

Military Rule of Evidence 707 and the Art of Post-Polygraph Interrogation: A Proposed Amendment to the Blanket Exclusionary Rule

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Introduction

To go beyond is as wrong as to fall short.
—Confucius¹

In March 1998, Military Rule of Evidence (MRE) 707² survived a constitutional challenge in *United States v. Scheffer*.³ The *Scheffer* opinion limits its focus to whether the rule unconstitutionally prevents an accused from presenting an exculpatory polygraph result.⁴ It does not address MRE 707's strict prohibition against any reference to the taking of a polygraph that is offered into evidence for any purpose,⁵ and this issue remains ripe for criticism. This article argues for the rescission of MRE 707's blanket exclusion of all references to the taking of a polygraph while leaving intact its prohibitions against admitting polygraph results, opinions of polygraph examiners, and references to offers and refusals to take a polygraph.

The blanket prohibition against any reference to a person taking a polygraph examination unfairly prevents an accused from attacking the reliability of his admissions in a post-polygraph interrogation. The issue is the art of the subsequent interrogation, not polygraph science. Whether in a motion or on the merits, an accused may want to present evidence that he took a polygraph test to demonstrate the overbearing effect of all the relevant circumstances surrounding the interrogation.

Military Rule of Evidence 707 directly conflicts with MRE 304(e)(2),⁶ which allows an accused to challenge the weight of an admission or confession already in evidence.⁷ The rule also conflicts with MRE 104(a) by imposing a restriction on evidence the military judge may consider in an evidentiary hearing.⁸ Military Rule of Evidence 707 should meet the legitimate need for the exclusion of polygraph evidence while avoiding conflict with MREs 304(e) and 104(a). The rule should permit an accused to introduce the facts surrounding his polygraph test as part of the totality of the circumstances inquiry into the voluntariness of his post-polygraph admissions. Once the accused

1. CONFUCIUS, THE CONFUCIAN ANALECTS (500 BC), *quoted in* BARTLETT'S FAMILIAR QUOTATIONS 61 (1992).

2. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 707 (2000) [hereinafter MCM].

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 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.

Id.

3. 523 U.S. 303 (1998).

4. *Id.* at 305.

5. MCM, *supra* note 2, MIL. R. EVID. 707(a).

6. *Id.* MIL. R. EVID. 304(e)(2).

Rule 304. Confessions and admissions

- (e)(2) *Weight of the evidence.* If a statement is admitted into evidence, the military judge shall permit the defense to present relevant evidence with respect to the voluntariness of the statement and shall instruct the members to give such weight to the statement as it deserves under all the circumstances. When trial is by military judge without members, the military judge shall determine the appropriate amount of weight to give the statement.

Id.

7. Under the definition section of MRE 304(c), confessions are "acknowledgements of guilt." *Id.* MIL. R. EVID. 304(c). Admissions are incriminating statements that tend to show guilt, but fall short of being an express confession to an offense. *Id.*

opens the door by mentioning his polygraph, MRE 707 should allow the government to demonstrate how the circumstances of his polygraph test did not overwhelm the accused's will.

Military judges should apply existing rules to determine the relevancy and probative value of the evidence, and to ensure the parties do not sponsor the results of a polygraph test. Judges should carefully instruct panel members on the limited purpose of such evidence, thereby assisting panel members to make the distinction and follow the law.

This article begins with a fictional scenario demonstrating when the facts surrounding a polygraph exam are probative of the voluntariness of an accused's statement. It then illustrates MRE 707's internal conflict with MREs 304(e) and 104(a). It then examines the decision to model MRE 707 after California Evidence Code section 351.1,⁹ and compares MRE 707 to the law of other states. Next, it looks to federal case law and determines that MRE 707 does not follow the majority of federal district courts in accordance with Article 36, Uniform Code of Military Justice (UCMJ).¹⁰ Finally, it studies the drafters' analysis of MRE 707 and concludes that the proposed amendment will maintain the legitimate basis for a polygraph exclusionary rule.

When Might the Fact of a Polygraph Test Be Probative Evidence?

A Scenario

Private (PVT) Jones accuses her drill sergeant, Sergeant First Class (SFC) Smith, of rape, cruelty and maltreatment, and adultery. At the Criminal Investigation Division (CID) headquarters, Special Agent (SA) White escorts SFC Smith to his office where he carefully advises Smith of his rights. Smith states that he understands his rights and signs a waiver.

Smith denies having sexual intercourse with the trainee, but SA White cuts off all of Smith's denials. He falsely tells Smith that CID has gathered several statements from witnesses who all say that SFC Smith constantly made sexual remarks about PVT Jones and always seemed to try to get her separated from her "buddy" and the rest of the platoon.

After forty-five minutes of questioning, the agent has the drill sergeant wait alone in a small, stark, windowless room. A half hour later, SA White resumes questioning SFC Smith in the interrogation room. He says that he is convinced Smith is lying and begins to get angry. He tells Smith that the maximum penalty for rape is the death penalty. He further informs Smith that because Smith's wife is a victim of the adultery, CID has no choice but to tell her about the charges. He says that he will likely ask Mrs. Smith about SFC Smith's whereabouts during the crimes, and if she ever suspected her husband of pursuing any young female trainees. Special Agent White gets more and more hostile. Smith continues to deny any misconduct, and also grows angrier. Smith finally indicates that he would like to leave.

At that moment, SA Brown enters and suggests that everyone calm down. He asks SFC Smith if he wants to go outside for a smoke. Special Agent Brown escorts SFC Smith outdoors by way of the vending machine and offers him a soft drink.

After a smoke and a chat, SA Brown and Smith reenter the interrogation room. A much calmer SA White apologizes for his temper. Special Agent Brown asks everyone to sit down and offers SFC Smith an opportunity to resolve this case—a polygraph test. He explains that the machine is "nearly foolproof," and assures SFC Smith that the polygraph examiner is among the most experienced in the Army. Special Agent White remarks that because of many recent similar allegations against drill sergeants, CID policy requires them to treat all complaints as credible unless evidence indicates otherwise. He explains that if Smith passes the polygraph test, it will "go a long way" in his favor with both CID and his chain of command, and put

8. *Id.* MIL. R. EVID. 104(a).

Rule 104. Preliminary questions

(a) *Questions of admissibility generally.* Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, the admissibility of evidence, an application for a continuance, or the availability of a witness 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.

Id.

9. *Id.* MIL. R. EVID. 707 analysis, app. 22, at A22-50 (stating the rule's origin in the California Evidence Code).

10. UCMJ art. 36(a) (2000).

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and 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 this chapter.

Id.

the focus of the investigation back on the trainee's credibility. Smith agrees to take a polygraph test, and SA White immediately sets it up.

Smith waits in the CID lobby until SA White comes out with another man in civilian clothes. He introduces himself as Mr. King and says that he will be giving the polygraph. He takes SFC Smith back to his office where they sit down and discuss how the polygraph machine works. Mr. King is smiling and relaxed, and he inspires SFC Smith's confidence in the polygraph process. Smith executes another rights warning and a statement of consent to take a polygraph.

Mr. King collects the following biographical data from SFC Smith: where he was born, where he grew up, who raised him, number of brothers and sisters, how long he has been married, his children's names and ages, and similar information. Mr. King is in no hurry. They talk about the Army, fishing, and their plans after retirement.

The test takes place in an adjoining "polygraph" room. After Mr. King gives the test, he leaves the room for a few minutes. He returns with a look of serious concern and tells SFC Smith, "Bob, we've got to have a talk."

Mr. King tells SFC Smith that he has failed the polygraph. He gently explains that he was disappointed to see it, but the results are clear. What's more, King explains, he knew before looking at the charts. With a sympathetic smile and shake of the head, Mr. King tells SFC Smith that he's "just not a good liar."

Smith just stares while Mr. King continues. Mr. King tells him that it is actually a good thing that Smith is a lousy liar. It means that he's basically a good person. After all, King says, "The only people who beat these tests are psychopaths and sociopaths, seriously disturbed people who have no appreciation of right and wrong who therefore reveal no physiological response when they lie."

Smith starts to protest, but Mr. King continues. He says it does not look good. He will have to inform SFC Smith's chain of command that Smith flunked a lie-detector test, and that Smith specifically lied about not having sex with PVT Jones. With these test results, explains Mr. King, the command will have little choice but to court-martial Smith for rape.

Mr. King lists all the implications of going to trial. Since Smith is such a poor liar, no one will believe him and he faces certain conviction. This will disgrace his unit and humiliate his family. He will be reduced to PVT, confined at Fort Leavenworth for many years (particularly because of the stigma attached to a drill sergeant raping a trainee), and receive a dishonorable discharge. He will lose his retirement benefits. His wife and kids will have to visit him in prison, which they may

do for a short while before Mrs. Smith divorces him. He will waste away in jail for the best years of his life, unable to support his family financially or to be an example to his children. When Mr. King is finished, SFC Smith sits in a dazed silence.

Mr. King then draws himself close to SFC Smith and puts his hand on Smith's shoulder. He tells SFC Smith that Smith is at a major crossroads in his life. He can continue to deny the offense ("a ridiculous waste of time in light of your charts"), or he can start taking steps to reduce the damage.

Mr. King provides the solution. He says that although the machine indicated deception on the question of whether SFC Smith had intercourse with PVT Jones, the issue of force is subjective. Mr. King says that he is not convinced that this is a rape scenario. There is no physical evidence indicating force. Mr. King suggests that the young, immature PVT Jones must have gotten mad at Smith for something and "cried rape" in revenge. Mr. King chuckles dryly that this has happened before.

Mr. King points out the big difference between rape and adultery. He notes that adultery is more likely disciplined below the court-martial level, usually with an Article 15 or letter of reprimand. It would be embarrassing, but a storm SFC Smith could weather. In either situation, Smith would not lose rank, and with sixteen years of service, he might avoid an administrative separation action and retire with full pension and benefits. Most importantly, Mr. King says, he could call the command and help "smooth things over" by explaining how cooperative SFC Smith has been in this "unfortunate situation."

Smith signs a one-page statement that confesses to one consensual act of sexual intercourse. As Mr. King types the statement for SFC Smith to sign, he asks if PVT Jones had initiated the encounter, commenting that sometimes trainees become infatuated with their drill sergeants. Smith responds that it was possible she was smitten with him, and Mr. King includes that in the statement.

Smith signs the statement and leaves CID. The next week, SFC Smith's commander reads Smith a charge sheet for rape. The trial counsel is confident because the confession establishes the element of vaginal penetration, and PVT Jones will testify about the force element. Since SFC Smith was a drill sergeant, the trial counsel also intends to ask for a "constructive force" instruction.

Discussion

A military judge considering these facts may rule that the admission was voluntary and admissible.¹¹ There was no physical coercion, and all the interrogative techniques were ostensibly within the bounds of the law.¹² To lessen the evidentiary

11. See MCM, *supra* note 2, MIL. R. EVID. 304(e)(1). "Burden of Proof—In general. The military judge must find by a preponderance of the evidence that a statement made by the accused was made voluntarily before it may be received into evidence." *Id.*

value the panel gives the statement, SFC Smith will want the members to know what motivated him to make his alleged admission.

In criminal investigations, the polygraph is an integral part of an overall interrogation technique. The polygraph examiner is therefore simply another interrogator, and his goal is to get the suspect to confess. If a suspect indicates deception or gives a result other than “no deception indicated,” the examiner will confront the suspect with his results. When the interrogator believes that the suspect is lying, he may get more aggressive in his post-polygraph interrogation.¹³ When the examiner’s belief is based more upon instinct than fact, the potential exists for a suspect to give a coerced or inaccurate statement against interest.

An innocent suspect might fail a polygraph test and, as a result, find himself subjected to an aggressive police interrogation.¹⁴ In the environment of a post-polygraph interrogation, the possibility exists that an innocent suspect might make an incriminating utterance or sign a statement prepared by police.¹⁵

Sergeant First Class Smith wants to tell the panel that Mr. King convinced him that no one would believe him after he performed so poorly on the polygraph test, and that he was going

to trial for rape unless he admitted to adultery.¹⁶ The fact of the polygraph test is relevant as a circumstance of the interrogation affecting the voluntary nature of SFC Smith’s statement.¹⁷ He wants the panel to know all the facts surrounding his statement, and to determine that the statement has little evidentiary value.

With regard to other relevant evidence, the military judge balances the probative value with the risk of unfair prejudice;¹⁸ however, MRE 707 precludes SFC Smith from disclosing the existence of the polygraph test even though he is not seeking to admit the results. Therefore, SFC Smith cannot present the totality of the circumstances of his interrogation. It is like trying to explain why one is surrounded with empty peanut shells without mentioning the elephant sitting in the middle of the room.

The Internal Conflicts

MRE 304 Versus MRE 707

To admit a confession or admission at trial, the prosecution¹⁹ must prove by a preponderance of the evidence²⁰ that the accused’s statement was voluntary and that sufficient corroborating evidence exists.²¹ Once the statement is admitted, it is strong evidence against an accused.²²

12. See *id.* MIL. R. EVID. 304(c)(3).

Rule 304. Confessions and admissions

(c)(3) *Definitions – Involuntary.* A statement is “involuntary” if it is obtained in violation of the self-incrimination privilege or due process clause of the Fifth Amendment to the Constitution of the United States, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement.

Id. The interrogation techniques in the fiction scenario—deception, false pretenses, minimizing the misconduct while maximizing the consequences, “good cop/bad cop,” false claims of scientific evidence, suggestions of possible leniency, and appeals to “do the right thing,” have all been upheld as permissible techniques that do not necessarily render a confession involuntary. See generally FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS chs. 8 and 9 (3d ed. 1986).

13. *Id.* ch. 6.

14. *Id.*

15. The prospect of false confessions seems counterintuitive, but there is significant research indicating that people may admit to wrongful acts they did not commit for a number of reasons. See generally Major James R. Agar, II, *The Admissibility of False Confession Expert Testimony*, ARMY LAW., Aug. 1999, at 26. These include compliance with authority, lack of age and experience, low intelligence, and a desperation to escape a stressful environment. *Id.*

16. The polygraph is effective in getting suspects to confess. The test is inherently stressful, and polygraph examiners are generally trained, experienced interrogators. M. G. Goldzband, *The Polygraph and Psychiatrists*, 35 J. FORENSIC SCI. 391, 397 (1990) (describing the process as a “painless third degree”), cited in *Amicus Curiae* brief of the Criminal Justice Legal Foundation in Support of Petitioner, at 10, *United States v. Scheffer*, 523 U.S. 303 (1998). In field studies, “confessions are most often obtained by polygraphers after a subject has failed the polygraph test.” Christopher J. Patrick & William G. Iacono, 76 J. OF APPLIED PSYCHOL., at 229, cited in *Amicus Curiae* brief of the Criminal Justice Legal Foundation in Support of Petitioner, at 10, *Scheffer*, 523 U.S. 303.

17. See MCM, *supra* note 2, MIL. R. EVID. 304(e)(2).

18. *Id.* MIL. R. EVID. 403.

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.

Id.

19. *Id.* MIL. R. EVID. 304(e).

Military Rule of Evidence 304(e)(2) provides that an accused may attack the voluntariness of his confession or admission at two stages: at a motion to suppress the statement and on the merits.²³ If the motion fails, the accused may present evidence again on the merits before the factfinder to attack the statement's voluntariness.²⁴ The language is strong: "the military judge *shall* permit the accused to present relevant evidence with respect to voluntariness."²⁵

Military Rule of Evidence 707 bans all polygraph references from trial,²⁶ even if the accused wishes to demonstrate that the polygraph interrogation technique was a major factor in the totality of the circumstances affecting the voluntariness of his statement.²⁷ Since MRE 707 is in effect "notwithstanding any other provision of law,"²⁸ it trumps an accused's existing right under MRE 304(e)(2).

MRE 104 Versus MRE 707

Military Rule of Evidence 104(a) states that when considering a preliminary question of admissibility of evidence, a military judge is only bound by the rules of evidence regarding privileges.²⁹ Therefore, when a judge considers a motion to suppress a statement because of a coercive post-polygraph

interrogation, MRE 104(a) permits the judge to consider the circumstances of the polygraph test. Military Rule of Evidence 707, however, states that it applies "notwithstanding any other provision of law."³⁰ If so, MRE 707 trumps MRE 104 and strips the military judge of some discretion in evidentiary hearings.

The military courts have not resolved the conflict between these rules. In *United States v. Light*,³¹ a civilian magistrate considered a failed polygraph result when issuing a warrant to search a soldier's off-post quarters. At court-martial, the defense moved to suppress the results of the search. The Army Court of Criminal Appeals (ACCA) disregarded MRE 707 and ruled that federal case law permitted polygraph evidence in probable cause determinations.³² The Court of Appeals for the Armed Forces (CAAF) recognized the discrepancy between the authoritative language of MRE 707 and MRE 104(a), but deftly sidestepped the issue by finding adequate independent bases to uphold the warrant, and left the conflict for the President to resolve.³³

MRE 102

In examining the conflicting rules, one should remain mindful of MRE 102.³⁴ It states that the evidentiary rules should be

20. MCM, *supra* note 2, R.C.M. 905(c)(1).

21. MCM, *supra* note 2, MIL. R. EVID. 304(g).

22. *See, e.g.*, *United States v. Duvall*, 47 M.J. 189 (1997).

23. MCM, *supra* note 2, MIL. R. EVID. 304(e)(2). Military Rule of Evidence 304 traces its history to *Jackson v. Denno*, 378 U.S. 368 (1964), where the Supreme Court stated that a defendant has a constitutional right to a fair hearing "in which both the underlying factual issues and the voluntariness of the confession are actually and reliably determined." *Id.* at 380. The Court further defined the process in its 1972 decision *Lego v. Twomey*, 404 U.S. 477 (1972), which expressly allowed the accused to present relevant evidence to the jury to test the weight and voluntariness of a confession that had been ruled admissible. The Court noted that even though the confession was in evidence, a jury might disregard a confession "which is insufficiently corroborated or otherwise deemed unworthy of belief." *Id.* at 485. The military effectively codified the result in *Lego v. Twomey* as MRE 304(e)(2) in the 1984 *Manual for Courts-Martial*. The change brought the military law in line with federal civilian courts. MCM, *supra* note 2, MIL. R. EVID. 304(e) analysis, app. 22, at A22-12.

24. MCM, *supra* note 2, MIL. R. EVID. 304(e)(2).

25. *Id.* (emphasis added).

26. *Id.* MIL. R. EVID. 707.

27. The test for evaluating the voluntariness of an accused's statement is whether, under the totality of the circumstances, the confession or admission "is the product of an essentially free and unconstrained choice by its maker." *United States v. Bubonics*, 45 M.J. 93, 95 (1996).

28. MCM, *supra* note 2, MIL. R. EVID. 707(a).

29. *Id.* MIL. R. EVID. 104(a).

30. *Id.* MIL. R. EVID. 707.

31. 48 M.J. 187 (1998).

32. *Id.* at 190. The ACCA saw "no basis to depart from federal precedent in this case." *Id.*

33. *Id.* at 191. Since MRE 707 would likely require an amendment to resolve this discrepancy, the President should also consider rescinding the blanket prohibition language to reconcile MRE 707 with MRE 304(e)(2).

34. MCM, *supra* note 2, MIL. R. EVID. 102.

read to ensure fairness to the greatest possible degree, with an eye toward determining the truth and doing justice. The rule specifically urges “promotion of growth and development of the law of evidence.”³⁵

Military Rule of Evidence 707’s blanket exclusion of any reference to the taking of a polygraph test needlessly hinders the court in determining the truth and doing justice. By creating conflict with MREs 304 and 104, MRE 707 does not beneficially develop the law of evidence.

Tracing the Origins of MRE 707

If you like laws and sausages, you should never watch either one being made.

—Otto Von Bismarck³⁶

Why Did the Department of Defense Draft an Evidentiary Rule for Polygraphs?

In 1987, the Court of Military Appeals ruled in *United States v. Gipson*³⁷ that an exculpatory polygraph test result was not inadmissible *per se*. In an opinion that seemed to anticipate the *Daubert*³⁸ standard for evaluating scientific evidence, the court concluded that polygraph evidence could be a helpful scientific tool.³⁹ The court opined that the trial court should have allowed the accused to attempt to lay a foundation to admit his

polygraph result.⁴⁰ It also outlined how a military judge should evaluate scientific evidence for admissibility.⁴¹

On 10 March 1988, the Army requested that the Joint Service Committee on Military Justice (JSC) approve a proposal in direct response to *Gipson*.⁴² The proposal stated, “The results of *U.S. v. Gipson* . . . should be overturned by either (1) adopting a rule similar to California’s . . . or (2) adopting a rule similar to New Mexico’s, which sets forth stringent requirements on the qualifications of polygraph examiners, the actual conduct of polygraph examinations, and notice requirements.”⁴³ By December 1989, the JSC had drafted an evidentiary rule making polygraph results inadmissible as a matter of law, and published it for comment in the Federal Register.⁴⁴

The California Rule

Since no federal rule of evidence expressly prohibits polygraph evidence, the drafters looked to the states for guidance. They modeled MRE 707 after California Evidence Code section 351.1.⁴⁵

In 1982, the California legislature addressed the situation the military faced after *Gipson*. The California Court of Appeals had recently decided *Witherspoon v. Superior Court*,⁴⁶ holding that it could not justify the longstanding practice of the California courts to exclude polygraph results *per se*. As the Court of

35. *Id.*

36. Attributed widely to Otto Von Bismarck, First Chancellor of the German Empire, 1871-1890, quoted in RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS REQUESTED FROM THE CONGRESSIONAL RESEARCH SERVICE 190 (1989).

37. 24 M.J. 246 (C.M.A. 1987).

38. *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579 (1993).

39. *Gipson*, 24 M.J. at 249.

40. *Id.* at 253.

41. *Id.* at 251-52.

42. Interview with Lieutenant Colonel (LTC) Denise R. Lind, Chief, Joint Service Committee Policy Branch, Criminal Law Division, Office of the Judge Advocate General, Rosslyn, Va. (Mar. 2000) [hereinafter Lind Interview].

43. *Id.*

44. *Id.* For further explanation (and criticism) of the process, see Kevin J. Barry, *Modernizing the Manual for Courts-Martial Rule-Making Process: A Work in Progress*, 165 MIL. L. REV. 237 (2000).

45. MCM, *supra* note 2, MIL. R. EVID. 707 analysis, app. 22, at A22-50 (stating the rule’s origin in the California Evidence Code).

(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, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court, unless all parties stipulate to the 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.

CAL. EVID. CODE § 351.1 (Deering 1999).

46. No. 64290, 1982 Cal. App. LEXIS 1691 (Cal. Ct. App. Jun. 23, 1982).

Military Appeals would later decide in *Gipson*, the *Witherspoon* court determined that parties could lay a foundation for polygraph results.⁴⁷

Defendant Witherspoon was awaiting trial on eight counts of armed robbery.⁴⁸ After confessing to the crimes, he passed an exculpatory polygraph examination. He sought to introduce the polygraph for two reasons: (1) to challenge the voluntariness of his initial confession, and (2) to demonstrate his innocence. The trial court denied his motion and refused to hold an evidentiary hearing. Before trial, Witherspoon petitioned the district appellate court for relief.⁴⁹

The appellate court granted the petition, citing California Evidence Code section 351, which stated that all relevant evidence is admissible.⁵⁰ The court stated that the California legislature intended to create all evidentiary rules by statute, and that the judiciary would not create rules of evidence.⁵¹

The *Witherspoon* court sent a clear message to the legislature by stating that the judiciary had no choice but to comply with existing statutory law favoring admissibility.⁵² The legislature took up the gauntlet; the *Witherspoon* decision was filed on 23 June 1982, and by 12 July 1983, the governor approved section 351.1 as an “urgency statute.”⁵³

Section 351.1 prohibited all polygraph results, polygraphers’ opinions, and any reference to an offer to take, failure to take, or taking of a polygraph examination unless the parties stipulated.⁵⁴ The staff comments to California Senate Bill 266 all focus, however, upon the unreliability of polygraph results.⁵⁵ They do not address offers to take polygraphs, failure to take polygraphs, or the blanket prohibition against any mention of a polygraph test.⁵⁶ In fact, no records in the legislative history of the bill indicate that California lawmakers considered allowing the reference to a polygraph test to demonstrate the circumstances of interrogation.⁵⁷

47. *Id.* at *19.

48. *Id.* at *1.

49. *Id.* at *2.

50. CAL. EVID. CODE § 351 (Deering 1999). The code section reflects the Truth in Evidence Act passed by California voters in June 1982. WEINSTEIN ET AL., EVIDENCE: RULES, STATUTES AND CASE SUPPLEMENT 214 (1987) (editorial note). Prior to the *Witherspoon* decision, California voters passed Proposition 8—“The Victims’ Bill of Rights.” See *In re Lance W.*, 694 P.2d 744, 747 (Cal. 1985). In June 1982, it became section 28 to Article I of the California Constitution. Section 28(d) of the amendment provides: “Right to Truth in Evidence. Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding” CAL. CONST. art. I, § 28.

51. *Witherspoon*, 1982 Cal. App. LEXIS 1691, at *7-8 (quoting REPORT AND RECOMMENDATIONS OF THE CALIFORNIA LAW REVISION COMMISSION (Jan. 1965)). The report stated:

As a general rule, the code permits the courts to work toward greater *admissibility* of evidence but does not permit the courts to develop additional *exclusionary* rules. Of course, the code neither limits nor defines the extent of the exclusionary evidence rules contained in the California and United States Constitutions. The meaning and scope of the rules of evidence that are based on constitutional principles will continue to be developed by the courts.

Id.

52. *Id.* at *18.

We are not unmindful of the fact that the use of the results of polygraph examinations as evidence may pose some procedural problems which will have to be dealt with. Those problems, however, can be resolved by legislation that totally excludes evidence of the results of polygraph examinations or, on the other hand, establishes a procedure that prescribes when and under what circumstances such evidence may be used. Until such legislation is forthcoming, however, it is our opinion that evidence of the results of a polygraph examination can be dealt with under the provisions of the Evidence Code and the procedures, which presently exist, for other types of physical and mental examinations of individuals involved in litigation.

Id.

53. Law of July 12, 1983, ch. 202, 1983 Cal. Stat. 667 (creating CAL. EVID. CODE § 351.1). Section 2 of the law made it effective immediately, stating that it was an urgency statute “necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution.” ASSEMBLY COMM. ON CRIMINAL LAW AND PUBLIC SAFETY, STAFF COMMENTS ON S. 266, at 2 (Mar. 16, 1983) [hereinafter STAFF COMMENTS]. The legislation specifically intended to overrule *Witherspoon* and create an exception to the Truth-In-Evidence section of Proposition 8 that bars the exclusion of any relevant evidence. *Id.*

54. CAL. EVID. CODE § 351.

55. STAFF COMMENTS, *supra* note 53, at 2.

56. *Id.*

The subsequent California case law does not provide any additional insights. The criminal cases applying § 351.1 deal with polygraph results and offers to take a polygraph test, but do not address references to a polygraph test to challenge the voluntariness of an accused's statement.⁵⁸

The Military Chose the California Rule as a Template

The Army's initial proposal to create MRE 707 presented only two options: the California rule or the New Mexico rule (which admitted polygraph evidence subject to tight controls on polygraph tests and their administrators). It is not clear what consideration the drafters gave to other issues and options arising from federal and state case law.⁵⁹

California's rule is not the best source of law. It is a hurried piece of legislation passed in reaction to a case that left open the possibility of admitting polygraph results. There is no evidence that the state's Senate Judiciary Committee considered admitting the fact of a polygraph test for reasons other than the result. There is no indication in the records of the JSC that the drafters of MRE 707 considered this issue, either.⁶⁰ By cutting and past-

ing the California rule, the military drafters similarly limited their focus to polygraph results.

The military reacted to *Gipson* as California reacted to *Witherspoon*. By adopting the California rule (minus the provision allowing parties to stipulate), the military drafters created a broad rule that excludes more than polygraph results.

Comparing California to Other States

Several states prohibit polygraph evidence to prove a test result, but admit it under limited circumstances to demonstrate voluntariness of a statement.⁶¹ These states have determined that polygraph evidence may be admissible to demonstrate circumstances surrounding a confession.

In *State v. Green*,⁶² the defendant confessed several times to shooting two teenaged girls. Before his first confession, Green had taken a polygraph examination. After the test, the examiner accused Green of lying, and he tearfully confessed. In several later confessions, Green asserted motives that tended to mitigate his conduct.⁶³ The prosecution offered the first confession

57. The California State Archives provided the author with the Staff Comments on Senate Bill 266, California Senate Committee on Judiciary and Assembly Committee On Criminal Law and Public Safety, and the Digests of the State Democratic and Republican Caucuses. The State Archives also provided additional correspondence in support and opposition of the bill. None of these materials addressed any issue other than polygraph results. In support of the bill, see, Letters from Allen H. Sumner, Acting Chief, Legislative Affairs Unit of the State of California Department of Justice, to Senator Bill Lockyer (sponsor of Senate Bill No. 266) (Feb. 2, 1983 and Mar. 4, 1983) (on file with author); Letter from Judge Brian D. Crahan, Los Angeles County Municipal Court Judges' Association, to Senator Bill Lockyer (Mar. 1, 1983) (on file with author); Letter from Larry Briskin, Legislative Advocate, California Public Defenders Association, to Senator Bill Lockyer (Mar. 3, 1983) (on file with author); Letter from Marjorie C. Swartz, Deputy State Public Defender, the Office of the State Public Defender, to Senator Bill Lockyer (Mar. 3, 1983) (on file with author); Letters from LeRoy Sana, Executive Director, California Peace Officers' Association, to Senator Bill Lockyer (Mar. 7, 1983 and Mar. 31, 1983) (on file with author); Letter from Michael L. Pinkerton, Legislative Advocate, California Attorneys for Criminal Justice, to Senator Bill Lockyer (Mar. 7, 1983) (on file with author); Letter from Mary Vail, Senior Staff Attorney, the Committee on Human Rights of the State Bar of California, to Senator Bill Lockyer (Apr. 29, 1983) (on file with author); Letter from Frank Zolin, Executive Director, Superior Court Executive Committee, to Assemblyman Bryon Sher (May 2, 1983) (on file with author); Letter from Allen H. Sumner, Acting Chief, Legislative Affairs Unit of the State of California Department of Justice, to Assemblyman Bryon D. Sher, Chairman, Assembly Committee on Criminal Law and Public Safety (June 2, 1983) (on file with author); Letter from Sue U. Malone, Executive Director, California Judges Association, to Senator Bill Lockyer (June 3, 1983) (on file with author); Letter from John T. Studebaker, Principal Deputy Legislative Counsel of California, to Governor George Deukmejian (July 1, 1983) (on file with author). In opposition to the bill, see, Letter from Robert Scarlett, Deputy State Pub. Defender, to Senator Bill Lockyer (Jun. 2, 1983) (favoring admission of an accused's exculpatory polygraph as a right to present a defense, and arguing that polygraph evidence should not be excluded from non-trial proceedings or the penalty phase of a death penalty case) (on file with author). The California legislature does not publish its complete proceedings and debates. See HENKE'S CALIFORNIA LAW GUIDE 57 (Daniel W. Martin ed., 3d ed. 1995).

58. *People v. Kegler*, No. B018744, 1987 Cal. App. LEXIS 2452 (Cal. Ct. App. Nov. 19, 1987) (denying the defendant from impeaching a government eyewitness with his failed polygraph); *People v. Espinoza*, No. S004728, 1992 Cal. LEXIS 5021 (Cal. Oct. 26, 1992) (arguing unsuccessfully that the defendant's willingness to take a polygraph was a "badge of innocence" and therefore relevant evidence as to his credibility). See *In re Aonte D.*, 25 Cal. App. 4th 167 (Cal. App. Dep't Super. Ct. 1994) (affirming that section 351.1 is a rational exercise of the state's power to decide that a category of evidence is not yet sufficiently probative to overcome policy considerations weighing against admissibility).

59. Lind Interview, *supra* note 42.

60. *Id.*

61. See, e.g., *Commonwealth v. Bettencourt*, 479 N.E.2d 187 (Mass. App. 1985) (finding that trial judge had discretion to prevent the defense from offering the fact of a polygraph because it constituted improper bolstering of credibility); *Schaeffer v. State*, 457 N.W.2d 194 (Minn. 1990); *People v. Madison*, 522 N.Y.S.2d 230 (N.Y. App. Div. 1987) ("the use or misuse of such an instrument is a factor to be considered among the totality of the evidence in determining whether or not a confession is the product of coercion"); *People v. Tarsia*, 405 N.E.2d 188 (N.Y. 1980); *People v. Leonard*, 397 N.Y.S.2d 386 (N.Y. App. Div. 1977); *People v. Wilson*, 354 N.Y.S.2d 296 (Misc. 2d 1974); *People v. Zimmer*, 329 N.Y.S.2d 17 (Misc. 2d 1972) (use of polygraph was a circumstance of interrogation that overbore defendant's will). But see *Johnson v. Florida*, 166 So. 2d 798 (Fla. Dist. Ct. App. 1964); *Commonwealth v. Corcione*, 307 N.E.2d 321 (Mass. 1974) (prosecution prevented from introducing the fact of the polygraph to show consciousness of guilt).

62. 531 P.2d 245 (Ore. 1975).

63. *Id.* at 248.

and presented the polygraph result, arguing that this version was the most credible because the defendant had been confronted with a polygraph result indicating deception.⁶⁴

The trial judge ruled that the state could reveal the fact of the polygraph as an important circumstance surrounding the confession, but the state could not reveal the results. He emphasized that he would not permit “bolstering of the examiner’s testimony” by the polygraph results.⁶⁵

Green argued on appeal that if the prosecution presented evidence that Green originally denied the offenses, but changed his story after taking a polygraph test, the jury would know the test result.⁶⁶ The Oregon Supreme Court identified the issue as whether the state, during a criminal case, may offer evidence that the defendant took a polygraph test before a confession.⁶⁷

The *Green* court noted that the state had the burden of proving the confession was voluntary, that the details of the examination were a relevant circumstance of the confession, and that relevance must be balanced against unfair prejudice.⁶⁸ It decided that when the state raised the issue, the jury would infer that the accused failed the test. Therefore, the government was sponsoring the failed polygraph as *de facto* evidence.⁶⁹

The Oregon Supreme Court reversed the conviction, holding that the danger of unfair prejudice outweighed the probative value of the evidence when the government initially revealed the fact of the polygraph.⁷⁰ More significantly, it provided guidance on how courts should treat polygraph evidence under these circumstances, putting the risk entirely in the hands of the defense. The opinion states that when the prosecution lays a foundation for a confession, it may offer evidence that the confession was voluntary, but may not mention a polygraph examination.⁷¹ If the defendant asserts that the confession was not voluntary due to a preceding polygraph, the prosecution could then offer evidence of the existence of the polygraph.⁷² The evidence could include the details of the polygraph examination, even if they might reveal the results of the examination, as long as the evidence was relevant on the question of voluntariness.⁷³

In *People v. Melock*,⁷⁴ the defendant was accused of killing his grandmother.⁷⁵ He took a polygraph test that yielded an unreadable result. The detective told the defendant he failed, and the defendant confessed to the crime.⁷⁶ The Illinois Supreme Court ruled that even after the judge has considered the issue independently in a motion, a jury could evaluate the voluntariness of a confession.⁷⁷ Noting that prior Illinois case law had allowed the state to introduce polygraph evidence to rebut alleged coercion,⁷⁸ the court opined that the trial court should have allowed the defendant to introduce the fact of his

64. *Id.* at 249. These facts included the details of the tests, specific questions and answers in the course of the test, and testimony of the examiner that the accused’s reactions to certain questions indicated he was lying. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 251 (noting an issue of first impression for the court).

68. *Id.* at 252-53.

69. *Id.* at 253.

70. *Id.*

71. *Id.* at 254.

72. *Id.*

In laying the legal foundation for the admissibility of a confession obtained before, during, or after a polygraph examination, a prosecuting attorney is confronted with a task requiring considerable caution. He must seek to avoid any reference by prosecuting witnesses to the results of the polygraph examination or even to the fact of the examination itself . . . The choice will rest with the defense attorney as to whether or not he wants to inject the polygraph issue into the case for the purpose of attempting to show that it or the technique was a coercive factor which compelled the defendant to confess.

Id. at 253 (quoting JOHN REID & FRED E. INBAU, TRUTH & DECEPTION: THE POLYGRAPH 254 (1966)).

73. *Id.*

74. 599 N.E.2d 941 (Ill. 1992).

75. *Id.* at 943.

76. *Id.* at 952.

77. *Id.* at 960.

polygraph test to show his subsequent confession was involuntary.⁷⁹

In *Murphy v. State*,⁸⁰ the defendant moved that the court prevent the prosecution from mentioning his polygraph examination unless he first raised it by attacking the voluntariness of his confession.⁸¹ Employing the same rationale as Oregon did in *Green*, the Maryland Court of Special Appeals ruled that the state could only refer to the fact of a polygraph test after the defendant asserted that the polygraph-assisted interrogation was coercive.⁸²

These three cases illustrate how the fact of a polygraph may be an important part of the inquiry into the voluntariness of an accused's statement. Each court resolved the issue of when to allow certain polygraph evidence using well-established rules for determining relevancy and balancing probative value with the risk of unfair prejudice, rather than employing a blanket prohibition. The Oregon and Maryland courts expressly gave the defendant the choice to introduce polygraph evidence for this limited purpose.⁸³ This approach prevents unfair prejudice to the defendant because the introduction of the evidence is his choice. The government suffers no unfair prejudice because, once the defendant has opened the door, it may argue that the polygraph test and subsequent interrogation brought increased pressure on the defendant's own guilty conscience. The government may also argue that the totality of the circumstances indicates a great deal of moral pressure to confess, but no physical duress or other unfair coercion.

These decisions show that judges can use existing rules to determine relevancy and probative value of polygraph evidence when it is not offered for the truth of its result or otherwise to attack or bolster credibility. By choosing only between California and New Mexico law, the drafters of MRE 707 did not consider the balanced approach taken by Oregon, Illinois, and Maryland.

Contrary to Article 36, UCMJ, MRE 707 Does Not Follow the Majority of Federal Courts

Article 36, UCMJ

The military used state law as its template because there is no federal rule of evidence on polygraphs.⁸⁴ The absence of an express federal rule, however, does not mean that the federal district courts have no methodology for dealing with polygraph evidence. The drafters of MRE 707 should have looked to the federal case law for the underlying principles of a new rule rather than adopt the California rule.⁸⁵

Consider the guidance in the UCMJ for promulgating new evidentiary rules. Article 36, UCMJ, authorizes the President to promulgate rules of evidence for military courts "by 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."⁸⁶ To the extent that MRE 707 precludes the "fact of" a polygraph, it does not apply the principles of law generally recognized in the cases decided in federal court cases.

78. *Id.* at 957-59. In one case, the defendant alleged his confession was coerced by physical violence, and the state was allowed to rebut by showing he confessed shortly after being told he failed a polygraph. *Id.* at 958 (citing *People v. Jackson*, 556 N.E.2d 619 (Ill. App. Ct. 1990)). In another case, a deputy sheriff testified that the defendant asked for and failed a polygraph prior to his confession. The court ruled that the fact of the polygraph was a relevant circumstance of the voluntariness of the confession, but not the result. *Id.* (citing *People v. Triplett*, 226 N.E.2d 30, 32 (Ill. 1967)).

79. *Id.* at 949-51. The case describes the circumstances of the interrogation process. The defendant Melock, a twenty-two year-old man with an IQ of 83, was interrogated by Chicago police for three hours in the "good cop-bad cop" style, during which he did not confess. He was then taken to John Reid and Assoc., Inc., for a polygraph exam, where he waited thirty minutes in the waiting room and forty-five minutes in the interrogation room. The defendant then took a one and one-half hour polygraph examination, throughout which he maintained his innocence. During the post-polygraph interview, the examiner told Melock that the defendant had failed the polygraph and was "150% sure" Melock was guilty, even though the test results were "unreadable." *Id.* Melock described going into a dazed "state of shock." *Id.* According to Melock, the "good cop" from earlier in the evening entered, put a hand on the defendant's knee, and said everything would be all right. The defendant stated that that officer asked leading questions, to which Melock grunted "uh-huh, uh-huh." The police transcribed this conversation into a typed statement that Melock signed. The defendant maintained that he was in too much shock to comprehend the questions and just responded automatically. He said that he signed the paper without reading it. *Id.*

80. 659 A.2d 384 (Md. Ct. Spec. App. 1995).

81. *Id.* at 386.

82. *Id.* at 390. *See also* *Johnson v. State*, 355 A.2d 504, 507 (Md. Ct. Spec. App. 1976) ("[We] are not concerned with the results of a polygraph examination, but rather with the circumstance that it was used as a psychological tool in the interrogation process.").

83. *See supra* notes 72-75, 84 and accompanying text.

84. *See* FED. R. EVID.

85. *See* *United States v. Scheffer*, 523 U.S. 303, 320 (1998) (Stevens, J., dissenting). Justice Stevens stated that he believed MRE 707 violates Article 36. *Id.* He remarked that he could think of no special military reason to stray from the practices of the federal courts. *Id.* at 429.

86. UCMJ art. 36 (2000).

The law of the federal district courts indicates that the fact of a polygraph test may be relevant in limited circumstances where the danger of unfair prejudice does not outweigh its probative value. Four circuits (District of Columbia, Third, Seventh, and Eighth) allow admission of the fact of a polygraph for the limited purpose of testing the voluntariness of a post-polygraph statement.⁸⁷ Four other circuits (Sixth, Ninth, Tenth, and Eleventh) allow polygraph evidence for evaluating voluntariness and for several other reasons other than the results.⁸⁸ In these eight circuits, the courts have simply balanced the probative value of the evidence with the risk of unfair prejudice in cases where parties sought to admit polygraph evidence for reasons other than the results.⁸⁹

Examples in the Federal District and Appellate Courts

In *United States v. Little Bear*,⁹⁰ the Court of Appeals for the Eighth Circuit found that the “psychological pressure inherent in a polygraph situation”⁹¹ is an important circumstance of the interrogation and necessary for the defense to challenge voluntariness.⁹² In *United States v. Jenner*,⁹³ the Eighth Circuit again

found the stressful environment of the polygraph-assisted interrogation “highly relevant.”⁹⁴

*United States v. Miller*⁹⁵ concerned a Federal Bureau of Investigation agent’s trial for espionage. During the investigation, the defendant submitted to several polygraph tests, which he knew he had failed. While preparing for another test, the new examiner told Miller that the polygraph results would be more accurate if his answers were definite and unequivocal. Before taking the test, Miller admitted that he had given a classified document to a Soviet agent.⁹⁶

The defense moved to exclude any evidence concerning the polygraph exam. The government stated that it intended to introduce the polygraph as a circumstance of Miller’s admission if the defendant challenged the voluntariness of his statement. Miller said that he did not intend to challenge voluntariness, but the reliability of the statement. The trial court determined that if Miller chose to challenge his statement in any way, the government could show the circumstances of Miller’s interview, including the fact of the polygraph exam.⁹⁷ When Miller challenged the reliability of his statements, the

87. Several cases illustrate this proposition. *See, e.g.*, *United States v. Johnson*, 816 F.2d 918 (3d Cir. 1987) (affirming that the government could introduce the fact of the defendant’s polygraph examination to rebut the circumstances of the interrogation alleged by defendant) (noting that the defendant was free to first reveal the fact of the polygraph as a circumstance of the interrogation if it had suited his purposes); *United States v. Kampiles*, 609 F.2d 1233 (7th Cir. 1979) (allowing the government to introduce the fact of a polygraph to rebut defense allegations of coercion). *Tyler v. United States*, 193 F.2d 24 (D.C. Cir. 1951) (allowing the prosecution to introduce the fact of a polygraph to demonstrate a confession was not the product of a physical beating, as the defendant alleged) (finding the court instructed the jury that the polygraph result was not evidence of lying, but was good evidence on whether the confession was in fact voluntary); *United States v. Zhang*, No. 98-425, 1999 U.S. Dist. LEXIS 2904 (D.N.J. Feb. 8, 1999); *see also* *United States v. Bad Cob*, 560 F.2d 877 (8th Cir. 1977) (ruling that the government could initially introduce a reference to the polygraph as a circumstance of the confession when the defendant confessed after refusing to take a polygraph test). The *Kampiles* court noted that the government was not asserting the accuracy of the result and the probative value of the evidence outweighed the danger of unfair prejudice. It put the defendant, however, in the position of either introducing coercive events “contemporaneous with but independent of the polygraph examination,” or waiving the issue of voluntariness altogether. *Kampiles*, 609 F.2d at 1245.

88. *United States v. Brown*, No. 90-10528, 1991 U.S. App. LEXIS 30260 (9th Cir. Dec. 16, 1991) (allowing the prosecution to mention a polygraph test if the defendant challenged voluntariness, even if the defendant never mentions the polygraph in making the challenge). The court ruled that the trial judge must narrowly tailor the government evidence to offset the danger of unfair prejudice. *Id.* at *3. *Wolfel v. Holbrook*, 823 F.2d 970 (6th Cir. 1987) (holding that under limited circumstances, a reference to a polygraph for reasons other than the test results could be relevant evidence). The court stated that the trial judge had discretion to determine relevance and then balance the probative value against the risk of unfair prejudice. *Id.* at 972. In this case, the defendant wanted to introduce his offer to take a polygraph for the sole purpose of bolstering his credibility, and the Court of Appeals for the Sixth Circuit determined that the trial court properly ruled that the evidence failed the balancing test. *Id.* at 974. *See also* *United States v. Tsosie*, No. 92-2103, 1993 U.S. App. LEXIS 2500 (10th Cir. Feb. 8, 1993); *United States v. Piccinona*, 885 F.2d 1529 (11th Cir. 1989) (adopting the Ninth Circuit’s view that the trial court should have discretion to admit polygraph evidence for a limited purpose other than the truth of the result if the probative value outweighs the risk of unfair prejudice and waste of time).

89. *See, e.g.*, *United States v. Bowen*, 857 F.2d 1337 (9th Cir. 1988) (holding that although polygraph results are not admissible evidence, it may be relevant that an exam is given). The court stated that trial judges are to exercise discretion using Federal Rule of Evidence 403 balancing of probative value and prejudicial harm. *Id.* at 1341.

90. 583 F.2d 411 (8th Cir. 1978).

91. *Id.* at 413.

92. *See id.*

93. 982 F.2d 329 (8th Cir. 1993).

94. *Id.* at 334.

95. 874 F.2d 1255 (9th Cir. 1989).

96. *Id.* at 1260.

97. *Id.* at 1260-61.

government presented evidence to the jury that he had taken and failed several polygraphs. This evidence included the specific questions asked during those polygraph tests and Miller's responses.⁹⁸ The Court of Appeals for the Ninth Circuit applied a balancing test and determined that the trial court let the prosecution go too far in describing the circumstances of the polygraph test. The court considered the thorough account of the polygraph examination unduly prejudicial, given the limited purpose of the evidence.⁹⁹

In *United States v. Hall*,¹⁰⁰ a bank employee stole money and gave a false description of a fictional robber.¹⁰¹ When Hall challenged the adequacy of the investigation against him, the government sought to explain that the investigation stopped partly because the defendant had failed three polygraphs.¹⁰² The trial court initially found this fact to be more prejudicial than probative, and would allow the government to present the evidence of three failed polygraphs only if the defendant attacked the adequacy of the investigation.¹⁰³

The defense did exactly that, and the trial court found that the probative value of the polygraph evidence outweighed the danger of unfair prejudice. It accepted polygraph evidence not for the test results, but rather to show that the agents believed that the polygraph results indicated they "had their man."¹⁰⁴

The federal district courts uniformly forbid admission of polygraph results to prove guilt or innocence, but they do not always forbid parties to refer to polygraph tests. They recognize that sometimes the parties will want to introduce the fact of the test for reasons other than the truth of the result.

In *Little Bear* and *Jenner*, the courts admitted the fact of a polygraph test as an important circumstance of interrogation that was relevant in a challenge to voluntariness.¹⁰⁵ The *Hall*

court allowed the parties to refer to a polygraph to challenge or support the adequacy of the police investigation, but not the voluntariness of a statement.¹⁰⁶

The *Miller* case stands as an example of judicial gatekeeping. It shows that in a challenge to the voluntariness of a post-polygraph statement, the defense controls whether the polygraph test should first be mentioned. Once the defense opens the door, the government may argue all fair inferences, including the possibility that the accused confessed because taking a polygraph test triggered his guilty conscience.¹⁰⁷

Although this defense strategy is risky, it should be available to a military accused as it is to defendants in other federal courts. Military Rule of Evidence 707 should be amended, therefore, to allow the defense to challenge the voluntariness of a statement by raising the fact of a polygraph test as a circumstance of interrogation. The amendment should permit the government to introduce only the circumstances of the polygraph once the defense reveals the fact of a polygraph exam.

The amendment proposed here is fair to the government and the accused. Because the defense controls the decision to introduce the evidence, the defense assumes the risk of whether the evidence is unfairly prejudicial. The amendment prohibits the government from initial introduction of the evidence. This prevents the government from using the evidence as a sword, which creates a great risk of unfair prejudice; however, once the defense opens the door by mentioning the polygraph test, the government may introduce facts surrounding the polygraph examination as a shield. This would allow the government to argue that the accused made a voluntary statement based upon conscience rather than coercion.

98. *Id.* at 1261.

99. *Id.* at 1261-62. The court hinted that the result might have been different if the trial judge had limited the amount of evidence that the government introduced and ensured it was narrowly tailored to the purpose of demonstrating voluntariness of the confessions. *Id.*

100. 805 F.2d 1410 (10th Cir. 1986).

101. *Id.* at 1410.

102. *Id.* at 1415.

103. *Id.* The court advised the defense that they "would have to buy the sour with the sweet" if they attacked the investigation. *Id.*

104. *Id.* at 1415-16.

105. *United States v. Jenner*, 982 F.2d 329, 334 (8th Cir. 1993); *United States v. Little Bear*, 583 F.2d 411, 413 (8th Cir. 1978).

106. *Hall*, 805 F.2d at 1415. This article focuses on admitting the fact of a polygraph test to show the totality of circumstances surrounding an accused's admission. The focus is not on admitting polygraph results to defend or challenge the adequacy of an investigation. The result of a polygraph test and the opinion of a polygraph examiner are inadmissible under the first prong of MRE 707. MCM, *supra* note 2, MIL. R. EVID. 707(a). This article supports the first prong of MRE 707, which is consistent with the majority of federal courts and upheld by the Supreme Court in *United States v. Scheffer*, 523 U.S. 303 (1998). See *supra* notes 86-103 and accompanying text.

107. In such arguments, trial counsel must avoid suggesting that the polygraph results are material evidence. Trial counsel should argue that the accused's confessions were motivated by his own conscience, not by any government coercion.

Military Case Law

Decisions Prior to Gipson

Before deciding *Gipson* in 1987, the military courts generally followed other federal courts. They refused to admit polygraph results, and they weighed the probative value of polygraph evidence against the risk of unfair prejudice.¹⁰⁸

As early as 1965, a court-martial allowed an accused to disclose the fact that he took a polygraph test to demonstrate the circumstances of his confession. In *United States v. Driver*,¹⁰⁹ the accused raised the issue of the voluntariness of his confession in a motion.¹¹⁰ On the merits, the trial counsel elicited testimony regarding the polygraph test for the purpose of showing that the confession was voluntary.¹¹¹ The Air Force Board of Review affirmed the decision of the trial court, which found that no polygraph result was mentioned, and instructed the panel to consider the test evidence only for determining whether the confession was voluntary, not for the test results.¹¹²

Twenty years later, the Air Force Court of Military Review held in *United States v. Gaines*¹¹³ that once an accused challenged the voluntariness of a confession made after taking a polygraph, the trial counsel could elicit all relevant facts surrounding the confession.¹¹⁴ This included the fact that the

accused confessed only after being told that his test indicated deception. The military judge gave an appropriate limiting instruction.¹¹⁵

United States v. Willis

In *United States v. Willis*,¹¹⁶ a case decided after MRE 707 was adopted, the accused took a polygraph and subsequently made ambiguous statements that tended to incriminate him.¹¹⁷ Although the agent who testified about the accused's statements never mentioned the polygraph, the accused argued there was an inference that he had taken and failed a lie-detector test. The CAAF found no such inference in the record.¹¹⁸

The accused asserted that he faced the choice of either remaining quiet and allowing the testimony, or raising the issue that he made those statements only after being told that he flunked a polygraph. He was not willing to risk the panel considering the polygraph result for an improper purpose.¹¹⁹

The CAAF agreed, musing that such cross-examination "could have surely sunk the defense's ship."¹²⁰ The court mentioned, however, that the accused never asked the court to waive MRE 707 with respect to this issue.¹²¹

108. See *infra* notes 109-15 and accompanying text.

109. 35 C.M.R. 870 (A.F.B.R. 1965).

110. *Id.* at 874.

111. *Id.* at 875.

112. *Id.* In 1965, the military courts followed the "Massachusetts Rule," under which the members make an independent finding on the admissibility of evidence that has been challenged as involuntary. MCM, *supra* note 2, MIL. R. EVID. 304 analysis, app. 22, at A22-12. The judge instructs the panel not to consider the evidence unless it finds the evidence voluntary beyond a reasonable doubt. This was codified in the 1969 MCM. *Id.*

113. 20 M.J. 668 (A.F.C.M.R. 1985).

114. *Id.* at 669.

115. *Id.* The judge told the members:

(1) they were not to consider evidence about the polygraph on the issue of the [accused's] guilt or innocence, (2) the actual results were inadmissible and should not be considered for any purpose, (3) the fact that the [accused] was told he failed the polygraph should only be considered for the proposition that that is what he was told and they should not speculate as to whether he did [actually] fail it; and (4) they could consider the polygraph evidence which was to be admitted only with regard to the voluntariness of the accused's confession.

Id.

116. 41 M.J. 435 (1995).

117. *Id.* at 438.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

The waiver language in *Willis* is intriguing. On its face, MRE 707 is neutral.¹²² It applies equally to the government and the defense rather than protecting only the accused. In *Willis*, the CAAF implies an accused wanting to challenge voluntariness may ask the military judge for a waiver of the rule barring all mention of the polygraph. This waiver language is significant because it suggests that MRE 707 exists to protect an accused from the government introducing prejudicial polygraph evidence first. When an accused waives the “protection” of MRE 707, he declines to be bound by a rule that does not suit his needs. In this respect, *Willis* appears consistent with *State v. Green*—letting the accused control the introduction of probative polygraph evidence.

The Proposed Rescission is Consistent with Scheffer

*United States v. Scheffer*¹²³ may be read consistently with this criticism of MRE 707. *Scheffer* involved admission of an exculpatory polygraph result.¹²⁴ The Court ruled that by excluding the polygraph result, MRE 707 does not violate the accused’s Sixth Amendment right to present a defense.¹²⁵ The Court found the rule to be a rational and proportionate solution to a legitimate governmental interest in ensuring that only reliable evidence is presented in a criminal trial.¹²⁶ The President was “within his constitutional prerogative to promulgate a *per se* rule that simply excludes all such [polygraph] evidence.”¹²⁷

The parties never raised and the Court never addressed the issue of testing the voluntariness of a confession. Therefore, the Court’s analysis in *Scheffer* should not apply when the issue is introduction of polygraph evidence to test the circumstances of interrogation. The Court addressed only the constitutionality of MRE 707 and whether a jury can consider lie-detector results.¹²⁸

In his dissent, Justice Stevens questioned whether the President had the authority to promulgate MRE 707.¹²⁹ Like Justice Kennedy (and the three Justices who joined his concurrence),¹³⁰ Justice Stevens was wary of a blanket rule of exclusion.¹³¹ He criticized the rule for stripping military judges of the authority that judges in other federal courts enjoy in weighing and admitting probative evidence.¹³² Justice Stevens also faulted MRE 707 for assuming that panel members will not follow a judge’s instruction on polygraph evidence.¹³³ He called for a narrower rule tailored to the concerns the government expressed when drafting MRE 707.¹³⁴

Drafters’ Analysis of MRE 707

Rescinding the Blanket Prohibition Does Not Conflict with the Drafters’ Analysis

The drafters’ analysis of MRE 707 addresses the rationale for the *per se* exclusion of polygraph evidence, but does not specifically address why the rule includes the prohibition

122. See MCM, *supra* note 2, MIL. R. EVID. 707.

123. 523 U.S. 303 (1998).

124. *Id.*

125. *Id.* at 315-17 (citing *Rock v. Arkansas*, 483 U.S. 44 (1987); *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Washington v. Texas*, 388 U.S. 14 (1967)).

126. *Id.* at 312.

127. *Id.* at 314-15. The Court cited three legitimate governmental concerns prompting the rule. First, polygraph science is unreliable for determining guilt or innocence; second, the jury has the responsibility to determine truth and deception, and the risk that the polygraph’s “aura of infallibility” might lead jurors to abandon that function; and third, the *per se* ban avoids repetitive litigation over the collateral issue of polygraph science. *Id.* at 312-15.

128. *Id.* at 312-15. None of the briefs (including the *amicus* briefs) or the oral arguments transcripts address the topic of introducing the “fact of” the polygraph examination as part of the interrogative process. The Criminal Justice Legal Foundation and the State of Connecticut filed *amicus curiae* briefs in support of the government petitioner. Several groups filed briefs in support of the respondent Scheffer: the National Association of Criminal Defense Lawyers, the United States Navy-Marine Corps Appellate Defense Division, the United States Army Defense Appellate Division, the Committee of Concerned Social Scientists, and the American Polygraph Association. See *id.*

129. *Id.* at 322 (Stevens, J., dissenting).

130. Justices O’Connor, Ginsburg, and Breyer joined Justice Kennedy’s concurrence criticizing (1) the wisdom of a blanket prohibition on polygraph evidence, and (2) the MRE 707 drafters’ belief that panel members will disregard a judge’s instructions as to polygraph evidence. *Id.* at 318-20 (Kennedy, J., concurring).

131. *Id.* at 322 (Stevens, J., dissenting).

132. *Id.*

133. *Id.* at 325.

134. *Id.* at 338.

against “any reference to the taking” of a polygraph test.¹³⁵ The analysis sets forth its rationale for the *per se* exclusion as follows: (1) danger of misleading court members; (2) danger of preempting the members’ judicial function; (3) danger of confusing the issues; (4) waste of time; and (5) more prejudicial than probative.¹³⁶ These are valid reasons to prohibit polygraph results, but they are not persuasive rationales for excluding polygraph evidence offered for other reasons.

*Admitting the Fact of a Polygraph Will Not Create a
“Trial Within a Trial”*

The drafters’ analysis states that MRE 707 will prevent the “trial within a trial” regarding the validity of the polygraph machine.¹³⁷ This article favors prohibiting polygraph results, since they invite diversion into a time-consuming debate of polygraph science and usurp the fact finder’s mission. If a military judge admits the fact of a polygraph for the limited purpose of challenging the voluntariness of a post-polygraph statement, however, the result of the polygraph is not material evidence. There is no debate of polygraph science because the result is not an issue.

*The Danger of Misleading or Preempting the Court Members
Is Low*

The drafters have stated that “to the extent that the [panel] 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’ will be preempted.”¹³⁸

If a judge tells panel members that they may not consider the result of a polygraph, but should consider the circumstances of the interrogation to determine how much weight to give the statement, one should assume (as in all other cases) that the panel members can and will follow that order.¹³⁹ There is nothing special about polygraph evidence that will entice panel members to abandon their duty to follow the judge’s instructions and apply the law.¹⁴⁰ Since the origins of the hearsay rule, jurors have evaluated evidence offered for reasons other than the truth of the matter asserted.¹⁴¹

*Reference to the Fact of a Polygraph May Be More Probative
than Prejudicial*

When an accused makes an admission in a post-polygraph interview, the polygraph exam is relevant because it is a vital part of the interrogation process. Under the amendment proposed here, the evidence is more probative than prejudicial because the accused assumes the risk of unfair prejudice.¹⁴² If the accused chooses to mention his polygraph, then he is satisfied that the panel will abide by the military judge’s limiting instruction.¹⁴³

The drafters of MRE 707 apparently developed such a broad prohibition against polygraph evidence to protect the best interests of the accused.¹⁴⁴ If so, the wholesale exclusion of any reference to the fact of a polygraph test is overly paternalistic. In all other instances, we allow the judge to act as a gatekeeper by limiting what is presented and giving proper instructions on the presented evidence.

135. MCM, *supra* note 2, MIL. R. EVID. 707 analysis, app. 22, at A22-50.

136. *Id.*

137. *Id.*

138. *Id.* (quoting *United States v. Alexander*, 526 F.2d 161, 168-69 (8th Cir. 1975)).

139. Military panels are specially selected using criteria under UCMJ Article 25(d)(2) (listing criteria of age, education, training, experience, length of service, and judicial temperament). UCMJ art. 25(d)(2) (2000). The criteria are objective and produce the most experienced, educated, and mature jurors. *See id.*

140. “It may be urged that the commitment of our system to jury trial presupposes the acceptance of the assumptions that the jury follows its instructions, that it will make a separate determination of the voluntariness issue, and that it will disregard what it is supposed to disregard.” Bernard D. Meltzer, *Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury*, 21 U. CHI. L. REV. 317, 327 (1954), *cited in* *Jackson v. Denno*, 378 U.S. 368, 382 (1964).

141. *See* MCM, *supra* note 2, MIL. R. EVID. 801.

142. The risk is that the panel will behave lawlessly and disregard the judge’s instruction. If the accused knowingly assumes the risk that the jury will disregard the judge’s instruction, there is no appreciable issue of ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 691 (1984). In a motion *in limine* to discuss the parameters of the evidence, the accused should state on the record that he understands the risk of prejudice.

143. The government might argue that if the judge instructs the panel members that the polygraph result is inadmissible, the panel might suspect that the polygraph examiner lied to the accused about the result. The answer is that the defense cannot be permitted to argue or even imply that the agent lied. The focus is the interrogation *technique*, not the result.

144. *See* MCM, *supra* note 2, MIL. R. EVID. 707 analysis, app. 22, at A22-50.

Conclusion: Rescind MRE 707's Blanket Prohibition on Reference to the Fact of a Polygraph Test

What Should Change

Military Rule of Evidence 707 is a useful rule that seeks to achieve fairness and judicial economy, but it is only partially successful because it does too much. The military should rescind the language in MRE 707 prohibiting all references to a polygraph test.

When the CAAF in *United States v. Light* called upon the military to clarify MRE 707's conflict with MRE 104(a), it created an occasion to eliminate MRE 707's blanket exclusion of all references to a polygraph test.¹⁴⁵ The rule's blanket exclusion should be eliminated because it conflicts with MRE 304(e)(2) by limiting the ability of the accused to present relevant evidence of the circumstances surrounding his admission. This blanket exclusion unfairly prejudices the accused's ability to present an accurate picture of his post-polygraph interrogation. Military judges can use existing rules for determining relevance, continue to balance probative value with prejudice, and issue meaningful instructions to the members.

Although Article 36, UCMJ, directs that new evidentiary rules will follow the majority of federal district courts,¹⁴⁶ MRE 707's blanket exclusionary rule does not match the case law of the federal courts. Instead, it follows California legislation that was quickly drafted in response to a specific case.¹⁴⁷ The legislative history of California Evidence Code section 351.1 and the drafters' analysis of MRE 707 each fail to address the issue of admitting polygraph tests for reasons other than their results.¹⁴⁸

What Should Not Change

The rest of MRE 707 should remain unchanged. Removing only the blanket prohibition will keep the best parts of the rule, resolve the inconsistencies, and improve overall fairness. The current rule properly prohibits polygraph results and polygraph examiner opinions¹⁴⁹ because the panel members should be the arbiters of truth and deception, not a machine whose science enjoys no consensus in the scientific community.¹⁵⁰ The current rule also properly precludes references to offers or refusals to take polygraph tests.¹⁵¹ Offering to take a polygraph may indicate consciousness of innocence, but it may also be a self-serving ploy or a desperate attempt to "beat the box." Likewise, one's refusal to take a polygraph may stem from consciousness of guilt or mistrust in the machine or police. Finally, commenting on an accused's failure to answer questions in a polygraph test may violate his right to remain silent.¹⁵²

The Solution

Military judges should follow Oregon's solution in *State v. Green*,¹⁵³ which is consistent with the treatment of polygraph evidence in the federal courts.¹⁵⁴ It allows an accused to initially introduce the circumstances of his polygraph examination for the limited purpose of testing the voluntariness of his post-polygraph admissions.¹⁵⁵ If the accused chooses to introduce the fact of his polygraph, the government may then show that the circumstances of the interrogation indicate permissible psychological pressure rather than impermissible physical coercion. The government may not in any way vouch for the results of the polygraph test, but may argue that the totality of the circumstances paint a clear picture of the accused's confrontation with his own guilty conscience.¹⁵⁶ The military judge should instruct the panel members that the polygraph result is not evidence, but the existence of the polygraph test is relevant for a

145. See *supra* notes 31-33 and accompanying text.

146. UCMJ art. 36 (2000).

147. See *supra* notes 46-58 and accompanying text.

148. See *supra* notes 43-62 and accompanying text.

149. See MCM, *supra* note 2, MIL. R. EVID. 707.

150. *Id.* analysis, app. 22, at A22-50.

151. *Id.*

152. See MCM, *supra* note 2, MIL. R. EVID. 304(h)(3).

153. 531 P.2d 245, 254 (Ore. 1975). See *supra* notes 64-73 and accompanying text.

154. See *supra* notes 89-109 and accompanying text.

155. See *Green*, 531 P.2d at 254.

156. See *id.*

limited purpose as one of the circumstances affecting the voluntariness of the accused's statement.

This solution is fair to both the accused and the government. It demonstrates trust in military judges and panels to evaluate relevant evidence. If amended, MRE 707 would continue to

prevent parties from introducing an offer or refusal to take a polygraph exam to establish or attack credibility. It would also continue to serve its desired purpose—eliminating the misleading, confusing, and resource-intensive process of litigating the admission of polygraph results.