Heads or Tails: The Employee Polygraph Protection Act

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NOTES

HEADS OR TAILS: THE EMPLOYEE POLYGRAPH PROTECTION ACT

Polygraph them all. I don’t know anything about polygraphs and I don’t know how accurate they are, but I know they’ll scare the hell out of people.¹

Apparently, private employers in the United States heeded this advice. While the utility of the polygraph² in the employment setting remains as unreliable as flipping a coin,³ use of the device among private employers has escalated since 1978 to a current annual level of approximately two million “lie detector” exams.⁴ Employers expanded administration of the test⁵ from investigations of specific instances of wrongdoing to periodic surveys and


² One commentator has defined the polygraph in the following terms: The polygraph consists of a blood pressure device that measures heart rate and blood pressure; a pneumograph, a tube fastened around the subject’s chest and abdomen that measures the rate of breathing by monitoring expansion of the chest and abdomen; and electrodes fastened to the subject’s index and ring fingers that monitor the variations in the flow of electrical current through the subject’s body.

Hurd, Use of the Polygraph in Screening Job Applicants, 22 Am. Bus. L.J. 529, 530 (1985). For purposes of this Note, the terms “polygraph” and “lie detector” are used interchangeably.


preemployment screening, arguably, to intimidate employees, rather than to determine culpability for a specific violation of law or company policy.

Recognizing the inherent unreliability of the polygraph, and its degradation of human dignity and privacy, President Reagan signed the Employee Polygraph Protection Act of 1988 (Polygraph Act or Act) into law on June 21, 1988. The statute became effective on December 12, 1988.

In order to eliminate widespread use of the polygraph, the Act directly prohibits the use of lie detectors during private employment application procedures and as a means of randomly evaluating current employees. Furthermore, the Act restricts the use of lie detectors in ongoing theft investigations, except where “reasonable suspicion” exists. The Polygraph Act exempts from coverage governmental employers, national defense and security employers, the FBI, and employers involved in the manufacture, distribution, or dispensation of controlled substances.

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6. Hurd, supra note 2, at 533; S. REP. NO. 284, 100th Cong., 2d Sess. 41, reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS 726, 728 [hereinafter S. REP. NO. 284]. Employers seeking to rationalize widespread use of the polygraph claim not only that the device reduces the time needed for background searches prior to hiring, but that it is a useful tool in reducing theft as well. Comment, supra note 1, at 551.

7. Comment, supra note 1, at 561; Carr, Employer Use of the “Lie Detector”: The Arbitration Experience, 35 LAB. L.J. 701, 704 (1984) (The Privacy Protection Study Commission, established under the Privacy Act of 1974, found the polygraph to be humiliating, coercive, and little more than an intimidating device).

8. See 133 CONG. REC. H9529 (daily ed. Nov. 4, 1987) (statement of Rep. Wheat). The Office of Technology Assessment concluded that the reliability of the polygraph as a condition of employment was 85% at best. Further studies indicate that approximately 260,000 people are erroneously labeled liars while 120,000 deceptive individuals walk away free. 134 CONG. REC. S1703 (daily ed. Mar. 2, 1988) (statement of Sen. Kennedy); see S. REP. NO. 284, supra note 6, at 42 (“It has been determined that even assuming an extraordinary 95% degree of accuracy with such tests, in every population of 1,000 examinees, 47 innocent people will be labeled guilty even though they are in fact innocent.”), reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS at 730. But see Note, supra note 4, at 813 (estimating that the number of people falsely diagnosed as liars may only be as high as 40,000).


14. 29 U.S.C.A. § 2006. While allowing the use of the polygraph in limited instances, the Act places certain restrictions on even these uses. See infra notes 149-215 and accompanying text.
This Note first traces the regulation of polygraph use in the workplace prior to federal legislation through collective bargaining agreements and state statutory circumscription. Next, it describes the Polygraph Act of 1988. Examining how the polygraph works, this Note discusses the accuracy debate surrounding the polygraph and evaluates the impact of this legislation on private industry, by analyzing compliance problems employers may experience and the inherent inconsistencies in the Act. Furthermore, it assesses potential sources of litigation that the exemptions and restrictions under the Act may breed. Finally, this Note concludes that Congress’ attempt to provide fairness to employees and establish a system of uniform polygraph usage among employers through enactment of the Polygraph Act fails to account for the polygraph’s unreliability and may actually intimidate employers.

I. THE PATCHWORK QUILT: THE LACK OF UNIFORMITY AMONG STATES

A. Labor Arbitration

Most law regarding the use of the polygraph in the workplace developed within the field of labor arbitration.15 Under the National Labor Relations Act,16 employers could legally establish in-house rules requiring the use of a lie detector without committing an unfair labor practice.17 However, when an employer’s desire to polygraph employees departed from legitimate management concerns and became aimed at union support or other protected activity, the use of a polygraph constituted an unfair labor practice.18

Although employers could administer a lie detector in ongoing investigations,19 management had to first fulfill its duty to negotiate with the union. In Medicenter, Mid-South Hospital,20 the National Labor Relations Board...
Catholic University Law Review

(NLRB) held that a rule requiring submission to a lie detector test was a mandatory subject of collective bargaining affecting the "terms and conditions of employment." Thus, an employer's refusal to bargain on this subject could have led to a charge of unlawful failure to bargain in good faith.

Despite the employers' ability to legally bargain for, and thus prescribe polygraphing, arbitrators consistently held inadmissible evidence acquired through use of a lie detector. However, where outside corroborative evidence of employees' asserted improprieties existed, and the polygraph results did not constitute the sole evidentiary basis for the disciplinary action taken, some arbitrators admitted the evidence. Alternatively, some arbitrators limited the use or weight accorded the evidence.

Despite the fact that much of the law regulating use of the polygraph in the workplace developed in the field of labor arbitration, collective bargaining afforded minimal protection to employees against polygraph examination. The employers' use of a lie detector in the preemployment setting laid outside the realm of mandatory bargaining subjects and thus was not

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22. Nagle, supra note 21, at 66; 29 U.S.C. § 158(d) (1982). Under section 158(a)(5), an employer could require polygraph testing where bargaining resulted in an impasse or where the union passed up the opportunity to bargain on the topic. Craver, supra note 17, at 32; Castagnera-Cain, Defamation, Invasion of Privacy, and Use of Lie Detectors in Employee Relations - An Overview, 4 Glendale L. Rev. 189, 206 (1982).

23. Craver, supra note 17, at 34. Because of the polygraph's inherent unreliability, most arbitrators balanced the employer's interests against the employees' interests in favor of the employees. Id. at 40. Thus, arbitrators did not discipline employees for refusing to submit to an exam. Id.

24. See Comment, supra note 1, at 557-58; Carr, supra note 7, at 707 (citing Brinks, Inc., 78-1 ARB ¶ 8236 (a polygraph could be used as a corroborative variable, but where the polygraph was the only available evidence, it was too unreliable)). But see Note, supra note 3, at 942:

A lie detector test [was] admissible on the ground that polygraphic testing ha[d] become a more or less recognized and established mechanism of adjunct utility in personnel administration. Thus, it [could have] become a factor of evidence in the broad searching for the facts that generally [was] possible at an arbitration hearing where rules of evidence are not controlling.

Id. (quoting Town & Country Food Co., 39 Lab. Arb. (BNA) 332 (1962)).

25. Note, The Working Man's Nemesis - The Polygraph, 6 N.C. Cent. L.J. 94, 96 (1974). Ultimately, however, arbitrators did not hold that the lie detector could not be used in certain circumstances, but rather as a threshold matter there must have been "at least [a] basis for a formal accusation against the subject." General American Transp. Corp. v. United Steelworkers Local 1133, 31 Lab. Arb. (BNA) 355, 364 (1958). Furthermore, a polygraph requirement was seen as an unwarranted extension of management rights infringing on individual privacy, absent a specific bargaining agreement. Note, supra note 15, at 698 (citing Town and Country Food Co., 39 Lab. Arb. (BNA) 332, 335 (1962)).

26. See supra note 15 and accompanying text.

27. Hurd, supra note 2, at 541.
embraced by collective bargaining agreements. Additionally, even where unions successfully bargained against such use, "such nonmonetary objectives [were] the first to be conceded by labor." Furthermore, labor regulation of polygraph testing appeared inapplicable to nonunionized employees. Thus, the inherent limitations of labor arbitration and agreements, as well as the problematic techniques employed by employers, triggered state legislation on polygraph testing.

B. State Statutory Circumscription of Polygraph Testing

Widespread denunciation of polygraph testing prompted statutory circumscription at the state level. Legislation at the state level had taken two forms. First, statutes regulated the exam itself, either banning or restricting polygraph usage. Second, statutes regulated the scope of the questions permitted and specified licensing requirements for those administering polygraph exams.

28. Id.
29. Id.
30. Id.
32. Although not separately addressed in this Note, it should be noted that a tort action based upon a common law right of privacy may be brought as a result of an employer administering a polygraph. This right has been codified in the First Restatement of Torts. Wiseman, supra note 4, at 57-60. The Restatement (Second) of Torts provides in relevant part:

(1) One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other.

(2) The right of privacy is invaded by (a) unreasonable intrusion upon the seclusion of another, as stated in § 652B; or (b) appropriation of the other's name or likeness, as stated in § 652C; or (c) unreasonable publicity given to the other's private life, as stated in § 652D; or (d) publicity that unreasonably places the other in a false light before the public, as stated in § 652E.

RESTATEMENT (SECOND) OF TORTS § 652A (1977). The Restatement further provides:

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

Id. § 652B.

The following states have adopted the RESTATEMENT (SECOND) OF TORTS § 652, which provides a common law right of privacy: Alabama, Arizona, Arkansas, Connecticut, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Hampshire, New Jersey, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Vermont, Washington, West Virginia, and Wisconsin. The District of Columbia also adopted this provision.

33. Gardner, supra note 5, at 310. Because the provisions of the National Labor Relations Act, 29 U.S.C. § 151-168 (1982), apply only to unionized employees, statutory provisions provided needed protection for the nonunionized.
34. Wiseman, supra note 4, at 61-62; Hurd, supra note 2, at 542.
35. Wiseman, supra note 4, at 62; Hurd, supra note 2, at 542.
Prior to the passage of the Polygraph Act, in attempting to regulate the scope of polygraph exams, some states prohibited the use of lie detectors in the workplace.\textsuperscript{36} Some statutes merely prohibited employers from demanding or requiring a test;\textsuperscript{37} others prohibited employers from even requesting that employees submit to an exam.\textsuperscript{38} Where statutes allowed employers to "request" submission to a polygraph, problems of abuse occurred.

Clearly, statutes allowing employers to solicit an employee's consent to a polygraph invited potential abuse.\textsuperscript{39} Many disputed the assumption that consent was truly voluntary, arguing that any consent given was really coerced.\textsuperscript{40} Rather, employers' requests subjected potential or current employees to economic coercion\textsuperscript{41} and confronted them with "the Hobson's choice of [either] taking the test or not even being considered for the job."\textsuperscript{42} The employees also faced the similarly distasteful choice between livelihood or self-incrimination.\textsuperscript{43} Employees' refusals to submit to polygraph tests led employers to draw the conclusion that the employees had something to hide.\textsuperscript{44} Such a conclusion ignored any bona fide rights that potential or curr-
rent employees possessed. Thus, it appeared that consent was often coerced. Therefore, statutes saying "request" in effect meant "require."

As an alternative to prohibiting or restricting polygraph exams, some statutes established licensing requirements for polygraph examiners and restricted areas of inquiry open to polygraph examination. Although these requirements varied from state to state, the primary goal of such legislation was to eliminate examiner incompetence. For example, some states required attendance at approved schools of polygraphy; others merely mandated competency examinations. In imposing such requirements, legislatures intended to increase reliability "by limiting the right to administer polygraph tests to . . . capable, trained, and honest" individuals.

State legislation arguably proved ineffective. Regulatory approaches lacked broad application and strong enforcement mechanisms. Abuse of polygraphs continued to grow despite state legislation. In fact, some employers set up practices of crossing state lines to hire employees from states

45. Hermann, supra note 5, at 139. Perhaps in light of the potential for abuse, states enacted prohibitory statutes. Note, supra note 25, at 102. But see Comment, supra note 1, at 567 (stating that a complete ban on polygraphs not only dissuaded polygraph research, but equally eliminated the efficiency of the hiring process).

46. Note, supra note 37, at 1422. These states were: Alabama, Arizona, Arkansas, California, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Michigan, Mississippi, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Vermont. See Hurd, supra note 2, at 542 nn.75-76.

47. Gardner, supra note 5, at 312.


49. Gardner, supra note 5, at 312.

50. Hermann, supra note 5, at 100. But see Tiner & O'Grady, Lie Detectors in Employment, 23 Harv. C.R.-C.L. L. Rev. 85, 111 (1988) (arguing that licensing laws skirt the real problem of reliability and tend to "legitimize the machines, their operators and the entire 'scientific process' of lie detecting").

51. Note, supra note 25, at 105.

52. Note, supra note 4, at 806.

53. Tiner & O'Grady, supra note 50, at 111.
with less restrictive regulations. Thus, the ineffectiveness of state legislation strengthened the demand for uniform federal legislation.

C. Failed Attempts at Federal Legislation

To halt the unbridled use of the polygraph in the workplace, members of Congress introduced over forty bills directed at regulating the “lie detector” in the last twenty years. Concentrating on privacy concerns and protecting individuals against constitutional infringements, these proposals primarily applied to the federal and private workforces. However, while federal legislation would have provided the necessary uniformity and protection against constitutional infringements, these bills met with unaltering failure.


58. Note, supra note 4, at 816 n.84. One critic attributes the unrelenting failure of prior bills to their prohibiting scope: “[I]t is time to pass a bill which will balance the interests of the employee with the property rights of the employer . . . [and thus] facilitate prevention of the current abuses of polygraph testing and allow assembly of data that will establish the proper parameters of polygraph use.” Comment, supra note 1, at 569.
II. FEDERAL LEGISLATION STRIKES A BLOW TO ACHIEVE FAIRNESS: THE DESTRUCTION OF THE FLIP OF THE COIN

Despite many failed attempts to enact federal legislation on polygraphs, on June 21, 1988, President Reagan signed into law the Polygraph Act. Aiming at striking a balance between the constitutional rights of employees and the property rights of employers, the Act seeks a middle ground between the unbridled use of polygraph examination and total prohibition. Seeking to "prevent the denial of employment opportunities," the Act prohibits private employers from using polygraphs during private employment application procedures or as a means of randomly evaluating current employees, and establishes national minimum standards for polygraphing under the exemptions. The Act also attempts to "focus use of the polygraph where it is likely to be the most accurate."

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61. Employees assert general rights of privacy. See, e.g., Note, supra note 3, at 950-51.

62. Employers assert property interests in their businesses and their property. Id.

63. See infra notes 64-67 and accompanying text.


67. 134 CONG. REC. S1796 (daily ed. Mar. 3, 1988) (statement of Sen. Hatch); see 29 U.S.C.A. § 2006(a)-(f) (West Supp. 1989) (delineating the exemptions from the Employee Polygraph Protection Act); 133 CONG. REC. H9534 (statement of Rep. Young: "If it becomes law just like it is written today, there will be the use of polygraphs throughout America"). However, the limited uses are applicable only to polygraph tests as distinguished from other lie detector tests. See infra notes 70-71.
A. Breadth of Coverage and Prohibition

The Polygraph Act applies to private employers\textsuperscript{68} engaged in interstate commerce.\textsuperscript{69} Broadly defining the terms “lie detector”\textsuperscript{70} and “polygraph,”\textsuperscript{71} the Act prohibits employers from resorting to these devices for either preemployment screening purposes or random testing.\textsuperscript{72} Specifically, the provisions make it unlawful to require, request, cause, or even suggest that employees, current or prospective, submit to a polygraph as a condition of employment.\textsuperscript{73} In addition, the Act further restricts use of the device, or results obtained therefrom.\textsuperscript{74} First, it prohibits any use, acceptance, or inquiry by employers regarding information obtained through polygraph use.\textsuperscript{75} Second, the Act eliminates any adverse employment action against employees for refusing to take the test, filing a complaint, exercising rights

\begin{itemize}
\item \textsuperscript{68} For purposes of the Act, “employer” is defined as:
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\item any person acting directly or indirectly in the interest of an employer in relation to an employee or prospective employee. A polygraph examiner either employed for or whose services are retained for the sole purpose of administering polygraph tests ordinarily would not be deemed an ‘employer’ with respect to examinees.
\end{itemize}
\item 29 U.S.C.A. § 2001(3). According to the Act, “lie detector” means: “a polygraph, deceptograph, voice stress analyzer, psychological stress evaluator, or any other similar device (whether mechanical or electrical) that is used, or the results of which are used, for the purpose of rendering a diagnostic opinion regarding the honesty or dishonesty of an individual.” Id.
\item 29 U.S.C.A. § 2002(4). “‘Polygraph’ means an instrument that - (A) records continuously, visually, permanently, and simultaneously changes in cardiovascular, respiratory, and electrodermal patterns as minimum instrumentation standards; and (B) is used, or the results of which are used, for the purpose of rendering a diagnostic opinion regarding the honesty or dishonesty of an individual.” Id. By excluding the term ‘chemical testing’ from its definition of polygraph and lie detector, see id.. Congress preserved the right of employers to use tests to ascertain the presence of controlled substances in an employee’s body. Congress further distinguished between the two terms, polygraph and lie detector, to clarify its intentions that only a polygraph may be used under the exemptions. 53 Fed. Reg. 41,497 (1989) (to be codified at 20 C.F.R. § 801.1).
\item 22 U.S.C.A. § 2002(1).
\item 74. See infra notes 75-76 and accompanying text.
\item 75. 29 U.S.C.A. § 2002(2).
\end{itemize}
provided by the Act, giving testimony in connection with the Act's enforce-
ment, or on the basis of the results of any test. 76

B. Preservation of Existing Laws or Agreements

While grasping for the goal of uniformity, the Polygraph Act does not by
its own terms achieve uniformity. The Act applies to laws less restrictive by
their terms than the Act itself on polygraph use, whether state or local law
or collective bargaining agreements. 77 Accordingly, the Act does not pre-
empt an existing agreement or law which subjects polygraph testing to total
prohibition or stricter control. 78 A legislature, state or local, remains free to
enact more stringent provisions to maintain control over polygraphs. 79
However, the regulations clarify this provision by requiring state provisions
to be stricter in all aspects of usage. 80 Thus, state polygraph laws must pro-
pose stricter procedural safeguards, test result limitations, rights and reme-
dies of examinees, as well as employer and examiner responsibilities. 81

Because of its limited impact on state law, the Act preserves the dominant
role of existing law. But, the Act also presents the possibility of state legisla-
tion which extinguishes any or all exemptions provided in the Polygraph
Act. 82 Thus, the regulations interpreting the Act contemplate three possible
schemes of regulation. The first possible scheme constitutes exclusive federal
regulation. If the Polygraph Act represents the most restrictive regulation,
it preempts state law. Second, for states imposing more stringent regulation,
those rules supplant federal law. Finally, where some federal requirements
impose stricter regulation and some state strictures are more prohibitive,
federal law and state law may intermingle. 83

Thus, while the Polygraph Act seeks to establish a system of uniform
polygraph use among employers, the Act preserves the possibility of state
regulation. 84 Where provisions of state legislation impose more restrictive
regulations on polygraph testing, state law may take precedence over the

76. Id. § 2002(3)-(4); see also 53 Fed. Reg. 41,497-98 (to be codified at 29 C.F.R.
§ 801.4(c)).
78. Id.
79. See id.
80. 53 Fed. Reg. 41,497-98 (to be codified at 29 C.F.R. § 801.5).
81. Id.
& ADMIN. NEWS at 754. In the Conference Report, for example, the conferees recognized the
possibility of union agreements providing more extensive protection for employees. Addition-
ally, they foresaw the possibility of states enacting across the board prohibitions applicable to
private and public employees.
83. See 53 Fed. Reg. 41,497-98 (to be codified at 29 C.F.R. § 801.5).
84. See supra notes 77-83 and accompanying text.
Yet, regardless of whether the Act preempts a particular state's law, the Act imposes a duty upon employers to provide notice to employees explaining its provisions.\textsuperscript{86}

\textbf{C. The Requirement of Notice}

To effectuate compliance and protect employees' constitutional rights, the Act requires employers to prominently post notices clearly explaining the provisions of the Act.\textsuperscript{87} The language specifically requires that "[e]mployer[s] shall post and maintain such notice[s] in conspicuous places on [their] premises where notices to employees and applicants to employment are customarily posted."\textsuperscript{88}

\textbf{D. The Exemptions}

While absolutely prohibiting the use of the polygraph as a preemployment screening device,\textsuperscript{89} the Polygraph Act permits the following employers to use the polygraph in other circumstances: public sector employers,\textsuperscript{90} national defense and security employers,\textsuperscript{91} employers conducting investigations of economic loss or injury,\textsuperscript{92} employers authorized to manufacture, distribute or dispense controlled substances,\textsuperscript{93} and employers providing security services.\textsuperscript{94} Thus, although it does not completely ban polygraph usage, the Polygraph Act circumscribes polygraph testing and delineates procedural safeguards to protect employees and employers.\textsuperscript{95}

\begin{itemize}
\item \textsuperscript{85} See 53 Fed. Reg. 41,497-98 (to be codified at 29 C.F.R. § 801.5).
\item \textsuperscript{86} 29 U.S.C.A. § 2003.
\item \textsuperscript{87} Id.
\item \textsuperscript{88} Id. While the language of the provisions appears to contemplate Secretary of Labor notification to every employer, the legislative history recognizes the absurdity of such a requirement. The regulations confirm the impossibility of the task and provide that copies of notices may be obtained at local offices of the Wage and Hour Division, the organizational unit at the Department of Labor responsible for enforcement and administration of the Act. 53 Fed. Reg. 41,497-98 (to be codified at 29 C.F.R. § 801.6).
\item \textsuperscript{89} L. Larson, supra note 59, § 12.03 at 12-74.
\item \textsuperscript{90} 29 U.S.C.A. § 2006(a) (West Supp. 1989).
\item \textsuperscript{91} Id. § 2006(b)-(c). FBI contractors are included under subsection (c).
\item \textsuperscript{92} Id. § 2006(d).
\item \textsuperscript{93} Id. § 2006(f).
\item \textsuperscript{94} Id. § 2006(e).
\end{itemize}
1. The Public Sector Employers’ Exemption

The Polygraph Act exempts “public sector employers”96 from its coverage.97 This provision exempts not only the Federal Government,98 but also State or local governments.99 However, the regulations limit the scope of the exclusion by not encompassing government contractors or nongovernmental agents working under the supervision of the government.100

While the Act denies protection to public employees, it confers jurisdiction over polygraphing of the public sector to congressional committees possessing the appropriate jurisdiction and expertise.101 Therefore, public employees may already possess protection against polygraph testing under existing legislation.102 The Act permits polygraph use in the public sector as an “insurance measure” for the public interest.103

96. See infra notes 97-99 and accompanying text.
97. 29 U.S.C.A. § 2006(a) (West Supp. 1989) provides: “This chapter shall not apply with respect to the United States Government, any State or local government, or any political subdivision of a State or local government.”
98. United States Government “means any agency or instrumentality, civilian or military, of the executive, legislative, or judicial branches of the Federal Government, and includes independent agencies, wholly-owned government corporations, and nonappropriated fund instrumentalities.” 53 Fed. Reg. 41,499 (1988) (to be codified at 29 C.F.R. § 801.10(b)).
99. 29 U.S.C.A. § 2006(a); 53 Fed. Reg. 41,499 (to be codified at 29 C.F.R. § 801.10(a)).
100. 53 Fed. Reg. 41,499 (to be codified at 29 C.F.R. § 801.10(c)).
102. In order to study government usage of polygraphs, an interagency committee was set up in 1965. H.R. REP. NO. 198, 89th Cong., 1st Sess. (1965). The committee recommendation that federal employees not be given polygraphs led to the Civil Service regulations. L. Larson, supra note 59, § 12.03 at 12-77 to -78 & n.25. These regulations establish restrictions on polygraph use in “personnel investigations of competitive service applicants and appointees to competitive service positions.” Id. at 12-78. Moreover, the United States Constitution places restraints on polygraph use by government employers. Id. at 12-80.
103. This “insurance measure” may be due to wide support for the proposition that the special positions of trust that government employees occupy, Note, Long Beach City Employees Association v. City of Long Beach: Truth or Consequences, 18 PAC. L.J. 407, 420 (1987), demand assurances of honesty and impartiality. Id. at 427. In Civil Serv. Ass’n v. Civil Serv. Comm’n, 139 Cal. App. 3d 449, 188 Cal. Rptr. 806 (1983), the Court of Appeals supported this proposition in stating: ‘In the course of his work, a public officer or employee must yield some of the privileges which are enjoyed by the citizenry at large.’ Unlike a private employee, a public employee is ‘directly, immediately, and entirely responsible to the city or State which is his [or her] employer. . . . He [or she] is a trustee of the public interest, bearing the burden of great and total responsibility to his [or her] public employer.’ While a public employee cannot be forced to give an answer which may tend to incriminate him or her in criminal proceedings, he may be required to choose between disclosing information and losing his employment.
139 Cal. App. 3d at 455, 188 Cal. Rptr. at 810 (citations omitted).
2. The National Defense and Security Exemption

The Act endorses polygraph testing as a vital instrument for national defense and security purposes. Limited to the Federal Government, the exemption permits the administration of the polygraph in pursuit of intelligence or counterintelligence functions. The exemption not only allows defense or intelligence agencies to subject their employees to polygraph examinations, but permits examination of agency contractors and their employees, and any individual working in areas with sensitive or classified information.

Although application of the national defense and security exemption appears to reach a wide range of employers, the scope of the exemption is limited. First, the provisions of the Act delineate certain agencies whose activities are sufficiently vital to national defense and security to necessitate use of the device. Second, certain Department of Defense directives and regulations constrain the administration of polygraphs under this exemption.

3. The Private Employers' Limited Exemption for Ongoing Investigations

Recognizing the validity of a polygraph used in connection with investigations of specific incidents, rather than as a predictor of future performance, the Polygraph Act provides private employers a limited exemption.
The Department of Labor's regulations interpret an "ongoing investigation" as one examining a specific incident or activity. Furthermore, employers may not use the exemption as a pretext to ascertain the occurrence of an economic loss. Rather, before resorting to the polygraph, employers must first pinpoint losses or injuries. Thus, where investigations focus on specific economic losses or injuries to employers' businesses, employers may legally request, but not require, employees to take a polygraph test.

Before requesting a polygraph exam in connection with an "ongoing investigation," employers must establish two prerequisites. First, they must establish that the employees possessed access to the stolen property. Under the regulations, "access" may constitute a bare opportunity to cause, or aid someone in causing, the injury, thus "including more than direct or physical contact during the course of employment." Second, employers must establish that evidence exists supporting "a reasonable suspicion that the employee[s] [were] involved in the incident[s] or activit[ies] under investigation." The Conference Report defines reasonable suspicion as requiring an objective, articulable, factual basis for suspicion beyond merely a loss and possible access.

In addition to showing access to property and reasonable suspicion, employers must provide clear, written statements of the incidents being investi-
gated, describing with "particularity" their reasons for suspecting the employees and the access the employees possessed. The regulations clarify that the particularity requirement encompasses more than a general explanation of the loss and suspicion. The provision requires employers to reduce their suspicions to specific, clear cut writings. Furthermore, a person with binding authority over the employers must sign the statement and the employers must preserve it as a part of their records for three years.

4. The Exemption for Drug Security, Drug Theft, or Drug Diversion Investigations

The Polygraph Act further allows polygraph exams to monitor employees engaged in the manufacture, distribution, or dispensation of controlled substances. The Act specifies that the exemption applies only to employers working with certain substances. Furthermore, employers' use of the polygraph may turn on employees' "access" to substances and vary with the types of employees.

As interpreted by the regulations, the controlled substance exemption requires authorization by and registration with the Drug Enforcement Administration (DEA) as a prerequisite to employers' coverage. While employers may manufacture controlled substances in the ordinary course of business, the absence of DEA registration renders the exemption unavailable. Assuming coverage of employers under the exemption, prior to administration of a polygraph test to prospective employees, employers

123. 53 Fed. Reg. 41,500 (to be codified at 29 C.F.R. § 801.12(g)(3)).
124. Id.
126. Id. § 2006(d)(4)(C). "Administering a polygraph test . . . without identification of a specific incident or activity and 'a reasonable suspicion that the employee was involved' would amount to little more than a fishing expedition." 53 Fed. Reg. 41,499 (to be codified at 29 C.F.R. § 801.12(b)).
128. Id. This section makes it clear that the employer must be dealing with a controlled substance, schedule I, II, III or IV, as defined under the Controlled Substance Act, 21 U.S.C. § 812 (1982 & Supp. V 1987).
131. Id.
132. The regulations expand the definition of a prospective employee to current employees, although presently working in a position void of direct access, who are under consideration for positions with the company entailing direct access. Id. (to be codified at 29 C.F.R. § 801.13(d)).
must show that the employees would have direct access\textsuperscript{133} to the controlled substance.\textsuperscript{134} In contrast, when testing current employees, employers need only show that employees had "access" to the substance.\textsuperscript{135} Even when testing current employees, however, the regulations provide that the exam may only be given in connection with an ongoing investigation.\textsuperscript{136} Accordingly, the exam becomes subject to the rigorous standards established for the ongoing investigation exemption.\textsuperscript{137}

5. *The Security Services Exemption*

The Polygraph Act provides an additional exemption from the ban on polygraph tests to private employers providing personnel for armored cars; designing, installing, or maintaining security alarms; or providing "plain clothes" security personnel.\textsuperscript{138} To come within the exemption, employers must establish that the provision of such security services constitutes their "primary business purpose."\textsuperscript{139} Furthermore, the regulations clarify that employers may only administer the polygraph to employees specifically employed to provide protection to "facilities, materials, or operations" having a significant impact on the health or safety of the public.\textsuperscript{140}

Although applicable only to prospective employees, or current employees transferring within the company to new positions meeting the requirements under the exemption, the regulations broaden the coverage of the exemption to encompass individuals whose duties impact security of a covered "facility, material, or operation," directly or indirectly.\textsuperscript{141} The scope of the exemption extends not only to positions providing prospective employees an opportunity to engage in a breach of security, but equally extends to those positions where prospective employees may cause other employees to engage

\textsuperscript{133} Id. (to be codified at 29 C.F.R. § 801.13(c)(1)).


\textsuperscript{135} Id. § 2006(f)(2)(B)(ii). The access controlling here is that as defined with regard to ongoing investigations. See supra notes 118-19 and accompanying text.

\textsuperscript{136} 53 Fed. Reg. 41,502 (to be codified at 29 C.F.R. § 801.13(f)).

\textsuperscript{137} 29 U.S.C.A. § 2006(f)(2)(B)(i). This exemption does not apply unless the investigation involves loss or injury to the employer in the manufacture, distribution, or dispensation of a controlled substance. "An economic loss or injury related to such noncontrolled substances would not constitute a basis of applicability of the [subsection 2006(f)] exemption." 53 Fed. Reg. 41,502 (to be codified at 29 C.F.R. § 801.13(f)(2)(i)).


\textsuperscript{139} Id. In other words, "at least 50% of the employer's annual dollar volume of business" must be derived from such services. 53 Fed. Reg. 41,502 (1988) (to be codified at 29 C.F.R. § 801.14(e)).


in such a breach.\textsuperscript{142} Mere knowledge vital to a security interest obtained from a position may present the possibility of a security violation and thus bring an employee within the exemption.\textsuperscript{143}

In providing protection to "facilities, materials, or operations," the Act covers a broad range of activities arguably unrelated to security services. For example, guards employed at public transportation, power plants, public water supply facilities, and toxic waste storages or disposals may be covered under the exemption.\textsuperscript{144} While not exhaustive, the Department of Labor regulations clarify that the exemption extends protection only to activities having a "significant" impact on public safety or health.\textsuperscript{145} The exemption also extends coverage to firms protecting "currency, negotiable securities, precious commodities or instruments, or proprietary information."\textsuperscript{146} Under the regulations, coverage of a particular facility, material, or operation under the security exemption ultimately rests within the discretion of the Administrator of the Wage and Hour Division "based on all the facts and circumstances."\textsuperscript{147} However, even assuming coverage under the exemption, an employer's use of the polygraph under the security services exemption, like the other exemptions, is restricted by procedural safeguards.\textsuperscript{148}

\section*{E. Restrictions on Polygraph Usage Under the Exemptions}

In addition to restricting the circumstances of polygraph usage,\textsuperscript{149} the Act delineates certain procedural safeguards\textsuperscript{150} to protect both employees and employers.\textsuperscript{151}

\subsection*{1. Adverse Employment Actions}

Under the Polygraph Act, employers may lawfully examine employees under the exemptions established for ongoing investigations, controlled substances, and security services.\textsuperscript{152} However, the Act limits the manner in which employers may use the results, or lack thereof, obtained from administration of a polygraph.\textsuperscript{153} Employers, acting under an exemption, may not

\begin{thebibliography}{100}
\bibitem{142} 53 Fed. Reg. 41,502 (to be codified at 29 C.F.R. § 801.14(g)(5)).
\bibitem{143} Id.
\bibitem{144} Id. § 2006(e)(1)(A).
\bibitem{145} Id.; 53 Fed. Reg. 41,502 (to be codified at 29 C.F.R. § 801.14(a)(1)).
\bibitem{147} 53 Fed. Reg. 41,503 (to be codified at 29 C.F.R. § 801.14(d)(3)).
\bibitem{148} See \textit{infra} notes 149-155 and accompanying text.
\bibitem{150} Id. § 2007.
\bibitem{151} Id.
\bibitem{152} Id. § 2006(d)-(f).
\bibitem{153} Id. § 2007.
\end{thebibliography}
advance any adverse employment action against employees, current or prospective, based solely on the outcome of the examination or employees' refusals to submit thereto. 4 These limits attempt to enforce congressional intent that the test not be used where employers take any action against employees, whether the action takes the form of a discharge, discipline, denial of employment or promotion, or discrimination, based solely on the analysis of a polygraph. 155

Although the results of a polygraph may not serve as the sole basis for an adverse employment action, 156 the regulations provide that employers may use the results as a contributing factor in deciding to take adverse action. 157 For example, employers may use the results of a polygraph administered under an ongoing investigation as evidence of misconduct, but may only take adverse action if additional supporting evidence exists. 158 Similarly, the outcome of tests given employees in connection with the security services or controlled substances exemptions may serve as supplementary evidence supporting adverse action. 159 Thus, employers must first satisfy the underlying requirements of the applicable exemptions in order to take adverse action. 160

2. Rights of Examinees

Section 2007(b) of the Act further restricts the limited usage of the polygraph by enacting rights for tested employees. 161 Under this section, the Act delineates requirements that must be followed during all phases of the exam. 162 The Act further specifies procedures during each of the exam's stages: 163 the pre-test phase, 164 the actual testing phase, 165 and the post-test phase. 166 Failure to meet the requirements set forth under this section renders the respective exemptions inapplicable. 167

154. Id. § 2007(a)(1)-(2).
155. Id. § 2007(a)(2); 53 Fed. Reg. 41,504 (1988) (to be codified at 29 C.F.R. § 801.20(a)).
156. Id. § 2007(a)(2); 53 Fed. Reg. 41,504 (to be codified at 29 C.F.R. § 801.20(a)).
157. 53 Fed. Reg. 41,504 (to be codified at 29 C.F.R. § 801.20(b)).
159. 53 Fed. Reg. 41,504 (to be codified at 29 C.F.R. § 801.21).
160. Id. (to be codified at 29 C.F.R. § 801.21(c)).
162. Id. § 2007(b)(1).
163. Id. § 2007(b)(2)-(4).
164. Id. § 2007(b)(2).
165. Id. § 2007(b)(3).
166. Id. § 2007(b)(4).
167. Id. § 2007(b); see infra notes 235-45 and accompanying text.
Throughout all phases of the exam, examinees possess certain unconditional rights. The Act prohibits probing questions which are "unnecessarily intrusive" or "degrading." More specifically, a polygraph may not inquire into irrelevant matters such as religion, racial concerns, politics, sexual preferences, or union sentiments. Furthermore, where the possibility exists that medical or psychological conditions of examinees may impair the accuracy of tests, upon provision of sufficient written evidence by employees, the Act prohibits testing them. Moreover, the Act preserves employees' rights to privacy by permitting them to terminate the exam at any time, without suffering threats of disciplinary action other than that allowed under the exemptions. Medical reasons, as well as other reasons, may form the basis for this termination.

The provisions providing for examinees' rights demarcate three separate test stages for exam administration. The pre-test phase involves preparing polygraph candidates for the actual test phase. The actual test involves both administration and analysis of the exam. The post-test phase constitutes follow-up questioning and review of test results.

(a) The Pre-test Phase

During the pre-test phase of the examination, the Polygraph Act provides examinees with an opportunity to review the proposed questions. It also requires that examinees be notified of their rights during all stages of the test, and given an explanation of the operation of the device. Employ-
ers must provide written notice to examinees\textsuperscript{186} describing unambiguously the place and time of the exam\textsuperscript{187} and advising them of their right to consult an attorney or other representative.\textsuperscript{188} The regulations require additional written notice verified by the examinees' signatures.\textsuperscript{189} This additional written notice must advise examinees of any hidden means by which they may be observed,\textsuperscript{190} any intent of examiners to use additional devices in conjunction with the polygraph,\textsuperscript{191} and "that the employer[s] or the examinee[s] may, with mutual knowledge, make a recording of the test."\textsuperscript{192} The notice must also inform examinees that any statement made by them may subsequently be used as evidence\textsuperscript{193} and that taking the test may not be a condition of employment.\textsuperscript{194} Further, the notice must explain the disclosure requirements\textsuperscript{195} and the legal rights and remedies under the Act of both the employers and examinees.\textsuperscript{196} Lastly, the regulations require employers to provide examinees notification that "the [employees'] rights under the Act may not be waived, either voluntarily or involuntarily, by contract or otherwise, except as part of a written settlement to a pending action or complaint under the Act, agreed to and signed by the parties."\textsuperscript{197}

\textit{(b) The Actual Test Phase}

During the actual test phase, the administration and analysis of the exam occurs.\textsuperscript{198} The Act eliminates questioning outside the scope of matters that the examinees previously reviewed during the pre-test phase.\textsuperscript{199}

\textit{(c) The Post-test Phase}

The last phase of the examination encompasses any contact between examinees and examiners subsequent to the test itself.\textsuperscript{200} Prior to any adverse

\begin{footnotesize}
\begin{enumerate}
\item[186.] Id. § 2007(b)(2)(A). In order to give the examinee time to consult an attorney, notice must be given 48 hours prior to the exam. See 53 Fed. Reg. 41,505 (1988) (to be codified at 29 C.F.R. § 801.22(c)(1)(i)(A)).
\item[188.] Id.
\item[189.] Id. § 2007(b)(2)(A).
\item[191.] Id. § 2007(b)(2)(C)(i).
\item[192.] Id. § 2007(b)(2)(C)(ii).
\item[193.] Id. § 2007(b)(2)(D)(ii).
\item[194.] Id. § 2007(b)(2)(D)(i).
\item[195.] 53 Fed. Reg. 41,505 (to be codified at 29 C.F.R. § 801.22(c)(1)(i)(C)).
\item[197.] Id. § 2007(b)(2)(C)(iii).
\item[198.] Id. § 2007(b)(2)(D)(iii).
\item[199.] Id. § 2007(b)(2)(D)(iv).
\item[200.] 53 Fed. Reg. 41,505 (1988) (to be codified at 29 C.F.R. § 801.22(c)(3)).
\end{enumerate}
\end{footnotesize}
action by employers as a result of the outcome of the test, examiners must interview examinees regarding the results of the test. 201 Examiners must also provide examinees with a copy of the questions asked, "the corresponding charted responses," and their analysis of the polygraph results. 202

3. Qualifications and Requirements of Examiners

The Polygraph Act not only sets forth requirements for preserving examinees' rights, 203 but also specifies minimal qualifications and requirements for examiners, 204 and conditions applicability of the exemptions to compliance. 205 Extending deference to the licensing and regulatory authorities at the state level, the Act requires that polygraphers possess a license only if the state in which exam administration occurs so requires. 206 Regardless of where the exam occurs, all examiners must carry a minimum liability coverage of $50,000. 207 Further, the Act supplements state requirements by establishing control over the exam itself, enforcing examinees' rights, 208 and setting limitations on the number, 209 duration, 210 and analysis of the exams. 211

The Act strictly limits examiners to the scope of the polygraph exam in analyzing the results. 212 Furthermore, employers must preserve all reports or records pertaining to the exam for three years. 213 Finally, examiners must present in writing 214 any conclusion drawn regarding the truthfulness of examinees and refrain from any personal recommendation. 215

F. Recordkeeping and Disclosure Requirements

Whereas the Polygraph Act allows the use of the polygraph under certain limited, 216 restricted 217 circumstances, the Act places additional restrictions

203. Id. § 2007(b).
204. Id. § 2007(c).
205. Id.
206. Id. § 2007(c)(1)(A).
207. Id. § 2007(c)(1)(B).
208. Id. § 2007(b).
209. Id.
210. Id.
211. Id. § 2007(c)(2).
212. Id. § 2007(c)(2)(A)(i)-(ii).
213. Id. § 2007(c)(2)(B).
216. Id. § 2006; see supra notes 89-148 and accompanying text.
on the use of the information obtained from the exam itself.\textsuperscript{218} The Act limits disclosure of the exam results,\textsuperscript{219} and the regulations implementing the disclosure provisions impose recordkeeping requirements for documents obtained or growing out of the administration of the exam.\textsuperscript{220}

Generally, the regulations place a heavy burden on employers to maintain records.\textsuperscript{221} Whenever an employer requests administration of an exam, the employer must make this request in writing and maintain a copy for three years.\textsuperscript{222} Moreover, where an employer demands a polygraph exam under the exemption for ongoing investigations, it must preserve not only a copy of the statement describing the incident, the "reasonable suspicion" and the employee's access to the property,\textsuperscript{223} but also it must maintain separate records outlining the loss itself.\textsuperscript{224} After the exam, the employer is required to maintain a copy of the examiner's report in a safe location with other employment files accessible to the Secretary of Labor or an authorized representative within seventy-two hours notice.\textsuperscript{225}

In addition to employers, examiners must keep records and reports.\textsuperscript{226} They must maintain both records of the number of exams given daily, and the reports made from each exam.\textsuperscript{227} Furthermore, the regulations also require that examiners keep these documents in a safe and quickly accessible location.\textsuperscript{228}

To further constrain the use of the polygraph, the Act establishes limitations on the disclosure of records and documents obtained from examinations.\textsuperscript{229} The provisions restrict both examiners and employers from disclosing information without authorization from examinees.\textsuperscript{230} Disclosure is permitted only to someone authorized to receive such results,\textsuperscript{231} someone who requested the test, or pursuant to a court order.\textsuperscript{232} The Act allows employers to disclose to a governmental agency admissions of criminal con-
duct by employees, but no other information. The regulations also permit disclosure by examiners to other examiners for the sole purpose of verifying the results.

G. Enforcement Provisions

The Secretary of Labor possesses the authority to seek injunctive relief and assess civil penalties up to $10,000 for violation of the Act or the corresponding Department of Labor regulations. Furthermore, the Polygraph Act creates, in favor of employees, a private right of action for damages or injunctive relief against employers who have violated the Act.

In assessing the extent of the violation, and the penalty imposed, the Administrator of the Wage and Hour Division (Administrator) must consider several factors. The Administrator may consider any past history of violating the Act, as well as the severity of the present violation. The Administrator may also consider the impact the violation has had on employees, the existence of good faith compliance efforts by the employer, and the employer's explanation of the particular violation. Where a violation of the Act resulted from the conduct of the examiner, the Administrator must evaluate whether the employer sought to ensure the examiner's compliance, and the foreseeability of the examiner's actions. Ultimately, the Polygraph Act subjects employers to liability not only under the Act's enforcement provisions, but also under employees' private actions. These actions include, but are not limited to, employment, reinstatement, promotion, or payment of lost wages and benefits.

234. 53 Fed. Reg. 41,507 (to be codified at 29 C.F.R. § 801.35(c)).
236. Id. § 2005(a)(1); 53 Fed. Reg. 41,507 (1988) (to be codified at 29 C.F.R. § 801.40(a)(2)). The regulations provide for immediate payment of the fine to the Wage and Hour Division of the Department of Labor, by hand or mail delivery. Id. (to be codified at 29 C.F.R. § 801.43).
237. 53 Fed. Reg. 41,507 (to be codified at 29 C.F.R. § 801.40(a)(2)). The regulations provide that the Solicitor of Labor, or one of his authorized representatives, may be delegated the authority to act in a civil action under the Act. Id. (to be codified at 29 C.F.R. § 801.41).
239. 53 Fed. Reg. 41,507 (to be codified at 29 C.F.R. § 801.42(b)).
240. Id. (to be codified at 29 C.F.R. § 801.42(b)(3)).
241. Id. (to be codified at 29 C.F.R. § 801.42(b)(2)).
242. Id. (to be codified at 29 C.F.R. § 801.42(b)(4)).
243. Id. (to be codified at 29 C.F.R. § 801.42(b)(6)).
244. Id. (to be codified at 29 C.F.R. § 801.40(b)(5)).
245. Id. (to be codified at 29 C.F.R. § 801.40(b)(1)); H.R. CONF. REP. NO. 659, supra note 10, at 14, reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS at 752, provides that "the

A. The Polygraph Technique and How the Machine Works

While use of the polygraph as a workplace tool for detecting lies has grown since 1978, society's use of truth eliciting devices originates from more primitive periods in history. Methods of detecting lies have evolved from primitive techniques such as the use of hot irons, trial by ordeal, and the chewing of dry rice. Although truth verification today arguably appears more sophisticated, the theory that "changes in the subject's vital signs indicate deception" remains the same.

Truth verification through polygraphing involves attaching various devices such as sphygmographs, pneumographic tubes, and electrodes to the examinee's body. The polygraph measures physiological changes induced by the fear of lying such as changes in the pulse rate, blood pressure, skin moisture, perspiration results, and respiratory rate. However, proper interpretation of these changes to distinguish between truthfulness and lying rests in the hands of the examiner.

Prior to administration of the test, polygraph examiners conduct a "pre-test interview" aimed at eliminating "any element of surprise from the actual testing" as well as neutralizing any adverse factors. During the actual testing phase, examiners ask examinees three types of questions. Control questions seek a deceptive response to act as a measuring tool.

enforcement provisions are not to be construed as a limitation upon private actions being brought under current law." Yet, the regulations provide that an action alleging a violation of the Act must be commenced within three years of the date of the violation. Furthermore, the court, at its discretion, may award attorneys fees. 29 U.S.C. § 2005(c)(2)-(3).


252. See supra notes 183-97 and accompanying text.

253. Gardner, supra note 5, at 52.

254. Hurd, supra note 2, at 531 (quoting Comment, Privacy: The Polygraph in Employment, 30 ARK. L. REV. 35, 36 (1976)).

255. See supra notes 198-99 and accompanying text.

256. Gardner, supra note 5, at 298.
against subsequent responses. Irrelevant questions seek a truthful answer for similar purposes. Relevant questions, however, aim directly at the examination itself and the area in question. Although examiners then categorize the response, ultimately the validity of the polygraph and the examination "assumes a correlation exists between prevarication and physiological responses. It further assumes that changes are measured objectively by truth verification techniques and interpreted accurately by examiners."

B. The Accuracy Debate

The Polygraph Act bans the use of the polygraph as a preemployment screening device, eliminating private employers' ability to ferret out the "undesirables," while encouraging more reliable methods of screening and internal control. However, the effectiveness of the Act as a protective measure depends on the effectiveness of the polygraph. While limiting private employers' use of polygraphs because of its inherent unreliability, the Act establishes a double standard allowing the use of the polygraph under certain circumstances. In other words, passage of the Act amounts to at least partial acceptance of the polygraph. By permitting the use of the polygraph in any context, Congress implicitly recognizes its reliability.

In enacting the statute, Congress recognized the unreliability of the device and seemingly credited the theory that use of the polygraph in the preemployment screening context leads to arbitrary results. Scientific research indicates that the device possesses no inherent qualities of scientific validity. For example, both the American Medical Association and the American Psychological Association denounce the polygraph test due to the lack

257. Hurd, supra note 2, at 531; Gardner, supra note 5, at 298.
258. Hurd, supra note 2, at 531; Gardner, supra note 5, at 298.
259. Hurd, supra note 2, at 531; Gardner, supra note 5, at 298.
260. Gardner, supra note 5, at 298.
262. Note, supra note 3, at 953.
263. Id.
264. See supra note 8 and accompanying text.
265. Id.
267. Note, supra note 3, at 938. "Ironically, such an assumption amounts to deception in itself, because the infallibility has yet to be proved." Id.
269. S. Rep. No. 284, supra note 6, reprinted in 1988 U.S. Code Cong. & Admin. News at 733; Gardner, supra note 5, at 316; Note, supra note 3, at 933-34; Craver, supra note 17, at 33. But see Note, supra note 3, at 941-42 (citing Richardson, Modern Scientific Evidence § 10.5 (Supp. 1963): "scientific infallibility should be no more a prerequisite to the introduction of lie detector tests than to the admissibility of other scientific evidence dependent
of evidence supporting its validity in the workplace.270 Although the Act aims to reduce the coercive nature of the exam, one of the primary factors leading to unreliability,271 the device’s accuracy in employment situations produces results no better than the flip of a coin.272 The polygraph test tarnishes the reputation of innocent persons as often as it pinpoints thieves.273 The polygraph measures physical reactions, such as blood pressure and heart beat, not truth or falsity.274 By granting exemptions, the Polygraph Act presupposes that under limited circumstances the inherently unreliable polygraph may be transformed into a sound instrument.275 Yet, the polygraph is either reliable or it is not.276

In addition to the inability of the polygraph to “detect lies,” various other factors affect the accuracy of results.277 In interpreting test results, the emotional and physical condition of examinees assumes a significant role.278 Because the polygraph as an instrument records numerous physiological variables, such as the heart rate,279 blood pressure, and respiration rate, an assumption of the polygraph’s reliability equally assumes that all liars react in a universal manner to questions presented in a lie detector exam.280 However, individuals react differently to questions posed in a test.281

271. Gardner, supra note 5, at 301 n.37. By making it unlawful for an employer to require, request, cause or even suggest that an employee submit to a polygraph, the Act limits the coercive nature of the exam. See supra note 73 and accompanying text.
274. See supra notes 251-52 and accompanying text.
276. See 133 CONG. REC. H9578 (daily ed. Nov. 4, 1987) (statement of Rep. Jacobs) (“Either the gun shoots bullets or blanks. It [sic] it shoots bullets, it may be useful; and if it shoots blanks and impugns the reputation of a thoroughly honest citizen . . . then it is not useful.”).
278. Gardner, supra note 5, at 303.
281. Castagnera-Cain, supra note 22, at 205.
rate results depend on fear of detection\textsuperscript{282} no physiological response unique to lying exists.\textsuperscript{283}

Moreover, physiological responses may result from fear, anxiety, nervousness or other physiological and mental abnormalities.\textsuperscript{284} For example, examinees’ resentment of the examination proceeding, as well as the highly personal questions asked, may make truthful responses indistinguishable from deceptive ones.\textsuperscript{285}

The structure and substance of the questions asked during a polygraph exam may also influence the outcome of the test.\textsuperscript{286} As a general rule, directing specific questions to examinees leads to more accurate test results.\textsuperscript{287} Under the Act, questions that are “unnecessarily intrusive” or “degrading” are prohibited.\textsuperscript{288} Polygraph examiners may not inquire into irrelevant matters such as religion,\textsuperscript{289} racial concerns,\textsuperscript{290} politics,\textsuperscript{291} sexual preferences,\textsuperscript{292} or union sentiments.\textsuperscript{293} Yet, while naturally intrusive, control questions and irrelevant questions serve a vital function in developing valid interpretations of exam results.\textsuperscript{294} Examiners compare responses to control questions, assumed to be answered truthfully, with responses to relevant questions in order to identify the “guilty” subjects.\textsuperscript{295} Thus, assuming acceptance of the reliability of the polygraph, as the Act appears to do under limited circumstances,\textsuperscript{296} the control questions become vital to ensuring the polygraph’s

\textsuperscript{282} Gardner, supra note 5, at 303; Comment, supra note 1, at 561; Note, supra note 37, at 1412.


\textsuperscript{284} Gardner, supra note 5, at 303; Hurd, supra note 2, at 530.

\textsuperscript{285} Gardner, supra note 5, at 303.

\textsuperscript{286} AMA Letter to Pat Williams, supra note 279. Furthermore, “[w]hile an applicant who has failed the test may not be able to reverse the resulting negative hiring decision, knowledge of the test results would enable him or her to make a more informed decision with regard to both consent to future testing and objections to particular questions.” Hurd, supra note 2, at 549. The Act allows disclosure of the results of an exam to the examinee. 29 U.S.C.A. § 2008(a). Yet, this better late than never approach clearly offers little consolation to an individual who has suffered adverse consequences as a result of the exam outcome.

\textsuperscript{287} Note, supra note 37, at 1417.


\textsuperscript{289} Id. § 2007(b)(1)(C)(i).

\textsuperscript{290} Id. § 2007(b)(1)(C)(ii).

\textsuperscript{291} Id. § 2007(b)(1)(C)(iii).

\textsuperscript{292} Id. § 2007(b)(1)(C)(iv).

\textsuperscript{293} Id. § 2007(b)(1)(C)(v).

\textsuperscript{294} Weimer, supra note 248, at 77.

\textsuperscript{295} Id.

\textsuperscript{296} See supra notes 261-76 and accompanying text.
validity. However, the Act compromises the critical nature of the control questions in favor of limiting the "probing" of what it assumes to be an accurate tool.

Further, the individual skill and training of examiners also affects the reliability of a polygraph.297 Clearly, "bells do not go off" at the moment someone tells a lie.298 Rather, the polygraph's ability to discern the truth rests in the skill of examiners.299 "Although an adequate instrument is essential for proper testing, the role of the examiner in interviewing the examinee, designing test questions, and evaluating and interpreting the polygram is much more critical to an accurate diagnosis than is the mechanical function of the polygraph itself."300 Thus, the skill of examiners fundamentally affects the ultimate reliability of the test.301

The Polygraph Act outlines provisions designed to promote examiner competency by binding examiners to respect examinees' rights, and also by establishing qualifications for examiners.302 Under the Act, the pre-test phase of the exam303 aids examiners in eliminating unreliable variables that decrease accuracy.304 Reviewing proposed questions305 ensures clarity of questions and precludes any element of surprise during the testing.306 The Act further seeks to ensure examiner competence and to limit innate examiner bias307 by strictly limiting test analysis to the scope of the exam.308 Moreover, perhaps in an effort to further increase reliability, the Act requires examiners to maintain systematic files of all exam reports or records.309 However, despite these attempts to cure the underlying ailments of the polygraph and its administration, the provisions of the statute fall short of establishing a remedy.

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297. See supra notes 286-87 and accompanying text.
298. Weimer, supra note 248, at 52.
300. Note, supra note 48, at 331 (footnote omitted) (quoting J. Reid & F. Inbau, Truth and Deception: The Polygraph ("Lie-Detector") Technique 235 (1966)).
301. See Note, supra note 3, at 934.
303. Id. § 2007(b)(2).
304. Hurd, supra note 2, at 531.
307. See generally Tiner & O'Grady, supra note 50, at 100.
309. Id. § 2007(c)(2)(B).
Clearly, the Act ignores the uncertainty that human error may contribute to lie detection fallibility. Attempts to bind examiners to strict rules ignores reality because polygraph examiners arguably do not base their diagnosis on the records alone. Polygraphers tend to find deception more often than not to preserve their own job security. Furthermore, mere establishment of written requirements can not eradicate the widespread subjectiveness that goes into analyzing polygraphs. Thus, although the Act establishes requirements and qualifications for examiners, these provisions do not guarantee reliability. Moreover, even though the Act delegates the authority to establish licensing laws to the states, thereby responding to federalism concerns while confirming federal dominion over regulation of the device, the Act ironically fails to promulgate the federal standards necessary to ensure examiner competency and examination accuracy.

C. Mental Strip Searches: Invasion of Privacy

Not only may the Polygraph Act face attack based upon its vacillation as to the reliability of the polygraph, but the Act may equally infringe on the constitutional right to privacy. The lie detector has been labeled as intrusive, resulting in the degradation of human dignity. However, the Act both denounces its use in the prescreening context and approves its use

311. Carr, supra note 7, at 702.
312. Note, supra note 4, at 812.
313. Gardner, supra note 5, at 305; Weimer, supra note 248, at 57.
316. Yet, even if the Act did take such a step, "if every examiner had the integrity of a Boy Scout, the problems inherent in the technology of the polygraph would not go away." 134 CONG. REC. H9544 (daily ed. Nov. 4, 1988) (citing Jussim, Lies, Damn Lies - And Polygraphs, NATION (Dec. 21, 1985)).
317. Note, supra note 37, at 1432; Comment, supra note 1, at 553.
318. Although the Constitution has not explicitly recognized a specific right to privacy, credence has been given to zones of privacy based on the first, fourth, fifth, ninth and fourteenth amendments. Wiseman, supra note 4, at 33-34; Note, supra note 25, at 103. Although not addressed in this Note, the use of a polygraph may infringe on constitutional guarantees against unreasonable searches and seizures, Wiseman, supra note 4, at 37-45, and the privilege against self-incrimination. Id. at 46-50.
319. See supra notes 261-76 and accompanying text.
320. In order to claim constitutional protection with respect to submission to a lie detector test, it is necessary as a prerequisite to show state action. While generally reserved to the public sector, at least one commentator would extend this showing to the private sphere. Hurd, supra note 2, at 545-46 (citing Friedman, Corporate Power, Government By Private Groups, and the Law, 57 COLUM. L. REV. 155, 176 (1957)).
321. Note, supra note 37, at 1417.
322. See supra note 9.
under the exemptions. Thus, the Act makes an arguably unwarranted distinction between the polygraph's effectiveness based on the employment setting in which it is used.

The Senate Subcommittee on Constitutional Rights has defined privacy as "the right of the individual to decide for himself, with only extraordinary exceptions in the interest of the whole society, when and under what conditions his thoughts, speech, and acts should be revealed to others." Use of the polygraph may invade individual privacy in two ways. First, the polygraph exam subjects examinees to questions which destroy all their defenses and open their internal thoughts and personality to examiners' inspection. Second, the inability to halt the "production line of dossiers" divulging exam results further humbles the subjects.

Under the Polygraph Act, the provisions for examinee rights and disclosure of test results seek to minimize intrusion upon privacy. By circumscribing permissible questions to specific, relevant areas, rather than allowing polygraphers to delve into highly personal matters, the Act attempts to shield the examinees' mental processes from invasion. Moreover, by limiting disclosure of records and documents obtained from examinations to a handful of authorized individuals, the Act further seeks to protect the privacy rights of tested employees, erecting a barrier against external dissemination.

While these provisions reduce the intrusiveness of the polygraph test, they fail to eliminate intrusiveness altogether. Although questioning an employee about his conduct on the job would not rise to the level of a constitutional

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323. Hermann, supra note 5, at 127-28 (citing Hearings on Psychological Testing Procedures and the Rights of Federal Employees Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 89th Cong., 1st Sess. 2 (1965)).
324. Gardner, supra note 5, at 305-06; Note, supra note 37, at 1417.
325. Gardner, supra note 5, at 305-06; Note, supra note 37, at 1417.
326. Gardner, supra note 5, at 305-06; Note, supra note 37, at 1417; Note, supra note 4, at 814. In Whalen v. Roe, 429 U.S. 589 (1977), the Supreme Court recognized that there are two interests attached to the right of privacy, "[o]ne interest comprises personal decisions made by an individual," Wiseman, supra note 4, at 53, "the other embraces 'the individual interest in avoiding disclosure of personal matters.'" Id. (citing Whalen, 429 U.S. at 599-600).
327. See infra notes 328-31 and accompanying text.
328. "If there is a quintessential zone of human privacy it is the mind. Our ability to exclude others from our mental processes is intrinsic to the human personality." Wiseman, supra note 4, at 59 (citing Long Beach City Employees Ass'n v. City of Long Beach, 719 P.2d 660, 663 (Cal. 1986)).
331. Weimer, supra note 248, at 76. The employer argues that an employee in effect consents to being polygraphed by seeking employment. Hurd, supra note 2, at 546.
deprivation of privacy, the polygraph's ability to probe the mind does not end at this point. Rather, at the moment a subject is hooked up to the “truth-telling” device, his responses, vital or not, are recorded. Clearly, the test's lack of reliability and the severe impairment of an individual's right to privacy outweigh any minimal benefits or rational purpose the Act poses for establishing a system of second-class citizens.

D. The Double Standard: The Exemptions

In promulgating exemptions, the Act, attempting to follow a balanced approach preserving responsible and necessary use of the polygraph, establishes a double standard. While the Act restricts the use of the polygraph due to its lack of accuracy, the fact that it permits the use of the polygraph under the exemptions appears contradictory. Thus, in enacting the Act, Congress permits government administration of polygraphs, but prohibits private sector use of such tests except in very narrow circumstances.

Generally, employers rely solely on lie detector results as determinative of employees' “guilt” or “innocence.” While language requiring corroborative evidence for disciplinary action reduces such a risk, the Act fails to anticipate the effect of this provision. Although employers may no longer rely solely on polygraph results, the Act may permit them to rely in part on the results. Furthermore, the Act leaves unsanctioned employers' manufacturing of corroborative evidence to satisfy this need. Clearly, nothing

332. See, e.g., Weimer, supra note 248, at 77. "The individual thus becomes an object, stripped of volition, subject to a probe of his essence." Wiseman, supra note 4, at 33.
333. See Note, supra note 103, at 415. Others may counter, however, that a thief, for example, has no right to privacy. Note, supra note 3, at 947, n.107 (citing The Polygraph in Labor Disputes, Couns. Polygraph Examiners Newsl., 10 (reprint 1965)). The truth verification techniques are an insidious search of the human mind and are a breach of the most fundamental of human rights. They provide a vehicle of excursion into the most private recesses of the human mind. Even if the polygraph testing was trustworthy, there is still no possible justification for such 'mental wiretapping.'

334. See supra notes 89-148 and accompanying text.
336. See generally Comment, supra note 1, at 553; Note, supra note 3, at 936.
337. Note, supra note 3, at 935.
338. Supra notes 152-60 and accompanying text.
within the provisions of the Act prevents employers from taking this action and concurrently circumventing the Act.

The Act not only fails to anticipate the effects of its provisions prohibiting adverse disciplinary actions, but also overlooks problems inherent in the exemptions. For example, citing the validity of polygraph results used in connection with investigations of specific incidents,Congress disregarded the lack of effectiveness of polygraph use in deterring or detecting ongoing theft in the workplace." Furthermore, under all the exemptions, due to the possibility of litigation over the validity of using a polygraph in a particular context, as well as the severity of the enforcement provisions, "employers [may] have no alternative but to abstain from all testing."

In promulgating exemptions for public sector employers, for employers in the national defense and security industries, for those employers providing private security services, as well as for employers authorized to manufacture, distribute, or dispense controlled substances, Congress acted under the guise of balancing individual interests with the public interest and "asserted a compelling need for access to the polygraph." In order to protect the national interest, or sensitive information, to deter drug trafficking, or merely to ensure trust and responsibility among public employees, the Act entrusts the security and welfare of the nation to a device arguably bereft of scientific reliability.

Despite attempts to "strike a blow for fairness" and balance individual interests with public interests, the Act's reservation of the "privilege" of polygraph use to the exemptions thwarts the public interest by setting up a
double standard.\textsuperscript{355} If the polygraph is void of scientific reliability, its use in the public sector does not cure its fallibility. Rather, any distinction between the private and public sectors on this ground appears hypocritical.\textsuperscript{356} Certainly, congressional approval cannot somehow transform the polygraph from an unreliable instrument to a reliable one.\textsuperscript{357} In the end, rather than serving the public interest by eliminating unbridled polygraph use, the Act may result in increased claims of privacy invasion,\textsuperscript{358} as well as equal protection claims\textsuperscript{359} by employees subject to the probing of the metal box.

IV. Conclusion

The Polygraph Act prohibits the use of a lie detector during the application procedure or as a means of sporadically checking current employees. In promulgating exemptions, the Act compromises its basic premise that the polygraph is unreliable. In addition, the Act invites constitutional challenges asserting privacy violations and lack of equal protection. Despite attempts to “strike a blow for fairness” in the workplace by balancing the property interests of employers with the privacy and dignity interests of employees, the Act effectively eliminates the employers’ rights to utilize polygraph testing under the exemptions. However, this result is arguably for the best because “[t]he polygraph is a pernicious instrument that has been seized upon by a society obsessed with gadgetry. It should be relegated to a Smithsonian Institution exhibit case as a monument to an American craze.”\textsuperscript{360}

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\textsuperscript{355} “[O]ften in the law we use a balancing test. We recognize that the need for something is so great that we use the best helpful means at our disposal, even though it may not be perfect.” 133 CONG. REC. H9566 (daily ed. Nov. 4, 1987) (statement of Rep. Roukema).

\textsuperscript{356} If the polygraph is unreliable it should not be imposed on any employee. See 133 CONG. REC. H9577 (daily ed. Nov. 4, 1987) (statement of Rep. Jacobs).

\textsuperscript{357} Id.

\textsuperscript{358} See supra notes 318-33 and accompanying text.

\textsuperscript{359} In Long Beach City Employers Ass’n v. City of Long Beach, the California Supreme Court held that requiring a public employee to submit to a polygraph test intrudes upon the individual’s privacy and unconstitutionally denies the public employee equal protection of the law. 41 Cal. 3d 937, 956, 719 P.2d 660, 672, 227 Cal. Rptr. 90, 102 (1986).

\textsuperscript{360} Note, supra note 3, at 937 (citing Musler, Trial By Gadget, 199 NATION 159 (Sept. 28, 1964)).