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CAN A COMMANDER AUTHORIZE SEARCHES & SEIZURES IN PRIVATIZED HOUSING AREAS?

MAJOR JEFF A. BOVARNICK[1]

It is then said that, apart from the Code, under immemorial custom a military commander has virtually unlimited authority to authorize searches on a military station . . . and that he must possess that power for the safety and discipline of his command and his subordinates.[2]

I. The Case of the Smoking Gun

A. The Crime Scene

Screams are silenced by gunshots in the installation housing area. Sergeant First Class (SFC) Jones hears the shots coming from the vicinity of Staff Sergeant (SSG) Smith's house next door and he immediately calls 911. When SFC Jones looks out his window, he sees someone running across the street into SSG Brown's quarters. Law enforcement officials arrive, enter the Smith quarters after no one answers the door, and find Mrs. Smith lying dead on the floor with a gunshot wound to her head. Sergeant First Class Jones informs the lead agent on the scene that he believes

1. Judge Advocate, U.S. Army. Presently assigned as Chief, Military Justice, 82d Airborne Division, Fort Bragg, North Carolina. LL.M., 2002, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia; J.D., 1992, New England School of Law; B.B.A., 1988, University of Massachusetts at Amherst. Previous assignments include: 101st Airborne Division (Air Assault), 1993-1996 (Trial Counsel, 1994-1995; Chief, Operational Law, 1995-1996); Fort Bragg Field Office, U.S. Army Trial Defense Service, 1996-1997 (Defense Counsel); Joint Readiness Training Center, Fort Polk, Louisiana, 1998 (Observer/Controller); Fort Sam Houston, Texas, 1999-2001 (Chief, Criminal Law Division, 1999-2000; Chief, Client Services Division, 2001). Member of the bars of Massachusetts, the Court of Appeals for the Armed Forces, and the Supreme Court of the United States. Previous publications: Perpich v. U.S. Dep't of Defense, *Who's in Charge of the National Guard?*, 26 NEW ENG L. REV. 453 (1991); *Trying to Remain Sane Trying an Insanity Case: United States v. Captain Thomas S. Payne*, ARMY LAW., June 2002, at 13 (co-author, Captain Jackie Thompson).

2. Saylor v. United States, 374 F.2d 894, 899 (Ct. Cl. 1967).

SSG Smith is in the field with his unit, and also about the person he saw running into SSG Brown's quarters after he called 911. About five minutes after SFC Jones called 911, SSG Brown, the occupant of the quarters across the street, also called the Military Police (MP) station and reported hearing gunshots. After numerous police vehicles arrived on the scene, SSG Brown comes out of his quarters, approaches SFC Jones and the agent interviewing him, and makes the unsolicited statement that he was outside, and after he heard the shots, he ran into his house to call the police. Within the hour, after confirming that SSG Smith was in the field with his unit, SSG Brown has become a suspect in Mrs. Smith's murder. The lead agent asks SSG Brown if he owns a gun and SSG Brown says that he does, but that it is in storage. The agent asks SSG Brown if he can go into his quarters to have a look around, but SSG Brown denies the request, tells the agent his wife is out of town, and then refuses to answer any more questions and asks for an attorney. The agent apprehends SSG Brown and orders his quarters sealed. After ensuring the crime scene is secure, the agent briefs the Garrison Commander on the situation and requests authorization to search SSG Brown's quarters. One additional fact: the quarters are in privatized housing.

B. The Smoking Gun

The lead agent prepares a written affidavit and personally briefs the garrison commander on all of the facts known to him. Finding probable cause, the garrison commander authorizes a search of SSG Brown's quarters for a gun. During the course of his search, the agent finds what turns out to be a recently fired, unregistered handgun stashed in the attic crawl space of SSG Brown's quarters. Other than SSG Brown's admission that he was in the area at the time the shots were fired and SFC Jones' corroborating identification, there is no other evidence linking SSG Brown to the crime scene at the Smith quarters. The only evidence linking SSG Brown to the murder of Mrs. Smith is the smoking gun found in his attic.

C. The Motion to Suppress

In a pretrial motion, the defense moves to suppress the handgun, claiming its discovery was the result of an illegal search. The defense bases it claim primarily on the commander's lack of authority over the land. The defense claims the "installation housing" area is not actually installation housing, but rather a private enclave on the federal installation.

The defense has attached the privatized housing contract to its motion demonstrating that the land was in fact conveyed to private developers by the government. A second defense exhibit is a copy of the rental agreement between SSG Brown and the private landlord. The lease requires SSG Brown to pay rent to the private landlord, but it also contains a clause authorizing the commander the right to enter the premises to inspect the property. It is the latter clause that the defense argues the government required the private landlord to put that clause in the leases and the government cannot, via a contract clause, bargain away a third party's constitutional right against an unlawful search. Swamped with more important motions in the capital murder case against SSG Brown, the lead trial counsel gives this suppression motion a cursory glance and assigns it to an assistant trial counsel. In a one paragraph response, the government acknowledges the facts as laid out by the defense and simply cites Military Rule of Evidence (MRE) 315(d)(1)[3] and the authority of commanders to authorize searches over property situated on a military installation.[4]

II. Introduction

This article examines the well-established concept of a commander's authority[5] to authorize searches over property he controls[6] in conjunction with the relatively new concept of privatized housing on military installations.[7] Specifically, does a military commander control privatized housing? The issue of control is essential to a commander's authority to issue search authorizations. In the privatized housing arena, installation land can be leased or conveyed outright to a private entity. When housing is privatized, does the commander still control the land? While the general concept of privatized housing is for the government to relinquish control of its housing operations, is the intent for commanders to relinquish control over the privatized housing areas? If so, then a commander who does not control privatized housing on the installation cannot authorize a search therein. If the commander does not have control over privatized housing, yet authorizes a search therein, then the result would be an illegal search

3. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 315(d)(1) (2002) [hereinafter MCM]. A commander "who has *control over the place* where the property or person to be searched is situated or found, or, if that place is not under military control, having control over persons subject to military law or the law of war" has the power to authorize a search pursuant to this rule. *Id.* (emphasis added).

and potentially a violation of the service member's Fourth Amendment guarantee against unreasonable searches.[8]

This article's primary focus is to explore the issues associated with a

4. This hypothetical attempts to portray a realistic fact pattern where a commander is called upon to authorize a search authorization in a privatized housing area. This fact pattern focuses solely on the commander's control over the privatized housing which is located within the borders of the installation. While search and seizure cases can present numerous issues, the narrow issue presented here is a probable cause search under MRE 315(d).

This article does not address MRE 314 searches that do not require probable cause. "Government property may be searched under [MRE 314] unless the person to whom the property is issued or assigned has a reasonable expectation of privacy therein at the time of the search." *Id.* MIL. R. EVID. 314(d). Although privatized housing is not government property (*see infra* sec. III), under MRE 314(d) even government housing quarters assigned to military members cannot be searched without probable because all such housing occupants clearly have a reasonable expectation of privacy in such living quarters. Such quarters are easily distinguished from barracks. *See infra* sec. VI.B. Additionally, the hypothetical fact pattern eliminates any issue of consent. If SSG Brown voluntarily consented to the search of his quarters, or his spouse was present to consent to a search, then a non-probable cause search is authorized under MRE 314(e). Since SSG Brown was apprehended *outside* his quarters and no one was home in his quarters, there are absolutely no MRE 314(g) circumstances authorizing a search incident to lawful apprehension of any area *inside* his quarters. *See* MCM, *supra* note 3, MIL. R. EVID. 314(g)(2) ("A search may be conducted for weapons and destructible evidence, in the area within the immediate control of a person who has been apprehended."); MCM, *supra* note 3, MIL. R. EVID. 314(g)(3) ("When an apprehension takes place at a location in which other persons might be present who might endanger those conducting the apprehension . . . a reasonable examination may be made of the general area in which such other persons might be located.").

Within MRE 315(d) probable cause searches, there also could be numerous issues that are not addressed in this article. The hypothetical fact pattern assumes the garrison commander is the proper authority who, if he controlled the property, could authorize the search (MRE 315(d)(1)). Next, the law enforcement officials have supplied the commander with the proper basis to make a probable cause determination (MRE 315(f)). And finally, there are no exigent circumstances that require immediate entry into SSG Brown's quarters such that an exception to the search authorization requirement applies (MRE 315(g)).

5. This article does not differentiate between a commander's authority under MRE 315(d)(1) and a military judge's or military magistrate's under MRE 315(d)(2). All must be "impartial" (MRE 315(d)) and all have the same scope of authorization (MRE 315(c)). *See also* U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 9-7 (20 Aug. 1999).

6. *See* MCM, *supra* note 3, MIL. R. EVID. 315(d)(1).

7. *See* National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186 (codified as amended at 10 U.S.C. §§ 2871-2885 (2000). Title 10 U.S.C. §§ 2871-2885 is commonly referred to as the Military Housing Privatization Initiative (MHPI), the phrase used in tit. XXVIII, subtit. A, Pub. L. No. 104-106. *See* H.R. REP. NO. 104-450, at 2801 (1996).

commander's authority to issue a search authorization for evidence in a privatized housing area. Section III reviews the Military Housing Privatization Initiative (MHPI), a pilot program started in 1996 to improve the quality of housing for military families.[9] Section III details the history of the legislation, the status of the housing privatization projects throughout the military, and the future of military housing. The MHPI is silent on the issue of a commander's authority to authorize searches within the privatized housing areas.[10] In particular, Section III reviews the Army's first housing privatization project and some of the legal issues of which it is associated. The government has a legal right to enter contracts,[11] but can the government, through a lease between a military tenant and a private landlord, require to military member to contract away the right to be free from an unreasonable search?

Section IV reviews sources and types of federal jurisdiction and what impact, if any, they have on the MHPI and a commander's control over the

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8. *See* U.S. CONST. amend. IV. ("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.").

9. *See* 10 U.S.C. §§ 2871-2885. Initially, the MHPI, signed into law by President Bill Clinton on 11 February 1996, began as a five-year pilot program scheduled to expire on Feb. 10, 2001. *Id*. § 2885; *see also The Privatization of Military Housing*, ACQWeb, Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics, 1, *at* http://www.defenselink.mil/acq/installation/hrso/about.htm [hereinafter ACQWeb Privatization]. (The website is no longer active and all archived files are on file with author.) The new website is www.acq.osd.mil/housing/mhpi (last visited Nov. 1, 2004) [hereinafter ACQWeb MHP]. The MHPI was expanded past its expiration date of 10 Feb. 2001 on two occasions: first, in 2000, it was extended to 31 Dec. 2004, and then in 2001, it was extended until 31 Dec. 2012. *See* National Defense Authorization Act for Fiscal Year 2001, Pub. L. No. 106-398, 114 Stat. 1654 (codified as amended at 10 U.S.C. § 2885 (2000)); National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, 115 Stat. 1306 (codified as amended at 10 U.S.C. § 2885 (2001)).

10. *See* 10 U.S.C. §§ 2801-2885. Within Title 10 of the United States, Subtitle A (General Military Law), Part IV (Service, Supply, and Procurement), Chapter 169 (Military Construction and Military Family Housing) § 2801, contains four subchapters: subchapter I (Military Construction) § 2801-15; subchapter II (Military Family Housing) §§ 2821-37; subchapter III (Administration of Military Construction and Military Family Housing) §§ 2851-68; and subchapter IV (Alternative Authority for Acquisition and Improvement of Military Housing) §§ 2871-85. Not one statutory section within Chapter 169 addresses the issues of jurisdiction, a commander's control over conveyed property, or the narrow issue of a commander's authority to authorize searches within privatized housing areas. Exhaustive computer database searches of the *Congressional Record* and testimony leading to the enactment of the statute failed to disclose any floor debate on the topics.

leased or conveyed land. Congress, not the executive branch, has full power over federal land through the Property Clause of the Constitution.[12] Yet, the Supreme Court has found that power can be delegated so that commanders have full control over their installations for all purposes to include maintenance of law and order.[13] Section V reviews the commander's law enforcement authority on and off the installation and how this would and should logically extend to privatized housing areas.

Because MHPI is still in its early stages, there are no reported cases where a commander's authority to allow searches in privatized housing areas has been challenged.[14] Section VI reviews the cases in areas most analogous to privatized housing, primarily cases associated with MRE 315(d)(1) and a commander's authority to issue probable cause search authorizations.[15] For search authorization purposes, the law is clear that a commander has full control over on post government-owned quarters and he no control over off post privately-owned quarters.[16] Where does privatized housing, specifically designed to mirror off post civilian communities, fall within the spectrum of cases? For comparative purposes, this section reviews both military court and federal civilian court decisions on the commander's authority to authorize searches of both government and

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11. *See* United States v. Tingey, 30 U.S. (5 Pet.) 115 (1831). The Supreme Court considered whether the United States had the right to enter into a contract. *See id.* at 125. The case arose when a Navy purser signed a $10,000 bond and thus entered into a contract with the defendant on behalf of the Navy. *See id.* The purser did not pay Tingey, a surety of the purser, the $10,000 when the bond became due and payable. *See id.* The defendant filed suit against the Navy of the United States. *See id.* at 125-26. The Supreme Court held the United States, as a general right of its sovereignty, may within its constitutional powers, enter into contracts not prohibited by law as an appropriate exercise of those powers. *See id.* at 128. Additionally, statutes (the Annual DOD Authorization and Appropriations Acts) and regulations (the Federal Acquisition Regulation) authorize the United States to enter into contracts. *See* CONTRACT & FISCAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, 50TH GRADUATE COURSE DESKBOOK vol. 1, at 3-5 to 3-7 (2001-2002).

12. *See infra* note 115 (providing the text of the Property Clause of the Constitution).

13. *See infra* notes 126-128 (discussing United States v. Grimaud, 220 U.S. 506 (1911)).

14. This information is based on research of military courts' databases through October 2004.

15. While thousands of cases and numerous treatises address the general area of unlawful searches, this article narrowly focuses on MRE 315(d)(1). Certain assumptions must be made for this analysis to remain focused: (1) the commander has been provided with sufficient information to make a probable cause determination pursuant to MRE 315(f)(2), and (2) there are no exigent circumstances present to negate the requirement for a search authorization pursuant to MRE 315(g). *See* MCM, *supra* note 3, MIL. R. EVID. 315(d)(1), (f)(2), and (g).

16. *See infra* sec. VI.B for a detailed discussion of this issue.

privately-owned property, whether occupied by service members or civilians, both on and off the installation.

Section VII reviews the two basic arguments for and against a commander's authority to allow probable cause searches in privatized housing areas. The argument for such searches is that privatized housing is on the installation so the commander retains control over the property necessary to satisfy the requirements of MRE 315(d)(1). But does he? The counter-argument is that when the government conveys its land to a private developer it relinquishes control over the property and with it the commander's requisite authority to permit an MRE 315(d)(1) search. But when a commander gives up control of his housing operation for the primary purpose of increasing the quality of military housing, has the commander also given up control for the purpose of searching the property?

Two things are certain: privatization is the present and future of military housing, and the law is silent on the issue addressed by this article. Until legislation clearly defines the law in this area, it may take a smoking gun to raise the issue to a level that answers the question: Does a commander "control" the privatized housing area and thus retain authority to authorize MRE 315(d)(1) searches? Finally, Section VII concludes with a proposed amendment to MRE 315(c)(3) specifically including privatized housing as property within military control.

III. Privatized Housing

> *Is there a program where by we could enter into an agreement with realtors off post to turn over our on-post housing and let our civilian partners run it, as well as build additional housing?*[17]

A. Here Today, and Not Gone Tomorrow

Privatized housing, that is housing on military installations owned by private developers and rented by service members, is here to stay. As the number of privatized housing units increase, the number of government-owned housing units will decrease. The Department of Defense (DoD)

17. General Dennis Reimer, Address to the Colorado Springs Chamber of Commerce (Jan. 10, 1995) (transcript *available at* http://www.carson.army.mil/RCI/RCI%20History/rci_history.htm (last visited Oct. 25, 2004)) [hereinafter Reimer Speech]; *see infra* notes 82-84 and accompanying text (providing a detailed discussion of General Reimer's speech).

owns approximately 300,000 military family housing units.[18] Prior to 1996, there were other housing initiatives similar to privatized housing, but they all failed.[19] In 1996, the initial plan called for 4,000 units to be privatized[20] with a stated goal of doubling the number of privatized units to 8,000 by 1997.[21] By 1998, there were 18,000 privatized units[22] and through 2001, over 90,000 units,[23] were planned for transition to privatized units. As of November 2004, there were over 180,000, or approximately 60% of the 300,000 government-owned housing units in various stages of planning, solicitation, and execution.[24] By 2010, the DoD self-imposed goal is to improve the quality of all military family housing units using privatization as one of primary tools to meets its objective.[25] With millions of dollars being used to implement these projects[26] at major installations across the United States[27] and the recent extension of the program through 2012,[28] privatized housing is here to stay. Another fact pointing to the deep entrenchment of privatized housing is that of the four initial projects,[29] two were for 50-year leases.[30]

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18. *See* Daniel H. Else, *Military Housing Privatization Initiative: Background and Issues*, CRS Report for Congress, CONG. RES. SERV., July 2, 2001, at ii [hereinafter CRS Report on MHPI]; *see also* ACQWeb MHP, *supra* note 9, *at* http://www.acq.osd.mil/housing/mhpiref.htm (referencing Mr. Else's report).

19. *See infra* note 41 (discussing the three original government housing projects: Wherry Housing, Capehart Housing, and Section 801 and 802 Housing).

20. *See Congressional Testimony, Report to Congress, On the First Year of the Housing Revitalization Initiative*, Mar. 1997, ACQWeb MPH, Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics 1, *at* http://www.acq.osd.mil/housing/congrestest.htm (last visited Nov. 1, 2004) [hereinafter ACQWeb First Year Report to Congress].

21. *See id*. at 5.

22. *See Congressional Testimony, Report to Congress, On the Second Year of the Housing Revitalization Initiative*, Mar. 1998, ACQWeb MHP, Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics, *at* http://www.acq.osd.mil/housing/congrestest.htm (last visited Nov. 1, 2004) [hereinafter ACQWeb Second Year Report to Congress].

23. *Project List, Department of Defense/Military Housing Privatization Initiative, October 2001 Report*, ACQWeb, Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics, *at* http://www.defenselink.mil/acq/installation/hrso/docs/octreport.htm (last visited Feb. 18, 2002) [hereinafter ACQWeb October 2001 Project List] (on file with author).

B. The Housing Problem, and Its Solution

Before 1996, DoD used two methods to house military members and their families, commercial and government-owned housing.[31] The primary method, used for about two-thirds of the families, has been to rely on

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24. The actual figure of 180,581 units in one of the three stages of the privatization process (award, solicitation, or planning) is derived from a combination of two sources, the ACQWeb MPH November 2004 Projects Awarded, Projects Pending, and Projects Planned lists at http://www.acq.osd.mil/housing/housingprojects.htm [hereinafter ACQWeb November 2004 MPH Lists] and the U.S. Army's Residential Communities Initiatives (RCI) Web site *at* http://rci.army.mil [hereinafter RCI Web site]. The RCI Web site, current through August 2004, lists all of the Army's privatization projects. The ACQWeb site lists all four services' projects current through November 2004. All of the privatization data and statistics in this section and the Tables in Appendix A comes from the ACQWeb site for all Air Force, Navy, and Marine privatization projects and from the RCI Web site for all Army projects.

Through August 2004, the RCI Web site lists thirty-five Army projects encompassing 84,253 units. *See* RCI Web site, Program Overview 11 (Aug. 2004), *at http://www.rci.army.mil/RFQ/program_summary_aug_04.ppt* [hereinafter RCI August 2004 Program Summary]. By comparison, the ACQWeb site lists twenty-eight Army projects encompassing 71,325 units. *See* ACQWeb November 2004 MPH Lists. For continuity purposes, the statistics in the charts below will use the ACQWeb November 2004 statistics.

25. *See* CRS Report on MHPI, *supra* note 18, at 15.

26. *See* ACQWeb First Year Report to Congress, *supra* note 20, at 6. In Fiscal Year 1996, approximately $3 million of appropriated funds were used for administrative costs to develop a methodology for applying the new authorities to the privatized housing projects. *See id.*

27. The first four privatized housing projects in order were: (1) Naval Air Station, Corpus Christi, Texas, 404 units, July 1996; (2) Naval Station, Everett, Washington, 185 units, March 1997 (the Everett I project was followed by the Everett II project for 288 units in December 2000); (3) Lackland Air Force Base, Texas, 420 units, August 1998; and (4) Fort Carson, Colorado, 2663 units, September 1999. *See id.* at 3-5; *see also* CRS Report on MHPI, *supra* note 18, at 16; ACQWeb November 2004 MPH Lists, *supra* note 24, at 1.

28. As congressional confidence in the program has grown, the MHPI has been extended twice, first from 2001 to 2004 and then from 2004 to 2012. *See* 10 U.S.C. § 2885 amendments: the Act of Oct. 30, 2000 substituted "December 31, 2004" for "February 10, 2001" and the Act of Dec. 28, 2001 substituted "2012" for "2004." As a result of the amendments to the 1996 act, the original expiration date of 10 February 2001 has been extended to 31 Dec. 2012. *See id.* § 2885.

29. *See supra* note 27 (listing the first four privatized housing projects).

30. *See* ACQWeb First Year Report to Congress, *supra* note 20, at 4. The Lackland Air Force Base, Texas project for the privatization of 420 units included a government lease of ninety-six acres of land to a private developer for a period of fifty years (through 2048). *See id*. The Fort Carson, Colorado privatization project for 2663 units includes a fifty-year lease with renewable option of twenty-five years for all of the land associated with the project and an outright conveyance of the existing structures to be revitalized. *See id*.

31. *See* CRS Report on MHPI, *supra* note 18, at 1.

commercial, i.e. off-post, privately owned housing. Members either buy their own home, or rent on the commercial market in areas surrounding military installations. Members living off-post receive a housing allowance to help defray expenses.[32] While off-post housing has problems of its own, such as affordability,[33] this article focuses on problems associated with government-owned housing which lead to a third method of housing military members, the Military Housing Privatization Initiative (MHPI).[34]

Congress authorized the MHPI as a pilot program in 1996 to increase the quality of military housing.[35] Approximately 300,000 military families live in government-owned housing on and off base.[36] Between 180,000 and 200,000 military families, or 60-66%, live in inadequate government quarters.[37] Whether the quarters are too old,[38] too small, or are simply falling apart, the fact is these sub-standard quarters directly affect the families' quality of life. "[T]he quality of military housing has a direct bearing on the retention of a proficient, capable volunteer career military force." [39] The DoD reported to Congress that it would take 30 years and $16 billion to bring existing government housing needs up to standard using traditional contracting and construction methods.[40] Although not the first attempt to correct the inadequate military housing situation,[41] the

32. *See id.*

33. *See* ACQWeb Privatization, *supra* note 9, at 2-3. Because of the limited number of government-owned housing units available at military installations (300,000 for an active duty military force of 1.5 million), military members are forced to live in the local communities surrounding the installations. Of the 1.2 million enlisted personnel, seventy-five percent are in the rank of E3 through E6. *See Tenant Profile*, ACQWeb, Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics, 1, *at* http://www.defenselink.mil/acq/installation/hrso/tenant.htm (last visited Jan. 31, 2002) [hereinafter ACQWeb Tenant Profile] (on file with author). At the lower end of the military pay scale, these enlisted personnel forced to live off post have difficulty finding quality, affordable housing within reasonable commuting distances of their installations. *See* ACQWeb Privatization, *supra* note 9, at 3.

34. *See supra* notes 7 and 9 (discussing the legislative history of the MPHI).

35. *See* CRS Report on MHPI, *supra* note 18, at 5 (beginning as a five-year pilot program within a ten-year plan to resolve the general military housing problem).

36. *See id.* at ii. Due to insufficient maintenance, lack of renovation, and modernization, the majority of government quarters have deteriorated over the past thirty years. *See* ACQWeb Privatization, *supra* note 9, at 1.

37. *See* CRS Report on MHPI, *supra* note 18, at 1 (reporting an estimated 180,000 inadequate government-owned quarters); ACQWeb First Year Report to Congress, *supra* note 20, at 1 (reporting an estimated 200,000 inadequate quarters).

38. *See* ACQWeb Tenant Profile, *supra* note 33, at 2 ("On-base housing has an average age of 33 years with one-quarter of this housing over 40 years old."); *see also infra* note 41 for a discussion of Capehart/Wherry Housing constructed from 1949-62.

MHPI was the most powerful authority provided by Congress to DoD to

39. CRS Report on MHPI, *supra* note 18, at 3. On 8 March 2001, each of the military services senior enlisted members (the Sergeant Major of the Army, the Master Chief Petty Officer of the Navy, the Sergeant Major of the Marine Corps, and the Chief Master Sergeant of the Air Force) testified before the House Appropriations Committee's Subcommittee on Military Construction that quality of housing for service members was a major concern. The common theme stressed by all four senior enlisted members was that quality of life of military families left at home "has a direct and dramatic effect on the numbers and quality of those who decide to remain for a full 20-plus active duty career." *Id*. at 2.

40. *See id*. at 1; *see also* ACQWeb Privatization, *supra* note 9, at 1 (estimating that the solution to housing problems using traditional contracting and construction methods could take between 30-40 years and up to $30 billion).

41. Three prior housing construction and private sector initiatives all failed due to various reasons: (1) Wherry Housing, (2) Capehart Housing, and (3) Section 801 and 802 Housing.

> (a) From 1949 to 1955, Wherry Housing (named for Senator Kenneth Spicer Wherry of Nebraska) (Pub. L. No. 81-221 of 1949) authorized the military services to solicit plans for housing from private builders. The lowest bidder would be awarded a contract to construct homes on government-controlled land for rental to military personnel. The contractor would obtain private financing for a mortgage and retain title to the real property and rented housing. Military members retained their housing allowances and paid rent to the private developer who then paid the mortgage. "[C]ongressional concerns with 'windfall' profits accruing to private developers" led to Wherry Housing's effective termination in 1955. Approximately 84,000 Wherry units were built in the early 1950's. *See* CRS Report on MHPI, *supra* note 18, at 3-4.

> (b) From 1957 to 1962, Capehart Housing (named for Senator Homer E. Capehart of Indiana) [Housing Amendments of Aug. 11, 1955 to the National Housing Act of 1934 (codified at 12 U.S.C. § 1748a, repealed by Act of July 27, 1962, Pub. L. No. 87-554, 76 Stat. 237] authorized private developers with privately obtained financing to build on government-controlled land. Unlike Wherry Housing, the title was turned over to the government and members forfeited their entire housing allowance. As a result, the Capehart Housing was government-owned and DoD made a single mortgage payment for a Capehart project to the private mortgager. Approximately 115,000 Capehart units were built. In 1957, the privately held Wherry units were purchased by the government and these housing projects are now commonly referred to as Capehart/Wherry housing. *See* CRS Report on MHPI, *supra* note 18, at 3-4.

rectify its housing problems.

C. The Means

The National Defense Authorization Act for Fiscal Year 1996[42] provided DoD with a variety of authorities to obtain private sector financing to improve housing for military members. The authorities, used individually, or in combination, include:[43]

1. Guarantees, both loan and rental;[44]
2. Conveyance/leasing of existing property and facilities;[45]
3. Differential Lease payments;[46]
4. Investments, both limited partnerships and stock/bond ownership;[47] and

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41. (cont.)

(c) Section 801 and Section 802 Housing was created by Title VII of the Military Construction Act of 1984 (Pub. L. No. 98-115) and this type of housing still exists today, however, its use is highly discouraged. These laws were passed to encourage private construction of military housing on and near military installations for use by military personnel. Section 801 is essentially a build-to-lease agreement with a local property developer and Section 802 encourages to construction of rental property by providing a rental guarantee. *See id*. at 4. Of the 12 alternative authorizations that are part of the MHPI, Build to Lease (similar to Section 801 Housing) and Rental Guarantee (similar to Section 802 Housing) are ranked 11 and 12, respectively, as the two worst-ranked methods to employ based on their highest budget scores. *See id*. at 12, tbl. 1, Alternative Authorizations Ranked by Impact on Budget. *See also infra* notes 66-67. For a detailed history of military housing *see* Dr. William C. Baldwin, *Four Housing Privatization Programs: A History of the Wherry, Capehart, Section 801, and Section 802 Family Housing Programs in the Army*, U.S. Army Corps of Engineers, Office of History (Oct. 1996), at http://www.acq.osd.mil/housing/docs/four.htm (last visited Nov. 10, 2004).

42. 10 U.S.C. § 2801-2885 (1996).

43. *See* ACQWeb Privatization, *supra* note 9, at 2.

44. *See* ACQWeb, Second Year Report to Congress, *supra* note 22, at 5 (authorizing the DoD to guarantee mortgage payments or provide guarantees for mortgage insurance); *see also* 10 U.S.C. § 2873 (addressing direct loans and loan guarantees).

45. *See* ACQWeb, Second Year Report to Congress, *supra* note 22, at 5-6 (allowing the DoD to "enter into contracts for the lease of family housing units to be constructed by the private sector"); *see also* 10 U.S.C. § 2874 (addressing leasing of housing to be constructed).

5. Direct Loans.[48]

Armed with new legislation, the Secretary of Defense created a joint Housing Revitalization Support Office (HRSO) staffed with 16 full-time housing and real estate experts from each of the four military services.[49] The HRSO's criteria and procedures for determining sites eligible for privatization are extremely complex;[50] however, the simple fact remains that if an installation's housing is in dire need of revitalization, it is likely to make the project list.[51]

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46. *See* ACQWeb, Second Year Report to Congress, *supra* note 22, at 6 (noting that the DoD may pay an amount in addition to the rent paid by the servicemember to encourage the private lessor to make its housing available to servicemenbers); *see also* 10 U.S.C. § 2877 (addressing differential lease payments).

47. *See* ACQWeb, Second Year Report to Congress, *supra* note 22, at 6. The DoD may invest in non-governmental entities involved in the acquisition or construction projects. The investment may be in the form of a limited partnership or the purchase of stocks or bonds or any combination thereof. There is no minimum investment, but there is a maximum of 33 1/3% of the capital cost of the project. "[DoD] also has the authority to convey the land or buildings as all or part of its investment, in which case its total contribution, including the value of the land and facilities may not exceed 45% of the total capital cost of the project." *Id*.; *see also* 10 U.S.C. § 2875 (addressing investments).

48. *See* ACQWeb, Second Year Report to Congress, *supra* note 22, at 6 ("[DoD] can offer a direct loan to a private developer to provide funds for the acquisition or construction of housing that will be available to military members."); *see also* 10 U.S.C. § 2873 (addressing direct loans and loan guarantees).

49. *See* ACQWeb First Year Report to Congress, *supra* note 20, at 2 (noting that during HRSO's first year of operation, it set policies, procedures and guidelines on how projects would be selected and how they would be completed from inception to completion).

50. *See id*. The HRSO has protocols to screen financial feasibility of projects at potential privatization sites, protocols for the collection of site specific data, and criteria to determine which authorities could be used most efficiently at each site. In addition to the full-time staff of experts, consultants are hired to advise on areas of real estate development and finance. Once the military service Department approves a project, it must also be approved by the Secretary of Defense. Upon final approval for a project, the service Department must then prepare a Request for Proposal and notify Congress of intent to proceed with the project. *See id*.

51. Through November 2004, there were ninety-five total projects encompassing 180,581 units: thirty-nine projects were awarded for 74,153 units, thirty-six projects were in the solicitation phase for 62,254 units, and twenty projects were in the planning phase for 34,174 units. *See* ACQWeb November 2004 MPH Lists, *supra* note 24, at 1-3.

D. The Methods

Additionally, the MHPI "toolbox" includes twelve alternative authorizations for project managers to select from when initiating a project.[52] Because Congress requires individual project reports and a yearly report on the progress of the MHPI,[53] one of the key factors for ultimate approval of the project rests with the impact the project will have on the agency's budget.[54] The following twelve methods are ranked from best (no impact on the agency's budget) to worst (high impact):[55]

1. Conveyance or lease of land or units;[56]

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52. *See* CRS Report on MHPI, *supra* note 18, at 4-5.

53. *See* 10 U.S.C. § 2884. Project reports for each contract for acquisition or construction of family housing and each conveyance or lease under the MHPI must be provided to the appropriate congressional committee by the Secretary of Defense not later thirty days before the contract solicitation is issued or the conveyance or lease is offered. The reports must include the method and justification for the United States' participation in the project. *See id*. § 2884(a). The Secretary of Defense must also provide annual reports to Congress in support of the budget detailing the expenditures and receipts of funds appropriated for the MHPI. *See id*. § 2884(b).

54. Each project and the methods chosen to implement that project goes through a complex process of "Budget Scoring" implemented by the Office of Management and Budget (OMB). *See* CRS Report on MHPI, *supra* note 18, at 9. Budget scoring is a method of scorekeeping to track the success of projects and incorporate lessons learned for future projects. *See id*. n.12. Budget scoring is a percentage, from 0% to 100%, of the funds from agency's budget that it must allocate to the project in a fiscal year. No impact on an agency's budget (or 0%) is the best and High impact (or 100%) is the worst. In between, impact is categorized as Low (between 4% to 7%) and Moderate (a 30% to 70% impact range). Budget impact is scored as follows: if an agency has a $1 million budget and a project costs $1 million, then the amount of its own budget the agency has to allocate to the project determines the budget score. For example, if the agency does not have to use any of its own funds (0%) then it receives the best possible budget score of 0%. If the agency has to allocate $100,000 (or 10% of its $1 million budget) of its own funds for the project, then the 10% budget score is considered Low impact. If the agency has to use $500,000 of its own funds, then it receives a 50% budget score for the Moderate budget impact. If the agency has to fund the entire project with its own funds, then it receives the worst budget score of 100% within the High impact category. *See id*. at 9; *see also* The Omnibus Budget Reconciliation Act of 1990 (Pub. L. 101-508) (as interpreted by OMB Circular A-11 and MHPI Guidelines issued by the OMB on 25 June 1997). Only the first twenty privatization projects were scored under the 1997 guidelines that were adjusted based on lessons learned. *See* CRS Report on MHPI, *supra* note 18, at n.12.

55. *See id*. at 12, tbl. 1 (Alternative Authorizations Ranked by Impact on Budget).

56. *See id.* In terms of Budget Scoring, conveyance or lease of land or units is the best method because it has zero impact on the budget. *See id*. The government may transfer title of its property to a private entity that will secure private financing for the project. *See id*. at 5.

2. Unit size and type;[57]
3. Ancillary support facilities;[58]
4. Payment of rent by allotment;[59]
5. Loan guarantees;[60]
6. Direct loan;[61]
7. Differential lease payments;[62]
8. Investment (joint venture);[63]
9. Interim leases;[64]
10. Assignment of members (tenant guarantee);[65]
11. Build to lease;[66] and
12. Rental guarantee.[67]

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57. *See id*. at 12, tbl. 1. By relaxing federal specifications for housing construction, local builders can construct housing pursuant to familiar local building codes resulting in more cost-effective construction. *See id*. This method also has no impact on the budget. *See id*. at 12.

58. *See id*. at 12, tbl. 1. To enhance attractiveness of the overall project, contractors can include support facilities such as child care centers and dining facilities as part of the housing development. *See id*. at 5. These added features improve the military members' quality of life with no impact on the budget. *See id*. at 12.

59. *See id.* The government guarantees the private landlord will receive the military members' rent payments through electronic funds transfer. *See id*. at 5. This guarantees cash flow to the landlord and reduces the uncertainty of receiving rent payments. Again, there is no impact on the budget. *See id*. at 12.

60. *See id.* The government can guarantee up to 80% of the private developer's private loan. *See id*. at 5. With federal backing, banks offer lower interest rates. Based on the low probability of contractor default in this scenario, the OMB rates this as Low impact on the budget (4-7%). *See id*. at 12.

61. *See id.* Here the government makes a direct loan to the contractor. The budget impact score for this method is categorized as Moderate, ranging from 30-70% impact on the agency's budget. *See id*.

62. *See id.* With a Differential Lease Payment, the government agrees to pay the landlord the differential between the BAH paid to the service member and the local market rents. *See id*. at 5. This method scores Moderate to High on the budget impact chart as this method falls within the bottom half of the chart (number 7 of 12). *See id*. at 12.

63. *See id.* In a Joint Venture project, the government can take an equity stake in the housing project. *See id*. at 5. This is another Moderate to High budget impact method and the agency could finance 100% of the project for the highest possible budget score. *See id*. at 12.

64. *See id.* With Interim Leasing agreements, the government may lease private housing units until the privatization project is completed. This method also rates as Moderate to High because of the requirement to make the interim lease payments. *See id.*

65. *See id.* This is a tenant guarantee where service members are assigned to housing in a particular project they may not otherwise choose to live in. *See id*. at 5. This arrangement forces an above market occupancy rate and has a High impact on the budget. *See id*. at 12.

These twelve methods can be used individually, or in any combination that the project manager deems will be most advantageous to the government. While the last four methods (#9 through #12) have not been utilized by any privatization projects due to high budget impact scores, the first four methods (#1 through #4) have been used in a number of projects.[68] In fact, two of the four original privatization projects, Lackland Air Force Base (AFB), Texas and Fort Carson, Colorado[69] each combined the first four methods. Both projects included 50-year leases of installation land to private developers, houses built to local building code standards, ancillary support facilities to enhance the communities, and the military members' rental payments are made to the private landlord through allotment.[70]

E. The Projects

Since the initial four projects were awarded on what turned out to be a yearly basis from 1996 through 1999,[71] the next eleven projects were awarded over a sixteen-month period from September 2000 through December 2001,[72] and twenty-one more were in solicitation for 2002.[73] The projects are tracked and categorized in three distinct phases: Projects Awarded, Projects in Solicitation, and Planned Projects.[74] All services

66. *See id.* Build to Lease is similar to Section 801 Housing where the government contracts for private construction of a housing project and then the government leases the units. *See id.*; *see also supra* note 41 (discussing Section 801 housing).

67. *See* CRS Report on MHPI, *supra* note 18, at 12. The Rental Guarantee arrangement is similar to Section 802 Housing where the government guarantees a minimum occupancy rate or rental income for a housing project. *See id.*; *see also supra* note 41 (discussing Section 802 housing).

68. *See* CRS Report on MHPI, *supra* note 18, at 4-5. "Alternative Authorizations Ranked by Impact on Budget" reflects the fact that several individual privatization projects combined many of the authorization methods. *See id*. at 12, tbl. 1.

69. *See supra* note 27 (discussing the first four privatized housing projects); CRS Report on MHPI, *supra* note 18, at app. A, tbl 1.

70. *See* CRS Report on MHPI, *supra* note 18, at 12.

71. *See id.* at app. A, tbl. 1.

72. *See id.* at 16, tbl. 2.

73. *See id.*; ACQWeb October 2001 Project List, *supra* note 23, at 1-2 (listing twelve Air Force, Navy, and Marine projects in the solicitation phase for 2002); RCI August 2004 Program Summary, *supra* note 24, at 11 (listing nine Army projects in the solicitation phase for 2002).

74. *See* CRS Report on MHPI, *supra* note 18, at 16, tbl. 2; ACQWeb October 2001 Project List, *supra* note 23, at 1-3.

have major projects in each phase of the privatization process, whether awarded, in solicitation or planned. [75]

With over 180,000 units somewhere in the MHPI process[76] as of late 2004, DoD has accounted for the eventual privatization of 60% of all military housing[77] just eight years into the program.[78] This aggressive attack

75. The following chart details the largest projects for each of the four services:

	Facility	Units	Projects Status
1.	Marine Corps Base Camp Pendleton (Phases 1-4), CA (Phase 2 includes some units at Quantico, VA and Phase 3 includes some units at Yuma, AZ	10,644	Award (Phases 1-3) & Planning (Phase 4)
2.	Naval Complex San Diego (Phase 1 and Phase 2), CA	9133	Award (Phases 1 and 2) & Planning (Phase 3)
3.	Fort Shafter/Schafter Barracks, Hawaii (Army)	7364	Solicitation
4.	Offutt Air Force Base, Nebraska	2255	Solicitation

See CRS Report on MHPI, *supra* note 18, at 16-17. Marine Corps Base Camp Pendleton (Phase 1) for 712 units was awarded in November 2000; MCB Camp Pendleton and MCB Quantico, VA (Phase 2) was awarded in September 2003 for 4534 units; MCB Camp Pendleton and MCB Yuma, AZ was awarded in October 2004 for 897 units; and MCB Camp Pendleton is currently in the planning phase for 4501 units for a completed project total of 10,644 units. *See* ACQWeb November 2004 MPH Lists, *supra* note 24. NC San Diego (Phase 1) for 3248 units was awarded in August 2001, NC San Diego (Phase 2) was awarded in May 2003 for 3217 units, and NC San Diego (Phase 3) is the planning phase for 2668 units for a completed project total of 9133 units. *See id.* The Fort Shafter/Schofield Barracks project was solicited in August 2002. *See id.* The Offutt AFB project was solicited in May 2003. *See id.*

76. There were 74,153 units in the Projects Awarded phase, 62,254 units in the Projects in Solicitation phase, and 34,174 units in the Planned Projects phase for a total of 180,581 units in the MHPI process. *See id.*

77. 180,581 units of the total 300,000 military family housing units. *See supra* note 36 and accompanying text.

78. The MHPI was signed into law on 11 Feb. 1996. *See supra* note 9 (discussing the enactment of MHPI).

of the problem has DoD well on its way to meeting its stated goal of improving military family housing by 2010.[79]

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79. *See supra* notes 25-28 and accompanying text. The following chart reviews the projects by service:

Service	# of Projects	% of total	# of Units	% of total
Army	28	30%	71,325	40%
Air Force	40	42%	53,367	30%
Navy	17	18%	36,277	20%
Marines	10	10%	19,612	10%
Totals	95	100%	180,581	100%

See RCI August 2004 Program Summary, *supra* note 24, at 1-3; RCI January 2002 Program Overview, *supra* note 24, at 1-2. The following chart breaks down the number of housing units per privatization project:

Units	0-1000	1001-2000	2001-3000	3001-4000	4001-5000	5001+	Total
Projects	38	26	13	8	5	5	95

One installation can have multiple projects, such as NS Everett I and NS Everett II, or an installation could have one "project" broken into phases. For purposes of this chart phases are considered separate projects. *See* CRS Report on MHPI, *supra* note 18, app. A, tbl. 6 (listing the installations with multiple projects, either by separate project or by phase). Of the thirty-eight projects in the "0-1000" category, the smallest is Picatinny Arsenal, New Jersey, with 116 units. *See* ACQWeb November 2004 MPH Lists, *supra* note 24, at 1. Of the five projects with over 5000 units, three are Army [Fort Shafter/Schofield Barracks, Hawaii (7634 units), Fort Hood, Texas (5912 units), and Fort Bragg, North Carolina (5580). *See id.* The Camp Pendleton Marine project (10,644 units) and San Diego Navy project (9133 units) are combined totals for more than multiple projects. *See supra* note 75 and accompanying chart (breaking down the individual projects).

F. Fort Carson, Colorado—The Army's First Privatization Project[80]

1. The Background

Ranking the Army projects by size, with 2663 units, Fort Carson is thirteenth on the list,[81] yet it was still chosen as the site for the Army's first privatization project. Maybe it was because of the following challenge made in January 1995 (thirteen months before the MHPI was signed in to law) by General Dennis Reimer, who was the Commanding General, U.S. Army Forces Command at the time:[82]

> Installations like Fort Carson and communities like Colorado Springs need to work closer together and share core competencies. We are just touching the tip of the iceberg and there is a lot more that we can do if we are innovative. I have challenged Fort Carson to be the model for the Army and charged them with the responsibility of developing privatization initiatives to their full potential. I have no idea where this will lead, but I believe it can be a win-win situation. . . . We need some fresh thinking on this issue because it is an area we have to solve quickly.[83]

In what was apparently an uncanny vision of the future of military housing, General Reimer's comments to the Colorado Springs Chamber of Commerce were obviously taken very seriously. After the MHPI was signed into law in 1996, the personnel involved in Fort Carson project moved quickly in a complex area where they literally broke new ground on March 25, 2000.[84] The Fort Carson Residential Communities Initiative (RCI)[85] included a 50-year lease,[86] the complete renovation and modernization of the installation's existing 1823 units, all of which were over 30

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80. Overall, Fort Carson, Colorado was the military's fourth privatization project under the MHPI, but it was the first for the Army. *See supra* note 27; *see also* CRS Report on MHPI, *supra* note 18, app. A, tbl. 1.

81. *See* CRS Report on MHPI, *supra* note 18, app. A, tbl. 4; *see also* CRS Report on MHPI, *supra* note 18, app. A, tbl. 5 (listing, for the other services, the top projects by number of units).

82. General Dennis Reimer was promoted to four-star general in June 1991. He served as the Vice Chief of Staff, U.S. Army, Washington, D.C., from 1991-1993; Commanding General, U.S. Army Forces Command, Fort McPherson, Georgia, from 1993-95; and as the 33rd Chief of Staff of the U.S. Army from 20 June 1995 until he retired on 21 June 1999. *See* Biography of General Reimer *available at* http://www.army.mil/cmh-pg/books/cg&csa/Reimer-DJ.htm (last visited Oct. 24, 2004).

83. Reimer Speech, *supra* note 17. The Fort Carson housing privatization project is called the Residential Communities Initiative (RCI). The web page is available at http://www.carson.army.mil/RCI/index.htm.

years old,[87] and the concurrent construction of 840 new units.[88] The RCI project allowed the private developer to build to local building code standards, build additional amenities,[89] and collect rent through allotment.[90]

2. Lessons Learned

While all initial indicators are the Army's first privatization project is a huge success, there are many lessons to be taken from Fort Carson to apply to all future projects.[91] Based on the scope and complexity of this project, it is not surprising that many valuable lessons were learned.[92] From complex contract issues to the "Yard of the Month" program,[93] the RCI project documented everything.[94] Of DoD's first four privatization projects,[95] Fort Carson's more than doubled the other three combined[96] so

84. The RCI Web site has a link to "Lessons Learned" which contains two briefings that report the lessons from the project. The first briefing is dated "22 March 2001" and the second one is "21 August 2001," the latter of which is available at http://www.carson.army.mil/RCI/Lessons%20Learned/2nd_briefing.htm [hereinafter RCI Lessons Learned]. The project status timeline is detailed as follows: Request for Proposal (RFP) (9 Sept. 1998); Contract Awarded (30 Sept. 1999); Contract Closing (23 Nov. 1999); Ground Breaking Ceremony (25 Mar. 2000); First New Home Complete (Dec. 2000); First Existing Home Renovated (Jan. 2001); New Construction Complete (Sept. 2004); and All Existing Units Renovated (Sept. 2005). *See id*. at 1-2. An original RFP went out in the fall of 1997, the bid closing was set for April 1998. Just before bid closing, there was a bid protest that resulted in a federal judge voiding the entire procurement. The second RFP went out in September 1998 with a bid closing date of 29 Jan. 1999. On 30 September 1999, the first ever Army family housing privatization project was awarded to the J.A. Jones Fort Carson Family Housing Limited Liability Corporation. *See id*. at 2.

85. *See* RCI Lessons Learned, *supra* note 84.

86. *See supra* note 30 (discussing Fort Carson's lease).

87. *See* Reimer Speech, *supra* note 17, at 2. In addition to the problem of aging housing, "[o]nly 17% of Fort Carson's soldiers lived on post, as compared to 29% for other FORSCOM installations. There are over 1500 families on the waiting list, with an average wait time of 3 to 24 months." *Id*.

88. *See id*. at 1.

89. *See* RCI Lessons Learned, *supra* note 84, at 1 (including such amenities as a "playground for every 50 units, generous landscaping, lawn irrigation systems, and extensive jogging and biking trials").

90. *See supra* note 59 (discussing guaranteed payment of rent).

91. *See generally* RCI Lessons Learned, *supra* note 84 (discussing the lessons learned from the Army's initial privatization project at Fort Carson).

it also not surprising that DoD closely tracked the project to enhance the overall MHPI program.[97]

3. Legal Issues—the Fort Carson Project

Fort Carson's project called for the renovation of existing homes and the concurrent construction of new homes.[98] In April 2000, five months after the RCI contract was signed[99] and months before any soldiers occupied the privatized housing,[100] the Deputy Staff Judge Advocate (DSJA) already recognized a potential issue: "Does the lease of the land and transfer of ownership of the quarters to a private contractor impact on the authority of the installation commander, military judge, and military magistrate to authorize searches in the quarters?"[101]

The DSJA's analysis focused on two critical points: (1) the opinion that the commander still "controls" the property,[102] and (2) the fact that the contract did not prohibit the authority to search.[103] The DSJA concluded, "[i]n my opinion, housing privatization does not change the legal basis for

92. The Fort Carson RCI lessons learned are broken into three categories: Pre-Award, Closing/Transition, and Post Award/Operations. Pre-Award lessons learned included areas that appear to have been costly oversights such as failure to determine the infrastructure upgrade requirements to common sense oversights as failure to keep the residents well informed about the program. Closing/Transition lessons learned included the recognition that more time was needed to accomplish the transition period and the acknowledgement that partnering was critical to success. Post Award/Operations proved to provide the most lessons learned and raised the most legal issues (discussed in sec. III.F.3., *infra*). *See id*. at 2. Many of the latter lessons learned are still being implemented and worked through, such as a commander's authority to authorize searches in privatized housing. *See infra* note 102 (discussing the search issues identified in the early lessons learned at Fort Carson).

93. *See* RCI Lessons Learned, *supra* note 84, at 2-3.

94. *See id.*

95. *See supra* note 27 and accompanying text; *see also* CRS Report on MHPI, *supra* note 18, at app. A, tbl. 1.

96. The NAS Corpus Christi/Kingsville I, Texas (404 units), NS Everett I, Washington (185 units), and Lackland AFB, Texas (420 units) projects total 1009 units compared to Fort Carson's 2663 units. *See* CRS Report on MHPI, *supra* note 18, at app. A, tbl 1.

97. *See supra* notes 20, 22 (discussing the ACQWeb First and Second Year Reports to Congress).

98. *See supra* notes 87-88 and accompanying text.

99. *See* RCI Lessons Learned, *supra* note 84. The contract closing took place on 23 November 1999. *See id*.

100. The first privatized homes were completed/renovated in December 2000/January 2001, respectively. *See id*.

authorizing searches in the privatized housing areas. To avoid any confusion concerning the issue, however, I recommend Fort Carson request a contract modification to make the Army's authority to authorize searches clear."[104]

It is unclear whether a commander "controls" privatized housing. There is no case law directly on point, and the legislation is silent on the issue.[105] The April 2000 Search MFR acknowledges there may be some confusion over a commander's authority to issue a search authorization in privatized housing, [106] but there is no doubt that the property remains under military control.[107] While acknowledging that legal memoranda are not binding, what is clear is there is certainly room for debate among legal

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101. Memorandum for Record by Lieutenant Colonel (LTC) Daniel K. Poling (unsigned), subject: Searches in Privatized Housing Areas on Fort Carson, para. 3a (5 Apr. 2000) [hereinafter Search MFR] (on file with author). Lieutenant Colonel Daniel K. Poling, then the DSJA of the Fort Carson OSJA, drafted this five-page memorandum. Major Michael Kramer, while a student in the 50th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, Charlottesville, Virginia, provided the memorandum to the author. Major Kramer was assigned to Fort Carson as a judge advocate from February 1999 to June 2001. In the Search MFR, the DSJA identified a second issue in addition to the one described in the text above. The second issue (with subparts) was:

> Does the privatization of Fort Carson's housing impact on other areas involving access to quarters? For example, does privatization affect the ability of the installation commander to invite off-post social welfare agencies to investigate cases such as child neglect? Does privatization affect command authority to conduct inspections of quarters?

Id. para. 3b.

102. *See id*. para. 7. In a detailed discussion, the Search MFR outlined the case law on the issue of whether the privatized housing on the installation is still "property under military control." *See id.* All of the following cases are discussed in detail in sect. VI.B. *infra*: United States v. Brown, 784 F.2d 1033, 1036-37 (10th Cir. 1986) (upholding a search of government quarters even though the quarters were occupied by civilians); Saylor v. United States, 374 F.2d 894, 900-01 (Ct. Cl. 1967) (finding a commander in Japan lacked authority to authorize search on post quarters occupied by a civilian employee); United States v. Grisby, 335 F.2d 652, 655 (4th Cir. 1964) (holding that government quarters on a military installation are under military control and thus subject to search pursuant to a military search authorization); United States v. Reppert, 76 F. Supp. 2d 185, 188 (D. Conn. 1999) (deciding that when the Navy leased property in the civilian community to house sailors, and even though the property was off-post, it was under military control); United States v. Moreno, 23 M.J. 622, 624 (A.F.C.M.R. 1986) (upholding the search of an on-post credit union, noting that a commander, judge, or magistrate could authorize searches of credit unions, commercial banks, or other nonmilitary activities); and United States v. Rogers, 388 F. Supp. 298, 301-02 (E.D. Va. 1975) (providing that a commander could properly order search of quarters assigned to civilian on Naval base).

scholars – a debate that would ultimately have to be settled by the courts. The issue of control is explored in greater detail in Section VI below.

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103. *See id*. para. 5. In reviewing the RCI Contract, the DSJA noted that the contract "makes no specific mention of authority to authorize searches. Under the contract, the leased area will remain part of Fort Carson and remain under exclusive federal jurisdiction." *Id*. "The contract also provides that police and fire protection will be provided by the Government." *Id*. The DSJA then cited the full text of paragraph 7 of the contract:

> The use and occupation of the Premises shall be subject to the general supervision and approval of the Fort Carson Installation Commander, hereinafter referred to as "said officer," and to such rules and regulations as may be prescribed from time to time by said officer covering the operation, security, access, or other aspects of the mission of Fort Carson.

Id.

The DSJA concluded this section by stating:

> [t]hese provisions strongly suggest the commander, military judge, and magistrate retain search authorization authority for the leased quarters. The maintenance of exclusive federal jurisdiction, the provision of police services, and the provision providing for general supervision suggest the military has reserved its police and supervisory powers over the area, to include authorizing searches.

Id.

104. *Id*. para. 2. The DSJA recommended the following contract modification as a solution:

> In recognition of the Army's need to insure security, military fitness, and good order and discipline, and the fact that the premises remain on a military installation of exclusive federal jurisdiction, the contractor agrees that all areas leased and/or owned by the contractor on Fort Carson under this contract are within military control and that the Army shall have the right to conduct inspections and authorize and conduct searches and seizures on all areas leased and/or owned by the contractor on Fort Carson.

Id. para. 9.

105. *See supra* note 14 (based on research of military case law through October 2004).

106. *See* Search MFR, *supra* note 101, para. 2 (specifying "[t]o avoid any confusion concerning the issue . . . ."); *see also* note 104 and accompanying text (providing the text of the entire quote).

107. *See* Search MFR, *supra* note 101, para. 4, 8 (concluding that MRE 315(d) "creates a per se rule that anything on the installation is automatically within military control, and hence there is arguably no need to look further" and that privatized housing is under military control, and hence subject to military search authorizations).

Next, the DSJA proposes a solution to the potential problem through a contract modification.[108] Where the contract is silent on the issue,[109] as is the MHPI legislation,[110] legal scholars may take issue with a contract clause being the sole justification for a potential violation of a military member's Fourth Amendment right against an unreasonable search.[111] A contract clause directly addressing the issue puts all parties on notice, however there must be legislation supporting such a powerful clause. With legislation in place, as ultimately suggested by this article, a contract clause could cite to such legislative authority as the legal justification for the search. Finally, this article concurs with the Fort Carson Search MFR opinion that commanders should be able to authorize searches in privatized housing quarters,[112] albeit through a different solution to the issue presented as discussed in Section VII below.

IV. Federal Jurisdiction

A. The Law of the Land

"[T]he United States owns in fee some 662 million acres, or about 29% of all land in the country."[113] The United States Constitution has two primary provisions dealing literally with the law of federal land, the "Enclave Clause"[114] and the "Property Clause."[115]

The Enclave Clause's "reference to 'exclusive legislation' has always been interpreted as meaning 'exclusive jurisdiction.'"[116] About 6% of fed-

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108. *See supra* note 104 (providing the text of the DSJA's proposed contract modification).

109. *See supra* note 103 (highlighting that the contract was silent on the issue of search and seizure in the privatized housing).

110. *See supra* note 10 (listing the extensive military housing legislation).

111. *See supra* note 8 (providing the text of the Fourth Amendment).

112. *See supra* notes 101, 103, and 104 (discussing the DSJA's review, recommendations, and conclusions with the Fort Carson RCI contract and the issue of search and seizure in privatized housing).

113. GEORGE CAMERON COGGINS, CHARLES F. WILKINSON & JOHN D. LESHY, FEDERAL PUBLIC LAND AND RESOURCES LAW 1 (3d ed. 1993). While the Bureau of Land Management (BLM) controls nearly ten percent of the land in the United States, the other nineteen percent of federal land is owned by federal agencies for a variety of government activities, such as the military, reservoirs, national parks, wildlife refuges, post offices, office buildings, and atomic reactor sites. *See id.* "Public domain" has two meanings: (1) lands acquired by the United States from other sovereigns, including Indian tribes, that is still federally-owned, and (2) "acquired lands" that the United States acquired or "reacquired" from private or state owners by gift, purchase, exchange, or condemnation. *See id*. at 2.

eral land, including some, but not all military bases, is wholly or partially exclusive jurisdiction.[117] While there are numerous aspects of jurisdiction,[118] in this context, the focus is legislative jurisdiction which is a legislative body's[119] authority to enact laws and conduct all business associated with its law-making function.[120] The Enclave Clause gives Congress the power to acquire legislative jurisdiction from a state "by consensual acquisition of land, or by nonconsensual acquisition followed by the State's subsequent cession of legislative authority over the land."[121] The legislative jurisdiction acquired can range from exclusive, to concurrent, or partial.[122]

The power the "Property Clause" vests in the United States is different from the power derived from the "Enclave Clause."[123] The Supreme Court has held that under the "Property Clause," Congress' power over federal public land is without limitations,[124] including the power to regulate private land adjacent to federal land when the regulation is for the protection of federal property.[125]

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114. U.S. CONST. art. I, § 8, cl. 17 states:

> To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings . . .

115. *Id.* art. IV, § 3, cl. 2 states:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

116. COGGINS, WILKINSON & LESHY, *supra* note 113, at 173 (citing United States v. Bevans, 16 U.S. (3 Wheat.) 336, 387 (1818)).

117. *See id.* Of the 662 million acres of federal land, approximately six percent (39 million acres) is held under exclusive federal jurisdiction, approximately five point five percent (36.5 million acres) is held under concurrent or partial jurisdiction, and the remaining eighty-eight point five percent or close to 600 million acres is held under proprietorial jurisdiction. *See id.* at 180 (providing statistics as of 1970).

118. BLACK'S LAW DICTIONARY 855-57 (7th ed. 1999).

119. In the context of the MHPI, and this section of the article, the legislative body is Congress.

In 1911, the Supreme Court held that Congress, not the Executive Branch, makes legislation with regard to federal land.[126] The court noted however that Congress could delegate the power to regulate land to the Executive Branch.[127] In 1911, the Secretary of Agriculture regulated fed-

120. *See id.* at 856. "Legislative jurisdiction" may be defined as:

> The term "legislative jurisdiction," when used in connection with a land area means the *authority* to legislate and to exercise executive and judicial powers within such area. When the Federal Government has legislative jurisdiction over a particular land area, it has the power and authority to enact, execute, and enforce general legislation within that area. This should be contrasted with other authority of the Federal Government, which is dependent, not upon area, but upon subject matter and purpose and which must be predicated upon some specific grant in the Constitution. Federal legislative jurisdiction is a sovereign power, whereas land ownership is in the nature of proprietorial action of the Government. The fact that the Federal Government has legislative jurisdiction over a particular land area does not establish that it has actually legislated with respect thereto. All that is meant is that the United States has the *authority* to do so.

U.S. DEP'T OF ARMY, REG. 405-20, FEDERAL LEGISLATIVE JURISDICTION 3a (1 Aug. 1973) [hereinafter AR 405-20].

121. Kleppe v. New Mexico, 426 U.S. 529, 542 (1976).

122. *See id*.; *see also infra* sec. IV.B. (providing a detailed description of the four sources of legislative jurisdiction).

123. *See Kleppe*, 426 U.S. at 542. "But while Congress can acquire exclusive or partial jurisdiction over lands within a State by the State's consent or cession, the presence or absence of such jurisdiction has nothing to do with Congress' powers under the Property Clause." *Id*. at 542-43.

124. *See* United States v. San Francisco, 310 U.S. 16, 29 (1940) ("The power over the public land thus entrusted to Congress is without limitations."); *see also Kleppe*, 426 U.S. at 536 ("[D]eterminations under the Property Clause are entrusted primarily to the judgment of Congress.").

125. *See* Camfield v. United States, 167 U.S. 518, 525-26 (1897). In future cases, the Supreme Court relied on *Camfield*:

> And *Camfield* holds that the Property Clause is broad enough to permit federal regulation of fences built on private land adjoining public land when the regulation is for the protection of the federal property. *Camfield* contains no suggestion of any limitation on Congress' power over conduct on its own property; its sole message is that the power granted by the Property Clause is broad enough to reach beyond territorial limits.

Kleppe, 426 U.S. at 538.

126. *See* United States v. Grimaud, 220 U.S. 506, 517-18 (1911).

127. *See id.*

eral forest land to preserve it from destruction, however it was pursuant to rules proscribed by Congress.[128] By analogy, Congress should proscribe the rules for search authorizations in privatized housing to be executed by DoD. Just as the Secretary of Agriculture was charged with preserving the forests, DoD is charged with preserving law and order on military installations. One aspect of the preservation of law and order on an installation includes a commander's search authority. As discussed in Section VII, a clear congressional mandate that places privatized housing under the installation commander's control will provide the commander with search authority.

B. The Four Types of Legislative Jurisdiction

Pursuant to the "Enclave Clause," Congress has the power to exercise legislative jurisdiction over federal property. The United States can acquire the right to exercise legislative jurisdiction in three ways: by purchase and consent, by cession, and by reservation.[129] Once the United States has acquired land, it can fall under one of four categories of legislative jurisdiction: exclusive,[130] concurrent,[131] partial,[132] and, proprietorial.[133]

Each of these four types of legislative jurisdiction has its own distinct characteristics. Under exclusive jurisdiction, only Congress can legislate and the federal government is responsible for law enforcement. The State cannot enforce its laws except to serve civil or criminal process.[134] Under concurrent jurisdiction, both State and Federal laws are applicable so both the State and Federal governments may prosecute offenders of crimes in these areas.[135] Under partial legislative jurisdiction, the State grants to the

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128. *Id.* at 522. The Court found:

> The Secretary of Agriculture could not make rules and regulations for any and every purpose. As to those here involved, they all relate to matters clearly indicated and authorized by Congress. The subjects as to which the Secretary can regulate are defined. The lands are set apart as a forest reserve. He is required to make provision to protect them from depredations and from harmful uses. He is authorized "to regulate the occupancy and use and to preserve the forests from destruction." A violation of reasonable rules regulating the use and occupancy of the property is made a crime, not by the Secretary, but by Congress. The statute, not the Secretary, fixes the penalty.

Id. (citation omitted).

Federal government, without reservation, the right for the Federal government to execute and enforce its laws as if the area were under exclusive federal jurisdiction.[136] "[T]he authority to legislate, execute and enforce municipal laws reserved by the State [is administered as if] the United States had no legislative jurisdiction whatever."[137] Finally, when the United States exercises a proprietorial interest only, then the "United States

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129. ADMINISTRATIVE & CIVIL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, 50TH GRADUATE COURSE FEDERAL AUTHORITY OVER LAND & FEDERAL-STATE RELATIONS ON AND OFF THE INSTALLATION OUTLINE 3 (2001-2002) [hereinafter FEDERAL AUTHORITY OVER LAND]; *see also* Installation Jurisdiction, Military Commander & the Law, Fall 1996, CPD/JA, Maxwell AFB AL, *available at* http://www.afcee.brooks.af.mil/dc/dcp/news/download/b-InstallationJuristiction.pdf [hereinafter Installation Jurisdiction] (last visited Nov. 10, 2004). Under the purchase and consent method, the government purchases the property and the state legislature consents to giving the federal government jurisdiction. *See id*. at 302. For cession, after the federal government acquires title to the property, the state may cede jurisdiction, in whole or in part, to the federal government. Prior to 1940, jurisdiction was ceded by the state at the time the government acquired title to the property. After 1940, the government must affirmatively accept jurisdiction for cessions of jurisdiction from the state. *See id*. at 302-03; *see also* 40 U.S.C. § 255 (2000); FEDERAL AUTHORITY OVER LAND, *supra*, at 4. Finally for reservation, which occurred mostly in the western United States, the government ceded property to establish a state, but reserved some land as federal property, thus retaining legislative jurisdiction over the land it reserved. *See* Installation Jurisdiction, *supra*, at 303.

130. *See* AR 405-20, *supra* note 120, para. 3b. Exclusive legislative jurisdiction is:

> . . . applied when the Federal Government possesses, by whatever method acquired, all of the authority of the State, and in which the State concerned has not reserved to itself the right to exercise any of the authority concurrently with the United States except the right to serve civil or criminal process in the area relative to activities which occurred outside the area. This term is applicable even though the State may exercise certain authority over the land pursuant to the authority granted by Congress in several Federal Statutes *permitting* the State to do so.

Id.

131. *See id.* para. 3c. Concurrent legislative jurisdiction is:

> . . . applied in those instances wherein, in granting to the United States authority which would otherwise amount to exclusive legislative jurisdiction over an area, the State concerned has reserved to itself the right to exercise, concurrently with the United States, all of the same authority.

Id.

exercises no legislative jurisdiction [and the] Federal Government has only the same rights in the land as does any other landowner."[138]

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132. *See id.* para. 3d. Partial legislative jurisdiction is:

> . . . applied in those instances where the Federal Government has been granted, for exercise by it over an area in a State, certain of the State's authority, but where the State concerned has reserved to itself the right to exercise, by itself or concurrently with the United States, other authority constituting more than merely the right to serve civil and criminal process in the area attributable to actions outside the area. For example, the United States is considered to have partial legislative jurisdiction where the State has reserved the additional right to tax private property.

Id.

133. *See id.* para. 3e. Proprietorial interest only jurisdiction is:

> . . . applied to those instances wherein the Federal Government has acquired some degree of right or title to an area in a State, but has not obtained any measure of the State's authority over the area. In applying this, recognition should be given to the fact that the United States, by virtue of its functions and authority under various provisions of the Constitution, has many powers and immunities not possessed by ordinary landowners with respect to areas in which it acquires an interest, and of the further fact that all its properties and functions are held or performed in a governmental capacity as distinguished from an action performed by a private owner or citizen.

Id.

134. *See id*. para. 4a. In exclusive federal jurisdiction areas, the State is not obligated to provide any governmental services such as sewage, trash removal, road maintenance, and fire protection. *See id.*

135. *See id*. para. 4b. The Double Jeopardy Clause of the United States Constitution, which prohibits "any person . . . , for the same offence, to be twice put in jeopardy of life or limb," does not apply because the State and Federal governments are two separate sovereigns. U.S. CONST. amend. V; *see also* MCM, *supra* note 3, R.C.M. 201(d) discussion ("Although it is constitutionally permissible to try a person by court-martial and by a State court for the same act, as a matter of policy, a person who is pending trial or has been tried by a State court should not ordinarily be tried by court-martial for the same act.").

136. *See* AR 405-20, *supra* note 120, para. 4c.

137. *Id*.

138. *Id*. para. 4d. In a proprietorial situation the federal government can perform all of its constitutional functions without interference from anyone, including the State. With that said, the State retains legislative jurisdiction over the area as if it were owned by a private landowner rather than the United States. *See id.* Finally, "the State may not impose its regulatory power directly upon the Federal Government nor may it tax the Federal land. It may tax a lessee's interest in the land." *Id.*

C. Impact on Privatized Housing Projects

When the United States is considering a privatized housing project, how much of a role is legislative jurisdiction in the decision-making process? Zero.[139] While the type of legislative jurisdiction that an installation has will not impact the decision to go forward with a project, it will impact several issues concerning the privatized housing land, such as contracts, claims, and taxes.[140]

For law enforcement issues within privatized housing communities, exclusive, concurrent, or partial legislative jurisdiction will allow the commander to maintain law and order in those areas.[141] Exclusive federal jurisdiction over privatized housing areas, along with other recommended changes,[142] would leave little doubt that the commander controls the area for law enforcement purposes.[143] If the land planned for privatization is not exclusive federal jurisdiction, such jurisdiction can and should be acquired.[144]

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139. The two main sources of privatization information are the ACQWeb site, maintained by the Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics (www.acq.osd.mil) and the Army's RCI Web site (www.rci.army.mil). The ACQWeb site lists five broad guidelines for new project proposals: (1) Proper housing for service members and their families; (2) leveraging of government funds with private sector funds; (3) involvement of local government; (4) integration with private sector housing; and (5) housing developments must be within reasonable commuting distances of the installations. ACQWeb Privatization, *supra* note 9, at 3-4. The Army's RCI Web site details the Army's plans to simply improve close to 80% of the Army's family housing inventory by leveraging scarce government funds with private sector capital to attract world class developers to build innovative and creative projects in reduced time at reduced costs. Information Paper, subject: Army's Residential Communities Initiative (RCI) Army Family Housing (AFH) Privatization Program and Processes (Jan. 2002), *at* http://www.rci.army.mil/programinfo/RCI_Program_Information_Paper_August_2004.pdf. Neither source mentions legislative jurisdiction as part of its planning process.

140. *See* RCI Lessons Learned, *supra* note 84, para. 5c (contract issues), 5r (claims issues), and 5y (tax issues).

141. *See supra* notes 130-36 and accompanying text (discussing the various types of legislative jurisdition).

142. *See infra* sec. VII.D (discussing a suggested legislative solution).

143. *See supra* note 130 (discussing exclusive legislative jurisdiction).

144. *See infra* sec. VII.D (recommending acquisition of exclusive federal jurisdiction). The Army sets forth its procedures for acquiring legislative jurisdiction in AR 405-20. *See* AR 405-20, *supra* note 120, paras. 7, 9 (regulating procedures for acquisition of legislative jurisdiction and "notice and information").

V. Law Enforcement On and Off the Installation

A. The Commander's Inherent Authority On the Installation

"There is nothing in the Constitution that disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops on base under his commander."[145] The commander's inherent authority and responsibility to maintain law and good order and discipline on a military installation is recognized by all branches of government.[146] The Department of Defense and Service Secretaries further emphasize the commanders' authority by empowering them to maintain installation law and order by providing the necessary regulations and law enforcement assets to carry out the mission.[147]

The law enforcement mission not only includes authority over service members, but also civilians on the installation.[148] While the authority over service members on the installation, and worldwide for that matter, comes directly from the UCMJ,[149] the authority over civilians on the installation comes from the commander's inherent authority described above.

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145. Greer v. Spock, 424 U.S. 828, 840 (1976).

146. *See* Major Matthew J. Gilligan, *Opening the Gate?: An Analysis of Military Law Enforcement Authority Over Civilian Lawbreakers On and Off the Federal Installation*, 161 MIL. L. REV. 1, 16 (1999) (vesting ultimate responsibility to ensure good order and discipline in the military in the President as Commander-in-Chief); *see also* U.S. CONST. art. II, § 2 (designating the President as Commander in Chief). Congress has delegated power to the Executive Branch through the Property Clause to "make all needful Rules and Regulations respecting the territory or other property belonging to the United States." U.S. CONST. art. IV, § 3, cl. 2; *see also* Gilligan, *supra*, at 16; *supra* note 115 for full text of the Property Clause. Additionally, Congress requires the Service Secretaries, such as the Secretary of the Army, to "issue regulations for the government of his department . . . and the custody, use, and preservation of its property." 5 U.S.C. § 301 (2000). The Supreme Court's views on the subject are clear. *See supra* notes 121-128 and accompanying text; *see generally* Cafeteria Workers v. McElroy, 367 U.S. 886, 893-94 (1961) (recognizing the inherent authority of an installation commander to make decisions that affect the installation).

147. *See* U.S. DEP'T OF DEFENSE, DIR. 5200.8, SECURITY OF DOD INSTALLATIONS AND RESOURCES 2-9 (25 Apr. 1991) (recognizing the authority of a DoD installation commander to take reasonably necessary and lawful measures to maintain law and order and to protect installation personnel and property); *see also* U.S. Dep't of Army, Reg. 190-13, Army Physical Security Program para. 1-23 (30 Sept. 1993) (designating that installation commanders "will issue the necessary regulations to protect and secure personnel, places, and property under their command per the Internal Security Act of 1950"). For the Internal Security Act of 1950, *see* 50 U.S.C. § 797 (2000).

B. Is Privatized Housing "On the Installation" or "Off the Installation?"

When privatized housing is within the borders of the installation, it is "on the installation" regardless of whether or not the property is owned by private landowners. When a privatized housing community is outside the borders of the installation, it seems logical to classify it as "off the installation." Where the privatized housing community is located, on or off the installation, has no impact on military law enforcement officials over service members (assuming a valid apprehension or search authorization),[150] but it will impact how they treat civilians.

1. Authority over Civilian Lawbreakers

One of the threshold issues for military law enforcement officials[151] is defining their authority over civilians. After identification of a violation, and possibly pursuit, a critical stage in the exercise of police power is the decision to arrest.[152] Once it is determined that a legal basis exists[153] to make an arrest/apprehension,[154] the location of the civilian is a primary factor in the extent of the commander's/law enforcement official's authority which, by law, is very limited.[155]

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148. *See* 18 U.S.C. § 1382 (2000):

> "Entering military, naval, or Coast Guard property. Whoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard reservation, post, forte arsenal, yard, station, or installation for any purpose prohibited by law or lawful regulation; or [w]hoever reenters or is found within any such [installation], after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof – [s]hall be fined not more than $500 or imprisoned not more than six months, or both."

149. UCMJ art. 5 (2002) (stating the territorial applicability of the UCMJ applies in all places).

150. *See id.*

151. *See* MCM, *supra* note 3, R.C.M. 302(b)(1) (defining military law enforcement as "[s]ecurity police, military police, master at arms personnel, members of the shore patrol, and persons designated by proper authorities to perform military criminal investigative, guard or police duties, whether subject to the code or not, when in each of the foregoing instances, the official making the apprehension is in the execution of law enforcement duties"). Both military members and civilians working in the military law enforcement capacity are extensions of the commander's authority. *See* Gilligan, *supra* note 146, at 2 n.2.

The primary basis for military law enforcement authority over civilians is derived from the inherent power of the installation commander to maintain law and order on the installation.[156] The Military Purpose Doctrine,[157] through case law, further expands the commander's authority over

152. *See* Gilligan, *supra* note 146, at 3. Major Gilligan suggests that the police power to arrest "is perhaps the most intrusive of all governmental powers." *Id.* He asserts that an illegal arrest could violate a person's Fourth Amendment rights to be free from an unreasonable seizure and possibly warrant a civil tort action in an egregious case. *See id*.; *see also* Saucier v. Katz, 533 U.S. 194 (2001). In *Saucier*, Katz, a protestor, was arrested by Saucier, a military police officer, during a speech by Vice President Gore on an Army base. *See Saucier*, 533 U.S. at 198. In a civil rights suit, Katz claimed Saucier used excessive force in violation of his Fourth Amendment rights under the concept of an unreasonable seizure based on Saucier's allegedly shoving Katz into a police van. *See id.* The federal district court and the Court of Appeals for the Ninth Circuit denied Saucier's motion for summary judgment and the government, representing Saucier's interests, appealed. *See id*. at 199. The Supreme Court reversed and held that Saucier was entitled to qualified immunity. *See id*. at 200. The Supreme Court relied on an earlier precedent holding that "[i]f the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate." *Id*. at 202 (citing Malley v. Briggs, 475 U.S. 335, 34 (1986)).

153. *See* MCM, *supra* note 3, R.C.M. 302(a)(1) discussion (requiring probable cause to apprehend a person subject to the UCMJ). "Probable cause to apprehend exists when there are reasonable grounds to believe that an offense has been or is being committed and the person to be apprehended committed or is committing it." *Id.* R.C.M. 302(c). "'Reasonable grounds' means that there must be the kind of reliable information that a reasonable, prudent person would rely on which makes it more likely than not that something is true. A mere suspicion is not enough but proof that would support a conviction is not necessary. A person who determines probable cause may rely on the reports of others." *Id*. R.C.M. 302(c) discussion.

154. This section is assuming the situation calls for a warrantless arrest. *Id*. R.C.M. 302(d)(2). *See infra* sec. V.B.2 for a comparison of situations that require an authorization to apprehend.

155. *See* UCMJ, art. 7(b); MCM, *supra* note 3, R.C.M. 302(c) (limiting military law enforcement official's authority to apprehend over persons to those subject to the UCMJ); *see also* Gilligan, *supra* note 146, at 6-7. While it is the subject of Major Gilligan's thesis, in short, the commander's authority over civilian lawbreakers is derived from the commander's inherent authority and an exception to the Posse Comitatus Act – the Military Purpose Doctrine. For a detailed discussion of the Posse Comitatus Act (18 U.S.C. § 1385) and its relation to this specific topic, *see* Gilligan, *supra* note 146, at 8-12. While the "Posse Comitatus Act (PCA) is the primary restriction on the use of military personnel in civilian law enforcement activities," there are constitutional, statutory, and common law exceptions. *Id*. at 8; *see also id*. at 11-12 nn. 47-53 for a discussion of the exceptions to the PCA. The Military Purpose Doctrine, a common law exception to the PCA, is the principle exception granting the commander and his military law enforcement personnel authority over civilians. *See id*. at 12.

156. *See supra* notes 145-46 (discussing sources of a commander's inherent power to maintain law and order on an installation).

civilians, both on and off the installation, for law enforcement actions that are performed primarily for a military purpose.[158]

2. On the Installation

On the installation, based on power flowing from the commander, "military law enforcement officials have the power to arrest civilian lawbreakers for the military purpose of maintaining law and order on the installation."[159] In *United States v. Banks*,[160] a case directly on point, Air Force Security Police arrested a civilian in an Air Force barracks room for possession of drugs.[161] The defense argued the arrest was a violation of the PCA.[162] The Ninth Circuit rejected the defense's argument and essentially ratified the Military Purpose Doctrine by holding that the "power to maintain order, security, and discipline on a military reservation is necessary to military operations."[163]

3. Off the Installation

Off the installation, military law enforcement activities are much more limited by the Posse Comitatus Act (PCA).[164] The off-post criminal activity must have a military nexus (an adverse impact on maintenance of law and order *on* the installation) for the Military Purpose Doctrine to apply as exception to the PCA.[165] The best example of a military interest in civilian criminal activity is the introduction of illegal drugs onto a mili-

157. *See supra* note 155 (discussing the Military Purpose Doctrine as an exception to the Posse Comitatus Act); *see also* Gilligan, *supra* note 146, at 13, sec. III (providing a detailed discussion of the Military Purpose Doctrine).

158. *See* Gilligan, *supra* note 146, at 14 (discussing expansion of commander's authority if performed for a military purpose).

159. *Id*. at 17-18 (footnote omitted).

160. 539 F.2d 14 (9th Cir. 1976).

161. *See id.* at 15.

162. *See id*.

163. *Id*. at 16 (citing Cafeteria and Rest. Workers Union v. McElroy, 367 U.S. 886 (1961)). The *Banks* court also held that when their actions are based on probable cause, military law enforcement officials may arrest and detain civilians for on-base criminal violations. *See Banks*, 539 F.2d at 16. The court concluded that the Trespass Statute, which gives the commander the express power to expel and prohibit re-entry of civilians onto the installation also implied the power to arrest. *See id.*; *see also* Gilligan, *supra* note 146, at 20 n.86.

164. 18 U.S.C. § 1382 (2000).

tary installation, declared by DoD to be an "important military interest."[166] As long as the military law enforcement activities are "passive"[167] and do not "pervade"[168] the activities of civil officials, then off-post investigations are legally permissible.

4. Private Dwellings – Rule for Courts-Martial (RCM) 302(e)[169]

While RCM 302(e) addresses apprehensions, and not searches, the Rule describes in particular detail when apprehensions can occur in private dwellings and offers insight for the analysis on searches in privatized housing.[170] A private dwelling includes:

> . . . dwellings, *on or off* a military installation, such as single family houses, duplexes, and apartments. The quarters may be owned, leased, or *rented* by the residents, or assigned, and may be occupied on a temporary or permanent basis. "Private dwelling" does not include . . . military barracks, vessels, aircraft, tents, bunkers, field encampments, and similar places.[171]

The rules describe the parameters for entering a private dwelling for purposes of an apprehension. No person may enter a private dwelling unless there is consent[172] or exigent circumstances.[173] Of particular interest to the main issue of this article, RCM 302(e)(2)(C) discusses entry into a private dwelling that is military property or *under military control* and

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165. *See* Gilligan, *supra* note 146, at 21-22 (discussing military law enforcement's limited authority over civilians off-post and noting "Military law enforcement officials have investigative authority wherever a legitimate military interest exists.").

166. *See id.* at 22-23, n.99 (citing Policy Memorandum Number 5, Inspector General, Department of Defense, subject: Criminal Drug Investigative Activities (1 Oct. 1987)); *see also* U.S. DEP'T OF DEFENSE, DIR. 5525.5, DOD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS 5.1.3, E2.1.5 (20 Dec. 1989).

167. *See* Gilligan, *supra* note 146, at 26.

168. *Id*. at 24 (citing United States v. Bacon, 851 F.2d 1312 (11th Cir. 1988) and United States v. Hartley, 796 F.2d 112, 114 (5th Cir. 1986)) (holding that military involvement must be "pervasive" to violate the [Posse Comitatus] Act).

169. MCM, *supra* note 3, R.C.M. 302(e).

170. *See id.* R.C.M. 302(e)(1) (noting that "[a]n apprehension made be made at anyplace" minus certain exceptions); *see infra* sec. IV.

171. *Id*. R.C.M. 302(e)(2) (emphasis added).

172. *See id*. R.C.M. 302(e)(2)(A); *see also id.* MIL. R. EVID. 314(e), MIL. R. EVID. 316(d)(2).

173. *See id*. R.C.M. 302(e)(2)(B); *see also id.* MIL. R. EVID.315(g), MIL. R. EVID. 316(d)(4)(B).

RCM 302(e)(2)(D) discusses entry into a private dwelling that is *not under military control*.[174]

For a dwelling under military control, a probable cause to apprehend determination must be made by a commander (or military judge or military magistrate).[175] If the person to be apprehended is a resident, there must be probable cause to believe the person is present in the dwelling.[176] If the person to be apprehended is not a resident, the entry into the dwelling must be authorized by the commander with the probable cause belief that the person will be present at the time of entry.[177]

For a dwelling not under military control,[178] and the person to be apprehended is a resident of the private dwelling, the arrest warrant must be issued by a competent civilian authority.[179] If the person is not a resident, then both the arrest warrant and the search warrant authorizing the entry into the private dwelling must be issued by a competent civilian authority.[180]

The main issue as to the proper authority to authorize the apprehension is military control. If the private dwelling is under military control, then a commander has the authority to apprehend. If the private dwelling is not under military control, only a civilian authority can authorize the entry and arrest. By analogy, it is logical to believe that if the privatized dwelling is under military control, then the commander can authorize the search, but if the privatized dwelling is not under military control, then the commander cannot.

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174. *See id*. R.C.M. 302(e)(2)(D) (the rule does not use the language "not under military control," but actually refers to the dwellings as "private dwellings not included in subsection (e)(2)(C) of this rule").

175. *See id*. R.C.M. 302(e)(2)(C)(i) refers to officials listed in MRE 315(d) which includes commanders (MRE 315(d)(1), military judges (MRE 315(d)(2), and military magistrates (MRE 315 (d) analysis: "MILITARY MAGISTRATES MAY ALSO BE EMPOWERED TO GRANT SEARCH AUTHORIZATIONS."). *Id*. MIL. R. EVID. 315(d)(2) analysis, app. 22, at A22-29 (original text in capital letters).

176. *See id*. R.C.M. 302(e)(2)(C)(i).

177. *See id*. R.C.M. 302(e)(2)(C)(ii).

178. *See supra* note 174 (discussing R.C.M. 302(e)(2)(D)).

179. *See* MCM, *supra* note 3, R.C.M. 302(e)(2)(D)(i).

180. *See id*. R.C.M. 302(e)(2)(D)(ii).

VI. The Commander's Authority to Authorize Searches

For purposes of the analysis and examination of cases in this section, there are some assumptions that must be made to narrow the focus of a commander's authority to authorize searches in privatized housing areas. Assume, as laid out in the hypothetical case in Section I above: (1) there is no consent,[181] (2) there are no exigent circumstances,[182] (3) the commander is neutral and detached,[183] (4) the commander has provided with the proper information to make a probable cause determination,[184] and (5) there is no way the search could be construed as an inspection.[185]

A. Probable Cause Searches – Military Rule of Evidence 315

The general rule is that "[e]vidence obtained from searches requiring probable cause conducted in accordance with this rule is admissible at trial when relevant and not otherwise inadmissible under these rules."[186]

1. "Authorization to Search" v. "Search Warrant"

An "authorization to search" comes from a competent military authority and a "search warrant" is issued by competent civilian authority.[187] The authorization to search can be oral or written,[188] but the better

181. *See id*. MIL. R. EVID. 314(e). Consent searches do not require probable cause. A potential issue with consent searches could arise in the area of privatized housing with regard to the required element of voluntariness. *See id*. MIL. R. EVID. 314(e)(4); *see also infra* sec. VII.C. for a discussion of this issue.

182. *See* MCM, *supra* note 3, MIL. R. EVID. 314(i), 315(g). Emergency searches to save lives under MRE 314(i) do not require probable cause ("In emergency circumstances to save life or for a related purpose, a search may be conducted of persons or property in a good faith effort to render immediate medical aid, to obtain information that will assist in the rendering of such aid, or to prevent immediate or ongoing personal injury."). These differ from the exigent circumstances discussed in MRE 315(g) which would otherwise require a probable cause determination, to include insufficient time to prevent destruction of evidence (MRE 315(g)(1)), lack of communication due to military operational necessity (MRE 315(g)(2)), search of an operable vehicle (MRE 315(g)(3)), and searches not otherwise required by the Constitution (MRE 315(g)(4)).

183. *See id.* MIL. R. EVID. 315(d)(1) (granting an *impartial* individual the power to authorize a search pursuant to this rule).

184. *See id*. MIL. R. EVID. 315(f).

185. *See id*. MIL. R. EVID. 313.

186. *Id*. MIL. R. EVID. 315(a).

187. *See id*. MIL. R. EVID. 315(b)(1), (2).

practice is to obtain the authorization in writing.[189] Each, the authorization and the warrant, are express permission to search a specific person or area for specific property or evidence and to seize such person, evidence, or property.[190]

2. Scope of Authorization

The search authorization may be issued for: (1) persons subject to military law,[191] (2) military property,[192] (3) persons and property within military control,[193] and (4) nonmilitary property within a foreign country.[194] "Persons and property within military control" is defined as "[*p]ersons or property situated on or in a military installation*, encampment, vessel, aircraft, vehicle, *or any other location under military control, wherever located*."[195]

3. Power to Authorize

Commanders,[196] military judges, and military magistrates,[197] as long as impartial, can authorize searches. A commander must have "control

188. *See id*. MIL. R. EVID. 315(b)(1) (the authorization to search may contain an order to subordinates to search in a specified manner).

189. *See, e.g.*, U.S. Dep't of Army, DA Form 3745, Search and Seizure Authorization (Sept. 2002) (providing a simple one-page form to fill out and present to the appropriate authority for signature after providing the appropriate factual predicate); U.S. Dep't of Army, DA Form 3744, Affidavit Supporting Request for Authorization to Search and Seize or Apprehend (Sept. 2002).

190. *See* MCM, *supra* note 3, MIL. R. EVID. 315(b)(1) and (2).

191. *See id*. MIL. R. EVID. 315(c)(1) (including persons subject to the law of war).

192. *See id*. MIL. R. EVID. 315(c)(2) (military property includes "[m]ilitary property of the United States or of nonappropriated fund activities of an armed force of the United States wherever located").

193. *See id*. MIL. R. EVID. 315(c)(3).

194. *See id*. MIL. R. EVID. 315(c)(4).

195. *See id*. MIL. R. EVID. 315(c)(4) (emphasis added).

196. *See id.* MIL. R. EVID. 315(d)(1) (this section includes commanders and "other person[s] serving in a position designated by the Secretary concerned as either a position analogous to an officer in charge or a position of command"). The rule explicitly focuses on the function of the position of command, rather than rank, thus non-officers assuming command of a unit have the authority to grant authorizations. *See id*. MIL. R. EVID. 315(d)(1) analysis, at A22-29.

197. *See id*. MIL. R. EVID. 315(d)(2); *see also supra* note 175 (discussing the officials empowered to grant search authorizations).

over the place where the property or person to be searched is situated or found, or, if that place is not under military control, having control over the persons subject to military law or the law of war."[198] The latter clause raises an interesting issue. If the *place* is not under military control, but the *person* is, can the commander authorize a search of the *place*? So if privatized housing is not under military control, but its occupant, a service member, is, does the commander still have authority to search the place? Common sense says he does not. The commander could still authorize the search of the *person* even if the person was not in an area under military control (off-post), but certainly not of the *place* if the place is not under military control.

B. Some Cases

1. Reasonable Expectation of Privacy

One of the key elements courts analyze when searches are challenged is the person's reasonable expectation of privacy,[199] thought to be more limited in the military.[200] At two ends of the spectrum are barracks and private off-post dwellings. When a servicemember's reasonable expectation of privacy is low, such as in a barracks room, the commander's ability to intrude for an inspection or search is high. Conversely, when a servicemember's reasonable expectation of privacy is high, such as in an off-post dwelling, the commander's ability to intrude on that service member is severely limited. In the middle, there is government housing,[201] clearly distinguished by the rules from barracks.[202] Military courts have already recognized that residents of on-post government quarters do not have the same reasonable expectation of privacy as off post apartments.[203]

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198. MCM, *supra* note 3, MIL. R. EVID. 315(d)(1).

199. *See id*. MIL. R. EVID. 311(a), 311(a)(2)."Evidence obtained as a result of an unlawful search or seizure made by a person acting in a governmental capacity is inadmissible against the accused if . . . [t]he accused had a reasonable expectation of privacy in the person, place or property searched." *Id*. MIL. R. EVID. 311(a) and 311(a)(2).

200. United States v. Ayala, 22 M.J. 777, 783 (A.C.M.R. 1986) (recognizing that military members do not enjoy the same rights of privacy as civilians); *see also infra* note 203 (discussing the court's detailed rationale).

201. *See supra* note 170 (defining a private dwelling to include single family houses, duplexes, and apartments).

202. *See* MCM, *supra* note 3, R.C.M. 302(e)(2) ("Private" dwelling does not include . . . military barracks.).

There are no cases dealing with private quarters on post. The subsections below review the law for command authorized searches in government-owned quarters on post (for both military members and civilians), property leased on post by nonmilitary activities such as banks, government-leased and government-owned quarters off post, private property off post, and searches of government-leased property in foreign countries (for comparison purposes only).

2. Government Quarters On Post

"There has long existed in the services a rule to the effect that a military commanding officer has the power to search military property within his jurisdiction."[204] Since the UCMJ was enacted in 1950,[205] there have been numerous cases that have upheld this concept.[206] When service members have contested the commander's authority to authorize searches of their on post government quarters, civilian federal courts[207] have also upheld the concept. Under MRE 315, there is little doubt that commanders

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203. *See Ayala*, 22 M.J. at 783 ("We recognize that 'members of the armed forces cannot and do not enjoy the same rights of privacy as do the civilian elements of our society.'" (quoting United States v. Thomas, 21 M.J. 928, 932 (A.C.M.R. 1986))). The Army Court of Military Review went on to state: "[n]evertheless, within so-called 'family housing' quarters and other military facilities authorized for use as places of temporary residence for service member dependents or non-military guests, we believe that persons lawfully residing therein generally are vested with 'a reasonable expectation of privacy' within the meaning of MRE 311(a)(2)." *Id.* In an extensive footnote the court gave the following opinion of a commander's power over government family housing:

> Although "family housing" units are places in which individuals normally can enjoy a "reasonable expectation of privacy," their expectation is not of the same level of privacy that a civilian enjoys when residing in a rented apartment. An installation commander remains responsible for the proper and safe use of government quarters and government furnishings located on his installation. In this regard, he has certain powers in excess of those that most civilian landlords enjoy. Thus, for example, to preclude anti-deficiency act violations from occurring when utility funding is critical, an installation commander can direct that heating/air conditioning thermostat settings not exceed certain levels, and can authorize staff personnel to inspect for compliance. The level of privacy which reasonably can be expected in quarters in the process of being "cleared" obviously is even more diminished. We have no doubt that all military personnel who are assigned family housing are aware that administrative inspections are an inherent aspect of the quarters clearance process.

Id. at 784 n.14.

can authorize searches of on post government-owned quarters. This is true even if those quarters are occupied by civilians, either permanently assigned to the quarters, such as a dependent, or temporarily occupied by a guest.[208]

One additional issue regarding a commander's control over on post quarters is which commander on the installation controls the property.[209] For example, can the Commander, 3d Battalion order a search of on post quarters of a soldier in 2d Battalion. No, because he does not control that property. This issue is easily avoided by going to the Brigade commander, or better yet, the Garrison Commander, installation commander, or military magistrate.

3. Leased Property On Post

With no privatized housing cases reaching the courts (yet), one of the closest analogies is a commander authorized search of an on post credit union, which is a nonmilitary activity. In *United States v. Moreno*,[210] the Air Force court held that although the appellant's assignments of error on the search issue were without merit, they warranted discussion.[211] The installation commander authorized a search of the on base credit union's records.[212] The court dismissed the appellant's contention that the commander had no authority to authorize a search of credit union records under the Right to Financial Privacy Act[213] and focused on whether the com-

204. United States v. Doyle, 4 C.M.R. 137, 139 (C.M.A. 1952). The Court of Military Appeals then described the basis for the rule and distinguished between a commander's power over military property and police power over a civilian's privacy:

> The basis for this rule of discretion lies in the reason that, since such an officer has been vested with unusual responsibilities in regard to personnel, property, and material, it is necessary that he be given commensurate power to fulfill that responsibility . . . . It is unnecessary, in this connection, to spell out the obvious policy considerations which require a differentiation between the power of a commanding officer over military property and the power of a police officer to invade a citizen's privacy. That there may be limitations upon the former'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 rights of an individual are unduly impaired.

Id. at 140.

205. MANUAL FOR COURTS-MARTIAL, UNITED STATES app. II (UCMJ) (1951).

mander had control over the credit union.[214] The court held the search was

206. *See Doyle*, 4 C.M.R. at 139. Military courts further have found:

> The authority of a commanding officer to make or order an inspection or search of personnel and property under his control has long been recognized in military law . . . . "Authority to make, or order, [a] search of a member of the military establishment, or of a public building *in a place under military control*, even though occupied as . . . living quarters by a member of the military establishment, always has been regarded as indispensable to the maintenance of good order and discipline in any military command . . . such a search is not unreasonable and therefore not unlawful."

United States v. Florence, 5 C.M.R. 48, 50 (C.M.A. 1952) (citations omitted); *see also* United States v. Murray, 31 C.M.R. 20, 22-23 (C.M.A. 1961) (reviewing the validity of a commander's authority under assumption of command orders, the court upheld the principle that a commander has authority to authorize a search of on post quarters as an area under his control); United States v. Brown, 28 C.M.R. 48, 55-56 (C.M.A. 1959) (finding that the commander did not have reasonable suspicion to search the person of the accused, but the dissent, in exploring the commander's authority over persons and places under his control reviewed the history of the issue citing *Doyle*, *Florence* and *Rhodes*); United States v. Rhodes, 11 C.M.R. 73, 74 (C.M.A. 1953) (recognizing "the well-settled military rule that a commanding officer possesses authority to make or to order an inspection or search of personnel and property under his control").

207. "This rule and the reasons for it have been expressly recognized and approved by the Federal courts." *Brown*, 28 C.M.R. at 55 (Latimer, J., dissenting) (citing United v. Best, 76 F. Supp. 857 (D. Mass. 1948) and Richardson v. Zuppann, 81 F. Supp. 809 (Mid. D. Penn. 1949)). The two most commonly cited cases for military members having their cases heard in federal district courts challenging a commander's authority to search their on post quarters are *Richardson* and United States v. Grisby, 335 F.2d 652 (4th Cir. 1964). In *Richardson*, the defendant, an Army private, got to the federal district court through a habeas corpus petition while he was military prisoner in the United States Disciplinary Barracks after his conviction by a general court-martial. *See Richardson*, 81 F. Supp. at 810. The district court cited some old opinions validating the commander's authority to search on post quarters:

> As to the second contention that the search and seizure was unlawful, this search and seizure was made in the official office of petitioner as an Army officer on an Army reservation. The position of the Judge Advocate General in this matter is definite and unequivocal, as in CM 244713, Kemerer, 28 Board of Review 393, 403:
>
> "The immunity from searches and seizures guaranteed by the Fourth Amendment to the Constitution does not extend to premises on military reservations."
>
> Again in CM201878, Bashien: "The Judge Advocate General has held that the Commanding Officer of any person subject to military law, by virtue of the authority and control which he has as commanding

reasonable, because the "commander had law enforcement responsibilities over the on-base credit union."[215] The court also cited the terms of the credit union's lease which "authorized base law enforcement personnel to enter the credit union at any time for inspection and inventory and when necessary for the protection of the interests of the government."[216]

4. Government-Owned Property Off Post

The vast majority of government-owned or government-leased off post housing is overseas. This category of housing exists in the United

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207. (cont.)

> officer, may enter the quarters of an officer or soldier on a military reservation without permission of the accused and conduct a search therein, and that evidence so obtained is admissible." Citing CM 171626, Cutchin.
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> Again, in JAG 250.413, Section 395 (27), Digest of Opinions of The Judge Advocate General, 1912-40, it was held: "Authority to make, or order, an inspection or search of a member of the military establishment, or of a public building in a place under military control, even though occupied as an office or as living quarters by a member of the military establishment, always has been regarded as indispensable to the maintenance of good order and discipline in any military command. * * * Such search is not unreasonable and therefore not unlawful."

Id. at 813.

In *Grisby*, the defendant, a marine corporal, went straight to federal court when the military let civilian authorities prosecute the accused's misconduct. *See Grigsby*, 335 F.2d at 654. Because his case was being held in district court vice a court-martial, the defendant challenged the validity of the search of his quarters authorized by the commander as opposed to a civilian magistrate. *See id.* at 655. The district court held:

> [T]here is no doubt about the validity of the search. [The 1951 MCM], promulgated by the President, with Congressional authorization, a search of property located within a military installation and occupied by persons subject to military law is valid when authorized by a commanding officer having jurisdiction over the place where the property is. The authorization of the Chief of Staff, acting for the commanding General, was in accordance with the Manual for Courts-Martial and validated, as a matter of military law, the search it approved.

Id. at 654.

States, but the majority of military court cases involving commander

208. *See* United States v. Brown, 784 F.2d 1033 (10th Cir. 1986) (discussing a dependent spouse of a military member living in government quarters); Saylor v. United States, 374 F.2d 894 (Ct. Cl.1967); United States v. Rogers, 388 F. Supp. 298 (E.D. Va. 1975) (discussing a government civilian contract employee living in government quarters). In *Brown*, the defendant was a civilian (the dependent husband of a military member) residing in government quarters at Kirtland AFB, New Mexico. The defendant challenged the search of the government quarters authorized by the commander pursuant to MRE 315. His main assertion was that military rules were inapplicable because all parties involved (the victim and suspects) were civilians and as such the Federal Rules of Criminal Procedure (Fed R. Crim. P. 41, the civilian counterpart to MRE 315) should have been followed. The 10th Circuit upheld the command authorized search finding the search followed the procedures set forth in MRE 315 and they did not violate the defendant's Fourth Amendment rights. *See Brown*, 784 F.2d at 1034, 1036-38.

In *Rogers*, the defendant was a civilian contract employee working and residing at the U.S. Naval Base at Guantanamo Bay, Cuba. The commanding officer authorized a search of Rogers' on base government quarters. The court reviewed two major issues, first whether the United States (Navy) can search the property of a civilian residing on base, and second whether the civilian is susceptible to the same search procedures as a military member or whether he gets full protections of the Fourth Amendment. The court held that based on the Navy's lease with Cuba, the United States retained complete control over all criminal matters occurring within the confines of the base and second, the civilian defendant was entitled to the full protections of the fourth amendment. After holding the commander controlled the area, the court held the search procedures followed by the military respected the rights guaranteed by the Fourth Amendment. *See Rogers*, 388 F. Supp. at 300-01.

Finally, in *Saylor*, the civilian defendant lived on a Navy base in Japan. The fact that this issue arose in a foreign country is not relevant in this portion of the analysis. The Court of Claims held that while the commander clearly controlled the area and could have lawfully authorized the search, the search authorization was so defective (lacking probable cause, specificity, etc.) it violated the defendant's Fourth Amendment rights and thus the search was held to be unlawful. *See Saylor*, 374 F.2d at 897-99.

209. *See* United States v. Mix, 35 M.J. 283 (C.M.A. 1992). Although the search in *Mix* dealt with the appellant's car, the issue was whether the commander controlled the area outside of a dining facility on post where the appellant's car was located. The appellant's battalion commander authorized a search of the car. Reviewing the issue, the Court of Military Appeals upheld the search under MRE 315(d)(1):

> Under the peculiar facts of this case all three battalion commanders as well as the brigade commander had control over the place where the automobile was located. This was a joint parking lot which surrounded the dining facility used by the three battalions.

Id. at 288.

210. 23 M.J. 622 (A.F.C.M.R. 1986).

211. *Id*. at 623.

212. *See id.*

213. The Right to Financial Privacy Act of 1978, 12 U.S.C. § 3406.

214. *See Moreno*, 23 M.J. at 624.

authorized searches of such off post housing originate overseas and those cases are discussed in Section VI.B.6. below. There are a couple of cases where the federal civilian courts have reviewed the commander's authority to authorize searches in off post government-owned or government-leased quarters in the United States.[217] In each case, the court scrutinized the lease to determine the issue of control and in each case, the court ultimately found the United States had control over the property, and thus upheld the searches.[218]

5. Private Property Off Post

As a universally accepted concept, commanders have no authority or control over private property off the installation. Thus, they cannot autho-

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215. *Id*. (citing Cafeteria and Rest. Workers Union v. McElroy, 367 U.S. 886 (1961) and United States v. Banks, 539 F.2d 14 (9th Cir. 1976)).

216. *Id.* at 624.

217. *See* United States v. Reppert, 76 F. Supp. 2d 185 (D. Conn. 1999); Donnelly v. United States, 525 F. Supp. 1230 (E.D. Va. 1981).

218. In *Reppert*, the defendant, a service member in the Navy, lived in an off base apartment leased by the Navy in Ledyard, Connecticut. Pursuant to MRE 315, the commander authorized a search of the apartment and the defendant argued "the search of his apartment was unlawful under [MRE] 315 since that rule does grant a commander the right to authorize a search of an off-base residence." *Reppert*, 76 F. Supp. at 187-88. The federal district court reviewed the terms of the rental contract which was entered by the United States for the benefit of U.S. Navy personnel and cited the following clause of the lease:

> In recognition of (1) the U.S. Navy's need to ensure security, military fitness, and good order and discipline and (2) the U.S. Navy's policy of conducting regularly scheduled periodic inspections, the Landlord agrees that while its facilities are occupied by ship's force, the U.S. Navy and not Tenant has control over the leased premises and shall have the right to conduct command inspections of those premises.

Id. at 188. The court held: "[b]ased on the lease, the defendant's apartment was "property under military control." Rule 315(c)(3). Therefore, the search was permissible under military law." *Id*. In *Donnelly*, the plaintiff was a Navy service member assigned to a nuclear submarine docked in Newport News, Virginia for extensive repairs for a period of eighteen months. The Navy furnished housing and negotiated several long-term leases in the civilian community. The court looked at the fact that the Navy was the lessor and the plaintiff did not have to sign a lease, nor did he have to pay any rent. Additionally, the Navy provided all furnishings and the government was liable for any damages to the apartment. Finally, the plaintiff was not required to live in the apartment furnished by the Navy, but made arrangements on his own. Based on these facts, the court found the Navy had complete control of the apartment and the commander had authority to authorize the search. *See Donnelly*, 525 F. Supp. at 1231-32.

rize searches there.[219] The rule, MRE 315 is clear on this point.[220] This is not to be confused with military law enforcement officials' authority, derived from the commander, to apprehend off post, both military members and civilians in limited circumstances.[221] Also, this is not to be confused with searches of military *members* off the installation.[222] Finally, there is a distinction for searches in foreign countries.[223]

6. Foreign Country

There are numerous cases addressing a commander's authority to authorize searches of military and nonmilitary property in a foreign country. There are various situations, all covered by MRE 315(c). First, there are searches of military property, such as government-owned quarters, wherever located (on or off the installation), governed by MRE 315(c)(2).[224] Next, there are searches of property within military control, such as government-leased quarters off the installation, governed by MRE 315(c)(3).[225] Finally, there are searches of nonmilitary property within a foreign country, such as privately-owned quarters off the installation, governed by MRE 315(c)(4).[226] There are other laws, such as Status of Forces Agreements (SOFA) and specific regulations governing such property,[227] but a line of cases is informative for comparison purposes to the privatized housing analysis.[228]

In perhaps the closest analogy to a search of privatized housing, in *United States v. Carter*,[229] the Court of Military Appeals held that a commander's authorization to search the private off post quarters of a service

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219. United States v. DeLeo, 5 C.M.R. 148, 157 (C.M.A. 1954) (holding "[i]nnumerable judicial decisions have announced that, in general, the search of a dwelling is illegal unless authorized by a warrant which meets the requirements of the Fourth Amendment. A military person's off-post dwelling -- located in the United States -- likewise may not lawfully be searched without a warrant.").

220. *See supra* notes 196-98 (discussing commander's power to authorize searches over locations they control); *see also* U.S. DEP'T OF ARMY, REG. 190-22, SEARCHES, SEIZURES, AND DISPOSITION OF PROPERTY para. 2-1(b) (1 Jan. 1983) [hereinafter AR 190-22] ("Searches conducted off military installations or in areas or buildings not under military control normally must be conducted by civilian authorities under the authority of a search warrant.").

221. *See supra* sec. V.B.3.

222. *See* MCM, *supra* note 3, MIL R. EVID. 315(c)(3).

223. *See id*. MIL. R. EVID. 315(c)(4).

224. *See id*. MIL. R. EVID. 315(c)(2).

225. *See id*. MIL. R. EVID. 315(c)(3).

226. *See id*. MIL. R. EVID. 315(c)(4).

member was lawful, because the service member controlled the property.[230] In France in the 1960s, the United States military had an arrangement very similar to privatized housing with a private French company for off post "rental guarantee housing" that provided for full occupancy by American military or civilian employees and their dependents.[231] Despite a SOFA provision and Army policy to the contrary,[232] the post commander ordered a search of a soldier's off post quarters.[233] The court noted the property was within France's jurisdiction and that the SOFA and Army policy required the installation commander to coordinate for French

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227. *See id*. MIL R. EVID. 315(c)(4)(B); *see also* AR 190-22, *supra* note 220, para. 2-1c.

> When the person or property to be searched is located in a foreign country, a search or seizure may be authorized according to this regulation. However, the authorization and actual conduct of the search or seizure is subject to international legal considerations. Thus, when the property is located outside of premises controlled by US forces, US military personnel will conduct searches only if such action has been consented to by host country authorities or if consistent with applicable international agreements or policy arrangements with host country authorities.

AR 190-22, *supra* note 220, para. 2-1c.

228. *See* United States v. Chapple, 36 M.J. 410, 411 (C.M.A. 1993) (discussing off post private quarters with a government-negotiated lease); United States v. Bunkley, 12 M.J. 240, 242 (C.M.A. 1982) (discussing off post private quarters held for the exclusive use of US military forces ; United States v. Mitchell, 45 C.M.R. 114, 116 (C.M.A. 1972) (discussing the impact of international agreements on searches); United States v. Carter, 36 C.M.R. 433, 437 (C.M.A. 1966) (discussing the extent of the military's control over the off post housing in the foreign country). In these cases, the various military courts considered the issue of whether a military commander could lawfully authorize an off post search of a private dwelling in a foreign country.

229. 36 C.M.R. 433 (C.M.A. 1966).

230. *See id*. at 437.

231. *Id*. at 435. Sergeant Carter's living arrangements were similar to the some provisions of the current MHPI:

> [The] accused resided off the military reservation in what is described as rental guarantee housing . . . [c]reated and owned by a private French corporation under guarantee arrangements for full occupancy by the United States Government with lodging assignments being held by American authorities. The corporation is obligated – so long as full occupancy is guaranteed – to rent only to the American military or civilian employees as well as their dependents.

Id. at 435; *see supra* notes 66, 68-69 and accompanying text (tenant guarantees and rental guarantees are two MHPI methods with High budget impact scores so that have not been utilized in any MHPI projects to date).

authorities to search off post quarters occupied by Americans.[234] Despite these facts, the court held the commander controlled the property and thus was authorized to order the search.[235]

In the foreign country cases following *Carter*, in the 1970s through 1990s, the courts have given more emphasis to the governing treaty provisions or regulations to determine what control, if any, the commander authorizing the search had over the off post quarters. [236] Ultimately however, if there is some element of control, combined with a reasonable search based on probable cause and meeting the fundamental concepts of the Fourth Amendment, the courts have upheld commander authorized searches of off post quarters.

VII. Privatized Housing – Time to Clear Up the Confusion on Who Has Control?

A. An Argument Against – The Commander Does Not and Should Not Have Control

Most challenges to a commander's authority to authorize searches off the installation have relied on the concept that the commander did not control the property.[237] The same argument cannot be made with respect to privatized housing, which is primarily within the borders of the installation.[238] The best argument for lack of control is the fact the government, through the MHPI, has sought to give up control of its military housing for the benefit of acquiring better military family housing at minimal cost to taxpayers.[239] If the government does not control the housing operation,

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232. *See Carter*, 36 C.M.R. at 436. In *Carter*, there was no dispute that the housing in question was under French jurisdiction. The NATO SOFA required American military officials to coordinate with and get French assistance for American military searches of such off post housing. *See id*. Under the U.S. Army Europe policy at the time, "installation commanders specifically had no authority to order searches of . . . living quarters outside the confines of the installation," commanders had to present the facts to the appropriate French authorities for action, and finally, if invited by the French, the Americans could accompany the French search party. *Id*. at 436 n.2.

233. *See id.* at 436**.** Despite the SOFA and policy, on this particular occasion, military law enforcement agents got authorization from the post commander to conduct a search of Carter's off post quarters. The agents informed the local French police, but both parties agreed that since only American military personnel were involved, the agents could conduct the search without assistance. *See id.*

234. *See supra* note 232.

then the commander cannot authorize searches on the privatized land pursuant to MRE 315(c)(3).[240]

The argument that commanders should not control privatized housing for law enforcement purposes must focus on the service member's reasonable expectation of privacy.[241] Privatized housing is designed to make old-style government housing look and feel like modern residential communi-

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235. *See Carter*, 36 C.M.R. at 440. The appellant argued that the SOFA controlled and the government violated its provision which required the American commander to go through the French authorities to search off post civilian-owned property occupied by Americans. The United States relied on the following provision from paragraph 152 of the *1951 Manual for Courts-Manual*:

> 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.

Id. at 437 n.3 (quoting MANUAL FOR COURTS-MARTIAL, UNITED STATES para. 152 (1951)). The court found that the SOFA and the MCM were compatible and that the issue of control was really not an issue at all: "[i]t is with the Government's position that we must agree, for the Court is unanimous in its belief that the only pertinent question present, under the facts of this case, is whether or not the authority to search was granted upon probable cause." *Id*. at 437.

236. *See, e.g.*, United States v. Chapple, 36 M.J. 410, 411 (C.M.A. 1993), United States v. Bunkley, 12 M.J. 240, 242 (C.M.A. 1982), United States v. Mitchell, 45 C.M.R. 114, 116 (C.M.A. 1972). In *United States v. Mitchell*, the Court of Military Appeals stated: "[t]he question of whether and under what condition a military commander can lawfully authorize an off-post search of a private dwelling in a foreign country is dependent upon international agreement or arrangement between the involved countries, where such exists." 45 C.M.R. 114, 116 (1972). The court reviewed a commander's authorization to search a soldier's off post private residence in Okinawa, Japan. In *Carter*, the court described the United States' connection to the off post residences, but in *Mitchell* no such connection is described. With no military connection to the off post housing, the *Mitchell* court cited the then-existing 1960 version of *AR 190-22*, "[i]n the United States, its Territories, and possession searches off military installations in areas or buildings *not* under military control must be conducted by civil officials of the jurisdiction under the authority of a search warrant," making it clear that the military had no control over the off post housing. *Mitchell*, 45 C.M.R. at 116. Next, the court focused on the SOFA which gave the Okinawan Civil Administration or Magistrate Court exclusive jurisdiction to authorize search warrants off post. Consequently, the commander had no authority to authorize a search off post so the search was held to be unlawful. *See id*. at 117.

ties. Therefore, the occupant's expectation of privacy is equal to that of a service member living off post in a civilian community. For example, a

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236. (cont.)

In *United States v. Bunkley*, a "Deputy Subcommunity Commander" ordered a search of a soldier's off post quarters that was "documented for the exclusive use of the US Forces or otherwise occupied by the US Forces as a result of an agreement with the receiving state concerned" in the Federal Republic of Germany. 12 M.J. 240, 242 (C.M.A. 1982) (quoting U.S. ARMY EUROPE (USAREUR) SUPPLEMENT 1 to AR 190-22, para. 2-1c (Dec. 16, 1971) [hereinafter USAREUR SUPP. 1 to AR 190-22]). The court focused on the regulatory language "documented for" by comparing "search[es] of premises 'not documented for,' or occupied by, United States Forces." *Bunkley*, 12 M.J. at 242-43 (quoting USAREUR SUPP. 1 to AR 190-22, para. 2-1e). First, the court determined that a subcommunity commander was an authorized official for the area where the housing was located. *See id*. at 244. Next, citing *Mitchell*, the court followed its earlier holding that an American commander can authorize an off post search in a private dwelling in a foreign country when an international agreement or arrangement exists between the countries. *See id.* Finally, the court analyzed the United States – Germany SOFA, specifically finding that a provision in a supplemental agreement to the NATO SOFA authorized military law enforcement agents to enter civilian premises occupied by service members to conduct a search authorized by a competent military authority. *See id*. at 248 (citation omitted).

In *United States v. Chapple*, the appellant, a Navy seaman, lived off base in Italy in an apartment with his fiance who was also in the Navy. 36 M.J. 410, 411 (C.M.A. 1993). The appellant's fiancé leased the apartment from a private Italian landlord. *See id.* The lease was negotiated and prepared through the Navy's housing referral office operated by Naval Support Activity (NAVSUPPACT), Naples, Italy. *See id.* The commander of NAVSUPPACT ordered a search of the apartment for evidence of a crime against appellant. *See id*. Neither the appellant nor his fiancé who leased the apartment were in the NAVSUPPACT command. *See id.* at 411. The appellant argued that the commander who authorized the search did not have authority over the property, which was a privately-owned apartment leased and occupied by his fiance. *See id*. at 412. The court held that the commander's "authority to authorize the search of [the] apartment must be based on either his control over [the] apartment or his command relationship with [the lessor (the fiance)] or [the] appellant." *Id.* at 413. While the latter issue of no command relationship was obvious, the court's holding is interesting for the privatized housing analogy:

> We hold that [the commander] did not have "control" over [the] apartment, as that term is used in Mil.R.Evid. 315(d)(1). The sole authority relied upon by the Government . . . is [the commander's] responsibility [under Navy regulations] to operate a housing referral office. While that directive required [the commander] to provide assistance to military personnel in finding and contracting for housing, it does not confer any authority over the property leased through the housing referral office.

Id. In privatized housing arrangements, the command will still operate a housing referral office and work in conjunction with the private developers to ensure the privatized housing is occupied by service members. Similar to *Chapple*, the lease will be between the service member and the private landlord. *See generally infra* secs. III.D. and F.

commander cannot authorize a search of service member's private residence that is located just outside the gate of an installation. The central theme of this argument must focus on the word "control" rather than the theory that privatized housing looks and feels like private housing therefore the expectation of privacy is the same.

The increased expectation of privacy argument is a difficult one considering the fact that the installation commander is still responsible for maintenance of law and order on the installation as well as the protection to all persons and property within the installation borders.[242] Although the government may relinquish control of privatized housing land for housing purposes, the government has not relinquished control for law enforcement purposes.

Residents of a privatized housing area on an installation likely expect that privacy, protection, and safety that comes with living on a military installation. The commanders are charged with maintaining that safety and security through the law enforcement function. An argument that by giving up the housing function, the government has also given up the law enforcement function within that housing area is without merit as there is no legislation to support such a claim.

B. An Argument For – The Commander Does and Should Have Control

All three branches of government concur that a military commander has the inherent authority to maintain law and order on a military installation.[243] A congressional program designed to improve military family

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237. *See generally infra* sec. VI.B (discussing the reasonable expectation of privacy at various types of quarters).

238. There are no statistics for the actual number of privatized housing communities that will be located within the borders of the installation, but in general, the Army has the largest number of units to be privatized and the vast majority of the Army's units, if not all, will be located within the installation borders. *See supra* note 79; *see generally* U.S. DEP'T OF ARMY, ARMY FAMILY MASTER HOUSING PLAN 2001, ASSISTANT CHIEF OF STAFF FOR INSTALLATION MANAGEMENT (amended Oct. 2001), *at* http://www.armyhousing.net/documents/FHMP2001.pdf.

239. *See* ACQWeb Privatization, *supra* note 9, at 1-2. Of the five means for implemented privatized housing projects, conveyance of federal land and facilities by the government to private developers illustrate this point the best. *See supra* note 47.

240. *See* MCM, *supra* note 3, MIL. R. EVID. 315(c)(3).

241. *See supra* sec. VI.B.1.

242. *See supra* notes 155-56 and accompanying text.

housing, executed by DoD, has done nothing to impact that authority.[244] Privatized housing is within the installation borders. Any system requiring the commander, through military law enforcement officials, to coordinate with local civilian authorities anytime a law enforcement issue arises within the borders of the installation would seriously hinder all parties ability to maintain law and order.

Commanders must maintain good order and discipline on an installation. The authority to do so must include the right the search areas on the installation.[245] The UCMJ ensures that commanders respect soldier's rights, including the protections of the Fourth Amendment. With personal legal advisors, military justice training, and extensive regulations for law enforcement personnel within their command, commanders are well equipped to make informed decisions concerning search authorizations in privatized housing areas.

Since the September 11, 2001 terrorist attacks on the World Trade Center towers in New York and the Pentagon in Washington, D.C., installation commanders have taken steps to increase security on installations, such as placing gate guards on installations previously considered to be "open posts."[246] It would be illogical for privatized housing areas not to enjoy the same security protections as the rest of an installation.

While privatized housing developers include numerous amenities in their proposals, such as parks and restaurants, for the enjoyment of the res-

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243. *See id*.

244. *See supra* note 10.

245. *See* U.S. DEP'T OF ARMY, REG. 190-16, PHYSICAL SECURITY para. 2-2 (31 May 1991) ("Installation commanders will develop, set up, and maintain policies and procedures to control installation access. They will [p]rescribe and distribute procedures for the search of persons (and their possessions) on the installation. These procedures will cover searches conducted as persons enter the installation, while they are on the installation, and as they leave the installation.").

246. *See* Richard J. Newman, *It's Cool to Be a Soldier Again*, Mar. 11, 2002, at 1, *available at* LEXIS, News Library, U.S. News & World Report File (discussing the security cordon at the front gate of the U.S. Military Academy at West Point, New York); William Branigin, *Fairfax Pushes Army to Reopen Fort Belvoir Road*, Feb. 12, 2002, at 1, *available at* LEXIS, News Library, U.S. News & World Report File (discussing the closure of certain roads at Fort Belvoir, Virginia).

idents, law enforcement is not one of those amenities. Law enforcement is a governmental function and must remain under the commander's control.

Finally, if a commander does not have control over privatized housing for law enforcement purposes, any command-initiated search in such areas could result in a constitutional tort lawsuit for a violation of the Fourth Amendment.[247]

C. A Contract Solution – Will It Work?

In basic terms, privatized housing involves two separate and distinct contracts, one between the government and the private developer, and one (a lease) between the private developer (now private landlord) and the service member tenant.[248] The first contract between the government and the developer is not an issue here. The second contract, however, the lease between the private developer and the military occupant, could present some issues. Other than assisting in the housing referral process, these leases do not involve the government. It is not an agreement between the government and the service member like the one a service member would sign prior to occupying on post government housing.

What if a lease clause, "Consent to Searches by the Command," is put into the standard boilerplate of a lease that a military member must sign prior to occupying a privatized house? The lease is between the military member and the private landlord and it has nothing to do with the commander, yet the government drafts the lease and requires as part of its contract with the private landlord to be in every lease with the military tenants. Would this solution work?

If a "consent search" were executed pursuant to such a clause, there is a strong argument that such a search would be unlawful. Under the circumstances, signing a lease prior to occupancy with a boilerplate consent clause buried among numerous other complex legal language would likely

247. *See* Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971). Constitutional torts is a complex area, but one is essentially a civil rights lawsuit against a federal official for a violation of a citizen's constitutional rights. Through *Bivens* and its progeny, the Supreme Court set forth the cause of action for such lawsuits, known as "Bivens actions." *See generally* William P. Kratzke, Some Recommendations Concerning Tort Liability of Government and its Employees for Torts and Constitutional Torts, 9 ADMIN. L.J. AM. U. 1105 (1996).

248. *See* ACQWeb Second Year Report to Congress, *supra* note 22, at 2-3.

not be considered voluntary under MRE 314(e)(4).[249] Consent issues are heavily litigated based on the fact that "[v]oluntariness is a question to be determined from all the circumstances."[250] In other words, voluntariness will be determined based on the facts of a particular case.[251] In the scenario described above, a consent clause buried within other legal boilerplate within a lease, is not the best solution for a command-authorized search of privatized housing. If a tenant were to sign such a lease prior to occupancy, it is difficult to argue such consent was knowing and voluntary when a search pursuant to that consent might take place months, possibly years, after such consent was granted. Another problem with this method is the fact that the command is not a party to the lease.

A better method would be to include a contract clause in the lease putting the tenant on notice that the although the landlord controls the property for all housing related issues, the commander controls the property for law enforcement purposes, including the right to authorize searches and seizures under applicable laws. Now, the tenant has not consented to any future searches, but has been put on notice that the commander has such authority. If and when a search becomes an issue, then law enforcement officials can seek consent at that time or go through the process of obtaining a search authorization if consent is not granted.

D. A Legislative Solution

1. Acquiring Exclusive Jurisdiction

If the land for a privatized housing project is on the installation, its jurisdiction status will be either exclusive, concurrent, or partial federal jurisdiction.[252] If the status of the land is either concurrent or partial, the

249. *See* MCM, *supra* note 3, MIL. R. EVID. 314(e)(4).

250. *Id.* MIL. R. EVID. 314(c)(4); *see also* United States v. Richter, 51 M.J. 213, 216 (1999) (discussing whether the appellant voluntarily consented to a search when he was told the agents conducting the search had or would get a warrant if he did not consent); United States v. Radvansky, 45 M.J. 226, 228 (1996) (discussing whether the appellant voluntarily consented to urinalysis when he was told he would be subject to a command-directed urinalysis if he did not consent).

251. *See Richter*, 51 M.J. at 221 (the court considered the totality of the circumstances); *Radvansky*, 45 M.J. at 229 (finding that voluntariness of consent is decided by the totality of the circumstances).

252. *See supra* notes 130-133.

project should include a plan to acquire exclusive federal jurisdiction over the property designated for privatized housing.[253]

The planning process for privatization projects is extremely complex[254] and the teams of people preparing such projects consider every aspect of the land. The additional step of converting the land to an exclusive federal jurisdiction status greatly enhances the commander's ability to maintain law enforcement over the housing area. With exclusive jurisdiction, there is no doubt that the federal government, and hence, the commander has the sole responsibility for law enforcement in the privatized housing area.[255]

2. Amending 10 U.S.C. § 2871

The United States Code chapter authorizing military housing includes a broad definition of a "military installation" as an activity under the jurisdiction of a Service Secretary, or in a foreign country, those activities under the operational control of a Service Secretary or the Secretary of Defense.[256] The code does not address a commander's control over such property for law enforcement purposes, and more specifically, the subsections authorizing privatized housing, the Military Housing Privatization Initiative, does not address which party, the private developer or the installation commander, controls the property for any purpose.

Adding a definition of "control" to the MHPI stating that all privatized housing areas will remain under the jurisdiction and control of the Service Secretaries, regardless of the disposition of the land in subsequent sections, for all law enforcement purposes will make the issue clear.[257] A definition of control in the MHPI, the primary legislation, will provide the general notice that commanders control the privatized housing land for law

253. AR 405-20, *supra* note 120, para. 7 (Procedure for Acquisition of Legislative Jurisdiction), para. 9 (Notice and Information); *see also supra* note 130 and accompanying text (discussing exclusive federal jurisdiction).

254. *See supra* note 139 and accompanying text (discussing the lack of consideration for legislative jurisdiction when selecting a privatized housing project).

255. *See supra* note 130 (discussing exclusive legislative jurisdiction).

256. *See* 10 U.S.C. § 2801 (2000). Section 2801 is the initial section in Chapter 169, Military Construction and Military Family Housing. *See supra* note 10. Section 2871, the initial section of the MHPI, also contains definitions, but no references to control over the property. *See supra* note 7 (discussing the statutory authority for the MHPI).

257. This definition should be added to 10 U.S.C. § 2871.

enforcement purposes. This concept can then be incorporated in the Military Rules of Evidence and service regulations, including supplements at the installation level, to provide more specific notice to all parties concerning the commander's authority over such land.

3. Amending MRE 315(c)

For military practitioners, an amendment to MRE 315(c)(3) would end any potential debate on the issue of whether a commander controls privatized housing land for purposes of authorizing searches in such areas. By an Executive Order, the President could amend the Manual for Courts-Martial by including language within the Military Rules of Evidence, complete with an analysis in Appendix 22, updating the law to include privatized housing.[258]

A specific cross reference in MRE 315(c) to the United States Code section on privatized housing leaves no doubt as to the specific type of housing regardless of what the service may call a particular project. For example, the Army references such privatized housing as the Residential Communities Initiatives (RCI).[259] Also, such cross referencing to the United States Code within the actual text of rules with the Manual for Courts-Martial is not unprecedented.[260]

The proposed amendment to MRE 315(c) provides commanders, law enforcement officials, and practitioners advising commanders with the necessary legal framework to ensure the rights of those living in privatized housing areas are protected. With clear language in the rule specifically placing privatized housing within military control for search authorization purposes, the issue of whether the commander controls such property is eliminated.

4. Updating Regulations

Service regulations governing topics such as command authority, installation security, and law enforcement activities generally define the

258. *See* app. B for a draft executive order and proposed amendment to RCM 315(c)(3).

259. *See supra* note 24 (discussing the Army's RCI program).

260. *See* MCM, *supra* note 3, R.C.M. 909.

commander's and law enforcement personnel's policies, procedures, and parameters on the installation.[261] Starting with the Department of Defense, and moving down to the services, directives and regulations must be updated to include references to privatized housing and the commander's control over such property.[262]

At the lowest level, installations with privatized housing projects, whether completed, underway, or planned, must update their local supplements to their respective service regulations to provide specific notice of the commander's control over the new project. For example, many Army installations have local supplements to AR 27-10, Military Justice.[263] A specific provision detailing the commander's law enforcement authority for that installation's housing area will again eliminate any issue on the topic.

Publicizing the fact that a commander controls privatized housing for law enforcement purposes at the lowest level will both enhance the commander's ability to maintain good order and discipline and protect and safeguard personnel and property on the military installation.

VIII. Conclusion

A commander has the inherent authority to maintain law and order on a military installation for the preservation of good order and discipline and the protection of the persons and property under his care. Part of the commander's authority includes the power to authorize searches in areas under his control.[264]

Privatized housing is a relatively new concept in military family housing. Since its inception in 1996, privatized housing has grown exponentially in the military, with close to 40% of all military family housing in some phase of the privatization process. The concept of the government

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261. *See supra* note 147 (discussing the Department of Defense Directive and Army Regulation mandating commanders to provide security and protection of their installations).

262. *See* U.S. DEP'T OF DEFENSE, DIR. 5200.8, SECURITY OF DOD INSTALLATIONS AND RESOURCES (25 Apr. 1991) (note the publication date well before the MHPI of 1996).

263. *See supra* note 5 (discussing the statutory and regulatory sources of a commander's authority).

264. *See supra* note 245 (discussing the regulatory requirement for commanders' programs to safeguard their installations).

turning over its housing operations to private developers is here to stay. Military servicemembers will benefit from modern housing with all of the amenities designed to make military family communities on post look and feel like off post civilian residential communities.

Legislation must be implemented to make it clear that despite the efforts to privatize military family housing, commanders have not given up control over the land for law enforcement purposes. The commander's search authorization authority within privatized housing areas is essential for maintenance of law and order and protection of persons and property on the installation.

The best solution is to amend MRE 315(c)(3), specifically the section within the rules that defines persons and property within military control, as outlined in Appendix B.

Appendix A

Table 1

The initial four privatization projects based on date of contract award:[265]

Facility		Units	Award Date
1.	Naval Air Station (NAS) Corpus Christi/ Kingsville I, Texas	404	July 1996
2.	Naval Station (NS) Everett I, Washington	185	March 1997
3.	Lackland Air Force Base (AFB), Texas	420	August 1998
4.	Fort Carson, Colorado (Army)	2663	September 1999

265. *See* ACQWeb October 2001 Project List, *supra* note 23, at 1. The Roman numeral "I" for the Kingsville and Everett projects indicate there are subsequent, yet separate projects at these locations. The NAS Kingsville II project for 150 units was awarded in November 2000 and the NS Everett II project for 288 units was awarded in December 2000. *See id.* Compare this to the project at Marine Corps Base (MCB) Camp Pendleton, California where one project is being awarded in phases: MCB Camp Pendleton (Phase 1) for 712 units was awarded in November 2000 and MCB Camp Pendleton (Phase 2) is currently in the planning phase for 3595 units. *See id.* at 1-2.

Table 2

Thirty-five projects were awarded from 2000 through November 2004:[266]

Facility		Units	Award Date
1.	Robins AFB, Georgia	670	September 2000
2.	Dyess AFB, TexasNaval Station (NS) Everett I, Washington	402	September 2000
3.	MCB Camp Pendleton I, California	712	November 2000
4.	NAS Kingsville II, Texas	2663	September 1999
5.	NS Everett II, Washington	288	December 2000
6.	Elmendorf AFB, Alaska	780	March 2001
7.	Naval Complex (NC) San Diego (Phase I), California	3248	August 2001
8.	NC New Orleans, Louisiana	935	October 2001
9.	Fort Hood, Texas (Army)	5912	November 2001
10.	Naval Complex South Texas, Texas	665	February 2002
11.	Fort Lewis, Washington (Army)	3982	April 2002
12.	Fort Meade, Maryland (Army)	3170	May 2002
13.	Wright-Patterson AFB, Ohio	1536	August 2002
14.	MCB Beaufort/MCB Parris Island, South Carolina	1718	March 2003
15.	Kirtland AFB, New Mexico	1073	April 2003
16.	NC San Diego (Phase 2), California	3217	May 2003
17.	Fort Bragg, North Carolina (Army)	5580	August 2003
18.	MCB Camp Pendleton/MCB Quantico, California	4534	September 2003
19.	Presidio of Monterey, California (Army)	2209	October 2003
20.	Patrick AFB, Florida	552	October 2003
21.	Fort Stewart, Georgia (Army)	3702	November 2003

22.	Fort Campbell, Kentucky (Army)	4255	December 2003
23.	Fort Belvoir, Virginia (Army)	2070	December 2003
24.	Moody AFB, Georgia	606	February 2004
25.	Fort Irwin/Moffett Field, California (Army)	2806	March 2004
26.	Hawaii Regional Navy (Phase I), Hawaii	1948	April 2004
27.	Fort Hamilton, New York (Army)	228	June 2004
28.	Walter Reed Army Medical Center, Washington, DC/Fort Detrick, Maryland (Army)	963	July 2004
29.	Little Rock AFB, Arkansas	1200	July 2004
30.	Buckley AFB, Colorado	351	August 2004
31.	Fort Polk, Louisiana (Army)	3821	September 2004
32.	Elmendorf AFB (Phase II), Alaska	1194	September 2004
33.	MCB Yuma/MCB Camp Pendleton, California	897	October 2004
34.	Hanscom AFB, Massachusetts	784	October 2004
35.	Northeast Region Navy (NY, NJ, CT, RI, & ME)	4264	November 2004

266. *See* CRS Report to Congress, *supra* note 18, at 16, tbl. 2 (Military Housing Privatization Initiative Project Status), July 2001; *see also* ACQWeb November 2004 MPH Lists, *supra* note 24, *at* http://www.acq.osd.mil/housing/projawarded.htm.

Table 3

As of November 2004, thirty-six projects were in the solicitation phase and pending award by Congress:[267]

Facility		Units	Projected Award
1.	Hickham AFB, HI	1356	August 2003
2.	Little Rock AFB, AR	1200	December 2003
3.	Buckley AFB, CO	351	January 2004
4.	Offutt AFB, NE	2255	March 2004
5.	Beale AFB, CA	1344	March 2004
6.	Shaw AFB, SC	1491	April 2004
7.	Fort Eustis/Story, VA	1193	May 2004
8.	Cannon AFB, NM	1246	May 2004
9.	Fort Shafter/Schofield Barracks, HI	7364	June 2004
10.	Hill AFB, UT	1018	July 2004
11.	Fort Leonard Wood, MO	2472	July 2004
12.	Wright-Patterson AFB (Phase 2), OH	496	July 2004
13.	Nellis AFB, NV	1178	August 2004
14.	Fort Drum, NY	2272	October 2004
15.	Navy Northwest Region I, WA	2705	October 2004
16.	Picatinny Arsenal, NJ	116	November 2004
17.	Dover AFB, NJ	980	November 2004
18.	Fort Sam Houston, TX	926	November 2004
19.	Carlisle Barracks, PA	316	November 2004
20.	Fort Monmouth, NJ	623	November 2004
21.	Fort Bliss, TX	2776	January 2005
22.	Altus AFB, OK	726	March 2005
23.	Langley AFB, VA	1480	March 2005

24.	Eglin/Hurlburt AFB, FL	2155	March 2005
25.	Tinker AFB, OK	858	April 2005
26.	Luke AFB, AZ	426	April 2005
27.	Sheppard AFB, TX	910	April 2005
28.	McGuire AFB, NJ	2592	May 2005
29.	Navy Mid-Atlantic Region (VA, MD, WV)	5930	July 2005
30.	Fort Benning, GA	4055	September 2005
31.	Fort Knox, KY	3380	December 2005
32.	Fort Rucker, AL	1516	December 2005
33.	Fort Leavenworth, KS	1580	February 2006
34.	Scott AFB, IL	1593	March 2006
35.	Fort Gordon, GA	872	April 2006
36.	Redstone Arsenal, AL	503	June 2006

267. ACQWeb November 2004 MPH Lists, *supra* note 24, *at* http://www.acq.osd.mil/housing/projplanned.htm.

Table 4

The Army's top fifteen projects (ranked by number of units to be privatized):[268]

	Installation	Units
1.	Fort Shafter/Schofield Barracks, HI	7364
2.	Fort Hood, TX	5912
3.	Fort Bragg, NC	5580
4.	Fort Campbell, KY	4255
5.	Fort Benning, GA	4055
6.	Fort Lewis, WA	3982
7.	Fort Polk, LA	3821
8.	Fort Stewart/Hunter Airfield, GA	3702
9.	Fort Knox, KY	3380
10.	Fort Meade, MD	3170
11.	Fort Bliss, TX	2776
12.	Fort Irwin/Moffett Airfield/Camp Parks, CA	2806
13.	Fort Carson, CO	2663
14.	Fort Leonard Wood, MO	2472
15.	Fort Drum, NY	2272

268. *Id.*

Table 5

The Air Force, Navy and Marine projects (ranked by number of units to privatized):[269]

	Air Force (# units)	Navy (# units)	Marines (# units)
1.	McGuire AFB, NJ (2592)[270]	NC San Diego, CA (9133)[271]	MCB Camp Pendleton, CA (10,644)[272]
2	Offutt AFB, NE (2255)	Southeast Region (6076)	MCB Camp Lejuene, SC (4534)
3.	Eglin/Hurlburt AFB, FL (2155)	Mid-Atlantic Region (5930)	MCAS Beaufort/MCD Parris Island, SC (1718)
4.	Wright-Patterson AFB, OH (2032)[273]	Northeast Region (4264)	MCB Twentynine Palms, CA (1382)
5.	Elmendorf AFB, AK (2022)[274]	Hawaii Region (2950)[275]	MC Hawaii (1377)
6.	Keesler AFB, MS (1682)	Northeast West Region (2823)	MC Kansas City (137)
7.	Scott AFB, IL (1593)	Northwest Region (2705)	
8.	Holloman AFB, NM (1506)	Southeast West Region (1763)	
9.	Shaw AFB, SC (1491)	NC New Orleans, LA (941)	
10.	Langley AFB, VA (1480)	NC South Texas, TX (665)	
11.	Hickam AFB, HI (1356)	NS Ebverett, WAS (473)[276]	
12.	Beale AFB, CA (1344)	NAS Corpus Christi/ NAS Kingsville, TX (554)[277]	
13.	Cannon AFB, NM (1246)		
14.	Little Rock AFB, AR (1200)		

15.	Travis AFB, CA (1179)		
16.	Nellis AFB, AZ (1178)		
17.	Barksdale, LA (1090)		
18.	Kirtland AFB, NM (1078)		
19.	Hill AFB, UT (1018)		

269. The chart represents all Air Force projects with over 1000 units, all existing Navy projects, and all existing Marine projects. *See id.*

270. This Air Force project is combined with Army property at Fort Dix, New Jersey. *See id.*

271. Combined Phase 1 (3248 units), Phase 2 (3217 units), and Phase 3 (2668 units). *See supra* note 75.

272. Combined Phase 1 (712 units), Phase 2 (4534 units), Phase 3 (897 units) and Phase 4 (4501 units). *See* ACQWeb November 2004 MPH Lists, *supra* note 24.

273. Combined Phase 1 (1536 units), Phase 2 (496 units). *See supra* app. A, tbl. 2, row 13 and tabl. 3, row 12..

274. Combined Elmendort I (292 units) and Elemndorf II (1194 units). *See supra* app. A, tbl, 2, rows 6 and 32.

275. Combined Hawaii I (1948 units) and Hawaii II (1002 units). *See* ACQWeb November 2004 MPH LIsts, *supra* note 24.

276. Combined NS Everett I (195 units) and NS Everett II (268 units). *See supra* app. A, tbl. 1, row 2 and tbl. 2, row 4.

277. Combined NAS Corpus Christi/Kingsville (404 units) and NAS Kingsville II (150 units). *See supra* app. A, tbl. 1, row 1 and tbl. 2, row 4.

Table 6

When the privatization projects get large, they are broken into separate phases over a number of years. The two largest projects, Camp Pendleton for the Marines and the Naval Complex in San Diego acocunt for 7% of the total 95 projects for all services and 19,777 units or 11% of the total 180,581 units.[278]

	MCB Camp Pendleton, California	NC San Diego, California
Phase 1.	712 units (Nov. 2000)	3248 units (Aug. 2001)
Phase 2.	4534 units (Sept. 2003) (includes Quantico, VA	3217 units (May 2003)
Phase 3.	897 units (Oct. 2004) (includes Yuma, AZ)	2668 units (May 2004)
Phase 4.	4501 units (July 2005)	
Total	10,644 units	9133 units

278. ACQWeb November 2004 MPH Lists, *supra* note 24.

Appendix B

EXECUTIVE ORDER XXXXX
AMENDMENTS TO THE MANUAL FOR
COURTS-MARTIAL, UNITED STATES

By the authority vested in me as President by the Constitution and the laws of the United States of America, including chapter 47 of title 10, United States Code (Uniform Code of Military Justice, 10 U.S.C. §§ 801-946), in order to prescribe amendments to the Manual for Courts-Martial, United States, prescribed by Executive Order No. 12,473, as amended by Executive Order No. 12,484, Executive Order No. 12,550, Executive Order No. 12,586, Executive Order No. 12,708, Executive Order No. 12,767, Executive Order 12,888; Executive Order 12,936; Executive Order 12,960; Executive Order 13,086; and Executive Order 13,140, it is hereby ordered as follows:

Section 1. Part III of the Manual for Courts-Martial, United States, is amended as follows:

a. MRE 315(c)(3) is amended as follows:

(3) *Persons and property within military control.* Persons or property situated on or in a military installation, encampment, vessel, aircraft, or any other location under military control wherever located; or <u>military family housing or military unaccompanied housing, commonly referred to as "privatized housing," and as defined by section 2872 of Title 10, United States Code, whether such privatized housing is located on or near the military installation within the United States and its territories and possessions; or</u>