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Articles

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PREFACE

The *Military Law Review* is designed to provide a medium for those interested in the field of military law to share the product of their experience and research with their fellow lawyers. Articles should be of direct concern and import in this area of scholarship, and preference will be given to those articles having lasting value as reference material for the military lawyer.

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JOHN FITZGERALD LEE

Judge Advocate of the Army
1849–1862

When the office of Judge Advocate of the Army was abolished in 1802, judge advocates continued to serve in the field. However, the year 1821 witnessed the total demise of the Judge Advocate General's Corps, and from that year until 1849, officers of the line, not necessarily attorneys, were detailed to serve as trial judge advocates for courts-martial, there being no permanent legal officers in the Army.

Available records indicate that the administration of military justice and the responsibilities for advising the general staff on legal matters were not uniformly exercised. At times the Secretary of War or the General-in-Chief of the Army requested opinions on various matters from the Attorney General of the United States. At other times (and with particular reference to the review of court-martial records) The Adjutant General of the Army performed the functions of a Judge Advocate General. In addition, the Generals-in-Chief of the Army, during this period, all were either lawyers or officers familiar with the law and no doubt served to some extent as their own legal advisors. It appears that Jacob Brown, General-in-Chief from 1815 to 1828, probably studied law. Alexander Macomb, General-in-Chief from 1828 to 1841, published treatises on martial law and court-martial procedure. Winfield Scott, General-in-Chief from 1841 to 1861, was a member of the Virginia Bar. Henry W. Halleck, General-in-Chief from 1862 to 1864, was a member of the California Bar, and an author of legal treatises.

The administration of military justice and the execution of the duties of a Judge Advocate General of the Army were to some extent regularized by Colonel Rodger Jones of Virginia, who served as Adjutant General of the Army from 1825 to 1852.

Colonel Jones himself was convicted by general court-martial as a result of a disagreement with Major General Alexander Macomb, General-in-Chief of the Army on The Adjutant General's legal authority to issue orders. During this disagreement Colonel Jones was alleged to have said to the General, "I defy you, sir; I defy you." Colonel Jones was sentenced, however, only to a reprimand and continued to serve as The Adjutant General.

Starting in 1844, Colonel Jones detailed an officer of the line to his office as Acting Judge Advocate of the Army to assist him in the performance of the legal functions that he had assumed. The first Acting Judge Advocate of the Army, who served until 1846, was First Lieutenant Samuel Chase Ridgely of the 4th Artillery, from Maryland. During the year 1847 the Acting Judge Advocate was Captain Leslie Chase of the 2d Artillery, from New York. Finally, in 1848, Captain John Fitzgerald Lee of the Ordnance Department was appointed Acting Judge Advocate of the Army.

Captain Lee, a native of Virginia, and grandson of Richard Henry Lee, President of the Continental Congress, was apparently not an attorney. Nevertheless, it may be assumed that he had knowledge of military law as it was the understanding of that day that every officer had a responsibility to educate himself in military law and therefore every officer of the Army was, to some extent, a member of the military bar.

Captain Lee had graduated from the United States Military Academy in 1830 and had served as Lieutenant of Artillery until 1837. In 1837 he was breveted a captain "for Gallantry and Good Conduct in the War against the Florida Indians." In 1838 he transferred to Ordnance and was regularly promoted to captain in 1847.

In 1849 Congress reestablished the statutory office of Judge Advocate of the Army with the brevet rank and pay of a Major of Cavalry, and Captain Lee was appointed to that office.

The records of his office indicate that the military justice functions performed at general headquarters were not substantial. During this period, and until 1862, no other judge advocates were authorized either at headquarters or in the field. The first record of court-martial reviewed by Major Lee was in 1850, some 12 months after his appointment. There is no record of correspondence on other matters pertaining to military law until 1854.

Major Lee rendered, among others, two interesting opinions during his tenure. He rendered an opinion (presumably his, although issued in the name of the General-in-Chief of the Army) that the sentence of a court-martial that required four privates for one year to wear iron bands around their necks each with seven prongs seven inches long was cruel and unusual punishment and therefore illegal.

The other opinion rendered by Major Lee may well have been responsible for his ultimate resignation from the Army. Major

General Henry W. Halleck was assigned to command the Department of Missouri. General Halleck, who as a young officer had become familiar with Winfield Scott's device of trial by military commission, proceeded to try by commission persons suspected of aiding the Confederacy, on the ground that the local civil courts were ineffective. Major Lee rendered an opinion that such commissions were without authority and illegal. General Halleck became General-in-Chief of the Army in July 1862. In the same month, Congress recreated the office of Judge Advocate General of the Army with the rank and pay of a Colonel of Cavalry, and in so doing abolished the office which Major Lee had held. Major Lee apparently was not recommended by General Halleck for appointment to the new office (which might have been explained by the fact that he was not an attorney and the ultimate appointee was). Nevertheless, rather than being reassigned to Ordnance or continued as a subordinate judge advocate (which offices were also reestablished by the same act of Congress) he resigned from the Army in September of 1862.

Major Lee retired to a Maryland farm in Prince George County. Thereafter he served as a member of the Maryland State Constitutional Convention in 1867 and as a state senator for the term 1868–69. He died in 1884 at the age of 71.

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MILITARY LAW REVIEW

MILITARY SEARCHES AND SEIZURES—THE DEVELOPMENT OF A CONSTITUTIONAL RIGHT*

BY CAPTAIN JOHN F. WEBB, JR.**

I. INTRODUCTION

The basis for the Federal rule, as it applies to both military and civilian trials, prohibiting unreasonable search and seizure is found in the Fourth Amendment to the United States Constitution which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The notion that persons and property ought to be protected against unreasonable search and seizure had its judicial birth in English law in 1765 when Lord Camden gave his opinion in *Entick v. Carrington* [1] invalidating the use of a general warrant issued by no less than one of the King's ministers to make an exploratory search of a man's private books and papers for the purpose of seizing evidence to be used against him in a criminal trial. What was condemned was the forcible and compulsory extortion of a person's testimony *or of his private papers*. There can be no doubt that the framers of the Fourth Amendment, determined to provide safeguards for the American people to protect them from unreasonable search and seizure, had in mind *Entick v. Carrington* as well as the notorious writs of assistance which had been used in colonial times to sanction general searches of property and persons. It was resistance to such colonial practices that had established the principle, which was enacted into the fundamental law in the Fourth Amendment, that a man's house is

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* This article was adapted from a thesis presented to The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, while the author was a member of the Twelfth Career Course. The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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[1] 19 How. St. Tr. 1029 (1765).

his castle and not to be invaded under any general authority to search and seize his goods and papers.[2] This article will explore that same protection, its development and growth, the manner of its enforcement, and the attitudes of the courts, as reflected in their opinions, particularly as it is applied in the military.[3]

The time is past when military law could be considered to be a system unto itself. The influences of civilian rules and decisions are becoming increasingly more pronounced with the passage of time. Nowhere is this more true than in the field of search and seizure. Although there are still some fundamental differences, such as the substitution of the authorization of a commander for the necessity of obtaining a search warrant, the traditional military concept of search and seizure is being reshaped by the Court of Military Appeals into the general mold created by the Supreme Court. In recent months the Court of Military Appeals has handed down decisions involving search and seizure which are destined to have far reaching effects not only upon Judge Advocates, but also upon commanders and persons charged with law enforcement and crime detection. Search and seizure must then be considered to be of vital importance in the military at the present time. The purpose of this article is to provide the Judge Advocate, the commander, and the law enforcement agents with a useful analysis of the opinions of both military and civilian courts and to furnish guidelines and suggested procedures upon which future actions may be based.

II. THE MILITARY RULE

There is no statutory basis for the military law of search and seizure; the *Uniform Code of Military Justice*[4] is silent on this point.[5] The authority is provided by the President in the *Manual for Courts-Martial, United States, 1951*,[6] which states in paragraph 152:

> 152. CERTAIN ILLEGALLY OBTAINED EVIDENCE.—Evidence is inadmissible against the accused if it was obtained as a result of an unlawful search of his property conducted or instigated by persons acting under authority of the United States, or if it was obtained under

[2] See, *e.g.*, Weeks v. United States, 232 U.S. 383 (1914); *cf.* Boyd v. United States, 116 U.S. 616 (1886).

[3] Violations of the Communications Act and so-called electronic eavesdropping will not be considered except insofar as they directly relate to Fourth Amendment protections. See *infra*, notes 26–37, and accompanying text.

[4] Hereinafter cited as UCMJ.

[5] See United States v. Dupree, 1 USCMA 665, 5 CMR 93 (1952).

[6] Hereinafter cited as MCM, 1951.

such circumstances that the provisions of Section 605 of the Communications Act of 1934 (48 Stat. 1103; 47 U.S.C. 605), pertaining to the unauthorized divulgence of communications by wire or radio, would prohibit its use against the accused were he being tried in a United States district court. All evidence obtained through information supplied by such illegally obtained evidence is likewise inadmissible. For example, evidence obtained by a lawful search is inadmissible if that search was conducted because of information derived from a preceding unlawful search of the kind mentioned above. Military courts have no authority to order a return to the accused of illegally seized property, or to impound such property for the purpose of suppressing its possible use as evidence, or to entertain a motion for the return or impounding of property alleged to have been illegally seized. Consequently, an objection to the use of evidence on the ground that it was illegally obtained, or on the ground that it was obtained through information supplied by illegally obtained evidence, is properly made at the time the prosecution attempts to introduce the evidence. Before the court rules upon such an objection, the accused should be given an opportunity to show the circumstances under which the evidence was obtained.

The following searches are among those which are lawful:

A search conducted in accordance with the authority granted by a lawful search warrant.

A search of an individual's person, of the clothing he is wearing, and of the property in his immediate possession or control, conducted as an incident of lawfully apprehending him.

A search under circumstances demanding immediate action to prevent the removal or disposal of property believed on reasonable grounds to be criminal goods.

A search made with the freely given consent of the owner in possession of the property searched.

A search of property which is owned or controlled by the United States and is under the control of an armed force, or of property which is located within a military installation or in a foreign country or in occupied territory and is owned, used, or occupied by persons subject to military law or to the law of war, which search has been authorized by a commanding officer (including an officer in charge) having jurisdiction over the place where the property is situated or, if the property is in a foreign country or in occupied territory, over personnel subject to military law or to the law of war in the place where the property is situated. The commanding officer may delegate the general authority to order searches to persons of his command. This example of authorized searches is not intended to preclude the legality of searches made by military personnel in the areas outlined above when made in accordance with military custom.

The principles enumerated above, with the possible exception of the last subparagraph of the second paragraph, are derived in turn from similar principles in the civilian Federal courts.[7] The

[7] See United States v. Dupree, 1 USCMA 665, 5 CMR 93 (1952); LEGAL AND LEGISLATIVE BASIS, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, at 240–241.

Court of Military Appeals, has been willing to infer that most—if not all—of the restrictions imposed by the Fourth Amendment in a civilian setting would be operative in the areas of court-martial procedure, and has always been guided in applying the Amendment's protection to specific situations in military law, by the general principles announced in the decisions of the Federal civilian courts.[8] Any military search which would be reasonable if tested by civilian standards will not be unreasonable under military law, since the Court of Military Appeals will attempt to carry out the congressional intent to grant under the UCMJ, wherever possible, military personnel the same rights and privileges accorded civilians.[9] But from the beginning the Court of Military Appeals has recognized that there are some fundamental concepts, not applicable in civilian courts, which apply in the area of military searches.[10] In *United States v. Florence*,[11] the Court examined the Board of Review cases both before and after the adoption of the UCMJ, and, without approving the analysis of the scope and applicability of the rules made in the various opinions because of the possible effect that the UCMJ and the *Manual for Courts-Martial* might have on them, noted that many good reasons had been spelled out for the differences in the two systems. Pointing to the concrete differences, the Court observed that there is no requirement in the present rules for the affidavit of probable cause required by civil statute, that the authority of a commanding officer to search a member of the military establishment or a place under military control, even though occupied as a residence or office, had always been recognized as indispensable to the maintenance of good order and discipline, that searches and seizures have been made pursuant to military command, as distinguished from civil warrant since the formation of the Government, and that military law did not prohibit searches without a warrant. These general principles have also been recognized by the Federal civilian courts,[12] and were discussed in

[8] See United States v. Ross, 13 USCMA 432, 32 CMR 432 (1963); United States v. Dupree, *supra*, note 7.

[9] See United States v. Florence, 1 USCMA 620, 5 CMR 48 (1952).

[10] See, *e.g.*, United States v. Florence, *supra*, note 9; United States v. Doyle, 1 USCMA 545, 4 CMR 137 (1952). For a more recent analysis see the dissenting opinion of Latimer, J., in United States v. Brown, 10 USCMA 482, 489, 28 CMR 48, 55 (1959).

[11] 1 USCMA 620, 5 CMR 48 (1952).

[12] See Best v. United States, 184 F.2d 131 (1st Cir. 1950), *cert. denied*, 340 U.S. 939 (1951); Richardson v. Zuppann, 81 F. Supp 809 (M.D. Pa.), *aff'd*, 174 F.2d 829 (3d Cir. 1949); Grewe v. France, 75 F. Supp. 433 (E.D. Wisc. 1948).

the hearings before the House Armed Services Committee when it was considering the UCMJ prior to its adoption.[13] The reasons that the military law of search and seizure is not circumscribed by all the refinements applied in civilian cases are clear. Completely different factors and circumstances confront a military commander than those which face a civil magistrate. A commander has responsibilities unknown outside the armed forces—protection of military property, the maintenance of a combat-ready unit, the health, welfare, morale and discipline of his men; the very exigencies of military service such as frequent transfers, close quarters in barracks with the attendant loss of privacy and complete control over one's own possessions, training and tactical situations, just to name a few—which must be considered in determining the necessity for the differences.[14] In the final analysis, however, the Court of Military Appeals has made it clear that the permissible deviations from civilian practice in initiating a search must leave unaffected the substantial rights of the individual.[15]

The path to the conclusion that the Fourth Amendment itself applied to the military was neither short nor easy. The year after the MCM, 1951, came into effect, an Air Force Board of Review stated:

> At the outset, it is necessary to recognize that the Fourth Amendment to the Constitution, guaranteeing to the people the right to be secure against "unreasonable searches and seizures," may not be brought into trials by court-martial in determining the admissibility of evidence obtained by search on a military reservation (ACM 1458, Worley (JC), 3 CMR(AF) 424, 437). Indeed, it has been broadly stated that "the immunity from searches and seizures guaranteed by the Fourth Amendment to the Constitution does not extend to premises on military reservations" (CM 244713, Kemerer, 28 BR 393, 403, cited with approval in Richardson v Zuppann, 81 F Supp 809, affirmed 174 F2d 829). Congress has not given to military personnel a substantive right against unreasonable search, as it might have done in the Uniform Code of Military Justice, nor has the President seen fit to do so, as he undoubtedly could by Executive Order under his powers as Commander-in-Chief . . . .[16]

The next year (1953) both the Supreme Court and the Court of Military Appeals had occasion to examine the question. The

[13] Mr. Larkin, General Counsel for the Secretary of Defense, testified: "The rule on searches and seizures, for instance is not exactly the same as it is in a Federal court." HEARINGS BEFORE HOUSE ARMED SERVICES COMMITTEE, 81ST CONG., 1ST SESS., ON H.R. 2498, at 1062.

[14] See ACM S–20491, Maginley, 32 CMR 842 (1962), *aff'd*, 13 USCMA 445, 32 CMR 445 (1963).

[15] See United States v. Brown, 10 USCMA 482, 28 CMR 48 (1959).

[16] ACM 4332, Kofnetka, 2 CMR 773, 777 (1952).

Court of Military Appeals avoided the specific issue of the application of the Fourth Amendment in *United States v. Rhodes*,[17] but six Justices of the Supreme Court faced the issue squarely in *Burns v. Wilson* [18] and recognized that as a general proposition the guarantees of the Constitution and Bill of Rights applied to servicemen. In 1958 a Navy Board of Review became the first military tribunal to hold that the Fourth Amendment applied to a person in military service.[19] In 1959, the Court of Military Appeals, in *United States v. Gebhart*,[20] specifically held for the first time that the protections of the Constitution applied to military personnel and that neither they, nor the Congress, nor the Executive, nor any individual could deny to such persons those protections. In 1960 the Court of Military Appeals, citing *Burns v. Wilson*, defined the extent of the constitutional protections when they said, ". . . It is apparent that the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed

[17] *3 USCMA 73, 11 CMR 73 (1953). "[N]or . . . are we required to* determine whether the Fourth Amendment to the Federal Constitution applies with full force and effect to the military establishment." *Id* at 75–76, 11 CMR at 75–76.

[18] 346 U.S. 137 (1953). There was no majority opinion. In the opinion of Vinson, Reed, Burton, & Clark, JJ.: "The military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights." *Id.* at 142. Douglas and Black, JJ., felt: "Of course the military tribunals are not governed by the procedure for trials prescribed in the Fifth and Sixth Amendments. . . . *But never have we held that all the rights covered by the* Fifth and Sixth Amendments were abrogated by Art. 1, § 8, cl 14 of the Constitution, empowering Congress to make rules for the armed forces. . . . Since the requirement for indictment before trial is the only provision of the Fifth Amendment made inapplicable to military trials, it seems to me clear that the other relevant requirements of the Fifth Amendment . . . are applicable to them." *Id.* at 152–53.

[19] NCM 58–00130, Hillan, 26 CMR 771 (1958). The Board stated, "And no accused is deprived of the protection of the constitution by reason of his military service. U.S. v. Ball (No. 9024), 8 USCMA 25, 23 CMR 249; U.S. v. *Bass (No. 9410), 8 USCMA 299, 24 CMR 109." 26 CMR at 786. Their* citation of authority, however, was open to question. The *Ball* case merely recognized the parallel between the civilian and military rules of exclusion. In the *Bass* case, the Court of Military Appeals did recognize by implication, without specifically so holding, the existence of a constitutional guarantee when they said: "In the absence of a claim . . . the accused cannot urge the constitutional protection against unreasonable seizures. The law is well settled that the guarantee of the Fourth Amendment to the Constitution is a personal right or privilege that can only be availed of by the owner or claimant of the property subjected to unreasonable search and seizure." (Footnote omitted.) 8 USCMA at 302, 24 CMR at 112.

[20] 10 USCMA 606, 28 CMR 172 (1959).

forces."[21] Since that time the Court of Military Appeals has reaffirmed that the guarantees of the Fourth Amendment are among those applicable.[22] The constitutional basis of the rights guaranteed to the serviceman before a court-martial in the field of search and seizure is unquestionably settled. It becomes of importance, then, to explore the specific areas within this broad general rule and examine in detail how these rights and protections have been and are being applied.

III. SEARCHES

Paragraph 152, MCM, 1951,[23] lists five types of searches which "are among those which are lawful." Each of the listed types of searches will be examined in detail. Consideration will be given both to its treatment by military courts, and, if there is a comparable search recognized in civilian law, the federal rules pertaining thereto. Emphasis will be placed upon any distinctions made in the two systems. In addition, an inquiry will be made in the light of past and current military law as to whether there are "other lawful searches" and searches based on "custom" which do not fit into the five specific categories. Before doing so, it would appear profitable to define what is a search, and, parenthetically, what has been held not to be a search, to examine who must make an unlawful search before it falls within the prohibition of the Fourth Amendment, and to inquire into the rights of an accused with respect to self-incrimination before and during a search. Further, since the criteria of "reasonable" and "probable cause" are threads which run through all searches, with the possible exception of those based on consent, a general query must be made into their meaning and usage.

A. *WHAT IS A SEARCH*

"Search" has been defined as "A 'quest' or a 'looking for' evidence of guilt to be used in a prosecution of a criminal action."[24] Or as "An examination of man's house or other building or premises, or of his person, with a view to the discovery of contraband or illicit or stolen property, *or some evidence of guilt to be used in the prosecution of a criminal action from some crime*

[21] United States v. Jacoby, 11 USCMA 428, 430–1, 29 CMR 244, 246–7 (1960).

[22] *Cf.* United States v. Vierra, 14 USCMA 48, 33 CMR 260 (1963); United States v. Battista, 14 USCMA 70, 33 CMR 282 (1963) (by implication).

[23] Set forth verbatim at pp. 2–3, *supra.*

[24] NCM 58–00130, Hillan, 26 CMR 771, 791 (1958).

or offense with which he is charged (79 C.J.S. Searches and Seizures, Sec 1)."[25] Generally a search will be a trespass unless it is legally authorized, but it is important to note that the courts will not be bound by the historical niceties of tort or property law [26] and have rejected attempts to exclude evidence by resort to legal fictions such as *trespass ab initio*.[27] The courts have been quick to exclude evidence where there has been an actual unlawful physical entry, whether by force,[28] stealth,[29] by unwilling submission to authority,[30] or without any express or implied consent.[31] Where there has been no physical entry [32] the actions of the Government have uniformly been held not to have been a search—not a violation of the Fourth Amendment right of privacy. On this ground, surveillance of an accused's activities at his home, from a neighboring house, with the permission of the owner thereof, where the agents never physically went upon the accused's premises,[33] use of a wire tap off the suspect's property,[34] placing a "detectaphone" against the common wall of an adjoining apartment,[35] or wiring for sound and electronic transmission a person variously described as an "informant" and "stool pigeon," sending him into accused's store, without any affirmative misrepresentation, to engage in conversation, and monitoring the conversation from off the premises,[36] have all been upheld. On the other hand, the Supreme Court, while still recognizing the validity of each of the above types of action, distinguished the insertion of a "spike microphone" into a party wall until it touched a heating duct serving accused's whole house, thus turning the entire house

[25] ACM 11753, Walsh, 21 CMR 876, 881 (1956).

[26] See Silverman v. United States, 365 U.S. 505 (1961).

[27] On Lee v. United States, 343 U.S. 747 (1952); McGuire v. United States, 273 U.S. 95 (1927). *Trespass ab initio* was defined in the *McGuire* case, *supra*, as being where one lawfully enters the premises of another, but his subsequent misconduct thereon taints the entry from the beginning with illegality. There, agents had entered under a valid search warrant, searched, and then unlawfully destroyed a still and its contents. The Court refused to hold the search illegal from its inception because of the alleged subsequent illegal acts of the agents.

[28] See McDonald v. United States, 335 U.S. 451 (1948); ACM S-19729, Jones, 31 CMR 540 (1961).

[29] See Gouled v. United tSates, 255 U.S. 298 (1921).

[30] See Johnson v. United States, 333 U.S. 10 (1948).

[31] See Nueslein v. District of Columbia, 115 F.2d 690 (D.C. Cir. 1940).

[32] See Goldman v. United States, 316 U.S. 129 (1942); Olmstead v. United States, 277 U.S. 438 (1928); United States v. Hooper, 9 USCMA 637, 26 CMR 417 (1958).

[33] United States v. Hooper, *supra*, note 32.

[34] Olmstead v. United States, 277 U.S. 438 (1928).

[35] Goldman v. United States, 316 U.S. 129 (1942).

[36] On Lee v. United States, 343 U.S. 747 (1952).

into a giant microphone. They held that such action constituted an unauthorized physical penetration of the accused's premises and was therefore an invasion of privacy denounced by the Fourth Amendment. In so holding the Court refused to determine or to base their opinion upon whether, at common law, such a use of a party wall would be a technical trespass.[37]

Insofar as persons, rather than premises, are concerned, the visual observation of a person and his outer garments, either by sunlight or artificial light, including ultra-violet, does not constitute a search, nor does it trespass upon his privacy.[38] The novel proposition that the use of the polygraph or lie detector constituted a search of the brain was rejected, since it was noted that the machine, while sometimes effective in inducing confessions, does not probe, search and seize matters contained in the deep, dark hidden recesses of the brain in the sense of a search and seizure, as those terms are commonly used.[39]

The voluntary surrender of property upon demand does not constitute a search and seizure.[40]

B. *UNDER WHAT AUTHORITY WAS THE SEARCH CONDUCTED*

The origin and history of the Fourth Amendment clearly show that it was intended as a restraint upon acts under the color of sovereign authority, and that there is no invasion of the security afforded by the Amendment when a search complained of is one conducted by a private individual.[41] Not every search made by persons in the military are made under "the authority of the United States." Two classes of military personnel are, however, normally considered to be clothed with the authority of the United States when they make a search: (1) A person duly assigned to law enforcement duty when the search is made for the sole purpose of enforcing military law; and, (2) A person having direct disciplinary power over the accused, since in the military, law enforcement is frequently an integral part of the broader

[37] See Silverman v. United States, 365 U.S. 505 (1961).

[38] United States v. Morse, 9 USCMA 799, 27 CMR 67 (1958).

[39] See ACM 13813, Haynes, 24 CMR 881 (1957), *rev'd on other grounds*, 9 USCMA 792, 27 CMR 60 (1958). *But see* State v. Wolf, 53 Del. 88, 164 A.2d 805 (1960) (where there is actual physical invasion of body, as by medical smears, such action may constitute a search and seizure); People v. Young, 42 Misc. 2d 540, 248 N.Y.S.2d 287 (County Ct. Feb. 15, 1964) (same); State v. Kroening, 274 Wisc. 266, 79 N.W.2d 810 (1956) (same).

[40] United States v. Marrelli, 4 USCMA 276, 15 CMR 276 (1954).

[41] Burdeau v. McDowell, 256 U.S. 465 (1921); United States v. Volante, 4 USCMA 689, 16 CMR 263 (1954).

problem of military command.[42] Originally only "federal" searches were excluded under the prohibitions of the Amendment,[43] and prior to *Elkins v. United States*[44] the fruits of an illegal search by state or local authorities were admissible in federal courts, civilian and military, provided that the search was not accomplished at the instigation of, in conjunction with, or as agents of the Federal Government.[45] In *Elkins v. United States*,[46] the Supreme Court put an end to this so called "silver platter"[47] doctrine when they held:

> Evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment is inadmissible over the defendant's timely objection in a Federal criminal trial. . . . The test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed.[48]

Although the question of illegal search by state or local officials has not been before the Court of Military Appeals since the *Elkins* case, they did recognize the principles therein involved in refusing to extend them to the area of evidence illegally obtained by private individuals.[49]

An area more common to the military than the civilian judiciary because of the world-wide operations of our armed forces is the introduction of evidence secured by a search conducted by an official of a foreign government. Two problems are presented: (1) Must such a search comply with the standards set forth in the Fourth Amendment; and, (2) To what extent may American officials participate before it becomes a "joint enterprise" or a search under the authority of the United States. No cases on this point have been decided since *Elkins*, but for reasons pointed out, *infra*, it would appear that the rules set forth in *United States v. DeLeo*[50] are still valid. In *DeLeo*, a French police in-

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[42] See United States v. Rogan, 8 USCMA 739, 25 CMR 243 (1958).

[43] See Weeks v. United States, 232 U.S. 383 (1914).

[44] 364 U.S. 206 (1960).

[45] See Gambino v. United States, 275 U.S. 310 (1927); Byars v. United States, 273 U.S. 28 (1927); ACM 11930, Allen, 21 CMR 897 (1956); ACM 5009, Gilbert, 5 CMR 708 (1952).

[46] 364 U.S. 206 (1960).

[47] The "silver platter" label comes from Lustig v. United States, 338 U.S. 74, 78–9 (1949), where the Supreme Court said, "[I]t is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter."

[48] 364 U.S. at 223–24.

[49] *Cf.* United States v. Seiber, 12 USCMA 520, 31 CMR 106 (1961).

[50] 5 USCMA 148, 17 CMR 148 (1954).

spector, working under valid French letters Rogatorie which under French law would permit the search involved, determined to investigate accused's alleged participation in the crime under consideration. He requested that an American investigator accompany him during his investigation of accused, and a Mr. Shumock was detailed. They went to accused's organization and Mr. Shumock apprehended accused, apparently so that accused would be considered to be in American rather than French custody and would stay out of a French jail. He then searched accused and accused's car, and accompanied the French inspector to accused's quarters on the French economy. During the search by the French inspector, Mr. Shumock saw some items which appeared to be connected with another, unrelated crime that he knew about, so he seized them. At accused's trial for the crime uncovered by the evidence Mr. Shumock seized, accused contested the admission of the items on the ground of an illegal search and seizure. The Court held, with respect to the first problem, *supra*, that if the search were to be treated exclusively as a French one it was not necessary to inquire how and on what basis it was conducted, citing as authority cases representing the pre-*Elkins* rule. Although this would be clearly wrong today in regard to a search by an official of an American state, insofar as it pertains to an official of a foreign country the rule should still be valid. In *Wolf v. Colorado*[51] the Supreme Court[52] held that the Fourteenth Amendment prohibited unreasonable searches and seizures made by state officials in violation of the Fourth Amendment.[53] However, the Supreme Court does not have review authority over the actions of foreign officials or trials as it does over state officials or trials under the Fourteenth Amendment. Further, the law does not demand the unreasonable. Foreign officials are governed by their own laws and rules in authorizing and conducting searches rather than by the Fourth Amendment and American rules and precedent; therefore, the latter would not apply to them, even if they knew of them.

In examining the second problem, the extent of participation in the investigation by an American investigator, the Court in *DeLeo* went on to say:

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[51] 338 U.S. 25 (1949).

[52] But it was not until Mapp v. Ohio, 367 U.S. 643 (1961), that the Supreme Court extended the exclusionary rule of the Fourth Amendment to the products of such searches when attempted to be used in a state criminal prosecution.

[53] See ACM 4948, Whitler, 5 CMR 458, *pet. denied*, 2 USCMA 672, 5 CMR 131 (1952).

> In our view, a somewhat higher degree of participation by Federal officials must be required in an overseas area, than one within the continental limits of the United States, as the predicate for a finding that a particular search constituted an American enterprise. . . .
>
> The situation is materially different as we meet it outside the territory of the United States. That is to say, the serviceman, who is under investigation by the police of a foreign nation, is present in that country by reason of military orders. Having sent him there, the United States labors under a duty to protect him—so far as properly can be—with respect to the criminal procedures of that foreign government. . . .
>
> . . . In short, American officials in overseas areas have quite generally and properly acted in liaison with agents of the 'host' country in connection of offenses of which American servicemen are suspected—this for the purpose of assuring that the legitimate interests of the suspect are protected in the conduct of the foreign investigation.
>
> With this in mind, we hesitate to hold too readily that the mere presence of a military investigator during a search by foreign police necessarily renders the proceeding an activity of the United States. . . .
>
> Mindful of these considerations, we suggest that circumstances which would serve to invoke the principle . . . within the confines of the United States might not at all suffice to demonstrate that a search, primarily conducted by French officials in France, should be treated in law as an American investigative proceeding.[54]

The Court's analysis of the permissible degree of participation seems to be as valid today as when it was written. There is no reason to believe that it is not, and should not be, the law today.

Closely paralleling *DeLeo* is the situation presented in *United States v. Smith*.[55] As a consequence of the confusion resulting from both the American and German investigators considering that a jointly conducted search of an accused's off post quarters located on the German economy was made under the authority of the other's laws, the search was rendered unlawful. When a bi-national search is conducted the investigators must clearly establish whose search it is, and conduct it accordingly. Further, a search by a foreign official who has no real, independent interest can not be used as a subterfuge to avoid American standards if he is in fact acting as an agent of the Americans or at their instigation.[56]

C. *THE WARNING REQUIREMENT UNDER ARTICLE 31, UCMJ, AND SEARCHES*

Article 31, UCMJ, which prohibits compulsory self-incrimination provides in pertinent part:

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[54] 5 USCMA at 155–57, 17 CMR at 155–57.
[55] 13 USCMA 553, 33 CMR 85 (1963).
[56] *Cf.* Gambino v. United States, 275 U.S. 310 (1927).

(a) No person subject to this code shall compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.

(b) No person subject to this code shall interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against his in a trial by court-martial.

Evidence obtained as a result of a search authorized by competent authority is not inadmissible because the accused was not advised of his rights under Article 31, UCMJ, prior to the search. The right to remain silent during an interrogation is entirely different from the right to be free from unreasonable search.[57] The primary question is one of categorization; namely, was the evidence obtained a non-verbal statement within the purview of Article 31, UCMJ, or was it the fruit of a search?[58] But what constitutes a "search" and what constitutes an "interrogation" is often difficult to determine. In *United States v. Nowling*,[59] an air policeman, knowing that accused had been returned to his billets earlier in the evening and that under the circumstances it was normal for him to have had his pass privilege suspended for the rest of the night, observed accused attempting to go through the gate of the base. Suspecting that accused did not have a pass in his possession, he approached accused and requested his pass. Accused produced a false pass, and was then taken into custody. The Court held that the air policeman's action was an interrogation to confirm or refute his suspicion that accused did not have a pass.[60] In *United States v. Cuthbert*,[61] the accused, a mail clerk, was seen placing some letters in his pockets. It was reported to the Postal Officer, who then felt accused's jacket which was hanging on a hook and noticed that it contained some

[57] United States v. Insani, 10 USCMA 519, 28 CMR 85 (1959).

[58] See ACM 16779, Davison, 29 CMR 829, *pet. denied*, 11 USCMA 792, 29 CMR 586 (1960).

[59] 9 USCMA 100, 25 CMR 362 (1958).

[60] As an aftermath of *Nowling*, *supra* note 59. The Judge Advocate General of the Army expressed the opinion in JAGJ 1958/5118 (July 28, 1958), that a routine pass check could be made without a warning under Article 31, UCMJ, and that if the subject refused to cooperate such refusal would constitute reasonable grounds upon which to base an apprehension. Incident to such apprehension the accused could then be searched and his possession or non-possession of a pass ascertained. See also United States v. Summers, 13 USCMA 573, 33 CMR 105 (1963), where it was held that police officers have the right to require persons found under suspicious circumstances to identify themselves.

[61] 11 USCMA 272, 29 CMR 88 (1960).

bulky materials. Before he could extract the materials accused came and put on the jacket. The Postal Officer then took accused into another room, told him that he had been observed putting mail in his pockets, and requested that accused empty them. Accused removed one letter and threw it on a crate. The Postal Officer asked if he had any others and accused said that he did not. The accused was then told to empty the rest of his pockets, and he removed more letters therefrom which did not belong to him. At no time had accused been warned of his rights under Article 31, UCMJ. The Court held[62] that asking an accused to "empty his pockets" is a search, not an interrogation wherein he is required to produce evidence against himself, and doing so in lieu of a "frisking" does not militate against a search. It is merely a less offensive method of accomplishing the same goal, since the items accused possessed would be secured by one means or another, with or without his consent. The Court distinguished *Nowling* by noting that the accused Cuthbert, unlike the accused Nowling, was having his person and effects searched incident to a lawful apprehension, was not asked to identify his clothing, and was not directed to do anything but comply with the terms of the search.

During the conduct of a search, an accused's participation therein may raise the issue of self-incrimination. If during a search an individual who is, or should have been, considered an accused or suspect,[63] is requested to and does either verbally[64] or by physical act,[65] identify his property, such a conscious, affirmative action on his part constitutes a statement—it is language or its equivalent[66] within the purview of Article 31, UCMJ —and he should have been warned prior to the information being elicited.[67] In evaluating the effect of this rule the Court of Military Appeals in *United States v. Taylor*,[68] remarked:

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[62] Ferguson dissenting on the ground that he could see no difference in the instant case and United States v. Nowling, 9 USCMA 100, 25 CMR 362 (1958).

[63] See United States v. Schafer, 13 USCMA 83, 32 CMR 83 (1962); United States v. Doyle, 9 USCMA 302, 26 CMR 82 (1958).

[64] United States v. Taylor, 5 USCMA 178, 17 CMR 178 (1954).

[65] United States v. Holmes, 6 USCMA 151, 19 CMR 277 (1955).

[66] United States v. Bennett, 7 USCMA 97, 21 CMR 223 (1956); see United States v. Ball, 6 USCMA 100, 19 CMR 226 (1955).

[67] United States v. Williams, 10 USCMA 578, 28 CMR 144 (1959); United States v. Holmes, 6 USCMA 151, 19 CMR 277 (1955); United States v. Taylor, 5 USCMA 178, 17 CMR 178 (1954).

[68] *Supra* note 67.

> To say that this places an insupportable burden on the investigative and enforcement agencies of military law is to talk nonsense. Thus, in the case before us now, the investigators would have lost nothing by pausing to inform the accused of his rights under Article 31, and of the offense of which he was suspected. Thereafter, if he declined to identify his clothing, they could (a) have sought identification from the other occupants of the hut; or (b) looked for identification marks on the garments which would reveal their ownership. In any event, although a heavier burden had been placed by Congress on military investigators than is visible here, this Court—like the several Armed Forces—would nonetheless be bound by that mandate.[69]

But if, on the other hand, the questions asked were innocuous, the answers cumulative, and the information obtained corroborative of facts already known to the parties conducting the search, although the words themselves would not be admissible, they would not render the search inadmissible.[70] Ordering men to stand beside their bunks or equipment during a "shakedown" search without a warning under Article 31, UCMJ, does not come within the general prohibition. Accused's compliance with this type of direction is not an act or statement "regarding the offense" which requires that the accused first be warned of his rights under Article 31, UCMJ, before the evidence of the result of the search of such equipment would be admissible. The direction and the act of compliance are only incidents necessary to a shakedown.[71]

D. *THE CRITERIA OF "REASONABLENESS" AND "PROBABLE CAUSE"—THE TOUCHSTONES IN SEARCHES*

The federal and military rules both exclude from evidence only the products of "unlawful" searches. The basis for the term "unlawful" is in the prohibition of "unreasonable" searches contained in the Fourth Amendment to the Constitution which recognizes and protects the individual's privacy and right to security from

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[69] *Id.* at 182, 17 CMR at 182.

[70] See United States v. Bennett, 7 USCMA 97, 21 CMR 223 (1956).

[71] United States v. Harman, 12 USCMA 180, 30 CMR 180 (1961) (concurring opinion of Chief Judge Quinn). Although the rule established in *Harman* appears to be valid, its factual distinction from the prior cases cited *supra* notes 64–66, appears to be strained. As pointed out in the dissent of Ferguson, J., the barracks involved housed transient personnel who were in the process of being transferred. Although as it turned out accused had not vacated his area, many of the occupants had moved their property. The actual location and ownership of all the gear which was to be subjected to the shakedown was not in fact known and accused's identification of his property was really more than standing beside his equipment.

such action.[72] The provision protects all people, those suspected or known to be offenders as well as the innocent,[73] and must be liberally construed to safeguard the rights of the citizen.[74] Although, as abstract rules of law, the general principles governing the power to search and the right to be protected against unreasonable searches and seizures are fairly simple, it is recognized that they are not easy to apply,[75] and that the boundary lines are often "shadowy, indistinct, and illusive."[76] Precedent is, at best, of doubtful value; each case must be decided upon its own facts.[77] The Fourth Amendment does not define what are "unreasonable" searches;[78] but in their effort to provide a definition, the Court of Military Appeals has defined an illegal search as one which falls within the constitutional proscription.[79] There is no fixed formula for determining what is a reasonable search—no litmus-paper test.[80] The criterion of reasonableness of the search depends upon "the facts and circumstances—the total atmosphere of the case."[81] In determining reasonableness, the need for effective law enforcement must be balanced against the right of privacy guaranteed by the Fourth Amendment.[82] The history of the frequent abuse of police powers that has come before the courts have made them ever vigilant against the relaxation of the fundamental requirements of probable cause which would leave the law-abiding citizen at the mercy of the officer's whims and caprices.[83] While the individual is entitled to be free

[72] United States v. Ball, 8 USMCA 25, 23 CMR 249 (1957); United States v. Swanson, 3 USCMA 671, 14 CMR 89 (1954).

[73] Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931).

[74] United States v. Lefkowitz, 285 U.S. 452 (1932); Boyd v. United States, 116 U.S. 516 (1886); United States v. Ball, 8 USCMA 25, 23 CMR 249 (1957). In the *Boyd* case, *supra*, the Supreme Court stated the cause for liberal construction when they said: "[I]llegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." 116 U.S. at 635.

[75] See United States v. Wilcher, 4 USCMA 215, 15 CMR 215 (1954).

[76] See United States v. Rhodes, 3 USCMA 73, 75, 11 CMR 73, 75 (1953).

[77] Compare United States v. Justice, 13 USCMA 31, 32 CMR 31 (1962).

[78] United States v. Rabinowitz, 339 U.S. 56 (1950).

[79] See United States v. Swanson, 3 USCMA 671, 14 CMR 89 (1954).

[80] United States v. Rabinowitz, 339 U.S. 56 (1950).

[81] United States v. Rabinowitz, *supra* note 80, at 66; *accord*, Go-Bart Importing Co. v. United States, 282 U. S. 344 (1931); United States v. Conlon, 14 USCMA 84, 33 CMR 296 (1963).

[82] See Johnson v. United States, 333 U.S. 10 (1948).

[83] See Wong Sun v. United States, 371 U.S. 471 (1963).

from capricious police interference, such freedom is not designed to be an "oppressive weight on law enforcement officers."[84] The police officer, engaged in the difficult duty of protecting the community, must be given fair leeway in enforcing the law.[85] Just as the courts require the police not to make a search except on reasonable grounds, the police have the right to expect the courts to be reasonable in judging their responses to particular situations.[86] Reasonableness is a question of degree,[87] and what may be considered reasonable on a wartime battlefield to secure evidence of spying might be considered highly irregular under different circumstances.[88]

One of the keynotes in determining whether a given search is reasonable is its "specificity" or lack thereof.[89] Both federal and military courts have frequently condemned general exploratory searches[90] of either a person or his house or effects[91] for purposes which have been variously characterized as "for matter which is not directly connected with the commission of a suspected offense . . . ";[92] or, "where the result of such a search is to produce unsuspected products of crime";[93] or, "made solely to find evidence of . . . guilt [for the crime for which arrested] . . . . "[94] The permissible scope of a search depends upon the type of search, the probable cause for its authorization, and the reasonableness under the circumstances. Although the authorized scope of each type of search will be discussed in more detail during the consideration of the various kinds of searches, two examples will serve to illustrate the general principles involved, no matter what the type.

In *United States v. Schafer*[95] a search of an area consisting of twenty barracks, three mess halls, and two other buildings upon the authorization of a commanding officer was held to be reason-

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[84] United States v. Jeffers, 342 U.S. 48, 51 (1951).

[85] See Brinegar v. United States, 338 U.S. 160 (1949).

[86] See United States v. Summers, 13 USCMA 573, 33 CMR 105 (1963).

[87] See CM 401337, Waller, 28 CMR 484 (1959), *aff'd*, 11 USCMA 295, 29 CMR 111 (1960).

[88] See United States v. Brown, 10 USCMA 482, 28 CMR 48 (1959).

[89] See United States v. Ross, 13 USCMA 432, 32 CMR 432 (1963).

[90] See United States v. Rabinowitz, 339 U.S. 56 (1950); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931); United States v. Doyle, 1 USCMA 545, 4 CMR 137 (1952).

[91] NCM 58–00130, Hillan, 26 CMR 771 (1958).

[92] United States v. Battista, 14 USCMA 70,72, 33 CMR 282, 284 (1963).

[93] United States v. Doyle, 1 USCMA 545, 549, 4 CMR 137, 141 (1952).

[94] United States v. Lefkowitz, 285 U.S. 452, 465 (1932).

[95] 13 USCMA 83, 32 CMR 83 (1962).

able where a dead body bearing unmistakable signs of foul play had been found in the area, blood stained clothing had been recovered in the area, and a trail of blood led from the building where the body was found toward barracks in the same area. The Court observed:

> Here the action taken was not based on base suspicion, but was virtually compelled by the circumstances. . . . [T]he scope of the search was not unduly broad; although it was somewhat generalized, it was not unreasonable under the circumstances.

In *United States v. Battista*,[96] after receiving a complaint from a dental patient that accused, a dentist, had engaged in two acts of sodomy with him while he was semiconscious from drugs purportedly administered for the purpose of treatment, military investigators requested and received permission from the ship's commanding officer to search the ship's dental office and accused's stateroom "to see if they could find 'some evidence of a homosexual nature, pornographic nature, names, and correspondence.'" The purpose of the search was further described as hoping to "uncover something 'of a nature that would suggest homosexuality. Pictures of nude men, things of that nature.'" The Court, in striking down the search, held:

> Here there was no . . . probable cause. The agents had no reason to believe that Dr. Battista had possession of any instrumentalities of his crime, its fruits, or other proper objects of a search. . . . The search was simply instituted for the purpose of securing evidence with which to convict the appellant of sodomy.[97]

Thus while under one set of facts, the search of a single room may be unreasonable, under other circumstances a search of an area consisting of twenty-five buildings may be most reasonable. In weighing the scope of a search for reasonableness it must be concluded that the search "did not go beyond the limits imposed by the necessities of the case."[98]

In federal courts, while a search not based on probable cause is per se unreasonable,[99] even though the officer is acting in good faith,[100] a search, no matter how strong the probable cause may be, will be held to be unreasonable unless conducted with a proper

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[96] 14 USCMA 70, 33 CMR 282 (1963).

[97] *Id.* at 72, 33 CMR at 284.

[98] United States v. Ross, 13 USCMA 432, 438, 32 CMR 432, 438 (1963).

[99] See Wong Sun v. United States, 371 U.S. 471 (1963); *cf.* Carroll v. United States, 267 U.S. 132 (1925).

[100] See Henry v. United States, 361 U.S. 98 (1959).

search warrant or under one of the limited, exceptional circumstances where search is permitted without a warrant.[101]

Under Federal case law, therefore, "reasonable" searches require two elements: (1) probable cause, and (2) authority to search based on the constitutional requirement of a warrant or a judicially approved substitute therefor; the absence of either will make the search unreasonable and hence unlawful.

On the other hand the military cases have generally tended to blend together and obliterate any distinction between "reasonable" searches and those "with probable cause,"[102] treating the lack of authority as separate and distinct from the concept of reasonableness.[103]

Since "probable cause," as distinguished from "reasonable," has a similar meaning in both disciplines, what then is the test

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[101] United States v. Jeffers, 342 U.S. 48 (1951); *cf.* Jones v. United States, 357 U.S. 493 (1958). In the *Jones* case, *supra*, federal agents, with good cause to believe that liquor was being distilled in a house, forced their way into it without a warrant, and, without arresting anyone there at the time, searched the house, and seized distilling equipment. In striking down the conviction on the basis of an illegal search the Supreme Court said: "It is settled doctrine that probable cause for belief that certain articles subject to seizure are in a dwelling cannot of itself justify a search without a warrant. . . . The decisions of this Court have time and again underscored the essential purpose of the Fourth Amendment to shield the citizen from unwarranted intrusions into his privacy. . . . Were federal officers free to search without a warrant merely upon probable cause to believe that certain articles were within a home, the provisions of the Fourth Amendment would become empty phrases, and the protection it affords largely nullified." *Id.* at 497–8. The Court also pointed out, however, that a warrant for the *nighttime* search of a private home will not issue upon probable cause but only upon positive knowledge. *Id.* at 498–99; see FED R. CRIM. P. 41 (c).

[102] See United States v. Brown, 10 USCMA 482, 487, 28 CMR 48, 53 (1959); United States v. Rhodes, 3 USCMA 73, 75, 11 CMR 73, 75 (1953). In the *Rhodes* case, *supra*, the Court said: "He had been informed reliably and officially that there was good reason [probable cause] to believe that the accused was engaged in an unlawful enterprise. . . . The search was in no sense general and exploratory, but instead was narrowly restricted in scope, purpose, and physical area. It was, therefore—under all of the circumstances, including the exigencies of the military service—entirely reasonable. . . . As the search was not, under the facts involved here, unreasonable, it was not unlawful." In *Brown, supra*, they said: "Both parties in essence have treated the question as one of the reasonableness of the search. Only unreasonable searches are prohibited. . . . The question is simply one of whether there was probable cause to search."

[103] See, *e.g.*, United States v. Murray, 12 USCMA 434, 31 CMR 20 (1961); United States v. Gebhart, 10 USCMA 606, 28 CMR 172 (1959). But, Ferguson, J., as shown by his dissent in United States v. Conlon, 14 USCMA 84, 33 CMR 296 (1963), has now adopted the view expressed by the Supreme Court.

for determining its existence or non-existence? Probable cause must be based on more than mere suspicion, report, or even good reason to suspect,[104] but it does not require proof sufficient to establish guilt.[105] Probable cause to search exists if, from the facts as they appear to him,[106] a reasonable, prudent, and responsible officer[107] would be justified in concluding that an offense has been or is being commited.[108] His actions are based upon "the factual and practical considerations of everyday life on which prudent men, not legal technicians, act."[109] His decisions are initially faced, not in the courtroom, but at the scene, where the totality of the circumstances facing him may have to be weighed against the necessity of a split second in which to act.[110]

The knowledge of the operative facts and circumstances required to establish probable cause need not be based on the direct, personal observations of the person who desires to make the search, but may be based on hearsay.[111] There must, however, be a "substantial basis for crediting the hearsay . . . ."[112] Normally it comes from one who may be categorized as an "informant." The courts have been willing to accept such information as establishing probable cause if it is from "a previously reliable informant,"[113] or one with a previous record of "accurate and reliable" information,[114] particularly where it is "reasonably corroborated by other matters within the officer's knowledge,"[115] or where the officer personally verifies every facet of the information furnished by the informant except whether the criminal goods are at the named place.[116] In other words it is generally recognized that the demonstrated reliability of the informant in such a case is the controlling factor.[117] Chief Judge Quinn, in his dissenting opinion in *United States v. Davenport*, felt that:

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[104] Henry v. United States, 361 U.S. 98 (1959); United States v. Gebhart, *supra*, note 103; United States v. Brown, 10 USCMA 482, 28 CMR 18 (1959).

[105] Draper v. United States, 358 U.S. 307 (1959).

[106] United States v. Conlon, 14 USCMA 84, 33 CMR 296 (1963).

[107] United States v. Rabinowitz, 339 U.S. 56 (1950); *cf.* United States v. Summers, 13 USCMA 573, 33 CMR 105 (1963).

[108] United States v. Ness, 13 USCMA 18, 32 CMR 18 (1962).

[109] Brinegar v. United States, 338 U.S. 160, 175 (1949).

[110] Wong Sun v. United States, 371 U.S. 471, 498 (1963) (dissenting opinion).

[111] United States v. Ness, 13 USCMA 18, 32 CMR 18 (1962).

[112] Jones v. United States, 362 U.S. 257 (1960).

[113] Espinoza v. United States, 278 F.2d 802, 804 (5th Cir. 1960).

[114] Draper v. United States, 358 U.S. 307, 313 (1959).

[115] Jones v. United States, 362 U.S. 257, 269 (1960).

[116] United States v. Ness, 13 USCMA 18, 32 CMR 18 (1962).

[117] *Cf.* United States v. Davenport, 14 USCMA 152, 33 CMR 364 (1963).

> A police officer, or an officer authorized to order a search, has the right, and should be expected as a reasonable person, to act on inherently credible information relating to a crime received from a identifiable person *not known* to be engaged in conduct tending to discredit his reliability. In other words, *the report of crime by an ordinary person has built in credibility.* [Emphasis in last sentence added.][118]

But it is clear that uncorroborated information received from an *anonymous* source cannot be considered probable cause to invade an individual's constitutional right to privacy and subject him to a search.[119] Probable cause must be found to exist prior to the search, for a search can never be justified by what is found,[120] but there must be a close relationship in time to the search to show probable cause at that time, not at some previous time, since that which would establish probable cause at one date might not alone show more than a suspicion of the continued existence of the same situation on a later date.[121]

E. *TYPES OF SEARCHES*

1. *Search Warrant.*

"A search conducted in accordance with the authority granted by a lawful search warrant,"[122] is among those which are lawful. Although there is no widespread use of or indeed the need for the use of a search warrant in the military law of search and seizure, the civilian rules governing the use of warrant are important for two reasons. First, as a general rule inside the United States the off-post accommodations, whether they be dwelling or hotel room, of a member of the armed forces are governed by civilian rather than military norms and thus usually can not be lawfully searched without a warrant.[123] Second, in recent cases such as *United States v. Davenport,*[124] the Court of Military Appeals has treated searches authorized by commanding officers, which have long been recognized as the military substitute for a search warrant for on-post and overseas searches, as being analogous in

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[118] *Id.* at 160, 32 CMR at 372.

[119] Costello v. United States, 298 F.2d 99 (9th Cir. 1962); United States v. Davenport, 14 USCMA 152, 33 CMR 364 (1963).

[120] Johnson v. United States, 333 U.S. 10 (1948); United States v. Davenport, *supra* note 119.

[121] ACM S–20491, Maginley, 32 CMR 842 (1962), *aff'd*, 13 USCMA 445, 32 CMR 445 (1963).

[122] MCM, 1951, para. 152.

[123] United States v. DeLeo, 5 USCMA 148, 17 CMR 148 (1954) (dictum); *cf.* NCM 58–00130, Hillan, 26 CMR 771 (1958).

[124] 14 USCMA 152, 33 CMR 364 (1963).

basic principles to a search authorized by warrant and has required that the same rules be applied thereto as would be applied in a civilian court for testing the validity of a warrant.

In analyzing the development of the Supreme Court's concept of the use of and requirement for a search warrant, it must be remembered that after the first clause of the Fourth Amendment provides for security against "unreasonable" searches, the second clause states, " . . . and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Based upon this authority, Rule 41(c) of the *Federal Rules of Criminal Procedure*, provides:

> (c) Issuance and contents.
>
> A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. . . . It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. . . .

In order for a warrent to be valid, probable cause[125] must appear in the facts presented to the officer issuing the warrant.[126] Probable cause does not appear where the affidavit merely states the affiant's belief that there is cause to search without stating the facts upon which that belief is based.[127] Both the Fourth Amendment and Rule 41(c), require that the warrant particularly describe the thing to be seized. This makes general searches under a warrant impossible; only that which is named can be taken *under the warrant* and nothing is left to the discretion of the officer executing the warrant.[128]

The military rule has developed as a principle of law, perhaps because of the lack of necessity for the use of warrants, that

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[125] For a definition of "probable cause" see the authorities cited in notes 104–121 *supra*, and the accompanying text.

[126] Jones v. United States, 362 U.S. 257 (1960).

[127] Nathanson v. United States, 290 U.S. 41 (1933).

[128] Marron v. United States, 275 U.S. 192 (1927). But in *Marron* the seizure of items other than those named in the warrant was upheld on the ground that they were independently seizable incident to an arrest made at the time the warrant was executed, even though they could not have been seized pursuant to the warrant had there been no arrest.

there is not a "preferred" mode of authorization for a search—that if a search can be based on one ground, it is unnecessary to consider whether other courses of action were practicable.[129] The philosophy of the Supreme Court is considerably different. The search warrant, particularly where a dwelling is concerned, is almost mandatory before a search will be held reasonable, regardless of what probable cause may exist. The Supreme Court has generally been most hesitant in granting exceptions to what they consider to be the constitutional mandate of the Fourth Amendment requiring search warrants. The exceptions, which have fluctuated in their scope and applicability over the years, can broadly be catagorized as (1) incident to lawful arrest, and (2) where there are "exceptional circumstances" which may consist of the flight or potential flight of the suspect, movable vehicles, or the threatened destruction of the criminal goods. These two categories are easily recognizable as being among those which will justify a military search. In order to put each type of search into its proper perspective when it is discussed in detail, *infra*, the requirement for a search warrant and the permissible use of the exceptions allowed in civilian practice must be contrasted with the military law. Of necessity this requires a review of the major Supreme Court cases dealing with the limitations generally imposed upon searches without a warrant. To explore the situation in depth would require a great deal more space then can be devoted herein. Most of the decisions since 1948 have been made by a Court of constantly changing membership, with various combinations of concurring and dissenting opinions, and in some instances without a clear-cut majority opinion.

At the outset, the preferred place that the Court gives the home must be recognized. As they observed in *Silverman v. United States*,[130] "At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion." Judge Jerome Frank perhaps summed up the situation best in his dissenting opinion in *United States v. On Lee*[131] when he said:

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[129] United States v. Dutcher, 7 USCMA 439, 22 CMR 229 (1956); United States v. Davis, 4 USCMA 577, 16 CMR 151 (1954). But as will be seen in the discussion of the other types of searches, *infra*, the Court of Military Appeals as a matter of practice prefers certain "authorized" types of searches over others and may strain to find one type while ignoring a more evident ground.

[130] 365 U.S. 505, 511 (1961).

[131] 193 F.2d 306 (2d Cir. 1951), *aff'd*, 343 U.S. 747 (1952).

> A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizable hunk of liberty—worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle.[132]

It can be said that the Supreme Court opened the chapter in *Agnello v. United States*[133] when they held:

> While the question has never been directly decided by this court, it has always been assumed that one's house cannot lawfully be searched without a search warrant, except as incident to a lawful arrest therein. . . . The search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws. . . . Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause.[134]

This position was reiterated without change seven years later, in 1932, in *United States v. Taylor*,[135] where it was pointed out that the officers had ample opportunity to obtain a warant and to proceed in an orderly way after they had discovered a still in operation. There was no possibility of material change in the situation during the time it would have taken to obtain a warrant, and leaving a man on guard would have prevented any such possibility. That same year the Court clearly expressed its reasons for the stringency of the rule in *United States v. Lefkowitz*:[136]

> . . . The informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried actions of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be obtained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime.[137]

The Court remained firm in their position for the next sixteen years and in 1948 not only reiterated their stand in the *Taylor* case[138]

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[132] *Id.* at 315–16.

[133] 269 U.S. 20 (1925).

[134] *Id.* at 32–3.

[135] 286 U.S. 1 (1932).

[136] 285 U.S. 452 (1932).

[137] *Id.* at 464.

[138] See Johnson v. United States, 333 U.S. 10, 13–4 (1948), in which the Court said: "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the sup-

but went even further in *Trupiano v. United States*[139] limiting the exception recognized in the *Agnello case* (to the effect that a dwelling could be searched without a warrant incident to a lawful arrest therein). They held that an arrest in a dwelling did not ipso facto legalize a search of the dwelling and that such a search would be unreasonable where it was practicable, but agents failed, to obtain a search warrant. During the same year recognition was given to the fact that there were exceptions to the constitutional mandate of a search warrant, but only if the "exigencies of the situation made that course imperative."[140] Two years later, in 1950, the Court handed down *United States v. Rabinowitz*,[141] the case that was to start muddying the troubled waters that have not yet been either cleared or calmed, and caused Mr. Justice Black in dissent to make the prophetic objection that, "In no other field has the law's uncertainty been more clearly manifested."[142] In *Rabinowitz*, the Court overruled *Trupiano*, and held a search conducted incident to an arrest authorized by an arrest warrant was valid notwithstanding the fact that the agents had sufficient opportunity, had they desired, to have obtained a search warrant. In justifying their position they said:

> It is appropriate to note that the Constitution does not say that the right of the people to be secure in their persons should not be violated without a search warrant if it is practicable for the officers to procure one. The mandate of the Fourth Amendment is that the people shall be secure against *unreasonable* searches. . . . Searches turn upon the reasonableness under all the circumstances and not upon the practicability of procuring a search warrant, for the warrant is not required. . . . The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. That criterion in turn depends upon the facts and circumstances—the total atmosphere of the case. *It is a sufficient precaution that law officers must justify their conduct before courts which have always been, and must be, jealous of the in-*

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port of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers." (Footnotes omitted.)

[139] 334 U.S. 699 (1948).

[140] McDonald v. United States, 335 U.S. 451, 456 (1948).

[141] 339 U.S. 56 (1950).

[142] *Id.* at 67.

dividual's right of privacy within the broad sweep of the Fourth Amendment. [Emphasis added to last sentence.][143]

It then appeared that the Court was relaxing its strict requirements for a warrant and perhaps the necessity for the intervention of the impartial magistrate between the officer and the citizen, feeling that judicial review would cure any errors that appeared. This was not to be, however, for in the next year, 1951, the holding in *United States v. Jeffers*[144] clearly demonstrated that the Court was continuing to emphasize the mandate of the Amendment requiring judicial process, and allowing only narrow exemptions based on search incident to lawful arrest and "exceptional circumstances." Two later cases, *Jones v. United States*[145] and *Chapman v. United States*,[146] both held that the search of a dwelling without a search warrant was illegal and distinguished *Rabinowitz* on the ground that there the search was conducted incident to a lawful arrest based on an arrest warrant. But for the recent case of *Ker v. California*[147] it would seem clear that the rationale in *Rabinowitz* was just unfortunately broad language in a case which merely set forth a narrow exception. However, in *Ker* the Supreme Court, by a five to four decision, upheld for the first time the search of a dwelling without either an arrest or search warrant. The entry of the officers for the purpose of searching for marijuana was held reasonable because of the furtive conduct of the suspect and the likelihood that the marijuana would be hidden or distributed before a warrant could be obtained in view of the late hour of the night. The Court found the controlling factor to be that time was of the essence. It can be argued that *Ker* supports the conclusion that the historic protection of the home from search without a warrant is being attacked from another direction, that of "exceptional circumstances" and that the doctrine announced in *Agnello* has been weakened.[148] Admittedly the Court in *Ker* used an exception, the existence of which they have always recognized, but it would appear that only by the most sophisticated distinction in factual

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[143] *Id.* at 65–66.

[144] 342 U.S. 48 (1951).

[145] 357 U.S. 493 (1958).

[146] 365 U.S. 610 (1961).

[147] 374 U.S. 23 (1963).

[148] In *Ker* 8 members of the court split 4–4 on whether the Fourth Amendment standard was violated. The ninth member, Mr. Justice Harlan, upheld the search because it was a state search rather that a federal one, and his view was that the Fourteenth Amendment standard ought be more flexible than that applicable to the Federal Government. In this view *Ker* would have no precedent value as to federal searches. See 374 U.S. at 44–46. Compare notes 151–153 *infra*, and text accompanying.

situations can any difference be seen between *Ker* and previous cases in which they reached contrary results.[149] However, a more logical conclusion as to the meaning of *Ker* would seem to lie in the fact that it is a post-*Mapp v. Ohio*[150] case and as the Court pointed out, it was measuring a state conviction against the Fourteenth Amendment rather than exercising its supervisory authority over Federal action.[151] The search was sanctioned by the law of the state involved. As Mr. Justice Clark, writing the opinion of the Court, stated:

> Findings of reasonableness, of course, are respected only insofar as consistent with federal constitutional guarantees. . . . The States are not thereby precluded from developing workable rules governing arrests, searches and seizures . . . provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures. . . . Such a standard implies no derogation of uniformity in applying federal constitutional guarantees but is only a recognition that conditions and circumstances vary just as do investigative and enforcement techniques.[152]

Of course only time and further cases in the area will reveal the intent of the Court in *Ker;* however, in view of the position that they have taken almost continually over the last forty years, it would seem more reasonable to consider that the Court was defining its relationship with the states in the post-*Mapp* era rather than making inroads into one of the doctrines of which they have been the most jealous in their protection.

2. *Incident to Apprehension.*

"A search of an individual's person, of the clothing he is wearing, and of the property in his immediate possession or control, conducted as an incident of lawfully apprehending him,"[153] is

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[149] See Johnson v. United States, 333 U.S. 10 (1948); United States v. Taylor, 286 U.S. 1 (1932). In *Ker* no more real exigency existed than in the *Johnson* and *Taylor* cases, *supra*, and posting a guard in *Ker* would have been as reasonable as it was in *Johnson* and *Taylor*, if it was desired to insure that the illicit goods were not removed while a warrant was obtained.

[150] 367 U.S. 643 (1961).

[151] Until Mapp v. Ohio, *supra* note 150, the Court had little reason to distinguish the review of a search and seizure question upon the ground of constitutional versus supervisory authority. It was only in situations such as Rea v. United States, 350 U.S. 214 (1956), where a federal officer was enjoined from testifying in a state prosecution as to evidence which he had obtained in violation of federal rules, that the Court was concerned with the question of the use in state trial of evidence gained by illegal governmental action.

[152] Ker v. California, 374 U.S. at 33–34.

[153] MCM, 1951, para. 152.

among those which are lawful. The right to search the person incident to arrest has always been recognized both in this country and in England,[154] but it is merely "... one of those *very narrow* exceptions to the 'guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case.' "[155] The necessities which are the basic roots of the exception are the necessity to protect the arresting officer and to deprive the prisoner of potential means of escape, and the necessity to avoid the destruction of evidence by the arrested person.[156] The Court of Military Appeals first gave judicial recognition to the validity in the military of this "longstanding" civilian rule in *United States v. Florence*.[157] The concept of reasonableness or probable cause would appear to occur in two places in this type of search; first, in the determination of the legality of the apprehension,[158] and second, in the determination of what is within the permissible limits of the search—what is within his immediate possession or control.[159]

"Apprehension" as defined in the military is used in the same way "arrest" is understood in common civilian usage, although the latter has a different connotation in the military.[160] Since both civilian and military sources will be consulted, the term "arrest" will be used in its civilian, rather than military, context herein and will be understood to be synonymous with "apprehension."

a. Legality of apprehension or arrest. Under civilian rules an arrest may be made either pursuant to a valid arrest warrant or without a warrant if the circumstances present legal justification. The validity of an arrest warrant is tested by the same criterion of reasonableness—knowledge that would justify a man of reasonable caution to believe that an offense has been or is being committed[161]—as are search warrants, since both are within the scope

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[154] See Weeks v. United States, 232 U.S. 383 (1914).

[155] United States v. Rabinowitz, 339 U.S. 56, 72 (1950) (dissenting opinion of Frankfurter, J.).

[156] *Id.* at 72–73.

[157] 1 USCMA 620, 5 CMR 48 (1952).

[158] See Draper v. United States, 358 U.S. 307 (1959); United States v. Dutcher, 7 USCMA 439, 22 CMR 229 (1956).

[159] See Harris v. United States, 331 U.S. 145 (1947); *cf.* United States v. Ross, 13 USCMA 432, 32 CMR 432 (1963).

[160] United States v. Ross, *supra*, note 159. For the authority for and definition of "apprehension" see UCMJ, Art. 7, as implemented by MCM, 1951, para. 19*a*. For the military meaning of "arrest" see UCMJ, Art. 9, and MCM, 1951, paras. 18*a*, 19*d*, and 20*a*.

[161] Brinegar v. United States, 338 U.S. 160 (1949).

of the Fourth Amendment.[162] The legal justification for arrest without a warrant, even if made by a federal officer, depends upon the law of the state within which the arrest is made, insofar as that law is not in violation of the Federal Constitution.[163] The general civilian rule, except where changed by statute, is that an arrest by either a police officer or a private person is valid without a warrant if a misdemeanor amounting to a breach of the peace is committed in his presence or if he has probable cause to believe that a felony has been committed and that the person arrested committed it.[164] It would appear that the general civilian rule that a citizen has authority to apprehend a person for a felony committed in his presence may well apply in the military also, in addition to the authority contained in the UCMJ and MCM, 1951.[165] The Supreme Court has never indicated that the probable cause required for arrest without a warrant is any more stringent than that required with a warrant, but they have specifically noted that it can not be less stringent.[166] The probable cause for belief must exist prior to the arrest or apprehension, whether it be civilian or military, since an arrest can not be justified by what is found during a subsequent search.[167] Likewise, the validity of a search incident to arrest must depend initially upon the validity of the arrest.[168] In other words, government agents can not legitimatize their acts by playing ring-around-the-legal-rosy where they search without probable cause, and as a result of a discovery made during the search, apprehend the accused; the apprehension can not be justified by the previous search and the search by the subsequent apprehension.[169]

But in the military a search is admissible if made during apprehension, even though the accused has not at the time been informed that he is under apprehension, since the whole thing is one unitary transaction which the court will not separate into many component

[162] Giordenello v. United States, 357 U.S. 480 (1958).

[163] United States v. Di Re, 332 U.S. 581 (1948). *But see* 18 U.S.C. § 3053 (1958) (federal arrest rule for U.S. Marshals); Peck, *The Use of Force to Protect Government Property*, *infra* p. 81 at 122 nn. 212, 213.

[164] See Carroll v. United States, 267 U.S. 132 (1925); 5 C.J.S. *Arrest* §§ 6, 8.

[165] Compare United States v. Ross, 13 USCMA 432, 436 n.2, 32 CMR 432, 436 n.2 (1963).

[166] See Wong Sun v. United States, 371 U.S. 471 (1963).

[167] Byars v. United States, 273 U.S. 28 (1927); see United States v. Ball, 8 USCMA 25, 23 CMR 249 (1957).

[168] See United States v. Rabinowitz, 339 U.S. 56 (1950); United States v. Ness, 13 USCMA 18, 32 CMR 18 (1962).

[169] ACM 4957, Thomas, 4 CMR 729, *pet. denied*, 2 USCMA 663, 4 CMR 173 (1952).

parts and test the validity of each by a stopwatch. If the record shows lawful apprehension and search closely interwoven, the search may be ruled as an incidental part of the whole transaction.[170] An arrest can not be made as a pretext to search for evidences of a crime.[171] The best example of this last rule is probably contained in *Taglavore v. United States.*[172] There an inspector on the vice squad acquired a warrant for appellant's arrest based upon alleged minor traffic offenses. The inspector suspected appellant of being connected with his employer's narcotics activities. Obtaining a warrant for a traffic offense was not, under the circumstances of the case, in accordance with normal police procedure. Although the warrant was obtained during the afternoon, it was held until after the employer was arrested late that night, and then given to two police officers with instructions to arrest appellant. The officers were warned that he might have marijuana cigarettes in his possession. He was arrested and subjected to a violent physical search when he tried to swallow something, which later was analyzed as a marijuana cigarette. The Court, in reversing, held that the police, in making the arrest and search, engaged in a deliberate, preplanned attempt to evade the requirements of the Fourth Amendment by using the subterfuge of a traffic arrest warrant to search for narcotics.

In *Henry v. United States,*[173] the Supreme Court clearly expressed the purpose of these rules when they said that "[u]nder our system suspicion is not enough for an officer to lay hands on a citizen. *It is better, so the Fourth Amendment teaches, that the guilty sometimes go free than the citizens be subject to easy arrest.*" (emphasis added).

The military rules of justification are identical except that no necessity for a warrant exists and no distinction is made between a felony and a misdemeanor. The circumstances must justify a prudent man in concluding that *an* offense has been or is being committed.[174]

b. Permissible scope of search—what is "within his immediate possession or control?" Although the right to search a person

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[170] United States v. Dutcher, 7 USCMA 439, 22 CMR 229 (1956); United States v. Cuthbert, 11 USCMA 272, 275, 29 CMR 88, 91 (1960) (Latimer, J., concurring).

[171] United States v. Lefkowitz, 285 U.S. 452 (1932); United States v. Brown, 10 USCMA 482, 28 CMR 48 (1959).

[172] 291 F.2d 262 (9th Cir. 1961).

[173] 361 U.S. 98 (1959).

[174] United States v. Ness, 13 USCMA 18, 32 CMR 18 (1962).

incident to a valid arrest has long been recognized,[175] whether there was permissible area beyond the person which could be searched under these circumstances was not clear until *Agnello v. United States,*[176] when the Supreme Court said:

> The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime *and to search the place where the arrest is made* . . . is not to be doubted. [Emphasis added.][177]

The place where the arrest is made has been held to include "all parts of the premises used for the unlawful purpose" which are under the "immediate possession and control" of the person arrested.[178] What is within the "immediate possession and control" of the individual depends greatly upon the nature of both that which is being sought and the place where the arrest and search are made.[179]

Considering first the nature of that which is sought, it is proper to conduct a search for items which may be classified as seizable—fruits of the crime, instrumentalities of the crime, contraband, and weapons or means of effecting an escape.[180] The search must be directed specifically towards those items connected with the crime charged and for which arrested,[181] and it becomes illegal if it is enlarged into a general exploratory search for whatever might be turned up or for fruits or instrumentalities of some other crime.[182] Although there does not seem to be any case in point, it would appear that a search, no matter how narrow its scope, would nonetheless be illegal if it were directed specifically toward finding a particular item or items categorized as non-seizable. However, an otherwise legal search marked by its specificity will not become illegal if other items, readily apparent,[183] which do not relate to the original purpose of the search are seized, if they are otherwise subject to seizure.[184] Although the term "readily apparent," which

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[175] See Weeks v. United States, 232 U.S. 383 (1914).

[176] 269 U.S. 20, 30 (1925).

[177] *Id.* at 30.

[178] Marron v. United States, 275 U.S. 192, 199 (1927).

[179] See CM 407443, Rogers, 32 CMR 623 (1962).

[180] United States v. Rabinowitz, 339 U.S. 56 (1950); Harris v. United States, 331 U.S. 145 (1947); Agnello v. United States, 269 U.S. 20 (1925). For a more detailed discussion of what is seizable see pp. 152–59 *infra.*

[181] Harris v. United States, *supra,* note 180.

[182] United States v. Lefkowitz, 285 U.S. 452 (1932); CM 407443, Rogers, 32 CMR 623 (1962).

[183] Marron v. United States, 275 U.S. 192 (1927); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931).

[184] United States v. Ross, 13 USCMA 432, 32 CMR, 432 (1963); United States v. Doyle, 1 USCMA 545, 4 CMR 137 (1952).

the Supreme Court used in *Go-Bart Importing Co. v. United States*,[185] was originally meant to convey just that—obvious, something which was in plain view—it has now come to mean something which would be discovered within the permissible limits of the scope of the search. The thoroughness of the search, in turn, depends upon the nature of the items sought. Thus a detailed search of every drawer, every piece of furniture, filing cabinets, safe, etc., would be reasonable when the objects searched for were small, like cancelled or forged checks, or postage stamps with counterfeit overprints, but the same meticulous investigation could not be considered to be reasonable where the crime involved a stolen automobile or an illegal still.[186]

Turning next to the place where the arrest is made, that which is under "immediate possession and control" of the person arrested varies depending upon the nature of the place—dwelling, hotel room, office, or vehicle, and whether the arrest is made outside, near to, or within the place being searched, as well as the relation of the place to the crime. In a field fraught with general rules which are hard to apply to specific fact situations, there is probably no area more difficult than this. In his dissenting opinion in *United States v. Rabinowitz*[187] Mr. Justice Frankfurter graphically illustrated the problem when, after analyzing the precedents, he said that, "The short of it is that the right to search the place of arrest is an innovation based on confusion, without historic foundation, and made in the teeth of a historic protection against it." A look at the factual basis for some of the court holdings may give the clearest understanding of the application of the principles announced. In *Agnello v. United States*,[188] the first case in which the Supreme Court considered the problem in detail, two men were apprehended on narcotics charges in the home of one of them. That place was searched incident to the arrest, and then the agents took the other man to his home four blocks away and searched it without a warrant, based on the arrest. The Court held that although a search may be made of the place where the arrest is made, that right does not extend to other places. Thus the search of the first house, in which the arrests were made, was upheld but the search of the dwelling four blocks away from the scene was condemned.

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[185] 282 U.S. 344 (1931).

[186] See United States v. Rabinowitz, 339 U.S. 56 (1950); Harris v. United States, 331 U.S. 145 (1947).

[187] *Supra* note 186, at 79.

[188] 269 U.S. 20 (1925).

As a general rule it may be stated that when an accused is apprehended outside of his house, hotel room, or other building, a search of the interior incident to the apprehension may be made only if an offense had been committed or was being committed in the presence of the arresting officers and was committed or being committed within the area searched. The reason for the latter exception is that a dwelling or building can not be privileged sanctuary where the criminal is apprehended on the outside immediately after the commission of the crime on the inside.[189]

Where an accused was apprehended when he came to reclaim the contents of a public locker in a bus station, it was held that a search of the locker incident to the apprehension was reasonable.[190]

The question must then be asked, what is the allowable scope of a search when an arrest is made within a building, dwelling, or office? In *United States v. Rabinowitz*[191] the suspect was arrested in his office on a charge of possessing stamps with counterfeit overlays superimposed thereon. Pursuant to the arrest the entire room was ransacked, and the desk, filing cabinets and safe all received a fine tooth search. The Court, using their oft-quoted language that the criterion of reasonableness depends "upon the facts and circumstances—the total atmosphere of the case,"[192] held that the search was reasonable. In *Harris v. United States*,[193] accused was arrested in the living room of his four room apartment, upon a charge of forgery. The agents, looking for stolen checks which had allegedly been used in the forgery, searched all four rooms in an operation that took five hours. The Supreme Court, in upholding the search, found that the accused was in exclusive possession of the whole apartment and felt that, although other situations could arise in which the nature and size of the objects sought or the lack of effective control over the premises might require a less extensive search, the search, under the particular facts present, did not go beyond that which was reasonably demanded by the situation. On the other hand there is no doubt

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[189] Compare CM 401337, Waller, 28 CMR 484 (1959), *aff'd*, 11 USCMA 295, 29 CMR 111 (1960). *Compare* Page v. United States, 282 F.2d 807 (8th Cir. 1960), CM 398866, Wallace, 27 CMR 605 (1958), *and* ACM 11930, Allen, 21 CMR 897 (1956), *with* Clifton v. United States, 224 F.2d 329 (4th Cir.), *cert. denied*, 350 U.S. 894 (1955), *and* United States v. Ross, 13 USCMA 432, 32 CMR 432 (1963).

[190] United States v. Ball, 8 USCMA 25, 23 CMR 249 (1957).

[191] 339 U.S. 56 (1950).

[192] *Id.* at 66.

[193] 331 U.S. 145 (1947).

of the contemporary validity of the holdings in *Go-Bart Importing Co. v. United States*,[194] and *United States v. Lefkowitz*,[195] insofar as each held that the search of a firm's office which resulted in the seizure of almost everything therein including such things as light bills, blank order books, insurance policies, etc., went too far and became general and exploratory in nature.[196]

It would appear, then, that there are no specific guide lines that can be drawn as to the extent of search incident to apprehension inside an office or dwelling. The courts will savor the entire operation and if it leaves a bad taste or smacks of overreaching into a general exploration, the old test of unreasonableness will be brought up to declare it invalid.

3. *To Prevent Removal of Criminal Goods.*

"A search under circumstances demanding immediate action to prevent the removal or disposal of property believed on reasonable grounds to be criminal goods,"[197] is among those which are lawful. The requirements for reasonableness or probable cause appear in two places in this type of search: first, in the belief that immediate action is needed to prevent the removal,[198] and second, in the belief that a crime has been committed—that there *are* criminal goods.[199] As in all areas in this field, what is reasonable depends upon the facts and circumstances in the case,[200] but in the requirement of a search to prevent removal a distinction must clearly be made between a dwelling, a store, or other permanent building, and a ship, motor boat, automobile, or other mode of conveyance. A more stringent requirement of reasonableness may be placed on the former before a search would be authorized.[201] In the latter the practicability of securing any other type of permission, such as a warrant or its military equivalent, is considerably lessened since a vehicle can quickly be moved out of the locality or jurisdiction. As an Air Force Board of Review once observed:

> It is a matter of common knowledge that the greater the distance which a criminal can put between himself and the scene of his crime, the more secure he becomes (at least temporarily) and the more difficult solution of the crime becomes. The automobile is an instrument eminently

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194 282 U.S. 344 (1931).
195 285 U.S. 452 (1932).
196 See, *e.g.*, United States v. Rabinowitz, 339 U.S. 56 (1950).
197 MCM, 1951, para. 152.
198 United States v. Swanson, 3 USCMA 671, 14 CMR 89 (1954).
199 Carroll v. United States, 267 U.S. 132 (1925).
200 See Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931).
201 United States v. DeLeo, 5 USCMA 148, 17 CMR 148 (1954) (dictum).

well-suited for the task of transporting a criminal to a land of "greener pastures" and "calmer waters" with the least possible delay.[202]

The distinction that the Supreme Court has drawn in defining probable cause in this type of search depending upon whether it is a dwelling or vehicle can best illustrate the point. In *Carroll v. United States*[203] prohibition agents met accused in Grand Rapids, Michigan, on September 29th and arranged to buy bootleg whiskey, but the transaction fell through. The agents noted that the accused was driving an Oldsmobile Roadster at the time. On October 6th the accused was seen driving the same car along the road from Grand Rapids to Detroit. Detroit was known as one of the most active centers for the illegal introduction of whiskey into the country. On December 15th, some two months after their only actual contact with the accused, the agents again saw accused driving the car from Detroit towards Grand Rapids. In the belief that he was carrying illicit whiskey, they stopped him without a warrant and searched the car, and found liquor. The Court held that the agents had convincing evidence to make them believe that accused was in fact a bootlegger. When they saw him driving the "firm" car from a place with Detroit's reputation, they had probable cause to stop him and conduct a search. In *Johnson v. United States*[204] agents smelled burning opium, and, without a warrant, knocked at the door of the hotel room from which it emanated. When it opened they arrested the only occupant, searched the room, and seized opium and smoking apparatus. In holding the search and seizure illegal the Supreme Court stated:

> No reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present evidence to a magistrate. These are never very convincing reasons and, in these circumstances, certainly are not enough to by-pass the constitutional requirement. *No suspect was fleeing or likely to take flight. The search was of permanent premises and not of a movable vehicle.* No evidence or contraband was threatened with removal or destruction, except perhaps the fumes which we suppose in time would disappear. [Emphasis added.][205]

The point to be made from the two cases is that a very relaxed requirement of probable cause was allowed in *Carroll* because of the movable nature of the item to be searched, whereas in *Johnson*, although probable cause existed, the circumstances pointed to the complete absence of any necessity for the quick action that is a

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[202] ACM 8094, Pagerie, 15 CMR 864, 870 (1954).
[203] 267 U.S. 132 (1925).
[204] 333 U.S. 10 (1948).
[205] *Id.* at 15.

requirement before a search will be permitted on the ground that it is necessary to prevent removal. It is clear from this, as well as the previous examination of searches based on warrant and apprehension, that in the Federal civilian courts, certain types of searches (*i.e.*, those based on warrant) are preferred, and that the courts will be slow to find justification for a search urged on the basis of an exception to that rule.[206] As a legal principle the rule is to the contrary in the military. The Court of Military Appeals has made it clear that if a search is legal based upon one ground, it does not matter and it is unnecessary to consider whether it satisfies any other ground.[207] In *United States v. Davis*[208] two men occupying the same hut as accused awoke and found their money missing. In the absence of all unit officers from the area, the first sergeant isolated all the men living in the hut and ordered a search which produced the stolen property from accused's belongings. The Court held that the search was necessary to prevent the removal or concealing of the stolen property and hence legal. It did not matter that the same result could have been accomplished by isolating the occupants and phoning the commanding officer for permission, since the possibility of other courses of action does not destroy the reasonableness of that which was actually done. Under the rationale of the *Johnson* case as quoted above, substituting a warrant for its military equivalent, the authorization of the commanding officer, a contrary result would certainly have been reached had the case been considered in the federal civilian judiciary.

Perhaps the best justification of the difference in the judicial outlook of the two systems is found in the recognition of the Court of Military Appeals that the taking of prompt action is a necessity in the military to enforce discipline, protect property and prevent disorders and crimes in an organization where men are forced to live in such close proximity to each other.[209]

The type of goods also influences the reasonableness of a search to prevent removal. Money, for example, is easily hidden, readily disposed of, and not normally subject to precise identification; hence, a successful search may depend more upon the lack of delay in its initiation than upon any other factor.[210] Similarly,

[206] See notes 141–52 *supra*, and accompanying text.

[207] United States v. Dutcher, 7 USCMA 439, 22 CMR 229 (1956).

[208] 4 USCMA 577, 16 CMR 151 (1954).

[209] See United States v. Davis, *supra* note 208; United States v. Swanson, 3 USCMA 671, 14 CMR 89 (1954).

[210] United States v. Swanson, *supra* note 209.

recovery of items affecting national security, such as classified documents, make the utmost urgency in a search justifiable.[211]

The facts in *Davis* actually show that under a strict interpretation of that portion of paragraph 152, MCM, 1951, dealing with search to prevent removal, the search was not required "under circumstances demanding immediate action." Once the occupants of the hut had been segregated, there was no way that any of them could dispose of the money if it were still in the hut. The first sergeant could have then at his leisure secured permission for the search. No reason actually existed, therefore, for him to have to make an immediate search. It would appear that the reasoning of an earlier Air Force Board of Review in an analogous situation is more tenable. There it was held that if no other factors such as the existence of accomplices or the possibility of others discovering the goods were present, a search could not be justified upon the necessity to take immediate action when the accused is in custody or otherwise in no position to dispose of the criminal goods.[212]

Although the Court of Military Appeals has indicated that there is no preference in the legal sense between the various grounds justifying a search, as a matter of practice the Court will now always choose certain grounds over the others if more than one is available.[213] The Court has not utilized a search to prevent removal to sustain a case since 1954; however, it has been strictly a case of nonuse. It must be emphasized that the Court has never expressed doubt as to the validity of the ground or limited it beyond the plain meaning of the MCM, 1951, provision. There is no indication that if a proper case came before the Court, there would be any hesitation in invoking the doctrine.

4. *With Consent.*

"A search made with the freely given consent of the owner in possession of the property searched,"[214] is among those which are lawful. Search with consent has been judicially recognized as

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[211] See ACM 8212, Cascio, 16 CMR 799 (1954), *pet. denied,* 5 USCMA 847, 18 CMR 333 (1955).

[212] ACM S-6534, Guest, 11 CMR 758 (1953).

[213] For example in United States v. Harman, 12 USCMA 180, 30 CMR 180 (1961), money was stolen in a barracks just before its occupants were due to depart to new assignments. The men were packed and moving out. The search was sustained as commander-authorized although the Court mentioned that it could be sustained as a search necessary to prevent removal.

[214] MCM, 1951, para. 152.

valid by both federal and military courts,[215] but a careful distinction must be drawn between what is termed "consent" and "mere acquiescence" or "peaceable submission" to the demands of a person having the color of office or authority. The latter will not validate an otherwise unlawful search.[216] The question of whether an accused's actions in a given case constitute consent or only acquiescence is a question of fact, and each case must be decided on that basis, with precedent being, at best, of doubtful value.[217] Because of what the Supreme Court once called the "implied coercion"[218] that is inherent in a situation where government agents claim the accussed consented to the search and voluntarily waived his constitutional safeguard, the government has to prove by "clear and positive" evidence that there was no duress, actual or implied, and that there was in fact consent on the part of the accused.[219] Where the accused is in the custody of Government agents, consent will not be lightly inferred;[220] it is a circumstance tending to show acquiescence in, rather than consent to, a search.[221] Although the burden of proof upon the government is an especially heavy obligation if the accused was in custody at the time he purportedly gave his consent,[222] the circumstance is not controlling if there is substantial evidence of affirmative consent.[223] In addition to the question of apprehension or custody, what further factors have the courts looked to in determining whether specific action constitutes consent rather than mere acquiescence or peaceable submission?

There is no illegality in an inducement to consent to a search where the person believes with good cause that, unless he agrees, a warrant may and will be secured.[224].

As was noted above, it is unnecessary to warn an accused of his rights in accordance with Article 31, UCMJ, in order to obtain his consent to a search. Consent to a search is in no way incrimi-

[215] See Davis v. United States, 328 U.S. 582 (1946); *cf.* United States v. Marrelli, 4 USCMA 276, 15 CMR 276 (1954).

[216] Amos v. United States, 255 U.S. 313 (1921); United States v. Wilcher, 4 USCMA 215, 15 CMR 215 (1954).

[217] See United States v. Berry, 6 USCMA 609, 20 CMR 325 (1956); *cf.* United States v. Smith, 13 USCMA 553, 33 CMR 85 (1963).

[218] Amos v. United States, 255 U.S. 313 (1921).

[219] Judd v. United States, 190 F.2d 649 (D.C. Cir. 1951); United States v. Alaniz, 9 USCMA 533, 26 CMR 313 (1958).

[220] ACM S-18141, Holiday, 28 CMR 807 (1959).

[221] *Cf.* United States v. Hurt, 9 USCMA 735, 27 CMR 3 (1958).

[222] See United States v. Justice, 13 USCMA 31, 32 CMR 31 (1962).

[223] United States v. Hurt, 9 USCMA 735, 27 CMR 3 (1958).

[224] *Cf.* United States v. Marrelli, 4 USCMA 276, 15 CMR 276 (1954).

nating; it relates only to the preliminary question of the lawfulness of the search, and, being no different from any other basis for a legal search, there is no sound reason to set it apart by requiring a warning.[225] There is likewise no requirement that an accused must be advised of his right not to consent to a search without a warrant or its military equivalent.[226] However, whether the accused was given an Article 31 warning or told of his right not to consent may throw light upon the question of whether the accused in fact consented. In *United States v. French*[227] the accused, an Air Force officer, attempted to communicate an offer to sell defense information to the Soviets. The offer was intercepted by federal agents who then, together with military law enforcement agents, went to accused's hotel room and negotiated with him for the documents. After negotiating with accused for the documents they revealed their identities. *They then advised accused of his constitutional right not to consent to a search* of his room and a locker in a train station, and after accused had twice agreed to the search in writing, made searches of the two places. The accused's action was held to amount to consent. On the other hand a search was held to be unlawful and the "consent" of accused to it negated by the facts even though he had signed a form permitting the search, where it was found that he had been illegally apprehended as he left a "known" (suspected?) narcotics outlet, twice searched while held at gunpoint, was thereafter taken, still under illegal custody, to a local law enforcement office where he was confronted by other law enforcement agents who also wanted to search him and had him sign the form before they did.[228]

Although civilian authority on the subject is divided, the Court of Military Appeals has never ruled upon the question of whether a wife has the *implied* authority to give consent to a search of her husband's property.[229]

Courts have been loath to find consent, and indeed state that it is contrary to human experience to expect the same, when the

[225] United States v. Whitacre, 12 USCMA 345, 30 CMR 345 (1961); United States v. Insani, 10 USCMA 519, 28 CMR 85 (1959). It should be noted, however, that in the *Insani* case, *supra*, Judge Ferguson in his dissent stated that he had "serious reservations" as to whether an accused's statement of consent may properly be introduced in evidence if he had not been warned of his rights under Article 31 prior to such consent.

[226] United States v. Whitacre, *supra* note 225; United States v. Wilcher, 4 USCMA 215, 15 CMR 215 (1954).

[227] 10 USCMA 171, 27 CMR 245 (1959).

[228] ACM S-18141, Holiday, 28 CMR 807 (1959).

[229] See United States v. Smith, 13 USCMA 553, 33 CMR 85 (1963); United States v. Sellers, 12 USCMA 262, 30 CMR 262 (1961).

accused knows that the search is certain to produce contraband property or items which are per se incriminatory in nature.[230]

Perhaps the best exploration of the various elements the Court considers in determining the question of consent v. submission is contained in *United States v. Wilcher*.[231] In holding that the accused did consent although there was no Article 31 warning and he was not told that he had a right not to consent, the Court noted: (1) the agent did not demand the right to search and he did not tell the accused he had come to search;[232] (2) although at the time the request was made accused was not in his room, he willingly granted permission to make the search and took the agent to his room. Such a free and affirmative conduct can reasonably be construed to indicate consent; (3) the material discovered was not contraband or property incriminating by its very nature; and, (4) where the material is of a type not readily identifiable as incriminating from its description, such as money, and where it is less than the amount stolen and not so inordinately large as to excite suspicion under the circumstances, it is easy to see that agreement to the search would be of little benefit to the authorities, but be beneficial to the accused since consent would tend to turn away further suspicion.

The Court of Military Appeals has suggested the solution to the problem of when agreement is consent and when it is only acquiescence or submission when they said in *United States v. Justice*:[233]

> It would certainly lessen the frequency of dispute and ease the burden of decision if law enforcement agents made crystal clear to persons whose premises are to be searched that they have no official authorization, and that they cannot search in the absence thereof, unless they have free and knowing consent to enter into and search the premises.[234]

5. *Under Authority of a Commanding Officer.*

A search of property which is owned or controlled by the United States and is under the control of an armed force, or of property which is located within a military installation, or in a foreign country or in occupied territory and is owned, used, or occupied by persons subject to military law or to the law of war, which search has been authorized by a commanding officer (including an officer in charge) having jurisdiction over the place where the property is situated or, if the property is in a

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[230] See Higgins v. United States, 209 F.2d 819 (D.C. Cir. 1954).

[231] 4 USCMA 215, 15 CMR 215 (1954) (alternative holding).

[232] *Cf.* United States v. Smith, 13 USCMA 553, 33 CMR 85 (1963).

[233] 13 USCMA 31, 32 CMR 31 (1962).

[234] *Id.* at 34, 32 CMR at 34.

> foreign country or in occupied territory, over personnel subject to military law or to the law of war in the place where the property is situated . . .[235]

is among those which are lawful.

Perhaps the clearest statement of the historic view of the power of the commander to search is contained in ACM 1458, *Worley*,[236] a case predating the UCMJ. There it was said:

> The essential difference between military jurisdiction and civil jurisdiction is apparent. Under civil jurisdiction, the informant has no power alone to make a search. The magistrate who hears the evidence has no power alone to make a search. The officer who serves the process has no power in himself to make a search. It requires the combined use of all three before a valid search and seizure can be made. On the other hand, *the Commanding Officer with respect to property under his control has plenary power.* He is fully and directly responsible to his Government for all action necessary to perfrom his duties. He has the power of investigation to determine whether a search should be made and to execute a search or direct its execution. In other words, he has the power of Federal agents, the magistrate and the process server. [Emphasis added.][237]

The Court of Military Appeals, soon after its formation, gave notice that it did not fully adopt the position that the commander had plenary power to determine that a search should be made, when it observed in *United States v. Doyle*:[238]

> . . . That there may be limitations upon the [commanding officer's] . . . power, we do not doubt. Insofar as the power bears on criminal prosecutions, both trial courts and appellate forums are available to insure that the commanding officer does not abuse his discretion to the extent that the rights of an individual are unduly impaired.[239]

For a number of years this language went unnoticed or at least unheeded and most Boards of Review continued to consider the power of the commander to order searches as absolute.[240] Then

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[235] MCM, 1951, para. 152.

[236] 3 CMR (AF) 424 (1950). See also CM 248379, Wilson, 31 BR 231 (1944); JAG 250.413, July 23, 1930, DIG. OPS. JAG 1912–40, § 395 (27), at 220.

[237] *Id.* at 442.

[238] 1 USCMA 545, 4 CMR 137 (1952).

[239] *Id.* at 548, 4 CMR at 140.

[240] See ACM 11753, Walsh, 21 CMR 876 (1956); ACM 6172, Turks, 9 CMR 641 (1953); ACM 5796, Toreson, 8 CMR 676 (1953). *But see* CM 389786, Washington, 22 CMR 346 (1956). In the *Toreson* case, *supra*, the Board of Review did note: "In Military law the commanding officer's authority to order a search has been substituted for a search warrant and there is no requirement that probable cause be shown before a search may be ordered. . . . The United States Court of Military Appeals has, however, shown *a preoccupation* with 'probable cause' which suggests

in 1959 the Court of Military Appeals handed down *United States v. Brown*.[241] In the *Brown* case at the direction of the commanding officer accused was among ten men searched as they returned from pass to see if any of them possessed narcotics. For the preceeding four months the commander had suspected six or seven of the men of using narcotics. In addition, the commander had learned that one of the ten had borrowed $10.00 prior to going on pass. Included in the group was one man, not the accused, who had allegedly been apprehended with narcotics but who had not been tried because of a defect in the chain of custody. It was upon these facts that the commander ordered the search. The Court, in reversing because of the search, held:

> The question is simply one of whether there was probable cause to search. . . .
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> While there is substantial discretion vested in the commanding officer to order a search of persons and property under his command. . . [he] acted on nothing more than mere suspicion. Reasonable or probable cause was clearly lacking for both the apprehension and the search and, although the military permits certain deviations from civilian practice in the procedures for initiating a search, the substantive rights of the individual and the necessity that probable cause exist therefor remain the same. Unreasonable searches and seizures will not be tolerated. . . . While we recognize the commanding officer's traditional authority to conduct a search in order to safeguard the security of his command . . . [his action] was with utter disregard for the rights of the accused and the others. He acted upon mere suspicion with no factual basis for his action. [Footnotes omitted.][242]

Although it can be said with assurance that the *Brown* decision caused momentary consternation, if not downright panic, in military legal circles over the striking down of what had been considered an immutable rule, the Court soon began to clarify the limits of *Brown*. In *United States v. Gebhart*,[243] the Court noted that while the authority to search must be based on probable cause, not mere suspicion, it could, if the appropriate situation existed, be general and include all personnel of the command or subdivision, or be limited only to persons specifically suspected of an offense. It was also pointed out that searches, whether

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that evidence thereon would be relevant in many cases. . . ." (Emphasis added.) 21 CMR at 682, n.2. But in the *Washington* case, *supra*, the Board of Review, after considering the opinions of the Court of Military Appeals held: ". . . [W]e believe the better view to be that unreasonable searches are equally objectionable under military or civilian law. . . ." 22 CMR at 849.

[241] 10 USCMA 482, 28 CMR 48 (1959).

[242] *Id.* at 487–9, 28 CMR at 53–5.

[243] 10 USCMA 606, 28 CMR 172 (1959).

generalized or particularized, should not be confused with inspections conducted by a commander in furtherance of the security of his command. The latter is wholly administrative or preventive in nature, not criminal. The difference between the so-called "shakedown" *search* and the "shakedown" *inspection*, therefore, becomes important, and although the problem of what a search is was examined above, specific application of those principles must be made at this time. A shakedown is generally considered to be a search or inspection of all the men, equipment, or both located in a particular barracks, unit, or area.[244] Its lawfulness, now tempered with the concept of probable cause if it is a search, has long been recognized. The circumstances of military life, such as the freedom of access that occupants of military barracks have to all parts thereof and the transient nature of the men assigned thereto, furnish the necessity that is the basis of the reasonable nature of such searches.[245] If the action is taken as a part of routine, normal, and legitimate military duties for the sole purpose of maintaining orderliness and cleanliness in the course of regulated military operations with no purpose in mind to seek out or locate a specific item of stolen property or the like, it is an inspection, but if the same action is taken under specific authorization for and purposely designed to uncover a specific item of stolen property or other evidences of a crime, it is a search, and the guarantees provided by the Fourth Amendment are applicable. The distinguishing feature is the purpose of the acts.[246] For example, where the accused was placed in the stockade and pursuant to Army Regulations and established unit procedure the supply sergeant broke into accused's foot locker to inventory and store the contents, and discovered stolen items therein, it was held that the sergeant was doing a routine, authorized act and was not engaged in a search.[247]

The power to order a search under the authority of the commander extends beyond the one in formal command of the unit, if proper circumstances exist. The commanding officer of a unit includes one left temporarily in charge of a unit as the senior

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[244] See United States v. Harman, 12 USCMA 180, 30 CMR 180 (1961).

[245] United States v. Harman, *supra* note 244; United States v. Gebhart, 10 USCMA 606, 28 CMR 172 (1959). See also note 14 *supra*, and accompanying text.

[246] CM 407463, Coleman, 32 CMR 522, *pet. denied*, 13 USCMA 697, 32 CMR 472 (1962).

[247] CM 407854, Rosado-Marrero, 32 CMR 583, *pet. denied*, 13 USCMA 700, 32 CMR 472 (1962).

officer present upon the departure of the assigned commanding officer, even though his absence be of short duration and not announced in official orders; this is true even though the actual commander is in the same geographical area and his absence from his headquarters was temporary.[248] Thus, in *United States v. Murray*[249] the regular commanding officer departed from the area and the executive officer made a formal assumption of command. The latter then departed from the organization, although he was in the same geographical area, and told the next senior officer, CWO Mullahey, that "he was in charge and unless anything came up short of death, not to disturb me." Nothing was said about the authority to conduct searches in the unit billets. Based upon probable cause, Mr. Mullahey searched accused's room and found incriminating evidence. The Court of Military Appeals held that Mr. Mullahey was the temporary commander of the unit and thus authorized to order searches upon probable cause. An Army Board of Review held a first sergeant to be a temporary commander of an element of the company left in his charge by the company commander when the company officers and most of the members of a unit had gone to another place. Even though there was no express delegation of authority by the commander, the first sergeant was authorized to give permission for a search of accused, who was under his "command."[250]

Although both cases predate the *Murray* case, Army and Air Force Boards of Review have held that the legality of a unit duty officer or officer of the day to direct searches pursuant to his own inherent authority, absent any delegation, is at best questionable.[251] The Air Force Board pointed out that although an officer of the day exercises command functions, he does not take command as such during his tour of duty but exercises his command directly under the commanding officer.[252] It would appear that the reasoning behind these cases is basically sound and should still represent the law. A duty officer or officer of the day acts in the name of the commander and for him, generally under detailed, specific instructions. It does not seem probable that a commander would in fact consider that the appointing of such a functionary each day for a tour of duty of normally twelve to fifteen

[248] United States v. Murray, 12 USCMA 434, 31 CMR 20 (1961).

[249] *Supra* note 248.

[250] See CM 402568, Weston, 28 CMR 571 (1959).

[251] See CM 389786, Washington, 22 CMR 346 (1956); ACM 4351, Gosnell, 3 CMR 646 (1952).

[252] 3 CMR at 658–59.

hours was a change of command for that period of time. If it were so the commander would actually be in command less than the various subordinates appointed to represent him during normal non-duty hours.

The question of the authority of a duty officer to conduct a search by force of "custom" will be discussed below.

The rationale of the cases from the Boards of Review concerning duty officers collaterally introduces another area which recently has been open to some question, that of delegation of authority. Paragraph 152, MCM, 1951, specifically provides, "The commanding officer may delegate the general authority to order searches to persons of his command." The Court of Military Appeals gave judicial recognition of this authority in *United States v. Doyle*[253] in 1952, and over the years Boards of Review in all three services have specifically or by necessary implication accepted the validity of the statement without question,[254] except where the propriety of the specific delegation was questioned.[255] In *United States v. Ness*[256] the majority of the Court, noting that there was testimony that the commander had delegated authority to order searches to the provost marshal, observed:

> There may be a substantial question as to the propriety of a blanket delegation of authority to order searches to a police officer such as the provost marshal. The fundamental idea behind the requirement that there be authorization to search separate from that of a police officer is that the official to whom the request is made brings "judicial" rather than a "police" attitude to the examination of the operative facts. Johnson v. United States, 333 US 10, 92 L ed 436, 68 S Ct 367 (1948) . . . .[257]

In his dissenting opinion, Judge Ferguson stated:

> . . . I am of the view that there can be no lawful delegation of the authority to order a search and seizure. The power to authorize such acts is purely judicial and must, therefore, be personally exercised by the commander, the Manual for Courts-Martial, United States, 1951, paragraph 152, to the contrary notwithstanding.[258]

To justify his contention Judge Ferguson then cites *Johnson v. United States*.[259] It can easily be seen, then, that the temper of the Court is such that if the power to search can be delegated,

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[253] 1 USCMA 545, 4 CMR 137 (1952).
[254] See CM 389786,Washington, 22 CMR 346 (1956); NCM 129, Boone, 4 CMR 442 (1952); ACM 4351, Gosnell, 3 CMR 646 (1952).
[255] See ACM S-19729, Jones, 31 CMR 540 (1961).
[256] 13 USCMA 18, 32 CMR 18 (1962).
[257] *Id.* at 20 n.1, 32 CMR at 20 n.1.
[258] *Id.* at 25–6, 32 CMR at 25–6.
[259] *I.e.*, that portion quoted in note 138 *supra*.

which a majority appears to be disposed to permit, the delegation must be made with discretion and must be to such person or persons as can fulfill the judicial aspect of the decision.

The Court of Military Appeals' interest in the commander's right to delegate his power to authorize searches is only one manifestation of their interest in the "judicial" aspect of his power. As previously noted, the authority of the commander to authorize a search has always been considered to be the military equivalent to a search warrant. Since *United States v. Brown*,[260] where it was held that the commanding officer had to have probable cause before he could search, the Court of Military Appeals, in reaching its decision in construing a commander-authorized search, has always consulted and followed the civilian federal cases dealing with search warrants.[261] In *United States v. Ness*[262] it was recognized that, like in a civilian federal court, the accused had a right to go behind the facts presented to the magistrate, or the person authorizing the search in the military, to ascertain their truthfulness and that false facts given by the person requesting the authorization would vitiate the grant of permission,[263] that an informant's information could provide probable cause,[264] and that if an informant provided the basis for the probable cause, the accused could force the identification of that person if the identity was relevant and helpful to the defense of the accused or was essential to a fair determination of the case.[265] It was held in *Ness*, as well as in *United States v. Davenport*,[266] that the probable cause, to be effective, must be presented to the commanding officer before he may validly authorize a search, and that absent such a demonstration he can not lawfully permit the search.[267]

In view of the obvious trend of the Court of Military Appeals to tighten the requirements of a commander-authorized search,

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[260] 10 USCMA 482, 28 CMR 48 (1959).

[261] For a complete discussion of the civilian cases see pp. 21–27 *supra*.

[262] 13 USCMA 18, 32 CMR 18 (1962).

[263] Citing King v. United States, 282 F.2d 398, 400 n.4 (4th Cir. 1960).

[264] Citing Jones v. United States, 362 U.S. 257 (1960). See notes 111–21, *supra*, and accompanying text.

[265] Citing Roviaro v. United States, 353 U.S. 53 (1957). But in *Ness*, the majority sustained the denial of the request for the identity of the informant based on the facts therein. Where the petitioner does not indicate how testimony of informant could establish innocence, denial of petition to reveal name of informant is not error. Rugendorf v. United States, 376 U.S. 528 (Feb. 27, 1964).

[266] 14 USCMA 152, 33 CMR 364 (1963).

[267] Citing, *e.g.*, Jones v. United States, 362 U.S. 257 (1960); Nathanson v. United States, 290 U.S. 41 (1933). See notes 125–27 *supra*, and accompanying text.

it would appear that the measure of what constitutes authorization must be examined. In *United States v. DeLeo*[268] it was said that a commanding officer had authorized a search by implication where he knew of and did not object to it after having previously participated in an earlier course of action by the investigator which led to the search. The Court pointed out that while the consent of an accused is not to be inferred readily, that of a commander involves different considerations. The commander, who normally stands in a "distinctly superior" military position to the investigator could not be deemed to be subject to coercive influence by that investigator.

It is submitted that if the same fact situation were presented today the Court would not be so willing to adopt such a casual approach to a determination that the search was authorized by the commander. Rather, it would appear that consistency would require following the guidelines set forth in the analysis in a more recent Board of Review opinion which pointed out:

> . . . If a law enforcement officer's search of another's personal effects is to be warranted by a discretionary command authorization, the person whose authorization is invoked must have been made aware of the purpose and object of the proposed search and of the reasons for it. Where the claimed authorization stems from one who merely stands by and unwittingly acquiesces in ignorance of and with a total lack of curiosity about what is going on, the authorization would appear to be no more than an empty gesture, devoid of substance. If that would meet the requirement, the rule that the military police must first obtain a commander's authorization to make a search would be reduced to a matter of form. In order to make a command authorization for a search the military equivalent of a search warrant under civilian practice, we think that the authorization, no matter how informal it may be, should be bottomed upon intelligent evaluation of the information supporting the request, and a determination that the proposed search is reasonable.[269]

6. *By "Custom," and "Other Reasonable Searches."*

An examination of the military cases on searches reveals that not all of those approved can be fitted into the five specifically listed and previously discussed categories. Paragraph 152, MCM, 1951, recognizes that the list of authorized searches " . . . is not intended to preclude the legality of searches made by military personnel when made in accordance with military custom." But there are also instances where the searches cannot be fitted into "custom" so a category of "other reasonable searches" has grown

[268] 5 USCMA 148, 17 CMR 148 (1954) (dictum).

[269] CM 401337, Waller, 28 CMR 484, 489 (1959), *aff'd*, 11 USCMA 295, 29 CMR 111 (1960).

up. Both will be examined to determine if any conclusions as to contemporary guidelines and limitations can be drawn as to these miscellaneous types of searches.

a. By custom.

Based upon the definition of "custom" given in paragraph 213*a*, MCM, 1951, it has been held that an Air Force officer of the day was not authorized by custom to conduct a search,[270] but in the Navy it was found that by regulations and custom the executive officer of a ship, charged with primary responsibility for the good order and discipline of the command, had "inherent power" to authorize shipboard searches, absent any delegation of power from the Captain.[271]

The Court of Military Appeals held in *United States v. Doyle*[272] that a master-at-arms of a ship, who is traditionally the disciplinary representative of the commanding officer, had authority to search based upon probable cause. Although the Court refused to find any inherent right in the master-at-arms, it found that under the circumstances the search was, according to existing military and naval law, reasonable and hence lawful. Armed as he was with an eye witness report, the inability of the master-at-arms to take prompt action would have seriously impaired his duties in regard to the enforcement of laws and regulations.

In *United States v. Rhodes*[273] the Court upheld a search of military property found to be "safely within the ambit of the direct responsibility" of the staff officer who conducted the search. The search was based on probable cause, restricted in scope, purpose, and physical area and was found, therefore, under all the circumstances, "including the exigencies of the military service," to be reasonable. The Court, however, cautioned that they were not intending to lay down a general rule that any military person possessed inherent authority to search the effects of anyone who was his subordinate, and noted: "In this field of law, as in so many others, general propositions are apt to be illusory—for the question in each case depends so completely on the setting in which it is found."[274]

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[270] ACM 4351, Gosnell, 3 CMR 646 (1952).

[271] WC NCM 60–00185, McCulloch, 29 CMR 676 (1960).

[272] 1 USCMA 545, 4 CMR 137 (1952).

[273] 3 USCMA 73, 11 CMR 73 (1953).

[274] *Id.* at 75, 11 CMR at 75.

It is submitted that the field of searches authorized by custom should be viewed with caution.[275] In the past ten years the Court of Military Appeals has not sustained a single search, as distinguished from an inspection, on the basis of custom. To the contrary, their opinions as examined *supra*, demonstrate a growing awareness of and reliance on the strict civilian rules, and strictly military searches like those which are commander-authorized have been specifically related to civilian rules governing search warrants. In view of the tenor of their recent cases it does not appear that custom has a place in the balancing of the constitutional guarantee of the right of privacy and permissible law enforcement tactics.

b. Other reasonable searches.

An examination of the three cases chosen to illustrate "other reasonable searches" reveals that in each the facts appear to be similar to the facts in cases decided under one or more of the specific categories listed in paragraph 152, MCM, 1951, and discussed, *supra*. None of them, however, was decided on that basis, but each was upheld on the same simple ground that under the circumstances the action taken was reasonable. In each case it can also be argued that there was not in fact a "search."

In *United States v. Bolling*[276] the *seizure* by a first sergeant of an unmarked duffel bag, which was believed upon good grounds to contain marijuana, found in a common area of the unit, visible to an easily obtainable by anyone who passed by, was held reasonable and proper. The possession of the drug is presumed to be wrongful and it could have been removed and concealed by anyone if the first sergeant had taken time to seek permission elsewhere to take action.[277] The subsequent act of a military policeman in searching the bag for more marijuana was held to be reasonable since the search was narrowed to a specific purpose. The discovery of letters therein identifying the owner was only incidental.

In *United States v. Summers*[278] there had been a series of breakins at the post exchange and several weapons had been stolen.

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[275] WC NCM 60-00185, McCulloch, 29 CMR 676 (1960), to the contrary notwithstanding. For a discussion of McCulloch, see note 271 *supra*, and accompanying text.

[276] 10 USCMA 82, 27 CMR 156 (1958).

[277] Here the action is similar to a search based on the necessity for immediate action to prevent removal. Also it could be said that this portion was not a search at all, just a seizure of contraband in plain sight.

[278] 13 USCMA 573, 33 CMR 105 (1963).

On the occasion in question the military police observed two people in a parked car near the post exchange at 1:30 A.M. The Court held lawful the actions of the police in apprehending the men and searching the car *after* they had first required the men to get out of the car and identify themselves and *after* the police had leaned inside the car to look around and had seen a partially concealed weapon.[279] There was no probable cause to apprehend and search prior to the discovery of the weapon.[280] This case, while analogous to a search incident to arrest, would appear to extend that doctrine to the right of an officer to detain and require identification of a person observed under suspicious circumstances even though no probable cause to arrest is present. There is still an element of probable cause present, but the circumstances are such that arrest is not justified, yet some degree of police investigation should be permitted.[281]

In *United States v. Conlon*[282] Air Force investigators were called to an off-post garage in the United States by city police who had responded to the request of one holding herself out to be the owner of the garage to shut off a burglar alarm. Through the open door the investigators saw goods which appeared to be military property. The woman demanded that all of the goods be removed from her garage and threatened to throw them out if they were not removed. The investigators then entered and

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[279] Ferguson, J., in his concurring opinion in *Summers* pointed out that in his opinion the actions of the police officers prior to the apprehension did not amount to a search at all. Their action consisted of looking at things in plain sight. See *id.* at 578–79, 33 CMR 110–11.

[280] The majority opinion pointed out that in judging the right of an individual to be free from police interference, the police have to be given "fair leeway" in enforcing the law. Thus, when a person is discovered at a place and under circumstances indicating that he is not going about his legitimate business, the police have the right and duty to investigate. If it is in an area where serious offenses have been committed, and the circumstances are such that the person's presence can be described as a "police hazard," the person can be required to identify himself. Such an inquiry cannot be limited to an inspection of identification documents, especially where the recent crimes which prompt the investigation involve the theft of weapons. Under such circumstances "patting down" of the person would be permitted. The car could also be patted down or looked into even if that involved leaning inside to see better. Such action is reasonable since a car is a likely place for weapons to be concealed.

[281] See Leagre, *The Fourth Amendment and the Law of Arrest*, 54 J. CRIM. L., C. & P.S. 393 (1963), for a discussion of the Uniform Arrest Act which purports to give authority to peace officers to stop, question, and if necessary, detain for two hours, any person "abroad"and to search them incident to such detention, all upon a belief less than that traditionally required for arrest. Compare N.Y. CODE CRIM. PROC. §§ 154a, 180a (new "Stop and Frisk" law).

[282] 14 USCMA 84, 33 CMR 296 (1963).

searched containers not established to have been seen from outside of the door. They discovered items of government property which were the basis of a charge of larceny against the accused. At the trial it was established that the garage was the property of the accused, not the woman.[283]

The Court held the actions of the investigators to be reasonable,[284] pointing to the fact that the woman's actions were those of a private individual. There was no evidence that any of those concerned with the discovery and seizure of the property had any information that the property had been stolen, or that the "search and seizure" was for the purpose of obtaining evidence against the accused or any other person since the fact that it was stolen became known only after the property had been found and taken into government possession.[285] Further, since military agents had lawfully gained knowledge that an unusually large quantity of government property was located on premises where a woman claiming and apparently in lawful possession was about to discard them, it was reasonable, if not obligatory, for the property to be taken into government custody if for no other reason than for safeguarding.[286]

If any cohesive factor can be found in this miscellanea, it is that in cases where it is doubtful whether there was in fact a search, the Court of Military Appeals, while willing to label the actions as searches, has weighed them for their basic compliance or noncompliance with constitutional standards and has taken action accordingly even though the facts would not fit into one of the express categories.

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[283] Compare the authorization relied upon here with the question of authorization given by a wife, note 229 *supra*, and accompanying text; and that given by a landlord, Chapman v. United States, 365 U.S. 610 (1961). With regard to the latter, see also the dissent of Ferguson, J., in *Conlon*.

[284] Judge Ferguson dissenting on the ground that while there was probable cause, a search based upon probable cause alone is not necessarily reasonable if there is no legal authorization for the action such as a search warrant. Compare Judge Ferguson's dissent with the analysis of "reasonable" and "probable cause," and the distinction of "reasonable" in military and civilian courts contained at pp. 15–21 *supra*.

[285] Each of the facts listed by the Court militates against the action being a search. Compare with the analysis of what is a search contained at pp. 7–9 *supra*.

[286] The fact that government property was being recovered allows agents more leeway in the scope of their actions. See, *e.g.*, Davis v. United States, 328 U.S. 582 (1946); United States v. Sellers, 12 USCMA 262, 30 CMR 262 (1961).

IV. SEIZURES

Neither the UCMJ nor the MCM, 1951, makes a provision as to what evidence may be seized, and there is an unfortunate predilection on the part of the judiciary, both civilian and military, to use the terms "search and seizure" together in an indiscriminate manner. Most certainly they are related and many times follow one after the other; however, it is imperative to remember that many combinations of possibilities are present. There can be a search which does not result in a seizure, a seizure without a search,[287] a valid search in which there is an illegal seizure,[288] a seizure which would be proper but for the fact that it was made during an illegal search,[289] and a legal search during which there was a lawful seizure.[290]

If a seizure is made during a search, the first inquiry that must be made is to the validity of the search. No matter what the nature of the seized item or however permissible it would have been to have seized it during a lawful search, it is inadmissible if the search was not proper.[291] If evidence is seized during a search, both the search and the seizure must be legal before it will be admissible.

The main purpose of the right of seizure is to obtain items from an accused which he could not be forced by subpoena to deliver because such action would violate his Fifth Amendment right against compulsory self-incrimination.[292] Not every item which is properly inspectable by the government during a lawful search, however, is seizable, no matter how proper the search that discovered it.[293] The roots of the philosophy that certain classes of property are not subject to seizure can be traced back to English law predating America's independence, a fact that the Supreme Court fully explained the first time it had occasion to consider the problem. In that case, *Boyd v. United States*,[294] the Court observed:

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[287] See United States v. Bolling, 10 USCMA 82, 27 CMR 156 (1958).

[288] See United States v. Higgins, 6 USCMA 308, 20 CMR 24 (1955).

[289] See United States v. Jeffers, 342 U.S. 48 (1951).

[290] See Harris v. United States, 331 U.S. 145 (1947).

[291] Abel v. United States, 362 U.S. 217, 234 (1960) (dictum).

[292] See United States v. Marrelli, 4 USCMA 276, 15 CMR 276 (1954).

[293] See Abel v. United States, 362 U.S. 217 (1960); United States v. Higgins, 6 USCMA 308, 20 CMR 24 (1955).

[294] 116 U.S. 616 (1886). *Boyd* did not actually involve a search. The case construed, and held unconstitutional, a statute which permitted the Government to demand certain records in a quasi-criminal case, and if they were refused the allegations of their contents contained in the demand were ac-

> The "unreasonable searches and seizures" condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned by the Fifth Amendment; and compelling a man "in a criminal case to be a witness against himself," which is condemned in the Fifth Amendment, throws light on the question as to what is a "unreasonable search and seizure" within the meaning of the Fourth Amendment. *And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself.* [Emphasis added.][295]

It was recognized in *Boyd,* and has been consistently reiterated since that time, that were it not for the Fifth Amendment protection, a man's private books and papers would be among the most potent evidence that could be brought against him.[296]

A. *WHAT IS SUBJECT TO SEIZURE?*

Over the years the concept of what could be seized and used in evidence developed slowly until now they may be categorized as (1) the fruits of the crime, (2) the instrumentalities, tools, or means by which the crime was committed, (3) property the possession of which is a crime—contraband, and (4) weapons or means by which escape might be effected, if the search is incident to apprehension.[297] Each of the four mentioned classifications is seizable, but a man's private property that is describable as " 'mere evidentiary' materials"[298] is not. The difficult problems normally arise in determining whether an item is an "instrumentality" or "mere evidence." A factual examination is vital to an understanding of the distinctions between and the meaning of each category of seizable items and those things which are not seizable, for as the Court of Military Appeals has observed, the boundary lines "are not clear, but are shadowy, indistinct, and elusive indeed."[299] Courts, both military and civilian, have demonstrated that unless

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cepted in evidence as true. The Court compared this to forcing a man to give evidence against himself in violation of the Fifth Amendment or to a seizure under the Fourth Amendment.

[295] *Id.* at 633.

[296] See *e.g.*, Gouled v. United States, 255 U.S. 298 (1921); United States v. Vierra, 14 USCMA 48, 33 CMR 260 (1963).

[297] See Harris v. United States, 331 U.S. 145 (1947); CM 401550, Starks, 28 CMR 476, *pet. denied,* 11 USCMA 769, 28 CMR 414 (1959). See also FED. R. CRIM. P. 41(b).

[298] United States v. Vierra, 14 USCMA 48, 52, 33 CMR 260, 264 (1963).

[299] United States v. Rhodes, 3 USCMA 73, 75, 11 CMR 73, 75 (1953).

care is used in analyzing and applying these terms, confusion and erroneous results will be reached.[300]

1. *Fruits of the Crime.*

Incident to a lawful search fruits of the crime can be seized and used in evidence. The phrase "fruits of the crime" is self explanatory. The best example of goods of this nature is the property which is stolen in a larceny case[301] or government property wrongfully in the hands of the accused.[302]

2. *Contraband—Property the Mere Possession of Which is Illegal.*

Certain property, usually designated contraband, is illegal to possess and may be seized incident to a lawful search and used in evidence. The two classes most frequently found are narcotics and untaxed liquor. Since their very possession is wrongful the government is entitled to possession even if the search is illegal and the items could not be introduced into evidence in a criminal trial.[303]

3. *Weapons or Means of Escape.*

Weapons or means of escape may be seized and used in evidence if obtained during a lawful search incident to a legal arrest. Seizure of items which fit into this category is justified by the necessity of protecting the arresting officer or the person in whose custody the accused is placed, and in insuring that he stays in custody once he has been captured.[304]

No reported case, federal or military, has been found which holds that "mere evidence" can be seized *from the person* of one searched incident to a lawful arrest and thereafter used in evi-

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[300] See CM 401837, Waller, 28 CMR 484 (1959), *aff'd*, 11 USCMA 295, 29 CMR 111 (1960); ACM 13959, Rhodes, 24 CMR 776 (1957). In the *Waller* case, *supra*, the Board of Review refers to several civilian federal cases where the courts misuse or misunderstand the terms and refer to "instrumentalities" as "proofs" and "evidences" of crime. In the *Rhodes* case, *supra*, an Air Force Board of Review showed itself to be laboring under a similar misapprehension when they stated that any evidence which would tend to corroborate the testimony of the alleged victim would be tools of the crime and would further tend to show to some degree the mental attitude of the accused and clarify what might otherwise be equivocal actions.

[301] Harris v. United States, 331 U.S. 145 (1947).

[302] See United States v. Sellers, 12 USCMA 262, 30 CMR 262 (1961). Compare Davis v. United States, 328 U.S. 582 (1946).

[303] See Jones v. United States, 362 U.S. 257 (1960).

[304] United States v. Rabinowitz, 339 U.S. 56, 72 (1950) (Frankfurter, J., dissenting).

dence; however, it has been suggested that such an exception to the general rule exists.[305] The contention is based upon the "plenary" power to divest a person arrested of anything whatsoever found on his person. Support for this position can be found in the dissenting opinion in *United States v. Rabinowitz*[306] where it is stated that one of the purposes of searching incident to arrest is to prevent evidence from being destroyed. Further, in *Kremen v. United States*,[307] a case involving a search incident to arrest, the Court said:

> The seizure of the entire contents of the house and its removal some two hundred miles away to the F.B.I. offices for the purpose of examination are beyond the sanction of any of our cases. While the evidence seized from the persons of the petitioners *might* have been legally admissible . . . . [Emphasis added.][308]

It must be noted, however, that the Court did not discuss what was seized from the persons, or within what category the items seized would have fallen. Some additional support may be gained from the general statement of Mr. Justice Murphy in his dissent in *Harris v. United States*[309] that: "Seizure may be made of articles and papers on the person of the one arrested. And the arresting officer is free to look around and seize those fruits and evidences of crime which are in plain sight and in his immediate and discernible presence." It should be pointed out, however, that this was being written in an attempt to narrow rather than enlarge the right to search incident to arrest. On the other hand the Supreme Court in *Agnello v. United States*[310] pointed out:

> The right without a search warrant contemporaneously to search persons lawfully arrested . . . and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted.[311]

In *Harris v. United States*,[312] the majority opinion, after quoting the above passage from *Agnello*, said:

> This Court has frequently recognized the distinction between merely evidentiary materials, on the one hand, which may not be seized either under the authority of a search warrant *or during the course of a search*

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[305] See U.S. DEP'T OF ARMY, PAMPHLET NO. 27–172, MILITARY JUSTICE—EVIDENCE 363 (1962).
[306] 339 U.S. 56, 72 (1950) (Frankfurter, J., dissenting).
[307] 353 U.S. 346 (1957).
[308] *Id.* at 347.
[309] 331 U.S. 145, 186 (1947).
[310] 269 U.S. 20 (1925).
[311] *Id.* at 30.
[312] 331 U.S. 145 (1947).

> *incident to arrest*, and on the other hand, those objects which may validly be seized including the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the person arrested might be effected, and property the possession of which is a crime. [Emphasis added.][313]

It would appear, therefore, that only items falling in the four categories previously listed are seizable from the person incident to arrest.

4. *Instrumentalities of the Crime.*

Instrumentalities of the crime may be seized incident to a lawful search and used in evidence. The courts have been quite liberal in holding that seized items constituted instrumentalities, tools, or means by which crime was committed, rather than "mere evidence." Not only have they held such obvious items as worthless checks redeemed by the accused in a larceny by check prosecution,[314] burglar tools and gambling paraphernalia,[315] and forged birth certificates and coded messages being used in espionage[316] to be instrumentalities of the crime, but they have also included such things as a diary in which illegal black market dealings were noted,[317] sample tracings of the victim's signature in a forgery case,[318] a letter from the accused to a confederate directing disposal of the stolen property,[319] and a ledger containing such bookkeeping as light and water bills of a speakeasy.[320] No real problem exists in making the identification if the item sought to be qualified as an instrumentality, tool, or means is a knife or gun used in an assault or homicide. However, when the property consists of such things as documents, books, records, accounts, and letters, the shadowy boundary of which the courts speak becomes painfully evident in attempting to determine their classification. It may generally be stated, however, that if the item can be characterized as necessary[321] or at least convenient[322] to the illegal operation, it will be held to be an instrumentality.

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[313] *Id.* at 154.

[314] United States v. Marrelli, 4 USCMA 276, 15 CMR 276 (1954).

[315] United States v. Lefkowitz, 285 U.S. 452 (1932).

[316] Abel v. United States, 362 U.S. 217 (1960).

[317] United States v. Rhodes, 3 USCMA 73, 11 CMR 73 (1953).

[318] *Cf.* United States v. DeLeo, 5 USCMA 148, 17 CMR 148 (1954).

[319] *Cf.* CM 401550, Starks, 28 CMR 476, *pet. denied*, 11 USCMA 769, 28 CMR 414 (1959).

[320] Marron v. United States, 275 U.S. 192 (1927).

[321] See Foley v. United States, 64 F.2d 1 (5th Cir.), *cert. denied*, 289 U.S. 762 (1933); Landau v. United States Atty., 82 F.2d 285 (2d Cir.), *cert. denied*, 298 U.S. 665 (1936).

[322] See Marron v. United States, 275 U.S. 192 (1927).

5. *Private Property which is Mere Evidence.*

Contrasted with what may be seized and admitted in evidence at trial, the following are examples of what have been held to constitute only evidence or indicia of the crime: documents which show an intent to attempt to violate export laws, but which are not the documents by which such an attempt was to be made;[323] letters and envelopes in which shipments of herbs from various parts of the United States were mentioned, in a prosecution for illegally importing herbs and medicinals from Communist China;[324] a note written by an accused to his wife after a larceny in which he told her the use to which he planned to put the money after his release from jail;[325] and a card advertising a coffee house which contained the signature "James V. Sinclair" on the back which was seized in an investigation of forgery of checks through the use of that name. There the card was held not to be a false document used for identification when cashing the checks but only evidence which would support a conviction.[326] In addition to cases involving documents, it has been said that an accused's blood-stained trousers and underwear in a rape case constituted no more than mere evidence.[327]

Generally then, the distinction seems to be that if the item is directly and closely related to the crime and was itself necessary to the commission of the crime or in a positive manner aided its commission, it will be classified as a means of commission of that offense. If it is only collateral in its relationship to the act charged, it would constitute only mere evidence. As such it would be inadmissible if it is the private property of the accused.

6. *Required Records and Records in the Hands of Custodians.*

Some recognition has been given to a so-called "required records exception" which appears to fall between those things which are normally considered to be seizable and those private books, papers, and documents which have been considered to be merely evidentiary. This exception purports to separate those things which though kept by an individual might be called public or quasi-public records as distinguished from normal business

[323] Takahashi v. United States, 143 F.2d 118 (9th Cir. 1944).

[324] *Cf.* Woo Lai Chun v. United States, 274 F.2d 708 (9th Cir. 1960).

[325] United States v. Higgins, 6 USCMA 308, 20 CMR 24 (1955).

[326] United States v. Vierra, 14 USCMA 48, 33 CMR 260 (1963).

[327] See CM 401337, Waller, 28 CMR 484 (1959), *aff'd*, 11 USCMA 295, 29 CMR 111 (1960).

records. In *United States v. Clancy*,[328] a trial for attempting to evade federal wagering taxes, the books, ledgers, bills, and records reflecting the transactions carried on in the course of a taxable wagering activity were held admissible. They were found to be not only the means by which the business was run and the tax evaded, but to be records required to be kept by law. As such they could not be considered to be private records. They were open to government inspection, and could thus be characterized as quasi-public records. They were, therefore, seizable during a lawful search.

Although the doctrine has not been widely utilized by civilian courts [329] a similar theory exists in the military insofar as the right to order production of or to search for and seize records of funds in the hands of a custodian of any military or non-appropriated fund, which he holds in a purely representative capacity[330] is concerned.

B. *LIMITATIONS UPON THE PERMISSIBLE EXTENT OF SEIZURES*

The limitations upon the permissible extent of seizures closely parallel the rules forbidding general exploratory searches discussed earlier.[331] Generally only items directly connected with the crime upon which the search is predicated can be seized. If in the course of a valid search, however, other items which are classified as seizable, are discovered, they may be seized even though they were not directly connected with the crime being investigated. This is true even though the original purpose of the search did not relate to them and even though the person conducting the search did not know that such property was on the premises when the search was initiated.[332]

The improper seizure of a few minor items which are not used against an accused will not taint the proceedings and make an otherwise reasonable search and seizure unlawful,[333] but where

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[328] 276 F.2d 617 (7th Cir. 1960) (alternative holding), *rev'd on other grounds*, 365 U.S. 312 (1961).

[329] See Annot. 79 A.L.R.2d 1005 (1961).

[330] See United States v. Sellers, 12 USCMA 262, 30 CMR 262 (1961).

[331] Thus general exploratory searches are usually denounced in terms of *seizure*. See notes 89–94, *supra*, and accompanying text.

[332] See notes 180–86, *supra*, and accompanying text. But see note 128, *supra*, and accompanying text for the limitation of what may be seized where the sole authority is a search warrant.

[333] United States v. Ross, 13 USCMA 432, 32 CMR 432 (1963).

there is a wholesale seizure a different rule would seem to apply. In *Kremen v. United States* [334] after an apparently lawful search incident to an arrest the entire contents of a house were seized and removed to an FBI office some two hundred miles away for the purpose of examination. The introduction of some of the items into evidence caused the Supreme Court to reverse per curiam without mentioning the nature of the items introduced or whether they would have been admissible had only properly seizable property been taken.

V. EVIDENTIARY CONSIDERATIONS

A. *EXCLUSION OF EVIDENCE*

At common law the admissibility of evidence was not affected by the illegality of the means by which it was obtained. In the absence of any constitutional, statutory, or judicial prohibition that rule still holds true.[335]

Paragraph 152, MCM, 1951, provides in part:

> Evidence is inadmissible against the accused if it was obtained as a result of an unlawful search of his property conducted or instigated by persons acting under authority of the United States . . . . All evidence obtained through information supplied by such illegally obtained evidence is likewise inadmissible. . . .

This prohibition contains two separate, although interrelated rules. The first, normally referred to as "the exclusionary rule" deals with evidence originally obtained through an illegal search; the second, known as "the fruit of the poison tree doctrine," excludes evidence discovered as a result of the use of evidence which would have itself been inadmissible because of the exclusionary rule.

One caveat which must be noted in the provisions of the quoted portion of paragraph 152, MCM, 1951, is in that portion which speaks of searches by persons "acting under authority of the United States." Since *Elkins v. United States* [336] products of unlawful searches by state or local officials in the United States are likewise inadmissible in federal civilian courts, and there can be little doubt that the same rule will be adopted by the Court of Military Appeals when such a case comes before it.[337]

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[334] 353 U.S. 346 (1957).

[335] See Olmstead v. United States, 277 U.S. 438 (1928).

[336] 364 U.S. 206 (1960).

[337] See pp. 9–12 *supra*, for a full analysis of the authority under which a search is conducted as it effects admissibility.

1. *The Exclusionary Rule.*

That portion of paragraph 152, MCM, 1951, *supra*, dealing with the exclusionary rule is derived from similar principles existing in federal civilian courts.[338] The exclusionary rule was introduced by the Supreme Court in 1914 in *Weeks v. United States* [339] for the purpose of effective implementation of the fundamental constitutional guarantees of the Fourth Amendment with regard to the sanctity of the home and inviolability of the person, to which they had given judicial recognition in 1886 in the decision of *Boyd v. United States*.[340]

2. *Fruit of Poison Tree Doctrine.*

The fruit of the poison tree doctrine extends the prohibition to the indirect as well as the direct products of an unwarranted search and seizure. Such evidence must be excluded whether it be in the nature of a confession,[341] real evidence such as the result of a laboratory test on urine in a narcotics case,[342] or the testimony of a witness whose identity was discovered as a direct consequence of the illegal search.[343]

The doctrine had its birth in *Silverthorne Lumber Co. v. United States*,[344] where the Government, admitting that it had illegally seized the property in question, maintained that it had the right to study the evidence, copy it, and then after its return to use the information thus gained to call upon the owners in a more regular manner to produce the same documents. Mr. Justice Holmes, speaking for the Court, disposed of the contention when he said:

> The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court, but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed.[345]

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[338] United States v. Dupree, 1 USCMA 865, 5 CMR 93 (1952).

[339] 232 U.S. 383 (1914).

[340] 116 U.S. 616 (1886). In the *Weeks* case, *supra* note 339, the Court said at 393: "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution."

[341] ACM 11930, Allen, 21 CMR 897 (1956).

[342] ACM 15962, Williams, 28 CMR 736 (1959).

[343] CM 354324, Heck, 6 CMR 223 (1952).

[344] 251 U.S. 385 (1920).

[345] *Id.* at 392.

The latest thorough statement by the Supreme Court of the scope of the evidence protected by the rule was in the 1963 case of *Wong Sun v. United States*.[346] The Court examined the prior authorities and concluded that both physical, tangible materials and testimony as to matters observed during an unlawful invasion have traditionally been barred from evidence. Likewise, verbal evidence by an accused which derives so immediately from the unwarranted invasion is no less the fruit of official misconduct than the more common tangible fruits of such action, since the policy underlying the exclusion of such evidence does not invite any logical distinction between physical and verbal evidence.

As the Court noted in *Silverthorne* the fact that there was at sometime in the past an illegal search in which some of the evidence was discovered does not mean that that evidence is forever lost to the Government. If the Government learns of the evidence from an "independent source,"[347] or if the connection between the lawless conduct of the Government agents and the discovery of the challenged evidence has "become so attenuated as to dissipate the taint,"[348] the evidence will be admissible.

Thus in *United States v. Ball*[349] criminal investigators staked out at a railway station with instructions to apprehend whoever removed a suitcase from a certain baggage locker, unlawfully opened the locker, examined its contents prior to its being claimed, discovered stolen goods, and then returned the bag to the locker and apprehended the accused when he subsequently opened the locker. The Court of Military Appeals held that the contents of the suitcase, which were seized incident to the apprehension, were admissible. The apprehension and subsequent search and seizure were based upon evidence known prior to and independently of the illegal search and were not the product of the illegal search.

In *Wong Sun v. United States*,[350] the Supreme Court expressed the test as follows:

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegal-

[346] 371 U.S. 471 (1963).

[347] Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

[348] *Cf.* Nardone v. United States, 308 U.S. 338, 341 (1939).

[349] 8 USCMA 25, 23 CMR 249 (1957).

[350] 371 U.S. 471, 487–8 (1963).

ity or instead by means sufficiently distinguishable to be purged of the primary taint."

In situations like *Ball* where the antecedent, independent grounds are readily apparent, no real problem is presented, but in cases where the distinction is not so clear there must be a factual determination [351] applying the tests mentioned above.

The question of a possible tainting of a confession by a prior illegal search or seizure is probably the most commonly encountered problem. It has been suggested that there are two ways that a confession can become tainted as the fruit of a prior illegal search.[352]

First, if the interrogation of the accused which resulted in a confession would not have occurred except as a result of information obtained during an illegal search, the confession will be the fruit. In *United States v. Ellwein* [353] the accused maintained that his confession resulted directly from the illegally obtained evidence (in this case an illegal wiretap rather than a search). The facts revealed that accused was apprehended through the use of an illegal wiretap while making an obscene phone call and that he thereafter confessed. The Court held that the confession was not tainted. The accused was not confronted by the illegally obtained evidence and there was testimony that the accused was a suspect prior to his apprehension and would have been interrogated eventually even had the illegal evidence not been obtained. *Ellwein* can readily be distinguished from *Ball* in that in the former there was no positive decision to interrogate a certain person prior to the actual illegality. Both cases, however, reached the same result—no taint—since in each there was evidence of record to support the trial court's factual determination that there was none. The Court of Military Appeals has given clear warning, however, that they will not hesitate to find error if from the circumstances portrayed in the record of trial as a whole it is apparent as a matter of law, the testimony of all the witnesses to the contrary notwithstanding, that the evidence obtained was the product of a prior illegal search.[354]

Second, even though the interrogation would have taken place if the illegal action had not occurred, the confession may neverthe-

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[351] See notes 412–420 *infra*, and accompanying text for discussion of factual determination at trial.

[352] See U.S. DEP'T OF ARMY, PAMPHLET NO. 27-172, MILITARY JUSTICE—EVIDENCE 379 (1962).

[353] 6 USCMA 25, 19 CMR 151 (1955).

[354] See United States v. Kauffman, 14 USCMA 283, 34 CMR 63 (1963).

less be tainted if the illegally obtained evidence was used to induce the confession, as in the case where accused's confession was secured upon his being confronted with the items seized during an unlawful search.[355] The fact that such evidence was obtained, however, does not necessarily mean that the subsequent confession is ipso facto tainted. If the accused was not confronted with the evidence,[356] even though he may know that the property is in the hands of the Government,[357] or if he sees the evidence in the hands of the interrogator at the beginning of the interrogation but it is not used as a lever,[358] or even if the interrogator mentions the evidence to him, if the evidence is not in itself particularly incriminating,[359] it may be determined that the confession was not the result of the obtaining of or displaying of such evidence. This is particularly so where the record shows the causal connection to be remote, or other motivating factors such as fear of the consequences of his act and his sense of guilt are present.[360]

3. *Involuntary Confessions and Prior Illegal Searches.*

Closely connected with the second ground in the previous section, *supra,* if the use by the interrogator or the knowledge by the accused of the illegally obtained evidence is such to overpower the will of the accused and deprive him of his freedom to elect to remain silent, the confession is inadmissible because it is involuntary.[361] A careful distinction must be drawn between the concept of tainting as applied to the fruit of the poison tree doctrine and this ground which goes further and requires more proof of a causal connection. As Judge Ferguson noted in his concurring opinion in *United States v. Spero:*[362]

> . . . When we speak of "tainting" in connection with the admission of confessions in evidence, a qualitative analysis of the circumstances must be made to determine if the circumstances surrounding the first statement rendered the questioned statement involuntary and hence inadmissible. This is to be distinguished from the "tainting" of evidence through illegal search and seizure where it must merely be shown that the evidence objected to is the product of the evidence that was illegally obtained.

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[355] See ACM 11930, Allen, 21 CMR 897 (1956).
[356] See United States v. Ellwein, 6 USCMA 25, 19 CMR 151 (1955).
[357] See United States v. Dutcher, 7 USCMA 439, 22 CMR 229 (1956).
[358] See CM 401337, Waller, 28 CMR 484 (1959), *aff'd,* 11 USCMA 295, 29 CMR 111 (1960).
[359] See ACM 16294, Martin, 28 CMR 822 (1959).
[360] See United States v. Waller, 11 USCMA 295, 29 CMR 111 (1960).
[361] See United States v. Askew, 14 USCMA 257, 34 CMR 37 (1963).
[362] 8 USCMA 110, 115, 23 CMR 334, 339 (1957).

The "qualitative analysis" spoken of with reference to involuntariness is that evidence from which it can be concluded that the use of the illegally obtained evidence caused the accused to be deprived of his right of free choice. The use of the illegally obtained evidence must in some way overcome his knowledge of his right to remain silent or it must be so closely connected with the confession that when it is used the accused did not possess thereafter the mental freedom to confess or deny.[363] It should be noted that although the defense may be unsuccessful in establishing that a confession is the product of an illegal search and thus inadmissible per se, it may still be established that the use of the fruits of the illegal search affected the voluntariness of the confession.

4. *Use of the Fruits of an Illegal Search for Impeachment of the Accused.*

The Supreme Court has held that when an accused testified to a certain fact on direct examination, the prosecution may use evidence obtained as a result of an illegal search for impeachment purposes. The Court reasoned that the exclusionary rule was not designed to allow the accused to lie with impunity. Since he raised the issue the prosecution has the right to explore it.[364] This exact point has never been decided in the military, but by way of analogy, a similar rule exists with regard to denying the right to invoke the marital privilege under similar circumstances, on the basis that public policy can not be perverted into a shield to cover untruths;[365] however, a statement which is obtained in violation of Article 31, UCMJ, is not admissible for impeachment purposes.[366] By Congressional mandate such a statement is inadmissible for all purposes.[367]

As will be seen in the following sections, the trend by the Court of Military Appeals is definitely towards treating the rule against the use of the products of illegal searches and seizures as violative of a constitutional norm rather than as an evidentiary rule based on policy decisions. It would appear, therefore, that the rationale which excludes statements obtained in violation of a person's right to remain silent, based as it is on a congressional enactment of the Fifth Amendment, is closer to the military concept of exclusion of the fruits of illegal searches than are the mere

[363] See United States v. Waller, 11 USCMA 295, 29 CMR 111 (1960).

[364] Walder v. United States, 347 U.S. 62 (1954).

[365] See United States v. Trudeau, 8 USCMA 22, 23 CMR 246 (1957).

[366] United States v. Pedersen, 2 USCMA 263, 8 CMR 63 (1953).

[367] See United States v. Price, 7 USCMA 590, 23 CMR 54 (1957).

policy considerations which are the basis of privileged communications. It is felt, therefore, that the Court of Military Appeals would not follow the Supreme Court but would forbid the use for any purpose of evidence gained through an illegal search or seizure.

5. *Evidence of Independent Crime Committed During Illegal Searches.*

In *United States v. Morrison* [368] the Court of Military Appeals held evidence of an independent crime committed during or immediately after an illegal search by the one subjected to such search to be admissible. The exclusionary rule has no application to an offense which is in no way dependent upon the evidence obtained as a result of the search, even though the subsequent crime would not have been committed but for the illegal acts of the Government agents. The reasons for barring testimony obtained as a result of an illegal search and seizure are to protect the individual in the enjoyment of his constitutional right and to bar the Government from benefitting from its own wrong. The Court weighed the competing policies and held that the means employed by the courts to give protection against unreasonable searches could not be extended to pardon an offender for subsequent and separate crimes.

6. *Nature of the Rule.*

In the first case in which the Court of Military Appeals had occasion to inquire into the exclusionary rule, *United States v. Dupree*,[369] the Court examined its background as reflected in federal court opinions, and, citing *Wolf v. Colorado*,[370] concluded that, "Although it was derived originally from the Fourth Amendment, it appears today that it is a rule of evidence, based primarily on the desirability of providing a means for enforcing the protections afforded by the Amendment." It would appear that at that time, both the reasoning and conclusion were correct. Later developments in the law have, however, cast doubt on the continuing validity of that position. That portion of *Wolf v. Colorado* which refused to extend the exclusionary rule to state trials has subsequently been overruled as has the "silver platter doctrine." Evidence obtained through an illegal search and seizure in violation of the Fourth (or Fourteenth) Amendment, whether by state, local, or federal officials, is not now admissible in either

[368] 10 USCMA 525, 28 CMR 91 (1959).

[369] 1 USCMA 665, 667, 5 CMR 93, 95 (1952).

[370] 338 U.S. 25 (1949).

federal or state courts.[371] As will be seen in the next section, *infra*, both the Supreme Court and the Court of Military Appeals have indicated doubt as to whether illegal searches and their fruits should be subject to the harmless error rule with violations tested for specific prejudice, or whether the constitutional protections violated require reversal on the ground of general prejudice. It should perhaps be noted parenthetically that violations of the Fifth Amendment right against self-incrimination, which in the military is codified into Article 31, UCMJ, are considered to be inherently prejudicial by the Court of Military Appeals. Such violations are reversed on general prejudice.[372] One need only to think back to the ringing words of the Supreme Court in *Boyd v. United States*[373] to see the view that the Court took in contrasting and comparing the Fourth and Fifth Amendments and in showing their intertwining of purposes. Recent decisions have done nothing to sap that analysis of its vitality.[374]

It is submitted that under the current philosophy of the Supreme Court the prohibition against the use in evidence of the products of unreasonable searches is one of constitutional rather than merely evidentiary law and should be treated accordingly.

B. *TESTS FOR AND THEORIES OF PREJUDICE*

Assuming that evidence which is the fruit of an illegal search is introduced at trial, consideration must be given to the result of such admission at trial and upon appellate review. Two problems are presented. First, it must be determined what test will be applied to weigh the prejudical effect of such evidence; and second, if the accused thereafter elects to testify, the treatment to be given such election.

1. *Test for Prejudice.*

In *United States v. Higgins*[375] the Court of Military Appeals applied the doctrine of specific prejudice to evidence which was illegally seized and refused to reverse in the face of compelling evidence. In reaching this result the Court cited as authority the Federal Court of Appeals case of *Woods v. United States*,[376] which stands for the same proposition. This same result was reached by

[371] See notes 41–48, 51–52 *supra*, and accompanying text.
[372] See United States v. Taylor, 5 USCMA 178, 17 CMR 178 (1953).
[373] See pp. 52–53 *supra*.
[374] See note 296 *supra*, and accompanying text.
[375] 6 USCMA 308, 20 CMR 24 (1955).
[376] 240 F.2d 37 (D.C. Cir. 1956).

the Court in *United States v. Justice* [377] and *United States v. Smith* [378] citing the *Higgins* and *Woods* cases. In the *Smith* case the Court also cited the Supreme Court case of *Kotteakos v. United States* [379] as authority for its decision, but in *Smith* the Court pointed out that the evidence "... was not a substantial factor in accused's conviction."[380] It would appear that there can be a difference in the harmless error rule which weighs for specific prejudice and a quantum of evidence that can be characterized as a "substantial factor;" however, the Court has given no standard of comparison. Of interest then is the language in the recent Supreme Court decision in *Fahy v. Connecticut* [381] which has not been cited in any reported military case, where the Court in examining the effect of an illegal search said, "The question is whether there is a reasonable possibility that the evidence complained of *might have contributed to the conviction.*" (Emphasis added.) The federal harmless error rule was set forth in *Kotteakos v. United States,*[382] which as noted *supra,* was cited by the Court of Military Appeals in the *Smith* case as authority for that holding, as: "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and judgment should stand...." The language in *Fahy* can be interpreted as either a paraphrase of the standard rule, or as indicating that the Supreme Court is moving away from the standard of harmless error as it is normally understood and is going to apply a modified version thereof in the realm of searches and seizures. The same conclusion can logically be understood from the "substantial factor" test of the Court of Military Appeals. Unfortunately neither Court has indicated wether they intend to continue to apply either the harmless error rule or a modification thereof. To the contrary, there is language in the most recent decisions of each Court on the subject that they are inviting tests upon the basis of general prejudice and may be willing to reverse based solely upon the erroneous admission of evidence of an illegal search. In *Fahy* the Supreme Court said:

> On the facts of this case, it is not now necessary for us to decide whether the erroneous admission of evidence obtained by an illegal search

[377] 13 USCMA 31, 32 CMR 31 (1962).
[378] 13 USCMA 553, 33 CMR 85 (1963).
[379] 328 U.S. 750 (1946).
[380] 13 USCMA 553, 564, 33 CMR 85, 96 (1963).
[381] 375 U.S. 85, 86-7 (1963).
[382] 328 U.S. 750, 764 (1946).

> and seizure can ever be subject to the normal rules of "harmless error" under the federal standard of what constitutes harmless error.[383]

In *United States v. Vierra*,[384] decided less than sixty days after the *Smith* case, the Court of Military Appeals apparently had second thoughts about "substantial factor" and while finding specific prejudice in the facts, said: ". . . it is not necessary that we consider the situation which might exist as to prejudice arising from the violation of a constitutional norm." The Court repeated substantially the same language in *United States v. Battista* [385] which they also reversed on specific prejudice. In *United States v. Kauffman* [386] the Court, while reversing on other grounds and finding that they did not have to go further "as to violations of constitutional rights," used the strongest of language to "condemn the illegal procedures" utilized in the searches therein involved. In both *Battista* and *Vierra* the Court cited *Kotteakos*, which as noted *supra*, they had cited as authority for their position in *Smith*. In *Kotteakos* the Court while defining the harmless error rule quoted *supra*, qualified its application by stating that it applied" . . . except perhaps where the departure is from a *constitutional norm* [19] or a specific command of Congress." (Emphasis added.)[387] In their footnote the Court noted that from receipt of illegal confessions (in violation of the Fifth Amendment) reversal flows even though there is clear evidence of guilt from the other evidence.

Although attempting to make prognostications[387a] as to the motives and trends of any appellate court is at best hazardous, it would appear that the language of *Vierra* and *Battista*, when contrasted with *Smith*, augurs well for the proposition that the Court will reverse *Smith* when the proper case for doing so is presented to them. Their request for such a case seems obvious. Their concern with general prejudice in this area would also appear to be another sign of a trend toward recognizing that the exclusionary rule and the fruit of the poison tree doctrine are rules of constitutional law rather than merely evidentiary in nature. As the Supreme Court pointed out in that part of *Kotteakos* quoted above, general prejudice is generally reserved for only the gravest

[383] 375 U.S. at 86. Compare Stoner v. California, 276 U.S. 483 (March 24, 1964).

[384] 14 USCMA 48, 54, 33 CMR 260, 266 (1963) (concurring opinion of Kilday and Ferguson, JJ.).

[385] 14 USCMA 70, 33 CMR 282 (1963).

[386] 14 USCMA 283, 34 CMR 63 (1963).

[387] Kotteakos v. United States, 328 U.S. 750, 764–5 (1946).

[387a] EDITOR: See author's addendum at p. 77 *infra*.

of errors, for it requires reversal on the basis of public policy rather than prejudice to the substantial rights of the accused.

2. *Effect of the Accused's Subsequent Election to Testify.*

If the fruits of an alleged illegal search and seizure come into evidence, one of two results can be reached if the accused elects to take the stand and testify, depending upon the reason for the election. If, as in *United States v. Sessions*,[388] the record shows that evidence obtained as the result of a challenged search which should not have been admitted put the accused in the position of having to explain that which never should have been before the court, reversal must follow. The Court is unwilling to hold the defense to an "all or nothing" reliance upon the soundness of his objection and will not permit the accused to be compelled to entrust the correction of the error to what it termed "the sometimes untender mercies of reviewing authorities." On the other hand, in *United States v. Woodruff*,[389] the accused first elected to remain silent and then decided to testify on the merits because of the evidence given by rebuttal witnesses, to which no hint of illegality attached. The Court held that his decision to fight it out on the merits at the trial level in the hope of convincing the court-martial that his possession of the stolen goods was innocent served to overcome the illegal search when he himself testified concerning the fruits of the search. *Sessions* was specifically distinguished on the ground that it was a "peculiar" situation which forced the accused to come forward to attempt to justify his possession of property taken from him through an illegal search and seizure which should not have been in evidence in the first place.

If the accused introduces items at trial in an attempt to impeach a prosecution witness, he may not thereafter complain that they were the fruits of an illegal search and seizure.[390]

The distinction then is the reason behind the election to testify. If the accused is faced with the alternative of remaining silent and relying on an objection to the evidence being sustained on appeal or of justifying his possession, the erroneous admission of the evidence into evidence will be held prejudicial. But, if for some other reason, not connected with the introduction of evidence which was the fruit of the search, he decides to become a witness, his testimony about his possession of the items will cure any previous error in admitting it.

[388] 10 USCMA 383, 27 CMR 457 (1959).
[389] 11 USCMA 268, 29 CMR 84 (1960).
[390] United States v. Waller, 11 USCMA 295, 29 CMR 111 (1960).

C. *THE WAIVER DOCTRINE*

As a general rule, failure to object to evidence of an alleged illegal search at the trial level and adjudicate it at that forum is fatal to a consideration thereof on the appellate levels.[391] The Court of Military Appeals has left the door open a crack for exceptions if they find that extreme circumstances exist where justice would require appellate consideration regardless of whether it was raised at the trial, such as where there is inadequate representation of counsel or where the record of trial discloses a flagrant violation which the law officer should have excluded on his own motion.[392] No case where such an exception has been involved has been before that Court; however, an Army Board of Review declined to apply the doctrine of waiver where such action would have been unjust. In that case [393] at the trial level the defense counsel and the law officer had been the same in three consecutive cases, all arising out of the same search. The defense had objected "vigorously" to the admissibility of the search in the first two cases but did not do so in the third. Reviewing the third case the Board of Review held that the failure of the defense to object, when considered in the light of the defeat he had suffered on two previous occasions on the same point of law from the same law officer, amounted to no more than an orderly submission to the rulings in the two prior cases, and that to distinguish the third case from the other two on the basis of waiver would cause a miscarriage of justice.

D. *BURDEN OF PROOF*

In the federal civilian system, it would appear that the burden of proof is upon the one challenging the receipt of the evidence,[394] unless the search is sought to be justified on one of the exceptions to the warrant requirement, and then the burden is upon those seeking the exemption to show the need for it.[395]

The military rule does not have a comparable shift in the burden dependent upon the ground urged to uphold the legality of the search, in all probability because there are no preferred methods

[391] See United States v. Hooper, 9 USCMA 637, 26 CMR 417 (1958); United States v. Dupree, 1 USCMA 665, 5 CMR 93 (1952).

[392] United States v. Dupree, *supra* note 391.

[393] CM 354597, Thomas, 6 CMR 259 (1952).

[394] See, *e.g.*, Nardone v. United States, 308 U.S. 338 (1939); Lotto v. United States, 157 F.2d 623 (8th Cir. 1946), *cert. denied*, 330 U.S. 811 (1947).

[395] United States v. Jeffers, 342 U.S. 48 (1951); *cf.* Judd v. United States, 190 F.2d 649 (D.C. Cir. 1951).

of authorization of a search.[396] In *United States v. Berry* [397] the Court of Military Appeals held that while a search may be presumed to be legal in the absence of objection, if the accused challenges the receipt of evidence obtained as a result of a search, the burden is upon the prosecution to justify the action taken. Subsequent cases have been uniform in holding that the burden is upon the prosecution regardless of the type of authorization relied upon.[398]

E. *STANDING TO OBJECT*

The right to object to the use of illegally obtained evidence is personal in nature and is not based on any consideration of the inherent untrustworthiness of the evidence.[399] Only a person "aggrieved" by an unlawful search and seizure has standing to object to its introduction into evidence.[400] Prior to *Jones v. United States*,[401] a person had standing to object to the introduction of the fruits of a search only if he had a sufficient property interest in the premises searched or the property seized,[402] but in *Jones* the Supreme Court brushed away the old highly legalistic common law rules of property interest in both the premises, and in at least certain instances, the property seized, and held that any one legitimately on the premises where a search occurs may challenge its legality when its fruits are attempted to be used against him. Further, the accused may object to the use of any evidence obtained as a result of such a search without admitting a property interest therein if the crime for which he is being tried alleges

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[396] See notes 206–209, *supra*, and accompanying text for the distinction in the federal and military courts on "preferred" grounds for authorization for a search.

[397] 6 USCMA 609, 20 CMR 325 (1956).

[398] See, *e.g.*, United States v. Brown, 10 USCMA 482, 28 CMR 48 (1959); United States v. Sessions, 10 USCMA 383, 27 CMR 457 (1959); United States v. Weaver, 9 USCMA 13, 25 CMR 275 (1958). It should be noted, however, that although it states a contrary rule and is hence overruled, para. 152, MCM, 1951, provides: "Before the court rules upon [an objection on the ground that the evidence was illegally obtained] . . . the accused should be given an opportunity to show the circumstances under which the evidence was obtained." Caution should also be exercised in reading Board of Review opinions which would place the burden on the accused. See, *e.g.*, ACM 13959, Rhodes, 24 CMR 776 (1957); ACM 8310, Wharton, 15 CMR 808 (1954); CM 366399, Edwards, 13 CMR 822 (1953), *pet. denied*, 4 USCMA 719, 15 CMR 431 (1954).

[399] United States v. Dupree, 1 USCMA 665, 5 CMR 93 (1952).

[400] Jones v. United States, 362 U.S. 257 (1960).

[401] *Ibid.*

[402] See, *e.g.*, United States v. Bass, 8 USCMA 299, 24 CMR 109 (1957).

that he was in fact in unlawful possession of those goods. The Court reasoned:

> The same element in this prosecution which has caused a dilemma, *i.e.*, that possession both convicts and confers standing, eliminates any necessity for a preliminary showing of an interest in the premises searched or the property seized, which ordinarily is required when standing is challenged. . . . [T]o hold to the contrary, that is, to hold that petitioner's failure to acknowledge interest in the narcotics or the premises prevented his attack upon the search, would be to permit the Government to have the advantage of contradictory positions as a basis for conviction. Petitioner's conviction flows from his possession of the narcotics at the time of the search. Yet the fruits of that search, upon which the conviction depends, were admitted into evidence on the ground that petitioner did not have possession of the narcotics at that time. The prosecution here thus subjected the defendant to the penalties meted out to one in lawless possession while refusing him the remedies designed for one in that situation.[403]

Although the Court has not elaborated upon the scope of the latter part of its holding, with reference to property interest in the items seized, it would appear that the doctrine may well be limited to cases involving contraband and not extended to all classes of property which may be seized. In the case of contraband, there can be no contest without a judicial admission of at least one element of the offense. The same result does not necessarily follow with other types of property.

Since the Supreme Court handed down *Jones*, there have been no cases involving the issue of standing to object before the Court of Military Appeals. The last case, *United States v. Bass*,[404] applied the strict property interest test. In view of the past record of the Court's consideration of federal precedent in this field,[405] however, especially when the rule is liberal in granting protection to an accused, there is little danger in predicting that if and when the issue comes before them the *Jones* rule will be specifically adopted.

Although the *Jones* rule considerably broadens an accused's right to maintain standing to object, there are situations where no such standing exists. For example, the accused will have no standing to object if he is not present on the premises at the time of a search, and has no property interest in the property seized from a co-accused or another,[406] or has vacated the premises and

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[403] Jones v. United States, 362 U.S. 257, 263 (1960).

[404] 8 USCMA 299, 24 CMR 109 (1957).

[405] See notes 46-49 *supra*, and accompanying text.

[406] See United States v. Sessions, 10 USCMA 383, 27 CMR 457 (1959).

abandoned the articles.[407] A result similar to abandonment occurs with regard to the property interest in a communication which one has dispatched to another. In such a case all the sender retains is a literary right. The receiver has title to it.[408] It is dubious if the nature of the retained interest is sufficient as to enable the sender to complain of its seizure from the recipient.[409] It has likewise been held that the husband-wife relationship is not sufficient to permit one spouse to maintain standing to object to the admission into evidence of the fruits of a search of and seizure from the other spouse.[410]

One further collateral matter must be noted. Although a co-accused may lack standing to object in a joint or common trial to the use of evidence improperly obtained through a search and seizure of the other accused, if that evidence is erroneously admitted, inquiry must be made into the question of whether that error adversely affected the rights of the co-accused. If it did, reversal must follow.[411]

F. *RULINGS OF LAW OFFICER AND DETERMINATION OF LEGALITY OR ILLEGALITY*

The Court of Military Appeals has held that no special rule of law applies to the admission of evidence obtained as the result of a search, and that, consequently, the ruling of the law officer is final.[412] He passes upon the question as an interlocutory matter under Article 51(b), UCMJ, and his ruling is reviewable only for abuse of discretion.[413] If, however, the law officer, after properly admitting it when he makes his initial ruling, submits the question to the court for its determination, it is error, but no prejudice can be present. The action is to the benefit of the accused. It gives him another chance for a favorable decision on his contention and places a greater burden upon the Government than is required.[414] This is particularly true where the defense counsel

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[407] Abel v. United States, 362 U.S. 217 (1960).

[408] See CM 401550, Starks, 28 CMR 476, *pet. denied*, 11 USCMA 769, 28 CMR 414 (1959).

[409] Compare United States v. Higgins, 6 USCMA 308, 20 CMR 24 (1955).

[410] *Ibid. But cf.* United States v. Moore, 14 USCMA 635, 34 CMR 415 (July 2, 1964).

[411] United States v. Sessions, 10 USCMA 383, 27 CMR 457 (1959). See also United States v. Schafer, 13 USCMA 83, 32 CMR 83 (1962), where the Court considered the legality of a seizure of certain items from a co-accused.

[412] United States v. Berry, 6 USCMA 609, 20 CMR 325 (1956).

[413] See United States v. Sessions, 10 USCMA 383, 27 CMR 457 (1959).

[414] See ACM 5796, Toreson, 8 CMR 676 (1953).

requests such an instruction be given, assists in its formulation, and voices his approval and concurrence therein.[415]

It would appear that one exception to the general rule exists, that of the effect of a search and seizure upon the voluntariness of a subsequent confession.[416] In the field of voluntariness of confessions, unlike searches and seizures, the law officer's ruling is final only if he excludes the evidence. If he admits the confession, the individual court members must reconsider the question of voluntariness, reject it *in toto* if they do not determine that it was voluntary, even though they may find that it was completely trustworthy, and if they find that it was voluntarily made they must make the final determination of what weight, if any, to give to the contents.[417]

In *United States v. Askew* [418] the Court of Military Appeals found that certain letters of the accused which had been illegally seized were used by criminal investigators in such a way that they constituted a lever against the accused's freedom of choice. The Court categorized them as a definite factor in obtaining the confession, which they indicated that the fact finders could have inferred, upon proper instruction, was not voluntary. The letters themselves were not placed in evidence. The Court reversed the case on the basis that the law officer's instructions were "... in nowise tailored either to the evidence in the case or to the issues involved, *i.e., the illegal seizure and use of the letters* and the threatened interview with accused's wife if he did not confess. *As such, there was no meaningful submission to the court-martial of the questions involved.*" (Emphasis added.)[419] Judge Quinn dissented, but only on the basis that the seized items were significant only insofar as they related to the coercive influence and were not so independently important as to require specific mention in the instructions.[420]

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[415] See United States v. Schafer, 13 USCMA 83, 32 CMR 83 (1962).

[416] See notes 362–63 *supra*, and accompanying text.

[417] United States v. Bruce, 9 USCMA 362, 26 CMR 142 (1958); United States v. Jones, 7 USCMA 623, 23 CMR 87 (1957); see United States v. McQuaid, 9 USCMA 563, 26 CMR 343 (1958).

[418] 14 USCMA 257, 34 CMR 37 (1963).

[419] *Id.* at 263, 34 CMR at 43.

[420] The Court reached a similar conclusion to that advocated by Judge Quinn in the earlier case of United States v. Waller, 11 USCMA 295, 29 CMR 111 (1960), where the Court found that the law officer was not required sua sponte to isolate the alleged unlawful search and seizure and particularly call it to the attention of the court-martial as a factor bearing upon voluntariness when the causal connection was at best remote.

If the law officer rules, therefore, that certain evidence is the product of an illegal search and seizure and that the search or its products might be considered to have significance on the issue of the voluntariness of a subsequent confession, the effect of the search or its products must be included in the instructions on voluntariness. The court members do not reconsider the law officer's determination of illegality of the search; his initial ruling on the search is binding on them. They must accept the proposition that the search was illegal and assess it only for influence and relevancy on the question of the confession. If the law officer rules that a search was proper, it would not thereafter be submitted to the court regardless of any issue of voluntariness of a subsequent confession. His ruling on the search being final and binding on the court members, the search could not adversely affect the admission of the confession since as a matter of law the use of the products in obtaining the confession would not be illegal.

VI. CONCLUSIONS AND RECOMMENDATIONS

A. *CONCLUSIONS*

In conclusion it can be said that the treatment of search and seizure in military law has undergone drastic change since the adoption of the UCMJ in 1951. The law of search and seizure has never remained static, and the Court of Military Appeals has shown no tendency towards abatement of changes. Rather, the Court has shown increasing awareness of the concepts expressed by the Federal judiciary as a whole and the Supreme Court in particular. Military law has been reshaped accordingly.

Judge Advocates must not only be aware of these changes and adjust their philosophy and advice accordingly, they must also insure that the commander, the military policeman and criminal investigator, and all other persons who conduct searches from time to time are aware of the part they must play in relation to each other and to the accused whose person or property they propose to search.

The accused now stands possessed of all the fundamental rights afforded by the Fourth Amendment to the Constitution and undoubtedly has standing to object to the use of seized evidence within the liberal construction prescribed by the Supreme Court.

The commanding officer is more than ever cast in the role of a magistrate. To be sure, he may still occupy the position of the policeman at the same time when he conducts an investigation

and decides to make a search incident thereto. But, whether he decides that a search should be made because of his own findings or because it has been suggested or requested by others, he must put on the robes of the magistrate and rule that *based upon the evidence presented to him* there is probable cause to order or authorize a search. He must also realize that before evidence obtained as a result of a search which he authorized may be used in a trial he may be called to testify as to the facts related to him upon which he determined that probable cause existed. The commander, therefore, should always be urged to make written records or memoranda of *all* pertinent facts before his memory grows cold and to keep them until final disposition of the case or incident.

The criminal investigator, military policeman, or other person who may conduct a search must realize that his actions in making a search will be held up to the closest scrutiny and that the burden will be upon the Government to justify his actions. In view of the demonstrable trends in military law, it behooves him to adopt the practice of securing the permission of the appropriate commander to make a search, after having presented the commander with a full disclosure of the evidence upon which he considers probable cause to be based. Gone are the days when an investigator could keep his cards close to his chest and "play footsie" with the commander as to his reasons for desiring to search. Similarly those conducting searches must utilize other grounds with care. In such a case the investigator must assure that his actions are justified by the necessities of the case, the rules circumscribing each type of search, and the limits placed upon the permissible scope of his actions by the constitutional rights of the person subjected to the search. Because of the exclusionary rule and the fruit of the poison tree doctrine it is difficult, though not necessarily impossible, in any given case to "rebag the cat." The searcher must always be aware that nothing is more flustrating to the orderly administration of justice than to have overwhelming evidence of guilt against an accused who walks free because the evidence was illegally obtained and inadmissible against him if a trial were held.

B. *RECOMMENDATIONS*

It is recommended that all judge advocates insure that a continuous training program be initiated to provide all commanders, military police and criminal investigators, and others in the chain

of command who may be called upon to conduct searches, with an understanding of the basic principles involved in searches and seizures so that they may pattern their actions accordingly.

Further, until the law is clarified the delegation of authority to authorize searches should be discouraged. If it is felt that in certain circumstances such delegation is necessary, the delegation should be made only to persons in responsible positions and not to those involved in the exercise of law enforcement duties. Otherwise, judge advocates and provost marshals would be passing upon the propriety of their own actions.

A written consent form should be used whenever possible to insure that those requested to waive their right to be free from a search give their permission with full understanding of their right not to do so.[421]

Finally, a written authorization for a search based upon the power of the commander should be used by law enforcement agents whenever possible. This will insure that probable cause is presented to the commander and that his decision is an informed one.[422]

ADDENDUM

After this article went to press, the Court of Military Appeals had occasion to consider overruling the *Smith* case as suggested at p. 68 *supra*. True to the caveat therein contained that making prognostications is at best hazardous, the Court chose not to overrule its previous holdings. In *United States v. Simpson* (No. 17565), _____ USCMA _____, 34 CMR _____ (11 September 1964), Chief Judge Quinn, speaking for the majority, reviewed the question of the standard required for reversal upon a showing of an illegal search and seizure. The majority stated that, in view of their own decisions on the subject, they did not consider it wise to adopt a rigid formula of reversal on general prejudice in advance of the Supreme Court. Judge Ferguson, is dissent, would hold that any violation of a constitutional protection requires reversal on general prejudice.—*Author.*

421 See appendix A.
422 See appendix B.

APPENDIX A

CONSENT TO SEARCH

I have been advised by _____ that he is a (criminal investigator) (military policeman) (_____) and that he is investigating the crime(s) of _____, of which I am (accused) (suspected) (_____). Further, I have been advised of my rights under Article 31, UCMJ, and understand that I do not have to do or say anything and that anything that I do or say may be used against me in a trial by court-martial.

I have been requested to consent to a search of my (person) (quarters or billets) (automobile) (_____). I understand that _____ has no official authorization to conduct a search, that he cannot make a search if I do not voluntarily give my consent, and that I have the right to refuse to allow such a search. Fully understanding all of the above, I hereby freely and voluntarily give my consent for such a search.

_____
Signature

_____
ASN RANK

_____
Unit or Address

_____
Witness

_____ _____
Witness (Date)

APPENDIX B

AUTHORIZATION TO CONDUCT SEARCH

TO: _____:
(person or persons authorized to conduct search)

Facts presented to me by _____
(name)

_____ satisfy me that there is probable cause
(organization or address)

to believe that (on the person) (&) (in the quarters or billets) (in the automobile) (_____) of _____
(individual whose person and/or property

_____ located at _____
is to be searched) (place or location of person and/or property

_____ there is certain property, to wit: _____
to be searched)

_____
(description of property)

which is subject to lawful seizure as _____
(justification of seizure, as "a tool of

_____,

the crime of _____" or "goods stolen from _____" etc.)

You are therefore authorized to conduct a search of the above described person and/or property and to seize the above described property or any other property discovered during said search which is lawfully subject to seizure.

_____
Witness

_____
Witness

_____
(Signature of commanding officer or other person to whom the authority to order a search has been delegated by the commanding officer.)

_____
(Date)

THE USE OF FORCE TO PROTECT GOVERNMENT PROPERTY*

By Captain Darrell L. Peck**

I. INTRODUCTION

His rifle slung loosely over his shoulder, the young soldier looked over the Nike site in the dim moonlight. This was his first time on sentry duty and he had not realized how lonely it could be. Suddenly he was startled by a sound near the fence. Straining his eyes, he made out a crouching figure moving from the fence toward the center of the site. "Halt," he cried, unslinging his rifle. The figure stood erect for an instant, then began to run. "Halt! Halt or I'll shoot," shouted the sentry. The figure continued across the site. The rifle cracked, once, then again, resounding in the stillness of the night, as the sentry fired into the air. Still the figure ran, faster than ever. The sentry aimed his weapon after the retreating figure and pulled the trigger.

A rare incident? Unfortunately, it is not. For example, in a period of only two months the United States Army Air Defense Command experienced twelve known penetrations or attempted penetrations into its Nike sites. In five of these twelve cases, the sentry fired at the intruder.[1]

Who was the intruder? Perhaps it was a saboteur, or possibly an espionage agent seeking important information for a foreign power. More likely, however, it was a thoughtless teenager taking a short cut, or a nearby resident looking for his cat, or, at worst, a petty thief out to get a few gallons of gasoline. Is the sentry justified in shooting at any or all such intruders?

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[1] See JAGA 1961/4826 (25 Aug. 1961). No injury was inflicted in any of these cases.

Unless he is specifically instructed to the contrary, the sentry will very likely assume that he is. He is required to memorize general orders which direct him to "take charge of this post and all government property in view" and "to challenge all persons on or near my post and to allow no one to pass without proper authority."[2] He is given a weapon and, in many cases, live ammunition. Quite naturally he assumes that he is expected to use them. As one young private put it after wounding a fleeing civilian, "... that is what weapons were there for, to use."[3]

Thus, because the sentry is armed with a deadly weapon the problem of when and how much force he may legally use in protecting government property [4] is a particularly acute one. But the same basic problem extends to every person intrusted with the custody of government property or the responsibility for protecting it. What may the military driver do when he discovers someone slashing the tires of the vehicle assigned to him? Or the motor sergeant when he sees someone stealing a can of gasoline? In each case the serviceman [5] will act according to his own best judgment to protect the property intrusted to his care, even though this may involve the use of force.

But what are the legal consequences of his use of force? What law will be applied in passing judgment on his conduct? What are the general legal principles governing the use of force in such cases? These are some of the problems which will be dealt with in this article.

II. THE PARTIES AND THE LAW

A. *THE UNITED STATES AS DEFENDANT*

If an injury is caused by the unprivileged or excessive use of force in protecting government property, the injured party could conceivably seek compensation either from the individual serviceman or, under the principle of *respondeat superior*, from the

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[2] See U.S. DEP'T OF ARMY, FIELD MANUAL NO. 26-5, INTERIOR GUARD, para. 5 (1956).

[3] Lewis v. United States, 194 F.2d 689, 692 (3d Cir. 1952).

[4] The term property as used herein refers to real and personal property in general. There is no discussion of legal problems peculiar to any particular type of property or arising from the special nature of such property (*e.g.*, nuclear materials, property of a classified or restricted nature).

[5] The term serviceman is used for convenience. With the exception of the *Posse Comitatus* Act, 18 U.S.C. § 1385 (1958), discussed below, the same legal principles are generally applicable to civilian guards and other employees of the United States who have no specific statutory law enforcement authority.

United States. It is to be expected that the injured party would prefer to recover directly from the United States since servicemen in general, and especially those usually performing guard duty, are not noted for their affluence.

A formidable obstacle to any civil action directly against the United States, however, is the fact that claims based on assault, battery, false imprisonment, and false arrest, all the torts most likely to be committed in connection with the defense of government property, are specifically excluded [6] from the Federal Tort Claims Act.[7] Nor are such claims payable administratively.[8]

This has not prevented imaginative plaintiffs from suing the United States, however. There have been several cases, for example, in which negligence has been alleged in connection with the serviceman's unprivileged or excessive use of force.

Typical of these is the case of *Collins v. United States* [9] in which suit was brought under the Federal Tort Claims Act alleging negligence on the part of a military policeman. The military policeman had parked his duly assigned Army vehicle outside of a hotel in the civilian community and had gone inside. When he came out he discovered Collins partly in the cab of the vehicle and two other civilians standing just outside of it. The military policeman, drawing and cocking his .45 pistol, demanded an explanation of what the three men were doing and lined them up at gun point. Collins attempted to seize the pistol but the weapon discharged, wounding him.

Although the use of a pistol may possibly have been excessive under the circumstances and therefore might have constituted an assault, the allegation of negligence seems somewhat strained. Apparently the court thought so too, since it found that the plaintiff had failed to sustain the burden of proving negligence on the part of the military policeman, and therefore dismissed the suit.[10]

Recovery against the United States on the theory of negligence was allowed under similar facts in the *Tastor* case,[11] where a

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[6] See 28 U.S.C. § 2680(h) (1958).

[7] Ch. 753, 60 Stat. 842 (1946), as amended (codified in scattered sections of 28 U.S.C.).

[8] See, *e.g.*, Army Regs. No. 25–25, para. 5*m*(6) (1 Oct. 1959); Army Regs. No. 25–30, para. 8*g* (1 Oct. 1959).

[9] 95 F. Supp. 522 (W.D. Pa. 1951).

[10] *Ibid.* (alternative holding). The Court also found that there was contributory negligence on the part of the plaintiff.

[11] Tastor v. United States, 124 F. Supp. 548 (N.D. Cal. 1954).

person trying to disarm a soldier guarding a ship was killed when the soldier's pistol discharged during the scuffle, and in the *Cerri* case,[12] where a bullet fired by a soldier without sufficient justification at a person escaping from arrest struck an innocent bystander.[13] However, no suit against the United States has been successful when the serviceman intentionally fired at the plaintiff or plaintiff's decedent.[14]

Thus, it appears that any suit for damages arising from the intentional use of unprivileged or excessive force against the injured party is not properly brought against the United States. And, of course, the United States is never criminally liable for the acts of its agents.

B. *THE INDIVIDUAL AS DEFENDANT*

With regard to the individual serviceman, the possibility of criminal liability to both state and federal governments must be considered in addition to any possible civil liability for damages.[15]

It has long been recognized that an officer of the United States is not subject to the criminal sanctions of a state for acts done within the scope of his duties.[16] Some decisions appear to base this immunity on lack of jurisdiction in state courts.

> . . . [W]here an officer from excess of zeal or misinformation, or lack of good judgment in the performance of what he conceives to be his duties as an officer, in fact transcends his authority, and invades the rights of individuals, he is answerable to the government or power under whose appointment he is acting, and may also lay himself liable to answer to a private individual who is injured or oppressed by his action; yet, where there is no criminal intent on his part, he does not become liable to answer to the criminal process of a different government.[17]

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[12] Cerri v. United States, 80 F. Supp. 831 (N.D. Cal. 1948).

[13] It may be significant that both cases in which recovery was allowed were decided in the same division of the same district court, although not by the same judge.

[14] See, *e.g.*, Stepp v. United States, 207 F.2d 909 (4th Cir. 1953), *cert. denied*, 347 U.S. 933 (1954); Lewis v. United States, 194 F.2d 689 (3d Cir. 1952); Ferran v. United States, 144 F. Supp. 652 (D.P.R. 1956).

[15] A detailed analysis of the criminal and civil liability of federal employees for acts done in the performance of their duties is beyond the scope of this article. Only a brief resume is included here.

[16] See *In re* Neagle, 135 U.S. 1, 75 (1890); *In re* Waite, 81 Fed. 359 (N.D. Iowa 1897), *aff'd* 88 Fed. 102 (8th Cir. 1898), *appeal dismissed*, 180 U.S. 635 (1901); Brown v. Cain, 56 F. Supp. 56 (E.D. Pa. 1944). This rule is also applicable to enlisted members of the armed forces. *In re* Fair, 100 Fed. 149 (C.C.D. Neb. 1900).

[17] *In re* Lewis, 83 Fed. 159, 160 (N.D. Wash. 1897). *Accord*, Brown v. Cain, *supra* note 16.

Other decisions appear to recognize performance of a federal duty as a substantive defense to state prosecution without actually denying the existence of jurdisdiction in the state court.[18]

This relative immunity from state prosecution is somewhat misleading, however, since the reasonableness of the serviceman's conduct will be closely scrutinized in determining whether his actions were done in good faith within the scope of his duties and without criminal intent.

For example, in *Brown v. Cain*,[19] Coast Guardsman Brown, guarding a shipyard, was struck by a brick during a riot. He shot at the legs of a man running away, thinking that was the guilty person and seeking to arrest him. The man tripped and fell just as Brown fired, and as a result the bullet inflicted a fatal wound. Brown was indicted by the state for murder and applied to the federal court for a writ of habeas corpus. Although the court eventually granted the writ, saying Brown was "amenable to the law of the United States and to no other",[20] the reasonableness of Brown's conduct was thoroughly examined. The court indicated that it would have held that Brown's act was beyond his authority, and therefore without protection, if the evidence had not been so clearly in his favor.

With regard to criminal responsibility to the United States, the serviceman has no immunity from prosecution. However, the acts of a subordinate, done in good faith in compliance with his supposed duty or orders, are justifiable unless those acts are manifestly beyond the scope of his authority, or the order is such that a man of ordinary sense and understanding would know it to be illegal.[21]

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[18] See United States *ex rel.* Drury v. Lewis, 200 U.S. 1 (1906); *In re* Neagle, 135 U.S. 1, 75 (1890). The proposition that state courts are without jurisdiction in cases where acts are claimed to have been done in performance of federal duty is put in doubt by the existence of 28 U.S.C. §§ 1442, 1442a (1958), which authorize removal of a state prosecution (or civil proceeding) to federal court for trial when the defendant officer or serviceman claims to have been acting pursuant to a federal duty. The case is nevertheless tried on the state indictment and state substantive law applies. See 28 U.S.C. §§ 1442, 1442a (1958); FED. R. CRIM. P. 54(b)(1) (and *Notes of the Advisory Committee on Rules*, 18 U.S.C. APPENDIX at 3441 (1958)).

[19] 56 F. Supp. 56 (E.D. Pa. 1944).

[20] *Id.* at 60.

[21] See United States v. Clark, 31 Fed. 710, 717 (C.C.E.D. Mich. 1887); MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951 [hereinafter cited as MCM, 1951], para. 197*b*; MODEL PENAL CODE § 21.0 (Prop. Off. Draft 1962).

An extreme example of a serviceman's liability for an act done in obedience to an order is the case of Airman First Class Kinder.[22] Kinder was on guard duty when he apprehended a Korean civilian prowling in a bomb dump shortly before midnight.

Lieutenant Schreiber ordered Kinder, accompanied by Airman First Class Toth, to take the Korean out and shoot him to discourage other prowlers. Kinder did so. He was convicted of premeditated murder since the order was so clearly illegal that it afforded him no protection.[23]

Obedience to an apparently lawful order is generally recognized as a defense to a serviceman's civil liability as well.[24] Except for this limited protection for military subordinates acting under orders, it had long been established that agents of the United States were personally liable for their own torts, though committed in performing their duties.[25] In recent years, however, there has been a considerable erosion of this concept.

The leading case in support of the proposition that federal employees are immune from liability for torts committed in performing their duties is *Gregoire v. Biddle*.[26] In that case Judge Learned Hand used very broad language in holding that the Attorney General and another Department of Justice official were not subject to civil suit by the plaintiff who claimed to have been falsely imprisoned by them. This case was extensively quoted by the Supreme Court in *Barr v. Matteo*,[27] a libel suit which appears to turn as much on the theory that a statement made in connection with official duties is privileged as upon any theory of general immunity from suit. Nevertheless, because the broad and persuasive language of Judge Hand was quoted with approval

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[22] See ACM 7321, Kinder, 14 CMR 742, 774 (1953).

[23] Lt. Schreiber was also convicted of premeditated murder. See United States v. Schreiber, 5 USCMA 602, 18 CMR 226 (1955). Toth was discharged before any action could be taken against him and later attempts to exercise jurisdiction over him were unsuccessful. See United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955).

[24] See McCall v. McDowell, 15 Fed. Cas. 1235, 1240 (No. 8673) (C.C.D. Cal. 1867); Neu v. McCarthy, 309 Mass. 17, 33 N.E.2d 570 (1941); *cf.* Barr v. Matteo, 360 U.S. 564 (1959). *But see*, Bates v. Clark, 95 U.S. 204 (1877); Little v. Barreme, 6 U.S. (2 Cranch.) 170, 179 (1804); *cf.* Mitchell v. Harmony, 54 U.S. (13 How.) 115 (1851).

[25] See Sloan Shipyards Corp. v. United States Shipping Bd. Emergency Fleet Corp., 258 U.S. 549, 567–68 (1922); McCall v McDowell, *supra* note 24, at 1238, Towle v. Ross, 32 F. Supp. 125 (D. Ore. 1940).

[26] 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).

[27] 360 U.S. 564 (1959).

by the Supreme Court, other federal courts are accepting it as the law.[28]

> The Supreme Court's acceptance of Gregoire v. Biddle impels us to the conclusion that the law has changed, and that it is now considered wise to leave some government agents entirely free from suit when they are acting within an area intrusted to their discretion.[29]

Because this legal concept is still in a stage of development, it is impossible to say how far it will extend. At present, it does not appear to guarantee immunity from civil suit to the serviceman who uses unprivileged or excessive force in the protection of government property.[30]

In any event, if the use of force is sufficiently flagrant, the serviceman may be held to have exceeded the limits of his authority and thereby to have lost any protection from either civil or criminal liability otherwise available to a federal employee.

C. *THE APPLICABLE LAW*

Although there are many federal statutes designed for the protection of government property,[31] there is no provision specifically authorizing the use of force for this purpose. The closest thing to a statutory authorization of force is the following:

> Whoever, within the jurisdiction of the United States, goes upon any military, naval or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation; or
>
> Whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or installation, *after having been removed therefrom* or ordered not to reenter by any officer or person in command or charge thereof—

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[28] See Norton v. McShane, 332 F.2d 855 (5th Cir. June 1, 1964) (suit against U.S. marshals for false arrest and assault); Ove Gustavsson Contracting Co. v. Floete, 299 F.2d 655 (2d Cir. 1962), *cert. denied*, 374 U.S. 827 (1963) (suit against gov't. inspector for causing cancellation of plaintiff's contract with gov't.); Gamage v. Peal, 217 F. Supp. 384 (N.D. Cal. 1962) (medical malpractice suit).

[29] Bershad v. Wood, 290 F.2d 714, 719 (9th Cir. 1961) (suit against Internal Revenue Service officials for erroneously impounding bank account).

[30] At least in the area of arrest (see pp. 107–114 *infra*) the soldier because of the *Posse Comitatus* Act, 18 U.S.C. § 1385 (1958), is not acting in an official capacity and therefore cannot claim the immunity of a federal employee (compare note 205, *infra*, and text accompanying).

Further, it is possible that Supreme Court will limit *Barr v. Matteo* when presented with an appropriate case. Compre Norton v. McShane, 332 F.2d 855, 868 (5th Cir. June 1, 1964) (Gewin, J., dissenting).

[31] Some of these statutes are discussed in more detail *infra*, at pp. 115–117.

> Shall be fined not more than $500 or imprisoned not more than six months, or both.[32]

By implication, at least, this provision would seem to authorize an installation commander to have persons removed from the installation, an action which may involve some degree of force.[33]

Section 21(a) of the National Security Act of 1950[34] also implies authority to promulgate regulations relating to the removal of persons from restricted areas, since it makes it a misdemeanor to violate such regulations. Pursuant to this authority,[35] commanders have been authorized to apprehend, interrogate, and search any person who enters a restricted area without authority.[36]

Obviously these provisions, even if they are conceded to authorize the use of force in certain cases, are of very limited application and provide little help to the person charged with the responsibility for protecting government property.

In the absence of any more specific federal statutes, recourse must be had to the law generally applicable to the place where the use of force occurs. This, of course, will depend upon the nature of federal and state jurisdiction over the situs.[37]

1. *Situs Subject to Exclusive Federal Jurisdiction.*

By definition, state laws are not effective in an area subject to exclusive federal jurisdiction. In the absence of any federal common law,[38] this leaves a considerable legal vacuum. The Assimilative Crimes Act[39] fills this void very adequately in the field of criminal law. It provides:

> Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 [under the exclusive or concurrent jurisdiction of the United States] of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within

[32] 18 U.S.C. § 1382 (1958). (Emphasis added.)

[33] See JAGA 1954/9901 (6 Jan. 1955).

[34] Ch. 1024, tit. I, § 21, 64 Stat. 1005, 50 U.S.C. § 797 (1958).

[35] As implemeted by Dep't of Defense Directive No. 5200.8 (20 Aug. 1954).

[36] See Army Regs. No. 380–20, para. 6*a* (6 Feb. 1958).

[37] The term jurisdiction, used in this sense, refers to legislative jurisdiction. The various types of such jurisdictions and their basic incidents are set forth in some detail in REPORT OF THE INTERDEPARTMENTAL COMMITTEE FOR THE STUDY OF JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES, PART II, A TEXT OF THE LAW OF LEGISLATIVE JUDISDICTION, at 10–11 (1957).

[38] See Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

[39] 18 U.S.C. § 13 (1958).

> the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.[40]

Thus, in the absence of any specific federal provision, the criminal liability of a person using unprivileged or excessive force in protecting government property will be determined by the current state law even though the act occurs in an area subject to exclusive federal jurisdiction.

With respect to civil liability, the law is slightly more complicated because there is no equivalent of the Assimilative Crimes Act. However, the Supreme Court in the *McGlinn* case [41] applied an international law principle which does serve to fill the legal vacuum with regard to civil law, though not as efficiently as the Assimilative Crimes Act does in the criminal field.

The Court determined that the state law in effect in the area when the United States acquires exclusive jurisdiction, and not incompatible with the laws of the United States, remains in force until changed or abrogated by the United States. A substantial difficulty with this rule is that it continues in effect only those state laws in force at the time federal jurisdiction is acquired, without regard to subsequent changes by the state.[42] Therefore, a military installation made up of several parcels of land, over each of which the United States acquired exclusive jurisdiction at a different time, could conceivably have several different rules of law.

2. *Situs Subject to the Jurisdiction of the State.*

If the place where the incident occurs is subject to the jurisdiction of the state, obviously the current substantive law rules of the state are applicable. The fact that the United States may have concurrent jurisdiction makes no difference at all in a civil case since there are no applicable federal statutes in this area of law and there is no federal common law.[43]

When a federal criminal prosecution is instituted on the basis of concurrent jurisdiction in the United States, federal substantive law is technically applicable. However, unless there is a

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[40] *Ibid.*

[41] Chicago, R.I. & P. Ry. v. McGlinn, 114 U.S. 542 (1885).

[42] See Arlington Hotel Co. v. Fant, 278 U.S. 439 (1929).

[43] See Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

specific federal criminal statute applicable to the offense charged,[44] the Assimilative Crimes Act[45] would apply. Under that act the state law in force at the time of the incident is adopted and applied, so the result is the same.

III. GENERAL LEGAL THEORIES JUSTIFYING THE USE OF FORCE

A preliminary excursion into American case law concerning the privilege to use force when property is threatened is very likely to leave the researcher quite confused. A more detailed analysis of the law, and especially of its historical common law background, brings the realization that it is not so much the researcher as it is the law that is confused. Careful examination of the various cases purporting to deal with the protection of property reveals that there are actually three entirely different areas of law involved. These concern defense of property, prevention of a criminal offense against the property, and effecting an arrest for a criminal offense against the property.[46]

The difficulty with trying to discover the basic rule of law in any one of these three areas is that courts usually fail to distinguish between them. In *Commonwealth v. Beverly*,[47] for example, the court's discussion included principles of defense of property, prevention of a felony, and arrest when the accused, lying in wait, had simply shot down and killed two men in the act of stealing his chickens. In *State v. Beal*[48] the court discussed the rules pertaining to the use of force to prevent a crime but, without making any reference to arrest, included a basic rule from that area of law.[49]

In the only case in which it has discussed a serviceman's use of force in protecting government property, the Court of Military

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[44] Although there are federal criminal statutes dealing with assault, 18 U.S.C. § 113 (1958), murder, 18 U.S.C. § 111 (1958), and manslaughter, 18 U.S.C. § 1112 (1958), in areas subject to concurrent federal jurisdiction, these contain no provisions relating to justification so, in the absence of any federal common law, reference must be made to state law even in the case of these offenses.

[45] 18 U.S.C. § 13 (1958).

[46] There are still two areas of law (not within the scope of this article, however) which are involved in many of the cases, self-defense and defense of another.

[47] 237 Ky. 35, 34 S.W.2d 941 (1931).

[48] 55 N.M. 382, 234 P.2d 331 (1951).

[49] See *Id.* at 389, 234 P.2d at 335–36.

Appeals showed a similar tendency.[50] Judge Lattimer, after extensively quoting provisions of the *Manual* and *Warren on Homicide* on the rules applicable to the use of force *in preventing a crime*, then continued: "The two foregoing authorities fairly suggest at least two factors which must be considered in connection with the defense to a killing *in the protection of property*".[51]

Such confusion of what are, or at least once were, distinct areas of law may be harmless in many cases but in others it will have a substantial effect on the outcome. This will be discussed in greater detail after separate examination of each of the three areas of law.

Before undertaking such an examination, however, certain aspects of the method of approach should be explained. First of all, no distinction will be made between criminal and civil cases because the substantive rules are basically the same.

> Rules of law covering the liability of the owner of property for an assault in defending it against aggression are applicable alike to a civil action for damages and to a criminal prosecution, with the exception of the rule of evidence, which, in a criminal cause, gives the defendant the benefit of a reasonable doubt.[52]

Thus, state criminal statutes justifying the use of force in protecting property are also applied in civil cases within the same jurisdiction.

Secondly, the rules of law as generally stated refer to acts by the owner of property. However, since the United States, like a corporation, can act only through agents, the person who acts in protecting government property will not be the owner. In practical application, there is no legal distinction made between acts done by the owner personally and acts done by an agent on his behalf.[53] Therefore no such distinction will be made in this discussion. The right of military personnel to take necessary action for the protection of government property intrusted to their care has long been recognized.

> [T]he questions . . . concerning the removal of trespassers on the United States lands . . . appear to involve no other legal question than that of the right of the officer in command of a military post to protect it by

[50] See United States v. Lee, 3 USCMA 501, 13 CMR 57 (1953).

[51] *Id.* at 507, 13 CMR at 63. (Emphasis added.)

[52] Redmon v. Caple, 159 S.W.2d 210, 212 (Tex. Ct. Civ. App. 1942); *accord*, Brown v. Martinez, 68 N.M. 271, 361 P.2d 152 (1961).

[53] See, *e.g.*, Montgomery Ward & Co. v. Freeman, 199 F.2d 720 (4th Cir. 1952); Applewhite v. New Orleans Great Northern R.R., 148 So. 261 (La. Ct. App. 1933); WIS. STAT. ANN. § 939.49(2) (1958).

> force from occupation or injury at the hands of trespassers. There can be no doubt upon this point. Due caution should be observed, however, that in executing this duty there be no unnecessary or wanton harm done either to persons or property.[54]

Finally, the United States as a property owner will not be distinguished from private owners of property since there appears to be no legal basis for such a distinction in either the cases or statutes dealing with the protection of property. It is well established that the United States is a legal entity with the same remedies for the protection of its property rights as other persons.[55]

A. *DEFENSE OF PROPERTY*

The right to use force in defense of property is not denied by any jurisdiction in the United States, and by using broad enough language, it is possible to state a general rule.

> It is the generally accepted rule that a person owning, or lawfully in possession of, property may use such force as is reasonably necessary under the circumstances in order to protect that property, and for the exertion of such force he is not liable either criminally or civilly. . . . It is also the general rule, however, that the use of a deadly weapon in the protection of property is unjustifiable, except in extreme cases.[56]

It should be noted that this rule is easily divisible into two parts on the basis of the degree of force involved. In order to understand the current application of the rule, it is necessary to make this division.

1. *The Basic Rule—Nondeadly Force.*

A very succinct statement of the basic rule relating to defense of property has been enacted into legislation in Wisconsin:

> A person is privileged to threaten or intentionally use force against another for the purpose of preventing or terminating what he reasonably believes to be an unlawful interference with his property. Only such degree of force or threat thereof may intentionally be used as the actor reasonably believes is necessary to prevent or terminate the interference.[57]

As long as the defense of property involves only the use of nondeadly force (that is, force neither intended nor likely to cause death or serious bodily harm), this basic rule is generally

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[54] 9 OPS. ATT'Y GEN. 476 (1860).

[55] See Cotton v. United States, 52 U.S. (11 How.) 229 (1850).

[56] Peasley v. Puget Sound Tug & Barge Co., 13 Wash. 2d 485, 506, 125 P.2d 681, 691 (1942).

[57] WIS. STAT. ANN. § 939.49(1) (1958).

recognized in the United States.[58] When deadly force is used, however, the various American jurisdictions are widely divided. An examination of the origin of the law relating to defense of property is helpful in understanding the reason for this difference.

The basic rule relating to the defense of property is derived from the old English common law. It was stated by Blackstone as follows:

> So likewise in defense of my goods or possessions, if any man endeavors to deprive me of them, I may justify laying hands upon him to prevent him; and in case he persists with violence, I may proceed to beat him away. . . . And, if sued for this or the like battery, he may set forth the whole case, and plead that he laid hands upon him gently, *molliter manus imposuit*, for this purpose.[59]

It should be noted that this is the entire rule stated by Blackstone as to the use of force in the defense of property. There is no reference to the use of deadly force. Nor later, in discussing justification of homicide, does Blackstone make any reference to the defense of property.[60]

Ignoring for the moment the problem as to the use of deadly force, it may be seen that the old common law rule, so far as it was specifically stated by Blackstone, is still followed.

A qualification of the rule which is widely recognized requires that the person interfering with the property of another be requested to desist before any force whatsoever may be used—unless the intrusion is forcible or it would obviously be useless or dangerous to make such a request.[61]

2. *The Use of Deadly Force.*

The lack of any specific reference in the old common law rule to the possible use of deadly force in defense of property left this area of the law open to interpretation. It is only to be expected that in the United States, with its many independent jurisdictions, various ways would be found to remedy this omission. There are now several varying rules and numerous shades of difference as to the use of deadly force in defense of property. There is not even agreement as to what constitutes deadly force, some juris-

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[58] See generally Annot., 25 A.L.R. 508 (1923), 32 A.L.R. 1541 (1924), 34 A.L.R. 1488 (1925).

[59] 3 BLACKSTONE, COMMENTARIES *121.

[60] See 4 BLACKSTONE, COMMENTARIES *179–*181.

[61] See Cornell v. Harris, 60 Idaho 87, 88 P.2d 498 (1939); Hughes v. Babcock, 349 Pa. 475, 37 A.2d 551 (1944); RESTATEMENT, TORTS § 77(d) (1934); MODEL PENAL CODE § 3.06(3)(a) (Prop. Off. Draft 1962).

dictions holding that the use of a deadly weapon to frighten an intruder, even though there is no intent to injure or kill him, constitutes the use of deadly force[62] while others would allow such use of the weapon even in situations where deadly force is not justified.[63]

The following five variations offer a cross-section of the different forms the rule as to the use of deadly force has taken. It should be kept in mind, however, that no more force than the actor reasonably believes necessary may be used under any form of the rule.[64]

a. Prohibition of Deadly Force. As previously mentioned, the old common law rule pertaining to the use of force in defense of property, as stated by Blackstone, was silent with regard to the use of deadly force, and defense of property was not mentioned in his discussion of justification of homicide. Although many subsequent decisions have served to correct this omission, it is quite possible that the omission was not inadvertent in the first place, but that Blackstone's failure to say more than he did was significant in itself. Use of deadly force may not have been mentioned in connection with defense of property simply because it was not within the rule. Defense of property may not have been mentioned in discussing justifiable homicide because it did not constitute justification.

If this interpretation is correct, then the old common law rule never allowed the use of deadly force solely in defense of property. This view is taken by some American jurisdictions.

> It is not reasonable to intentionally use force intended or likely to cause death or great bodily harm for the sole purpose of defense of one's property.[65]

Some writers, in fact, indicate this is the prevailing view.

> And since the law has always placed a higher value upon human safety than upon mere rights in property, it is the accepted rule that there is no privilege to use any force calculated to cause death or serious bodily injury where only the property is threatened.[66]

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[62] See People v. Doud, 223 Mich. 120, 193 N.W. 884 (1924) (dictum); ILL. CRIM. CODE §§ 7–8 (1961); *cf.* State v. Pallanck, 146 Conn. 527, 152 A.2d 633 (1959).

[63] See IND. ANN. STAT. § 10–4707 (1956); *cf.* State v. Nickerson, 126 Mont. 157, 247 P.2d 188 (1952).

[64] There are exceptions. Under the Texas rule, for example, a person committing a theft at night or burglary may be slain rather indiscriminately. See TEX. PEN. CODE art. 1222 (1961).

[65] WIS. STAT. ANN. § 939.49(1) (1958).

[66] PROSSER, TORTS § 21 at 93 (2d ed. 1955).

However, relatively few jurisdictions expressly hold that deadly force may never be used in defense of property. This will be discussed in more detail after the other variations of the rule have been considered.

b. Defense of the Person. Many of the cases which purport to deal with defense of property also involve defense of the person, that is, either self-defense or defense of another. In deciding these cases, the courts are obviously influenced by the danger to human safety involved in the acts against the property, but seldom specifically base their decision on that factor. This has led to another version of the rule:

> The intentional infliction upon another of harmful or offensive contact or other bodily harm by a means which is intended or likely to cause death or serious bodily harm for the purpose of preventing or terminating the other's intrusion upon the actor's possession of land or chattels is privileged if, but only if, the actor reasonably believes that the intruder, unless expelled or excluded, is likely to cause death or serious bodily harm to the actor or to a third person whom the actor is privileged to protect.[67]

Of course defense of property and defense of the person are two different things, and the latter has no place in this discussion.[68] However, defense of the person as described in the above rule does not refer to the ordinary rules relating to self-defense and defense of another. Rather it is a special rule applicable to cases where an interference with property bears with it some threat to the person. The only real difference between this special rule and the ordinary principles of defense of the person is that, in the former, the danger to the actor or the third person whom he is privileged to protect need not be as imminent as is required under the latter.[69]

It should be noted that those acts which constitute both an interference with property and a threat of death or serious bodily harm to the person are, for the most part, dangerous felonies[70] such as robbery, burglary, and arson.

c. Dangerous Felonies. The majority rule regarding the defense of property by the use of deadly force limits the use of

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[67] RESTATEMENT, TORTS § 79 (1934). ACCORD, LA. REV. STAT. ANN. §§ 14.19–20 (1951). Compare MODEL PENAL CODE § 3.06(3)(d) (Prop. Off. Draft 1962).

[68] As mentioned in note 46 *supra*, self-defense and defense of another are not within the scope of this article.

[69] See RESTATEMENT, TORTS § 79 at 182 (1934).

such force to situations in which the victim is committing a dangerous felony, that is, one involving violence, force or surprise.

The rule is not stated in exactly the same way in every jurisdiction which follow it, but the variations are not too great. Thus, it is said that deadly force may be used in defense of property only "against one who manifestly intends or endeavors by violence or surprise, to commit a known felony",[71] or when there is "a felonious use of force on the part of the aggressor",[72] or "a felony which is either an atrocious crime or one attempted to be committed by force (or surprise) . . . ."[73]

The Court of Military Appeals appeared to adopt this majority view in *United States v. Lee*.[74] In that case, Corporal Lee had made a pretrial statement in explanation of his shooting two Korean civilians. According to this statement, Lee had discovered the two victims stealing radios from his jeep and had shot them in the act. Then, completely ignoring his victims, he replaced the radios in the jeep and returned to his unit without even bothering to report the incident.

At the trial level, no argument was made to the effect that Lee's acts were justifiable as defense of government property and, in fact, the pretrial statement was only admitted into evidence over the objection of Lee's counsel. However, after Lee was convicted of murder and aggravated assault, the case was appealed on the theory that the law officer erred in not instructing on the issue of justification. The Court, although holding that the facts were insufficient to raise the issue, indicated that homicide would be justified in defense of property only in the case of a crime of "a forceful, aggravated, or serious nature."[75]

The use of "or" rather than "and" in this phrase could raise some doubt as to whether the Court was making reference to the same dangerous felonies included in the majority rule. However, the offense which Lee's victims were supposedly committing was

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[70] A criminal offense is generally classified as a felony or a misdemeanor. Whether a particular offense is a felony or a misdemeanor must be determined by reference to the law of the situs or, in the case of a federal offense, by 18 U.S.C. § 1 (1958). Under the later provision any offense punishable by death or imprisonment for a term exceeding one year is a felony, and any lesser offense is a misdemeanor. The majority of states use this same dividing line.

[71] ARK. STAT. ANN. § 41–2231 (1947).

[72] State v. Lee, 258 N.C. 44, 47, 127 S.E.2d 774, 776 (1962).

[73] Commonwealth v. Emmons, 157 Pa. Super. 495, 498, 43 A.2d 568, 569 (1945).

[74] 3 USCMA 501, 13 CMR 57 (1953).

[75] *Id.* at 507, 13 CMR at 63.

a serious one (*i.e.*, a felony), so obviously the Court was requiring more than just that. Furthermore, additional reference was made to the fact that the victim's offense was not a forcible one.

> The offense, if any, being committed by the Koreans would be no more than a taking without force or violence. There was no necessity for repelling any force against the accused. . . . there was no violence on the part of the Koreans, no fear on the part of the accused. . . .[76]

Therefore it appears that the Court of Military Appeals accepts the majority view and will consider the use of deadly force in defense of property to be justified only in case of a dangerous felony.[77]

This majority rule seems to have its origin in the early common law relating to a somewhat different proposition.

> Homicide is justifiable . . . where it is committed for the prevention of some atrocious crime, which cannot otherwise be avoided. . . . such homicide as is committed for the prevention of any forcible and atrocious crime, is justifiable by the law of nature; and also by the law of England. . . . If any person attempts a robbery or murder of another, or attempts to break open a house, in the night-time (which extends also to an attempt to burn it), and shall be killed in such attempt, the slayer shall be acquitted and discharged. This reaches not to any crime unaccompanied with force, as picking of pockets.[78]

Although this language appears to be very similar to the current majority rule regarding defense of property by deadly force, here Blackstone was speaking of the prevention of felonies as distinguished from defense of property. As previously seen, Blackstone made no reference to the use of deadly force in connection with defense of property. However, since many felonies are against property rights, including the examples of robbery, burglary, and arson cited by Blackstone, the eventual confusion of the two rules was not surprising.

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[76] *Ibid.*

[77] The Court apparently intended to apply the "general" American rule. If a case should arise in the United States in a jurisdiction which does not follow this majority rule, it would be interesting to see whether the Court of Military Appeals would apply the law of the situs or whether it would apply the rule of the *Lee* case as a military rule applicable in all court-martial cases regardless of the law of the situs. The latter appears more probable, judging by the analogous area of self-defense where the military rule is applied without regard to the fact that the law of the situs may be quite different. This means that the serviceman's actions in defense of government property will often be subject to two different standards, the military rule for court-martial purposes and the local law for the purpose of proceedings in a civilian court.

[78] 4 BLACKSTONE, COMMENTARIES *179–*180. Before Blackstone's time, the law imposed less restriction on the slaying of a felon. Compare 3 COKE, INSTITUTES *56.

d. Any Felony. Somewhat broader than the majority rule is the following:

> A man may use force to defend property in his actual possession against one who endeavors to dispossess him, without right, however, taking care that the force used does not exceed what reasonably appears to be necessary for the purpose of defense and prevention. And if a trespass on the property of another amounts to a felony, the killing of the trespasser is justified, if necessary to prevent it.[79]

This rule would allow the use of deadly force to defend property from any felony. Under this theory, for example, a railroad guard was held not liable for shooting a man attempting to steal the contents of a freight car, a simple larceny.[80]

e. The Texas Rule. Undoubtedly, the jurisdiction allowing the greatest use of deadly force in defense of property is Texas. There is a general statutory provision declaring homicide to be justifiable when committed in protecting property against "unlawful and violent attack".[81] This is similar to the majority rule in that the attack on the property must be violent, but there is no requirement that the attack constitute a felony, only that it be unlawful.

There is another statute declaring homicide justifiable in the case of certain specified felonies, basically the same dangerous felonies included under the majority rule, and also in the case of theft at night,[82] even though that is not a felony if less than fifty dollars is taken.[83]

Thus, it appears that Texas permits the use of deadly force in defending property not only against the usual dangerous felonies, but also against any other unlawful and violent attack, even though not a felony,[84] and even against theft at night when no violence whatsoever is involved.[85]

f. Comparison of the Various Rules. From the foregoing it may be seen that the attitude of the various jurisdictions toward the use of deadly force in defense of property ranges over a considerable spectrum. It is impossible to reconcile all these different

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[79] WHARTON, HOMICIDE § 526 at 784 (3d ed. 1907).

[80] See Applewhite v. New Orleans Great Northern R.R., 148 So. 261 (La. Ct. App. 1933). Louisiana has since adopted a more restrictive rule. See LA. REV. STAT. ANN. §14.19-20 (1951).

[81] TEX. PEN. CODE art. 1224 (1961).

[82] See TEX. PEN. CODE art. 1222 (1961).

[83] See TEX. PEN. CODE arts. 1421-22 (1953).

[84] See Gilliam v. State, 100 Tex. Crim. 67, 272 S.W. 154 (1925).

[85] See Teague v. State, 84 Tex. Crim. 169, 206 S.W. 193 (1918).

views but between the first three, at least, there is a similar underlying principle. This principle is that deadly force is permissible only when human life is endangered, either actually or potentially, by the threat to the property.

Saying that deadly force cannot be used "for the *sole* purpose of defense of one's property"[86] is basically no different than saying such force can be used only when the interference with the property is also "likely to cause death or serious bodily harm"[87] to the one in possession. And saying that deadly force may be resorted to only in case of a felony involving force and violence is really saying nothing different because such felonies, by their very nature, constitute a threat to human safety.

> The law is that a man may oppose force with force in defense of his person, his family or property against one who manifestly endeavors by violence to commit a felony, as murder, robbery, rape, arson or burglary. In all these felonies, from their atrocity and violence, human life, either is, or is presumed to be in peril.[88]

This same principle could perhaps be applied to that portion of the Texas rule allowing deadly force in case of "violent and unlawful attack",[89] but hardly to a nonviolent theft at night. The same problem arises in attempting to apply this principle to the rule allowing deadly force in the case of any felony, since many felonies involve no threat to human safety.

g. The Duty to Yield. The fact that there is a limitation on the use of deadly force in defense of property raises an interesting problem. What does the person protecting property do when nondeadly force is ineffective, yet deadly force is not permissible? For example, if an armed guard sees a person placing government property in a truck but is too far away to reach the scene in time to prevent the thief from driving off with it, may the guard use his weapon to prevent the loss of the property?

Most jurisdictions which have dealt with the problem would not hold the use of deadly force justifiable in such a case.[90] Thus, under the majority rule, a person must suffer the loss of his property rather than use deadly force to protect it, unless a dangerous felony is involved.

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[86] WIS. STAT. ANN. §939.49(1) (1958). (Emphasis added.)

[87] RESTATEMENT, TORTS § 79 (1934).

[88] United States v. Gilliam, 25 Fed. Cas. 1319, 1320 (No. 15,205a) (C.C.D.C. 1882).

[89] TEX. PEN. CODE art. 1224 (1961).

[90] See, *e.g.*, Brown v. State, 149 Ark. 588, 233 S.W. 762 (1921). *Contra*, Hassell v. State, 80 Tex. Crim. 93, 188 S.W. 991 (1916).

3. *Mistake.*

Although it is generally agreed that no more force may be used in defense of property than is necessary, it is the view of most jurisdictions that this necessity is determined by the reasonable belief of the actor rather than by the actual facts.[91] Thus, the serviceman is protected if he makes a reasonable mistake as to whether the property he acts to defend is really threatened. Many states have included this principle in their statutes dealing with the justifiable use of force[92] or justifiable homicide.[93]

4. *Subsequent Actions.*

In addition to the actual defense of the property, force may also be used in certain subsequent actions which are closely connected. For example, it has long been recognized that the right to use force in defense of property extends to prompt pursuit of the thief and recovery of the property.[94] In fact, if the recovery of the property is immediate, the case is often treated as one of defense rather than recaption.[95]

However, recaption is subject to an important limitation not applicable to defense of property. As has already been seen, action taken in defense of property may be justified by the reasonable belief of the actor even though he may in fact be mistaken. When seeking to recover property, however, the actor is liable if he is in fact mistaken regardless of what he reasonably believed.[96] Thus, if the owner of property pursues and uses force against one whom he believes has stolen it, he is liable if that person is in fact not guilty.[97] This distinction between the rules of defense and recaption has been attributed to the importance attached to possession by the early common law.[98]

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[91] See State v. Lee, 258 N.C. 44, 127 S.E.2d 774 (1962); RESTATEMENT, TORTS §§ 77(b), 79 (1934).

[92] See, *e.g.*, ILL. CRIM. CODE § 7–3 (1961); WIS. STAT. ANN. § 939.49(1) (1958).

[93] See, *e.g.*, ARIZ. REV. STAT. § 13–462(2) (1956); CAL. PEN. CODE §§ 197–8; IDAHO CODE ANN. § 18–4010 (1947).

[94] See Crawford v. State, 90 Ga. 701, 17 S.E. 628 (1892); Riffel v. Letts, 31 Cal. App. 426, 428, 160 Pac. 845, 846 (1916) (dictum); PROSSER, TORTS § 24 at 100 (2d ed. 1955).

[95] See Curlee v. Scales, 200 N.C. 612, 158 S.E. 89 (1931); Branston, *The Forcible Recaption of Chattels*, 28 L. Q. REV. 262, 270 (1912).

[96] See RESTATEMENT, TORTS § 100, comment *d* (1934).

[97] See Dunlevy v. Wolferman, 106 Mo. App. 46, 79 S.W. 1165 (1904); Little Stores v. Isenberg, 26 Tenn. App. 357, 172 S.W.2d 13 (1943); *cf.* Estes v. Brewster Cigar Co., 156 Wash. 465, 287 Pac. 36 (1930).

[98] See Branston, *The Forcible Recaption of Chattels*, 28 L. Q. REV. 262 (1912).

Another problem area closely related to the defense and recaption of property concerns the right to temporarily detain, question, and search the person suspected of having interfered with the property. At common law such conduct constituted false imprisonment and battery and was not privileged even though the suspect was in fact guilty.[99]

The first major departure from the older rule came with a group of cases allowing the owner or his agent to detain for a reasonable time and to question a person suspected of acts against his property.[100] This principle has gained wider recognition in recent years,[101] and is apparently being broadened to allow a search of the suspect.[102] One of its more important features is that it exempts the owner or his agent from liability if there was probable cause for his action, even though the suspect was in fact not guilty of any misconduct toward the property.[103] Although this departure from the common law appears to be a growing trend, it is only followed by a few jurisdictions at present, some of which have adopted it by statutes applicable only to shoplifters.[104]

By regulation the Army has adopted a position substantially in accordance with this trend.[105] A commander is specifically authorized to apprehend, search and interrogate any person who enters a restricted area without competent authority. The individual is then either warned and released or, if sufficient cause exists, is turned over to a United States marshal. Unless a restricted area is involved, however, there is no specific authorization for such action.

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[99] For a detailed treatment of the common law background on this point, see Comment, 46 ILL. L. REV. 887 (1952). Later modifications in the law are discussed in Comment, 47 NW. U. L. REV. 82 (1950).

[100] See Piggly-Wiggly Co. v. Rickles, 212 Ala. 585, 103 So. 860 (1925) (allowing detention but not search); Jacques v. Childs Dining Hall Co., 244 Mass. 438, 138, N.E. 843 (1923); Rezeau v. State, 95 Tex. Crim. 323, 254 S.W. 574 (1923).

[101] See Montgomery Ward & Co. v. Freeman, 199 F.2d 720 (4th Cir. 1952); Burnaman v. J. C. Penny Co., 181 F. Supp. 633 (S.D. Tex. 1960).

[102] See Burnaman v. J. C. Penny Co., *supra* note 101.

[103] See Collyer v. S. H. Kress Co., 5 Cal. 2d 175, 54 P.2d 20 (1936).

[104] See MIN. STAT. ANN. § 622.27 (1957).

[105] See Army Regs. No. 380–20, para. 6*a* (6 Feb. 1958). However, this regulation undoubtedly relies on implied statutory authorization, ch. 1024, tit. I. § 21, 64 Stat. 1005 (1950), 50 U.S.C. § 797(a) (1958) rather than upon the trend of case law.

B. *PREVENTION OF A CRIMINAL OFFENSE*

A second major area of substantive law important to the use of force for the protection of government property is that relating to the prevention of criminal offenses. It is generally recognized that every person is privileged to use some force to prevent the commission of some crimes, but the degree of force which may be used and the kind of offenses which it may be employed to prevent vary considerably from one jurisdiction to another.

1. *The Basic Rule—Nondeadly Force.*

At common law the right to use force for the prevention of criminal offenses was generally coextensive with the right to make a citizen's arrest for such offenses.[106] Under this rule force could be used to prevent any felony or a misdemeanor which constituted a breach of the peace.[107]

Several states have enacted statutes which restrict the right to use force for the prevention of criminal offenses against property to cases in which the offense is forcible in nature.[108] Since a forcible offense would probably constitute a breach of the peace in most cases, these statutes do not appear to expand on the common law by allowing the use of force to prevent misdemeanors other than breaches of the peace. Rather they seem to narrow the rule by eliminating the common law right to use force to prevent non-forcible felonies against property.

Other states have enlarged on the common law and allow the use of force to prevent any trespass or interference with property[109] or to prevent offenses generally, without regard to the nature of the offense.[110]

The Model Penal Code would allow the use of nondeadly force to prevent any crime involving or threatening damage to or loss of property or a breach of the peace.[111] This would also be considerable expansion on the common law with regard to offenses against property since every such offense, either felony or misdemeanor, would be included in the rule.

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[106] See RESTATEMENT, TORTS § 140, comment *a* (1934).

[107] The circumstances justifying arrest by a private citizen are discussed in more detail in the following subsection.

[108] See, *e.g.*, CAL. PEN. CODE § 693; LA. REV. ANN. § 14.19 (1951); ORE. REV. STAT. § 145.110 (1959).

[109] See, *e.g.*, N. Y. PEN. LAW § 246(3).

[110] See, *e.g.*, ARIZ. REV. STAT. ANN. § 13-246(A)(3) (1956); TEX. PEN. CODE art. 1142(3) (1961).

[111] See MODEL PENAL CODE § 3.07(5)(a) (Prop. Off. Draft 1962).

The Court of Military Appeals in the *Hamilton* case[112] appears to have adopted a rule considerably more restrictive than the common law. Hamilton, an off-duty air policeman, held his knife to the throat of another airman to put an end to the latter's disorderly and abusive conduct after lesser measures had failed to deter him. A very minor cut was inflicted. Hamilton was convicted of aggravated assault. In passing on the defense argument that the use of force was justifiable because it was necessary to prevent the commission of criminal offenses,[113] the Court unanimously upheld the conviction, saying that a private person may use force to prevent an offense only when it constitutes a felony. The same result could have been reached under the common law rule by considering the use of the knife under the circumstances to have been deadly force. However, the Court made no distinction as to the degree of force but indicated that no force could be used to prevent anything less than a felony.

Although the right to use force in the prevention of relatively minor offenses may seem unimportant, it is probably the situation which will most often confront the serviceman protecting government property. As will be seen later, many offenses against government property are misdemeanors. Since such offenses generally do not constitute a breach of the peace, in most jurisdictions the serviceman is without authority, under this theory of law, to use force to prevent them.[114]

2. *The Use of Deadly Force.*

No American jurisdiction goes so far as to hold that prevention of a criminal offense is never justification for the use of deadly force. Like the law relating to defense of property, however, there is considerable difference of opinion as to when such drastic measures are permissible.

a. Defense of the Person. The statute most restrictive of the use of deadly force for the prevention of offenses provides that such force is justified if used to prevent a violent or forcible felony involving danger to life or of great bodily harm.[115] This in itself

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[112] United States v. Hamilton, 10 USCMA 130, 27 CMR 204 (1959).

[113] Drunk and disorderly conduct, abusive language in the presence of a female, and assault, *id.* at 133, 27 CMR at 207.

[114] If the *Hamilton* case establishes a military rule, to be applied in all court-martial cases regardless of the law of the situs, note 77 *supra*, the serviceman's right to use force to prevent a misdemeanor against government property has been eliminated for court-martial purposes. A civilian court would still apply the law of the situs, of course.

[115] See LA. REV. STAT. ANN. § 14.20(2) (1951).

is a substantial limitation, but the statute provides further that the circumstances must be sufficient to excite the fear of a reasonable person that there would be serious danger to his *own* life or person if he attempted to prevent the felony without killing the culprit.[116] This latter limitation is an innovation not generally recognized, although it is implied to some extent in the principle that killing a felon is justified only when reasonably believed to be absolutely necessary.

The Model Penal Code would adopt a position not quite so restrictive. The use of deadly force would be justified in preventing any crime which the actor reasonably believes will cause death or serious bodily harm.[117]

Both of these approaches substantially eliminate prevention of a criminal offense as a separate ground for justification of deadly force since defense of the person is made an essential element.

b. Dangerous Felonies. As already mentioned in connection with defense of property, the early common law rule held homicide justifiable when necessarily committed in the prevention of any forcible or atrocious felony.[118] This is still the most generally accepted rule as to when deadly force may be used to prevent criminal offenses.[119]

The fact that a state statute appears to modify the common law rule is not always controlling, either. For example, the Oregon statute provides that homicide is justifiable when committed to prevent a felony upon the slayer or members of his household[120] or upon property in his possession.[121] This could be interpreted as enlarging the common law rule since no mention is made of any requirement that the felony being prevented be a dangerous or forcible one. Yet the Supreme Court of Oregon, after an extensive review of authorities, said:

> Any civilized system of law recognizes the supreme value of life, and excuses or justifies its taking only in cases of absolute necessity. It is for that reason that the right to kill to prevent the commission of a

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[116] See *ibid.*

[117] See MODEL PENAL CODE § 3.07(5)(a)(ii)(1) (Prop. Off. Draft 1962).

[118] See 4 BLACKSTONE, COMMENTARIES *180.

[119] See State v. Robinson, 328 S.W.2d 667 (Mo. 1959); Commonwealth v. Emmons, 157 Pa. Super. 495, 43 A.2d 568 (1945); ARK. STAT. ANN. § 41-2232 (1947).

[120] See ORE. REV. STAT. § 163.100a (1957).

[121] See ORE. REV. STAT. § 163.100b (1957).

> felony does not extend to secret felonies not committed by force or to remote and problematic dangers.[122]

Similarly a Washington statute[123] providing that homicide is justifiable when committed in resisting the commission of a felony, without any express limitation as to the type of felony, was held to be "but a statutory declaration of the common law"[124] and not to justify homicide except in the case of violent felonies endangering human life.

The Court of Military Appeals in the *Lee* case, previously discussed, apparently accepted this majority rule.[125] The *Manual* also adopts this position.[126]

According to Blackstone, the rule allowing the use of deadly force in preventing the commission of dangerous felonies was based on the fact that these felonies were punishable by death.

> For the one uniform principle that runs through our own, and all other laws, seems to be this, that where a crime, in itself capital, is endeavored to be committed by force, it is lawful to repel that force by the death of the party attempting.[127]

This reasoning would certainly not be applicable today when capital punishment is so much more restricted than it was in Blackstone's day.

The true basis for allowing the use of deadly force in preventing forcible felonies appears to be that such offenses are at least a potential threat to human safety.[128] Thus, this rule is very similar to, but slightly more liberal than, the rule expressly limiting the use of deadly force to those cases where defense of the person is involved.

c. Any Felony. Many jurisdictions appear to have adopted rules which go beyond the theory that the felony prevented must involve at least a potential threat to human life before the use of deadly force is justifiable in preventing it. These states have adopted statutes declaring homicide justifiable if committed in the prevention of a felony, without specifying any particular

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[122] State v. Nodine, 198 Ore. 679, 714, 259 P.2d 1056, 1071 (1953).

[123] REV. CODE WASH. ANN. § 9.48.170 (1961).

[124] State v. Nyland, 47 Wash.2d 240, 242, 287 P.2d 345, 347 (1955).

[125] See United States v. Lee, 3 USCMA 501, 13 CMR 57 (1953).

[126] See MCM, 1951, para. 197*b*.

[127] 4 BLACKSTONE, COMMENTARIES *181.

[128] See United States v. Gilliam, 25 Fed. Cas. 1319 (No. 15,205a) (C.C.D.C. 1882).

kind of felony.[129] As already mentioned, however, it is not entirely reliable to accept such statutes at face value since some courts have held that they do not change the common law requirement that the felony prevented must be a dangerous one.[130]

Some jurisdictions, though, have clearly abandoned any requirement that the felony prevented must be dangerous. In *People v. Silver*,[131] for example, three young brothers drove their car up to a private gasoline pump at a mine at night and began to fill the tank with gasoline. A watchman opened fire with a rifle, killing one of the boys and wounding another. Because the boys were committing a felony, under a greatly expanded statutory definition of burglary, the watchman's conviction for manslaughter was reversed. The California statute, therefore, appears to allow the use of deadly force to prevent a felony without requiring even a potential danger to human safety.[132]

Since a large number of states have justifiable homicide statutes similar or identical to California's with regard to the prevention of felonies, if the bulk of them interpret these statutes in the same way this could conceivably rival the majority rule. However, most of these statutes have not yet been interpreted by the courts on this particular point.

d. Offenses Other Than Felonies. In a few very limited instances the use of deadly force is permissible in preventing an offense not amounting to a felony. For example, the right to use deadly force in suppressing a riot is generally recognized even though participation in a riot may not constitute a felony.[133] Texas allows the use of deadly force to prevent any theft at night, even though not a felony.[134]

3. *Mistake.*

Although force may be used only when a criminal offense cannot otherwise by prevented, the prevailing view, as in the case of defense of property, is that this necessity is determined by the

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[129] See, *e.g.*, ARIZ. REV. STAT. ANN. § 13–462 (1956); IDAHO CODE ANN. § 18–4009 (1947); N. Y. PEN. LAW § 1055.

[130] See State v. Nodine, 198 Ore. 679, 259 P.2d 1056 (1953); State v. Nyland, 47 Wash.2d 240, 287 P.2d 345 (1955).

[131] 6 Cal.2d 714, 108 P.2d 4 (1940).

[132] See Note, 13 STAN. L. REV. 566, 578 (1961).

[133] See, *e.g.*, CAL. PEN. CODE § 197(4); N. Y. PEN. LAW § 1055; RESTATEMENT, TORTS § 142 (1934).

[134] See TEX. PEN. CODE art. 1222 (1961).

reasonable belief of the actor rather than by the actual facts.[135] This affords the serviceman some protection if he is mistaken as to whether an offense is actually being committed or as to the nature of the offense. This is obviously an important protection.

Most of the statutes dealing with the use of force in preventing offenses are silent as to whether the actor is justified in relying on a reasonable belief that an offense is being committed.[136] The silence of some of these would seem to cast doubt on the general rule since they expressly apply the reasonable belief principle in the case of force used in defense of persons or property, but fail to say that it also extends to prevention of offenses.[137] Such a statute has not prevented a holding that the actor's reasonable belief is sufficient, however.[138]

The justifiable homicide statutes of a few jurisdictions include the word "actual" in the section referring to resisting certain felonies.[139] This more clearly seems to put the actor outside the protection of the statute if he kills a person he mistakenly believes to be committing such a felony.

4. *Subsequent Actions.*

In the prevention of criminal offenses, by definition, there is no justification for the use of force unless an offense either is being or is about to be committed. If the supposed culprit abandons his attempt to commit the offense, or attempts to flee, there is no longer any necessity to use force to prevent the offense.[140] So too, if the offense has already been completed, forcible action against the offender is not justifiable under this theory of law.[141] In either case, however, the further use of force might be justifiable in an attempt to arrest the culprit.

C. *ARREST*

The right of a private person to make an arrest without a warrant, popularly referred to as a citizen's arrest, is a survival

[135] See Williams v. State, 70 Ga. 10, 27 S.E.2d 109 (1943); RESTATEMENT, TORTS § 143 (1948 Supp.).

[136] See, *e.g.*, CAL. PEN. CODE § 692–694; ORE. REV. STAT. §§ 145.110, 163.100 (1957).

[137] See, *e.g.*, ARIZ. REV. STAT. §§ 13-462(1)–(2) (1956); IDAHO CODE ANN. §§ 18–4009–4010 (1947). See generally Comment, 59 COLUM. L. REV. 1212, 1219–20 n.40 (1959).

[138] See Viliborghi v. State, 45 Ariz. 275, 43 P.2d 210 (1935). *But see* State v. Law, 106 Utah 196, 147 P.2d 324 (1944).

[139] See, *e.g.*, N. Y. PEN. LAW § 1055.

[140] See State v. Beal, 55 N.M. 382, 234 P.2d 331 (1951).

[141] *Cf.* Haworth v. Elliott, 67 Cal. App.2d 77, 153 P.2d 804 (1944).

from the early common law when law enforcement was largely in the hands of private citizens rather than peace officers. Although less common today, the right is still generally recognized in the United States.

Some question might be raised as to the right of a private person to arrest for a federal offense since the federal statutes specifying who may arrest for offenses against the United States do not mention private citizens,[142] and there is no federal common law.[143] However, the applicability of the citizen's arrest to federal offenses is apparently an accepted principle.[144]

The serviceman, like any private citizen, may arrest[145] certain offenders even though they are not subject to military law.[146] There is one important qualification, however. That is the *Posse Comitatus* Act[147] which, in effect, prohibits the use of any part of the Army or Air Force[148] to execute the laws. An order directing servicemen as part of their official duties to arrest civilian lawbreakers would undoubtedly run afoul of the Act.[149] However, in cases where it can reasonably be done, the serviceman will often act spontaneously to apprehend a person who has committed an offense against property under the serviceman's protection. "When the serviceman acts on his own initiative, as an individual, in an unofficial capacity, . . . he is beyond the restrictions of the Act."[150]

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[142] See 18 U.S.C. §§ 3041–3060 (1958). *But see* FED. R. CRIM. P. 5(a).

[143] See Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

[144] See Ward v. United States, 316 F.2d 113 (9th Cir. 1963) (citizen's arrest by postal inspector for theft of mail); *cf.* FED. R. CRIM. P. 5(a). The legality of such an arrest is determined by state law. See Ward v. United States, *supra*; Cline v. United States, 9 F.2d 621 (9th Cir. 1925). Compare United States v. Burgos, 269 F.2d 763 (2d Cir. 1959), where the court, without determining the existence of a federal citizen's arrest, indicates that, if such does exist, it is controlled by state law.

[145] The term "apprehension" is generally used in the military. For the purpose of the discussion "arrest" and "apprehension" will be used interchangeably.

[146] See Army Regs. No. 633–1, para. 8*a* (13 Sept. 1962). Somewhat different provisions apply to the apprehension of military personnel, UNIFORM CODE OF MILITARY JUSTICE [hereinafter cited as UCMJ], Art. 7; MCM, 1951, para. 19; Army Regs. No. 633–1, para. 4*a* (13 Sept. 1962).

[147] 18 U.S.C. § 1385 (1958).

[148] The *Posse Comitatus* Act makes no reference to other branches of the armed forces.

[149] This limitation would not apply to the serviceman's apprehension of any person who enters a restricted area without authority, ch. 1024, tit. I, § 21, 64 Stat. 1005 (1950), 50 U.S.C. § 797 (1958); Dep't of Defense Directive No. 5200.8 (20 Aug. 1954); Army Regs. No. 380–20, para. 6*a* (Feb. 6, 1958).

[150] Furman, *Restrictions Upon the Use of the Army Imposed by the Posse Comitatus Act*, 7 MIL. L. REV. 85, 127 (1960).

1. *The Basic Rule—Nondeadly Force.*

The use of force in connection with an arrest actually involves two distinct problems, the circumstances under which an arrest may be made and the amount of force which may be used in making it. At common law either a peace officer or a private person could arrest for a misdemeanor amounting to a breach of the peace, if committed in his presence,[151] or for a felony, whether or not committed in his presence.[152] The right to arrest carried with it the right to use whatever force reasonably appeared to be necessary to overcome the offender's resistance and prevent his flight,[153] with certain limitations on the use of deadly force which will be discussed below. Although the majority of American jurisdictions still follow these common law principles as to arrests by private citizens,[154] in many states there have been statutory modifications.

Some jurisdictions have expanded somewhat on the common law and allow a private person to arrest for any misdeameanor committed in his presence as well as for any felony.[155] One state also allows the arrest of any person reasonably believed to be in possession of stolen property.[156] Others have restricted a private citizen's right to arrest for felonies to those committed in his presence, while not modifying his common law right to arrest for breaches of the peace.[157] Still others allow a private person to arrest for any offense committed in his presence,[158] thereby expanding the common law rule with respect to misdemeanors and restricting it with respect to felonies. In some jurisdictions a private person may arrest only for a felony.[159]

Where the statutes are silent, it may be presumed that nondeadly force may still be used whenever it reasonably appears necessary to effect an arrest by a private person. Some jurisdic-

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151 See Perkins, *The Law of Arrest*, 25 IOWA L. REV. 201, 230 (1940).

152 See *id.* at 233.

153 See Waite, *The Law of Arrest*, 24 TEX. L. REV. 279, 301 (1945).

154 There has been a much greater enlargement of the common law, both as to when an arrest may be made and what force may be used in making it, in the case of peace officers. However, since this discussion is concerned primarily with arrests by servicemen, no discussion of statutes applicable to state peace officers is included here.

155 See, *e.g.*, N. Y. PEN. CODE § 183; 22 OKLA. STAT. ANN. § 202 (1937).

156 See Lasker v. State, 290 S.W.2d 901 (Tex. Ct. Crim. App. 1956) (interpreting TEX. CODE CRIM. PROC. art. 325 (1954)).

157 See GEN. STAT. N. C. §§ 15–39 to –40 (1953).

158 See TEX. CODE CRIM. PROC. art 212 (1954).

159 See LA. REV. STAT. ANN. § 15–61 (1951).

tions, in fact, have statutes specifically providing that force used in making a lawful arrest is privileged or that it does not constitute assault and battery.[160]

Several jurisdictions, however, appear to limit the right of a private person to use force in making an arrest. These states have statutes which provide that the use of force is not unlawful in certain cases.[161] One of the enumerations is: "When necessarily committed by any person in arresting one who has committed any felony and delivering him to a public officer competent to receive him in custody".[162] No mention is made of the use of force to arrest for a misdemeanor even though some of these states[163] allow a private person to arrest for any misdeameanor committed in his presence. Under the principle *expressio unius est exclusio alterius*, it appears that in jurisdictions with such statutes no force at all may be used by a private person to effect an arrest except for a felony.

No American jurisdiction has gone so far as to say that no force may be used by a private person in lawfully arresting for a felony.

2. *The Use of Deadly Force.*

A private person is not privileged to use deadly force to effect an arrest for a misdemeanor even in jurisdictions where such arrests are permitted.[164]

Under the early common law a private person was privileged to use deadly force in attempting to arrest for any felony if the felon could not otherwise be taken.[165] It appears that this is still the rule of a majority of American jurisdictions,[166] without any distinction as to the nature of the felony. Some states, however,

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[160] See, *e.g.*, ARIZ. REV. STAT. ANN. § 13-246(5) (1956); LA. REV. STAT. ANN. § 14-18(2) (1951); WIS. STAT. ANN. § 939.45(4) (1958).

[161] See, *e.g.*, N. Y. PEN. LAW. § 246(2); REV. CODE WASH. ANN. § 9.11.040(2) (1961).

[162] 21 OKLA. STAT. ANN. § 643(2) (1961).

[163] *E.g.*, New York, Oklahoma.

[164] See Waite, *The Law of Arrest*, 24 TEX. L. REV. 279, 301 (1945).

[165] See People v. Lillard, 18 Cal. App. 343, 123 Pac. 221 (1912); Waite, *supra* note 164, at 303.

[166] For a compilation of statutes adopting this rule, see Comment, 59 COLUM. L. REV. 1212, 1219 n.37 (1959). There are very few cases involving the use of deadly force by a private person in making an arrest; however, see People v. Lillard, *supra* note 165; *cf.* Brown v. Cain, 56 F. Supp. 56 (E.D. Penn. 1944).

allow a private person to use deadly force only when aiding a peace officer.[167]

The American Law Institute originally took the position that the privilege to kill in arresting for a felony should be limited, as it generally is in the prevention of offenses, to felonies which at least potentially endanger human life.[168] This is a very logical position, of course, since it seems ridiculous to prohibit a person from killing to prevent a non-dangerous felony but to allow him to kill the same felon an instant later on the theory of arresting him. However, after a number of years with little, if any, support for its position, the Institute reluctantly accepted the common law rule.[169]

Since then, one jurisdiction has adopted a statute, similar to the Institute's original position, providing that a private person may use deadly force in making an arrest only when he reasonably believes that such force is necessary to prevent death or great bodily harm to himself or another.[170] The Model Penal Code would not allow private persons to use deadly force at all in making an arrest.[171]

Probably the most famous case involving the use of deadly force by a serviceman in attempting to arrest a civilian is that of *United States ex. rel. Drury v. Lewis.*[172] Lieutenant Drury was commander of a detachment of men stationed at Allegheny Arsenal in Pittsburgh. Because of the periodic theft of copper down spouts and eave troughs from arsenal buildings, Lieutenant Drury was directed to establish patrols of the grounds and arrest anyone committing depredations on the arsenal property.[173] Some-

[167] See MINN. STAT. ANN. §§ 619.28–.29 (1947); N. Y. PEN. CODE § 1055. Washington allows a private citizen to use deadly force, but not with the intent to kill unless aiding a peace officer. See State v. Clarke, 61 Wash.2d 138, 377 P.2d 449 (1962).

[168] See RESTATEMENT, TORTS § 131 (1934).

[169] See RESTATEMENT, TORTS § 131 (1948 Supp.).

[170] See ILL. CRIM. CODE § 7–6(a) (1961).

[171] See MODEL PENAL CODE § 3.07(2)(b) (Prop. Off. Draft 1962).

[172] 200 U.S. 1 (1906). As yet there is no military rule relating to citizen's arrest. For the present, therefore, the serviceman's actions in this area may be judged only by the law of the situs. Compare notes 77 and 114, *supra*. *Cf.* United States v. DiRe, 332 U.S. 581, 589 (1948), holding that in the absence of an applicable federal statute the law of the state where an arrest without warrant takes place determines its validity even though the arrest was made by a federal investigator for a federal offense.

[173] Although the *Posse Comitatus* Act had been adopted twenty-five years before this incident, § 15, Army Appropriation Act of June 18, 1878, 20 Stat. 152, no one seemed to be bothered by the fact that Lieutenant Drury was ordered to arrest civilian lawbreakers as part of his official duties. The Act was not even mentioned in the decision.

time later, one of Lieutenant Drury's men, in his presence and apparently acting under his orders, shot and killed a nineteen year old youth who had fled when an attempt was made to arrest him. The youth had been stealing arsenal property, then a felony.

The Supreme Court refused to order Lieutenant Drury's release from the custody of state authorities because there was evidence that he had ordered the soldier to fire after the youth had stopped running and was returning to surrender. By implication, however, the Court indicated that, if the evidence had clearly established that shooting the youth had been the only way in which he could be apprehended, a writ of habeas corpus would have been appropriate.[174]

From the foregoing discussion it is apparent that the law is considerably more liberal in allowing the use of deadly force in making an arrest than in defending property or preventing a criminal offense.

3. *Mistake.*

An important concern of a private person making an arrest is whether he is liable if the person arrested is in fact innocent.[175] The general rule at common law was that the person making an arrest acted at his peril. There was one exception: if a felony had actually been committed and the person making the arrest reasonably believed that the person being arrested had committed it, an arrest without the use of deadly force was privileged even though the person arrested was in fact innocent.[176] In most jurisdictions this restriction on the use of deadly force has been eliminated, so that the use of deadly force is privileged whenever the private person is lawfully arresting for a *felony*, whether or not the person arrested is guilty.[177]

A few jurisdictions have narrowed the common law rule by restricting the privilege of a private person to arrest, even for a felony, only to cases where the person arrested is actually

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[174] The Court implied the existence of a separate *federal* substantive defense of justification, based upon the performance of a federal duty, when it stated that Lieutenant Drury could bring a writ of error to the Supreme Court to review his allegation of having been acting in the performance of his federal duties if he were convicted by the state court. Compare note 18 *supra*, and text accompanying.

[175] See generally Annot., 133 A.L.R. 608 (1941).

[176] See Waite, *The Law of Arrest*, 24 TEX. L. REV. 279, 289 (1945); *cf.* Baker v. Commonwealth, 212 Ky. 50, 278 S.W. 163 (1925).

[177] See, *e.g.*, CAL. PEN. CODE § 197(4); UTAH CODE ANN. § 76–30–10(5) (1953). See also RESTATEMENT, TORTS § 131 (1948 Supp.).

guilty.[178] One state has enlarged the privilege by allowing a private person to arrest for any offense, other than an ordinance violation, on reasonable grounds even though no offense was actually committed.[179] Others allow a private person to arrest for a felony whenever there are reasonable grounds, even though no felony was in fact committed.[180] Most jurisdictions, however, have retained the rule that an arrest by a private person is privileged only if the person arrested is actually guilty or if a felony has actually been committed and there are reasonable grounds to believe that the person arrested is guilty.[181]

Thus, in the majority of jurisdictions, a private person is liable whenever he mistakenly arrests an innocent person for a misdemeanor; and he is liable whenever he mistakenly arrests an innocent person for a felony which has not actually been committed by someone.

4. *Subsequent Actions.*[182]

In any case where force is authorized in making an arrest, the fact that the culprit is fleeing gives rise to no restriction on its use. In many cases, however, the only way to stop a person in flight will be with a bullet, so the choice is between using deadly force and letting the person escape. Although there is some authority to the contrary,[183] most jurisdictions which allow a private person to use deadly force to effect an arrest for a felony impose no limitation on such force merely because the culprit is fleeing. The test is whether deadly force is necessary to effect the arrest, not whether it is necessary to prevent any further harm to persons or property.[184] Thus, if there is no other way to effect the arrest, an unarmed, fleeing felon may be shot down.[185] This rule may have been satisfactory when there were relatively few felonies, all punishable by death, but it is subject to severe

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[178] See, *e.g.*, N. Y. PEN. CODE § 183.

[179] See ILL. CODE CRIM. PROC. § 107–3 (1963).

[180] See MISS. CODE ANN. § 2470 (1942); OHIO REV. CODE ANN. § 2935.04 (1954).

[181] See, *e.g.*, CAL. PEN. CODE § 837; KY. REV. STAT. § 431.05(2) (1963); GEN. STAT. N. C. §§ 15–39 to –40 (1953).

[182] Although it is not entirely accurate to refer to efforts to arrest a fleeing offender as subsequent actions, that term is used here for the sake of comparison with defense of property and prevention of criminal offenses.

[183] See Roe v. State, 55 Tex. Crim. 128, 115 S.W. 593 (1909); WARREN, HOMICIDE § 145 at 629 (perm. ed. 1938).

[184] See RESTATEMENT, TORTS § 131(c) (1948 Supp.).

[185] See People v. Lillard, 18 Cal. App. 343, 123 Pac. 221 (1912).

criticism at a time when there are so many statutory felonies, few of which are capital.[186]

Another subsequent action which is sometimes desirable is that of search. The right to conduct a search of a person incident to his lawful arrest is well recognized and extends also to property in his immediate possession and control.[187] The fact that the arrest is by a private citizen rather than by a peace officer does not diminish this right.[188]

D. *THE IMPORTANCE OF DISTINGUISHING BETWEEN THE THREE THEORIES*

In introducing this section, mention was made of the tendency to confuse the areas of substantive law dealing with defense of property, prevention of a criminal offense against the property, and arrest for such an offense. Now that each of these areas of law has been examined, a brief comparison will demonstrate the importance of recognizing that they are, or at least should be, distinct. For simplicity, only the majority views as to each area of law will be compared.

First of all, there is a substantial difference as to when and how much force is privileged. Force may be used in defending property from any interference, whether or not that interference constitutes a criminal offense. Both prevention of offenses and arrest are limited by most jurisdictions to felonies and breaches of the peace. Deadly force may be used to arrest for any felony, whereas such force is privileged in defense of property and prevention of offenses only in the case of a dangerous felony.

The actor is justified in acting on his reasonable belief in defense of property or prevention of offenses, even though it should prove that he was mistaken. In effecting an arrest, however, the actor is not protected, in the case of a misdemeanor, unless the person arrested is in fact guilty or, in the case of a felony, unless the felony has actually been committed, regardless of his reasonable belief.

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[186] See Note, 15 VA. L. REV. 582, 583 (1929).

[187] See United States v. Rabinowitz, 339 U.S. 56 (1950); Perkins, *The Law of Arrest*, 25 IOWA L. REV. 201, 261 (1940); Webb, *Military Searches and Seizures—The Development of a Constitutional Right*, p. 1 *supra*, at 27–34.

[188] See Ward v. United States, 316 F.2d 113 (9th Cir. 1963).

With regard to the time during which force may be used, there is also a considerable variation. There is no specific time limit on an arrest for a felony. A person who commits a felony against government property can be pursued and arrested by the serviceman, even a week or a month later if he is recognized as the culprit. The right to use force to prevent an offense, however, terminates when the offense has been completed or when the culprit abandons the attempt and flees. There is no right to pursue him. In defense of property, the culprit may be pursued but, under the prevailing rule, only for the purpose of recovering property.

In making an arrest, it is permissible to search the person arrested or property in his immediate possession and control. This right is not generally recognized in connection with defense of property or prevention of criminal offenses. Furthermore, it is only in connection with an arrest that the right to detain the culprit is established.

Finally, the serviceman can be required as part of his official duties to defend property or prevent criminal offenses against it, but he may not be ordered to effect a citizen's arrest.

These differences between the law of defense of property, prevention of offenses, and arrest are certainly too significant to be ignored. Although in some cases the courts can confuse two or all three of these theories without affecting the outcome, in many others the result will depend on which theory is applied. In addition, confusion of the rules, even when it does not affect the outcome of the particular case, results in a misleading precedent.

IV. FEDERAL OFFENSES AGAINST PROPERTY

In examining the various theories of law under which the use of force may be justified, it is readily seen that it makes a considerable difference whether a felony or a misdemeanor is being committed. In most jurisdictions, for example, the rules of law relating to prevention of offenses and to arrest do not allow the use of any force in the case of ordinary misdemeanors. In other cases, deadly force may be used in the case of felonies, or at least certain felonies, but not in the case of misdemeanors.

In determining whether an interference with government property constitutes a misdemeanor or a felony, reference must be had to the ordinary criminal laws of the state in which the in-

cident occurs.[189] In addition, there are certain federal criminal laws specifically applicable to property in which the United States has a particular interest.

Examination of some of the federal offenses of particular concern to military personnel in connection with protecting government property will be helpful not only in visualizing the application of the general rules just discussed to particular offenses but also in understanding the scope of the authority which would be created by the recommendations in the following section.

In areas subject to the exclusive or concurrent jurisdiction of the United States,[190] it is a felony to willfully and maliciously destroy or injure any building, structure, machinery, supplies, military or naval stores, or munitions, or to attempt to do so.[191] An almost identical provision applies to arson of such property.[192] There is no requirement that the destruction or injury exceed any specific amount to constitute a felony.

Certain offenses relate to property owned or used by the United States without regard to the nature of federal jurisdiction over the situs. For example, the theft of government property is a crime against the laws of the United States without regard to where the offense takes place. If the amount of the theft exceeds one hundred dollars, it is a felony; otherwise it is a misdemeanor.[193]

A similar distinction with regard to value is made in the case of willful injury to or depredations against any government property. If the damage exceeds one hundred dollars, the offense is a felony; otherwise it is a misdemeanor.[194] This provision also applies to property being manufactured or constructed for the United States, even though title has not yet passed. If the property damaged or destroyed is connected with any means of communication operated or controlled by the United States, the offense is a felony regardless of the value involved.[195]

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[189] In case of a federal prosecution under the Assimilative Crimes Act, 18 U.S.C. § 13 (1958), for an offense committed in a place subject to the exclusive or concurrent jurisdiction of the United States, the penalty for the offense is determined by reference to state law, but whether the offense is a felony or a misdemeanor is controlled by 18 U.S.C. § 1 (1958).

[190] The statutes use the term "special maritime and territorial jurisdiction of the United States." This term is defined in 18 U.S.C. § 7 (1958).

[191] See 18 U.S.C. § 1363 (1958).

[192] See 18 U.S.C. § 81 (1958).

[193] See 18 U.S.C. § 641 (1958).

[194] See 18 U.S.C. § 1361 (1958).

[195] See 18 U.S.C. § 1362 (1958).

It is also a felony to injure, destroy, contaminate, or infect any national-defense material, premises, or utilities with intent to impede the national defense.[196] National-defense material, premises, and utilities are defined so broadly as to include almost everything.[197]

A relatively obscure provision makes it a felony to willfully trespass upon, injure, or destroy any property or material of a fortification.[198] This is the only case in which trespass is made a felony merely because it is willful, without the requirement of some greater criminal intent. There are other offenses which seem more serious, yet are only misdemeanors.

For example, pursuant to section 21 of the Internal Security Act of 1950,[199] the Armed Forces have made extensive use of restricted areas to safeguard their most sensitive materials and activities. These areas are generally well fenced, posted with warning signs, and guarded by armed sentries. Access is strictly controlled. Surprisingly enough, willful violation of the regulations for the protection of these areas is only a misdemeanor.[200] It seems somewhat incongruous that a person who deliberately ignores the warning signs, climbs the fence, and enters a restricted area only commits a misdemeanor, even if the entry is for an unlawful purpose,[201] while one who willfully trespasses upon the property of fortification is guilty of a felony.

However, if the purpose of entering the restricted area, or almost any other place connected with the national defense, is to obtain information respecting the national defense with intent or reason to believe that it will be used to the injury of the United States, a felony is committed.[202] In many circumstances the mere fact that a person either forcibly or furtively enters a sensitive area could be sufficient basis for a reasonable belief that he entertained such an intention and was therefore committing a felony.

V. SUMMARY, RECOMMENDATIONS, AND CONCLUSION

A. *SUMMARY*

Now that each of these areas of law has been examined separately, it is interesting to see what a serviceman may legally do

[196] See 18 U.S.C. § 2155 (1958).
[197] See 18 U.S.C. § 2151 (1958).
[198] See 18 U.S.C. § 2152 (1958). The wording of this statute indicates that it may have been intended to apply primarily to harbor defense fortifications.
[199] Ch. 1024, tit. I, § 21, 64 Stat. 1005 (1950), 50 U.S.C. § 797 (1958).
[200] *Ibid.*
[201] See 18 U.S.C. § 1382 (1958).
[202] See 18 U.S.C. § 793(a) (1958).

in protecting government property when his privilege to act in defense of property, in preventing a crime, and in effecting an arrest are combined. Using the majority rule as to each point, he may proceed as follows.

Ordinarily he must tell the person intruding on or interfering with the property to desist. If that fails, he may use whatever nondeadly force he reasonably believes is necessary to terminate or prevent the intrusion. He may resort to deadly force if he reasonably believes it is necessary to stop the intruder from committing a dangerous felony or, when a felony has actually been committed and he reasonably believes the intruder has committed it, to arrest him. In the latter case, as well as when the intruder has actually committed a breach of the peace in the serviceman's presence, the serviceman may also take him into custody and search him. Otherwise the intruder may not be detained. However, the serviceman may pursue any intruder who has actually taken government property and, using nondeadly force if necessary, recover the property.

Clearly this is a considerable amount of authority. Yet there are some very significant deficiencies in it which bear closer examination.

1. *No Duty to Arrest.*

First of all, the foregoing summary of what the serviceman may do in protecting government property includes many actions which may be taken only pursuant to making an arrest. Without these his authority is substantially less. But because the the *Posse Comitatus* Act,[203] members of the Army and Air Force may not be ordered to arrest lawbreakers as part of their official duties. Therefore any arrest by such personnel must be entirely of their own volition. Instructing servicemen as to their right to arrest as private citizens and encouraging them to do so[204] would not violate the letter of the Act and would probably be effective to some extent, but it is unsatisfactory to have to rely on purely voluntary actions, simply because of the lack of consistent and dependable results.

2. *The Risk of Personal Liability.*

The problem of the individual serviceman's personal liability is also greatly aggravated by the *Posse Comitatus* Act. As previous-

[203] 18 U.S.C. § 1385 (1958).

[204] This is done to some extent. See, *e.g.*, U. S. DEP'T OF ARMY, FIELD MANUAL NO. 19–5, THE MILITARY POLICEMAN [hereinafter cited as FM 19–5], para. 28 (1959).

ly mentioned, the serviceman has some degree of protection from personal liability, both civil and criminal, for acts done in the performance of duty or pursuant to apparently legal orders. However, since the soldier or airman cannot legally be given the duty of enforcing the law,[205] if he mistakenly makes an unlawful citizen's arrest or uses excessive force in making a lawful one, he cannot claim this protection. Thus, he is fully subject to both civil and criminal liability when making an arrest.

The risk of such liability is great since a citizen's arrest is lawful in most states only if the person arrested has actually committed a breach of the peace in the serviceman's presence or if a felony has actually been committed and there are reasonable grounds to believe that the person arrested committed it. In other cases the serviceman's reasonable belief is no protection.

Thus, although there is always some risk that the serviceman will be personally liable for the use of force, the risk is extremely great when he is effecting a citizen's arrest.

3. *Insufficient Authority to Detain.*

A third significant deficiency in the serviceman's authority to protect government property is also somewhat related to his right to arrest. In most jurisdictions the serviceman may not detain an intruder except in connection with a lawful arrest.[206] As has already been mentioned, the right to make a citizen's arrest is fraught with the risk of personal liability and is limited for the most part to situations where a felony has actually been committed.[207]. As seen in the preceding chapter, many offenses against government property are misdemeanors. In most jurisdictions the serviceman has no legal right to detain a misdemeanant even though he witnesses the offense and could easily apprehend the culprit on the spot.

In some cases it would undoubtedly be desirable for the serviceman to be able to detain a person without the requirement that a felony has been committed.

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[205] See Wrynn v. United States, 200 F. Supp. 457 (E.D.N.Y. 1961) (Air Force pilots held to have been outside scope of employment in aiding police search for escaped convict).

[206] However, one who unlawfully enters a restricted area may be apprehended, searched, and questioned, Army Regs. No. 380–20, para. 6*a* (6 Feb. 1958), based on Internal Security Act of 1950, ch. 1024, tit. I, § 21, 62 Stat. 1005, 50 U.S.C. § 797 (1958).

[207] Although a private person may usually arrest for a breach of the peace committed in his presence, relatively few misdemeanors against government property will constitute breaches of the peace.

4. *Lack of Uniformity.*

Another important deficiency in the serviceman's authority to protect government property is the lack of a uniform rule as to what he may legally do. His actions must comply with the law of the situs. This is the most serious obstacle to any practical service-wide guidance as to the use of force to protect government property.[208] This means that, if there is to be any guidance at all, it must be provided locally.[209] If the serviceman should manage to acquire adequate local training as to the use of force to protect government property, its value is largely lost with his next change of station.

The rules of some jurisdictions as to the use of force are much more liberal than the majority rules summarized above. This, of course, is to the serviceman's advantage. On the other hand, some states impose much greater limitations on the use of force. An examination of the combined effect of the most restrictive rules illustrates how little force the serviceman may be allowed to use.

Under these rules, the serviceman must ordinarily tell the intruder to desist. If that fails, he may use whatever nondeadly force he reasonably believes is necessary to terminate or prevent the intrusion. The serviceman also may pursue an intruder who has actually taken property and recover it by nondeadly force if necessary. However, he may not take the intruder into custody, search him, or otherwise detain him unless the intruder has actually committed a felony in the serviceman's presence. In no event may the serviceman use deadly force except in defense of the person. Thus, if the intruder does not endanger human life and the serviceman is unable to stop him with nondeadly force, the serviceman cannot legally stop him at all, no matter what the offense.

To a limited extent this latter restriction exists even under the majority view. Whenever nondeadly force is not sufficient to stop the intruder from committing an offense or from escaping, but the use of deadly force is not privileged, the serviceman

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[208] Current Army publications dealing with this subject are necessarily unspecific, *e.g.*, U. S. DEP'T OF ARMY, FIELD MANUAL NO. 19–30, PHYSICAL SECURITY, para. 99 (1959), or limited to general common law principles, *e.g.*, FM 19–5, note 204 *supra*, para. 28. The latter is particularly undesirable since several states are now more restrictive than the common law rules.

[209] Even a state by state guide would not be entirely reliable because, as seen above at p. 89, the nature of federal jurisdiction over any particular parcel of land affects the applicability of the current state law as to civil liability.

cannot legally stop him. This can readly be classified as a deficiency in the serviceman's authority, however, but rather reflects the fundamental belief of our legal system in the value of human life. This belief must be balanced against the prevention of crime and protection of property rights. No one would seriously advocate giving a guard the right to kill to prevent the theft of a few gallons of gasoline even though the lack of such authority meant the thief must be allowed to escape with the property. On the other hand, the law of the more restrictive jurisdictions would apply the same rule if the thief were stealing a portable nuclear bomb.[210] In the latter case, the potential threat to human life in allowing the theft to succeed appears to outweigh the sanctity of the life of the thief by a considerable margin.

B. *RECOMMENDATIONS*

The foregoing discussion points out some of the deficiencies in the right to use force in the protection of government property under the current state of the law. Increasing the authority of the serviceman in this regard is the obvious solution. Unfortunately, however, the problem is not that simple.

Actually there are three separate interests which must be reconciled by any satisfactory solution. First, there is the interest of the United States in the security of its property. Second, there is the interest of the individual serviceman in avoiding personal liability. These two interests do not conflict and both could be satisfied by a substantial increase in the serviceman's authority to use force. The third interest, however, is diametrically opposed to such a solution. That is the interest of the ordinary citizen to be secure from the unprivileged or excessive use of force.

Because of the serviceman's relative immunity from both civil and criminal liability for acts done in the performance of duty, any increase in his right to use force subjects other persons to a greater risk of injury without a means of redress.[211] Even under the current law, the serviceman is privileged in some instances to use force on the basis of his reasonable belief although he is in fact mistaken. Thus, completely innocent persons may suffer injuries for which they have no legal right to be compensated. To increase

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[210] Theft of a nuclear weapons is a felony, ch. 1073, § 1, 68 Stat. 936 (1954), as amended, 42 U.S.C. § 2122 (1958), but since the guard would not be acting in defense of the person, under the most restrictive rule he would not be justified in killing the thief to prevent his escape with the weapon.

[211] Redress may be had through private relief legislation, of course.

the serviceman's authority to use force would also increase the likelihood of such injuries.

The following recommendations are made with these conflicting interests in mind.

1. *Authority to Arrest.*

It is recommended that officers, enlisted persons, and employees of the armed forces be given statutory authority to arrest for violation of laws of the United States when such violations relate to government property which the person making the arrest is responsible to protect (app. A). This authority to arrest should extend to any offense committed or attempted in the presence of the officer, enlisted person, or employee and to any felony which he has reasonable grounds to believe the person to be arrested has committed or is committing.[212]

The statute should specifically provide for the same authority to use force in making an arrest as peace officers of the United States have.[213] Any attempt to give military personnel a greater right to use force would be most unlikely to be adopted.

Such a statute would establish uniformity as to the circumstances under which an arrest could be made. This would provide a broad base of authority applicable throughout the United States.

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[212] This would be consistent with other federal statutes dealing with arrest. For example, this is the same authority as that granted U.S. Marshals. See 18 U.S.C. § 3053 (1958). See also 18 U.S.C. § 2236(b) (1958).

[213] The United States Marshal, the ordinary peace officer of the United States, has the authority of a sheriff under the laws of the state in which he serves. 28 U.S.C. § 549 (1958). Thus, except for the authority to arrest without a warrant, see note 212 *supra*, state law controls a U. S. Marshal making an arrest. Nevertheless, by equating the serviceman's authority to arrest to that of the United States peace officer his situation is aided, first because the *posse comitatus* act is removed as an obstacle (see 18 U.S.C. § 1385 (1958)), and, secondly, because the local law applied to the use of force would be that applicable to peace officers, which in some states exceeds the authority to use force which a private citizen has in making an arrest. See note 154 *supra*.

Under such a statute the soldier, further, could use the state peace officer standard on the use of force while basing his authority to arrest on the federal statute. *Cf.* United States v. Krapf, 180 F. Supp. 886 (D.N.J.), *aff'd on other grounds*, 285 F.2d 647 (3d Cir. 1960). Another case has also upheld the proposition that when the state law of arrest applies it is nevertheless the federal definition of what is a felony that applies. See Ward v. United States, 316 F.2d 113 (9th Cir. 1963).

Basing the serviceman's authority on that of peace officers of the United States, rather than directly on that of the sheriff, is useful because 28 U.S.C. § 549 is not applicable in all cases (*e.g.*, in the District of Columbia), and yet where it is not applicable there still may be a standard for U.S. peace officers (*e.g.*, D.C. Code) which the soldier could claim.

The proposed statute would significantly increase the right of the serviceman to use force in protecting government property in the many jurisdictions in which a peace officer is given more authority to use force in making an arrest than a private citizen may use.

In addition, such a statute, by allowing a serviceman to arrest as part of his official duty, would reduce his risk of personal liability. It would also give the serviceman authority to detain offenders who at present cannot legally be detained. Thus, all of the deficiencies pointed out above would be either eliminated or substantially reduced by the proposed statute.

A federal statute is obviously the only practical way of accomplishing the desired result since it is inconceivable that all fifty states could be persuaded to act favorably on this matter.

Actually it is somewhat surprising that servicemen protecting government property do not already have authority to arrest in connection with that duty. Many other federal employees have such authority even when protection of federal property is only an incidental part of their duties and the property is less critical than that protected by servicemen in many cases.[214]

2. *Payment of Damages by the United States.*

It is recommended that the Federal Tort Claims Act[215] be amended to allow recovery from the United States for an assault or battery resulting from the mistaken or excessive use of force by an employee of the government in performing his duty to protect government property (app. B). It is further recommended that recovery from the United States be made the exclusive remedy in such cases (app. C).

The first of the recommendations would not only offset any increased risk of uncompensated injury resulting from the previously recommended arrest statute, but would also provide a means of recovery for those innocent persons, injured through a reasonable mistake, who at present have no remedy other than private relief legislation. The second recommendation would pro-

[214] See, *e.g.*, 33 Stat. 873 (1905), 16 U.S.C. §§ 10, 559 (1958), providing that all employees of the National Park Service and Forest Service may arrest for violation of any law or regulation relating to national parks or forests.

[215] Ch. 753, 60 Stat. 842 (1946), as amended by 75 Stat. 539 (1961) (codified in scattered sections of 28 U.S.C.). Specifically the recommendation would require amendments to 28 U.S.C. §§ 2679, 2680.

vide the individual serviceman with additional protection from civil liability.

It may be argued that additional protection from civil liability would increase the likelihood of the irresponsible use of force by servicemen. This is considered extremely doubtful, however. It is questionable whether the majority of low ranking servicemen are particularly concerned about their civil liability. Indeed, such a thought probably never enters the mind of a guard confronted with an actual problem in protecting government property. In considering the consequences to himself, he is most likely to think of the possibility of disciplinary action for failure to take adequate measures,[216] rather than of the consequences of using excessive force. If he should consider the latter, in all probability he will do so in terms of possible disciplinary action which may be taken against him for the use of excessive force.

The recommendation that the United States pay all claims in this area does not reduce the serviceman's criminal responsibility to the United States for his unprivileged or excessive use of force. The military disciplinary system, with its varying levels of punishment to fit different degrees of guilt, is best equipped to deal with the wrongful conduct of military personnel and undoubtedly is the strongest deterrent to such conduct. Therefore, the risk of any increase in the irresponsible use of force by providing additional protection from civil liability is considered insignificant.

C. *CONCLUSION*

There is no doubt that servicemen need increased authority to adequately protect government property. At present the serviceman's authority in this regard is seriously out of proportion to his responsibility. Under the foregoing recommendations the serviceman would have the authority to perform his duties more effectively and have greater assurance against personal liability as well. Yet the public would also be provided with greater protection from uncompensated injuries.

Although the recommended authority to arrest would constitute an exception to the *Posse Comitatus* Act, that Act was never intended to hinder the Army in protecting government

[216] A sentry who fails to take adequate measures to protect government property under his care may be guilty of an offense under UCMJ, Art. 108(3) (suffering military property to be lost, damaged, destroyed, etc.) or Art. 92(3) (dereliction in the performance of duty).

property.[217] The serviceman's authority to arrest under the proposed statute would certainly not be disproportionate to that of other employees of the government with correspnding responsibilities.

Although these recommendations do not purport to give the serviceman all that might ever be desirable in the way of authority to use force in protecting government property, they do represent an attempt to reconcile the conflicting interests involved.

[217] For a brief history of the *Posse Comitatus* Act, including its original purpose, see Furman, *Restrictions Upon the Use of the Army Imposed by the Posse Comitatus Act*, 7 MIL. L. REV. 85–86 (1960).

APPENDIX A

(Proposed Addition to Chapter 203, 18 U.S.C.)

§ . Military personnel protecting Government property.

Officers, enlisted persons, and employees of the armed forces of the United States who, as part of their official duties, are responsible for the protection of Government property may make arrests without warrant for any offense against the United States committed or attempted in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony; provided that such offense or such felony is related to Government property under the protection of the officer, enlisted man, or employee making the arrest. Such persons shall have the same authority to use force in making arrests under this section as have peace officers of the United States in the place in which the arrest occurs. Any person arrested under this provision shall be taken before the nearest United States commissioner, within whose jurisdiction the arrest is made, for trial.

APPENDIX B

(Proposed Amendment* to 28 U.S.C. § 2680)

§ 2680. Exceptions.

The provisions of this chapter and section 1346 (b) of this title shall not apply to—

* * * * *

(h) Any claim arising out of an assault *or* battery *(except when resulting from the mistaken or excessive use of force by an employee of the Government in performing his duty to protect Government property), or* false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or with contract rights.

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* Italicized material indicates proposed additions to existing statute.

APPENDIX C

(Proposed Amendment* to 28 U.S.C. § 2679, as Amended)

§ 2679. Exclusiveness of remedy.

* * * * *

(b) The remedy by suit against the United States as provided by section 1346 (b) of this title for damage to property or for personal injury, including death, resulting *from the actions of any employee of the Government in performing his duty to protect Government property or* from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

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* Italicized material indicates proposed additions to existing statute.

COMMENT

INCOMPATIBLE BLOOD TRANSFUSIONS.* Every transfusion of whole blood into a human being carries with it the possibility that it may cause him injury or death. Such a result may follow the transmission of infection that is present in the donor of the transfused blood,[1] or it may follow the transmission of infection by contaminant material contained on improperly sterilized syringes or needles. A transfusion also may cause injury or death if the transfused blood is incompatible with the blood of the recipient patient.[2]

There are interesting legal ramifications in each of the possibilities mentioned, but this article will be limited to a consideration of those aspects of law which are involved in transfusions with incompatible blood.

I. BLOOD GROUPS[3]

Blood is a fluid which carries three formed elements (solid or semi-solid particles) known as red cells, white cells and platelets.[4] Red cells perform the function of carrying oxygen to the tissues, and are those with which this article is concerned.

Red blood cells have certain properties which may vary from person to person. These properties fall into separate categories known as blood groups; they cause red cells to clump together when blood containing red cells with properties of a particular group is mixed with other blood that contains substances that are antagonistic to those properties. When a mixing of blood samples

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* The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

[1] See, *e.g.*, Giambozi v. Peters, 127 Conn. 380, 16 A.2d 833 (1940); Fischer v. Wilmington General Hospital, 51 Del. 554, 149 A.2d 749 (Super. Ct. 1959); Perlmutter v. Beth David Hospital, 308 N.Y. 100, 123 N.E.2d 792 (1954).

[2] This enumeration does not, of course, run the gamut of possibilities for misadventure to patients as a result of blood transfusions. It serves as a warning, however, that blood transfusions should not be administered indiscriminately.

[3] This is a rudimentary explanation in non-technical terms. It is recognized that whenever scientific matters are translated into English for the layman, something may be lost in the translation.

[4] Red cells and white cells are also known as red corpuscles and white corpuscles, respectively.

results in the clumping of red cells, the blood in the samples is said to be "incompatible."[5]

The ability to categorize blood samples according to the clumping properties of their blood groups is a significant factor in giving blood transfusions, because a transfusion with incompatible blood is fraught with danger to the patient.

When incompatible blood is administered to a patient, the clumping of red cells which may result can limit the flow of oxygen-bearing blood through the veins and arteries to the tissues; in addition, large clumps may accumulate in the kidneys or elsewhere. Incompatibility of mixed bloods can also lead to destruction of the oxygen-bearing red cells. The end results of incompatible blood transfusions may be the death of the patient, or permanent damage to his brain, kidneys, or other portions of his body.

The administration of incompatible blood may evoke symptoms in a patient before much blood has been transfused. These symptoms include pain, anxiety, flushing of the face, chill, and an increase in the pulse rate and respiration. They may be followed by shock, nausea, coma, high temperatures and delirium.

In some cases, early appearance of these symptoms may serve as a warning to stop the transfusion; if the transfusion is stopped soon enough, the patient may suffer little or no harm.[6] In other cases, however, early symptoms may be masked if the patient is under anesthesia, or already in shock; in the absence of a warning from observable symptoms, a transfusion is apt to be continued to a stage where only permanent injury to the patient, or his death, may ensue.

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[5] The clumping properties of red blood cells were originally categorized by four lettered groups designated A, B, AB and O. Subsequently, additional blood groups were identified, and were given designations such as M–N, Rh–Hr, Kell, Lewis, Lutheran, Duffy and Kidd. All of these groups may be further divided into subgroups, and each red blood cell may contain the properties of one or more of these groups and subgroups. It is probable that there are subgroups of presently known groups that remain to be discovered. Blood groups are transmitted in genes according to Mendel's laws, so thousands of different combinations of groups are possible. Although, as a general rule, there may be incompatibility between two blood samples containing dissimilar blood groups, it has been found that in the A, B, AB and O groupings, group O blood may be given with relative safety to persons with blood of group A, B, or AB. Thus, group O blood is known as "universal donor blood."

[6] In Joseph v. W. H. Gross Latter-Day Saints Hospital, 10 Utah 2d 94, 348 P.2d 935 (1960), one of the allegations of plaintiff was that the defendant had failed to stop giving the transfusion after an unfavorable reaction was or should have been noticed.

A number of techniques have been developed in order to group and cross-match blood samples for compatibility. Because there is a great number of possible combinations of blood groups, however, not all these techniques can be employed in every case involving a transfusion. Some of the limitations on the use of techniques include the economics of the situation and the availability of personnel and equipment.

II. NEGLIGENCE

Most actions for damages for injury or death resulting from transfusions with allegedly incompatible blood are brought on the theory of negligence. Actions have been unsuccessful when brought on the theory of breach of warranty of fitness of the transfused blood for its intended use.

For example, in *Dibblee v. Dr. W. H. Gross Latter-Day Saints Hospital*,[7] the administrator of an estate brought an action against the defendant hospital for damages for the death of a patient following a blood transfusion. It could not be shown that the transfused blood had been negligently grouped or mis-matched, so the action was based on the breach of an implied warrantly that the blood was "fit for the use for which it was intended." In denying recovery on this theory, the court said that the "furnishing of blood by a hospital at the specific request of a patient or his doctor, and for a charge, is part of a *service*, not a *sale* in any connotational sense of those terms."[8] In *Goelz v. J. K. & Susie L. Wadley Research Institute and Blood Bank*,[9] the same rule was applied in an action for breach of warrantly against a blood bank which had supplied blood to the hospital in which the patient had received a transfusion.

In the light of presently available scientific knowledge, there are certain minimum standards of care which must be observed in performing blood grouping or cross-matching tests prior to a transfusion. Procedures which are acceptable and customary

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[7] 12 Utah 2d 241, 364 P.2d 1085 (1961); *accord*, Perlmutter v. Beth David Hospital, 308 N.Y. 100, 123 N.E.2d 792 (1954); Gile v. Kennewick Public Hospital District, 48 Wash. 2d 774, 296 P.2d 662 (1956).

[8] 12 Utah 2d at 243, 364 P.2d at 1087.

[9] 350 S.W.2d 573 (Tex. Ct. Civ. App. 1961) (alternative holding). An exception to the requirement for pre-transfusion blood grouping and cross-matching may be found in an emergency situation where advance tests are not feasible. In such a case, transfusion of universal donor blood, see note 5 *supra*, to a patient who later suffers a transfusion reaction should not, in and of itself, be considered blameworthy.

in the local medical community will usually set the standards to be followed,[10] but even these standards could be deemed inadequate in a court of law.[11]

Whether or not a hospital has followed customary methods and procedures in grouping and cross-matching blood would be probative, and, in most cases, conclusive on the question of due care, unless the standards are obviously too low. The plaintiff has the burden of showing that the hospital was negligent.

Expert testimony can be particularly important on the issue of causation, because even when acceptable standard tests are scrupulously followed, and admittedly compatible blood is transfused, a patient may still suffer a transfusion reaction because of his unknown physiological peculiarities, or because his blood and the transfused blood contain as yet unidentifiable incompatible blood groups for which there are no grouping and cross-matching tests.

This problem of proving causation appears to militate against invoking the doctrine of *res ipsa loquitur* in actions involving transfusions with allegedly mis-matched blood, even when evidence shows that the blood was in fact mis-matched; a person does not always suffer a transfusion reaction from a transfusion with incompatible blood, but he may suffer such a reaction for other reasons when an incompatible blood transfusion is given.

III. DECISIONS IN POINT

There are not many reported cases based on alleged negligent injury or death from transfusions with mis-matched blood, and not all of these are solely concerned with claims alleging negligence in performing or following proper laboratory standards and techniques in grouping and cross-matching. Some cases involve the adminstration of mislabeled blood, and some involve the administration of incompatible blood to a person who did not require a transfusion.[12] It is not possible to predict the possibilities for all new types of cases.

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[10] See Levin, *Malpractice and the Federal Tort Claims Act*, [1963] INSURANCE LAW JOURNAL 453, 457.

[11] See Favalora v. Aetna Casualty and Surety Company, 144 So.2d 544 (La. Ct. App. 1962).

[12] There is a type of case related to those involving transfusions with mismatched blood. This type indicts a failure to give an exchange transfusion to a newborn infant where there is an Rh factor incompatibility between the parents. See Price v. Neyland, 320 F.2d 674 (D.C. Cir. 1963).

A. *ERRONEOUS TESTS*

In *Berg v. New York Society for the Relief of the Ruptured and Cripped,*[13] a husband and his wife brought an action against the defendant hospital to recover damages for injury caused by a laboratory technician's negligence. The wife had been hospitalized for rheumatoid arthritis; in connection with her treatment, she was to have received a transfusion of blood. Before the transfusion, a sample of Mrs. Berg's blood was taken, and the necessary testing was performed. The laboratory technician mistakenly reported, however, that Mrs. Berg's blood was group A–Rh positive, whereas, in fact, her blood was group A–Rh negative. On March 19, 1947, 500 c.c.'s of Rh positive blood were infused into Mrs. Berg. On March 26, 1947, while she was again being infused with Rh positive blood, she developed an unfavorable reaction after 100 c.c.'s had been administered, and the transfusion was stopped. She was discharged from the hospital on April 12, 1947, and, shortly thereafter, became pregnant. As a result of the incompatible blood transfusions she had received while in the hospital, Mrs. Berg was sensitized to a point where the fetus had no chance of surviving, and died before delivery. In finding for the plaintiffs, the court held that the hospital was liable for consequential damages because of the negligence of its laboratory technician.

In *Redding v. United States,*[14] the evidence revealed that, during the course of a hysterectomy, plaintiff Mrs. Redding was initially transfused with incompatible blood. When she appeared to be having a transfusion reaction, the blood was rechecked, and she was then transfused with compatible blood. Although the second transfusion saved Mrs. Redding's life, she suffered permanent damage to her kidneys, and developed a condition of rheumatoid arthritis. The defendant admitted that an error had been made in cross-matching Mr. Redding's blood, offered evidence to show that all proper procedures had been followed, and that, in some cases, an error can be made despite the use of due care. This argument was rejected by the court, which rendered judgment for the plaintiffs. In its opinion, the court discussed the question whether *res ipsa loquitur* should be applied, but it is not clear that the doctrine, as such, was followed.

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[13] 1 N.Y.2d 499, 136 N.E.2d 523 (1956). For a detailed statement of facts, see the lower court opinion in 136 N.Y.S.2d 528 (Sup. Ct. 1954). *Compare with* Price v. Neyland, *supra* note 12, *and* Quinton v. United States, 203 F. Supp. 332 (N.D. Tex. 1961).

[14] 196 F. Supp. 871 (W.D. Ark. 1961).

In *National Homeopathic Hospital v. Phillips*,[15] the hospital was held liable in damages for the transfusion death of a patient when it was shown that a laboratory technician had erroneously tested and reported incompatible blood as being compatible.

In *Joseph v. W. H. Gross Latter-Day Saints Hospital*,[16] the plaintiff father, individually and as guardian ad litem for his children, brought an action for damages for the death of the mother, alleging that the hospital had been negligent in administering incompatible blood during a transfusion. The facts indicated that on April 4, 1953, Mrs. Joseph was operated on for the removal of an ovarian cyst, and received transfusions of two pints of blood, one during the operation, and the other after having been returned to her room. During the second transfusion, she manifested symptoms of undue distress, and she began to perspire, and to shake as if chilling. Ten days later, Mrs. Joseph died in the hospital of a lower nephron nephrosis (inflammation of the kidney that prevents it from functioning) which appeared to have resulted from an incompatible blood transfusion. The claim of negligence was that the hospital had failed to exercise proper care in (a) grouping and matching the blood, (b) administering the transfusion, and/or (c) failing to stop giving the transfusion after an unfavorable reaction was or should have been noticed. The jury found for the defendant hospital. On appeal, the plaintiff asked the court to invoke the doctrine of *res ipsa loquitur*, but the court refused to do so. The court pointed out that the evidence showed that the hospital had taken all reasonable precautions to assure proper matching of blood before the transfusions, and that there was no evidence that the wrong type of blood had been given. The court recognized that the occurrence of a transfusion reaction does not necessarily indicate that there has been negligence, and stated:

> According to the evidence in this case there can be no certainty that there will be no adverse blood reaction even when the best methods known to medical science are used in the typing and matching of blood . . . . [E]ven when such procedures are followed, hemolytic reactions [destruction of the red corpuscles] nevertheless occur in about one to five per thousand transfusions and . . . death may result in from twenty-five to thirty per cent of those suffering such reaction.
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> . . . .
>
> It is apparent, however, that there are known hazards involved in giving blood transfusions and this would, of course, impose upon those

[15] 181 F.2d 293 (D.C. Cir. 1950).

[16] 10 Utah 2d 94, 348 P.2d 935 (1960).

> administering them the duty of exercising the utmost care and vigilance for the safety of the patient. This includes not only the preliminary steps in taking, typing and matching the blood . . . but also the duty of make careful observation of the patient during the transfusion for any indications of an adverse reaction.[17]

Gillen v. United States [18] was an action by the husband and son of a decedent for damages for her wrongful death, which allegedly resulted from the negligence of military medical personnel when she was a patient in a military hospital. Mrs. Gillen, the deceased, had been admitted as a confinement patient to the Air Force hospital at Perrin Air Force Base, Sherman, Texas, on December 19, 1955. On December 24th, at about 4:16 P. M., she was delivered of a stillborn child, and suffered hemorrhaging, with attendant shock. At about 4:30 P. M., whole blood was ordered and caused to be transfused into her by attending medical personnel. Mrs. Gillen failed to rally, her condition worsened, and she died, two days later, of a lower nephron nephrosis. The plaintiffs alleged that the medical personnel of Perrin Hospital had negligently failed properly to determine Mrs. Gillen's blood group, that they had transfused her with incompatible blood, and that the onset of the nephrosis and her death were direct and proximate results of this negligence. Although the evidence, particularly the testimony of medical experts was conflicting, the court found that Mrs. Gillen had not been transfused with incompatible blood, and that the nephrosis and death were not occasioned by her receipt of incompatible blood. In a footnote to its opinion, the Court of Appeals stated: "Hemorrhage loss of 1,000 c.c.'s of blood and a manual removal of retained (12–13 days) placenta resulted in utero placental damage to the deceased. Medical testimony showed that lower nephron nephritis could be caused by 12 physiological conditions, three of which are (1) transfusion reaction, (2) shock, and (3) utero placental damage."[19] The court refused to apply the doctrine of *res ispa loquitur* as a conclusive presumption.

B. *MISLABELED BLOOD*

In *Parker v. Port Huron Hospital,*[20] the sample tube containing the patient's blood was mixed up with two other tubes containing the blood of other patients. Although the sample in each tube was

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[17] *Id.* at 99–100, 342 P.2d at 988.

[18] 281 F.2d 425 (9th Cir. 1960).

[19] *Id.* at 427 n.3.

[20] 361 Mich. 1, 105 N.W.2d 1 (1960).

correctly grouped and cross-matched, the laboratory technician labeled the wrong sample as coming from the patient involved in the case. As a result, the patient was transfused with incompatible blood, and died. The court held for the plaintiff, because it was shown that the technician had not followed acceptable procedures in labeling the samples.

In *Mississippi Baptist Hospital v. Holmes*,[21] the laboratory techician correctly grouped the blood of two patients, but inadvertently switched identification labels. As a consequence, one of the patients was given blood of the wrong blood group, and died. The court found the hospital liable. In this case, the defense experts contended that even though the wrong blood had been given, it could not be stated with certainty that the transfusion had caused the death, as there had not been an autopsy. The court, holding that the plaintiff need not "prove to a moral certainty and beyond every other reasonable hypothesis the exact cause of the death complained of," said:

> To illustrate that these experts in giving their testimony that something else could have happened had in mind reasonable possibilities as against the contention that the transfusion of the wrong type of blood had in fact caused her death as a reasonable probability, some of them testified that if one should see a person shot in the head with a pistol and then see the victim fall over and die instantly, an autopsy would still be necessary in order to determine the cause of death with a reasonable degree of certainty. This high degree of proof is not even required in homicide cases.[22]

In *Mazer v. Lipshutz*,[23] the facts showed that plaintiff's decedent, Israel Abrams, had entered the hospital on December 17th for an operation, and was placed in room 807. On the same day, another Israel Abrams entered the same hospital and was assigned to room 842. Following usual hospital practice, the anesthetist for the operation on the first Irsael Abrams ordered two pints of blood to be made available in the operating room. During the course of the operation, the anesthetist sent for a bottle of blood, and noted that it bore the name "Israel Abrams," but the wrong room number. He called for the head blood bank technician, a hospital employee, who assured him that the blood was correct for the Israel Abrams then on the operating table. Thereafter, a total of six pints of incompatible blood was administered, and the patient died. In individual actions against the surgeon and the

[21] 214 Miss. 906, 55 So.2d 142 (1951), 56 So.2d 709 (1952).

[22] *Id.* at 921, 55 So.2d at 147.

[23] 327 F.2d 42 (3d Cir. 1963).

anesthetist (the hospital had been given a release) the jury found both defendants free from negligence. The trial court denied a motion for a new trial as against the surgeon, pointing out that the surgeon had not had control of the employees of the hospital and, therefore, could not be charged with responsibility for their negligence. On appeal, the court held that under Pennsylvania law, the surgeon, as "captain of the ship," could be liable for the negligence of the head technician and ordered a new trial.

C. *WRONG PATIENT TRANSFUSED*

Necolayff v. Genessee Hospital[24] was a case where an interne and a nurse gave a transfusion of incompatible blood to a patient who did not require a transfusion. The transfusion had been intended for another patient on the same floor. The defendant hospital was held liable for negligent injury.

In *Weiss v. Rubin*,[25] an action for damages was brought against the hospital, the anesthetist and the surgeon, when death occurred to a surgical patient who had received blood intended for another. A judgment against all three defendants was sustained on appeal. The facts, briefly, indicated that during the course of an operation upon the decedent, the surgeon was told by the anesthetist that he had the patient's blood ready. The anesthetist asked "Shall I give it?" and the surgeon responded in the affirmative. The circulating nurse had come into the operating room with a bottle of blood on which there was a slip with the name of another patient, previously operated, but not by the defendant surgeon, at which operation the circulating nurse and the anesthetist had also been present. The proof showed that although it was the duty of the surgeon to order blood,[26] he had neither ordered blood for this patient nor asked how it had gotten into the operating room.

IV. CONCLUSION

The fact that there are few reported cases involving transfusions with incompatible blood may be interpreted as meaning that, in the great majority of cases involving transfusions, patients are transfused with compatible blood. The fact that errors

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[24] 270 App. Div. 648, 61 N.Y.S.2d 832 (4th Dep't 1946).

[25] 11 App. Div.2d 818, 205 N.Y.S.2d 274 (2d Dep't 1960), *aff'd* 9 N.Y.2d 230, 173 N.E.2d 791 (1961).

[26] See 9 N.Y.2d at 233, 173 N.E.2d at 792. Compare Mazer v. Lipshutz, 327 F.2d 42 (3d Cir. 1963), where the anesthetist had the duty to order blood.

can be made, however, suggests that hospitals and blood banks should make certain that their grouping and cross-matching procedures are adequate, and that they are strictly followed by competent personnel under proper supervision.

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BOOK REVIEW*

The Death Penalty in America. Edited by Hugo Adam Bedau. Anchor Books, Doubleday & Company, Inc., Garden City, New York, 1964. Pp. 584. Bibliography. Index.

Hugo Adam Bedau has collected the opinions of several authorities on the subject of capital punishment, including Thorstein Sellin, J. Edgar Hoover, John Barlow Martin, Sidney Hook, and Jacques Barzun. The result is a unique anthology which extensively explores the bases upon which the abolitionists, and, to a lesser degree, the retentionists, rest their respective cases. The editor, himself a declared abolitionist, has included six essays of his own on topics he considered "so fundamental they could not be omitted."

The book is divided into nine chapters, the first of which is a general introduction written entirely by Professor Bedau. Here he examines the characteristic components of English capital laws as a foundation for the pattern of the Colonial American laws in connection with capital punishment. The Colonial framework is then developed by the author as the historic basis upon which the major American innovations in capital punishment were instituted during the past century and a half. It is worthy of comment that such a Herculean task is accomplished in the surprisingly short space of thirty-two pages. By way of conclusion to this initial chapter, the author makes the interesting observation that, in its most fundamental aspects, the death penalty really plays a microscopic role in the overall program of criminal treatment and in the administration of criminal justice. This, he points out, is evinced by the fact that only about one inmate in one thousand (in the state and federal systems) is under a sentence of death. "The obvious inference," he concludes, "is that the death penalty in our country is an anachronism, a vestigial survivor of an earlier era when the possibilities of incarcerative and rehabilitative penology were hardly imagined."[1] The reader, whether he be retentionist, abolitionist, or uncommitted, is forced to question the validity of this conclusion. Is the low percentage

* The opinions and conclusions presented herein are those of the individual reviewer and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

[1] P. 31.

of prisoners under the death sentence an illustration of the success of the death penalty, or, as the author would have us believe, is it exemplary of its failure? Are the possibilities of incarcerative and rehabilitative penology fully appreciated even in the present era, in view of the rate of recidivism in this country? At this early point in the book the thoughtful reader is forced to decide, therefore, at least tentatively, that the "inference" Professor Bedau constructs is not quite so obvious as he would purport.

The introduction to Chapter Two, also written by the editor, presents a study of the various offenses punishable by death in the United States, a discussion of juveniles and capital punishment, and the seven crimes for which the death penalty has been carried out since 1930 (murder, rape, armed robbery, kidnapping, espionage, burglary, and assault by a life term prisoner). The author draws some rather interesting conclusions, based upon available statistical data: first, year by year, the total number of serious crimes committed in all jurisdictions greatly exceeds those which are capitally punishable. The question that may be interposed is whether this disparity is *because* of, or in *spite* of the death penalty. (The deterrent effect of the death penalty is extensively discussed at a later point of the book.) Secondly, the rate of capitally punishable homicides is generally proportionate to the total volume of homicides committed during any given time period. Thus, the latter may be used as a guide to the former—a helpful device in view of the dearth of statistical data on the number of capitally punishable homicides committed during any given year. This observation does not represent an innovation of methodology, however, for as is pointed out by the editor, Edwin H. Sutherland discussed statistical relationships between general homicides and capitally punishable homicides in his article "Murder and the Death Penalty" in 1925.[2] Third, the general homicide rate, including capitally punishable homicides, is on a slow but relatively steady decline.

Perhaps the most informative and interestingly written article of the six presented in Chapter Two is "A Sociological Analysis of Criminal Homicide," by Professor Marvin E. Wolfgang of the University of Pennsylvania. This article is based largely upon statistical data collected and analyzed by the author after an intensive study of all criminal homicides recorded by the Philadelphia Homicide Squad from 1 January 1948 through 31 Decem-

[2] See Sutherland, *Murder and the Death Penalty*, 15 J. CRIM. L., C. & P.S. 523 (1925).

ber 1952. This research resulted in the determination that while criminal homicide is largely an unplanned act, nevertheless there are rather clearly defined uniformaties and patterns. For example, statistically, there is a significant association between criminal homicide and the race and sex of both the victim and the offender; Negroes and males exceed greatly their proportions in the population generally, and the rates for these two categories are decidedly greater than the rates for whites and females. This factor is of great significance in determining the degree of interrelationship between socioeconomic groups and crime rates; the author uses the phrase "subculture of violence" to characterize the phenomenon of socially isolated ethnic groups who are virtually required to live in restricted residential areas characterized by poor housing, high population density, overcrowded home conditions, and disoriented value systems. The author's research also reveals that in nearly two-thirds of the cases, either the victim or the offender, or both, had been drinking immediately before the slaying.

In sum, Professor Wolfgang has presented a thorough and meaningful analysis of statistical data which should be of extreme value for future inquiry into the etiological factors of criminal homicide.

The book's third chapter presents "The Argument for the Death Penalty." It is interesting that the editor has limited this aspect of his anthology to but forty-five pages. In his introduction to Chapter Three, Professor Bedau divides proponents of the death penalty into three main categories. First, law enforcement agencies provide the primary support, on the bases of retribution and deterrence. Some theologians of the more "Bible-Centered persuasion" provide the secondary line of defense.[3] (Later portions of the book leave the reader with the impression that an appreciable segment of religious groups oppose the death penalty, and those of their number who actively support retention are dissidents.) Thirdly, a "moderate" approach is supported by many who are not prepared to completely divorce society from the possibility of recourse to the death penalty, but at the same time accept as valid the factual evidence cited by the abolitionists.

The editor's selection of articles for inclusion in the chapter is unfortunate. Withal they are interesting, if only for the weakness of the arguments they present, and the dogmatism which

[3] P. 121.

characterizes their style. An example is "Capital Punishment: Your Protection and Mine," by Edward J. Allen, Chief of Police, Santa Ana, California.[4] He develops at one point in his essay the following mystifying syllogism which will be synopsized without needless further comment: one reason advanced for the abolition of the death penalty is that slavery may be equated with the capital punishment. Enlightened society now frowns upon slavery and favors its continued abolition; therefore, we ought to do away with the death penalty because we are more advanced than the generations who preceded us. The author then concludes that, "[s]lavery never was, or never will be, morally right, or justifiable, or just. The death penalty is morally right and justifiable and just. So these sophists are merely advancing a completely false and odious comparison."[5] After completing the book, the reader wonders whether the editor intended to represent the position of the Protagonists by articles which most effectively articulate their position.

Chapter Four presents the argument against the death penalty. It is in this chapter that the editor presents the thrust of the book, for he has colleced five articles which succinctly put forth several valid arguments against capital punishment. It is strategically located immediately following the chapter which embodies the opposing view, and withal, successfully refutes every salient point made in Chapter Three. Perhaps the most stimulating of these articles (for the legally trained reader) is that written by Gerald Gottlieb in which the future constitutionality of the death penalty is questioned.[6]

Chapter Five is a collection of three articles on the general subject of public opinion and capital punishment. This segment is slightly burdensome reading, owing mainly to an inordinate use of statistics throughout.

The deterrent effect of the death penalty is treated in the essays of the sixth chapter. The main thrust of these articles is that, as a deterrent, the death penalty has not been shown by the Protagonists to be sufficiently efficacious to warrant its retention.

Related topics are treated in the following chapter titled "Abolition: Success or Failure," which recounts the legislative struggle for abolition and the reasons for later reintroduction of the death penalty in Oregon, Missouri, and Delaware.

[4] P. 135.
[5] P. 140.
[6] P. 194.

The final two chapters (eight and nine) deal with general aspects of criminal justice and case histories, respectively. In perspective, these articles serve as post-scripts, and are entirely interesting if not strikingly informative.

Professor Bedau has brought together the views (all previously published) of several distinguished writers in the field of penology, and in doing so he has undoubtedly made a contribution to the field. It cannot be said, however, that the editor has compiled an objective anthology, although that was admittedly not his purpose. Perhaps it would not be unfair to conclude that the book's most bothersome defect is its repetition of facts, figures, and arguments for abolition; but then, it should also be added that repetition is a defect which might occur to the "cover to cover" reader of any anthology of this nature.

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