sup> *Katta v. United States*, 774 F. Supp. 1134 (N.D.Ill. 1991).

<sup>42</sup> *Cortez v. United States*, 854 F.2d 723 (5<sup>th</sup> Cir. 1988); *Harvey v. United States*, 884 F.2d 857 (5<sup>th</sup> Cir. 1989).

<sup>43</sup> *Madsen v. U.S. ex rel. U.S. Army Corps of Engineers*, 841 F.2d 1011 (10<sup>th</sup> Cir. 1987).

In *Madsen*, recall the service member was on terminal leave pending retirement and was subsequently placed on medical hold at the time of the alleged medical malpractice. The court held that the test is whether the member was on active duty status and, if so, then the medical care was “incident to service.” Subsequently, two decisions from the district courts have held that while on the TDRL, the member is still on active duty status.<sup>44</sup>

Likewise, although the Eighth Circuit has not had the issue squarely before it, based on *Lampitt v. United States*,<sup>45</sup> and the district courts’ decisions within that circuit, one can reasonably predict that the Eighth Circuit will rule that medical care received at a military facility while a service member is on the TDRL is “incident to service.” Recall in *Lampitt*, the service member was on “convalescence leave” prior to being placed on the TDRL. The Eighth Circuit held that the member was on active duty at the time because the member was still subject to military control and the care he received was incident to service as it was provided by military physicians at a military hospital. Within the Eighth Circuit, one district court has held that the medical care received while on the TDRL is “incident to service,”<sup>46</sup> and another court held that the medical care was “incident to service” even when the member had long been discharged from the service.<sup>47</sup>

Finally, within the Second Circuit, only one district court has addressed this issue. In *Rinelli v. United States*,<sup>48</sup> the court held that although a malpractice cause of action at a Veterans Administration hospital by a member on the TDRL was not *Feres* barred, the question remains whether medical care received at a military hospital while on the TDRL is *Feres* barred.

While it is true that the Supreme Court’s view on the *Feres* doctrine, at least as that Court is currently composed, is unknown, there is no real danger of a reversal of this important doctrine, which the Court has upheld since 1950. Indeed, the Supreme Court need not even revisit the rationale of *Feres* in a future case, though it has previously done so in *United States v. Johnson*,<sup>49</sup> since differences between the circuits turn on the issue of whether medical care

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<sup>44</sup> *Whitham v. United States*, 765 F.Supp. 674 (D.Kan. 1991); *Berry v. United States*, 772 F. Supp. 563 (D.Kan. 1991).

<sup>45</sup> *Lampitt v. United States*, 753 F.2d 702 (8<sup>th</sup> Cir. 1985), *cert. denied*, 472 U.S. 1029 (1985).

<sup>46</sup> *Andersen v. United States*, 575 F. Supp. 470 (E.D.Mo. 1983).

<sup>47</sup> *Katta v. United States*, 774 F. Supp. 1134 (N.D.Ill. 1991).

<sup>48</sup> *Rinelli v. United States*, 706 F. Supp. 190 (E.D.N.Y. 1988).

<sup>49</sup> *United States v. Johnson*, 481 U.S. 681, 688-691 (1987). The circuit courts have since interpreted *United States v. Johnson* as holding that medical care received while on active duty status is “incident to service,” regardless of whether the initial injury itself was “service-connected.” *Atkinson v. United States*, 825 F.2d 202 (9<sup>th</sup> Cir. 1987), *cert. denied*, 485 U.S. 987 (1988); *Loughney v. United States*, 839 F.2d 186 (3<sup>rd</sup> Cir. 1988); *Appelhans v. United States*, 877 F.2d 309 (4<sup>th</sup> Cir. 1989); *Borden v. Veterans Administration*, 41 F.3d 763 (1<sup>st</sup> Cir. 1994); *Hayes v. United States*, 44 F.3d 377 (5<sup>th</sup> Cir. 1995), *cert. denied*, 116 S. Ct. 66 (1995); *Skees v. United States*, 107 F.3d 421 (6<sup>th</sup> Cir. 1997); *Jones v. United States*, 112 F.2d 299 (7<sup>th</sup> Cir. 1997).

received while on the TDRL is “incident to service.” The Supreme Court would be asked to decide one or both of the following questions: (1) whether being on the TDRL is akin to being on active duty, a status to which *Feres* would apply; or (2) whether the determining factor is that the initial injury for which medical care has been received is “service-connected.”

#### IV. CONCLUSION

The military services’ apprehension on this issue is unfounded as there is no real danger of a reversal of the *Feres* doctrine, at least when the alleged negligence is medical malpractice. The military services should assert *Feres* in all cases arising out of medical care rendered while the member is on the TDRL. Given the different rationales for upholding *Feres* in the Fourth and Eleventh Circuits and in the district courts within the Second and Eighth Circuits, the services should pursue *certiorari* in the appropriate case. Such a case should be one where the initial injury is “service-connected;” the care for that injury continued while the member was on the TDRL; and the treatment was provided by military providers at a military hospital. Given these facts and the precedence of upholding the *Feres* doctrine, it is unlikely the Supreme Court would reverse the rationales expounded by these lower courts.<sup>50</sup>

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<sup>50</sup> Hornbrook & Kirschbaum, *The Feres Doctrine: Here Today - Gone Tomorrow?*, 33 A.F. L. REV. 1 (1990).