How Far Can They Go: Should Commanders Be Able to Treat Hotel Rooms Like an Extension of the Barracks for Search and Seizure Purposes?

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> *A military barracks or berthing area may be a foxhole in a remote training or combat area or it may be the almost mythical condominiums referred to in recruiting brochures and motion pictures. It may be represented by elaborate areas of individual room configuration designed to accord to the service member a measure of personal privacy and protection from the more raucous environment of a ship's berthing area or an open squad bay. The range of such architectural designs does not represent a granting of sanctuary areas inconsistent with the control and discipline of a military organization.*[1]

Introduction

In the months following 11 September 2001, thousands of reservists and members of the National Guard were called to active duty.[2] This mass mobilization caused barracks shortages on many installations, and some of these mobilized forces were housed in hotel rooms either on or off the installation.[3] Consequently, commanders struggled to set standards for mobilized forces living in hotel rooms that were commensurate with service members living in traditional barracks rooms.

Long before the development of the Uniform Code of Military Justice (UCMJ), there was a general principle that commanders could search military property within their control.[4] "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."[5] It is also important to note that the type of search that would be considered reasonable in the military would not necessarily be reasonable in civilian society because of the "competing constitutional interest of military necessity."[6] Courts have consistently held that while "persons serving on active duty in the armed forces of our country are not divested of all their constitutional rights as individuals,"[7] the unique customs, traditions, and mission requirements of the service are such that service members do not exercise the same degree of personal liberty as do civilians.[8] There are exemptions clearly noted in the Constitution, as well as implied exceptions to the fundamental rights normally enjoyed by an individual in the civilian community.[9]

Since there is little question that a commander has both a unique responsibility and authority in the area of search and seizure, the focus then shifts to the extent of that authority. The Military Rules of Evidence (MRE)[10] provide some guidance as to the limits of a commander's power to search and seize a service member's property, and the courts have further defined military property as distinct from an individual's property and the reasonable expectation of privacy.[11] Inventories and inspec-

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1. United States v. McCormick, 13 M.J. 900, 903-04 (N.M.C.M.R. 1982).

2. U.S. Dep't of Defense, *National Guard and Reserve Units Called to Active Duty (Dec. 12, 2001), available at* http://www.defenselink.mil/news/Dec2001/d20011212active.pdf (last visited Oct. 15, 2003) [hereinafter Defenselink] (providing statistics released by the Department of Defense indicating that as of 12 December 2001, 58,741 Soldiers, Sailors, Airmen, and Marines were activated from the reserves and the National Guard).

3. Fort Bragg, North Carolina is one of several major Army mobilization sites. As of 22 January 2004, Fort Bragg had 503 hotel rooms housing 648 Soldiers located on the installation and 1151 hotel rooms housing 1330 Soldiers off of the installation. E-mail from CW2 Tammy Wright, Housing Coordinator, 2125th Garrison Support Unit, Fort Bragg, North Carolina, to MAJ Alison Martin, Student, 52d Judge Advocate Officer Graduate Course, U.S. Army (Jan. 22, 2004) (on file with author).

4. *See* United States v. Doyle, 4 C.M.R. 137, 139 (C.M.A. 1952) (citing United States v. Kemerer, 28 B.R. 393 (1943); Dig. Op. JAG 1912-1940, sec. 395 (27); United States v. Worley, 3 C.M.R. (AF) 424 (1950)). In *United States v. Stuckey,* the court reviewed the history of search and seizure and noted that the commander's authority has traditionally been a critical part of military law:

> On July 23, 1930, The Judge Advocate General stated in an opinion: 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 a search is not unreasonable and therefore not unlawful. J.A.G. 250.413.

United States v. Stuckey, 10 M.J. 347, 352 (C.M.A. 1981).

5. *Doyle*, 4 C.M.R. at 140.

6. United States v. Ezell, 6 M.J. 307, 328-29 (C.M.A. 1979).

tions, if conducted properly, are authorized in order to allow the commander to ensure the health and welfare of the unit. If commanders exceed the scope and purpose of the inspection or inventory, however, the intrusion may develop into an unlawful search. Although the Rules for Courts-Martial (RCM) separately address the concept of apprehension,[12] there is often a good deal of interplay between this concept and that of search and seizure.

First, this article addresses the limits of search and seizure, as well as the related issues of inspections, inventories, and apprehensions of Soldiers living in hotel rooms for the purposes of military duty. Second, the article provides an overview of the current military law regarding search and seizure, as well as a detailed analysis of why the definition of "under military control" should include hotel rooms. Third, this article discusses the current law regarding inspections, inventories, and apprehensions. These other areas of Fourth Amendment[13] law raise a number of important issues that may impact a commander's ability to conduct search and seizure off of the installation. Fourth, the article reviews the issues surrounding search and seizure in privatized housing as a basis for comparison to hotel rooms. Fifth, this article discusses the impact of the Posse Comitatus Act[14] on the range of options available to the commander. Finally, the article analyzes the impact of these distinct areas of the law upon the ultimate question regarding a commander's authority to search hotel rooms.

This article concludes that commanders can treat the service members' hotel rooms as the legal equivalent of barracks rooms. The customs and traditions of the service combined with the concept of military necessity have throughout history served as the basis for a commander's authority to apprehend service members, inspect, inventory and search areas under military control, and seize evidence therein. The issue is how to define a location under military control. Military and civilian case law, as well as the evolving military environment, indicate that a hotel room can be considered a location under military control. There are numerous factors that a commander, with a judge advocate's (JA) advice and assistance, should consider in making the determination. Though no single factor is likely to be dispositive, a critical one is whether the government, rather than the service member, directly leases the property. Search and seizure case law in the federal sector, military cases involving search and seizure, inspections, inventories, and apprehensions, and military practice, provide a framework for establishing the commander's authority to search service members' hotel rooms located off of the installation and seize evidence located in those rooms for use in judicial and nonjudicial proceedings.

Military Search and Seizure Law

The commander's authority to conduct search and seizure has long been established. In a case decided just one year after the implementation of the UCMJ, the Court of Military Appeals (COMA) in *United States v. Doyle* noted, "[t]here 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."[15] At the same time, courts have recognized that many Fourth Amendment protections provided to average citizens also apply to service members.[16]

7. United States v. Kazmierczak, 37 C.M.R. 214, 219 (C.M.A. 1967). The court noted that

> Article I, Section 8, Clause 14, of the Constitution of the United States confers upon Congress the power to "make Rules for the Government and Regulation" of the military, but that power, like all the other powers of Congress enumerated in Section 8, must not be exercised in contravention of individual rights guaranteed by the Constitution.

Id.; *see also* United States v. Reppert, 76 F. Supp. 185, 189 (D. Conn. 1999) (noting that the Fourth Amendment applies to military searches); United States v. Stringer, 37 M.J. 120, 123 (C.M.A. 1993) (noting that the Fourth Amendment applies to searches of the property of service members upon entry onto an installation); United States v. Lopez, 35 M.J. 35, 41 (C.M.A. 1992) (finding that the Bill of Rights applies to members of the armed forces). *But see* FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE sec. 1-52.00, at 26 (1991) (noting that while the Supreme Court's holdings seem to indicate that most of the provisions of the Bill of Rights apply to members of the armed forces, the Court has never directly addressed the issue); *see* U.S. CONST. amend. I-X.

8. *See Kazmierczak*, 37 C.M.R. at 219.

9. *See id*.

10. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL R. EVID. (2002) [hereinafter MCM].

11. The Court of Military Appeals (COMA) reiterated that in order for any person to claim a reasonable expectation of privacy, the person must meet the two pronged test outlined by the Supreme Court. That is, the person must have both a subjective and objective expectation of privacy. *See* United States v. Ayala, 26 M.J. 190-91 (C.M.A. 1988) (citing Smith v. Maryland, 442 U.S. 735, 740 (1979); Katz v. United States 389 U.S. 347, 361 (1967)).

12. MCM, *supra* note 10, R.C.M. 302.

13. U.S. CONST. amend. IV.

14. 18 U.S.C.S. § 1385 (LEXIS 2004).

15. 4 C.M.R. 137, 139 (C.M.A. 1952).

Military Rule of Evidence 315

When commanders have probable cause, they may search persons "subject to military law," and different types of property including military property, "location[s] under military control," and certain property within a foreign country.[17] The first question is whether, under certain conditions, a commander may consider hotel rooms located off of the installation to be under military control. The second step in the analysis is to determine whether or not the actions of the command were reasonable.

The Definition of Place Under Military Control

As the UCMJ matured, the military courts began to set the limits of the commander's ability to search a service member's property and helped to define the meaning of place under military control.

Authority to Search Service Members' Personal Belongings

In *United States v. Murray*, the accused was a unit mail handler suspected of stealing items from the mail.[18] The acting commander authorized a search of the accused's room in the barracks and his personal belongings to look for the mail. The COMA found that a commander could authorize the search of the barracks room and personal belongings of the accused.[19] In *United States v. Ayala*, the Army service court found that while members living in on-post housing enjoy a greater expectation of privacy in their homes than do soldiers living in the barracks, the installation commander remains responsible for the use and safety of quarters located on the installation.[20] Therefore, military control also includes military family quarters.[21] The COMA, now known as the Court of Appeals for the Armed Forces or CAAF, has not directly addressed this point, but their findings in cases in which the search of military housing is related to the major issue seem to agree with the Army court.[22]

Expectation of Privacy in Barracks Room Diminished

"[R]easonable expectations of privacy within the military society will differ from those in the civilian society."[23] Although service members do have a reasonable expectation of privacy in their barracks room, "a [S]oldier cannot reasonably expect the Army barracks to be a sanctuary like his civilian home."[24] By analogy, RCM 302(e)(2), clearly distinguishes between the barracks and other private living areas for purposes of apprehension without a warrant.[25]

In *United States v. McCarthy*, an Air Force security police officer ordered the charge of quarters (CQ), to open the door to a military dormitory room upon probable cause that the occupant assaulted three female service members.[26] Once the door was open, the officer apprehended the airman occupying the room.[27] The COMA determined that the accused airman "could not reasonably expect to avoid apprehension in this case by retreating to his room."[28] In reaching its holding, the court relied on several factors. The court found that since the unit assigned the airman to his room, chose his roommate, and

16. *See, e.g.*, United States v. Middleton, 10 M.J. 123, 127 (C.M.A. 1981).

17. MCM, *supra* note 10, MIL R. EVID. 315(c). A commander must have the authority to search the affected areas. "Authorization to search is an express permission . . . . issued by competent military authority to search a person or an area for specified property or evidence . . . ." *Id.* MIL. R. EVID. 315(b). This authorization to search is distinct from a search warrant that is defined as an "express permission to search and seize issued by competent civilian authority." *Id.* The search authorization is limited in scope to military property or locations under military control. *Id.* MIL. R. EVID. 315(c).

18. *See* 31 C.M.R. 20 (C.M.A. 1961).

19. *See id.* at 22-23.

20. *See* 22 M.J. 777, 784 n.14 (A.C.M.R. 1986), *aff'd on other grounds*, 26 M.J. 190 (C.M.A. 1988).

21. *See id.*; *see also* United States v. Peters, 11 M.J. 901, 903 (A.F.C.M.R. 1981) (stating that those living in military quarters have a reasonable expectation of privacy in their home).

22. *See, e.g.*, United States v. Alexander, 34 M.J. 121, 124 (C.M.A. 1992) (finding that a dormitory room was an area under military control and that the search, which also involved the family housing areas, was lawful).

23. United States v. Middleton, 10 M.J. 123, 127 (C.M.A. 1981); *see also* United States v. Thomas, 21 M.J. 928, 932 (A.C.M.R. 1986).

24. Committee for G.I. Rights, et al. v. Callaway, et al., 518 F.2d 466, 477 (D.C. Cir. 1975).

25. MCM, *supra* note 10, RC.M. 302(e)(2).

26. 38 M.J. 398 (C.M.A. 1993).

27. *Id.* at 399.

28. *Id.* at 403.

maintained a good deal of control over his conduct while living in the dorm, the airman was on notice that his dorm room was not the same as a private home.[29] The court also noted that the Supreme Court has "recognized that the need for order and discipline may affect what is 'reasonable' under the Fourth Amendment," and that a military commander's responsibility to maintain the barracks in good order and provide for the safety and welfare of the service members residing there resulted in a lower expectation of privacy for those occupants.[30]

In *United States v. McCormick*, investigators obtained entry into the accused sailor's room using the master key and arrested the accused upon entry.[31] The Navy-Marine Court of Military Review recognized that as the form of the military barracks evolves, the function remains essentially the same. Consequently, the commander's authority in the barracks must remain constant, despite the changes to configuration of the area.[32]

> The individual's expectations or possible perceptions of privacy, based on the design of the military barracks or the degree of freedom accorded therein by the military commander, does not establish a barrier against the exercise of military authority or police powers. To hold otherwise would impose upon military commanders the requirement to maintain wholly open, public berthing areas for their personnel. It would require military commanders to avoid any modern barracks construction in order to insure that their authority to maintain discipline and control over their on base barracks was judicially recognized.[33]

From this, we can infer that a commander can treat a hotel room like a military barracks, despite the location. The key in making this determination is establishing that the hotel room is functioning in the same way as the barracks. Therefore, as the cases[34] suggest, the lease provision, the notice to the service members, and standard operating procedures at the hotel room must mirror those used in military barracks in order for the hotel to be considered an area under military control.

Expectation of Privacy in Temporary Lodging on the Installation

In *United States v. Ayala*, law enforcement officers obtained entry into a service member's room in a military guesthouse in order to apprehend the occupant.[35] The Army court found that service members and their families enjoy a reasonable expectation of privacy in their family quarters and other military facilities that serve as temporary dwellings.[36] The court also distinguished barracks rooms from military guesthouses located on the installation such that service members and their families have a greater degree of privacy in a military guesthouse.[37] In its review of the case, the COMA did not directly address whether or not an occupant of a guest house has a higher expectation of privacy than someone living in the barracks, but nevertheless found that the entry into the room was lawful based on exigent circumstances and upheld the lower court's ruling that probable cause existed to make the apprehension.[38] Thus, JAs can infer that the court also recognized that residents of a temporary guest house have a reasonable expectation of privacy. Absent the exigency, law enforcement would have had to obtain authority from the commander to authorize the apprehension.

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29. *See id*.

30. *Id.*; *see also* United States v. Curry, 46 M.J. 733, 740 (N-M. Ct. Crim. App. 1997) (noting that a service member has a reduced expectation of privacy in his or her barracks room); United States v. McCormick, 13 M.J. 900, 904 (N.M.C.M.R. 1982) (finding that a service member does not have the same expectation of privacy in a barracks room as he might have in a civilian home).

31. *McCormick*, 13 M.J. at 904.

32. *See id.*

33. *Id.*

34. *See infra* notes 24 and 27.

35. 22 M.J. 777 (A.C.M.R. 1986), *aff'd on other grounds*, 26 M.J. 190 (C.M.A. 1988).

36. *Id.* at 783.

37. *Id*. at 789.

38. United States v. Ayala, 26 M.J. 190, 192 (C.M.A. 1988); *see also* United States v. Salazar, 44 M.J. 464, 467 (1996) (finding that a Soldier who was ordered to move from his temporary residence located off of the installation to the barracks still had a reasonable expectation of privacy in that home, even though it was only a temporary living arrangement).

Searches of Service Member's Home Located Off of the Installation

Initially, military courts held that "searches of a service member's private dwelling located off-base in the United States are to be gauged by civilian standards and not military."[39] More recent military cases upheld the rule. For example, in *United States v. Mitchell*, the COMA found that arrests made off of the installation, even if that installation is located overseas, require "prior authorization from a commander or a magistrate,"[40] because "the on-base housing of military personnel with their dependents and the voluntarily chosen off-post housing of individual service members do not embody that essential military character or the dictates of military necessity."[41] Therefore, any searches off of the installation must be conducted in conjunction with a valid search warrant if located in the United States and with a command authorization if located overseas.[42]

Two different federal-courts rulings, however, seem to indicate that searches authorized by a commander of a service member's housing located off of the installation in the United States may be permissible if the housing is leased and controlled by the military. In these cases, the housing falls within the definition of property under military control envisioned by Congress in MRE 315(c)(3).[43] The key to the courts' holding in those cases seems to rest on the provisions of the lease agreement as well as the notice of military control provided to the tenant-service member.[44]

In *Donnelly v. United States*, the plaintiff was a sailor in the U.S. Navy who resided in an apartment located off of the installation leased by the Navy.[45] Donnelly did not enter into a lease agreement with the owner of the apartment. He did not pay a security deposit or pay rent. The government supplied all furnishings, linen, and kitchen supplies. The government remained liable for any damages to the dwelling or its furnishings.[46] All sailors living in the housing were briefed as to the rules and regulations governing conduct and were notified that the apartments would be subject to periodic inspections. A few months after Donnelly moved into the apartment, the commanding officer conducted a health and welfare inspection and found marijuana among Donnelly's personal items.[47] Donnelly was given a Captain's Mast under Article 15 of the UCMJ and the commanding officer found Donnelly guilty of possession of marijuana. Subsequently, Donnelly sought a declaratory judgment from the U.S. District Court for the Eastern District of Virginia declaring that the resulting punishment from the Captain's Mast should be set aside because the search of the apartment violated the Fourth Amendment.[48] The matter went before the court in the form of a motion for summary judgment by the Assistant U.S. Attorney for Norfolk, Virginia.[49]

The court held that the apartment was an "extension of Navy quarters . . . over which the Navy [had] control to inspect fully."[50] The court based its decision on various factors including the degree of control the Navy retained over the apartment, and the clear notice to Donnelly and the other sailors as to the Navy's ability to inspect the premises. There are two important points to take away from this case. First, the government regulated the conduct of the sailors living in the apartments, even though the housing was located off of the installation. Second, Donnelly was on notice of the command's ability and intent to inspect by virtue of the Navy's continued control over the housing and by the commanding officer's publication of his intent to conduct periodic inspections.

In *United States v. Reppert*, the appellant was also a sailor in the U.S. Navy who resided in an apartment located off of the

39. United States v. Walsh, 21 C.M.R. 876, 883 (A.F.B.R. 1956) (citing United States v. Doyle, 4 C.M.R. 137, 139 (C.M.A. 1952); United States v. Florence, 5 C.M.R. 48, 51 (C.M.A. 1952)).

40. 12 M.J. 265, 269 (C.M.A. 1982).

41. United States v. McCormick, 13 M.J. 900, 904 (N.M.C.M.R. 1982).

42. *See Walsh*, 21 C.M.R. at 883.

43. *See* United States v. Reppert, 76 F. Supp. 2d 185, 188-89 (D. Conn. 1999); Donnelly v. United States, 525 F. Supp. 1230, 1231 (E.D. Va. 1981); *see also* MCM, *supra* note 10, MIL. R. EVID. 315(c)(3) (stating "*Persons and property within military control*. Persons or property situated on or in a military installation, encampment, vessel, aircraft, vehicle, or any other location under military control, wherever located . . . .").

44. *See Reppert*, 76 F. Supp. 2d at 189; *Donnelly*, 525 F. Supp. at 1231.

45. *Donnelly*, 525 F. Supp. at 1231.

46. *See id*. at 1231-32.

47. *See id*. at 1232.

48. *See id.* at 1231-32.

49. *See id.* at 1231.

50. *Id*. at 1232.

installation.[51] The Navy leased the apartment "on behalf of the U.S. Government for the benefit of U.S. Navy personnel."[52] The appellant's roommate reported that he had child pornography on his computer in the apartment.[53] Based on this information, an investigator from Naval Criminal Investigative Service requested authority from the military commander to enter the apartment and seize the computer.[54] Upon searching the computer's hard drive, investigators found images of child pornography.[55] The charges were originally referred to court-martial, but the Assistant U.S. Attorney for the District of Connecticut eventually decided to prosecute the case in federal court.[56] The matter before the court was a motion to suppress the evidence as a violation of the Fourth Amendment and the Federal Rules of Criminal Procedure.[57]

The court relied on the lease provision to find that the apartment fell within the military control of the commander and that the evidence seized would not be suppressed. The lease in question stated:

> 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.[58]

The *Reppert* court broadly construed the language of MRE 315 and relied heavily on the lease to find that the apartment fell under the authority of the commanding officer. The court even went so far as to say, "Based on the lease, the defendant's apartment was 'property under military control.'"[59] The court implicitly notes that the lease provided notice to Reppert that he did not have the same expectation of privacy in the apartment as one would have in a home that the Navy did not lease.

Commercial Property Located on the Installation

In *United States v. Moreno*, the Air Force Court of Military Review found that leased, commercial property on the installation also falls under the commander's purview for purposes of search and seizure.[60] "This includes buildings occupied by credit unions, commercial banks, and other nonmilitary activities."[61] In *Moreno*, law enforcement officers believed the accused mistakenly received deposits into his credit union account and, when he realized the error, transferred the money to another account. Based on this information, the installation commander authorized a search of the records maintained by the credit union.[62] The Air Force court found that although the credit union building was properly under military control, The Right to Financial Privacy Act (TRFPA)[63] governed the search of the bank records.[64] Therefore, only a "federal magistrate or a judge of a state court of record" sitting in the district where the property is located may issue a search warrant for the bank records.[65] Despite the court's finding that the government violated Rule 41 of the Federal Rules of Criminal Procedure,[66] TRFPA, and the Air Force investigation regulation, it upheld the installation commander's search authorization.[67]

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51. *See* 76 F. Supp. 2d 185 (D. Conn. 1999).

52. *See id*. at 187.

53. *Id*.

54. *Id*.

55. *Id*.

56. *Id*. at 191.

57. *Id*.

58. *Id*. at 188.

59. *Id*.

60. *See* 23 M.J. 622, 623 (A.F.C.M.R. 1986), *review denied*, 24 M.J. 348 (C.M.A. 1987).

61. *Id*. at 624.

62. *Id*. at 623.

63. 12 U.S.C. § 3406 (2000).

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

65. *Id*.

In making its finding, the court determined that the scope of the search was reasonable. First, the commander had law enforcement authority over the credit union. Second, the provisions of the lease "authorized base law enforcement personnel to enter the credit union at any time for inspection and inventory and when necessary for protection of the interests of the government."[68] Again, courts will look to the lease itself to help determine whether a place is properly under military control. Therefore, it is critical that installations contracting for hotel rooms ensure the provisions of the lease allow for search and seizure by the command and clearly provide notice to service members of that authority.

Searches of Property Located Off of the Installation Overseas

Military Rule of Evidence 315(c)(4) has carved out an exception to the general rule regarding searches of nonmilitary property within a foreign country. The rule requires commanders to coordinate with a representative of the appropriate agency that occupies the property if it is "owned, used, occupied by, or in possession of an agency of the United States other than the Department of Defense [DOD]."[69] The rule also requires commanders to reference the appropriate treaty or agreement before conducting a search of "other property situated in a foreign country."[70] Both provisions specifically state that failure to comply with the coordination directions does not "render a search unlawful within the meaning of MRE 311."[71]

Military courts have noted that "[a] search of an off-base dwelling occupied by a military person in an overseas area where authorized by the commander has been held lawful."[72] In order to help determine the lawfulness of the entry and search into an off-post dwelling, courts routinely look to the language of the applicable Status of Forces Agreement (SOFA).[73] The military courts have also held that they will strictly construe the language of the SOFA. Unless the SOFA or other applicable treaty create a personal right with respect to search and seizure, any search and seizure provisions of the document cannot "be enforced by invoking the exclusionary rule."[74]

The overseas cases raise two important issues. First, the warrant requirement does not apply, and a commander may authorize search, seizure, or apprehension at a private dwelling located off of the installation occupied by a service member, subject to the limitations and guidance provided by applicable treaties or agreements. Therefore, the area off of the installation overseas is treated similarly to the "location under military control" language that addresses property located in the United States and covered by MRE 315(c)(3). Second, in determining the reasonableness of the search, the courts will strictly construe the language of the governing agreement. Much like the holdings in *Moreno*, *Reppert*, and *Donnelly*, in cases located overseas, the courts are willing to allow the military a certain degree of discretion to set their own regulations on how to conduct reasonable searches and seizures. The courts, however, will hold the services to the provisions of the regulations or the lease when evaluating the lawfulness of the search and use the provisions to help determine whether or not the search was reasonable.

Reasonableness

Once the court determines that the area is properly under military control, the next step is to evaluate the reasonableness of the search itself. "The constitutional line for admission at courts-martial of evidence produced by such searches and seizures is that such command action must be reasonable."[75]

In *United States v. Stringer*, the COMA used a number of factors to help determine if the command's actions during an inspection upon exit of an installation were reasonable. The case took place in Korea and the inspections were focused on

66. FED. R. CRIM. P. 41.

67. *Moreno*, 23 M.J. at 624.

68. *Id.*

69. MCM, *supra* note 10, MIL. R. EVID. 315(c)(4)(A).

70. *Id.* MIL. R. EVID. 315(c)(4)(B).

71. *Id.* MIL. R. EVID. 315(c)(4)(A), (B).

72. United States v. Walsh, 21 C.M.R. 876, 883 (A.F.B.R. 1956) (citing United States v. Higgins, 20 C.M.R. 773 (C.M.A. 1955); United States v. DeLeo, 17 C.M.R. 148 (C.M.A. 1954), *overruled on other grounds by* United States v. Jordan 50 C.M.R. 664 (C.M.A. 1975); *cf.* United States v. Heck, 6 C.M.R. 223 (C.M.A. 1952); United States v. Trolinger, 5 C.M.R. 447 (C.M.A. 1952)).

73. *See, e.g.*, United States v. Mitchell, 12 M.J. 265, 268 (C.M.A. 1982); United States v. Bunkley, 12 M.J. 240, 245 (C.M.A 1982).

74. *Mitchell*, 12 M.J. at 268.

75. United States v. Stringer, 37 M.J. 120, 126 (C.M.A. 1993). The court also stated, "In addition, we note that this Court has long recognized a service member's Fourth Amendment right to protection against unlawful searches and seizures (citations omitted). Likewise, we have recognized the military commander's authority to search persons and places within his control (citations omitted)." *Id.*

the problems associated with the black- marketing of high-value items.[76] The court found that although a written inspection policy is preferred, it is not required because a commander always has the responsibility and the authority to maintain the good order and discipline of a unit or an installation.[77] In *Stringer*, the court also reviewed the manner of the execution of the inspection. Specifically, the degree of intrusiveness of the search balanced against the individual's expectation of privacy.[78] The gate guard initially detained the accused, and then walked the Soldier to the desk sergeant at the military police station, who asked the accused his unit of assignment and other administrative information to help verify the documentation relating to the Soldier's purchases.[79] Another factor the court evaluated was the amount of individual discretion given to the Soldiers conducting the inspections.[80] The court found that the gate guard was given specific instructions as to how to stop a vehicle, verify the Letter of Authorization for all persons who carried high value items and escort the Soldier to the MP station should questions arise as to the authenticity of the Letter of Authorization.[81] Thus, the court concluded the gate guard had very little discretion and was simply implementing the commander's policy.[82]

> It is only unreasonable searches and seizure against which a service member–or a civilian–is protected by the Fourth Amendment. What is unreasonable depends substantially on the circumstances of the intrusion; and this Court has recognized that, in some instances, an intrusion that might be unreasonable in a civilian context not only is reasonable but is necessary in a military context.[83]

Therefore, the focus of this prong of the search analysis is the command action in executing the search in light of the surrounding facts and circumstances. Although the "Fourth Amendment protects people, not places,"[84] the location of the search is one of the factors a court may use to help determine if those actions by the command, were, in fact, reasonable. The location of the hotel room may be cause to believe that the search is unreasonable unless the service member has notice that the room will be treated like a barracks. Additionally, courts will evaluate the actual conduct of those conducting a search as well as their degree of discretion. Like a search in a traditional barracks, the command must establish clear guidelines and ensure those conducting the search stay within those guidelines.

Implications for Search and Seizure in Hotel Rooms

The plain language of MRE 315 provides the commander authority to authorize a search of military property. In particular, the phrase "or any other location under military control, wherever located," would seem to indicate that that authority should be broadly construed.[85] The holdings of various military appellate courts, however, demonstrate that military search and seizure law is riddled with qualifications of the basic language of the rule. Therefore, we must not only look to search and seizure law in the barracks, but we must evaluate a variety of different areas of the law, to find the outer limit of the definition of "location under military control."

Several cases have demonstrated that living spaces located on the installation fall under military control. This can include barracks, military quarters, or temporary lodging. Additionally, leased commercial property located on the installation can also be considered under military control and as such, does not require a search warrant.

Interestingly, cases decided by two different federal district courts show an evolution towards a more liberal interpretation of command authority off of the installation than the holdings of the military courts. Federal courts relied on several factors to arrive at their holdings, including (1) the government rather than the individual leased the property; (2) clear language in the lease reserving the right of the military to conduct inspections; (3) the fact that the property within the housing was furnished by the government; (4) the fact that the government remained

76. *Id.* at 122.

77. *Id.* at 126.

78. *Id.* at 129.

79. *Id.* at 129 n.4.

80. *Id.* at 129.

81. *Id.*

82. *Id.*

83. United States v. Thatcher, 28 M.J. 20, 22 (C.M.A. 1989).

84. Katz v. United States, 389 U.S. 347, 351 (1967).

85. MCM, *supra* note 10, MIL. R. EVID. 315(c)(3).

liable to the owner of the property for any damages; and (5) the degree of notice provided to the service member as to possible inspections of the property by the military.[86]

The federal cases also comport with military practice regarding searches of service members' homes located off of the installation overseas. Military courts have used SOFAs and other diplomatic agreements rather than relying on traditional Fourth Amendment jurisprudence as the basis for their analysis as to the reasonableness of the search.[87] The findings in the federal cases also follow a military court's ruling that the search of private, leased buildings was valid. The court based its finding, in part, on the authority granted to the command by the lease itself.[88]

Taken together, several similarities emerge. Areas "under military control" have traditionally been limited to locations on the installation. In certain circumstances, however, military control can be extended to private dwellings occupied by service members living off of the installation. Two federal courts have found that leased property located off of the installation can also be considered an area under military control.[89] Courts will look to the service's own guidelines and practices to help determine whether or not the location of the search was under military control, the reasonableness of the search, and the notice provided to the service members that the area was controlled by the military. Therefore, it would not be unreasonable to extend the reach of MRE 315(c)(3) to hotel rooms leased by the government provided it met certain criteria. Specifically, that the lease allowed for searches of the property, service members were notified as to the possibility of inspections and searches, and the government maintained a high degree of control over the property. This control should include assigning rooms and roommates, regulating conduct in the hotel, setting limitations on visitors, and assigning a unit representative to act as a liaison between the unit and the hotel. Finally, commanders must adhere to basic search and seizure rules, including providing clear guidance to those conducting the search and insuring they remain within the stated search parameters.

Inspections, Inventories, and Apprehensions

Inspections

Once a command determines that the hotel room is an area under military control, the command can conduct inspections and inventories, but the unique location of the room gives rise to some special considerations.

Purpose

Inspections may be conducted "as an incident of command" when the primary purpose is "to determine and to ensure the security, military fitness, or good order and discipline of the unit."[90] Commanders may inspect the equipment as well as the person of a service member.[91] Additionally, when conducting inspections, commanders may use "any reasonable natural or technological aid," and may conduct no-notice inspections.[92] "Due to the critical and unique nature of the military mission, inspections of many sorts are reasonable under the Fourth Amendment and are everyday facts of military life."[93] The Army Court of Military Review gave a detailed list of indicia of reliability for a health and welfare inspection. The Court of Military Review adopted these criteria in *United States v. Middleton*:

> A military inspection is an examination or review of the person, property, and equipment of a [S]oldier, the barracks in which he lives, the place where he works, and the material for which he is responsible. An inspection may relate to readiness, security, living conditions, personal appearance, or a combination of these and other categories. Its purpose may be to examine the clothing and appearance of individuals, the presence and condition of equipment, the state of repair and cleanliness of barracks and work areas, and the security of an area or unit. Except for the ceremonial aspect, its basis is military necessity.

86. *See generally* United States v. Reppert, 76 F. Supp. 2d 185, 188-89 (D. Conn. 1999); Donnelly v. United States, 525 F. Supp. 1230, 1231-32 (E.D. Va. 1981).

87. *See generally* United States v. Mitchell, 12 M.J. 265, 268 (C.M.A. 1982); United States v. Walsh, 21 C.M.R. 876, 883 (A.F.B.R. 1956).

88. *See* United States v. Moreno, 23 M.J. 622, 624 (A.F.C.M.R. 1986), *review denied*, 24 M.J. 348 (C.M.A. 1987).

89. *See generally Reppert*, 76 F. Supp. at 185; *Donnelly,* 525 F. Supp. at 1230.

90. MCM, *supra* note 10, MIL. R. EVID. 313(c).

91. *Id*.; *see also id.* MIL. R. EVID. 312.

92. *Id.*

93. United States v. Alexander, 34 M.J. 121, 127 (C.M.A. 1992).

> Among the attributes of an inspection are: that it is regularly performed; often announced in advance; usually conducted during normal duty hours; personnel of the unit are treated evenhandedly; and there is no underlying law enforcement purpose. An inspection is distinguished from a generalized search of a unit or geographic area based upon probable cause in that the latter usually arises from some known or suspected criminal conduct and usually has a law enforcement as well as a possible legitimate inspection purpose.[94]

Scope

Commanders are allowed a good deal of leeway in conducting the inspection once they have established a proper purpose for that inspection. Conversely, commanders and those conducting the inspections do not have unfettered discretion simply because the original, stated purpose was proper. The scope of the inspection must also be within the bounds of that originally stated.

> For instance, if the only purpose of an inspection is to make sure that all stereos and televisions are identified with a personal marking, it logically would be outside the scope of that inspection to look into the pockets of pants and jackets of a [S]oldier whose barracks was being inspected.[95]

Without restrictions as to both scope and purpose, previously announced inspections could easily become a subterfuge for a search.[96] "Accordingly, commanders and persons conducting such inspections must be ever faithful to the bounds of a given inspection, in terms both of area and purpose."[97]

Inventories

Purpose

In a case involving the inventory of a Soldier who was apprehended, the COMA in *United States v. Kazmierczak* pointed out that while "the private possessions of a member of the military are not open to indiscriminate search for evidence of criminal conduct,"[98] military inventories are '"a legitimate, normal, and customary routine' in military administration."[99] Just as commanders cannot use an inspection as a subterfuge to search, "inventory procedures may not be used as a subterfuge to conduct an illegal search."[100] Military Rule of Evidence 313(c) provides that contraband found while conducting an inventory for the primary purpose of administrative requirements, may be seized.[101]

Additionally, a lawful inventory must meet two remaining requisites that are derived from the purpose requirement.[102] First, the inventory must be "legitimately based."[103] That is, there must be a clear, administrative procedure for the inventory based on the valid purpose. For example, the courts have found that a regulation that required the unit to inventory an absentee's clothing, along with the traditional need for readiness inspections, were proper bases for an inventory.[104] Second, the government must conduct the inventory properly and not exceed the scope of the inventory purpose.[105]

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94. United States v. Hay, 3 M.J. 655, 656 (A.C.M.R. 1977), *quoted in* United States v. Middleton, 10 M.J. 123, 128 (C.M.A. 1981).

95. United States v. Brown, 12 M.J. 420, 423 (C.M.A. 1982).

96. *See id.*

97. *Id.*

98. 37 C.M.R. 214, 220 (C.M.A. 1967) (citing United States v Battista, 33 C.M.R. 282, 285 (C.M.A. 1963)).

99. *Id.* at 221 (quoting United States v. Coleman, 32 C.M.R. 522 (A.B.R. 1962)).

100. United States v. Mossbauer, 44 C.M.R. 14, 16 (C.M.A. 1971); *see also* MCM, *supra* note 10, MIL. R. EVID. 313(c).

101. MCM, *supra* note 10, MIL. R. EVID. 313(c).

102. United States v. Hines, 5 M.J. 916, 919 (C.M.A. 1978), *aff'd*, 11 M.J. 88 (C.M.A. 1981) (citing United States v. Kazmierczak, 37 C.M.R. 214 (1967); United States v. Welch, 40 C.M.R. 638 (A.B.R. 1968), *aff'd*, 41 C.M.R. 134 (C.M.A. 1969)).

103. *Kazmierczak*, 37 C.M.R. at 219-20.

104. *Id.* at 220.

105. *Id.* at 224.

Inventory of Personal Property Incident to Arrest or Unauthorized Absence

In *United States v. Kazmierczak*, the court held that regulations "providing for the inventory of an arrested serviceman's personal property, w[ere] not *per se* contrary to the constitutional prohibition against unreasonable searches and seizures."[106] In order to be valid, "[a]n inventory regulation must strike a fair balance between legitimate governmental need and the right of the individual to privacy."[107] Furthermore, "the test remains one of reasonableness."[108]

In *United States v. Jasper*, the COMA found that the commander has a "legitimate interest" in inventorying the personal property of a Soldier who has left the unit due to an unauthorized absence.[109] The need for a prompt inventory may be elevated if the Soldier lives in an off-post dwelling when assigned overseas.[110] "There is an important governmental interest in safeguarding military property overseas, particularly in light of the rise in international terrorist activities."[111] The court is more likely to find that the inventory is valid when the command follows regulations and other policies to inventory the belongings of absent personnel.[112]

These cases present two important points for commanders who intend to conduct inventories of the personal belongings of service members residing in hotel rooms. First, commanders must follow service and installation regulations if they apply. The JA should also work with the unit to develop standing operating procedures (SOP) and other guidance for how such inventories will be conducted in hotel rooms. Second, in at least one case, the COMA was willing to broadly construe a commander's ability to conduct an inventory of property located off of the installation due to an "important government interest."[113] It is important for JAs to realize that even if a court finds that a leased hotel room is an area properly "under military control," a commander has less physical control over such property. Therefore, JAs must understand and articulate the argument that the military has an important government interest in inventorying a Soldier's property believed to be located in a hotel room in the event of an unauthorized absence or other valid administrative purpose.

Apprehensions

Rule for Courts-Martial 302

Apprehension is an important sub-set of search and seizure law. Rule for Courts-Martial 302(c) allows for the seizure of persons when there is probable cause to believe "that an offense has been or is being committed and the person to be apprehended committed or is committing it."[114] Evidence seized by an unlawful apprehension is inadmissible.[115]

Due to the invasive nature of an apprehension made at the home of the suspect, absent exigent circumstances or consent, authorities must either obtain a warrant or provide authorization under RCM 302(e)(2)(C) before making an arrest or an apprehension in a private dwelling.[116] Rule for Courts-Martial 302(e) provides that private dwellings can be located either on or off of the installation and include "single-family houses, duplexes, and apartments."[117] Several different military courts have gradually refined the application of the rule to the armed forces and have recognized that service members do not have the same expectation of privacy in their barracks as do those residing in civilian homes.[118] Military courts have held that a private dwelling can include military quarters, Bachelor Officer

106. *Id.* at 220; *see also* United States v. Mossbauer, 44 C.M.R. 14, 16 (C.M.A. 1971).

107. *Kazmierczak*, 37 C.M.R. at 220.

108. United States v. Welch, 41 C.M.R. 134, 136 (C.M.A. 1969).

109. 20 M.J. 112, 114 (C.M.A. 1985).

110. *Id.*

111. *Id.* at 115.

112. *Id*. at 114. *See, e.g.*, U.S. DEP'T OF ARMY, REG. 700-84, ISSUE AND SALE OF PERSONAL CLOTHING para. 12-12 (28 Feb. 1994) [hereinafter AR 700-84] (providing detailed guidance as to proper inventory procedures for absentee personnel); *see also* United States v. Law, 17 M.J. 229, 237 (C.M.A. 1984) (finding that if a unit follows Marine Corps regulations regarding inventory procedures, then despite the fact there was suspicion of contraband, the inventory is not necessarily unlawful).

113. *Jasper*, 20 M.J. at 114.

114. MCM, *supra* note 10, R.C.M. 302(c); *see also id.* MIL. R. EVID. 316(c).

115. MCM, *supra* note 10, MIL. R. EVID. 311; *see also* United States v. Dunaway, 442 U.S. 200 (1979).

116. *See* Payton v. New York, 445 U.S. 573, 603 (1980); *see also* MCM, *supra* note 10, R.C.M. 302(e)(2)(C).

117. MCM, *supra* note 10, MIL. R. EVID. 315(e)(2).

118. *See, e.g.*, United States v. McCarthy, 38 M.J. 398, 401 (C.M.A. 1993).

Quarters (BOQ) or Bachelor Enlisted Quarters (BEQ) rooms, and hotel rooms located off of the installation.

Military Quarters and BOQ or BEQ Rooms

In *United States v. Roberts*, the COMA held that occupants of military quarters, though having both elements of military property and a civilian home, are entitled to a reasonable expectation of privacy, because "military quarters have some aspects of a dwelling or a home and in those respects the military member may reasonably expect privacy protected by the Fourth Amendment."[119] In *United States v. Ayala*, however, the Army court held that, "their expectation [of privacy] is not the same level of privacy that a civilian enjoys when residing in a rented apartment."[120]

Despite the courts' findings that military quarters for either single service members or those living with families offer a greater expectation of privacy than the barracks, the areas are still "under military control."[121] A commander can authorize the apprehension of a service member living in military housing and an arrest warrant is not required.[122]

Hotel Rooms Located Off of the Installation

In a line of cases that helped to formulate the modern rules regarding search and seizure, the Supreme Court held that occupants of hotel rooms have an expectation of privacy. "No less than a tenant of a house, or the occupant of a room in a boarding house, a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures."[123] This is true even if a hotel manager or desk clerk allows law enforcement access to the room.[124] Hotel guests do not lose their expectation of privacy even if they give "'implied or express permission' to 'such persons as maids, janitors or repairmen' to enter [his] room 'in the performance of their duties.'"[125]

Taken together, these Court cases as well as the holdings in the military courts show that individuals staying in hotel rooms receive the full protections of the Fourth Amendment and that hotel rooms are considered to be private dwellings for the purposes of military apprehensions under RCM 302.[126] An arrest in a hotel room off of the installation ordinarily requires an arrest warrant. Therefore, in order to shift the analysis so that a commander can authorize entry into a hotel room of a service member for the purposes of an apprehension, the room must be considered to be an extension of the barracks and "under military control."

Areas That Are Not Private Dwellings

Some areas are also clearly identified as falling outside the definition of private dwelling for purposes of apprehension. These areas include "living areas in military barracks,[127] vessels, aircraft, vehicles, tents, bunkers, field encampments, and similar places."[128]

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119. 2 M.J. 31, 36 (C.M.A. 1976). In *United States v. Kaliski*, the COMA found that the expectation of privacy extended to the cartilage surrounding his BOQ room similar to what a civilian might expect outside of a private residence. United States v. Kaliski, 37 M.J. 105 (C.M.A. 1993).

120. 22 M.J. 777, 784 n.14 (A.C.M.R. 1986), *aff'd on other grounds*, 26 M.J. 190 (C.M.A. 1988). While the COMA did not directly address the issue of the diminished expectation of privacy in military quarters during their review, one can infer that the Army court's finding on this issue is valid. Additionally, other cases have shown that military quarters are an area "under military control" and thereby subject to military authority. *See, e.g.*, United States v. Figueroa, 35 M.J. 54, 56 (C.M.A. 1992) (holding that a commander "had a substantial basis for concluding that probable cause existed to search appellant's quarters.").

121. *See* United States v. Reppert, 76 F. Supp. 2d 185, 188-89 (D. Conn. 1999); Donnelly v. United States, 525 F. Supp. 1230, 1231 (E.D. Va. 1981); *see also* MCM, *supra* note 10, MIL. R. EVID. 315(c)(3) (stating "*Persons and property within military control*. Persons or property situated on or in a military installation, encampment, vessel, aircraft, vehicle, or any other location under military control, wherever located . . . .").

122. United States v. Stuckey, 10 M.J. 347, 359 (C.M.A. 1981).

123. United States v. Stoner, 376 U.S. 483, 490 (1964) (citing McDonald v. United States, 335 U.S. 451 (1948); Johnson v. United States, 333 U.S. 10 (1948)).

124. *Id.* at 489 (citing Lusting v. United States, 338 U.S. 74 (1949); United States v. Jeffers, 342 U.S. 48 (1951)).

125. *Id.* (citing *Jeffers*, 342 U.S. at 51.).

126. United States v. Ayala, 22 M.J. 777, 789-90 (A.C.M.R. 1986).

127. MCM, *supra* note 10, R.C.M. 302(e)(2); *see also* United States v. McCarthy, 38 M.J. 398, 400 (C.M.A. 1993).

128. MCM, *supra* note 10, R.C.M. 302(e)(2). In *United States v. Khamsouk*, the court noted:

> As a matter of terminology, under R.C.M. 302(a)(1), . . . "the taking of a person into custody" is referred to as "apprehension" and not arrest. Apprehension is the equivalent of "arrest" in civilian terminology. (In military terminology, "arrest" is a form of restraint. (citations omitted) However, apprehensions by military personnel are unlawful if they violate the Fourth Amendment as applied to the armed forces.

57 M.J. 282, 287 (2002) (citations omitted).

Military barracks need not be treated like private dwellings.[129] Indeed,

> [t]he Fourth Amendment correctly, in our view, has been extended by *Payton* over private dwellings. A military barracks, no matter the manner or design of its construction, is *not,* however, a private dwelling. Its military character is distinct and necessary to the effective functioning of any military unit. We are not reluctant, therefore, when balancing the individual liberties of our military personnel against the needs of military command and control, to subordinate in such clearly defined areas, the individual to the greater, unique needs of the military society.[130]

In *United States v. McCarthy*, the court found that a service member living in a military barracks room has substantially less expectation of privacy than a person living in civilian housing.[131] Some factors the *McCarthy* court considered included the following: (1) service members are usually assigned their room and their roommate; (2) they are not allowed "to cook in [their] room[s], have overnight guests, or have unaccompanied underage guests"; (3) that service members are aware that they are "subject to inspection to a degree not contemplated in private homes"; and (4) that "the CQ [has] a key to the room and [is] authorized to enter the room on official business."[132] While in a civilian dormitory, the residents have some degree of control and choice, "[b]arracks occupants have no way to avoid noisy, abusive, violent, or unclean occupants, and "[e]viction of undesirable 'tenants' is not an option."[133] The court in *McCarthy* went on to note that "[w]hat is tolerated in the barracks sets the level of discipline in the unit," and that a military commander has a responsibility for the safety and well being of all those service members who reside in the barracks.[134]

Implications for Searches and Seizures in Hotel Rooms

Issues raised by the cases involving inventories, inspections, and apprehensions can be applied to searches and seizures of service members living in hotel rooms. First, the command must have a legitimate purpose for conducting the inspection and or the inventory. For example, regularly scheduled health and welfare inspections and furniture inventories are commonly accepted reasons for military, administrative examinations. Second, clear notice must be provided to the service member that although they may be temporarily residing in an off-post hotel room, they are still subject to the standard military health and welfare inspection and or administrative inventories. The lease and a well-publicized SOP can provide such notice. The lease itself can provide actual notice to the service member and the hotel that the area is under military control. Therefore, under both the objective and subjective standard, a service member has a lower expectation of privacy in the hotel. Third, commanders should follow applicable regulations and policies and ensure their examinations are reasonable by weighing the legitimate government need against the service member's reasonable expectation of privacy.[135] Fourth, commanders must ensure that those conducting inspections or inventories in the hotel room stay within the stated scope.[136] Finally, it is imperative that commanders treat the hotel room just like a barracks in certain respects. Commanders should continue to control room assignments, set clear limitations on visitors, and provide guidance on smoking, cooking, noise control, and all of the normal conduct that would be expected of a service member living in traditional barracks.[137]

Search and Seizure in Privatized Housing

Generally

As military communities began to show signs of neglect and age, Congress developed a resolution to build military housing

129. *See McCarthy*, 38 M.J. at 401.

130. United States v. McCormick, 13 M.J. 900, 904 (N.M.C.M.R. 1982).

131. *See McCarthy*, 38 M.J. at 403.

132. *Id*. (citing United States v. Baker, 30 M.J. 262, 267 n.2 (C.M.A. 1990) ("Prior notice is a factor relevant to the reasonableness of a search and tends to reduce the intrusion on privacy occasioned by the search.")). Additionally, the court notes that the factors listed are "not in themselves determinative." *Id*. But rather, they impact whether the service member can meet the subjective prong of having a reasonable expectation of privacy. *Id.*

133. *Id*.

134. *Id*. ("In the barracks, the impact that one service member can have on other persons living or working there demands that a commander have authority to regulate behavior in ways not ordinarily acceptable in the civilian sphere."). Captain John S. Cooke, United States v. Ezell*: Is the Commander a Magistrate? Maybe*, ARMY LAW., Aug. 1979, at 19 n.46, *quoted in* United States v. McCarthy, 38 M.J. 398, 403 (C.M.A. 1993).

135. *See, e.g.*, AR 700-84, *supra* note 112; *see also* United States v. Mossbauer, 44 C.M.R. 14, 16 (C.M.A. 1971) (discussing the balancing test between legitimate government need and reasonable expectation of privacy).

136. United States v. Hines, 5 M.J. 916, 920 (C.M.A. 1978).

137. *McCarthy*, 38 M.J. at 403.

using the expertise of the private sector.[138] The new approach was very popular with military installations, and as of February 2002, thirty-nine percent of the existing 300,000 military housing units were in some stage of the Military Housing Privatization Initiative (MHPI).[139] The MHPI project becomes a potential search and seizure issue for commanders because of the project format. That is, "[t]he developer will own, operate and maintain the houses, and lease the underlying land from the agency for a term of fifty years."[140] Therefore, the commander's authority to authorize searches within MHPI housing units is not clearly delineated. A review of the problems and proposed solutions for search and seizure in privatized housing areas are informative for comparison purposes.

Commander's Authority to Authorize Searches

Search and Seizure

While courts recognize that commanders have the responsibility and the authority to provide for the safety of the installation and the welfare of its residents, there are currently no decisions addressing the search and seizure issue as it applies to privatized housing in the United States.[141] There is an older military case, however, that dealt with contract housing located off of the installation overseas.[142] In *United States v. Carter*, the accused lived "off the military reservation . . . [in] housing created and owned by a private French corporation under guarantee arrangements for full occupancy by the U.S. Government with lodging assignments being held by American authorities."[143] The court also noted that the French corporation was only authorized to provide housing to American service members, American civilian workers, and their families. The court held that the search of the accused's housing by American military law enforcement was lawful. In making its findings, the court found that although different, the search provisions of the SOFA and the *Manual for Courts-Martial* (*MCM*) were comparable.[144]

A series of subsequent cases relied almost exclusively on the applicable SOFA to determine whether or not the search was lawful.[145] For example, in *United States v. Mitchell*, the COMA recognized that while the *MCM* allows for searches of property located overseas, the provisions do not detail the extent of the commanders' authority in this area. Instead, the court noted that "[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."[146]

Thus, the idea of using the contract, or in the case of housing overseas, the international agreement, to clarify the authority of the military commander is not new. This concept can be applied to privatized housing and to hotel rooms occupied as barracks and to fill in the gaps of the language of MRE 315 to expand the common definition of area under military control.

The Authority of the Contract

One way to address the ambiguity is to include a provision in the contract between the developer and the government relating to the military authority in the housing area.[147] Another way to deal with the issue is to require a provision in the lease between the developer and the service member "stating that MHPI houses are in an area of exclusive federal jurisdiction and the premises are under military control."[148] One commentator has stated that two federal cases suggest that "clear language in the agreement between the [g]overnment and the developer may be sufficient to extend the commander's authority to search property not owned by the [g]overnment."[149]

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138. Major Jeff Bovarnick, Looking at Private Parts: Can a Commander Authorize Searches and Seizures in Privatized Housing Areas, 5 n.6 (2001) (unpublished manuscript, on file with the Professional Writing Program, The Judge Advocate General's Legal Center and School, Charlottesville, Virginia) (quoting 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)).

139. *Id.* at 10.

140. Captain Stacie A. Remy Vest, *Military Housing Privatization Initiative: A Guidance Document for Wading Through the Legal Morass*, 53 A.F. L. REV. 1, 24 (2002).

141. *Id.* at 28; *see also* U.S. DEP'T OF DEFENSE, DIR. 5200.8, SECURITY OF DOD INSTALLATIONS AND RESOURCES para. 5.1 (25 Apr. 1991) [hereinafter DOD DIR. 5200.8] (designating the military installation commander as the person authorized to issue regulations for the protection and security for property and places under military control).

142. *See, e.g.*, United States v. Carter, 36 C.M.R. 433 (C.M.A. 1966).

143. *Id.* at 435.

144. *See id*. at 437.

145. *See, e.g.*, United States v. Bunkley, 12 M.J. 240, 242-43 (C.M.A. 1982); United States v. Mitchell, 45 C.M.R. 114, 116 (1972).

146. *Mitchell*, 45 C.M.R. at 116.

147. *See* Vest, *supra* note 140, at 27-28.

The Impact of Jurisdiction

A key difference between leased hotel rooms and privatized housing is land ownership. The focus of the MHPI is to work with private developers to upgrade current housing or to build new housing on the installation.[150] Therefore, although the government will lease the housing to the developer, the government will retain ownership in the property. The ownership is a trigger for legislative jurisdiction. "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."[151] Since the government will not have ownership of the underlying land in the hotel rooms, they cannot acquire legislative jurisdiction. Instead, we must rely on the commander's authority over the person and the property under military control language.

Implications for Search and Seizure in Hotel Rooms

There are several lessons the installation JA should take away from the privatized housing initiative. For example, the government should include provisions in the lease with the hotel that clarify its authority and put the service member on notice as to the government's responsibility in terms of law enforcement. A sample lease provision that details the service's authority to search the hotel room and access the property is provided at the Appendix.[152] The lease incorporates many of the issues raised by the comparison to the MHPI as well as the other areas of search and seizure law as detailed in several sections of this article. The government should also provide the service member with information regarding the rules and procedures in the hotel. A lease with the service member is not necessarily required, but the command should provide the occupants with clear guidance as to government authority when the service members sign for the room key. An SOP that addresses service members in hotel rooms and provides notice as to the commander's authority over the property is also important to provide notice to service member occupants and guidance to their leaders. The JA will have to work with military law enforcement and their civilian counterparts to develop clear guidance as to which agency will respond in the event of an incident. Military law enforcement must be trained as to the proper response and the limitations of authority off of the installation, especially in regards to a civilian's actions within a government-leased hotel.

Posse Comitatus and the Need for a Memorandum of Understanding (MOU)

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.[153]

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148. *Id.*; *see also* Fort Carson Privatized Housing Tenant Lease, stating

> RIGHT OF REENTRY. Landlord, its agents, and employees, and the United States Government, the Army, and Fort Carson military authorities, may enter the Premises at reasonable times with a pass key, or otherwise, to make needed repairs or installations of equipment, pipes, wires, and other appliances, or to inspect the premises. However, Landlord or the Government is required to give prior notice of at least 24 hours to Tenant of its desire to enter the Premises. In emergency situations, Landlord or the Government may enter the Premises without any such prior notice. Landlord shall indemnify Tenant for any damages caused by its negligence or misconduct during such entry. If entry is under emergency conditions, Landlord or the Government shall leave written notice of the entry in a conspicuous place in the premises immediately after the entry. Tenant and Landlord recognize: that the Army needs to ensure security, military fitness, and good order and discipline; that the premises remain on a military installation of exclusive federal jurisdiction; and that all areas owned or leased by Landlord under its contract with the Army are within military control. In recognition of these facts, the Army retains the ability to authorize and conduct inspections in all areas leased or owned by the Landlord on Fort Carson.

Fort Carson Privatized Housing Tenant Lease (forthcoming Summer 2004) (draft at para. 13, on file with Office of the Staff Judge Advocate, Administrative Law Office, Fort Carson, Colorado).

149. *See* Vest, *supra* note 140, at 27-28. The author refers to *United States v. Reppert*, 76 F. Supp. 2d 185, 188-89 (D. Conn. 1999) (finding that the language of the lease was sufficient to find that property leased by the Navy but located off the installation was an area under military control for purposes of MRE 315(c)(3)); Donnelly v. United States, 525 F. Supp. 1230, 1231 (E.D. Va. 1981) (finding that property leased by the Navy but located off of the installation was an area under military control based on the degree of control exercised by the Navy over the property and the notice to the service members that the premises was controlled by the Navy).

150. *See generally* Office of the Deputy Under Secretary of Defense (Installation and Environment), *Military Housing Privatization*, *at* http://www.acq.osd.mil/housing (last visited Jan. 19, 2004); *see also* E-mail from Lisa Tychen, Attorney, Housing and Competitive Sourcing Office, Office of the Under Secretary of Defense (Installations and Environment), to MAJ Alison Martin, Student, 52d Judge Advocate Officer Graduate Course, U.S. Army (Mar. 5, 2004) (on file with author) (stating that the focus of MHPI is on privatization, so the purchase of new land and or the acquisition of exclusive jurisdiction where it did not exist before would be incompatible with the goals of the project).

151. U.S. DEP'T OF ARMY, REG. 405-20, FEDERAL LEGISLATIVE JURISDICTION para. 3a (21 Feb. 1974) [hereinafter AR 405-20]. When the United States acquires property, the government has absolute possession and control. The government, however, does not acquire partial, concurrent, or exclusive jurisdiction until notice of acceptance of jurisdiction is given under 40 U.S.C. § 255 (2000); *see also* Adams v. United States, 319 U.S. 312 (1943).

152. *See* Appendix, Sample Lease Provision.

History

Although "[a] firmly rooted constitutional principle of American government is that the federal armed forces shall be subordinate to civil authorities,"[154] during the Civil War and Reconstruction, Congress greatly expanded the ability of the President to use the military to enforce civil law.[155] Due in part to partisan politics and in part to the government's excessive use of the Army in the southern states,[156] the Posse Comitatus Act was enacted in 1878 and forms the foundation of the limitation of the use of the military in law enforcement against civilians.[157] In response to several cases that arose in the 1970s and congressional modification of the act in 1981,[158] the DOD issued a directive to the armed forces detailing permissible and impermissible assistance to civilian law enforcement.[159]

Evolution of the Current Standard

In 1973, the American Indian Movement forcibly occupied the village of Wounded Knee at the Pine Ridge Indian Reservation in South Dakota.[160] An Army colonel provided advice to law enforcement personnel during the uprising.[161] A series of cases came out of the incident at Wounded Knee that provided a framework to analyze Posse Comitatus issues.[162] The final case in the series, *United States v. McArthur*, developed the current standard.

In *United States v. McArthur*, the judge found that the standard applied by previous courts was either "too vague" or "too mechanical."[163] The new standard stated that the use of military personnel in civilian law enforcement operations will violate the Posse Comitatus Act if the "military personnel subjected the citizens to the exercise of military power which was *regulatory, proscriptive, or compulsory* in nature, ..."[164] This is the current standard applied by the courts in determining whether or not an action by the armed forces violates 18 U.S.C. § 1385.

Military Purpose Doctrine

Courts have carved out an exception to the Posse Comitatus Act for some actions by the armed forces.[165] For example, in *United States v. Chon*, the Ninth Circuit found that the Navy's investigation of a civilian living off of the installation did not violate the Posse Comitatus Act because its primary purpose was to recover DOD equipment allegedly stolen by the appellant.[166] This exception is further detailed in the *DOD Directive 5525.5*.[167]

Implications for Search and Seizure in Hotel Rooms

Commanders must take steps to ensure that searches and seizures off of the installation clearly fall within the military purpose doctrine outlined by various court rulings and further

153. 18 U.S.C. § 1385.

154. Major Matthew J. Gilligan, *Opening the Gate?: An Analysis of Military Law Enforcement Authority Over Civilian Lawbreakers On and Off of the Federal Installation*, 161 MIL L. REV. 1, 5 (1999).

155. Brian L. Porto, Annotation, *Construction and Application of Posse Comitatus Act (18 U.S.C.A. § 1385), and Similar Predecessor Provisions, Restricting the Use of United States Army and Air Force to Execute Laws*, 141 A.L.R. FED. 271, 273 (2003).

156. *See* Colonel Paul Jackson Rice, *New Laws and Insights Encircle the Posse Comitatus Act*, 104 MIL. L. REV. 101, 111 (1984).

157. *See* Porto, *supra* note 155, at 273.

158. *See* Rice, *supra* note 156, at 112 (citing United States v. Walden, 490 F.2d 372 (4th Cir. 1974), *cert. denied*, 416 U.S. 983 (1974); United States v. Banks, 383 F. Supp. 368 (D.S.D. 1974); United States v. Jaramillo et al., 380 F. Supp. 1375 (D.Neb. 1974), *appeal dismissed*, 510 F.2d 808 (8th Cir. 1975)).

159. *See* U.S. DEP'T OF DEFENSE, DIR. 5525.5, DOD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS (20 Dec. 1989) [hereinafter DOD DIR. 5525.5].

160. *Jamarillo*, 380 F. Supp. at 1376-77.

161. *See* United States v. McArthur, 419 F. Supp. 186, 189 (D.N.D. 1975).

162. *See* United States v. Banks, 383 F. Supp. 368 (D.S.D. 1974) (finding that the correct standard was totality of the evidence, but not providing a clear standard as to the application of the Act to the actions by members of the armed forces); United States v. Red Feather, 392 F. Supp. 916, 923 (D.S.D. 1975) (holding that the "direct and active use of troops for the purpose of executing the laws . . . .", would run afoul of the act, but that the armed forces could provide "materials, supplies, or equipment of any type or kind in execution of the law" without violating the Act).

163. *McArthur*, 419 F. Supp. at 194.

164. *Id.* (emphasis added).

165. *See, e.g.*, United States v. Allen, 53 M.J. 402, 407 (2000) (finding that investigators had an independent, continuing military interest in an investigation and could therefore turn over the results of that investigation to civilian law enforcement under the Military Purpose Doctrine).

166. 210 F.3d 990, 994 (9th Cir. 2000).

codified in *DoD Directive 5525.1* in order to avoid a violation of the Posse Comitatus Act. The JA should work with military and civilian law enforcement to establish an MOU detailing an appropriate military response as well as assistance from civilian law enforcement in the event civilians are involved in an incident at a service member's hotel room. The JA should also assist military law enforcement to ensure the installation security regulation contains detailed guidance for conducting law enforcement off of the installation. Military police must be well-trained on the tactics, techniques, and procedures for entering hotel rooms located off of the installation and understand the limits of their duties and responsibilities. Above all, commanders and military law enforcement must understand that any law enforcement activity off of the installation must be for the primary purpose of enforcing the UCMJ and the interests of the military, rather than for the enforcement of civilian laws.[168]

Suggested Methods to Expand the Definition of Area Under Military Control

The Continuing Problem

Since December 2001, the U.S. military has almost tripled the number of service members mobilized.[169] Many of these units are deployed and are conducting operations overseas, while others fill critical shortages at installations across the United States. Many more have completed their mobilization and stay at various installations during their demobilization process. Installations will continue to grapple with the housing shortage and many will look to the local economy to provide temporary housing. The issue of command authority in hotel rooms will continue to cause concern as commanders attempt to maintain good order and discipline for all service members, regardless of where they are housed.

Implications for the Future

As early as 1967, the COMA noted that as Fourth Amendment law changed, then so must the legal review and the analysis of command activities.

> In recent decades, the scope of constitutionally protected rights and privileges of the individual has been substantially redefined. Many practices evolved on the basis of the old, and more circumscribed, concepts have failed to meet the challenges of the new definitions. A thick coat of tradition, therefore, is no assurance of constitutional acceptability.[170]

Later, the COMA acknowledged that the traditional concept of barracks life was evolving. While commanders still had the responsibility to ensure the health and welfare of service members occupying the barracks, commanders' authority to carry out their duties must change to keep pace with the new challenges arising from giving Soldiers more privacy than they enjoyed in the past.[171] The cases demonstrate that while courts will continue to respect the traditions and customs of the service, the military must adjust its practices and procedures to both the evolving laws impacting personal liberties and the changing environment of military service.

One way to adjust military practices to the changing environment is to allow commanders to treat hotel rooms like barracks rooms when housing shortages force units to locate Soldiers off of the installation. There are several obstacles that commanders will have to overcome in order to accomplish this goal. Judge advocates will have to work with contracting officers, military and civilian law enforcement, and the command to ensure that leased agreements with commercial entities allow the command maximum flexibility in dealing with this type of property.

In reviewing several diverse areas of law in this article, a number of factors that favor an expanded definition of area under military control emerge. These factors include the following: (1) rooms that are leased and paid for directly by the government rather than the service member; (2) language in the lease containing specific provisions for search, seizure, inventory, inspection, and apprehension by military authorities; (3) the existence of an SOP that puts service members on notice as to possible inspections and the authority of the command to search rooms; (4) command control of unit assignments, conduct in the hotel rooms, and enforcement of other administra-

167. DOD DIR. 5525.5, *supra* note 159, encls. 4, para. E4.1.2.1.2-6. Permissible military purposes include: (1) "[i]nvestigations and other actions relating to enforcement of the UCMJ"; (2) "[i]nvestigations and other actions that are likely to result in administrative proceedings by DoD, regardless of whether there is a related civil or criminal proceeding"; (3) "[i]nvestigations and other actions related to the commander's inherent authority to maintain law and order on a military installation or facility"; (4) "[p]rotection of classified military information or equipment"; (5) "[p]rotection of DoD personnel, DoD equipment, and official guests of the [DOD]"; and (6) "[s]uch other actions that are undertaken primarily for a military or foreign affair's purpose." *Id.*

168. *See* United States v. Thompson, 33 M.J. 218, 221 n.4 (C.M.A. 1991).

169. Statistics released by the DOD indicate that as of 15 October 2003, 164,014 Soldiers, Sailors, Airmen, and Marines were activated from the reserves and the National Guard. *See* AKO, The U.S. Army Portal, 2 June 2004, *available at* http://www.us.army.mil/usar/main.html. Other statistics released by the DOD, however, indicate that as of 12 December 2001, only 58,741 service members were mobilized. *See* Defenselink, *supra* note 2.

170. United States v. Kazmierczak, 37 C.M.R. 214, 219 (C.M.A. 1967).

171. *See* United States v. Middleton, 10 M.J. 123, 127-28 (C.M.A. 1981).

tive regulations in the hotel; (5) the existence of installation regulations that outline practices and procedures to be used to search hotel rooms and also provide notice to service members as to military authority; (6) provisions in the lease that allow for command access to each room without the permission of the service member; (7) the existence of a prior, written memorandum of agreement with local law enforcement addressing military authority; and (8) the existence of a legitimate military interest within the meaning of the Posse Comitatus Act.[172]

The JA must keep in mind that neither the lease nor an SOP nor installation regulations, standing alone, create the authority for the commander to search. Instead, these documents put the member on notice that the command considers the hotel room to be an area "under military control." This notice is a critical component in determining both the subjective and the objective prong of an individual's reasonable expectation of privacy. When a unit maintains a high degree of control in the hotel regarding room assignments and expected conduct, service members are more likely to understand that they have a lower expectation of privacy than they would in a typical, civilian hotel room. Clear military law enforcement regulations and guidelines for proper procedures will reduce the chance that military law enforcement will overstep their authority and violate the Posse Comitatus Act. Judge advocates must also be clear that military necessity is the driving force for command action rather than location.

The case law supports a greater emphasis on military necessity in the barracks and those areas that "embody that essential military character . . . ."[173] Judge advocates must be able to articulate reasons why hotel rooms used as barracks should fall under the broad umbrella of military necessity and be able to show that although located off of the installation, the rooms still have an "essential military character." For example, commands must assign service members to rooms, have rules and regulations that govern visitation and conduct in the hotel, and have access to the rooms through an appointed unit representative. Commanders should inspect and inventory the rooms on a regular basis and have policies and regulations that govern those actions.

There are other practical considerations not addressed by the courts that would also favor more authority by commanders. Judge advocates should consider the reason for and the duration of the occupation of the hotel rooms as well as whether or not the hotel has limited the access to the hallways and entryways to the service members' rooms from other hotel guests. When a Soldier occupies a hotel room for a longer period of time (perhaps sixty days or more), there is better notice to the occupant that this location is more than just a temporary duty destination, it is long-term housing akin to a barracks room. Additionally, courts would more readily find that the property was under military control if the government made arrangements for service members to occupy distinct areas of the hotel separate and apart from other hotel guests. A separation would serve two important purposes. First, it would eliminate many of the problems with civilians becoming involved in incidents that would require intervention by military law enforcement. Second, it would reinforce the notice to the service member that although they are living in a hotel, the location is really just an extension of the barracks.

Conclusion

> While the physical trappings of a modern barracks or military dormitory may be more comfortable and private than an open bay barracks, the need for discipline and readiness has not changed. A [S]oldier may lawfully be ordered to move from private family quarters into the barracks, for reasons related to military discipline or military readiness. While a civilian may retreat into the home and refuse the entreaties of the police to come out, a [S]oldier may lawfully be ordered to come out of his or her quarters. In short, the threshold of a barracks/dormitory room does not provide the same sanctuary as the threshold of a private home.[174]

As the Global War on Terror continues into its third year, the military will continue to struggle to find housing for troops.[175] Housing members of the armed forces in hotel rooms is a reasonable alternative, and with careful planning and coordination, commanders can treat hotel rooms like an extension of the barracks for purposes of search and seizure. The commander's authority to conduct search and seizure has always been an integral part of the responsibility of command. Extending the definition of that authority to hotel rooms off of the installation is simply a new way to address an age-old facet of command.

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172. *See* United States v. Thompson, 33 M.J. 218 (1991), *cert. denied*, 502 U.S. 1074 (1992); U.S. DEP'T OF ARMY, REG. 195-2, CRIMINAL INVESTIGATION ACTIVITIES para. 3-1(a) (30 Oct. 1985).

173. *See, e.g.*, United States v. Mitchell, 12 M.J. 265, 269 (C.M.A. 1982).

174. United States v. McCarthy, 38 M.J. 398, 403 (C.M.A. 1993) (citations omitted).

175. Mass mobilizations and temporary housing in hotels are not unique to the Global War on Terror. Indeed, during WWII, Soldiers, Sailors, and Marines were also placed in hotels during basic training and while waiting to be shipped into theatre. *See* Andrea Stone, *WWII Veterans' Kids Keep Reunions, Memories Alive*, USA TODAY, Nov. 11, 2003, at 5a. Over 160,000 reservists were mobilized during World War I, approximately 200,000 reservists served on active duty during the Korean War, and 85,276 reservists were called to duty for Desert Shield/Storm. U.S. ARMY COMMAND & GEN. STAFF C., RES. PLANNING AND FORCE MGMT. 9-15 (2002).

Appendix

Sample Lease Provisions

"In recognition of the U.S. [Army's] need to ensure security, military fitness, and good order and discipline, . . . the Landlord agrees that while its facilities are occupied by [service members assigned to the installation], the U.S. [Army] and not Tenant has control over the leased premises and shall have the right to conduct command inspections of those premises."[176] The Landlord further agrees to recognize the Army's authority for purposes of search, seizure, and apprehension "when necessary for protection of the interests of the government,"[177] and that the leased property is an area under military control.

The Landlord agrees to provide keys and access to all leased rooms to the U.S. Army for purposes of internal control and distribution. The Landlord further agrees to address all concerns about room cleanliness, access for repair, and any other problems to the designated unit representative for the service member. In the event of any serious misconduct by a service member on the premises, the Landlord agrees that in addition to notifying the proper civilian authorities, the Landlord will contact the designated unit representative.[178]

176. United States v. Reppert, 76 F. Supp. 2d 185, 188 (D.Conn. 1999).

177. United Sates v. Moreno, 23 M.J. 622, 623 (A.F.C.M.R. 1986), *review denied*, 24 M.J. 348 (C.M.A. 1987).

178. *See* United States v. McCauley (Special Operations Support Command (ABN), Fort Bragg, North Carolina, 4 Oct. 2002) (unpublished) (on file with the Office of the Staff Judge Advocate, Special Operations Command (ABN), Fort Bragg, North Carolina) (containing a Barracks/Hotel Standard Operating Procedure from Special Operations Support Command (ABN), Fort Bragg, North Carolina).