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MILITARY RULE OF EVIDENCE 707: A BRIGHT LINE RULE WHICH NEEDS TO BE DIMMED

A Thesis

Presented to

The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, The United States Army, or any other governmental agency.

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ABSTRACT: An examination of MRE 707 and the validity of its bright line rule of exclusion for polygraph evidence. A comparative analysis with existing case law and rules of evidence reveals MRE 707 to be statutorily and constitutionally defective. This study will analyze possible theories of admissibility for polygraph evidence so as to highlight the deficiencies inherent in MRE 707 and strengthen the argument for a revocation of the rule.

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I. INTRODUCTION

> **Any rule that impedes the discovery of truth in a court of law impedes as well the doing of justice.[1]**
>
> **--- Justice Potter Stewart**

On July 6, 1991 the military justice system swung its turret 180 degrees and decreed that polygraph evidence would no longer be allowed on the evidentiary battlefield.[2] The President promulgated the Military Rules Of Evidence[3] [hereinafter MRE] in 1980[4] and since then numerous changes have been made.[5] With the promulgation of MRE 707, the military courts went from being one of the more liberal federal jurisdictions in regards to polygraph evidence,[6] to becoming a jurisdiction in which the admission of such evidence was totally banned.[7] The effect of MRE 707 is to remove all discretion from the military judge in the weighing of the legal and logical relevance of polygraph evidence.

This attitude is reflective of the legal labyrinth through which polygraph evidence has traveled in its search for acceptance in the various court systems.[8] In an age where technology reigns, the military seems unwilling to accept

polygraph evidence despite the fact that it is easily controlled, analyzed, and potentially helpful to the trier of fact. Arguably, polygraph evidence has generated more controversy in its quest for judicial acceptance than any other type of evidence.[9] Over the years, three general approaches have been used by various courts in the admissibility dilemma concerning polygraph evidence.[10] The first approach, used by various federal circuit courts of appeals to include the Fourth, Fifth, D.C., and now the military courts, is one of per se inadmissibility.[11] The second approach allows the introduction of polygraph evidence when both parties stipulate to various conditions. This approach has been adopted by the Eighth Circuit.[12] "The third approach allows admission of polygraph evidence in the discretion of the court upon finding that special circumstances are present, without requiring stipulation by the parties."[13] These "special circumstances" range from permitting the introduction of polygraph evidence for a limited purpose such as impeachment, to explaining why the government did not fully investigate a case.[14] The common denominator which seems to explain the selective use of polygraph evidence is a belief in the ability of the trial judge to utilize the evidentiary rules in conforming polygraph evidence to accepted norms of admissibility.

The focus of this thesis is two dimensional in that the issues concerning the viability of MRE 707 are intertwined with

the possible admission of polygraph evidence into a court of law. The goal of this approach is to create a rationale basis for the deletion of MRE 707 from the operative MRE's. Accordingly this study will explore various issues dealing with the admissibility of polygraph evidence within the boundaries of pre-MRE 707 case law. By showing the possible admissibility of polygraph evidence the justification for a bright line rule of exclusion is removed.

Additionally, this paper will analyze MRE 707's compatibility with case law, the MRE's, and the rights of the accused. Using a comparative analysis with already existing MRE's, a trend will be established showing MRE 707 to be inconsistent with both the goals and philosophy of the rules of evidence. This article will also review the impact of MRE 707 on an accused's constitutionally protected rights. By allowing for the possibility of admission, the government avoids constitutional violations which may result from any per se exclusion of evidence. This is especially true when the evidence conforms to already existing standards of admissibility as polygraph evidence does. As mentioned, the focus of this article will be on theories of admissibility and the propriety of MRE 707, and not a per se validation of the polygraph. Such issues as the competence of the examiner, generally accepted procedures, and the technical proficiency of the polygraph device will be discussed only to bolster the argument for a revocation of MRE 707.

The critics of polygraph evidence seem to forget that no evidence can be said to be 100 percent accurate. Indeed, inaccuracy rates for eyewitness identification have been reported to be as high as 39 percent,[15] yet there is never any hesitancy to permit the eyewitness to take the stand and present the court with this type of critical testimony. This same spirit of indulgence should control potentially relevant evidence such as the testimony concerning the polygraph.

II. THE POLYGRAPH MACHINE

> **If there is ever devised a psychological test for valuation of witnesses, the law will run to meet it.**[16]

The quest to differentiate truth from falsehood has been with us almost as long as the ability to lie. During this time a number of techniques have been employed to discern truth from falsehood. For example,

> It is said that more than 4000 years ago the Chinese would try the accused in the presence of a physician who, listening or feeling for a change in the heartbeat, would announce whether the accused was testifying truthfully. Others believed that a dry mouth better indicated deception. Dry mouth tests

> required suspected liars to chew rice flour, lick a hot iron, or swallow a slice of bread and cheese. If the rice flour remained dry, the hot iron burned the suspected liar's tongue....[17]

Unfortunately, even after almost 80 years of study and development there apparently are some who equate the polygraph machine with the rice flour test.

"The so-called polygraph was in existence as early as 1908 as an instrument used in connection with medical examinations by Dr. James Mackenzie, an English heart specialist."[18] Over the years the polygraph machine has been the focus of extensive scientific research culminating in a device widely used.[19]

The polygraph is a machine that objectively measures and records physiological changes in an individual, and has been the focus of critiques and supporters for years.[20] The polygraph device is best described as "an electronic instrument comprised of four components: the pneumograph chest assembly which measures the inhalation/exhalation ratio; the galvanic skin response (graph) which measures skin resistance and perspiration changes; the cardiosimulgraph which measures blood pressure and pulse rate; and the kymograph" which permits recordation of the examinee's reaction.[21]

The underlying theory on which the polygraph is based is the assumption that consciously lying is stressful, and that this stress manifests itself in physiological responses which can be recorded and objectively analyzed.[22] Assumptions inherent in the theoretical underpinning of the polygraph include the following: (1) individuals are not able to control their physiologies and behavior, (2) that specific emotions can be triggered by specific stimuli, (3) that there are specific relationships between the different aspects of behavior (such as what people say, how they behave, and how they respond physiologically), and (4) that there are no differences among people, so that most people will respond similarly.[23] There are various examination techniques, but the most widely used is the control question technique.[24] The physiological reactions result from the various questions asked by the examiner.[25] In the control question technique there are three types of questions used to illicit responses: relevant, control, and irrelevant.[26] "Relevant questions deal with the specific incident under investigation;[27] control questions involve matters similar to that being investigated but different in time and category;[28] irrelevant questions are unrelated to the incident under investigation"[29] and are used to obtain normal truthful reactions.[30] The responses are interpreted by the examiner[31] who subjectively analyzes the charts produced by the machine.[32] In addition to the objective information in the charts, the examiner also may incorporate the subject's demeanor,

body language, attitude, and responses in his or her evaluation.[33]

Arguably, the most important factor in the polygraph examination, and the evolution towards reliability, is the individual examiner. Utilizing his or her ability, experience, and education, the examiner essentially applies something close to an interpretive art form in reviewing the charts.[34] The findings of the examiner will result in one of three conclusions. That deception was indicated, no deception was indicated, or that the test results were inconclusive.[35]

What may be of equal importance in understanding the polygraph device is knowing what it is not. "There is no lie detector. The Polygraph 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 emotional reactions."[36] Theory, machine, and operator all come together to form the specific data barred by MRE 707.

III. THE RULE: MRE 707

> **There is no Pinocchio response. If you lie your nose does not grow a half an inch longer or some other bodily response.**[37]

A. The Historical Background of Polygraph Evidence

Prior to 1987, the results of polygraph examinations were inadmissible at courts-martial.[38] To a large extent, this was due to the "general acceptance requirement" first enunciated in the 1923 case of Frye v. United States,[39] and incorporated into paragraph 142e[40] of the Manual for Courts-Martial, 1969(Rev.).[41] The Frye standard stood for the proposition that, to be admissible, scientific evidence must be generally accepted "in the particular field in which it belongs."[42] With the promulgation of the MRE's,[43] the blanket prohibition against polygraph evidence was discarded and the precedential value of Frye declined.[44] This diminished vitality resulted from a conflict with the newly created MRE's,[45] specifically MRE's 401-403,[46] and MRE 702.[47] The drafter's analysis to MRE 702 specifically states that the rule may be broader and supersede the Frye standard.[48]

The Gipson[49] decision judicially clarified that Frye was no longer the controlling case in determining the admissibility of novel scientific evidence. Rather, if used at all, the Frye test has now been relegated to a useful component in determining the probative value of evidence.[50]

Through Gipson, the Court of Military Appeals expanded the admissibility equation for expert testimony generally, and

polygraph evidence in particular by focusing on MRE's 401, 402, and 702.[51] Once basic relevance is established under MRE's 401-403, MRE 702 imposes the marginal burden that scientific evidence "assist the trier of fact to understand the evidence or to determine a fact in issue."[52] Simply put, the question to be answered is whether the evidence is reliable enough to be helpful in resolving the issues.[53] "Reliability can be established by showing the degree to which the procedure or technique is accepted within the scientific community."[54] Here we see Frye resurrecting itself, but in an advisory capacity. In this context, general acceptance is a factor that may or may not persuade on the point of admissibility.[55] The Gipson decision did not make polygraph evidence per se admissible, it merely held it was not per se inadmissible.[56] Finally the court concluded, "The greater weight of authority indicates that [the polygraph] can be a helpful scientific tool."[57]

Since the Gipson case, and prior to the creation of MRE 707, the military case law dealing with polygraph evidence can be summed up as "close, but no cigars." Case after case reflects one or both sides being allowed to lay the foundation for admissibility only to see the military judge refuse to allow it in for a variety of reasons.[58] The various reasons given to support exclusion include minimal probative value,[59] not probative of the witness' character for truthfulness,[60] and lack of relevancy resulting from the fact that accused failed to take

the stand.[61] Often, the Court of Military Appeals or the Courts of Review will cite error at the trial level for failing to follow the Gipson opinion or excluding the polygraph evidence, but will affirm citing harmless error.[62] Obviously, one result of the Gipson decision was not to immerse the courts in polygraph evidence. Yet the trend of the various polygraph cases seemed to point to the potential acceptance of polygraph evidence. The genesis of MRE 707 is surprising when viewed in the context of the Gipson decision and its progeny.

B. MRE 707

The rule itself provides:

> 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.[63]

MRE 707(A) creates a bright line rule of exclusion which excludes all evidence relating to the results of polygraph examinations. As a result, a military judge cannot entertain any motion seeking admission of polygraph evidence, nor allow the proponent to even try and establish reliability. Interestingly, MRE 707(B) seems to acknowledge the continued use of the polygraph device in the military. MRE 707(B) indicates that any statements which are lawfully elicited during the polygraph procedure may be admissible, presumably as admissions by the accused. It would seem the drafters of MRE 707 anticipate and acknowledge that the polygraph machine will continue to be used regularly as an investigative tool. This is an anomalous position to take, as the bright line rule seems rooted in the belief that the polygraph device is inherently unreliable. The drafters' justification for the creation of this bright line rule is found in the analysis and reflects often-argued points in opposition to the polygraph.

C. Justification for the Bright Line Rule

The drafters of MRE 707 cited four areas of concern in justifying the need for a bright line rule of exclusion. They include the following: (1) the fear that court members would be mislead, (2) there would be a confusion of issues, (3) the trial would incur a substantial waste of time, and (4) that the polygraph is inherently unreliable. These reasons are the basis

for the drafter's position that polygraph evidence would impinge on the integrity of the military judicial system. To avoid redundancy, these four specific areas will be detailed in the following sections, but will be fully addressed in parts IV and V of this thesis.

1. Court Members May Be Mislead

The impetus for the bright-line rule is based on several policy grounds.[64] The first of which is the fear that the members will be mislead by the polygraph evidence. The analysis cites United States v. Alexander,[65] in which the court opined that:

> When 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.... Present day jurors, despite their sophistication and increased educational levels and intellectual capacities, are likely to give significant, if not conclusive, weight to a polygraphist's opinion...[t]o the extent that the polygraph's results are accepted as unimpeachable or conclusive by jurors, despite cautionary instructions by the trial judge, the juror's traditional responsibility to collectively ascertain the facts and adjudge guilt or innocence is preempted.[66]

2. Confusion of the Issues.

The second basis given by the drafters is that the consideration of polygraph evidence may lead to a confusion of the issues by forcing a determination as to the legitimacy of the offered evidence. The drafters refer to State v. Grier,[67] where that court held that polygraph evidence could not be admitted under any circumstances. The Grier court was concerned that polygraph evidence may overwhelm the members and that the device itself was "inherently unreliable".[68]

3. Substantial Waste of Time

The next articulated rationale is the belief that a substantial waste of time will be expended in the qualifying of polygraph evidence as reliable and competent.[69] The drafters also seemed concerned that polygraph evidence would place a burden on the administration of justice that would outweighs the probative value.

4. Lack of Reliability

Finally, the drafters criticize the reliability of polygraph evidence and state, "polygraph evidence has not been sufficiently established" and would impinge on the integrity of the judicial system. The drafters, seemingly wanting to avoid resurrecting

the controversy of Frye-Gipson-MRE 702, emphasize the rule is not intended to accept or reject any of the legal dogma surrounding expert testimony.

As mentioned, this paper will address all of the above concerns as they relate to proposed theories of admissibility for polygraph evidence. Generally speaking, if one was to accept the rationale advanced by the drafters, one must agree to certain initial premises. First, the adversarial system is a failure and the competent utilization of pretrial preparation and effective cross-examination pales in comparison to the testimony of the polygraph examiner. Second, the members are incapable of following or understanding the military judge's instructions in this area. Third, the military judge is incapable of applying long-established evidentiary rules to polygraph evidence.[70] To accept the above assumptions is to crack the bedrock on which the military judicial system is founded. While a variety of intuitive arguments against the drafter's analysis are available, the next important point is one the drafters do not address, the issue of due process.

IV. DUE PROCESS AND THE POLYGRAPH

> **It is always the best policy to speak the truth, unless of course you are an exceptionally good liar.**[71]

The adoption of a rigid rule of evidentiary exclusion must ultimately be analyzed from a constitutional perspective. In this critical context, a review of the due process[72] and compulsory process[73] clauses of the Constitution reveal potential challenges to the validity of MRE 707. In the case of In Re Oliver,[74] Mr. Justice Black in his opinion for the court identified these basic rights:

> A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense--a right to his day in court--are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and be represented by counsel.[75]

These rights are not without some constraints. As Judge Cox notes in the Gipson decision, "[A] few courts have experimented with the notion that the accused has an independent constitutional right to present favorable polygraph evidence. We do not subscribe to this theory because there can be no right to present evidence...unless it can be shown to be helpful and relevant."[76] If polygraph evidence has the potential to be material and relevant, than any per se rule of exclusion must be closely scrutinized. The constitutionality of an exclusionary rule designed to ensure receipt of trustworthy evidence, but which has the effect of unconstitutionally limiting the Sixth

Amendment right of an accused to present favorable evidence, has surfaced in a number of Supreme Court cases.

A. Applicable Constitutional Precedents

The Court in Rock v. Arkansas[77] addressed whether a criminal defendant's right to testify may be restricted by a state rule that categorically excluded hypnotically refreshed testimony. Vickie Rock had been charged and convicted of manslaughter concerning the death of her husband. Prior to trial Rock was put under hypnosis to remember details surrounding the firing of the gun which had killed her husband. The trial court refused to admit the hypnotically-refreshed testimony and this ruling greatly limited the accused's testimony at trial.[78] The Arkansas Supreme Court affirmed holding that the constitutional dangers of exclusion were not outweighed by the probative value of the evidence. The Supreme Court reversed and opined that the Arkansas statute prohibiting this type of evidence was overly restrictive. Surprisingly, the Court refused to endorse, without reservation, the use of hypnosis as an investigative tool. Further, the Supreme Court viewed the scientific understanding of the phenomenon, and of the means to control the effect of hypnosis as still in their incipient stages.[79] The Supreme Court's lack of confidence in hypnotically induced testimony did not hinder its apparent inclination to protect it from wholesale exclusion. The Court explained that "a state's legitimate

interest in barring unreliable evidence does not extend to per se exclusions that may be reliable in an individual's case."[80] In other words, it was the possible exclusion of reliable evidence, without consideration of the circumstances surrounding the collection of said evidence which the Court found constitutionally offensive. The Court also noted that evidentiary rules which limits the presentation of the defense cannot be arbitrary or disproportionate to the purpose for which it serves. The court observed that cross-examination was one means to highlight inconsistencies,[81] as would the proper utilization of jury instructions. It should be noted that the Arkansas exclusion applied to the testimony of defendants and not the testimony of other witnesses, and thus may have received a more rigorous analysis.[82]

One of the first cases to interpret the compulsory process clause was Washington v. Texas.[83] The accused had been charged with and found guilty of murder. At trial the accused denied committing the murder theorizing that someone else had pulled the trigger. The defense's alibi witness had been previously convicted of the same murder and was serving a lengthy jail term. The accused sought to put this other individual on the stand to testify as to who actually pulled the trigger and what role the accused played in trying to prevent the act of violence. Two Texas statutes in existence at the time prevented persons charged or convicted as co-participants in the same crime from testifying

for one another.[84] On the basis of these two statutes, the trial judge refused to allow the accomplice to testify. The Supreme Court reversed holding that the compulsory process clause provides the accused with the right to obtain witnesses in his or her favor and the right to have them testify. The Supreme Court recognized the rationale in preventing co-indictee from testifying, but the effect of this presumption of unreliability was to preclude relevant and material testimony. This resulted in the contravening of the accused's right to compulsory precess.[85]

The right to call witnesses on one's own behalf was again raised in Chambers v. Mississippi.[86] In that case, the Supreme Court recognized that the right to call witnesses in one's own behalf is an essential component of constitutional due process.[87] Leon Chambers was tried by a jury in a Mississippi trial court, and convicted of murdering a policeman. Along with a general denial to the charge, Chambers sought to introduce four statements of a Mr. McDonald, who had independently confessed to the charged crime on a number of occasions. Chambers also sought to admit the testimony of three witnesses who would have corroborated McDonald's confessions.

The state refused to call McDonald, leaving Chambers no alternative but to call him as his own witness. On direct examination, Chambers was able to lay the foundation for

McDonald's out-of-court confession and it was read to the jury. On cross-examination, the state elicited Mr. McDonald's repudiation of the confession, as well as his version of what transpired the night of the killing. These points were extremely damaging to Chambers. Because of Mississippi's antiquated "voucher rule", which precluded the impeachment of one's own witness, Chambers was unable to cross-examine McDonald, or to call the other witnesses whose testimony would have discredited McDonald's repudiation and demonstrated his complicity.[88] The state court also cited the hearsay rule as a bar to some of the statements incriminating McDonald. Mississippi recognized declarations against pecuniary interest as an exception to the hearsay rule, but recognized no such exception for declarations like McDonald's, which were against his penal interests.[89]

The Supreme Court first addressed the voucher rule stating, "[t]he right to confront and cross-examine witnesses in one's own behalf have long been recognized as essential to due process."[90] The court went on to say this was not an absolute right and could succumb to other legitimate interests. Still, the court dismissed the voucher rule as no longer having any application "to the realities of the criminal process."[91] The Supreme Court viewed the antiquated voucher rule as having little or no legitimate interests which would justify the exclusion of critical evidence for the defense.

The Supreme Court then addressed the hearsay bar by acknowledging the justification in admitting hearsay statements is found in the statement's indicia of trustworthiness. The Court observed "[t]he testimony rejected by the trial court did contain persuasive assurances, and thus was well within the basic rationale of the exception for declarations against interests."[92]

Since this decision, a number of commentators have indicated their belief that Chambers, like Washington, could be read to require the admission of polygraph evidence, at least where a proper foundation demonstrated the reliability of the evidence, and the evidence was critical to the case.[93] Both cases can be viewed as situations in which constitutional demands overrode state evidentiary rules of exclusions. In State v. Dorsey,[94] the New Mexico Supreme Court viewed restrictions on the admission of polygraph evidence as "inconsistent with concepts of due process."[95] In Dorsey the New Mexico Supreme Court held that polygraph results are admissible if (1) the operator is qualified, (2) the testing procedures were reliable, and (3) the test of the particular subject was valid.[96] The New Mexico Supreme Court's decision in Dorsey indicates that court's willingness to concede both the importance of polygraph evidence, and the allowance of the proponent to establish reliability. This is consistent with the argument arising out of Chambers. When polygraph evidence is critical to the defendant's case and

contains adequate indicia of trustworthiness, admissibility may be mandated by the compulsory process clause.[97]

B Conclusion

Washington, Chambers and Rock all demonstrate the Supreme Courts' willingness to scrutinize exclusionary rules of evidence which exclude critical evidence.[98] The common analysis used by the Supreme Court in both the Rock and Chambers decisions is to look at whether there is a valid state purpose behind a rule of exclusion that purports to exclude favorable evidence.[99] The Court's methodology would then encompass the question of whether the evidence has the potential to be reliable and trustworthy. If so, the Court will closely examine the exclusionary rule for possible due process violations.[100] Given the tenor of the Supreme Court's description of hypnotically refreshed testimony in Rock, it's hard to imagine polygraph evidence being given less of a vote of confidence.[101] Further, the Supreme Court put the burden on the state to show how hypnotically enhanced testimony is always so untrustworthy and so immune to the traditional means of evaluating credibility that it should disable an accused from testifying on his or her own behalf.[102] The Rock analysis of the due process clause seems to mandate the admission of evidence which could corroborate the reliability of the polygraph, paving the way towards admission.[103] The application of MRE 707 to potentially reliable polygraph evidence would seem to contradict

the holding in Rock. Therefore the constitutionality of MRE 707 is very questionable. If polygraph evidence is reliable and critical, the Chambers rationale implies that this type of evidence is required by the Constitution "in the sense that the defendant will be otherwise unable to provide credible evidence of an important fact."[104]

V. MRE 707: A CONTRADICTION WITHIN THE MILITARY RULES OF EVIDENCE.

> An expert is one who knows more and more about less and less.[105]

In addition to the constitutional questions surrounding MRE 707, there is a sense of uniqueness which seems to guide the rule. As MRE 707 is one rule among many, all supposedly striving for a common goal this is not necessarily an admirable trait. When comparing MRE 707 with some of the other MRE's one notices a pattern of inconsistencies, contradictions, and unnecessary duplications. The following chapter will compare and contrast MRE 707 with some of the other MRE's. This comparison will highlight the fact that MRE 707 is statutorily defective while concurrently justifying the possible admission of polygraph evidence. Both issues appear to be interwoven, as a denunciation of MRE 707 also works to bolster the argument supporting the admissibility of polygraph evidence.

A. MRE 702

The MRE's make no distinction between "expert" testimony and "experimental" or "scientific evidence." MRE 702 highlights that any testimony based on scientific, technical, or specialized knowledge may qualify as expert testimony. MRE 702 provides that:

> 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 an opinion or otherwise.[106]

MRE 702, read in conjunction with MRE's 703 through 705, expands the admissibility of expert testimony in the courtroom.[107] The Court of Military Appeals discussed this expansionist view in United States v. Snipes.[108] In Snipes, the accused who was charged with child molestation, offered testimony challenging the veracity of the victim. In rebuttal, the government put a psychologist on the stand who testified that, in his opinion, the victim was truthful in her allegations and that her mental state was consistent with having been sexually abused.[109] The Court of Military Appeals upheld the admission of the child psychologist's testimony which established behavior profiles for sexually abused

children. The court based its decision on the lack of an articulated objection by the defense and the fact that the defense had opened the door in this area. Further, the court found no abuse of discretion in allowing the receipt of this evidence on the credibility of the child, but refused to allow any expert testimony on guilt or innocence. This case is a good example as to how far The Court Of Military Appeals will go in admitting expert testimony. Even behavior profile testimony, which is often close to improperly commenting on the ultimate issue, is allowed in under MRE 702. If you analyze behavior profile testimony you see it to be testimony which often bolsters the credibility of the victim, thereby creating an inference that the victim is truthful and the criminal acts occurred. This testimony is achieved through the subjective personal observations by the doctor of the victim. A comparison of behavior profile testimony and the polygraph reveal striking similarities. Both types of evidence flow from the subjective interaction by a expert which causes an opinion on the credibility of the subject. In his concurring opinion, Judge Everett warned about the possible inequities of allowing this type of behavior profile evidence to be admitted, yet shunning polygraph evidence.[110] Judge Everett stated, "an anomaly will exist if we continue to exclude the opinion of polygraph operators...but receive in evidence the opinion of various other experts about whether a victim or other witness has been telling the truth."[111]

The Court of Military Appeals went even further in this expansive view concerning expert testimony in the Gipson case. In Gipson the court interpreted MRE 702 to encompass all evidence that may prove helpful.[112] The court opined that helpfulness is determined by balancing:

> (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.[113]

These are the principles to be considered in reviewing polygraph evidence in relation to MRE 702. If polygraph evidence is deemed helpful to the factfinder through an analysis of the above three principles, one questions the validity of MRE 707. Polygraph evidence is often wrongly referred to as experimental or scientific evidence.[114] It is actually expert opinion evidence based upon the application of a scientific principle to data collected by the expert.[115] Although the polygraph charts should be introduced to establish the foundation for the testimony, the heart of the evidence is the examiner's opinion as to whether or not the subject was truthful in answering certain questions. In

deciding if polygraph evidence is properly admitted under MRE 702, the balancing test enumerated in Gipson must be applied. The first issue to be addressed is that of reliability.

1. MRE 702: The Reliability of the Polygraph

In analyzing for reliability, the court should first examine the principles underlining the expert testimony. Some scientific principles are so well-established that courts routinely (and without explicit acknowledgement) take judicial notice of their validity, so as to permit expert testimony based thereon.[116] For example, judicial notice is often taken concerning fingerprint and ballistic evidence,[117] recognizing for example that no two fingerprints are identical or that no two bullets fired from different guns have identical markings. If the underlying premise is not yet certain, the proponent of the evidence must establish it by presenting proof of its validity. The reliability of the polygraph device has long been the topic of judicial and scientific scholars.[118] In United States v. Ridling,[119] the court discussed various techniques utilized by examiners stating that, "nothing in the different techniques casts doubt about the theory behind the polygraph."[120] In the court's view, polygraph evidence was indeed helpful and, in analyzing the issue, the court noted that those cases barring polygraph evidence "were not persuasive insofar as they are predicated on the unreliability of the polygraph."[121] In McMorris

v. Israel,[122] the 7th Circuit Court of Appeals noted in their opinion the high accuracy rates of polygraph results. This conclusion is backed by various studies.

Many scientific studies show accuracy rates for polygraph testing well in excess of 90 percent.[123] One such study had a polygraph examiner testing statements from underground criminal informants, a group not known for their veracity, and correctly identified 102 out of 106 statements as true or false.[124] Perhaps the best indication that polygraph test results are highly reliable is the ability of one polygraph examiner to examine the charts of another and reach the same conclusions. Gordon J. Barland, of the University of Utah, conducted an experiment[125] in which he administered polygraph examinations to 72 subjects who were participants in a mock crime situation. The subjects who had committed the crime (a taking of $10) were told they could keep the money if they could successfully avoid detection. Three separate charts were recorded on each of the subjects and the relevant responses were scored on a continuum ranging from negative 3 (deception) to positive 3 (non-deception). Only the charts were submitted to five polygraphers from the Army's Military Police School in Fort Gordon, Georgia. The five examiners knew nothing about the individual subjects except for what was on the polygraph and the wording of the questions. The responses of each subject were scored by each examiner for each physiological indicator, and compared against the scoring of the

other examiners. An analysis of the data, based upon the comparisons of the judgments of each polygraph examiner, revealed an average correlation of .86. This figure, known as the correlation coefficient, is a mathematical derivation used to ascertain the relationship between any two variables. Plus or minus 1.00 constitutes perfect correlation and 0.00 signifying no relationship at all. Out of 559 cases where two examiners both reach some decision about the subject's truthfulness, it was found that the examiners had agreed 534 times or approximately 95.5%.[126]

In another study,[127] polygraph charts from twenty-five criminal investigations were selected for experimentation. The accuracy of the charts used had been verified by fully corroborated confessions of the guilty subjects. Of the 75 examinations administered in those cases, 35 were considered dramatically indicative of truth or deception to a fully qualified examiner. The remaining 40, however, presented a serious challenge to even the best polygraphers. To assess the examiner's expertise in this difficult exercise of chart interpretation, the polygraph charts and a summary of the nature of the investigation were submitted to seven experienced examiners and three inexperienced examiners. The examiners were not advised of the age or sex of the subjects, nor did the examiners know where the relevant questions were located on the charts. Results of the study showed that the trio of

inexperienced polygraphers attained an average of more than 79 percent correct judgments. The seven examiners who had more than six months experience achieved an average of more than 90 percent correct judgments in the detection of truth and deception. Once again, these results were achieved without the examiner either having met the subject or knowing the exact questions which had been asked.[128]

The increased accuracy of the polygraph technique has led to its widespread use by investigative and law enforcement agencies at all levels of local, state, and Federal Government to include the Federal Bureau of Investigation (FBI), Central Intelligence Agency (CIA), and the various investigative agencies of the armed forces. The decision as to whether or not to prosecute a particular case is frequently made on the basis of the results of polygraph.[129]

In any given year, thousands of polygraphs are administered for everything from security checks to employment qualifications. For example, in 1982, the Department of Defense reported conducting 18,301 polygraph examinations; the National Security Agency (NSA) conducted 6,700; and other agencies of the Federal Government conducted 4,296 polygraph examinations.[130] The use of the polygraph has become so pervasive in the private sector that Congress drafted The Employee Polygraph Protection Act[131] which greatly limited situations where citizens could be subjected to

polygraphs by private employers. One commentator on the Act noted that "[t]he fact that the statute exempts the federal government, local governments, and employers that manufacture, distribute, or dispense controlled substances tends to indicate that privacy concerns, not accuracy worries motivated Congress."[132] Admittedly, public acceptance alone should not support a judicial determination of reliability; however, the fact that businesses, the military, government agencies, and others extensively utilize polygraph examinations should provide some indication that the polygraph is more than some pseudo-science.[133]

Some courts show apparent disdain for polygraph evidence, yet routinely admit as expert testimony arguably less reliable information.[134] In United States v. Stifel,[135] the court admitted testimony concerning a revolutionary technique for the analysis of bomb fragments. Although the new technique was criticized by a number of experts as being unreliable, the court upheld the admission stating, "[c]riticism of the test methods were fully developed before the jury and were appropriate for the body's consideration. Such rebuttal went to the weight of testimony, not to its admissibility."[136] Another example of notoriously unreliable evidence being admitted[137] is found in the Supreme Court case of Barefoot v. Estelle,[138] where the Court upheld the use of psychiatric testimony predicting future dangerousness. This testimony was based on hypothetical questions vice personal

evaluations of the accused and was used to support the imposition of the death penalty. In Estelle the Court noted, "We are not persuaded that such testimony is almost entirely unreliable and that the factfinder and the adversary system will not be competent to uncover, recognize, and take due account of its shortcomings."[139]

2. MRE 702: Trial Members and the Polygraph

The second tier of the MRE 702 balancing test addresses the often-raised concern that polygraph evidence will overwhelm, confuse, or mislead the jury. In other words, the evidence will not be helpful to the factfinders as required in MRE 702. This thesis will more fully discuss the dangers of confusion of the issues later, as they more properly relate to MRE's 401-403. In relation to the helpful standard, the courts historically have been concerned that polygraph evidence would be given "undue reliance,"[140] thus usurping the role of the factfinder.

There are three responses to the fear that the member's function will be usurped by the polygraph. First, if a polygraph examination is as accurate as the proponent has proved it to be, it merits heavy reliance in a process whose primary purpose is the search for "truth." Secondly, judicial opinion[141] recognize that the administration of justice will not collapse with the introduction of polygraph evidence and, in fact, the system may

well improve. Members will not become overawed by the polygraph because the examiners can be adequately cross-examined and subjected to judicial scrutiny. The third response is that the concern over the "overwhelming impact" of the polygraph is exaggerated. This exaggerated concern for the jury's response has been best and most fully gainsaid by Judge P.J. Gardner:

> Too much of the law of evidence has its roots in an era when jurors were ignorant peasants and an elite group (the lawyers and judges) carefully hand fed them such information as they (the elite) felt the peasants could safely absorb. . . It is now the latter portion of the Twentieth Century, and while many, and perhaps most, lawyers and judges still consider themselves as elite corps, any substantial experience on the trial court level should persuade all but the most barnacled encrusted traditionalist that the average juror today enjoys a knowledge, an awareness, a sophistication and in many cases an education comparable to or superior to that of law school graduates. It is high time that lawyers and judges accept the fact that the rest of society is entitled to the respect and consideration of equals. . . . Today it takes a certain effrontery, a certain intellectual snobbery, to say to a juror, "You cannot hear this evidence because you are not capable of effectively evaluating it." Because of a lack of

> appreciation of the stability and integrity of the jury system, too much emphasis is still being put on the danger of prejudicing the jury by the admission of allegedly improper evidence. Basically, everything helpful to the truthfulness process should be admissible as relevant evidence.[142]

This statement by Judge Gardner has even more meaning in the military justice system where a typical members panel consists of mid-to-senior officers, all of whom are well trained and hold positions of leadership and responsibility.[143] The argument that polygraph evidence may mislead the factfinder has even less merit when one considers that many military trials are argued without members, with the military judge as the trier of fact. Civilian juries have also given indications that they too as a group are not unduly influenced by the admission of polygraph evidence.[144]

3. MRE 702: Application of the Polygraph

The third part of the helpfulness balancing test, as explained in the Gipson case, is a connection between the scientific research or test result to be presented and a particular disputed factual issue in the case.[145] This part of the helpfulness balancing test is really a relevancy standard. In other words, as applied to polygraph evidence, what tendency does the polygraph examiner's testimony have to make the

existence of a disputed fact of consequence more or less probable. To use this test the trial court must identify the disputed fact of consequence to which the polygraph relates.[146] In the Gipson case, Judge Cox noted that polygraph evidence is limited to, "[w]hether the examinee was being truthful or deceptive at the time of the polygraph exam. It is then for the factfinder to decide whether to draw an inference regarding the truthfulness of the examinee's trial testimony".[147] Trying to merge this concept of limited use with the balancing requirement that the factual issue be disputed creates an interesting question. In other words, "[h]ow does the credibility at the time of the polygraph exam become a disputed factual issue?"[148]

The Gipson court further defined polygraph evidence noting, "[w]hile polygraph evidence relates to the credibility of a certain statement, it does not relate to the declarant's character."[149] It is clear the prerequisite for the admission of polygraph evidence is the accused taking the stand,[150] but what the Gipson court does not clarify is what event makes the examinee's credibility at the time of the polygraph exam a disputed fact. The court's opinion seems to suggest that the examinee's in court-testimony is enough to create a disputed issue requirement. The same result is achieved by considering the examinee's credibility at the time of the polygraph exam to be automatically disputed once he or she testifies.

4. Conclusion

MRE 702, as interrupted by the Court of Military Appeals,[151] is an expansive rule of evidence which allows the admission of evidence if it can be helpful to the trier of fact. The balancing test utilized by the court[152] ensures that the admitted evidence is reliable, understandable, and relevant. A military jury is a sophisticated group of individuals which is more than able to understand and properly utilize polygraph evidence as it applies to a case. The relevance of the testifying accused's credibility and the possible affect polygraph evidence may intentionally impute are obvious. The Court of Military Appeals addressed the issue of reliability thusly;

> [t]he most troublesome aspect of the question of reliability is the wide range of uses which are apparently being made of the polygraph in private business, industry, and the federal government. If the tests are not reliable, why are they being used so heavily? Are they merely some type of "hocus-pocus" used to create an atmosphere which induces the guilty to confess, or do they really provide scientific evidence from which an examiner may ferret out the truth? The greater weight of authority indicates that it can be a helpful scientific tool.[153]

Polygraph evidence easily passes muster under the liberal auspices of MRE 702, much more so than some evidence which is routinely admitted.[154] Accordingly, the rule of exclusion encompassed in MRE 707 is a blatant example of statutory incompatibility and inefficiency. In other words, MRE 702 and MRE 707 are diametrically opposed in their treatment of polygraph evidence, which may lead to some confusion among practicing attorneys and military judges.

A recent change to FRE 702[155] has been proposed which could mark a halt to the expansive admissibility trend currently enjoyed by MRE 702. The proposed changes which may become applicable[156] to the military[157] are as follows:

> ~~If~~ Testimony providing scientific, technical, or other specialized ~~knowledge~~ information, in the form of an opinion or otherwise, may be permitted only if (1) the information is reasonably reliable and will substantially assist the trier of fact to understand the evidence or to determine a fact in issue,--and (2) the ~~a~~ witness is qualified as an expert by knowledge, skill, experience, training, or education to provide such testimony.~~ may testify there to in the form of an opinion or otherwise~~...[158]

The proposed rule would make it more difficult to use expert testimony. It accomplishes this by raising the standards for

admission and increasing the judicial control in this area.[159] Its effect and adoption in the military are unsettled because these changes, in both character and motivation, were made because of the frivolous use of expert testimony in civil trials.[160]

B. Rules of Relevance: MRE's 401-403

1. MRE 401 and MRE 402

MRE 401 defines relevant evidence as, "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."[161] This is clearly a de minimis standard and MRE 401 should be considered more a definitive rule than one of exclusion. Oftentimes this rule is called the rule of "logical relevance."[162] Polygraph evidence easily qualifies as evidence probative on the issue of the credibility of the testifying accused, which is always determinative on the ultimate issue.

MRE 402 provides that, "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by the rules, or by other rules proscribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible".[163] Taken together, MRE's 401 and 402 form the first of many legal hurdles

polygraph evidence would have to overcome to be admitted. To comply with these two rules, polygraph evidence must make the existence of a fact more or less probable. Admittedly this is a relatively easy standard to meet as polygraph evidence need only detect deception at better than a 50-50 rate.[164] As most of the studies for the polygraph device show accuracy rates well in excess of 50 percent, polygraph evidence seems to qualify as relevant evidence under MRE 401 and MRE 402.[165]

2. MRE 403

Once relevancy is established, a proponent of evidence must take into consideration the balancing test contained in MRE 403.[166] MRE 403 directs the military judge to exclude even relevant evidence, "[i]f its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence."[167] The application of MRE's 401 through 403 has sometimes been referred to as a determination of the "legal relevance" of the offered evidence.[168] Of the three relevancy rules, MRE 403 is arguably the most important as it embodies an active rule of exclusion and largely credits judicial discretion in balancing the admission of evidence.[169]

An analytical review of the drafter's justification for MRE 707 reveals an overt rejection of a military judge's ability to accurately utilize MRE 403. Indeed, the reasons delineated in the drafters's analysis justifying the promulgation of MRE 707 are moot when one realizes the total overlap with the exclusionary abilities of MRE 403. The prejudicial impact of creating MRE 707 is seen not only in the apparent statutory redundancy, but the preclusion of a fact-specific analysis called for under MRE 403.[170] By precluding any judicial analysis, or more precisely, by doing an analysis without referral to particular facts, MRE 707 directly contradicts the judicial philosophy inherent in MRE's 401-403. This philosophy stands for the proposition that a proponent of potentially relevant evidence has the right to have their evidence undergo a fact-specific, case-specific, review by the military judge. The issue then is whether polygraph evidence would pass judicial review under MRE 403 in a fact-specific, case-specific setting.

a. MRE 403: Confusion of the Issues

Confusion of the issues historically has been one of the main concerns in admitting polygraph evidence.[171] It is one of the reasons cited by the drafters in their justification for the bright line rule of exclusion in MRE 707. The argument advanced by the drafters is that the trier of fact will lose its focus on the guilt or innocence of the accused and concentrate on the

validity and weight to be afforded the polygraph evidence.[172] Supposedly, the polygraph becomes the focus of the trial as psychologist, polygraph examiners, and physicians will come forth to praise or condemn, leaving behind the issue of guilt or innocence. The fallacy in the drafters objections lie in distinguishing polygraph evidence from other types of testimony developed from experts. Ignoring the inequity of singling out polygraph evidence, the drafters fail to recognize that the adversarial process is not the best approach in resolving intellectual disputes in the scientific arena.[173] As to the resolution of scientific disputes in the courtroom, Judge Learned Hand wrote:

> The result is that the ordinary means successful to aid the jury in getting at the facts, aid, instead of that, in confusing them...The trouble with all this is that it is setting the jury to decide, where doctors disagree. The whole object of the expert is to tell the jury, not facts, as we have seen, but general truths derived from his specialized experience. But how can the jury judge between two statements each founded upon an experience confessedly foreign in kind to their own? It is just because they are incompetent for such a task that the expert is necessary at all.[174]

If confusion of the issues is inherent in the particular field, it will be excluded by a case-specific, fact-specific analysis. Expert testimony, by its very nature, tends to invite confusion of the issues. To inject selective wholesale exclusion in this area invites inequities which may hinder a resolution of helpful issues.

b. MRE 403: Misleading the Members

Another aspect of polygraph evidence which has been used to justify MRE 707 is the danger of misleading the members. The expressed concern of the drafters is that the members will be overwhelmed and put undue weight on the polygraph evidence. This danger is not particular to the polygraph, ever present in our adversarial system is the danger that the members will be overwhelmed by any type of expert testimony. As probative value is based on the degree to which the evidence establishes a fact,[175] to a large extent then the reliability of the evidence ascertains its probative value.[176] The reliability of any expert testimony is established by laying the proper foundation in areas such as experience, technique, education, and accomplishments. Once the foundation is laid, the court is able to ascertain the level of reliability and thereby establish the resulting probative value. If the expert's credentials are accepted, reliability may be inferred, and the trier of fact will put great weight in the evidence. Arguably, the term "undue weight" has no

place in our adversarial system in relation to proposed expert testimony. The goal of the advocate is to persuade the trier of fact to believe, accept, and trust in his or her position. The proponent of evidence wants to maximize the level of "undue weight" as it relates to the offered evidence. Judicial instructions, cross-examination, pretrial motions in-limine, and the discovery process are part of the checks and balances which maintain a sense of "legal equilibrium". No scientific or pseudo-scientific data is available which stands for the proposition that polygraph evidence has the ability to adversely control the deliberation process more than other routinely admitted types of expert testimony.[177] To create a bright line rule of exclusion which precludes the presenting of foundational matters, thus negating any chance to establish reliability for polygraph evidence is disproportionate to the goal allegedly served. Therefore justifying the creation of MRE 707 because of an apparent lack of proven reliability surrounding the polygraph device is an example of flawed logic.

(c) MRE 403: Considerations of Undue Delay

As highlighted in MRE 403, the concern is whether polygraph evidence would lead to, "consideration of undue delay, waste of time, or needless presentation of cumulative evidence."[178] If properly litigated, there is little doubt that litigating the polygraph issue can be time consuming. Like any other type of

expert testimony, how much time is utilized will directly relate to the quality of the counsel, the availability of experts, and the facts specific to that case. If time considerations were of such paramount importance, the military courts might never see a urinalysis case overseas again. The potential for lengthy motion practice is certainly present in affording both sides a full opportunity to develop the law in this area. To achieve a just resolution in many cases, delays may be both justified and mandated. But how much time is too much? The answer to this question is found in both case law and already established rules of evidence.

An interesting rule of evidence, rarely cited, is MRE 102.[179] The lack of citations is attributed to the fact that this is a rule of reason rather than exclusion. MRE 102 defines the philosophy and goals inherent in the rules of evidence and states:

> These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.[180]

This rule is often used by the courts as a reminder that the law must remain flexible and that blind rigid adherence to

inelastic concepts may preclude truth being discovered and proceedings justly determined.[181] In United States v. Jones[182] the Army court summed up its position in regards to MRE 102 by stating, "[w]hile MRE 102 does not constitute a license to substitute judicial predilection for the specific dictates of the President, it does clearly establish a desire for flexibility and new approaches in the interpretation of the rules."[183] The common theme raised in the various courts' interpretation of MRE 102 are developing the law and ascertaining the truth. Time consumed in a professional manner in pursuit of these goals should not be labeled as unjustifiable delay. The philosophy inherent in the MRE's as a whole supports the acceptance of inherent delays in deciding polygraph issues as a reasonable means to a justified end.

Excluding relevant evidence or the possibility of admission because of a potential waste of time can easily become a judicial abuse of discretion. Yet this seems to be the direct result of the implementation of MRE 707. By its very existence, MRE 707 seems to accomplish that which arguably would be defined as an abuse of discretion if done by a military judge. In United States v. Allen,[184] the Navy-Marine Corps Court of Military Review warned, "an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay may result in a violation of an accused right to the assistance of counsel."[185] A review of the case law[186] indicates that when a

delay is requested, "a military judge should exercise caution before denying a continuance if in doing so, one of the parties may be denied essential evidence."[187] The Fifth Circuit Court of Appeals[188] recognized the need to preserve an accused's rights, even in the face of potentially lengthy delays. The court stated:

> A scheduled trial date never becomes such an overarching end that it results in the erosion of the defendant's right to a fair trial. If forcing a defendant to an early trial date substantially impairs his ability to effectively present evidence to rebut the prosecution's case or to establish defenses, then pursuit of the goal of expeditiousness is far more detrimental to our common purpose in the criminal justice system than the delay of a few days or weeks that may be sought.[189]

As the heart of the accused's case is often the credibility of the defendant, polygraph evidence can very easily be characterized as essential evidence. Thus, to the extent that MRE 707 is born out of fear that too much time may be expended resolving essential issues, that rule is inherently defective.

3. Conclusion

Prior to the creation of MRE 707, an opponent of the polygraph could feel very confident of ultimately prevailing in the exclusion of polygraph evidence. Judicial application of the rules of relevancy usually resulted in the exclusion of polygraph evidence.[190] The rules in place, prior to the creation of MRE 707, effectively precluded the confusion and prejudicial effects most feared by the detractors of the polygraph. This was done by a fact-specific, case-by-case analysis which reviewed the reliability and professional characteristics inherent in the evidence offered. If the evidence offered failed to meet either the relevance definition under MRE 401 or the balancing test under MRE 403, it was excluded.

The flaw in MRE 707 is its assumption that polygraph evidence will always fall short in a MRE 403 balancing test. Studies have shown consistently that polygraph evidence does not overwhelm or confuse the members so as to justify a rule of exclusion. The philosophy inherent in the evidentiary rules and the supporting case law, point to a judicial emphasis on developing the law while ascertaining the truth. The speedy disposition of cases is of secondary importance and, if unduly emphasized, may hinder an individual's rights. MRE 403 has long been utilized to provide an opportunity for the proponent of evidence to establish legal relevancy, while giving the court an

enforcement mechanism to exclude that not properly admitted. By not permitting a proponent of polygraph evidence an opportunity to lay the foundation for legal relevance, MRE 707 evades the checks and balances found in MRE 403. MRE 707 adds nothing to the MRE's as it is simply an exclusionary rule containing a ban which had already existed.

C. Impeachment, Corroboration, and MRE 608

Viewed in its totality, MRE 707 stands for the proposition that polygraph evidence is inappropriate for admission in a military court of law. To rebut this proposition the legal characterization and use of polygraph evidence should be discussed. As earlier mentioned, The Court of Military Appeals in the Gipson decision refused to equate polygraph evidence with character evidence. The court went on to elaborate in some detail as to how, with this characterization, polygraph evidence related to MRE 608:

> ...we reject the government's alternate contention that Mil.R.Evid. 608(a)(2) and (b) bar the use of polygraph evidence. Mil.R.Evid. 608(a)(2) allows admission of "evidence of truthful character...only after the character for truthfulness has been attacked." As the government points out, appellant's character was not attacked. However, since the rule addresses character

> evidence, and polygraph evidence is not character evidence, the rule is inapposite. A like result disposes of the government's Mil.R.Evid. 608(b) argument. That rule generally prohibits use of "extrinsic evidence,""other than conviction of crime," to prove "specific instances of conduct of a witness, for the purpose of attacking or supporting the credibility of the witness." Evidence of such conduct (usually misconduct) is adduced for the inference that might be drawn about the witness' character for credibility. Again, since polygraph results do not reveal character, they are not barred by this rule.[191]

With this position taken by the Court of Military Appeals, issues such as whether the polygraph exam could be considered a specific instance of conduct under MRE 608(b) or whether a day-long exam qualifies an expert to render an opinion on character for truthfulness are mooted.

As previously mentioned, the polygraph examiner can only testify as to his opinion on whether the examinee was being truthful or deceptive at the time of the polygraph, and it is from this that any inference of credibility will be drawn.[192] Obviously, the Court of Military Appeals mandates as a premise to the admission of polygraph evidence, that the examinee testify at trial. Without the testimony of the examinee, the polygraph

evidence would have no relevant basis for admission.[193] In writing for the court in Gipson, Judge Cox recognized the effect of polygraph evidence would be an inference of credibility (or lack thereof), but also conceded, "theoretically, it is conceivable that an expert's opinion about the truthfulness of a statement made during a polygraph exam could even support a direct inference as to guilt or innocence."[194] Herein lies the true danger of polygraph evidence.[195] The mode of the expert's testimony will directly affect the prejudicial impact on the trier of fact. If the expert is allowed to testify to the "relevant control questions" asked and the examinee's responses, the specific structure of the questions may well support a direct inference as to the guilt or innocence of the accused. For example, if the examinee is an accused facing various charges of child abuse and the examiner's testimony at trial is as follows:

> Defense lawyer's question: What question did you utilize during the examination?
>
> Polygraph examiner: I asked the following, "Did you ever put your penis in _____'s vagina?"
>
> Defense lawyer's question: What was the accused's response?
>
> Polygraph examiner: The examinee answered no.

Defense Lawyer's question: Do you have an opinion as to the diagnosis of that response?

Polygraph examiner: In my opinion the accused was non-deceptive in his response.

Assuming the above is not being offered for the truth of the matter asserted but as a basis for the polygrapher's expert opinion as to the outcome of the exam,[196] one can see how close the testimony comes to answering the ultimate issue of the case. The court in Gipson cited this danger as another reason to insist on the examinee's testimony as a prerequisite to the admission of polygraph evidence. Without one's in-court testimony, "[t]he conclusions of the expert concerning the credibility of the declarant would be the only evidence presented to the fact-finder. In this circumstance, we really would be concerned about usurpation of the factfinder's role."[197]

Judge Cox is overly optimistic as to the protective effect of insisting on the in-court testimony of the examinee prior to the admittance of polygraph evidence. Even in that scenario, the danger of the factfinder's role being usurped is present. When a correctly instructed military panel receives a balanced presentation of the facts, though it may not surrender its factfinding role, the potential for subliminal effect is present. The most persuasive justification for MRE 707 is that the members

will simply use polygraph evidence as substantive evidence on the ultimate issue. To avoid this hypothetical harm, the drafters have opted for the extreme of a bright line rule of exclusion, a remedy that vastly surpasses the harm it was intended to cure. Polygraph evidence is simply a tool to draw an inference concerning the credibility of a testifying witness. Any greater use of such evidence will justify the fears surrounding the use of the polygraph. The issue thus becomes, how does the court ensure a proper use of polygraph evidence without instituting a complete bar to admittance?

The means to ensure the proper use of polygraph evidence is to circumscribe the extent of the testimony presented.[198] The proponent of the polygraph should be limited in the foundational information presented by the expert to the factfinder. Instead of a fact-specific rendition of the relevant control questions, the trial court should only allow generalized information, specific enough to avoid confusion. For example:

> Defense lawyer's question: What questions did you utilize during the examination?
>
> Polygraph examiner: Questions were put to <u>(accused)</u> that related to possible acts of misconduct.

Defense lawyer's question: What were the (accused) 's responses?

Polygraph examiner: In my opinion the examinee's answers reflected a denial of any misconduct.

Defense lawyer's question: Do you have an opinion as to the diagnosis of the responses?

Polygraph examiner: In my opinion, the accused was non-deceptive in his responses.

The above responses are admittedly vague, but the danger that the factfinder will go beyond the arguably permissive inference of credibility is minimized.[199] Polygraph testing could also go to the trier of fact in the form of a stipulation,[200] giving even greater control to the military judge. Limiting the proponent to only generalized information would still allow the opponent to attack the weight of the evidence by asking specific questions on cross-examination. This may be a questionable tactic as it would allow in on cross-examination, or arguable re-direct, the information one sought to exclude by using vague questions.

The danger of polygraph evidence being misused is much greater when the examinee is the accused. The issue of guilt or

innocence is always lurking beyond the inference of credibility as to the accused. If the examinee is merely a witness, any adverse or positive evidence resulting from a polygraph would more readily go to the weight of the evidence rather than the ultimate issue.[201] An alternative to MRE 707 would be a partial rule of exclusion, in which only polygraph examinations administered to the accused would be admissible.[202] Though the impeachment or corroboration of witnesses is often an important aspect of a trial, a steady flow of multiple examinations could result in an unreasonable delay in the trial. A vast amount of confusing, collateral, and cumulative material could well justify a rule prohibiting the polygraph examinations of all but the accused and possibly the victim.

1. Conclusion

Through the guidance set forth in Gipson,[203] the issues and rules surrounding character evidence are inapplicable when discussing polygraph evidence. As MRE 608 does not apply to polygraph evidence, it cannot be used as a basis to preclude it.[204] The use of the polygraph is limited to the areas of impeachment and/or corroboration through an inference concerning credibility. This evidence can be highly effective while being regulated through a carefully controlled direct examination, or by means of stipulation. A knowledgeable understanding of the

character of polygraph evidence and its properly controlled use, highlight the lack of a need for a bright line rule of exclusion.

D. Rule For Courts-Martial 811: Stipulations

Unlike the military, there are a number of jurisdictions which apply per se rules of exclusions to polygraph evidence yet allow an exception when the parties stipulate.[205] This exception is both a workable and reasonable approach to the polygraph dilemma. The stipulation approach "[a]llows the trial court discretion to admit the evidence if the parties stipulate to the admissibility, scope, and use of the results prior to the administration of the examination".[206] In Piccinonna, the court detailed criteria for the use of stipulated polygraph evidence:

> Polygraph expert testimony will be admissible in this circuit when both parties stipulate in advance as to the circumstances of the test and as to the scope of its admissibility. The stipulation as to circumstances must indicate that the parties agree on material matters such as the manner in which the test is conducted, the nature of the questions asked, and the identity of the examiner administering the test. The stipulation as to scope of admissibility must indicate the purpose or purposes for which the evidence will be introduced. When the parties agree to both of these conditions in advance of the

polygraph test, evidence of the test results is admissible.[207]

A number of advantages are gained through the stipulation process. These advantages in turn display the inequities of a bright line exclusion of all polygraph evidence. By having a procedural guide for stipulated polygraph results, a court can anticipate and overcome the various problems associated with polygraph evidence. One of the main advantages gained by listing the various factors to be agreed upon is avoiding any "so-called" battle of experts.[208] This is accomplished by agreeing on the testing procedure, the nature of the questions, and the identity of the examiner. This particular process, by getting the parties to agree among themselves and resolve routine objections, can alleviate most of the traditional fears associated with polygraph evidence, such as confusion of the issues and the waste of time.

Another case describing the stipulation process is United States v. Oliver,[209] where the accused was charged and found guilty of interstate transportation of a woman for sexual gratification. The defenses's contention at trial was that the transportation and sex acts were consensual.[210] At a pretrial hearing, the defendant advised the trial court that, at his own expense, he had taken a polygraph examination which had resulted in a finding of no deception to the relevant questions. The defendant then offered to submit to yet another polygraph,

stipulating to its admissibility even if the results were unfavorable.[211] The government subsequently agreed to stipulate and the trial court went through a lengthy voir dire of the accused[212] ensuring a knowledgeable waiver of any future objection. Subsequently, the accused failed the polygraph exam and it was used against him at trial. The defendant then moved to admit the results of the previously unstipulated polygraph, but the court refused to admit it. The Eighth Circuit Court of Appeals held that the accused had made a knowing waiver of his rights against self-incrimination and that the trial court had ruled correctly in admitting the stipulated exam while excluding the unstipulated exam.[213]

Although the presence of contradictory polygraph results in the same case might seems to denigrate the reliability of the polygraph, the case's importance lies in the validation of the use of stipulations. By requiring both sides to stipulate to the admissibility of the exam, the incentive to find objective, qualified professionals is created. Neither side will agree to a expert who demonstrates partiality to either party, so the process seems to encourage a high degree of quality. The logical result of such a process should be a polygraph exam with a higher degree of trustworthiness.[214]

This is exactly what occurred in the Oliver case. The trial court's exclusion of the first exam was not so much based on the

fact that it was ex parte, but on the apparently haphazard procedures used. The first examiner had questionable qualifications, was not fully informed of the specifics of the case, and utilized nonspecific relevant control questions. Presumably, these limitations would have precluded the government from stipulating to the first exam, and it never would have been agreed to. The stipulated exam was run by a highly qualified expert, who was fully informed about the nuances of the case, and who used generally accepted procedures in administering the exam. The accused attacked this second exam only after an adverse result was achieved. The accused's motion to exclude the second exam was based on possible bias of the examiner and a violation of fifth amendment rights, not the inherent unreliability of the process.[215]

1. Conclusion

The stipulation method of admitting polygraph evidence is an effective tool of the trial bench which highlights how unnecessary a per se rule of exclusion is. By agreeing in advance to the admissibility of the results, the stipulation process ensures both sides will utilize objective and qualified examiners who will provide trustworthy evidence. An agreement on exam procedures avoids any evidentiary battle between conflicting experts. This would save time and avoid confusion which often results from contrary opinions among experts.

The stipulation process has long been favored by the courts because of the ease of judicial control.[216] A military judge has the discretionary power to exclude a stipulation from being admitted into evidence if it appears to be unclear or confusing.[217] Further, a military judge may decline to accept a stipulation into evidence in furtherance of the interests of justice.[218] An additional control inherent in the stipulation process is the ability of one party to simply refuse to enter into a stipulation, or make a timely withdrawal.[219] These rights are consistent with the Court Of Military Appeals's opinion that "there is no independent constitutional right to present favorable polygraph evidence."[220] Finally, even if both sides agree to a stipulation, the stipulation itself must pass muster in the area of relevancy.[221] If this were not the case both sides could arguably agree to a stipulation concerning voodoo and have it admitted!

Admittedly the stipulation approach is not perfect. The constitutional infirmities suggested by Chambers v. Mississippi and Rock v Arkansas[222] are not cured by the stipulation. If a party has a constitutional right to offer this sort of testimony, there is no justification that will support limiting the right to stipulations contingent upon the prosecutor's agreement. You either have a right that exists in all situations or not at all.[223] Therefore, because of the possibility that the trial

counsel will refuse to stipulate, there remains a constitutional dilemma which presents itself with rules of total exclusion such as MRE 707. The other limitation in the stipulation process is that the issue of reliability may still be unresolved. In other words, how reliable must the evidence be before the military judge will accept the stipulation into evidence? Hopefully the adversarial process would ensure that only reliable evidence would be amenable to both sides in the creation of a stipulation.

On the whole the stipulation process ensures reliable, trustworthy evidence which saves time, avoids confusion and maintains judicial control. MRE 707's exclusionary rule only ensures that trustworthy evidence produced by the stipulation process never reaches the factfinder.

E. MRE 412: Rape Shield

MRE 707 is somewhat unique under the MRE's because it is the only rule which adversely effects an accused's rights without any possible exception to its per se rule of exclusion. The so-called rules of exclusion, MRE's 407-411, exclude various forms of information,[224] but usually to the benefit of the accused. The closest one comes to finding a per se rule of exclusion which is adverse to the rights of the accused is MRE 412.[225] This rule addresses two distinct forms of evidence, specific instances of conduct and opinion/reputation evidence. MRE 412 contains a

bright line rule of exclusion as to opinion and reputation evidence relating to the past sexual behavior of the victim.[226] There is no exception to this aspect of the rule as this type of attack on a rape victim's sexual history often resulted in evidence of doubtful probative value and injection of irrelevant collateral issues.[227] For the same reason, the rule also contains a per se rule of exclusion dealing with specific conduct of the victim's past sexual behavior.[228] But contained in the rule are three exceptions which allow for the admission of factual evidence concerning the victim's past sexual behavior. The first two exceptions are specific to non-consensual sexual offenses as they allow for evidence to be presented concerning three issues, source of semen, injury to the victim, and consent. These two exceptions have little or no value in a discussion of MRE 707, except that they evidence an unwillingness by the drafters to completely foreclose the admission of exculpatory evidence in this area. The third exception bears analysis in that it calls for the admission of evidence of the victims past sexual behavior if there is a determination that there is a constitutional requirement for its admittance.[229] All three exceptions are based on the concept of relevance outweighing the danger of unfair prejudice to the victim.[230] MRE 412 seems to recognize the potential for constitutional issues arising in a rule containing a per se rule of exclusion. This begs the question as to why the potential for constitutionally required evidence is required under 412 and not MRE 707.

In trying to define "constitutionally required" as it relates to Federal Rule of Evidence 412,[231] the Tenth Circuit Court of Appeals, in United States v. Begay,[232] stated:

> Although the Rule provides no guidance as to the meaning of the phrase "constitutionally required," it seems clear that the Constitution requires that a criminal defendant be given the opportunity to present evidence that is relevant, material, and favorable to his defense.[233]

Some earlier decisions merit discussions in further defining the necessity of "constitutionally required."

In United States v. Dorsey[234] the accused raised the defense of consent to a rape charge. The government's evidence showed that the victim had fled the scene of the rape in a tearful and emotional state and within a short period of time had reported the rape to various friends and authorities.[235] The defendant attempted to explain the young girl's emotional state by testifying that she had had sex with his friend earlier that evening and when she proposed to have sex with the accused he had called her a whore. Upon hearing this she had burst into tears and left. The accused tried to offer the testimony of the victim's earlier sexual activity but the trial judge excluded the evidence under MRE 412. The Court of Military Appeals disagreed,

holding that the evidence was constitutionally required as it was being offered to corroborate the accused's explanation of some of the most damaging information against him, specifically the emotional state of the victim.[236]

In United States v. Colon-Angueira,[237] the accused also was charged with rape, and attempted to admit evidence that prior to the charged incident, the victim's husband had been unfaithful, and that the infidelity had caused the victim to be upset and angry. The defense also tried to admit evidence that the victim had had sex with two other men following the alleged rape. The defense's theory of admissibility was that at the time of the offense, the victim had a hostile state of mind towards her husband which probably motivated or impelled her to have consensual sex with the accused. The military judge excluded the evidence pursuant to MRE 412, and the Court of Military Appeals reversed holding that the excluded evidence was relevant, material, and constitutionally required.[238] The court stated, "As a rule of relevance, MRE 412 must not be applied mechanically by military judges. Otherwise, a trespass will occur against the Sixth Amendment rights of the accused...."[239]

In United States v. Jensen,[240] the accused was charged with raping a foreign national while stationed in South Korea. The evidence showed that the accused and a friend had met the victim on a street corner, with the accused's friend soon going into the

alley with the victim and having intercourse. The accused then took the victim into the alley and also had intercourse with her, this act constituting the basis for the charge. At trial the accused insisted that both he and his friend had consensual intercourse with the victim. The trial judge excluded the testimony of the friend, who was prepared to testify that his intercourse with the victim was consensual. The Court of Military Appeals reversed holding that the excluded evidence was constitutionally required to be admitted and this failure denied the accused his Sixth Amendment right to confront his accuser.[241]

The common thread running through these and other cases[242] appears to be that specific acts of the victim will be constitutionally required if the defense can establish a legal relevancy to the Fifth and Sixth Amendment rights of the accused. The drafters's analysis[243] states that the rule recognizes the "fundamental right of the defense under the Fifth Amendment of the Constitution of the United States" to present relevant evidence.[244] The analysis goes on to say that MRE 412 was never intended to be a rule of absolute privilege and evidence "that is constitutionally required to be admitted on behalf of the defendant remains admissible notwithstanding the absence of express authorization in MRE 412(a)."[245]

1. Conclusion

The willingness to analyze past sexual behavior of a rape victim in MRE 412 via a constitutionally required exception is inconsistent with the bright line rule of MRE 707. If the polygraph evidence being offered has any tendency to suggest that the proponent can meet the requirements of relevancy and materiality, while showing it to be favorable to the defense, it may well be constitutionally required.[246] The bright line rule of exclusion encompassed in MRE 707 suggests possible constitutional infirmity when compared to MRE 412.

VI. THE POLYGRAPH AND SPECIAL CIRCUMSTANCES

> **The two maxims of any great man at court are, always to keep his countenance, and never to keep his word.**[247]

One of the quandaries MRE 707 creates becomes apparent when reviewing the rule as a whole. MRE 707(A) categorically excludes all evidence relating to the polygraph. This would seem to foreclose judicial acceptance of even an offer of proof or motion for admission. Yet MRE 707(B) provides that statements obtained during an examination, which are otherwise admissible, shall not be excluded from admission. It is laudable that the drafters realize that, MRE 707 notwithstanding, the polygraph remains a widely used investigative tool. What is not mentioned in the

rule is the solution to various scenarios whereby statements and facts intertwined in the examination are admissible, but any reference to the polygraph is not. The result of this ambiguity tends to create inequities for both the government and the accused.

In Tyler v. United States,[248] the accused was charged with first degree murder, subsequently apprehended and brought in for questioning. The police suggested he submit to a polygraph examination. He agreed and was given a polygraph, with the results indicating deception. When told of the result, the accused confessed to the murder. At trial the accused claimed his confession was coerced, causing the prosecutor to offer into evidence the fact that the accused had confessed after failing the polygraph.[249] The trial court allowed in evidence of the polygraph for the limited purpose of deciding whether the confession was voluntary. The trial judge gave instructions to the jury accordingly. The appellate court agreed, stating:

> This court has held the results of a lie detector test to be inadmissible. [citation omitted] We do not mean to impair the ruling. But here the circumstances are different. The evidence had a material bearing upon the conditions leading to Tyler's confession and was relevant upon the vital question as to whether the same was voluntary. With the court's clear and positive

> instruction to the jury, holding the evidence within the presumption that the instruction was followed by the jury, we are not warranted in assuming that any prejudicial results followed from the incident.[250]

The bright line rule contained in MRE 707 would preclude the above limited use of the polygraph evidence, even though it was clearly relevant on the question of voluntariness. What is ironic is that the impetus behind the exclusionary aspects of MRE 707 is the alleged lack of reliability inherent in the polygraph machine. Yet the issue of reliability in a Tyler situation is immaterial, as the only relevant evidence is the accused's subjective perceptions and how they relate to the issue of voluntariness.[251] In a Tyler scenario, MRE 707 could have the effect of preventing disclosure and consideration of highly relevant evidence on a key issue. If the authorities utilized the polygraph in a deceitful manner so as to trick the accused but not affect the voluntariness,[252] ordinarily the defense could still attack the weight of the confession by explaining how it had been achieved.[253] Thus MRE 707 seems to prevent a defense counsel from utilizing a tactic which is expressly authorized under MRE 304(e)(2).[254] In this situation, the government seems to have an inequitable advantage as a result of a rule which is suppose to be non-partisan.[255] The defense is not the only side which may be prejudiced by the rule.

Change the facts slightly in a case where the voluntary aspects of a statement are being challenged and it is possible for the government to be unfairly prejudiced. For example, assume an accused is brought down to the Naval Investigative Service [hereinafter NIS] office at 0800 for questioning. The accused is read and waives his rights, denies all involvement, and demands a polygraph. Approximately 1000, a polygraph examiner is available and the preliminaries begin. Assume forty-five minutes are wasted because of an uncooperative accused, but, by 1100, the examination begins. The examination runs until 1145 and, at 1215, the original NIS agent reappears. He informs the accused that the results of the examination indicate deception and proceeds to further question the accused. At 1315, the accused makes certain incriminating statements which are reduced to a written statement and ready for signature at 1400. At that time the accused refuses to sign the statement, demands a lawyer, and exits the NIS office at 1415. The accused later contests all charges and moves to strike the incriminating statements arguing the statements were involuntarily coerced. At trial, the military judge allows in the statements and the defense decides to attack the weight to be given the statements. The defense does this by eliciting information from either the accused or the NIS agent that the accused was held at the NIS office for over six hours on the day the statements were made. The impression created is that the accused was put in a position of duress over a number of hours, finally capitulating by giving the government

a statement of little validity. Because MRE 707 would prevent any mention of the polygraph, the members are now left with a defense oriented, distorted version of the facts.

The above hypothetical is close to what occurred in United States v. Hall.[256] In that case, the trial judge warned the accused in advance that if the defense tactic was to impugn the quality of the government's investigation, government witnesses would be allowed to testify that a full scale investigation was not deemed necessary because the accused had failed a polygraph examination. At trial, the defense did raise the issue of the quality of the investigation and the polygraph was admitted with an appropriate limiting instruction.[257] The Tenth Circuit Court of Appeals upheld the conviction stating, "The probative value of the evidence in sustaining the specific point for which it was being offered here is substantial, and the party offering the evidence was not asserting the accuracy of the test results."[258]

In United States v. Kampiles,[259] once again the issue of voluntariness of a confession was raised. When the accused stated his intent to question the voluntariness of his confession, the government countered by offering evidence that the accused had failed a polygraph exam. The government's theory of admissibility for the polygraph was not to use it substantively, but on the issue of voluntariness.[260] The trial

court ruled in favor of the government being allowed to use the polygraph evidence which resulted in the defense not contesting the voluntariness. On appeal, the Seventh Circuit Court found for the government and opined:

> It would have been unfair to allow defendant to present his account of his admissions, based upon the alleged threats by Agent Murphy, without allowing the government to demonstrate the extent to which failure of the polygraph precipitated the confession. The bargain struck was fair because it affected both parties through prohibitions running to each side. Moreover, it left the ultimate decision to the defendant and he deliberately choose to keep out references to both the polygraph and Agent Murphy's alleged statements....[261]

Present in United States v. Bowen,[262] were multiple accused who had attempted to falsify polygraph results in an effort to cover-up the underlying charges. At trial, the government was allowed to enter into evidence information concerning these tactics as proof of an attempt to evade the charged offenses. The Ninth Circuit Court of Appeals held, "If polygraph evidence is being introduced because it is relevant that a polygraph examination was given, regardless of the result, then it may be admissible."[263] This case is a good example of a court recognizing some utility in the limited use of polygraph evidence

and its resulting probative value. In other words, the court saw a greater harm in allowing a distortion of the facts than in admitting evidence of the polygraph.

A. Conclusion

The common theme which runs through the various courts who allow in polygraph evidence for a limited purpose, is a recognition that wholesale exclusion under a per se rule is unwarranted. Even courts which have historically excluded polygraph evidence see the validity of limited use in certain circumstances. The application of MRE 707 in these situations seems to run contrary to the philosophical fairness inherent in the MRE's. Additionally MRE 707 has a direct impact on limiting the Fifth Amendment rights of the accused with the apparent neutralization of MRE 304(e)(2). The unfortunate result is the constant flow of misinformation in an arena dedicated to the finding of truth.

VII CONCLUSION

> **And, after all what is a lie? Tis but the truth in masquerade; and I defy historians, heroes, lawyers, priests, to put some fact without some laven of a lie.**[264]

The search for the truth is often a long and difficult road. While a prophylactic exclusionary rule is the simplest solution to the polygraph dilemma, it to quickly ignores the rights of the accused and the possible relevance of the polygraph. The wide spread reliance on the polygraph as an investigatory tool by the military, reinforces its potential role in the courtroom. Presently, the procedures and techniques used by polygraph examiners make the polygraph device more reliable than many forms of scientific evidence routinely admitted. Judicial scrutiny, the adverserial system, the ability to stipulate, and already existing MRE's are all capable of incorporating polygraph evidence into traditional norms of admissible evidence. MRE 707 should be deleted from the rules of evidence because of the potential for confusion it brings to the courtroom. It accomplishes this by removing judicial discretion in the evidentiary process, and by running contrary to constitutional case law and other existing rules of evidence. The potential good contained in MRE 707's exclusionary rule is fairly embraced in MRE 403, so as a rule it has little positive value. Until MRE 707 is deleted, the military courts have lost the ability to remain flexible in meeting the myriad of situations which will arise from the widely used polygraph device.

ENDNOTES

1. Hawkins v. United States, 358 U.S. 74, 81 (1958).

2. See infra part III.A. for a discussion supporting this proposition.

3. Manual for Courts-Martial, United States, 1984, Mil. R. Evid. [hereinafter MCM].

4. Exec. Order No. 12,198, 45 Fed. Reg. 16932 (1980).

5. See Exec. Order No. 12,233 (September 1, 1980) (Mil. R. Evid. 302, 305(h), 317(c), and 1101(b); Exec. Order No. 12,306 (June 1, 1981) (Mil. R. Evid. 410); Exec. Order No. 12,315 (July 29, 1981) (Mil. R. Evid. 1101(c)); Exec. Order No. 12,473 (April 13, 1984) (Mil. R. Evid. 201A, 312, 313, 314, 315, 316, 321); Exec. Order No. 12,550 (February 19, 1986) (Mil. R. Evid. 304, 311, 609, 804(a)); Exec. Order No. 12,708 (March 23, 1990) (Mil. R. Evid. 304(b) and 506).

6. See United States v. Piccinonna, 885 F.2d 1529, 1534-35 (11th Cir. 1989), on remand, 729 F. Supp. 1336 (S.D. Fla. 1990), aff'd 925 F.2d 1474 (11th Cir. Fla. 29 Jan 1991). (The court surveyed the various approaches and characterized the military courts as having no prerequisites, excepting judicial scrutiny, to admitting polygraph evidence).

7. MCM, supra note 3, Mil. R. Evid. 707, as amended by Exec. Order No. 12767 (effective date 6 July 1991).

8. See W. Thomas Halbleib, U.S. v. Piccinonna: The Eleventh Circuit Adds Another Approach to Polygraph Evidence in the Federal System, 80 Ky. L. J. 225, 226 (1991).

9. See generally Williams, Polygraph Test Results Inadmissible at Criminal Trials, 24 Suffolk U.L.Rev. 279 (1990).

10. Piccinonna, 885 F.2d at 1533.

11. Id. at 1534; United States v. Brevard, 739 F.2d 180 (4th Cir. 1984); United States v. Clark, 598 F.2d 994, 995 (5th Cir. 1979), vacated en banc 622 F.2d 917 (1980), cert. denied, 449 U.S. 1128 (1981); United States v. Skeens, 494 F.2d 1050, 1053 (D.C. Cir. 1974). These circuits have consistently adhered to an approach of per se inadmissibility in regards to polygraph evidence.

12. Id.; Anderson v. United States, 788 F.2d 517, 519 (8th Cir. 1975); United States v. Alexander, 526 F.2d 161, 166 (8th Cir. 1975).

13. See Mark W. Brennan, Reexamining Polygraph Admissibility, 56 Missouri Law Review 143, 150 (1991). This third approach favors a case-by-case determination as to the admissibility of polygraph

evidence using nothing more than judicial scrutiny from the trial judge.

14. Piccinonna, F.2d at 1535. The Tenth Circuit Court agreed with the rationale permitting the government to introduce evidence that the defendant had failed a polygraph test to explain why the police detective had not conducted a more thorough investigation. The detective's theory was that he already had his man so no further investigation was necessary.

15. Warren E. Leary, The Eye-Witness is Never Wrong, N.Y. Times, Nov. 15, 1988, at 8. (Citing a study by Dr. Brian L. Cutler and Steven D. Penrod).

16. J. H. Wigmore, 2 Wigmore on Evidence §875, at 237 (2ed. 1923).

17. Halbleib, supra note 8, at 229.

18. John A. Ronayne, Admissibility of Testing by the Psychological Stress Evaluator, 9 Pace L. Rev. 243, 246 (1989).

19. Raskin, Science, Competence, and Polygraph Techniques, 8 Crim. Def. 11, 13 (May-June 1981). See also Department of Defense, The Accuracy and Utility of Polygraph Testing (1984), reprinted in 13 Polygraph 1, 58 (1984) ("There has been more scientific research conducted on lie detectors in the last six years than in the previous 60 years."). Id.

20. Ronayne, supra note 18, at 247.

21. United States v. Rodriguez, 34 M.J. 562 (A.C.M.R. 1991). The court held that polygraph evidence was relevant on the issue of the accused's credibility after the accused took the stand and denied the charge of using cocaine. This case was arraigned prior to the promulgation of Mil. R. Evid 707, and was therefore unencumbered by the rule.

22. Piccinonna, 885 F.2d at 1537.

23. Id., at 1538.

24. See Lykken, A Tremor in the Blood: Uses and Abuses of the Lie Detector, ch. 4 (1981).

25. Horvath & Reid, The Reliability of Polygraph Examiner's Diagnosis of Truth and Deception, 62 J. Crim. Law, Criminology & Police Sci. 276, 279 (1971).

26. Rodriguez, 34 M.J. at 563.

27. An example of a relevant question would be, "Did you stab Bob with the knife?"

28. An example of a control question would be, "Have you ever hurt any one before?"

29. Rodriguez, 34 M.J. at 563.

30. An example of an irrelevant question would be, "Is your name Bob?"

31. Horvath & Reid, supra note 25, at 279. "Generally, the truthful person will respond more to the control questions than to the relevant questions because they represent a greater threat to him. For the same reason the deceptive person will respond more to the relevant questions than to the control questions." Id.

32. Halbleib, supra note 8 at 232.

33. Id.

34. Id.

35. David Lykken, The Right Way to use a Lie Detector, 8 Psychol. Today 56, 58 (1975).

36. H.R. Rep. No. 198, 89th Cong., 1st Sess. 13 (1965). The House Committee on Government Operations took a strong stand against the reliability of polygraphs in concluding, "There is 'no lie detector,' neither machine nor human. People have been deceived by a myth that a metal box in the hands of an investigator can detect truth or falsehood." Id. at 1.

37. John F. Beary III, H.R. Rep. No. 198, 89th Cong., 1st Sess. 13 (1965). Dr. Beary made this remark in his comments before Congress.

38. See, e.g., United States v. Ledlow, 29 C.M.R. 475 (C.M.A. 1960). This was a larceny case in which polygraph testimony inadvertently crept into the record. The court reaffirmed the inadmissibility of the polygraph but found harmless error.

39. 293 F. 1013 (D.C. Cir. 1923).

40. Effective 1 April 1981, MCM, 1969 (Rev.) para 142e, was deleted by change 5 to the MCM, 1969 (Rev.) of July 29, 1981.

41. Paragraph 142(e), MCM, 1969 (Rev.).

42. Frye, 293 F. at 1014.

43. Supra note 4.

44. Donald F. O'Connor,Jr., The Polygraph: Scientific Evidence on Trial, 37 Naval L. Rev. 97, 102 (1988), citing S. Saltzburg, L. Schinasi, and D. Schlueter, Military Rules of Evidence Manual 589 (1986).

45. See supra notes 3-4 and accompanying text.

46. MCM, supra note 3, Mil. R. Evid. 401, 402, and 403.

47. MCM, supra note 3, Mil. R. Evid. 702.

48. MCM, supra note 3, Mil. R. Evid. 702 Analysis, App 22, at A22-45.

49. United States v. Gipson, 24 M.J. 246 (C.M.A. 1987).

50. Craig P. Wittman, U.S. v. Gipson: Out of the Frye Pan, into the Fire, The Army Lawyer, Oct. 1987 at 11.

51. O'Connor, supra note 44, at 104.

52. MCM, supra note 3, Mil. R. Evid. 702; See also Gipson, 24 M.J. at 251. The court reviewed the relatively low standard of reliability needed for the admission of expert testimony.

53. O'Connor, supra note 44, at 105.

54. See O'Connor, supra note 44, at 106.

55. Gipson, 24 M.J. at 252.

56. See United States v. West, 27 M.J. 223 (C.M.A. 1988).

57. Gipson, 24 M.J. at 249.

58. But see Rodriguez, 34 M.J. at 566 (polygraph examination results were relevant to credibility of accused who testified he did not use cocaine).

59. In United States v. Joyner, 29 M.J. 209 (C.M.A. 1989), the Court of Military Appeals said an accused willingness to take a polygraph usually should not be admitted as proof of his innocence because of its minimal probative value.

60. In United States v. Tyler, 26 M.J. 680 (A.F.C.M.R. 1988), the defense counsel tried to impeach a government witness by

trying to introduce the fact that the witness had refused to take a polygraph. The Air Force Court of Military Review agreed with the trial judge's decision that the evidence had no probative value towards the accused's guilt.

61. In United States v. Abeyta, 25 M.J. 97 (C.M.A. 1987), the court upheld the trial judge's decision to exclude evidence of the polygraph. Initially the trial judge had allowed the defense counsel to lay the foundation for the admission of the exculpatory polygraph, but excluded it when the accused failed to testify.

62. See United States v. Berg, 30 M.J. 195 (C.M.A. 1990); United States v. Allen, 24 M.J. 450 (C.M.A. 1987).

63. MCM, supra note 3, Mil. R. Evid. 707.

64. MCM, supra note 3, Mil. R. Evid. 707 analysis, at A22-46.

65. Alexander, 526 F.2d at 168.

66. Id. at 168.

67. 300 S.E. 2d 351 (N.C. 1983).

68. Id. at 642.

69. People v. Kegler, 242 Cal. Rptr. 897 (Cal. Ct. App. 1987).

70. MCM, supra note 3, Mil. R. Evid. 402 and 403.

71. Jerome K. Jerome, The Idler, (1892), reprinted in Dictionary of Quotations, (Bergen Evans Ed. 1978).

72. U.S. Const. amend. V. provides that, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

73. U.S. Const. amend. VI. provides that, "In all criminal prosecutions, the accused shall enjoy the right to a speedy trial and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witness in his favor, and to have the Assistance of Counsel for his defense.

74. 333 U.S. 257 (1948).

75. Id. at 273.

76. Gipson, 24 M.J. at 252. The Gipson court cites Chambers and Washington v. Texas to conclude that when scientific evidence is helpful, relevant, and not unduly prejudicial it has a role to play in criminal litigation.

77. 483 U.S. 44 (1987).

78. Id. at 46-48.

79. Id. at 61.

80. Id.

81. Id.

82. Halbleib, supra note 8, at 248.

83. 388 U.S. 14 (1967).

84. Id. at 16-17. The Texas statute created an irrebuttable presumption based on the assumption that an accomplice was inclined to lie to save a co-accused.

85. Id. at 20-24.

86. 410 U.S. 284 (1973).

87. Halbleib, supra note 8, at 245.

88. Chambers, 410 U.S. at 285-89.

89. Id. at 298-99.

90. Id. at 294.

91. Id. at 296.

92. Id. at 302.

93. See Halbleib, supra note 8, at 247, citing n. 124, Note, Admission of Polygraph Results: A Due Process Perspective, 55 Ind. L.J. 157, 189-90 (1980).

94. 539 P.2d 204 (N.M. 1975), see also Tafoya v. Baca, 702 P.2d 1001 (N.M. 1985) (Arguing that Chambers may require admission of polygraph evidence when critical to the defense).

95. Halbleib, supra note 8, at 247.

96. Dorsey, 539 P.2d at 205. See also State v. Urioste, 617 P.2d 156, 159 (N.M. 1980) (error to preclude cross-examination of examiner concerning chart and scoring); State v. Bell, 560 P.2d 925, 929-930 (N.M. 1977) (inconclusive results are irrelevant and therefore inadmissible).

97. Id. at 247.

98. Id. at 248.

99. Rock, 483 U.S. at 61.

100. See Halbleib, supra note 8, at 249.

101. Id.

102. Id.

103. Halbleib, supra note 8, at 249.

104. Id.

105. T.S. Elliot, Whispers of Immortality, reprinted in Dictionary of Quotations, supra note 71, at 89.

106. MCM, supra note 3, Mil. R. Evid. 702.

107. See O'Connor, supra note 44, at 104.

108. 18 M.J. 172 (C.M.A. 1984).

109. Id. at 177.

110. See O'Connor, supra note 44, at 104.

111. Snipes, 18 M.J. at 180.

112. O'Connor, supra note 44, at 104.

113. Gipson, 24 M.J. at 251, (quoting United States v. Downing, 753 F.2d 1224, 1237 (3rd Cir. 1985)).

114. C.T. McCormick, McCormick on Evidence 2ed. (1972), at 505.

115. Id.

116. MCM, supra note 3, MIL. R. Evid. 201. Mil. R. Evid. 201(c) specifically give a military judge the sue sponte right to take judicial notice on his or her own.

117. United States v. Downing, 753 F.2d 1224, 1234 (3rd Cir. 1985).

118. See generally Raskin, The Polygraph in 1986: Scientific, Professional and Legal Issues Surrounding Application and Acceptance of Polygraph Evidence, 1986 Utah L. Rev. 29; Tarlow, Admissibility of Polygraph Evidence in 1975: An Aid in Determining Credibility in a Perjury Plagued System, 26 Hasting L.J. 917 (1975).

119. 350 F. Supp 90 (E.D. Mich. 1972).

120. Id. at 95.

121. Id.

122. 643 F.2d 458 (7th Cir 1981), cert. denied, 455 U.S. 967 (1982). The accused was charged with robbery and prior to trial contacted the government in order to stipulate to the admissibility of a future polygraph. This was done in accordance with Wisconsin's stipulation rule which allowed for the admission of polygraph evidence if stipulated to. The prosecutor refused to enter into a stipulation, and the accused previously taken (but unstipulated) polygraph was ruled inadmissible. The Seventh

Circuit Court of Appeals reversed the conviction stating that the unjustified refusal by the government may have violated the accused's due process rights.

123. See R. Pfaff, The Polygraph: An Invaluable Judicial Aid, 50 ABAJ 1130, 1132 (1964). See also F. Horvath & J. Reid, supra note 25, at 279.

124. Blum & Osterloj, The Polygraph Examination as a Means for Detecting Truth and Falsehood in Stories Presented by Police Informants, 59 J. Crim. L., Criminology and Police Sci. 133, 136-37 (1968).

125. Gordon J. Barland, The Reliability of Polygraph Chart Evaluations, an art. presented at the American Polygraph Ass'n Seminar in Chicago, Ill., Aug. 4, 1972.

126. Id.

127. Horvath & Reid, supra note 25, at 267.

128. Id.

129. See Halbleib, supra note 8, at 242.

130. U.S. Congress, Office of Technology Assessment, Scientific Validity of Polygraph Testing: A review and Evaluation - A Technical Memorandum, (1983), reprinted in 12 Polygraph 198, 201 (1983).

131. Employee Polygraph Protection Act, Pub. L. No. 100-347, 102 Stat. 646 (1988)(codified at 29 U.S.C. §2001-2009 (1988).

132. Halbleib, supra note 8, at 242.

133. Id. at 241.

134. O'Connor, supra at note 44, at 106.

135. 433 F.2d 431 (6th Cir. 1970), cert. denied, 401 U.S. 944 (1971).

136. Id. at 438.

137. O'Connor, supra note 44, at 106.

138. 463 U.S. 880 (1983).

139. Id. at 899.

140. Alexander, 526 F.2d at 165.

141. See infra note 145.

142. People v Johnson, 109 Cal. Rptr. 118, 132-34 (32 Cal. Ct. App.3d. 1973) (Gardner, P.J. dissenting).

143. Uniform Code of Military Justice art. 25, 10 U.S.C. §821 (1982). The degree of competence of a military panel is bolstered by art. 25(d)(2) which directs the convening authority to detail members who are qualified for member's duty according

to age, education, training, experience, length of service, and judicial temperament.

144. F. Barnett, How Does a Jury View Polygraph Results?, 2 J. American Polygraph Association, No. 4 at 275-77 (1977). (One study analyzed a group of jurors in a larceny case where the trial court allowed the results of a polygraph into evidence, and an acquittal resulted. Interviewed after the deliberation process, the jurors explained that they had given no additional weight to the polygraph results and had set the polygraph evidence aside, deciding the case without it).

145. See supra note 113 and accompanying text.

146. O'Connor, supra note 44, at 107.

147. Gipson, 24 M.J. at 253.

148. Id.

149. Id. at 252.

150. Id. at 253. See also Abeyta, 25 M.J. at 98.

151. See Gipson, 24 M.J. at 251.

152. Id.

153. Id. at 249.

154. See supra notes 136-142 and accompanying text.

155. See Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence, (Aug. 1991).

156. Omitted changes refer to the civil rule contained in FRE 702 which are inapplicable to the military.

157. MCM, supra note 3, Mil. R. Evid. 1102 works to automatically incorporate any amendment to the Fed. R. Evid. into the Mil. R. Evid. absent contrary action by the President. This incorporation is automatic 180 days after the effective date of an amendment.

158. Proposed amendments, Aug. 1991 draft, supra note 155 at 83. Underlined material is new and material lined-through is that omitted from the current rule.

159. Jack B. Weinstein, Rule 702 of the F.R.E. is Sound; It Should Not be Amended, 137 West's Federal Rules Decision 631, at 638 (1991).

160. See Id.

161. MCM, supra note 3, Mil. R. Evid. 401.

162. C.T. McCormick, McCormick on Evidence 3ed., at 542-43 (1984).

163. MCM, supra note 3, Mil. R. Evid. 402.

164. See Halbleib, supra note 8, at 237.

165. See Horvath & Reid, supra note 25, at 237.

166. MCM, supra note 3,Mil. R. Evid. 403.

167. Id.

168. McCormick, supra note 162, at 548.

169. See O'Connor, supra note 44, at 110.

170. See Halbleib, supra note 8, at 237.

171. In United States v. Mckinnie, 29 M.J. 825 (A.C.M.R. 1989), aff'd, 32 M.J. 141 (C.M.A. 1991), the accused was charged with fraternization and subjected himself to an ex parte polygraph which resulted in a finding of no deception. The trial judge excluded the evidence after applying the balancing test enumerated in Mil. R. Evid. 403. Specifically the trial judge was concerned with the lack of reliability in a ex parte exam. He further declined to force the trial counsel to stipulate to a second exam, fearing the likelihood of misleading the members with multiple exams. The Army Court of Review found no abuse of discretion and affirmed the conviction.

172. See Halbleib, supra note 8, at 238.

173. Id.

174. Id., citing Hand, Historical and Practical Considerations Regarding Expert Testimony, 15 Har. L. Rev. 40, 53-54 (1902).

175. MCM, supra note 3, Mil. R. Evid 401.

176. See O'Connor, supra note 44, at 114.

177. Halbleib, supra note 8, at 141.

178. MCM, supra note 3, Mil. R. Evid 403.

179. MCM, supra note 3, Mil. R. Evid 102.

180. Id.

181. See United States v. Hines, 18 M.J. 722 (A.F.C.M.R. 1984). The Hines court referred to Mil. R. Evid. 102 in analyzing whether evidence had equivalent circumstantial guarantees of trustworthiness under Mil. R. Evid. 804(b)(5); See also United States v. Smith, 30 M.J. 1022 (A.F.C.M.R. 1990). In Smith, the Air Force Court of Military Review used Mil. R. Evid. 102 in its evaluation of evidence which was potentially inadmissible under the martial-communication privilege which is contained in Mil. R. Evid. 504. The Court concluded that evidence adduced at trial concerning a conspiracy to defraud the trial court was properly admitted and not protected under Mil. R. Evid. 504.

182. 19 M.J. 961 (A.C.M.R. 1985).

183. Id. at 967.

184. 31 M.J. 572 (N.M.C.M.R. 1990).

185. Id. at 620, (citing United States v. Thomas, 22 M.J. 57, 59, quoting Morris v. Slappy 461 U.S. 1, 11-12, (1982)).

186. See United States v. Dinks, 1 M.J. 254 (C.M.A. 1976); United States v. Perry, 14 M.J. 856 (A.C.M.R. 1982), pet. denied 16 M.J. 135 (C.M.A. 1983); United States v. Keys, 29 M.J. 920 (A.C.M.R. 1989).

187. Allen, 31 M.J. at 620, (citing United States v. Browers, 20 M.J. 356 (C.M.A. 1985). In Browers the Court of Military Appeals reaffirmed that a military judge should exercise caution before denying a continuance if the result would be to deprive a party of an essential witness.

188. United States v. Uptain, 531 F.2d 1281 (5th Cir. 1976).

189. Id. at 1291.

190. See supra notes 58-61 and accompanying text.

191. Gipson, 24 M.J. at 252-3.

192. Id.

193. Id. at 253.

194. Id.

195. See Id.

196. MCM, supra note 3, Mil. R. Evid 703 and 801(c). The hypothetical questions would be allowed into evidence under Mil. R. Evid. 703 as a basis for the expert's opinion. While coming in for this purpose, and not for the truth of the matter asserted, the testimony would become non-hearsay under Mil. R. Evid 801(c).

197. Gipson, 24 M.J. at 253.

198. See United States v. Miller, 874 F.2d 1255 (9th Cir. 1989). The court reversed the conviction of the accused because the trial judge allowed in the specific questions asked, and the answers elicited during a polygraph examination. The court reasoned that the specificity of the information unduly prejudiced the accused.

199. See Id. at 1262.

200. See infra part V.D. for a discussion supporting this proposition.

201. See Wittman, supra note 48, at 13.

202. See Halbleib, supra note 8, at 264.

203. Gipson, 24 M.J. at 252.

204. Id.

205. For examples of the stipulation approach, see McMorris v. Israel, 643 F.2d 458, 459-60 (7th Cir. 1981), cert. denied, 455 U.S. 967 (1982); United States v. Oliver 525 F.2d 731, 736-37 (8th Cir 1975), cert. denied, 424 U.S. 973 (1976).

206. Halbleib, supra note 8, at 251.

207. Piccinonna, 885 F.2d at 1536.

208. See Brennan, supra note 13, at 155.

209. 525 F.2d 731 (8th Cir. 1975), cert. denied, 429 U.S. 973 (1976).

210. Id. at 733.

211. Id. at 734.

212. Id. at 735, n.5. A transcript of the highly detailed voir dire is contained in the note.

213. Id. at 736-38.

214. See Halbleib, supra note 8, at 252.

215. Oliver, 525 F.2d at 737-38. At trial, the defense's attack of the second polygraph was based on the examiner being both biased and predisposed to finding the accused deceptive. The accused's fifth amendment argument alleged the judge had coerced him into agreeing to the second polygraph at a pretrial hearing.

The Eighth Circuit Court of Appeals disagreed, and the case was affirmed.

216. MCM, supra note 3, R.C.M. 811(b).

217. Id.

218. Id.

219. MCM, supra note 3, R.C.M. 811(c),(d).

220. Gipson, 24 M.J. at 252.

221. MCM, supra note 3, Mil. R. Evid. 401,403.

222. See supra notes 77-97 and accompanying text.

223. See Halbleib, supra note 8, at 253.

224. MCM, supra note 3, Mil. R. Evid. 407-411. The rights of the accused under these rules include the ability to prevent the government from offering into evidence a number of things. Such things as an offer to compromise, remedial measures, plea discussions and the payment of medical expenses are inadmissible.

225. MCM, supra note 3, Mil. R. Evid. 412.

226. Id. Mil. R. Evid. 412(a).

227. See Privacy for Rape Victims: Hearings on H.R. 14666 and

other Bills Before the Subcommittee on Criminal Justice of the Committee on the Judiciary, 94th Congress, 2d Session (1966).

228. MCM, supra note 3, Mil. R. Evid. 412(b).

229. Id. Mil. R. Evid 412(b)(1).

230. United States v. Merrival, 600 f.2d 717 (8th Cir. 1979).

231. Fed. R. Evid. 412 is substantially the same rule as its military counter-part with minor differences in its scope of application and procedural requirements.

232. United States v. Begay, 937 F.2d 515 (10th Cir. 1991).

233. Id. at 523, (quoting United States v. Saunders, 736 F.Supp 698, 703 (E.D. Va. 1990)).

234. 16 M.J. 1 (C.M.A. 1983).

235. Id. at 3.

236. Id. at 2-7.

237. 16 M.J. 20 (C.M.A. 1983).

238. Id. at 22-27.

239. Id. at 30.

240. 25 M.J. 284 (C.M.A. 1987).

241. Id. at 285-89.

242. See United States v. Elvine, 16 M.J. 14 (C.M.A. 1983).

243. MCM, supra note 3, Mil. R. Evid. 412 analysis, app. 22, at A22-34.

244. Id.

245. Id.

246. See United States v. Hicks, 24 M.J. 3, 10 (C.M.A. 1987), cert. denied 484 U.S. 827 (1987).

247. Jonathan Swift, Thoughts on Various Subjects, reprinted in Dictionary of Quotations, supra note 71 at 178.

248. 193 F.2d 24 (D.C. Cir. 1951), cert. denied, 343 U.S. 908 (1952).

249. Id. at 25-28.

250. Id. at 31.

251. See Halbleib, supra note 8, at 251.

252. See United States v. Melanson, 15 M.J. 765 (A.F.C.M.R. 1983), pet. denied 16 M.J. 321 (C.M.A. 1983). See also White, Police Trickery in Inducing Confessions, 127 U. Pa. L. Rev. 581 (1979).

253. MCM, supra note 3, Mil. R. Evid. 304(e)(2). See also United States v. Miller, 31 M.J. 247 (C.M.A. 1990).

254. MCM, supra note 3, Mil. R. Evid. 304(e)(2) provides, "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 the circumstances.

255. MCM, supra note 3, Mil. R. Evid. 102.

256. 805 F.2d 1410 (10th Cir. 1986).

257. Id. at 1414-17.

258. Id. at 1417.

259. 609 F.2d 1233 (7th Cir. 1979), cert. denied 446 U.S. 954 (1979).

260. Id. at 1242-43.

261. Id. at 1244.

262. 857 F.2d 1337, (9th Cir. 1988).

263. Id. at 1341.

264. Byron, Don Juan XI.xxxvii, reprinted in Dictionary of Quotations, supra note 71 at 98.