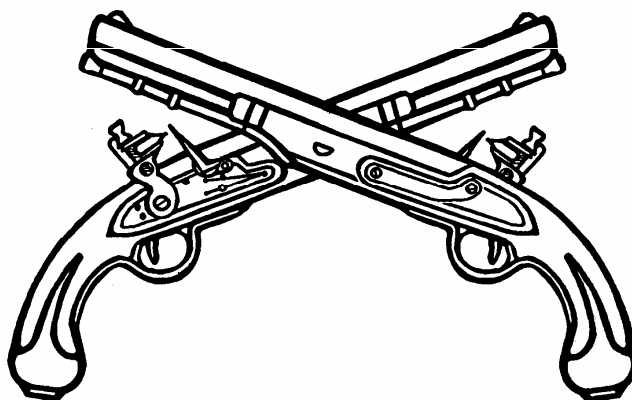


SEARCH AND SEIZURE

MP



SETS THE STANDARD FOR EXCELLENCE

THE ARMY INSTITUTE FOR PROFESSIONAL DEVELOPMENT
ARMY CORRESPONDENCE COURSE PROGRAM

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THRU
GROWTH

SEARCH AND SEIZURE

Subcourse Number MP1021

EDITION D

United States Army Military Police School
Fort Leonard Wood, MO 65473-8929

4 Credit Hours

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SUBCOURSE OVERVIEW

This subcourse examines the law of search and seizure. It covers the general principles and applicability of the Fourth Amendment to the United States Constitution. After analyzing when the Fourth Amendment protection applies, it examines in detail the law governing searches pursuant to a warrant/authorization. This includes an understanding of the probable cause standard, and how it may be satisfied. The subcourse then examines the various exceptions to the warrant/authorization requirement.

The criminal investigator must understand this area of the law. The actions of the police officer can drastically affect whether or not the offender can be successfully prosecuted. Officers and NCOs must also understand the critical roles they play in the functioning of our military justice system.

Involvement in police work inevitably will involve such matters as apprehensions, searches, and seizure of evidence. Unless you have a basic understanding of this area of the law, the result will be illegal searches, and an exclusion of the evidence at trial. The criminal may then go free, due to the errors of those who sought to apprehend him.

There are no prerequisites for this subcourse.

This subcourse reflects the doctrine which was current at the time it was prepared. In your own work situation, always refer to the latest official publications.

Unless otherwise stated, the masculine gender of singular pronouns is used to refer to both men and women.

TERMINAL LEARNING OBJECTIVE:

ACTION: You will understand and be able to apply the law of search and seizure. You will understand the law governing the conduct of searches, seizures, and apprehensions. You will understand the law applicable to searches and seizures that are based on a

prior authorization/warrant, as well as those which are based on an exception to the authorization/warrant requirement.

CONDITION: You will have this subcourse, pencil, and paper.

STANDARD: To demonstrate competency of this task you must achieve a score of 70 percent on the subcourse examination.

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LESSON

SEARCH AND SEIZURE

Critical Tasks: 03-3758.00-8019
03-3758.00-8020
03-9080.12-3800
03-3757.00-7000
03-3757.00-7001
191-377-5208
191-390-0143

OVERVIEW

LESSON DESCRIPTION:

This subcourse will reinforce your basic knowledge and understanding of the law of search and seizure, and will further expand that knowledge. If you have no prior familiarity with this subject, this subcourse will give you a sound working knowledge of the applicable legal principles. Several major developments have occurred in this area in the last few years. You must understand these principles, and how to apply them in the field. The successful completion of this subcourse will help prepare you to assume the added responsibilities of a supervisor over those who are engaged in law enforcement duties. Subordinates, of course, will look to you for guidance. If you don't know the law, you will be unable to perform this vital role.

TERMINAL LEARNING OBJECTIVE:

- ACTION:** At the end of this lesson, you will understand and be able to apply the law of search and seizure. You will understand the law governing the conduct of searches, seizures, and apprehensions. You will understand the law applicable to searches and seizures that are based on a prior authorization/warrant, as well as those which are based on an exception to the authorization/warrant requirement.
- CONDITION:** You will have this subcourse, pencil, and paper.
- STANDARDS:** To demonstrate your competency of this task you must achieve a minimum of 70 percent on the subcourse examination.
- REFERENCES:** None.

INTRODUCTION

"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 warrant shall be issued, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized." Underlying the above, the Fourth Amendment to the United States Constitution, are two basic principles. First, the Fourth Amendment is a prohibition against searches and seizures. This subcourse will examine in detail the types of searches/seizures which the appellate courts have found to be reasonable, and those which have been branded as unlawful and unreasonable. Second, the Fourth Amendment states a preference for the use of a search warrant. In the military, we use the term "search authorization" to refer to "an express permission, written or oral, issued by competent military authority to search a person or an area for specified property or evidence or for a specific person and to seize such property, evidence, or person." (Military Rules of Evidence 315(b) 1). A "search warrant" fulfills a similar purpose, but is "issued by competent civilian authority" (MRE 315(b) 2). We will examine the search authorization/warrant in much detail later. For now, just realize that there is a general preference for the use of a search authorization/warrant. The appellate courts feel that this ensures that the police officer's evaluation of the facts will be reviewed by a neutral and detached third party.

A prior authorization/warrant is not needed in every case, as the courts recognize various exceptions to this general preference. We will examine each of these exceptions later. The general preference, however, remains. If you have time and it is practical to do so, obtain a search authorization. This is always the safest way to proceed.

We will shortly be examining the Fourth Amendment, and the rules which govern lawful searches and seizures. Before doing that, however, we need to obtain a basic understanding of when the Fourth Amendment applies.

PART A - THE APPLICABILITY OF THE FOURTH AMENDMENT

1. General. What triggers the Fourth Amendment? When does it apply? Does it ALWAYS apply, regardless of who does the search, and regardless of where one is searching? As an example, does it apply to a search done by one's spouse or children? Does it matter where they are searching? Does the Fourth Amendment apply if the area being searched is a city dump? These are the questions that we will now examine.

In order for the Fourth Amendment to apply, we must have two things. First, the search/seizure must have been done "by a person acting in a governmental capacity" (RCM 311a.) Second, the accused or suspect must have "a reasonable expectation of privacy in the person, place or property searched." (RCM 311(a) 2.) We will examine both of these concepts in detail shortly. First, however, you must understand that BOTH must be present in order for the Fourth Amendment to apply. If only one is present, that is not sufficient, so the Fourth Amendment will not be triggered. Remember, we need BOTH.

One factor can exist without the other, but this simply means that the Fourth Amendment doesn't apply to the situation at hand. As an example, suppose a search of your home is done by your spouse or children. You certainly have a right of privacy in your home, but there is no governmental action in such a situation. Consequently, the Fourth Amendment does not apply, and does not protect you from a search by a spouse/child. On the other hand, suppose governmental officials (MPI, CID, etc.) conduct a search of property which you have thrown away into a dumpster outside of the barracks. Here, we have governmental action, but you have no reasonable expectation of privacy. Remember, the Fourth Amendment does not apply unless we have BOTH. If the Fourth Amendment is inapplicable, the evidence that is seized in the search will be admissible in court. We will now examine these concepts in more detail.

The case of U.S. v Sullivan, 42 MJ 360 (CAAF, 1995) clearly illustrates a situation in which there is no governmental action and hence no coverage by the Fourth Amendment. In Sullivan, the accused conducted a telephone sex survey of over 700 Army spouses at Fort Rucker, Alabama using his cordless telephone. The Fourth Amendment Exclusionary Rule was inapplicable to the action of the accused's neighbor, who was acting in a private capacity when he recorded the accused's transmissions. The neighbor later turned over these recordings to law enforcement officials and they were used in Chief Sullivan's successful prosecution. CAAF held that the tape recordings of the conversations were properly admitted into evidence by the trial judge.

Law enforcement officials, however, must be aware of the provisions of 18 U.S.C. sections 2510 and 2511 if they wish to intercept cordless telephone conversations as part of their investigatory activity. The most recent revision of 18 U.S.C. section 2510 in 1994 deleted the exclusion of cordless telephone communication from the term "wire communication." Law enforcement officials will now be required to observe all the provisions of 18 U.S.C. section 2511 regarding interception and disclosure of wire, oral, or electronic communication concerning cordless telephone conversations.

2. The Purely Private Search. Here, the subject of the search may have a reasonable expectation of privacy, but there is no governmental action. In one case, the U.S. Supreme Court held that the protection of the Fourth Amendment "applies to governmental action...it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies." The Court concluded that the Fourth Amendment offers no protection against the acts of private individuals. The Fourth Amendment, then, is a restraint UPON THE GOVERNMENT, not upon private parties. Where there is no governmental action, the Fourth Amendment is not violated, and the evidence seized by a private person is admissible in court. Bordeau v. McDowell, 65 L. Ed. 1048 (1921).

Suppose that following a divorce, the accused's ex-wife wrongfully enters his home, and takes his private papers. She then takes them to his commander in order to show that he obtained his commission by fraud; i.e., he never graduated high school. Under such facts, the wife is not acting as a governmental official or as an agent of the government. The rule is that "evidence taken by wrongful act of a private person, without participation by the government, will not be barred from evidence." In such cases, there is no misconduct by any government officials. Under these facts, "the government is guilty of no impropriety and there is no wrongful activity on its part to deter." U.S. v. Seiber, 31 CMR 106 (CMA, 1961).

The fact that the ex-wife may have committed a crime herself (trespass, larceny, etc.) does not affect the outcome. The Fourth Amendment only applies where governmental activity is involved. It does not protect a husband from the wrongful acts of his wife. It would, of course, be different if the government officials (commander, CID, etc.) told the wife to do what she did. Under such facts, the wife would then be acting as an agent of the government (on its behalf). She would not, therefore, be acting in a purely private capacity. If that were the case, the presence of governmental action would trigger the Fourth Amendment.

This issue frequently arises when the search is done by someone in the military, but not by MPI, CID, etc. Actions by military law enforcement agencies, or by the chain of command, would involve governmental action. Suppose, however, that the search is done by the accused's roommate. The rule is that "not every search made by persons in the military service is under the authority of the United States. At the same time, however, it is clear that "a search by a person duly assigned to law enforcement duty, and made for the sole purpose of enforcing military law, is conducted by a person acting under the authority of the United States." Also, "a search by one having direct disciplinary power over the accused" is considered to have been done under the authority of the United States, thereby involving governmental action. U.S. v. Volante, 16 CMR 263 (CMA, 1954).

In U.S. v. Thomas, 36 CMR 462 (CMA, 1966), the accused was assigned as a runner for the Charge of Quarters (CQ). A search done by the CQ was found to involve governmental action. He was described as "a noncommissioned officer detailed by the company commander for a 24-hour tour of duty, to observe violations of rules and regulations by the personnel of the company" and as "a noncommissioned officer, clothed with the power to supervise the discipline of the command." The CQ, a sergeant, was also the accused's "direct military superior," and "a more precise definition of police activity would be hard to find." The search, then, involved governmental action, so the Fourth Amendment was applicable. It was not a purely private search.

"Searches by persons having direct disciplinary authority over the person searched are equated to those conducted by law enforcement agents, for law enforcement is frequently an integral part of the broader problem of military command." U.S. v. Fleener, 43 CMR 974 (AFCMR, 1971). This is the general rule, although each case must be decided on its own facts. It is still possible to find a private search where one is acting in a purely private capacity "notwithstanding that they possess the authority of a particular military rank or grade" U.S. v. Rogan, 25 CMR 23 (CMA, 1958). The Fourth Amendment, for example, does not generally protect the thief from a recovery of the stolen property by his victim.

U.S. v. Carter, 35 CMR 467 (CMA, 1965) involved an interesting set of facts. The Third Army heavyweight boxing champion was PFC Dorsey, known as "The Slammer." Before going to bed one night, he put \$145 in his locker. In the morning, it was missing. PFC Dorsey suspected the accused, who occupied the next bunk in the barracks. PFC Dorsey searched the accused's person and threatened to hit him unless the accused removed his shoes. The money was found hidden in one of his shoes that the accused was wearing. The court held that the Fourth Amendment "has consistently been applied only to action by...government authority." It does not apply to actions taken by private persons. Accordingly, "a thief...is not protected by the Fourth Amendment against the owner." In this case, then, PFC Dorsey was found to have acted "exclusively in his own private interests."

U.S. v. Thrower, 12 MJ 777 (ACMR, 1981), involved a similar situation. The accused shared a room with SPC McCullough. SPC McCullough knew that his roommate had drugs in the room, and was afraid that he would be blamed for their presence. He took the drugs out of his roommate's locker and gave them to the commander. His seizure of the drugs was found to involve "acts in his private capacity and not as a person acting in a governmental capacity." Remember, "private persons are not subject to the Fourth Amendment," and evidence seized by them is admissible in court. U.S. v. Morrison, 12 MJ 222 (CMA, 1982). Cases like these would have a different result, of course, if the police or commander had directed the roommate to do the search. Were that the case, the roommate would be acting in a governmental capacity, as a government agent, and it would no longer be a purely private search. U.S. v. Aponte, 11 MJ 917 (ACMR, 1981).

3. Foreign Searches. When we speak of "governmental action" we mean action by officials of the United States. This includes, of course, the U.S. Army, the federal government, and also a state or any political subdivision of a state (city, county, etc.). In other words, the Fourth Amendment applies to officials of the United States (MRE 311(c) 2). To be challenged as unlawful under the Fourth Amendment, a search must have been "conducted, instigated, or participated in by agents of the U.S. government. Officials of a foreign government are not bound by the Military Rules of Evidence, or by the U.S. government. As a result, evidence seized by officials of a foreign government will be admissible in our courts, unless it was obtained as a result of subjecting the accused to "gross and brutal maltreatment." (MRE 311(c) 3.)

The problem frequently arises overseas, when the search is performed by officials of the foreign government (Germany, Korea, Japan, etc.), and they then give the evidence to the U.S. authorities. The mere presence of U.S. officials at the scene of a foreign search does not convert it into a search by the United States. Consequently, it does not have to meet our constitutional standards, and the evidence is admissible in our courts. U.S. v. Morrison, 12 MJ 272 (CMA, 1982). The issue will be whether or not the U.S. officials instigated the search, conducted it, or participated in it. U.S. v. Coleman, 25 MJ 679 (ACMR 1987).

We could not, for example, evade the Fourth Amendment by using foreign police officers as a means of conducting searches that we could not conduct ourselves. If we use them as our agents in an attempt to get around the Fourth Amendment, the courts will stop us. As an example, furnishing information to the officials of a foreign government is not improper, unless the purpose of this action is to get the foreign officials to conduct a search that we could not do ourselves. U.S. v. Morrison, 12 MJ 272 (CMA, 1982). If the American authorities become directly involved in the search, such as by assisting in the search itself, this will trigger the Fourth Amendment. U.S. v. Armstrong, 9 MJ 374 (CMA, 1980). A key issue is whether or not the foreign officials were acting as our agents. In other words, if we could not lawfully do the search, did we simply ask them to, in order to evade or circumvent the requirements of the Fourth Amendment? If this is what has occurred, it is not considered to be a foreign search. It will be treated as an American search, and it must meet the requirements of the Fourth Amendment. U.S. v. Jones, 6 MQ 226 (CMA, 1979).

In one case, the court found that the exchange of information between American and British law enforcement agents was "commonplace." The "mere furnishing of information to local law enforcement officials by American investigative agencies does not justify a conclusion that it was done for the purpose of instigating the accused's arrest." Again, if we act simply to circumvent (evade) the Fourth Amendment, the courts will apply the Fourth Amendment. In effect, it will then be treated not as a foreign search, but as an American search, involving U.S. governmental action. U.S. v. Koch, 15 MJ 847 (AFCMR, 1983).

Remember, the purpose of this rule "is to prevent American authorities from evading constitutional protection by using foreign personnel to conduct a search or seizure that would have been unlawful if conducted by Americans." This requires an element of causation, and more than our mere presence. The presence of American officials may be for such legitimate purposes as simply to observe, to protect American property, or to act as interpreters. Our mere presence, you will recall, does not convert it into an American search. U.S. v. Baker, 16 MJ 689 (ACMR, 1983).

To sum up the issue of the foreign search, the accused may have had a reasonable expectation of privacy in the area searched. This, however, is not enough to trigger the Fourth Amendment. There must also be governmental action. This element is lacking here; consequently, the Fourth Amendment is not applicable. Remember, this must not simply be an attempt to evade the law by having the foreign officials do something that we could not do ourselves. If that is the situation, the courts will consider it to be an American search, not a foreign one.

4. The Reasonable Expectation of Privacy.

a. General. The language of the Fourth Amendment speaks in terms of the peoples' right to be secure in their "persons, houses, papers, and effects." This was formerly held to protect the people against a physical trespass upon their property. Olmstead v. U.S., 72 L. Ed. 944 (1928). This involved whether the police physically intruded upon the property (whether they actually entered the home, car, etc.). In other words, did the police physically trespass upon my home or car? This view gave way to changes in technology. In Katz v. U.S., 19 L. Ed. 2d 576 (1967), an electronic listening device was attached to the outside of a public telephone booth. It surely wasn't the defendant's property. Was there, then, a trespass upon his property? In the physical sense, there wasn't. In this case, the Supreme Court abandoned the technical "trespass" concept, and ruled that "the Fourth Amendment protects people, not places...a person in a telephone booth may rely upon the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call, is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world." The fact that the listening device was attached to the outside of the phone booth (there was no physical trespass) was not material. The problem was that the police had "violated the privacy upon which he justifiably relied while using the phone booth."

This, then, is the modern view. Even if a search involves governmental action, the Fourth Amendment will only apply if the accused had a reasonable expectation of privacy in "the person, place, or property searched." (MRE 311(a) 2.) While the issue of governmental action looks at who does the search (governmental agents v. private persons), here we are looking at where they are searching. The issue "depends not upon a property right in the invaded place, but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." The accused must have such an expectation of privacy, and it also must be one which society will recognize as reasonable. Rakas v. Illinois, 58 L.Ed.2d 387 (1978).

In one case, the police asked the phone company to install a pen register at its central office. This would record the numbers dialed from the defendant's home phone. The pen register did not record the content of the conversation, or even the identity of the parties thereto. It simply recorded the numbers that had been dialed. The Supreme Court held that there was no reasonable expectation of privacy in the numbers dialed. The subject had voluntarily conveyed this information to the phone company and "assumed the risk that the information would be revealed to the police." Even if the subject did himself have any such expectation of privacy (which the Court found highly doubtful), it was not one which society would recognize as legitimate or reasonable. Smith v. Maryland, 61 L.Ed.2d 220 (1979).

In U.S. v. Knotts, 75 L.Ed.2d 55 (1983), an individual was suspected of conspiring to manufacture controlled substances. The police installed a radio transmitter (beeper) inside of a 5-gallon drum of chloroform. When the defendant purchased it, the police were able to follow his car to a cabin.

Following surveillance for several days, the police obtained a search warrant, and discovered the location to be a drug laboratory. On appeal, the Supreme Court held that this "amounted principally to the following of an automobile on public streets and highways...A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." When the subject traveled on public streets, "he voluntarily conveyed to anyone who wanted to look the fact that he was traveling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination when he exited from public roads onto private property."

Hudson v. Palmer, 82 L. Ed 2d 393 (1984), involved a search of an inmate's prison cell. The Supreme Court concluded that "society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell...prisoners have no legitimate expectation of privacy." In another case, the police went to an adult bookstore, browsed for several minutes, and then purchased some of the magazines. The clerk was then arrested for selling obscene materials. On appeal, the issue was whether this violated the Fourth Amendment. The Supreme Court ruled that the clerk "did not have any reasonable expectation of privacy in areas of the store where the public was invited to enter and transact business...the officer's action in entering the bookstore and examining the wares that were intentionally exposed to all who frequent the place of business did not infringe a legitimate expectation of privacy." There was, then, no unreasonable search and seizure, and the evidence was admissible. Maryland v. Bacon, 37 Cr. L. 3111 (1985).

In People v. California, (Ct. App. 2d Dist.) Crim #BO27605, 3/31/88, the defendant was under arrest for car theft. At the police station, he was left alone in the interview room for a few minutes while some officers went to get the booking forms. As another officer watched through a mirror, the defendant started talking to himself, saying, "I'm really nailed now." The court held that the defendant had no reasonable expectation of privacy under these facts.

In one case, an individual was in a car accident. His vehicle crashed into a tree, flipped over, and skidded to a halt off of the left side of the road. The vehicle was towed to a civilian garage and was later searched by a special agent of the Naval Investigative Service (NIS). In this case, the vehicle had been "utterly demolished" and left upside down on the grounds of the Naval Academy. Under these facts, "the car had permanently ceased its function as a means of transportation and, lacking a top or operable windows and doors, was completely exposed to the view of law enforcement personnel and elements of the public...The accident resulted in a fatality. Under such circumstances...no one could reasonably expect that his vehicle would not be thoroughly examined...the authorities invaded no constitutionally protected interest" U.S. v. Olmstead, 17 MJ 247 (CMA, 1984).

The above case should be contrasted with Michigan v. Clifford, 78 L.Ed.2d 477 (1984). There, a fire broke out in the defendant's home and the fire department arrived at approximately 0540 hours. The fire was put out and all fire officials and police left the premises at 0704 hours. The initial entry to put out the fire was, of course, lawful. A burning building represents an exigent, or emergency,

situation. As such, it demands immediate entry. Michigan v. Tyler, 56 L.Ed.2d 486 (1978). In the Clifford case, however, the arson investigators returned to the scene at 1300 hours. This was about 6 hours after the fire had been extinguished, and they had left the scene. Was the resulting search of the home lawful? Here, the search involved the defendant's HOME. The Court noted that some fires "may be so devastating that no reasonable privacy interests remain in the ash and ruins." This was not, however, such a case. Part of the home had been largely undamaged by the fire, and many personal belongings remained inside. The owners had arranged to have the home secured. "Under these circumstances, and in light of the strong expectations of privacy associated with a home," the owners did retain a reasonable expectation of privacy. Again, this was a personal residence, and "privacy interests are especially strong in a private residence...At least where a homeowner has made a reasonable effort to secure his fire-damaged home after the blaze has been extinguished and the fire and police units have left the scene...a subsequent post-fire search must be conducted pursuant to a warrant."

In U.S. v. Weiss, 11 MJ 651 (AFCMR, 1981), the sheriff of Hillsborough, Florida, was armed with a court order to repossess the accused's automobile. The sheriff obtained the aid of the MacDill AFB Security Police. As a courtesy, the sheriff's department generally allowed individuals to remove personal items from the vehicles that were being repossessed. The accused was, therefore, allowed to remove his possessions. When the accused subsequently departed carrying a box of personal items that he removed from the vehicle, the security policeman saw a piece of plastic sticking out of the console. He reached into the car, opened the console, and discovered a bag of marijuana. The policeman testified that he thought the accused had left something of his in the vehicle, and that he was getting it for the benefit of the accused. The court held that "the accused could have no reasonable expectation of privacy in this situation.. title to the vehicle had passed from the accused."

In U.S. v. Repp, 23 MJ 589 (AFCMR, 1986), the court dealt with a suspect who had been apprehended, and who had his forearms examined for needle marks. The court held that forearms "possess no reasonable expectation of privacy. They are routinely exposed to public view." In U.S. v. Adams, 13 MJ 818 (ACMR, 1982), the victim of a sexual assault turned on a personal tape recorder and actually recorded the incident. The court held that the prohibition against recording a conversation without consent, found in AR 600-20, was aimed at official activities, and "does not proscribe the recording by an off-duty soldier in her private living quarters of what occurred during the commission of a serious and repulsive crime against her person by an intruder." Here, the recording was done in a purely private capacity. Further, "there certainly could be no expectation of privacy on the part of the appellant...not only could he expect to have the victim testify against him regarding his conduct, but it appears that during a substantial part of the time involved, the door of the room was open to a hall used by other occupants of the building. Under these facts, the appellant could not expect what he said to Private L during his encounter with her to have remained confidential."

In U.S. v. Bailey, 3 MJ 799 (ACMR, 1977), military police investigators seized marijuana that was hidden in a bucket under a sink in the first floor latrine in the barracks. The court found no reasonable expectation of privacy under these facts. In U.S. v. Wisniewski, 21 MJ 370 (CMA, 1986), an NCO "peered into an opening in the blinds" covering a window which was along a public walkway. The court held that the sergeant "did nothing more than look through an opening available to any curious passerby...The common walkway from which (he) peered through the opening in the blinds was available for the use of residents of the barracks and their guests, as well as others having legitimate reasons to be on the premises...He had no difficulty in gaining a view into the room by merely peering through the opening in the blinds. Thus, the accused had no reasonable expectation of privacy from visual intrusions in the place and objects observed because they could be viewed with ease from a public walkway."

In Maryland v. Bacon, 37 Cr. L. 3111 (1985), undercover police officers entered an adult bookstore in the afternoon (during the time when it was open to the public), looked through some of the magazines, bought some, and then arrested the clerk. Since the public had been invited into the store, the actions of the police did not violate any reasonable expectation privacy on the part of the defendant.

A recent military case illustrates an instance where the court determined that the accused had no reasonable expectation of privacy. In U.S. v. Visser, 40 MJ 86 (CMA, 1994), the government did not invade the accused's reasonable expectation of privacy where a moving company exposed unpackaged items within its truck to security police. The security polices' view of the items was properly used to obtain a civilian search warrant.

b. Abandoned Property. Here, the accused has no reasonable expectation of privacy. In a case where the subject paid his bill and vacated a hotel room, a subsequent search of the wastepaper basket in the room was lawful, as it involved property that had been abandoned. Abel v. U.S., 4 L.Ed.2d 668 (1960). The same was true for the recovery of a crumpled piece of paper from a trash can in the accused's office. U.S. v. Perkins, 47 CMR 259 (AFCMR, 1973). In U.S. v. Ayala, 23 MJ 777 (ACMR, 1986), affid 26 MJ 190 (ACMR 1988), the accused was suspected of having killed his wife. The CID learned that the accused was living in guest quarters and had moved out of his government quarters. When they arrived at the government quarters, however, they discovered that all of the furniture had been removed, but the quarters were still in the process of being cleared. The accused had moved out and removed all personal property, and the quarters were still being cleaned. He was "no longer using the premises for their intended purpose as a place of residence." Under these facts, the accused still possessed "an interest" in the quarters, but it was "equally clear that (he) also had voluntarily relinquished any right to use the quarters as a residence...(he) was no longer making personal use of the quarters as his residence." The court found there was no reasonable expectation or privacy, explaining that "we do not believe that society is prepared to recognize such an expectation when a soldier has moved all of his personal belongings from the government quarters located on a military installation, has completed his own preclearing chores in those quarters, has retained a contract cleaning team, has provided that team with a means of access to the quarters, has left the team in those quarters to clean them after they were empty, and has taken up residence in another building on the military installation."

In another case, an Army sergeant (E5) knocked on the accused's door in the barracks. The accused opened the door, at which time the sergeant asked him why the door was locked (it was a violation of a company policy). The accused took a cellophane package out of his pocket and dropped it out of the window. This "voluntary act of attempting to rid his person of the packets of heroin resulted in abandonment of these illegal substances." U.S. v. Weckner, 3 MJ 549 (ACMR, 1977).

An abandonment must be voluntary. Discarding evidence in response to unlawful police conduct will not result in an abandonment. U.S. v. Robinson, 6 MJ 109 (CMA, 1979). "When an arrest is unlawful...and an accused's disposition of an item was a response to that unlawful pressure, the accused retains a possessory right in the item entitling him to have it suppressed as evidence." U.S. v. Swinson, 48 CMR 201 (AFCMR, 1974). If there is an illegal apprehension or seizure, then, an abandonment will not result therefrom. U.S. v. Foster, 11 MJ 530 (ACMR, 1981). This prevents the police from benefiting from their illegal activities and, therefore, serves the purpose of deterring them from violating the law.

In California v. Greenwood, 56 L. W. 4400 (1988), the police in Laguna Beach, California, asked the neighborhood trash collector to pick up the garbage bags that the defendant had left on the curb in front of his house. The police also asked the trash collector to turn the bags over to the police without first mixing their contents with the garbage from any other houses. The defendant objected to the search, but the Supreme Court held there was no reasonable expectation of privacy in the garbage:

"We conclude that (defendants) exposed their garbage to the public sufficiently to defeat their claim to Fourth Amendment protection...(The defendants) placed their refuse at the curb for the express purpose of conveying it to a third party, the trash collector, who might himself have searched through (it) or permitted others, such as the police to do so. Accordingly, having deposited their garbage in the area particularly suited for public inspection... for the express purpose of having strangers take it, (defendants) could have no reasonable expectation of privacy in the...items they discarded...The police cannot be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public.

c. The Precipitous Bailment. A "bailment" is simply where one loans his property to another for a period of time (as distinguished from giving it away altogether). Sometimes, instead of abandoning property, an accused will toss it to an accomplice or friend, attempting to avoid detection by the police. This is essentially what happened in Rawlings v. Kentucky, 65 L. Ed. 2d 633 (1980). There, police arrived at a residence to apprehend an individual for drug offenses. Several other persons were in the house at the time. A police officer had one of the individuals empty her purse, which resulted in the seizure of various drugs. As she emptied her purse, she told the defendant to take what was his. At this point, the accused claimed ownership of all of the drugs found in the purse. At trial, he tried to suppress the drugs, claiming they were illegally seized from the purse.

The evidence established that on the morning of the arrest, the accused was carrying the drugs when he "asked her if she would carry this for me and she said yes," at which point he dumped the drugs into her purse. The woman testified that when she recognized the substances as drugs, she told the accused to remove them from her purse. At that point, however, the police showed up. The Supreme Court concluded that the defendant had no legitimate expectation of privacy in the purse. He had known the woman for only a few days, and "had never sought or received access to her purse prior to that sudden bailment...Nor did petitioner have any right to exclude other persons from access to Cox's purse...The precipitous nature of the transaction hardly supports a reasonable inference that petitioner took normal precautions to maintain his privacy...he had no subjective expectation that Cox's purse would remain free from governmental intrusion...petitioner had no reasonable expectation of privacy in Cox's purse at the time of the search."

U.S. v. Sanford, 12 MJ 170 (CMA, 1981), involved a similar problem. There, SFC Lander approached the accused and told him, "Lieutenant Young wants to see you." As the accused entered the battery area, he walked up to another soldier and handed him a leather pouch, saying, "hold this for me." SFC Lander demanded that the other soldier give him the pouch, which was done. It turned out to contain marijuana. In terms of whether the accused retained any reasonable expectation of privacy in the pouch, the court said the issue was whether he "took actual precautions to ensure his expectations of privacy in (the other soldier's) custody of the pouch and that society is prepared to accept these efforts as reasonable or normal to accomplish this end." Here, the other soldier "had no prior arrangement with appellant to possess or protect this or any other property on his behalf...Appellant's hurried and gratuitous request for (the other soldier) to keep the property was no more than a precipitous bailment incapable of providing any realistic expectation that his property would remain private and secure."

d. Common Areas and Open Fields. In U.S. v. Grosskreutz, 5 MJ 344 (CMA, 1978), the court held that the use of a marijuana detection dog in a public parking area to monitor the air spaces surrounding an automobile did not violate any reasonable expectation of privacy. In U.S. v. Baker, 14 MJ 602 (AFCMR, 1982), the court held that "there is no expectation of privacy in the hallways and common areas of a large apartment building...the volume of traffic from fellow tenants, guests, landlords and maintenance personnel is sufficient to make any such subjective expectation of privacy objectively unreasonable."

California v. Ciraolo, 54 L. W. 4464 (1986) involved police officers who received a tip that the accused was growing marijuana in his backyard. They could not observe it at ground level, however, due to a fence. They then obtained a private plane and flew over the house, within navigable airspace. They photographed the marijuana plants, and used the photographs to support their application for a search warrant. The Court held that the police were where they had a right to be, and that they made their observations "in a physically nonintrusive manner...Any member of the public flying in this

airspace who glanced down could have seen everything...(his) expectation that his garden was protected from such observation is unreasonable and is not one that society is prepared to honor...in an age where private and commercial flight in the public airways is routine, it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet. The Fourth Amendment simply does not require the police traveling in the public airways at this altitude to obtain a warrant in order to observe what is visible to the naked eye."

Contrast the above case with U.S. v. Peters, 11 MJ 901 (AFCMR, 1981). There, the police took a marijuana detection dog to the accused's on-post family quarters. No one had authorized any such search. The dog was taken past all of the doors and windows. The issue was: Do occupants of family housing have a reasonable expectation of privacy in the grounds outside their quarters? Here, the court held that the yard "was not a public walkway or a common area but rather a specific yard closely associated with the house." The police, when they stood in the yard and had the dog sniff at the windows, "were not in any place where they otherwise had a right to be. In short, they were in the same position as trespassers" and were held to have violated the accused's reasonable expectation of privacy in his home.

The Fourth Amendment does not protect common areas. It also does not protect "open fields." Hester v. U.S., 68 L. Ed. 898 (1924). A person's private yard, however, is not the same as an open field. The police may enter and search an "open field" without a warrant. In one case, the police had reports that marijuana was being grown on the accused's farm, so they went there to investigate. They found the marijuana growing about a mile from the residence itself. In another case, the police had a report that marijuana was being grown in the woods behind the accused's home. Going there, they also found the marijuana. Both cases went to the U.S. Supreme Court, which held that "an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home...open fields do not provide the setting for those intimate activities that the Fourth Amendment is intended to shelter from government interference or surveillance. There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields...For these reasons, the asserted expectation of privacy in open fields is not an expectation that society recognizes as reasonable." Oliver v. U.S., 80 L.Ed.2d 214 (1984).

An open field is different, then, from "the land immediately surrounding and associated with the home." This area immediately surrounding the home (called the curtilage) "is the area to which extends the intimate activity associated with the sanctity of a man's home and the privacies of life...no expectation of privacy legitimately attaches to open fields...an individual has no legitimate expectation that open fields will remain free from warrantless intrusion by government officers." The presence of "no trespassing" signs does not change the outcome. The point is that an intrusion into an "open field" does not interfere with "the personal and societal values protected by the Fourth Amendment." Oliver v. U.S., 80 L. Ed.2d 214 (1984).

In U.S. v. Dunn, 40 Cr. L. 3313 (1987), Drug Enforcement Administration agents placed beepers in chemicals and equipment that were used to make controlled substances. They then tracked them to the defendant's home. The home, a ranch, was totally circled by a fence. There were also various other fenced areas inside of this perimeter. The residence was about 1/2 mile from a public road, and was itself encircled by a fence. There were two barns about 50 yards away from the fence. One of these barns was itself encircled by still another fence. The agents entered onto the property without a warrant. To do so, they had to cross the perimeter fence. They also crossed over one other interior fence. At this point, about halfway between the barn and the residence, they smelled phenylacetic acid. They then crossed still another fence and were able to look into the barn, where they observed a drug laboratory.

The Supreme Court explained that "curtilage" is "the area immediately surrounding a dwelling house." The issue in such cases is whether the area encloses "the intimate activity associated with the sanctity of a man's home." An important factor for the Court was the proximity of the area to the home (here, it was approximately 50 yards away). A second important factor is whether the area is included within an enclosure surrounding the home. A third is the nature of the uses to which the area is put; i.e., is it to be considered part of the home? A final factor is the steps taken by the individual defendant to protect the area from observation. The Court concluded that the area around the barn was an open field. There was, then, no problem with the officers standing there when they made their observations.

e. The Wired Informant. When an individual makes statements to his confederates/accomplices, he is held to have assumed the risk of betrayal by them. Thus, his misplaced trust and confidence in another does not protect him should the other person reveal his conversation to the police. There is, then, no reasonable expectation of privacy that will safeguard the accused against this possibility of betrayal. Again, the accused is deemed to have assumed the risk that the other individual will not maintain the confidence of the communication.

In On Lee v. U.S., 96 L. Ed. 1270 (1952), the defendant spoke with an informant who was wired for sound, wearing a concealed microphone. The conversation was overheard by nearby police officers. This was not an unreasonable search, as the defendant had been "talking confidently and indiscreetly with one he trusted." The fact that this trust was misplaced did not create a Fourth Amendment violation. A somewhat similar issue arose in Lopez v. U.S. 10 L.Ed.2d 462 (1963), where the informant recorded the conversation. The Supreme Court held that the informant would have been free to testify

himself as to the content of the conversation. Thus, the defendant knew full well that his accomplice could turn and testify against him. Again, there was no Fourth Amendment violation. A criminal "must realize and risk that his companions may be reporting to the police." U.S. v. White, 28 L. Ed.2d 453 (1971). The Fourth Amendment does not protect a criminal's "misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it...The risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak." Hoffa v. U.S., 19 L. Ed.2d 374 (1966).

The recording of conversations must comply with applicable Army regulations. Consult with JAG, and be aware of restrictions found in AR 190-53. Also, if an accused has had charges preferred against him, or if he is under pretrial restraint, the use of undercover informants to elicit incriminating statements may be found to have violated the 6th Amendment right to counsel. U.S. v. Henry, 65 L. Ed.2d 115 (1980). The informant may, however, simply listen to the accused, so long as he does not engage him in any conversation. Kuhlmann v. Wilson, 91 L. Ed.2d 364 (1986). Remember, before using any such procedures, consult with JAG.

f. Government Property. MRE 314(d) states that government property may be searched without a warrant/authorization or probable cause "unless the person to whom the property is issued or assigned has a reasonable expectation of privacy therein." The question is whether or not the property has been issued for personal use. "Wall or floor lockers in living quarters issued for the purpose of storing personal possessions normally are issued for personal use; but the determination as to whether a person has a reasonable expectation of privacy in government property issued for personal use depends on the facts and circumstances at the time of the search." The question is whether or not the government office/property is such that there is a reasonable expectation of freedom from governmental intrusion. This is an issue that "must be addressed on a case-by-case basis." What is clear, then, is that one certainly MAY have a reasonable expectation of privacy in a personal office or desk, even if it is technically the government's property. This was recognized by the U.S. Supreme Court in Mancusi v. DeForte, 20 L.Ed.2d 1154 (1968), and again in O'Conner v. Ortega, 41 Cr. L. 3001 (1987).

In the O'Conner case, the Court held that a supervisor may search the employee's desk, if such is reasonable and in relation to work-related misconduct, but not if in connection with a criminal investigation. Based on this case, then, one should get a search authorization before searching a private desk/office, when this is done in connection with a criminal investigation. Before proceeding in this area, consult with JAG. The fact that the property is owned by the government "does not automatically exclude the possibility that the appellant may have acquired a legitimate expectation of privacy in its contents." U.S. v. Muniz, 23 MJ 201 (CMA, 1987).

The facts of a particular case may affect whether or not the employee has such a reasonable expectation of privacy. In one case, a desk in a mailroom was searched. Personnel working there were not allowed to bring personal items into the mailroom without written permission. This was, then, not a search of one's "personal effects," and the accused should have expected governmental intrusion "designed to insure proper, efficient, and secure operation of the postal unit, especially when pursuant to regulation personal property was not to be brought into the work area." U.S. v. Torres, 46 CMR 96 (CMA, 1975). An important question in these cases, as the Supreme Court noted in the O'Connor case, is whether persons are allowed to keep personal belongings in the office/desk, or whether there is a policy against such. Also, was the property "made available...for his personal use so as to provide him with an expectation of privacy from governmental intrusion?" An equally important consideration "is the extent to which the government has retained the right to enter the property." U.S. v. Simmons, 46 CMR 288 (CMA, 1975). This of course, will be affected by command policies. U.S. v. Maglito, 43 CMR 296 (CMA, 1971), involved an accused who attempted to enter a restricted barracks. The command's rule was that all persons entering it were subject to being searched. The accused, therefore, "could not reasonably expect to be free of inspection." In another case, the command had a policy of having officers and NCOs walk through the barracks at random. The policy was not unlawful and was not a subterfuge for an illegal search. The policy, however, resulted in the accused having no reasonable expectation of privacy. U.S. v. Frazier, 49 CMR 713 (CMA, 1975).

In U.S. v. Cunningham, 11 MJ 242 (CMA, 1978), the unit had a policy that doors to rooms were to be left unlocked. This, therefore, put the occupants "on notice that they could not reasonably expect that no one would enter their rooms without permission." Under such facts, the accused may not reasonably expect that he may lock the doors and exclude his superiors. He was, instead, "on notice that he would not be allowed to create a private sanctuary where he would be shielded from control by his military superiors." U.S. v. Lewis, 11 MJ 188 (CMA, 1981).

Contrast these cases with those involving searches of government property issued for personal use. In one case, the search was of a flight bag "issued to the accused for his individual use in carrying government issue items, such as cold weather gear, as well as personal clothing and toiletries" Here, there was a reasonable expectation of privacy. U.S. v. Bowles, 7 MJ 735 (AFCMR, 1979). The issue is whether the military property "was designed or intended to be a place free from governmental intrusion." U.S. v. Whalen, 15 MJ 572 (ACMR, 1983).

There is, then, no absolute rule in the areas of government property. One may have a reasonable expectation of privacy therein, but this is not necessarily the case. Was the individual allowed to keep personal belongings in his desk, or was there a policy against such? Check with JAG before proceeding here; if the search is in connection with a criminal investigation, an authorization/warrant may be necessary.

To sum up what we have covered thus far, the Fourth Amendment is triggered when we have two things: (1) governmental action; and (2) a reasonable expectation of privacy on the part of the person who is searched. When both are present, the protections of the Fourth Amendment apply and the search/seizure must comply with the requirements of the Fourth Amendment. If not, the result will be the application of the exclusionary rule. Violating the law, then, carries with it a high price.

PART B - EXCLUSIONARY RULE

1. General. Before we examine the specific rules under the Fourth Amendment (what is a legal vs. an illegal search, what is probable cause, when an authorization/warrant is required, exceptions to the authorization requirement, etc.), we need to pause and understand the importance of complying with the law in this area. Evidence that is obtained as a result of an illegal search and seizure is inadmissible against the accused at trial. It is excluded from evidence (MRE 311a). This means we lose the direct result of the unlawful search, as well as evidence that is derived therefrom. To use an example, suppose you unlawfully apprehend a soldier. You search him and discover a knife and a 1-ounce bag of marijuana on his person. Both items are the direct result of the illegal search, and would be suppressed. Suppose you sent the drugs to a laboratory for analysis, and you received back a lab report. This report identified the substance as marijuana. Suppose that you also sent the knife to the lab for examination, and that you got back a report stating that it has the suspect's fingerprints on it, along with human blood. Suppose you then show both lab reports to the suspect and tell him that he might as well confess, since you have the evidence to convict him. He admits the marijuana is his, and says he used the knife in a robbery the prior evening.

Since there was an illegal apprehension, all the evidence "obtained through the means of such seized evidence" is also going to be suppressed. The lab reports and confession, then, are examples of what we call "derivative evidence," known otherwise as the "fruit of the poisoned tree." U.S. v. Leiffer, 10 MJ 639 (NCMR, 1980). This "derivative evidence" may be physical evidence, a confession, or even the identity of witnesses. U.S. v. Van Hoose, 11 MJ 878 (AFCMR, 1981). The issue is whether the government has acquired the additional evidence by exploiting, or taking advantage of, its illegal actions. U.S. v. Kesteloot, 6 MJ 706 (NCMR, 1978). If we suppress the physical evidence as well as live testimony of the witnesses that is derived therefrom, the entire government case may be destroyed. U.S. v. Duckworth, 9 MJ 861 (ACMR, 1980).

2. Exceptions to the Exclusionary Rule.

a. General. The purpose of the exclusionary rule is to deter unlawful police conduct. Its application depends, therefore, on whether the goal of deterring the police from breaking the law would be furthered. Illinois v. Krull, 55 L. W. 4291 (1987). Since its purpose is to deter, courts have recognized exceptions to the application of the exclusionary rule. These are situations where the rule will not apply, even though there has been a violation of the law by the police.

b. Independent Source. Here, the government may argue that the evidence really wasn't the result, or product, of the illegal search. In other words, the government may show that the evidence was not obtained through an exploitation of its earlier illegal actions. In one case, for example, the issue was whether the testimony of a witness was the product of an illegal search. The court found it was not; the witness's identity wasn't tainted because the government was already aware of it, prior to the illegal search. U.S. v. Waller, 3 MJ 32 (CMA, 1977). In other words, the issue is whether or not the discovery of the evidence occurred as a result of the illegal search. If not, the purpose of the exclusionary rule does not call for the exclusion of the evidence. U.S. v. Boisvert, 1 MJ 918 (AFCMR, 1976). Remember, the exclusionary rule bars from trial "evidence obtained either during or as the direct result of an unlawful intrusion." It does not exclude evidence that is obtained independently, or apart from, the illegal conduct. U.S. v. Sowards, 6 MJ 864 (AFCMR, 1978).

In U.S. v. Moreno, 23 MJ 622 (AFCMR, 1986), the court dealt with the problem of an illegal search which was followed by a second, legal, search. In other words, suppose there is an unlawful search. The police later obtain a search warrant and perform a second search, this one being lawful. The second search is, of course, legal, and the evidence will be admissible "as long as the search authorization was based on an independent source of information...The evil which the exclusionary rule is guarding against is the use of illegally obtained information to support a search warrant." There is no problem, then, if the second search is based on information known before the illegal search was conducted. The Supreme Court has similarly held that evidence will not be suppressed if it was seized under a valid search warrant that is based on information the police had PRIOR to an unlawful entry into a residence. In other words, the search warrant was based on information that was "unrelated to the entry and therefore constituted an independent source for the evidence." Under such facts, "the exclusionary rule has no application where the government learned of the evidence from an independent source...None of the information on which the warrant was secured was derived from or related in any way to the initial entry...the information came from sources wholly unconnected with the entry and was known to the agents well before the initial entry. No information obtained during the initial entry or occupation of the apartment was needed or used by the agents to secure the warrant." Segura v. U.S. 82 L.Ed.2d 599 (1984).

In Murray v. U.S., 56 L. W. 4801 (1988), the police placed the defendant under surveillance for drug activities, based on information they obtained from informants. After watching the defendant drive a truck into a warehouse, the police later entered the warehouse (unlawfully) where they found bundles of marijuana in plain view. The police didn't disturb the bundles, but left the premises. They later applied for a search warrant, but did NOT mention the prior illegal entry or anything that they had observed during the illegal entry. When they obtained the warrant, they re-entered the warehouse and seized 270 bales of marijuana. The Supreme Court held:

"..if that later acquisition was not the result of the earlier entry, there is no reason why the independent source doctrine should not apply...So long as a later, lawful seizure is genuinely independent of an earlier, tainted one...there is no reason why the independent source doctrine should not apply."

The government, then, would have to show that the decision to obtain the warrant wasn't prompted by what the police saw during the illegal entry. Also, information unlawfully obtained mustn't have been presented to the judge who issued the warrant. There must be a "genuinely independent" source for the warrant.

c. Inevitable Discovery. The exclusionary rule will not be applied if the government can establish that "the evidence would have been obtained even if the unlawful search or seizure had not been made." (MRE 311(e) 1.) In other words, would the evidence have been discovered lawfully, without reference to the unlawful acts?

In one case, an informant told his commander that a quantity of drugs was stored in a locker at a train station, and that it would be picked up at midnight. The commander authorized the CID agents to go and observe the locker, and to apprehend the accused when he picked up the drugs. Instead, the agents began a search of all of the lockers and found eleven plates of hashish in one of them. They put back one plate, confiscated the rest, and then waited for the accused. Shortly after midnight, he arrived and opened the locker. He was immediately apprehended. The court held that the authorization from the commander was simply to OBSERVE, and not to search any of the lockers. There was, therefore, an illegal, unauthorized search. The court concluded, however, that evidence isn't admissible "where the normal course of police investigation would, in any case, even absent the illicit conduct, have inevitably led to such evidence." The accused "would have been arrested when he arrived at the train station and opened the locker. It was truly inevitable that the hashish would be discovered at that time...the prosecution proved that the seizure of the hashish was inevitable through the exercise of proper police procedures authorized by proper authority, despite the prior illegal search of the accused's locker." U.S. v. Kozak, 12 MJ 389 (CMA, 1982).

For this exception to apply, however, the court explained that the government must show that when the illegal search occurred, "the government agents possessed, or were actively pursuing, evidence or leads that would have inevitably led to the discovery of the evidence and that the evidence would inevitably have been discovered in a lawful manner had not the illegality occurred." In another case which reached the Supreme Court, a 10-year-old girl disappeared on Christmas Eve. The police began a massive search for the body, dividing the area into grids and using 200 volunteers. While the search was in progress, the accused was illegally interrogated. He confessed and led the police to the body. At this point, of course, the search ended. The Court did not apply the exclusionary rule, however since it was inevitable that the body would have been discovered. Had the search not been called off when the suspect took the police to the body, the police would have continued therewith, using the same grid system. They were, in fact, already approaching the area where the body was found. The instructions to those participating in the search were to look in all ditches, all culverts, all roads, all abandoned buildings, and "any other place where a small child could be secreted." The body was found in a ditch along the road. Nix v. Williams, 81 L.Ed.2d 377 (1984).

This exception only applies where the government can clearly establish that the evidence would have inevitably been discovered. U.S. v. Butner, 15 MJ 139 (CMA, 1983). An interesting case is U.S. v. Carrubba, 19 MJ 896 (ACMR, 1985). The accused walked "in to the MP station" and requested that someone take him to retrieve his car, which was off-post. The accused had been stopped by civilian police off-post for driving while under the influence of alcohol, and was apparently still intoxicated. Two military policemen agreed to take him to his car. During the ride, the accused said he had a shotgun and marijuana in his car. One of the officers drove the car back on-post, accompanied by the accused. Upon reaching the MP station, the accused removed a plastic bag containing marijuana from the glove compartment. The MP told him to put the bag away, at which time the accused went to the trunk and tried to open it. The MP opened the trunk for the accused, at which time the accused put the plastic bag into a back pack. The accused then unfolded a towel in the trunk, to reveal a sawed-off shotgun. He refolded the towel and shut the trunk. The MP repeated these facts to his partner and to the desk sergeant. The accused was apprehended and MPI was notified. The MPI agent was advised that the accused had said he had "dope and a sawed-off shotgun" in the car. The accused would not consent to a search of the car, and told the MPI agent to go get a search warrant.

The MPI agent left to get the authorization. As the agent was departing, the accused asked one of the MP what he (the MP) would have done. The MP said he would have cooperated. The accused then consented to the search and the MPI agent was called back (before he ever got the authorization). On appeal the court held that the consent was invalid, due to the accused's intoxication. The evidence was still admissible, however, because the MPI agent "had sufficient probable cause to obtain a search authorization and was actively pursuing such authorization that would have inevitably led to the discovery of the evidence." Under this exception, then, "challenged evidence which is the product of illegal government activity is admissible if the prosecution establishes...that the evidence at issue would inevitably have been discovered by lawful means because of information already in the government's possession or leads actively being pursued by the government." Here, the MPI agent was on his way to get a search authorization when the accused consented. This consent "did no more than hasten the inevitable discovery of the contraband." Had he not consented, the MPI agent would have gotten the search authorization. Thus, even without the consent, the evidence would inevitably have been discovered.

In U.S. v. Haye, 25 MJ 849 (AFCMR, 1988), the court stressed once again that this exception is to be applied "carefully and narrowly." Without such restraint, the doctrine will support almost any supposition or hunch a prosecutor can propose.

d. Good Faith. A third exception to the exclusionary rule is that the search or seizure "resulted from an authorization to search, seize, or apprehend issued by an individual competent to issue the authorization...or from a search warrant or arrest warrant issued by competent civilian authority." For this exception to apply, however, the individual issuing the authorization/warrant must have a "substantial basis for determining the existence of probable cause," and the police who execute the authorization/warrant must have "reasonably and with good faith relied on the issuance of the authorization or warrant." (MRE 311(b) 3.)

In U.S. v. Leon, 82 L.Ed.2d 677 (1984), the police obtained a search warrant which was later held to be invalid due to a lack of probable cause for its issuance. The Supreme Court held that the exclusionary rule is designed to deter the police from breaking the law. It should not be applied to deter reasonable police conduct; indeed, in such a situation, there is nothing to deter. Here, "there is no police illegality," so why deter them from acting reasonably and in good faith? Indeed, the application of the exclusionary rule under such circumstances would not be reasonable. It would be different, of course, if the police obtained the authorization/warrant by deliberately furnishing false information. Also, the exception will not apply if no reasonably well-trained police officer would have relied on the warrant. Stated differently, was the police officer's reliance on the authorization/warrant reasonable? If so, the exception may be applied.

Remember, this is a good faith exception, not a bad faith one. The exception doesn't apply if the police should have known the search to be unlawful. Massachusetts v. Shephard, 82 L. Ed.2d 737 (1984). The Fourth Amendment, of course, prohibits UNREASONABLE searches and seizures. Where the good faith exception applies, the police have acted reasonably. U.S. v. Postle, 20 MJ 632 (NMCMR, 1985). Where the police officer acts reasonably and in good faith, "technical deficiencies as to the establishment of probable cause for the search authorization issued do not require exclusion of the fruits of the search." U.S. v. Queen, 20 MJ 817 (NMCMR, 1985). Again, since the purpose of the exclusionary rule is to deter the police from acting unlawfully, it makes no sense to apply the rule in such cases. U.S. v. Krull, 40 Cr. L. 3327 (1987).

In another case that went to the U.S. Supreme Court, the police officers obtained a warrant to search the person of Lawrence McWebb and "the premises known as 2036 Park Avenue third floor apartment." The police believed that there was only one apartment on the third floor, but there were actually two. Only one, however, was occupied by McWebb. Before getting the warrant, a police officer went to the location and determined that it matched the description given him by an informant. The officer also checked with the gas and electric company, and determined that the third floor was in McWebb's name." The police records pertaining to McWebb showed that he lived at that address. The police were, therefore, reasonable in concluding that McWebb was the only tenant on the third floor.

With the warrant, the police proceeded to the scene. They found McWebb at the scene and used his key to gain entrance to the building. At the top of the third floor, they could look into two rooms (the doors were open). The police, thinking it was part of McWebb's apartment, entered one of the two rooms. After entering, they seized heroin which was in plain view. At this point, however, they suddenly realized that they were not in McWebb's apartment. The Court held that had the police known (or if they should have known) that there were two separate residences on the third floor, they would have been required to exclude the other apartment from the scope of the warrant. They had probable cause to search McWebb's apartment only. The Court, however, "must judge the constitutionality of their conduct in light of the information available to them at the time they acted." Under the facts, if the police knew or should have known of the existence of a separate apartment on the third floor before they entered the other apartment, "they would have been obligated to limit their search to McWebb's apartment." Here, however, the police didn't know, and they made an "honest mistake." The police reasonably thought they were authorized to search the entire third floor, since they thought it all belonged to McWebb. They acted with good faith, and the evidence was admissible. Maryland v. Garrison, 40 Cr. L. 3288 (1987).

In Arizona v. Evans, 63 U.S.L.W. 4179 (1995), the exclusionary rule did not require suppression of evidence seized incident to an arrest resulting from an inaccurate computer where court personnel were responsible for the inaccuracy. In this case, the police did act in good faith and the court personnel were clearly responsible for the error.

Remember, good faith is not equivalent to carelessness or ignorance. The issue is whether a reasonably well-trained police officer would have known the search authorization/warrant was bad. The police, then, are held to a standard of reasonable competency. If a reasonable police officer would have known that the warrant was invalid, there is no good faith. A police officer cannot, therefore, close his eyes to the facts and shield himself with ignorance. The courts will not reward a police officer who fails to know what he reasonably should have known. Malley v. Briggs, 38 Cr. L. (1986).

The best way to avoid problems with the exclusionary rule is simply to comply with the law at all times. The exclusionary rule will only apply where there has been a Fourth Amendment violation in the first place. The exceptions to its application are, then, only applicable in situations where there has been a violation of the law in the first instance. What we will now examine is the substance of the Fourth Amendment itself; i.e., what is a lawful search and what makes a search unlawful. Remember, the Fourth Amendment prohibits searches and seizures that are unreasonable. Also, there is a general preference for the use of a search authorization/warrant. These two themes underlay the entire Fourth Amendment area, and we will continually be coming back to them.

PART C - SEARCHES PURSUANT TO AUTHORIZATION (THE PROBABLE CAUSE EQUATION)

1. General. As we saw earlier, the Fourth Amendment states a general preference for the use of a search authorization/warrant. This is not an absolute rule, however, as there are various situations where the police may act without a prior authorization. We will examine each of them in detail

later. Before doing so, we will first examine the process of obtaining a search authorization/warrant. Remember, a "search authorization" is issued by MILITARY authority, whereas a "search warrant" refers to a search that has been authorized by civilian authorities (MRE 315b). For purposes of the principles which we shall be discussing, the rules underlying both are very similar, and we shall use the term search authorization."

As we look at the specific rules, always keep the general principles in mind. The use of a search authorization is preferred by the courts, as it ensures review by an independent, neutral, and detached individual. In a close case, your obtainment of a prior authorization could be the deciding factor. If you have time, therefore, get the search authorization. It is the safest route to go. Even if it is still possible to get the evidence admitted into court (under an exception to the authorization requirement, or even an exception to the exclusionary rule), the use of a prior authorization will greatly simplify the matter. Also, once you have examined all of the types of searches that are lawful even without a prior authorization, always think: do you meet one of these exceptions? If not, get the prior authorization.

2. Who Can Issue?

a. CONUS. In the military, a search authorization may be issued by "competent military authority." (MRE 315(b) 1.) This includes a military judge and a military magistrate (AR 27-10, paragraph 9-7). It also includes a commander "who has control over the place where the property or person to be searched is situated or found." This is a nondelegable duty. U.S. v. Kalscheuer, 11 MJ 373 (CMA, 1981). Searches conducted off post "normally must be conducted by civilian authorities under the authority of a search warrant." (AR 190-22, paragraph Z-1b.) AR 195-2, paragraph 3-22b, specifically states that CID agents may seek such a search warrant from a civilian judge. This must, however, be coordinated with the civilian prosecutor in advance. Also, when executing the warrant, they "will be accompanied by a civil law enforcement officer having statutory arrest authority."

b. OCONUS. "When the person or property to be searched is located in a foreign country, a search or seizure may be authorized. When the property is located outside of premises controlled by U.S. forces, U.S. 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, paragraph 2-1c.)

3. Procedures for Issuance. A search authorization is based on a finding of probable cause. We will examine this concept in detail shortly. For now, just understand that it is "a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched." (MRE 315(f) 2.) It is a practical, nontechnical standard that involves probabilities, not proof to an absolute certainty or beyond a reasonable doubt. "These are not technical; they are the facts and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. It involves common sense conclusions about human behavior and the assessment of probabilities in particular factual situations." Illinois v. Gates, 76 L. Ed.2d 527 (1983).

A search authorization "may be issued on the basis of a written or oral statement, electronic message, or other appropriate means of communication. Information provided in support of the request for authorization may be sworn or unsworn. The fact that sworn information is generally more credible and often entitled to greater weight than information not given under oath should be considered." (AR 27-10, paragraph 9-8a.) A military "search authorization" is, then, different from a search warrant issued by a civilian judge. U.S. v. Stuckey, 10 MJ 347 (CMA, 1981). Under Rule 41(c)(2) of the Federal Rules of Criminal Procedure, for example, a civilian search warrant must be based on sworn affidavits/testimony.

The military search authorization must particularly describe the place to be searched and the person or things to be seized. A search, then, "must be limited in two ways: to a particular area and to a particular object or objects." U.S. v. Lusk, 21 MJ 695 (ACMR, 1985). Exploratory searches "have long been condemned." The person who executes the authorization and conducts the search should know where he may look, and what he is to look for; and what he may seize. The authorization must "contain at least a description by general terms of the class, or classes, of property to be searched for and seized." U.S. v. Hartsook, 35 CMR 263 (CMA, 1965).

An authorization "should be executed within 10 days after the date of issue." (AR 27-10, paragraph 9-10a.) The information must not be too stale. U.S. v. Johnson, 21 MJ 553 (AFCMR, 1955). "Facts and circumstances which would suffice to constitute probable cause on the date of the happening obviously would lessen with the passage of time. What is sufficient to establish probable cause on one day may not be sufficient to do so on a later date." In other words, the fact that property was in a certain place three weeks ago does not necessarily indicate that it is, there now. Is there, then, any basis for the conclusion that the accused continues to possess it now? If not, the information is stale, and probable cause is lacking. U.S. v. Bright, 2 MJ 663 (AFCMR, 1976).

In terms of staleness, an important issue is the nature of the property. U.S. v. Queen, 26 MJ 136 (CMA 1988). Is it the type of property that would probably have been quickly disposed of, or is it the type the accused would be expected to keep in his home for a long period of time? U.S. v. Lovell, 8 MJ 613 (AFCMR, 1979). In one case, the accused's possession of a substantial amount of hashish justified a reasonable conclusion that it was still there 3 days later. U.S. v. Land, 10 MJ 103 (CMA, 1980). This was not true, however, for a delay involving a month. U.S. v. Crow, 41 CMR 384 (CMA, 1970).

4. The Role of the Commander--Authorization v. Participation. A commander who authorizes a search may observe it. "An otherwise impartial authorizing official does not lose that character merely because he or she is present at the scene of a search or is otherwise readily available to persons who may seek the issuance of a search authorization; nor does such an official lose impartial character merely because the officer previously and impartially authorized investigative activities when such previous authorization is similar in intent or function to a pretrial authorization made by the United States District Courts." (MRE 315d.)

A military commander is "capable of neutrality when he is not actively involved in the investigative or prosecutorial functions...where the military commander becomes personally involved as an active participant in the gathering of evidence or otherwise demonstrates personal bias or involvement in the investigative or prosecutorial process against the accused, that commander is devoid of neutrality...obtaining information to be used as the basis for requesting authorization to search in a law enforcement function and involvement in that information-gathering process would disqualify the commander from authorizing the search." U.S. v. Exell, 6 MJ 307 (CMA, 1979).

The fact that the commander is aware that the suspect has been involved in prior misconduct does not disqualify him. The commander may not, however, authorize a search and then conduct it. Such involvement in the "enterprise of ferreting out crime" is a law enforcement activity. Stated another way, one may not authorize a search "while at the same time performing investigative functions." U.S. v. Forbes, 7 MJ 969 (ACMR, 1979). In one case, the CID called the commander and asked him to come to the accused's room. He did so, and authorized a search of the room. Here, the commander "merely made himself available to the police agents. His accession to the request for his presence simply expedited the application process" and was NOT the same as "participation in the mechanics of the search." U.S. v. Powell, 8 MJ 260 (CMA, 1980).

In another case, the commander knew of a suspect's prior record of misconduct. He also knew the informant, who now told the commander that the suspect was in possession of some drugs. The commander considered the informant to be reliable, based on past experiences wherein the informant had provided him with accurate information. The court held that a commander's possession of prior knowledge about the accused doesn't disqualify him from authorizing a search. Similarly, his possession of prior knowledge about the informant is also permissible. This knowledge, of course, may be used to determine the reliability of the informant. U.S. v. Rushing, 11 MJ 95 (CMA, 1981).

The commander may not, on the other hand, personally direct the investigation and then authorize the search. Engaging in such police activity deprives him of his neutrality. U.S. v. Cordero, 11 MJ 210 (CMA, 1981). A commander cannot be "personally and deeply involved" in the investigative process and also authorize a search. U.S. v. Wallace, 11 MJ 445 (CMA, 1981). In one case, an informant told the commander that some troops had drugs in their room. The commander, having earlier recruited the informant, listened to his story and then had the informant repeat it in the presence of CID agents. The commander then decided to set up a controlled buy. After an undercover purchase by CID was made (using the informant), the commander then went with the agents to the suspect's room, where he authorized a search. Having assisted in conducting the search, the commander discovered drugs which he kept in his possession until arriving at the MP station. Faced with these facts, the court concluded that the commander "was the policeman in charge of the operation." He had recruited the informant, made the decision to proceed with a controlled purchase, assisted in the search, and retained custody of the drugs. The commander, as a result, had disqualified himself from weighing the evidence that he himself had helped to develop. U.S. v. Murray, 12 MJ 139 (CMA, 1981). The commander, then, should avoid getting involved in the "information-gathering process." This includes such things as directing the use of informants, controlled buys, surveillance operations, etc. U.S. v. Ezell, 6 MJ 307 (CMA, 1979).

In another case, an informant had previously given his commander the names of soldiers suspected of using drugs. On one occasion, the informant gave the commander some amphetamines that he said he had bought from two other soldiers. The commander then gave the informant a marked \$5 bill, and instructed him to make another purchase and return immediately. The informant did so, and returned with more drugs, which resulted in the commander authorizing a search of the room. The court held that the commander had gone too far, and had "involved himself in the law enforcement venture of ferreting out evidence of crime." U.S. v. Wenzel, 7 MJ 95 (CMA, 1979). Compare that case with U.S. v. Cuffee, 8 MJ 710 (ACMR, 1979). There, the CID agents came up with a plan for making a controlled buy. They used their informant and money. The commander's presence at the scene of the search which he authorized was held to be permissible. In such a case, the commander didn't conduct the search, but "merely observed the procedures occurring in the barracks and affecting the personnel of his command." He had not actively participated "in the investigative, evidence-gathering enterprise. He neither approved nor directed the use of the informant, the surveillance, (or) the buy."

In summary, the commander "may order an investigation into activities of a suspect." He may not, however, "become personally involved in the actual evidence-gathering process." If he does, "he thereby loses the objectivity and impartiality constitutionally required of an official who authorizes a search based on probable cause." If an application for a search authorization is defective, then, the commander should not himself personally conduct the investigation in order to cure the defects and establish probable cause. If the commander does this, he "leaves the judicial role and undertakes the policeman's." In other words, the commander may authorize the search. The gathering of information to support the probable cause determination, and the actual conduct of the search, should be left to others. U.S. v. Rivera, 10 MJ 55 (CMA, 1980).

5. Probable Cause--What is It?

a. General. As we already have seen, this is a "reasonable belief" that the evidence will be found in the place, or on the person, to be searched (MRE 314(f) 2). It is a nontechnical, common sense standard. Illinois v. Gates, 76 L. Ed.2d 527 (1983).

A probable cause determination may be made on the basis of one's personal observations, or on the basis of hearsay. U.S. v. Edwards, 3 MJ 921 (ACMR, 1977). Hearsay is simply where someone else relays the information to the one who authorizes the search (as opposed to him seeing it for himself). In other words, I didn't see the suspect put the drugs in the trunk of the car--you told me he put them there. Probable cause "is not to be evaluated from a remote vantage point of a library, but rather from the viewpoint of a prudent and cautious police officer on the scene...Only the probability, and not a prima facie showing of criminal activity is the standard." U.S. v. Fisher, 5 MJ 873 (ACMR, 1978). Again, it is a common sense standard. A police officer's affidavit or statement in support of an authorization is "normally drafted by nonlawyers in the midst and haste of a criminal investigation...A grudging or negative attitude by reviewing courts towards warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting." U.S. v. Lovell, 8 MJ 613 (AFCMR, 1979).

In the Lovell case, for example, the court held that this is not the place for technical rules of evidence. Information furnished by a suspect's wife may be used to establish probable cause for a search of the husband's property. Whether or not the wife could testify against the husband at trial (due to the marital privilege) was immaterial.

b. The Role of the Authorizing Official. Usually, probable cause is based on hearsay. In other words, the commander who authorizes the search does not personally see what happened, but is told the facts by someone else. That "someone else" may be an NCO, MPI, CID, an informant, etc. From whatever the source, the commander must get the facts. Why does he conclude that the evidence will be found in the place to be searched? Why is this a reasonable conclusion? The commander must make this determination. It is not enough for him to merely rubber-stamp or ratify someone else's conclusions. The commander is acting in a judicial capacity here, and he cannot abandon the requirements of that position.

In one case, the police officer said, under oath, "I have cause to suspect and do believe that certain merchandise (drugs) is located at the following premises." Here, the police officer may have had probable cause, but that isn't enough. The police must communicate the facts to the commander who authorizes the search. A "mere affirmance of belief or suspicion" is not enough. Nathanson v. U.S. 78 L. Ed. 159 (1933). In another case, the police officer said, "I have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates, other narcotics, and narcotic paraphernalia are being kept" at stated premises. This, too, was insufficient, as it presented no more than "mere conclusions." Aguilar v. Texas, 12 L. Ed.2d 723 (1964). From such general statements, there is no way that the commander could make his own determination. Why is the information reliable? Why is the person credible? No facts are presented that would allow the commander to make such determinations. He is forced, then, to simply rely on the vague, unsupported conclusions of the police. This is not enough, and will not support a search authorization. Remember, the facts must be communicated to the one who authorizes the search. The fact that the MPI or CID agents have the information isn't enough; they must relay it to the commander.

What this requires is that the commander probe and inquire further. As we shall see, the commander must obtain sufficient information so that he can PERSONALLY conclude that the evidence is in the place to be searched. To do this, he must get the facts. Without them, the authorization will be bad, and the evidence will be inadmissible. In U.S. v. Edie, 5 MJ 647 (AFCMR, 1978), the OSI agent "failed to inform the authorizing authority of the identity of the informants or the fact that both had previously made signed, sworn statements." The failure to identify them, or "to in some way establish their reliability" was fatal to the case. Again, the facts must be presented to the commander. He may not simply rely on the investigator's conclusions, but must make "his own independent judgment based on the facts presented to him."

c. The Probable Cause Test--Basis of Knowledge and Reliability. As we have seen, a commander may make a probable cause determination based on his own observations. More frequently, however, it is based on the furnishing of the facts to him. Hearsay information is legally sufficient, but you must be familiar with the applicable standard for weighing it. "Hearsay," you will recall, is simply where I do not see the facts for myself, but someone else tells them to me. In Aguilar v. Texas, 12 L. Ed.2d 723 (1964), the Supreme Court dealt with the problem of an unidentified informant. The Court decided that "although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant...the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, was credible or his information reliable." This is known as the Aguilar 2-prong test. It is an easy framework for evaluating probable cause when the information is furnished by another. It looks at two issues. The first is basis of knowledge, and involves a simple question: How do you know? In other words, how did the informant get his information? Is it based on his observation? Was he there? Did he see it for himself? If not, did someone tell him? Who? Was it the suspect? Is it simply a rumor he is passing on, or is it fact? The second issue is reliability, which involves an equally simple question: Why should I believe you? This looks at the believability of the source of the information. Is he truthful? Why? Has he provided accurate information in the past? How many times? Why do you trust him? Is the information under oath? Is he providing it against his own interests?

The point to keep in mind is that the commander cannot simply accept vague generalities and conclusions. If he is going to act on the basis of information furnished to him, he must be able to independently make the probable cause determination. Without getting the facts, he cannot do so.

The courts have recognized certain categories of persons as being inherently reliable. In U.S. v. Whalen, 15 MJ 872 (ACMR, 1983), the court held that a commander may rely on the opinion of an experienced NCO or officer regarding the detection of the odor of marijuana. "When an experienced noncommissioned officer in a position of responsibility makes a statement to his commander that he has smelled the odor of marijuana," this may be relied on. U.S. v. Cunningham, 11 MJ 242 (CMA, 1981). This is true both for the odor and the appearance of marijuana. U.S. v. Cooper, 14 MJ 758 (ACMR, 1982).

Hearsay information provided by a law enforcement officer is also considered to be reliable. The police may, therefore, act on the basis of information provided by another police officer. U.S. v. Gutierrez, 3 MJ 796 (ACMR, 1977). The arresting officer need not personally observe the facts, and may rely on the information furnished by the other police officers. The issue will be whether, taken as a whole, the police had sufficient information to constitute probable cause. U.S. v. Herberg, 35 CMR 219 (CMA, 1965). In one case, for example, an MP provided information to NIS agents, which resulted in an obtainment of an authorization to search. The commander was told that the informant was an MP. This was sufficient to satisfy the requirement "that the authority ordering the search be apprised of some of the underlying circumstances from which the individual requesting permission to search concluded the informant was credible or his information reliable." U.S. v. Abernathy, 6 MJ 819 (NCMR, 1978).

A complaint from a victim of a crime is also considered to be reliable. U.S. v. Herberg, 36 CMR 219 (CMA, 1965), as is a report from a citizen eyewitness. U.S. v. Gutierrez, 3 MJ 796 (ACMR, 1977). Information from a "good soldier" may also be regarded as reliable. In one case, for example, the platoon sergeant vouched for the soldier's duty performance and personal reliability. U.S. v. Cordero, 11 MJ 210 (CMA, 1981). A soldier's prior good record may also make him reliable. U.S. v. Garay, 2 MJ 460 (ACMR, 1975). The same is true for a report from a "known, reputable member" of the command. U.S. v. Lidle, 45 CMR 229 (CMA, 1974). An important factor is whether the soldier has previously furnished accurate information. If so, such "proven reliability" is sufficient to establish probable cause. U.S. v. Miller, 44 CMR 146 (CMA, 1971). Another important factor is whether the informant's statements were against his own interests: "Common sense in the important daily affairs of life would induce a prudent and disinterested observer to credit these statements. People do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions. Admissions of crime...carry their own indicia of credibility--sufficient at least to support a finding of probable cause." U.S. v. Harris, 29 L. Ed.2d 723 (1971).

Victims or eyewitnesses, as we have seen, may be relied upon. U.S. v. Ozanich, 27 MJ 585 (AFCMR, 1988). Frequently, such people have not furnished information to the police before and are, in effect, previously unknown to the police. Unless they are presumed reliable, the police could not act on the basis of eyewitness reports. This would simply produce an unreasonable result. U.S. v. Burden, 5 MJ 704 (AFCMR, 1978). Where a soldier "was not a faceless or anonymous informant," and where "he gave his information in the presence of an officer of his unit," this was deemed to have a "truth-telling effect." U.S. v. Land, 10 MJ 103 (CMA, 1980). There is a degree of accountability in a military environment that is unparalleled in civilian society." Consequently, where his identity and organization are known, he is in a poor position to fabricate with impunity." This accountability is sufficient to make him reliable. U.S. v. Tipton, 16 MJ 268 (CMA, 1983).

Keep in mind that the overall issue is one of reasonableness, evaluated under the totality of the circumstances. Remember, it is not a mathematical test, and involves no rigid formula. In one case, for example, there were two informants who provided information. Neither was by itself sufficient to satisfy both parts of the Aguilar test (basis of knowledge and reliability). Each provided only one-half of the test. Taken together, however, since each one matched the details of the other, the "interlocking of details in the accounts substantially reduces the likelihood that each informer was simply purveying unreliable gossip." U.S. v. Barton, 11 MJ 230 (CMA, 1981). Together, then, they constituted probable cause.

d. The Probable Cause Test--Corroboration. Sometimes, it is not possible to satisfy both parts of the Aguilar test. Sometimes, it is not possible to fulfill either. As an example, take the case of an anonymous tip. Here, we may have no basis of knowledge, and we have no reliability. Without knowing the source of the information, we cannot ask him any additional questions. This, however, is not a totally uncommon situation, and the police frequently receive such tips. It is important to understand how probable cause can be established, in the face of this sort of information. It also provides further understanding of just what probable cause is. Remember, we are looking at a reasonable belief, evaluated in the context of all the information provided and the realities of everyday life and common sense.

In one case that went to the U.S. Supreme Court, a named informant had worked as such for approximately six months. His previously-furnished information (for which he had been paid) was always accurate. On September 3, he told the police that a person named Draper had recently moved to Denver, and was selling narcotics. On September 7, he told the police that Draper had gone to Chicago the day earlier (September 6), and was bringing back 3 ounces of heroin by train, on the morning of either September 8 or 9. The informant described Draper as a Negro of light complexion, 27 years of age, 5 feet, 8 inches in height, 160 pounds, wearing a light-colored raincoat, brown slacks, and black shoes. He was further described as carrying a tan zipper bag. The informant stated that Draper "walked real fast." On the morning of September 9, the police observed a train arrive in Denver from Chicago. A person matching the above physical description and wearing the clothing stated by the informant got off of the train, carrying a tan zipper bag. He walked real fast. The police apprehended him. He was found to be carrying heroin. Did the police have probable cause for the apprehension?

In effect, through their own observations, the police had now corroborated, or substantiated/verified, the information provided by the informant. Of the information provided, the following had been substantiated:

FACTS

Train arrive in Denver
From Chicago
Morning of 8 or 9 September
Physical description (height, weight)
Light-colored raincoat
Brown slacks
Black shoes
Carrying a tan zipper bag
Walk real fast
Carrying 3 ounces of heroin

VERIFIED

+
+
+
+
+
+
+
+
+
?

The problem was that the informant was reliable (as shown by his past record of furnishing reliable information), but the police knew nothing about his basis of knowledge. How did the informant know that Draper would be bringing the heroin back with him? Nobody asked. Although both parts of the Aguilar test (basis of knowledge and reliability) were not, therefore, satisfied, was there probable cause, considering the overall totality of the circumstances? The Supreme Court said yes: "The information given to narcotics agent Marsh by (the informant) may have been hearsay to Marsh, but coming from one employed for that purpose and whose information had always been found accurate and reliable, it is clear that Marsh would have been derelict in his duties had he not pursued it. And when, in pursuing that information, he saw a man, having the exact physical attributes and wearing the precise clothing and carrying the tan zipper bag...alight from one of the very trains from the very place stated...and start to walk at a "fast" pace toward the station exit, Marsh had personally verified every facet of the information given him by (the informant) except whether (Draper) had accomplished his mission and had the 3 ounces of heroin on his person or in his bag. And surely, with every other bit of (the informants) information being thus personally verified, Marsh had reasonable grounds to believe that the remaining unverified bit of...information--that Draper would have the heroin with him--was likewise true."

The Court explained that "in dealing with probable cause, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act...Probable cause exists where the facts and circumstances within the arresting officers' knowledge and of which they had reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." Draper v. U.S., 3 L. Ed.2d 327 (1959).

In Draper, then, the informant had met only one part of the Aguilar test. He was reliable, but the police didn't establish his basis of knowledge. They did, however, corroborate, or verify, the information provided by the informant. This was sufficient to constitute probable cause. Based on this case, if either of the two parts of the Aguilar test (basis of knowledge and reliability) are weak or absent, corroboration can save the case. Taken together, the information may be sufficient to constitute probable cause. Suppose, however, that BOTH parts are missing. In other words, what if we lack

BOTH basis of knowledge and reliability? Can corroboration save a case such as this? In Illinois v. Gates, 76 L.Ed.2d 527 (1983), the police department of Bloomingdale, Illinois, received the following anonymous letter on May 3, 1978:

"This letter is to inform you that you have a couple in your town who strictly make their living on selling drugs. They are Sue and Lance Gates. They live on Greenway, off Bloomingdale Rd., in the condominiums. Most of their buys are done in Florida. Sue, his wife, drives their car to Florida, where she leaves it to be loaded up with drugs, then Lance flies down and drives it back. Sue flies back after she drops the car off in Florida. May 3, she is driving down there again and Lance will be flying down in a few days to drive it back. At the time Lance drives the car back, he has the trunk loaded with over \$100,000.00 in drugs. Presently they have over \$100,000.00 worth of drugs in their basement. They brag about the fact they never have to work, and make their living on pushers. I guarantee if you watch them carefully, you will make a big catch. They are friends with some big drug dealers, who visit their house often."

The anonymous letter, standing alone, was not enough to give the police probable cause for a search. It established neither basis of knowledge nor reliability: "Standing alone, the anonymous letter would not provide the basis for a magistrate's determination that there was probable cause to believe contraband would be found in the Gates' car and home. The letter provided virtually nothing from which one might conclude that its author is either honest or his information reliable; likewise, the letter gives absolutely no indication of the basis for the writer's predictions regarding the Gates' criminal activities. Something more was required, then, before a magistrate could conclude that there was probable cause to believe that contraband would be found in the Gates' home and car." The extra "something" that could strengthen this case was the element of corroboration. The overall issue is whether the magistrate had a substantial basis for crediting the information. Considering all of the information (to include the informant's basis of knowledge and reliability), is there a "fair probability" that contraband or evidence of a crime will be found in a particular place? Of the two elements of the Aguilar test (basis of knowledge and reliability), "a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." In such a situation, such matters as reliability and basis of knowledge "are all highly relevant" but are not entirely separate and independent requirements to be rigidly exacted in every case. Instead, "they should be understood simply as closely intertwined issues that may usefully illuminate the common sense practical question of whether there is probable cause."

In the Gates case, the police checked the facts and first verified that Sue and Lance Gates lived in Bloomingdale. They also discovered that "L.

Gates" had an airline reservation for West Palm Beach, Florida, leaving May 5, at 4:15 p.m. Surveillance by the authorities in Florida revealed that "L. Gates" departed the flight and took a taxi to a Holiday Inn. He went to a room registered to a "Susan Gates." At 7 a.m. the next morning, Mr. Gates and an unidentified woman left the hotel in a Mercury bearing Illinois license plates. They drove northward on an interstate used by travelers heading for the Chicago area. The license number was checked, and the car belonged to Gates. In essence, then, the police had corroborated the details provided by the letter. Of the facts provided, the following had been substantiated:

<u>FACTS</u>	<u>VERIFIED</u>
Sue and Lance Gates live in Bloomington	+
Lance will fly to Florida	+
in a few days	+
Sue will drive to Florida	+
on May 3	+
Lance will drive car back to Illinois	+
Sue will fly back to Illinois	-
Car will be loaded with drugs	?
Drugs kept in basement of home	?

This was similar to the Draper case, but there wasn't a 100 percent match. Sue did not fly back to Illinois (as the informant stated she would), but drove with her husband. Overall, however, there was plenty of corroboration. Probable cause, remember, is a "practical, common sense decision." Massachusetts v. Upton, 80 L.Ed.2d 721 (1983). The Gates case, then, shows the "value of corroboration of the details of an informant's tip, through independent police work." The Supreme Court noted that Florida is a well-known source of narcotics. Also, the brief, overnight stay and return in a car waiting in Florida was suggestive of a prearranged drug trip. Corroboration, even of details that were noncriminal in and of themselves, saved the case. "It serves to reduce the chances of this being merely a reckless or fabricated tale, and provides a basis for crediting the information." In Gates, it created a "fair probability" that the informant got the facts from Gates himself. The point to remember is that a weak case (or an insufficient one) can be made strong through corroboration. If the police can substantiate some of the details of the informant's tip, this fact is extremely important. If either (or both) part of the Aguilar test is lacking (basis of knowledge and reliability), corroboration can fill in the gap. The police, through a little independent work, can take a bad case and make a good one out of it.

The military court decisions follow the same pattern, also noting that "probable cause could not be determined in a mechanical way." Instead, "the totality of the circumstances must be considered." U.S. v. Ozanich, 27 MJ 585 (AFCMR, 1988). The informant's reliability and basis of knowledge are clearly extremely important factors. U.S. v. Moore, 23 MJ 295 (CMA, 1987). The element of corroboration is, likewise, critically important. In one case, informants told CID agents that the accused and a fellow soldier (SGT Screen) were selling drugs. An informant said he personally negotiated a purchase from the accused and SGT Screen's wife. Also, the accused was present in SGT Screen's home when a controlled purchase was made. Additionally, the CID had placed SGT Screen's home under surveillance for 24 hours, and had observed the accused entering and departing the home on numerous occasions. Based on this, the agents apprehended the accused. Was there probable cause?

The court said yes, explaining that the standard requires "only the probability" of criminal activity, which "is much less rigorous" than the standard governing the admissibility of evidence at a court-martial. Also, the issue is "not to be confined...by restrictions on the use of their common sense." Overall, the issue is "whether such (a police officer) in the particular circumstances, conditioned by his observations and information, and guided by the whole of his police experience, reasonably could have believed that a crime had been committed by the person to be apprehended." Here, the information led to an apprehension, as opposed to a search. The probable cause determination/standard for authorizing a search "has been adopted by the military to apply equally in evaluating probable cause to apprehend." Under the facts of this case, "the reliability of the informer's information...when tested and interpreted in a common sense and realistic fashion, without applying the technical requirements of elaborate specificity once exacted...is...established by sufficient corroboration." U.S. v. Fisher, 5 MJ 873 (ACMR, 1978).

6. The Search of a Private Residence--the Authorization/Warrant Requirement. An apprehension requires probable cause, which (as we have seen) is the same standard as that applicable to the authorization of a search. An accused may be apprehended in a public place without a prior search/arrest authorization (RCM 302(e) 1). The same is true for an apprehension of the accused outside of a private residence. U.S. v. Davis, 13 MJ 671 (AFCMR, 1982). Entry into a private dwelling, however, generally requires a prior authorization. There are some exceptions to this general rule that we will examine later. For now, simply understand the basic rule. The military rule (RCM 302(e) 2) is taken from the U.S. Supreme Court's decision in Payton v. New York, 63 L. Ed.2d 639 (1980). There, the Court held that "the Fourth Amendment...prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest."

This is a reflection of the concept that "the home is one's castle." The physical entry into a person's home "is the chief evil against which the wording of the Fourth Amendment is directed." Without some sort of exigent circumstances (emergency), entry into a private residence is prohibited without a prior authorization. Welsh v. Wisconsin, 80 L. Ed.2d 732 (1984). The next question, then, is: What constitutes a "private residence?"

RCM 302(e)(2) defines a "private dwelling" to include 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." The term "does not include the following, whether or not subdivided into individual units: living areas in military barracks, vessels, aircraft, vehicles, tents, bunkers, field encampments, and similar places."

In U.S. v. McCarthy, 38 MJ 398 (CMA 1993), a warrant was not required to apprehend the accused in his military dormitory room. Under the Fourth Amendment and RCM 302(e)(2), an apprehension warrant or authorization is only required if the apprehension occurs in the "home." A barracks room is not equivalent to a home. The precedential value of this case is not entirely clear. Commanders and law enforcement personnel should consider the effect the "single soldier" initiative will have upon a soldier's reasonable expectation of privacy in his or her barracks room. The administration of this program, unfortunately, is not uniform and varies from installation to installation. There are no cases on this issue at present.

In U.S. v. McCormick, 13 MJ 900 (NMCMR, 1982), NIS agents apprehended the accused in his own room in the Bachelor Enlisted Quarters (BEQ). The court ruled that military authorities may enter barracks and berthing areas, without arrest authorizations specifically related to such areas, for the purpose of effecting the lawful apprehension of persons subject to military authority and for the purpose of apprehending those persons who, while not subject to military jurisdiction under the Code, are properly the subject of the commander's concern for the safety of his command." A barracks, then, is not a private dwelling. If the authorities have probable cause, a soldier may be apprehended in the barracks without a prior authorization. This was held to be true regardless of the way the building was designed, and whether or not it had individual rooms. The rule, then, is that "absent exigent circumstances, appropriate authorization by a responsible commander based upon probable cause must be obtained before a private dwelling may be entered to make an arrest, even though the person entering possesses authority to arrest and has probable cause to do so." U.S. v. Jamison, 2 MJ 906 (ACMR, 1976). In U.S. v. Mitchell, 12 MJ 265 (CMA, 1982), the rule was applied to an apprehension of a soldier in an off-post apartment overseas. The same is true for a CONUS apartment, both being treated as "private dwellings." U.S. v. Baker, 14 MJ 602 (AFCMR, 1982).

In U.S. v. Ayala, 22 MJ 777 (ACMR, 1986), the court held that this rule applies to on-post family quarters, explaining that it is "limited in its military application to circumstances where the service member's apprehension occurs within a private dwelling or residence." In this case, the accused was apprehended at the Ivy Inn, which was an on-post government facility operated as a guest house. It was handled similar to a hotel/motel. The fact that maids could enter to clean the room (as could maintenance personnel) did not mean that the POLICE could do so. The court explained that only on-post "motel/hotel-type accommodations" would be equated with a private dwelling.

Some older cases stated that a soldier does have a reasonable expectation of privacy in a private BOQ room (Bachelor Officers' Quarters). An example is U.S. v. Hines, 5 MJ 916 (ACMR, 1978). It is not, therefore, a clearly decided issue. U.S. v. Mitchell, 12 MJ 265 (CMA, 1982). While the authorization requirement applies to a private residence, the matter of private rooms in the barracks has not been clearly decided. U.S. v. Davis, 8 MJ 79 (CMA, 1979). In the McCormick case, the Navy Court of Military Review ruled that the BEQ was not the equivalent of a private dwelling. It is not clear just what the Army Court of Military Review would do in such a situation. Until the matter is clarified by the appellate courts, consult with JAG before acting in this area. If you have time, get a prior authorization. Remember, this is always the safest way to go.

In Michigan v. Summers, 69 L. Ed.2d 340 (1981), the Supreme Court held that when the police execute a warrant to search a private residence, they can detain the occupants thereof: "A warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." Also, "when an apprehension takes place at a location in which other persons reasonably might be present who might interfere with the apprehension or endanger those apprehending, a reasonable examination may be made of the general area in which such other persons might be located." (MRE 314(g) 3.) This does not, however, by itself, automatically justify apprehending other people who happen to be present. Remember, Michigan v. Summers, 69 L. Ed.2d 340 (1981), authorized the police to detain the occupants during the search. There is a "legitimate law enforcement interest in preventing flight in the event that incriminating evidence is found." Also, there is "the interest in minimizing the risk of harm to the officers." As stated, this does not mean that everyone present may be apprehended.

In Ybarra v. Illinois, 62 L. Ed.2d 238 (1979), the police were executing a search warrant in a tavern. The warrant said they could search the tavern and the bartender for "evidence of the offense of possession of a controlled substance." The police did a pat down "search for weapons" of all customers who were present at the time, amounting to approximately 13 people. On one of the customers they found heroin. Here, the police had no probable cause to search these people, and they "had no reason to believe that he was about to commit any offense." He had made no movements that showed he was going to commit any crime, or which showed he was trying to conceal any contraband. Also, he said nothing suspicious. The police, then, "knew nothing" about this customer, "except that he was present." Faced with these facts, the Supreme Court ruled that a person's mere presence to others who are suspected of criminal activity "does not, without more, give rise to probable cause to search that person...a search or seizure of a person must be supported by probable cause particularized with respect to that person." Each customer, then, has a constitutional protection. Here, then, the warrant did not authorize a search of these other people: "It follows that a warrant to search a place cannot normally be construed to authorize a search of each individual in that place."

In this case, then, the police lacked probable cause to apprehend this particular customer, or to search him. Also, they had no reasonable belief that he was armed and dangerous. They didn't recognize him as a person with a prior criminal history, and had no particular reason to believe he might be inclined to assault them. He acted in a nonthreatening manner, his hands were empty, and he made no gestures indicating he intended to assault them. In short, the police could not state any facts which would have justified a belief that he was dangerous. He was simply a customer who happened to be there. The search of his person was, therefore, illegal.

PART D - EXCEPTIONS TO THE AUTHORIZATION/WARRANT REQUIREMENT

1. General. A search authorization/warrant is not ALWAYS required. The general rule is to get one if it is feasible to do so. The courts have recognized situations in which the police may conduct searches/seizures without a prior authorization. You must, therefore, understand what these exceptions are and how they apply. They are set forth in MRE 314 and MRE 315(g). The exceptions are the result of the courts' recognition of the practical difficulties which confront our police on the street, and also reflect common sense solutions to some very real problems.

2. Consent.

a. General. "Searches may be conducted of any person or property with lawful consent." (MRE 314(e) 1.) U.S. v. Ward, 12 MJ 846 (ACMR, 1982), involved a search of family quarters that was done without a prior authorization. As we have seen, this is not lawful (in the absence of some exigency, or emergency). Here, however, the court decided that the accused had consented to the search. Consent, then, is a recognized exception to the authorization/warrant requirement.

b. What is consent? Consent "must be given voluntarily. Voluntariness is a question to be determined from all the circumstances...Mere submission to the color of authority of personnel performing law enforcement duties or acquiescence in an announced or intended purpose to search is not a voluntary consent." (MRE 314(e) 4.) Consent "must be shown by clear and convincing evidence." (MRE 314(e) 5.) In one case, for example, the accused had been in a car accident. He was both intoxicated and injured. The court concluded that the government had not shown the accused to even understand what he was doing. Consequently, the government was unable to prove that he had consented to a search. U.S. v. Cockerm, 15 MJ 879 (ACMR, 1983).

A person may consent even though he is under apprehension. U.S. v. Decker, 37 CMR 17 (CMA, 1966). The issue is whether consent is the product of free will, or the result of coercion, threats, or other improper influences. U.S. v. Childress, 2 MJ 1292 (NCMR, 1972). Custody does not, by itself, prevent a finding of consent. The issue, remember, is whether it is an act of free will. In other words, does the accused have the capacity to exercise a free choice? Was there any coercion? The mere fact that an officer, even the accused's commander, is the one who asks for consent, does not by itself constitute coercion. U.S. v. Wallace, 11 MJ 445 (CMA, 1981). The consent must, of course, be "freely and voluntarily given," which is an issue to be determined from examining all of the surrounding circumstances. U.S. v. Middleton, 10 MJ 123 (CMA, 1981).

In U.S. v. Jenkins, 24 MJ 846 (AFCMR, 1987), the court upheld a finding of consent. The accused argued that the police were themselves nonthreatening, but said that the presence of a drug detection dog was a "menacing threat." The dog handler testified that it was a nonaggressive dog, and the court found no evidence of coercion, either actual or implied.

The mere submission to authority is not consent. U.S. v. Gillis, 8 MJ 118 (CMA, 1979). Although an individual may voluntarily give up his Fourth Amendment protection, it is not enough if he simply "acquiesced or submitted to the agents' claim of authority." U.S. v. Mayton, 1 MJ 171 (CMA, 1975). In one case, the police were let into a home by the suspect's 66-year-old grandmother. They told her they had a warrant, which wasn't true. Their subsequent claim that she "consented" to their entry was not valid. What existed was mere submission or acquiescence to their authority: "When the law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion...Where there is coercion, there cannot be consent." Bumper v. North Carolina, 20 L. Ed.2d 797 (1968).

In another case, an MP said, "Good morning, sir. I am making a search of vehicles. Would you step outside and open up the trunk?" This, too, was not a valid consent. The MP was polite, but had announced that he was making a search. This was, then, an implicit show of authority, so the search was the result of coercion, not consent. U.S. v. Chase, 1 MJ 275 (CMA, 1976). Where the suspect is given no option, the result will be deemed a acquiescence, not consent. U.S. v. White, 27 MJ 264 (CMA 1988).

What if the suspect asks what will happen if he refuses to consent? Can you tell him that, in such an event, you will apply for a search authorization? In U.S. v. Rushing, 38 CMR 96 (CMA, 1967), the court held that such a statement "is nothing more than the statement of an intention to follow a legal course of action," and that it was not coercive. The mere fact that the suspect believes that "a warrant may and will be secured" does not invalidate the consent. U.S. v. Marrelli, 15 CMR 276 (CMA, 1954). Consent may still be valid, even if the suspect is told that if he doesn't consent, an authorization WILL be obtained. U.S. v. Nicholson, 1 MJ 616 (ACMR, 1975). It is, however, preferable to simply state you will APPLY for one, and not announce that you WILL GET ONE.

Consent "which is the product of misrepresentation, fraud, trickery, or deception is not voluntary" and therefore renders inadmissible any evidence which is obtained thereby. U.S. v. Kennedy, 50 CMR 1 (AFCMR, 1975). "Consent is not free or voluntary when it is acquired by trick or deceit." U.S. v. Holler, 43 CMR 461 (AFCMR, 1970). There is no requirement to tell a suspect what you are looking for. U.S. v. Kennedy, 50 CMR 1 (AFCMR, 1975). If he asks, however, do not deceive him. Fraud will prevent a finding of a valid consent.

Relevant factors in determining the issue of consent include the issue of custody, the length and tone of any interrogation, the presence of any threats, and the age/background of the accused. Also, did the accused actually assist in the search, such as by helping to unlock the trunk of his vehicle? U.S. v. Decker, 37 CMR 17 (CMA, 1966). Overall, what is needed is an "uncoerced election to grant the license to search." Asking a suspect to hand over the keys to his car trunk was not consent. U.S. v. Mota Aros, 8 MJ 121 (CMA, 1979). In one interesting case, the accused's commander went with the military police to the accused's barracks. He was also accompanied by a supply sergeant who was equipped with a sledgehammer and boltcutters. The commander asked the accused for permission to search his locker, adding the statement, "with or without your consent, it will probably be opened anyway." The court found that there was no consent. Indeed, the commander had stated that the locker would be opened even without consent. This, along with the presence of the supply sergeant and his equipment, "was unlikely to cause the accused to believe that his refusal to consent to the search would be effective." U.S. v. Vasquez, 47 CMR 795 (CMA, 1973).

The suspect needn't be advised that he has a right to refuse consent. Schneckloth v. Bustamonte, 25 L. Ed.2d 854 (1978). It is a relevant factor, along with all other surrounding circumstances. It is not, however, necessary to a finding of consent. U.S. v. Barden, 9 MJ 621 (ACMR, 1980). A suspect, then, may consent even if he is unaware of his right to refuse to do so. Article 31 warnings also are not required, since "consenting to a search is not a statement within the meaning of Article 31." U.S. v. George, 9 MJ 607 (ACMR, 1980). Consent to a search is not considered to be a form of interrogation. U.S. v. Morris, 1 MJ 352 (CMA, 1976). The consent "is by itself in no way incriminating. It relates only to the preliminary question of the lawfulness of the search." U.S. v. Insani, 28 CMR 85 (CMA, 1958). It is, again, a relevant factor in the totality of the circumstances surrounding the alleged consent. U.S. v. Stoecker, 17 MJ 158 (CMA, 1984). Since it is not a form of interrogation, a suspect who invokes his right to remain silent and who refuses to answer questions may still be asked for his consent to a search. U.S. v. Roa, 20 MJ 867 (AFCMR, 1985).

c. Scope of consent. The scope of the consent search may be limited. If you say you are looking for electrical equipment and the suspect consents to a search, this will only authorize you to look for the equipment, and only in the places where you may reasonably expect to find it. It will not authorize you to search in small containers that couldn't reasonably be expected to hold the equipment. U.S. v. Stoecker, 17 MJ 158 (CMA, 1984). This would not be an issue if the investigator didn't identify the object of the search. In other words, if you simply get consent to search "a car," you are not limited to just a certain part of the car. Also, remember that there is no legal requirement for you to state what you are looking for. If the suspect asks, of course, you cannot deceive him, but must tell him. Remember, though, that doing so will limit the scope of the search to what you tell him you are looking for.

Also, consent "may be limited in any way by the person granting the consent, including limitations in terms of time, place, or property, and may be withdrawn at any time." (MRE 314(e) 3.) Upon withdrawal, the consent will no longer support a subsequent search. Also, note that the consent may be withdrawn "for any reason, even while a search under it is in progress." U.S. v. Castro, 48 CMR 782 (CMA, 1971). If an accused withdraws his consent in the middle of a search, the search cannot proceed, at least not on the basis of consent. U.S. v. Cady, 47 CMR 345 (CMA, 1973).

d. Who can consent? A person may, of course, consent to a search of his own property. He may also consent to a search of property "when the person exercises control over that property." (MQ 314(e) 2.) A driver of a borrowed vehicle could consent to a search of the car, even though he isn't the "owner" of it. Remember, the issue is control. A landlord cannot consent to a search of a tenant's apartment. Stoner v. California, 376 U.S. 731 (1969). In one case, the accused was living off post in another's apartment. His mistress (who owned the apartment) invited the police in and consented to a search. In the bedroom, the police found various items of stolen military property. The court held that "the Fourth Amendment does not forbid police officers to enter a house into which they have been

invited by a person who lives there." This was, of course, her apartment. She could, therefore, allow anyone to enter, and could "invite them to any room over which she exercised dominion and control." Here, then, she had control over and access to all of the areas into which she had escorted the police. U.S. v. Mathis, 37 CMR 42 (CMA, 1967). She could not, however, have consented to a search of a place that was strictly personal to the accused, and over which she had no right of control (assuming that there had been such a place). The rule is that consent "may be obtained not only from the accused himself, but also from the third parties who possess common authority over or other sufficient relationship to the premises or effects sought to be inspected." As an example, a husband and wife can generally consent to a search of one another's property. The fact that the wife does not keep her property in her husband's areas "does not mean that she was precluded from using them, at least in the absence of a specific prohibition to that effect. A wife, then, can consent to a search of her husband's desk and filing cabinet. One does not have a reasonable expectation of privacy against his wife." U.S. v. Curry, 15 MJ 701 (ACMR, 1983). The facts of a specific case, of course, will determine whether or not a spouse has sufficient control over the premises in question. U.S. v. Clow, 26 MJ 176 (CMA 1988). One may exercise sufficient control even though the marriage is a "stormy one." U.S. v. Fish, 25 MJ 732 (AFCMR 1987), aff'd 27 MJ 183 (CMA 1988).

Even a person with apparent authority may consent to a search under appropriate circumstances. In U.S. v. White, 40 MJ 257 (CMA, 1994). An Airman who shared an off-base apartment with accused had apparent authority to consent to a search of accused's bedroom. The Airman told police that the apartment occupants frequently borrowed personal property from each other and went into each other's rooms without asking permission. CMA upheld the search based upon the apparent authority theory despite the fact that the occupants had only shared the apartment for two weeks and there was insufficient time to establish common authority over accused's bedroom. At trial, the military judge had ruled that Air Force investigators "reasonably believed" that the roommate had authority to consent to the search of accused's room.

There is no requirement that consent to a search be reduced to writing. In the case of a husband and wife, it would seem prudent to get it in writing. This will make the consent easier to prove in court, should they later decide to deny that consent had been given. It is not, however, a legal requirement. As a practical matter, written consent may be easier to establish than oral consent. Both, however, are equally valid.

In another case, the accused was going to PCS, so he stored some of his personal property in a friend's garage. The garage "was used for their mutual benefit" and the owner of the garage "retained the ultimate control over the garage and the positioning and disposition of the property stored therein...where two or more persons have equal rights to use or occupancy of premises, either may give consent to search, and both take the risk that the other will permit third parties to inspect the premises." U.S. v. Boyce, 3 MJ 711 (AFCMR, 1977).

In another case, the accused's girlfriend was staying at a friend's apartment. The friend authorized a search of his apartment, which led to the recovery of a stolen TV which the girlfriend was keeping for the accused. Here, the apartment owner "retained his proprietary rights in the room occupied by the accused's girlfriend...he was able to enter the room at various times and to view its contents upon his initiative... (he) was within his rights to authorize and consent to the search." Also, there was no evidence to show that the owner had ever given up any of his rights over the room. Remember, it was HIS apartment, and he was simply letting someone else stay with him. He still retained control over the apartment, and gave up no rights over the room. U.S. v. Yarbrough, 48 CMR 448 (NMCMR, 1974). This is not the same as a landlord-tenant situation, where the tenant is given exclusive control over the residence, or at least some proprietary rights. Remember, a landlord or hotel owner does not have the right to consent to a search of a tenant's room. Stoner v. California, 11 L. Ed.2d 856 (1964).

A roommate, then, could consent to a search of parts of a room over which he exercises control. Depending on the facts, this could include the entire room. It would not, however, include private areas of the other person over which he has no right of control. In cases where it is not clear who has control (and who can, therefore, consent to a search of a given area), it is safest to go ahead and get a search authorization. A casual visitor to a home will generally lack the authority to consent to a search of that home. Such a person would lack the necessary degree of control. The same is true for minor children, as well as a babysitter. Relying on "consent" from these people is unnecessarily risky, and should be avoided.

One of the most unusual cases involving a consent problem is U.S. v. Gorshe, 6 MJ 640 (NCOMR, 1978). There, a soldier was asked for consent to a search of his locker. He said he had no objection, and attempted to open a combination lock, but couldn't do so. When the lock was then cut off, the locker was opened and found to contain 850 grams of marijuana. At this point, the soldier said it wasn't his locker...and it wasn't! As it turned out, it was not his locker, but it belonged to another soldier. The issue, then, was whether there was a valid "consent" search of this "other soldier's" locker. Under these unusual facts, the first soldier had no interest in this locker. Another soldier had "rightful and exclusive present occupancy of the locker." Consequently, the one who consented had no authority to do so, and the search was unlawful.

3. Search Incident to Apprehension.

a. What is an apprehension? Before examining the specific rule (that a lawful apprehension carries with it the right to search the person apprehended), we need to pause for a moment and examine what constitutes an "apprehension." It is the "equivalent of arrest," and "is the taking of a person into custody." (RCM 302(a) 1.) It "involves substance rather than form. No specific words or any words at all need be used." U.S. v. Repp, 23 MJ 589 (AFCMR, 1986). Telling a suspect to freeze and get up against a wall is sufficient. U.S. v. Walker, 13 MJ 982 (ACMR, 1982). It is normally done "by clearly notifying the person to be apprehended that the person is in custody. This notice should be given orally or in writing, but it may be implied by the circumstances" (MRE 302(d) 1.)

b. Who may apprehend? Any person subject to the UCMJ may be apprehended by a military "law enforcement officer." This is defined to include "security 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." If an enlisted person apprehends a commissioned or warrant officer, he "should make an immediate report to the commissioned officer to whom the apprehending person is responsible." (RCM 302(b) 1.) Also, commissioned, warrant, petty, and noncommissioned officers may apprehend persons subject to the UCMJ. (RCM 302(b) 2.) Noncommissioned and petty officers not otherwise performing law enforcement duties should not apprehend a commissioned officer unless directed to do so by a commissioned officer or in order to prevent disgrace to the service or the escape of one who has committed a serious offense. Remember, an apprehension must be based on probable cause. It does not require a prior authorization, however, unless it is made in a "private dwelling."

Persons subject to the UCMJ, then, may be apprehended by "law enforcement officials." This term includes civilian personnel who are acting in such a capacity (DAJA-AL 1979/3255). What about civilians who commit crimes on post? Is there any authority to apprehend them? AR 600-40, paragraph 3, refers to a "citizen's arrest power." It is far better, however, not to rely on this. States differ in terms of their "citizen's arrest power." Also, a police officer acting under such a power is doing so in a private capacity. Consequently, he may be subject to a lawsuit. A better basis for apprehending civilians on post is under the "agency" concept.

The installation commander is responsible "for maintenance of law and order at the installation." (AR 210-10, paragraph 2-9.) "When a military policeman, acting as the agent of the installation commander, restrains or apprehends a civilian for an on-post offense, the military policeman is acting in an official capacity." (DAJA-AL 1979/2975.) Further, "DA civilian law enforcement personnel and guards, when authorized by the local commander, can apprehend and detain DOD civilian employees and non-DOD civilians when on post and for offenses committed on post under the general authority of the installation commander to maintain law and order on the installation."

Further, "the authority of contractor personnel to apprehend...individuals can be ascertained only by examining the contract under which such personnel are performing. A particular individual contract could be drafted to provide authority for contractors to take actions necessary to protect government property under their control." (DAJA-AL 1979/3255.) Also, AR 190-56, paragraph 5-2(a), states that "federally employed Army civilian police and security guards, performing law enforcement and security duties authorized by the installation commander, may apprehend any person found on the installation for offenses committed on post that are felonies, breaches of the peace, or otherwise a threat to property or welfare."

c. Search incident to apprehension--What may be searched? "A person who has been lawfully apprehended may be searched." (MRE 314(g) 1.) The basis for the search is the apprehension. In Chimel v. U.S., 39 L.Ed.2d 686 (1969), the Supreme Court held: "When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction." Consequently, a person who has been apprehended is subject to a full search of his person, regardless of the nature of the offense for which he was apprehended. Once the suspect has been lawfully apprehended, "a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search." Accordingly, the police officer need not specifically fear that the subject is actually armed or in possession of contraband. U.S. v. Robinson, 38 L. Ed.2d 427 (1973). There is, then, no requirement for an independent basis, or separate justification for the search.

As a result, such a search is lawful even when it follows a person's arrest for a nonviolent traffic offense; it "is the fact of custodial arrest which gives rise to the authority to search." Gustafson v. Florida, 38 L.Ed.2d 427 (1973). Remember, however, that the underlying apprehension must be valid. If the apprehension is unlawful, it will not support the following search. Nor will an illegal apprehension be made valid by what is found during the illegal search.

Beyond a search of the person, the police may also search "for weapons or destructible evidence in the area within the immediate control of a person who has been apprehended." This is the area "which the individual searching could reasonably believe that the person apprehended could reach with a sudden movement to obtain such property" (MRE 314(g) 2.) In Chimel, the Supreme Court held that "the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area within his immediate control--construing the phrase to mean the area from which he might gain possession of a weapon or destructible evidence." The Court added that this does not justify a search of an entire home, or rooms other than those in which the person arrested is physically present.

Remember, if an apprehension takes place "at a location in which other persons reasonably might be present who might interfere with the apprehension or endanger those apprehending, a reasonable examination may be made of the general area in which such other persons might be located." (MRE 314(g) 3.) Remember also, however, "that mere presence at the scene of a crime does not give probable cause for an apprehension...Guilt may not be established by mere association...more than mere suspicion is needed for an arrest and search." U.S. v. Pope, 3 MJ 1037 (AFCMR, 1977). The police cannot apprehend mere bystanders. U.S. v. Pope, 3 MJ 1056 (AFCMR, 1977). Stated differently, "mere presence of a person on premises which law enforcement officers have reason to believe are being used for criminal activity does not, in itself, constitute probable cause for an immediate arrest...Other factors must reasonably establish that such a person manifested sufficient participation in the criminal activities." U.S. v. Escobedo, 11 MJ 51 (CMA, 1981).

Where, then, do you draw the line between "mere presence" and probable cause? In U.S. v. Walker, 13 MJ 982 (ACMR, 1982), CID agents obtained an authorization to search government quarters for drugs. When they entered, they found several people seated around a dining room table. On the table were approximately 10 pieces of hashish, a knife, a scale, aluminum foil, and a pair of scissors. The court concluded that the hashish was being cut and packaged. The accused's mere presence, of course, would not have been enough to constitute probable cause for his apprehension. Here, however, there was more. The agents had probable cause to believe that the offense of possession of hashish occurred (and was, in fact, still occurring), "and that each of the three individuals grouped around the table had committed it." The search incident to apprehension must be connected to the apprehension. Where both occur contemporaneously (at the same time), the justification for the search is clear. The justification diminishes, however, as the search becomes remote in time or place; i.e., as it becomes separated from the apprehension. Chimel v. U.S., 23 L.Ed.2d 685 (1969). The Supreme Court has referred to such a search as one done "immediately upon arrest," although it is permissible to delay a search in order to avoid unnecessary embarrassment to the suspect, or where it is simply impractical to conduct it earlier. Illinois v. Lafayette, 77 L.Ed.2d (1983). Normally, however, the search takes place at the time of the apprehension. U.S. v. Chadwick, 53 L.Ed.2d (1977). Unless there is such a specific basis for delay, the search must be done at the same time as the apprehension. Vale v. Louisiana, 26 L.Ed.2d 409 (1970). Also, remember that it is limited to the immediate vicinity. Shipley v. California, 23 L.Ed.2d 732 (1969).

d. Searches of Automobiles--What is Incident to Apprehension? In one case, the police apprehended some individuals for drug offenses. They were apprehended in a vehicle and, as part of the search incident thereto, the police unzipped the pocket of a jacket they found on the back seat. It was found to contain cocaine. Was this a lawful search of the arrestee's "surrounding area?" The Supreme Court said yes, and held that articles inside the passenger compartment are considered to be within "the area into which an arrestee might reach in order to grab a weapon or evidentiary item...when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile...The police may also examine the contents of any containers found within the passenger compartment, for the passenger compartment is within the reach of the arrestee. So also will containers in it be within his

reach...Such a container may, of course, be searched whether it is open or closed." A "container" was defined as "any object capable of holding another object. It thus includes closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and the like." New York v. Belton, 69 L.Ed.2d 768 (1981).

This area does not, however, include the trunk. It also does NOT include a search of the area behind a rear door panel when, in order to get at the area, the police had to remove the door panel and the rear seat. The issue is one of reasonableness. Is it reasonable to believe that the suspect could reach the area with a sudden movement? Where the entire rear seat and door panel had to be removed in order to get at the area, the court understandably said no. State v. Cuellar, 511 A.2d 745 (N.J. Super., 1986). A suspect may, however, be removed from the vehicle prior to the search. This is a reasonable precaution for the police officer's safety. (MRE 314(g) 2.)

e. The movements of the suspect--What is his "surrounding area?" In one case, the police stopped a person who asked permission to enter his residence in order to get an identification card. The police officer said this was all right, and followed the subject to his room at a university dormitory. This led to a seizure of drugs which the police officer discovered in the room. The Supreme Court held that "it is not unreasonable under the Fourth Amendment for a police officer, as a matter of routine, to monitor the movements of an arrested person, as his judgment dictates, following the arrest. The officer's need to ensure his own safety--as well as the integrity of the arrest--is compelling." Washington v. Chrisman, 70 L.Ed.2d 778 (1982).

Suppose the suspect had wanted to enter his room for a change of clothing? What if the "change of clothing" is said to be in a dresser? Under these facts, remember that the officer may follow the person who has been apprehended. The individual may not be reaching for a shirt--he may be reaching for a gun. This is another rule, then, that considers the need to protect the police officer. So long as the police are not engaged in a mere subterfuge by deliberately moving the subject throughout the home in order to search different rooms, they may act reasonably in the protection of their safety. It is not a subterfuge, of course, if the movement is at the subject's request. As long as there is a legitimate reason for the subject moving (such as where he himself asked to do so), the police may follow the subject. As the subject moves, the area that is within his "lunging distance" also changes. If he goes to a dresser, for example, that area is now within his reach. This is simply a rule of reason. Were it otherwise, the subject could easily gain access to a weapon. If the police officer couldn't continually follow the person who has been apprehended, the subject could simply flee. Again, you should understand that these are rules of reason, designed to accommodate both the Fourth Amendment protection of the individual suspect, as well as the needs of the police.

4. The Investigative Stop (Stop and Frisk).

a. The mere citizen contact--what is it? The law allows for three levels of police-citizen contact. The most intrusive is an actual apprehension, where the subject is taken into custody. At the opposite extreme is what we call "mere citizen contact." This is not a "seizure" and the Fourth Amendment is not triggered. The courts have recognized that "not all contacts between the police and the citizenry involve a seizure. Only when the officer, by means of physical force or (a) show of authority, has in some way restrained the liberty of a citizen may we conclude that a seizure has occurred." U.S. v. Foster, 11 MJ 530 (ACMR, 1981). There is no restraint of the citizen's liberty in the case of a "mere citizen contact;" instead, voluntary cooperation is being sought.

In the case of "mere citizen contact," a police officer may approach an individual and ask him questions. Such police conduct does not constitute an intrusion giving rise to the safeguards of the Fourth Amendment. A person so stopped is free to decline the invitation and walk away. If the accused has been "detained by a show of authority," a seizure will have occurred. In such a case, it is no longer merely a "citizen contact," but has escalated to an actual seizure. U.S. v. Foster, 11 MJ 530 (ACMR, 1981). "Not every encounter between a police officer and an individual constitutes a 'seizure' involving protection secured by the Fourth Amendment...A seizure, within the meaning of the Fourth Amendment, occurs only if in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." Relevant factors include the threatening presence of several police officers, the display of a weapon, physical touching of the accused, or the use of language or tone of voice which indicates that compliance with the officer's request might be compelled. Where a suspect was asked if he would accompany the investigators back to their office for questioning, the court concluded that: "it is clear that not every instance where a person agrees to a police request to accompany them for questioning is a 'seizure' within the meaning of the Fourth Amendment." Where the decision to accompany the police officers is voluntary and the accused is free to terminate the questioning and proceed on his or her way at any time, then it cannot be said that a "seizure" has occurred. In short, the individual was free to accept or decline the invitation and could have terminated the questioning and departed at will. U.S. v. Spencer, 11 MJ 539 (AMCR, 1981).

It has also been held that a soldier was not "seized" when he was told that his commander, a lieutenant, wanted to see him. A soldier "is simply not free to ignore the lawful commands of his superiors." Viewed in "the context of the military and its daily operations, such action is not considered to be 'seizure.'" U.S. v. Sanford, 12 MJ 170 (CMA, 1981). The same is true for telling a soldier to report to military investigators for questioning. U.S. v. Scott, 13 MJ 874 (NMCMR, 1982). It would be different if the soldier had been brought in under guard, not being free to leave. Under such facts, the courts may find an apprehension to have occurred. U.S. v. Schneider, 14 MJ 189 (CMA, 1982). That is different, of course, from one who has simply been told to report for questioning. U.S. v. Price, 15 MJ 628 (NMCMR, 1982). A requirement to report to a particular place, then, does not amount to a Fourth Amendment seizure. U.S. v. Hardison, 17 MJ 701 (NMCMR, 1983). The same is true, then, even where the soldier is ordered to report. "Merely being ordered to report to the CID office does not equate to a 'seizure' under the Fourth Amendment." The situation changes, however, if the accused was then subjected to a show of authority and reasonably concluded that he was not free to leave. U.S. v. Thomas, 21 MJ 928 (ACMR, 1986).

When the police officer stops a suspect on the street, a "citizen contact" does not trigger the Fourth Amendment; again, this is not considered to be a "seizure" of the person. It is noncoercive, and may be shown by a routine field interview. There is no probable cause, no reasonable suspicion, but also no restraint. U.S. v. Robinson, 16 MJ 526 (ACMR, 1983). Since there is no probable cause or even suspicion, the authority of the police officer is very limited here. "The police officer is not entitled to seize and search every person whom he sees on the street or of whom he makes inquiries. Before he places a hand on the person of a citizen in search of anything, he must have constitutionally adequate, reasonable grounds for doing so." Sibron v. N.Y., 20 L.Ed.2d 918 1968).

b. The investigative stop--what is its basis? This is the second level of police-citizen contact, midway between the "mere citizen contact" and the actual apprehension. Remember, in the case of a "mere citizen contact," the authority of the police is very limited. There is, for example, no basis for an apprehension. Since the police are seeking the individual's voluntary cooperation, they lack probable cause for an apprehension. If the police attempt to do more than they lawfully can do, the result is likely to be an illegal apprehension. The issue is whether the individual can terminate the conversation and leave. If not, a court is likely to find that he has been unlawfully seized.

In the case of an investigative stop, the situation is different. This is a seizure of the person, and the Fourth Amendment is triggered. Under MRE 314(f), a police officer may make such a stop when he "has information or observes unusual conduct that leads him or her reasonably to conclude in light of his or her experience that criminal activity may be afoot." This is midway between a "mere citizen contact and an actual apprehension."

In one famous case, a police officer in Cleveland observed two men standing on a street corner at 2:30 in the afternoon. He had never seen them before, but had been a police officer for 30 years. For 20 of these years, he had been patrolling that vicinity for shoplifters and pickpockets. The officer's interest was aroused as he watched the two men. They walked back and forth in front of store windows, looked in, and kept repeating the process over and over, stopping periodically to talk with one another. The police officer became "thoroughly suspicious" and felt that they were casing the stores for a hold-up. He considered it his duty to investigate, and said he feared the men were armed. The officer approached them and asked for their names. They mumbled something and the officer then grabbed one of the men and patted down the outside of his clothing. He was armed with a .38-caliber revolver. The Supreme Court held that the suspect had been "seized," explaining that when a police officer "by means of physical force or a show of authority" accosts an individual and restrains his freedom to walk away, a seizure has occurred. The police officer's actions would be reasonable if he could "point to specific and articulable facts which, taken together with rational inferences from these facts," justified the intrusion. Even without probable cause to believe that the suspects had actually committed a crime, then, a police officer may approach the person for the purpose of investigating possible criminal behavior. Given the facts of the case, "it would have been poor police work indeed for an officer of 30 year's experience in the detection of thievery from stores in the same neighborhood to have failed to investigate this behavior further."

The Court looked at the dangers of police work and the need of the police to take steps to assure themselves that the individual they approach is not armed. It "would be unreasonable to require that police officers take unnecessary risks in the performance of their duties." Accordingly, when the police officer "is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm." There is no probable cause for an actual apprehension, so this search is strictly limited. Terry v. Ohio, 20 L.Ed.2d 889 (1969). The person stopped may be frisked for weapons "when that person is reasonably believed to be armed and dangerous." (MRE 314(F)(2).) In Terry, the Supreme Court upheld this reasonable frisk for weapons when the police officer "has reason to believe that he is dealing with an armed and dangerous individual...The officer need not be absolutely certain that the individual is armed." The issue is whether a reasonably prudent police officer "would be warranted in the belief that his safety or that of others was in danger." In this specific case, the actions of the police officer were found to be reasonable. A reasonably prudent police officer "would have been warranted in believing (the suspect) was armed and thus presented a threat to the officer's safety while he was investigating his suspicious behavior." It was reasonable for the officer to believe that the suspects were contemplating a daylight robbery. It was also reasonable to have assumed that such a crime would be likely to involve the use of a weapon. The basis for the search, then, is not to look for evidence or drugs, but is "the protection of the police officer and others nearby, and it must, therefore, be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden (weapons)."

Under this rule, then, the police may stop and detain an individual "for a brief period of time" when they reasonably suspect he is engaged in criminal activity. U.S. v. Thomas, 10 MJ 687 (ACMR, 1981). This does not justify, however, a general exploratory search for drugs. A limited pat-down for weapons is all that is allowed here, not a search for drugs or other contraband. Sibron v. New York, 20 L.Ed.2d 917 (1968). Remember, the frisk "depends on a reasonable belief that the suspect is dangerous and may gain immediate control of a weapon." U.S. v. Stoecker, 17 MJ 158 (CMA, 1984).

While police may seize nonthreatening contraband detected by "plain feel" while frisking a suspect for concealed weapons, the identity of the contraband must be "immediately apparent;" for Terry does not permit continued outside manipulation of a pocket's contents to determine its identity once it is clear no weapons are present. Minnesota v. Dickerson, No. 91-2019 (1993).

In U.S. v. Yardell, 13 MJ 616 (AFCMR, 1982), the accused was observed carrying a large cardboard box and running from building to building in the shadows during the early morning hours. The accused was stopped by two AF security policemen. The court held that they "were aware of sufficient facts to justify a reasonable belief that the accused might be engaged in criminal activity. Carrying a large box during the predawn morning while carefully staying in the shadows logically aroused the suspicion of any alert police officer." Also, the police needn't be absolutely certain that the suspect is armed. "The test is whether a reasonably prudent man in those circumstances would be warranted in a belief that his safety was in danger...a police officer is not constitutionally required to wager his physical safety against the odds that a suspect is not armed." The police could, therefore, also "frisk" a partially opened box that the suspect was carrying, since it could easily have contained a weapon.

c. The "frisk" of a vehicle. The key to the Fourth Amendment is reasonableness. The police officer's safety is a legitimate and extremely important concern. Pennsylvania v. Mimms, 54 L.Ed.2d 331 (1977). In one case, a vehicle was stopped for having expired license plates. The police officer had the driver get out of the vehicle, at which time he noticed a large bulge under the driver's jacket. The police officer frisked the driver for a weapon, which was held to be lawful. The police officer's safety was sufficient to justify having the driver get out of the car. The bulge in the jacket permitted the officer to reasonably conclude that the man was armed.

When a police officer "discovers a person at a place, and under circumstances, indicating he is not going about his legitimate business, the officer has a duty to investigate." If the suspect is in a vehicle, the officer "is entitled to ask the occupant of the car to get out and identify himself." It is reasonable for the officer to shine a flashlight in, and himself lean into, the interior of the vehicle. Since the officer may reasonably frisk the subject himself for weapons, it is also reasonable for the officer to look in the interior of the vehicle. Again, there must be a reasonable fear that the subject may have a weapon in the car. In one case, for example, the court held such a fear to be reasonable when the police were investigating a series of thefts, including the breaking into of a weapons storeroom and the theft of firearms. U.S. v. Summers, 33 CMR 105 (CMA, 1963).

In Michigan v. Long, 77 L.Ed.2d 1201 (1983), the Supreme Court held that during an investigative stop, the police may conduct a protective search of a passenger compartment of an automobile, limited to these areas in which a weapon may be placed or hidden. To do so, the police officer must reasonably believe that the suspect is dangerous, and that he may gain control of a weapon. Terry is not limited to a frisk of the person. The purpose is to accommodate the police officer's need to protect himself in a situation where probable cause is lacking. If that officer has a reasonable belief that the

person he is investigating at close range is armed and dangerous, it is only reasonable that he be given the power to take necessary measures in determining whether the suspect is, in fact, carrying a weapon and, if so, to neutralize the threat. Suspects may injure the police officer "by virtue of their access to weapons, even though they may not themselves be armed." The search of the vehicle's passenger compartment (limited to those areas where a weapon may have been placed or hidden) is permissible when the police officer has a reasonable belief, based on "specific and articulable facts" that "the suspect is dangerous and...may gain immediate control of weapons."

In the Long case, the actions of the police officer were upheld as being reasonable. The police, again, may conduct a frisk of the vehicle's passenger compartment "to uncover weapons, as long as they possess an articulable and objectively reasonable belief that the suspect is potentially dangerous." Here, the search was upheld, even though the suspect was under apprehension, outside of the car, and under the control of another officer; it was still possible for the suspect to break away and retrieve a weapon from the car. The safety factor was, again, of critical importance. The courts are extremely sensitive to this issue in these potentially dangerous situations. This was the basis for the frisk in the Terry case. The same need applies where the suspect is in a vehicle. To stop the car, remember, you need "specific and articulable facts" which lead to the conclusion that the subject is involved in criminal activity. U.S. v. Morrison, 5 MJ 680 (ACMR, 1978).

d. The factual basis for the stop--What constitutes "articulable suspicion?" An investigative stop may be based on hearsay. The information the police officer has may be supplied by someone else, or may be observed directly by him. U.S. v. Edwards, 3 MJ 921 (ACMR, 1977). In one case, an informant told a police officer that a person in a nearby car "had a gun at his waist." The officer approached the vehicle to investigate and tapped at the window. When the suspect rolled down the window, the officer reached in and removed a revolver from the suspect's waistband. The Supreme Court held that the Fourth Amendment: "does not require a policeman who lacks the precise level of information necessary for probable cause to simply shrug his shoulders and allow a crime to occur or a criminal to escape...a brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts." An informant's tip may be enough to warrant the investigative stop and the frisk, whether or not it constitutes probable cause for an actual apprehension. Adams v. Williams, 32 L.Ed.2d 612 (1972).

The stop "must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." This judgment is based on all of the circumstances. This may include information from police reports and "consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and makes deductions." U.S. v. Cortez, 66 L.Ed.2d 621 (1982). Such a stop is also valid "if police have a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony." Police reliance on a flyer or bulletin, then, is reasonable and may result in an investigative stop. U.S. v. Hensley, 83 L.W.d.2d 604 (1985).

The police may also rely on such factors as the suspect's appearance (his emotional strain, nervousness, perspiring, heaving breathing, symptoms of drug influence, etc.), his actions (attempting to conceal his identity, flight, avoiding the police, etc.), the reputation and arrest record of the suspect, the actions of any companions and their appearance or demeanor (evasiveness, suspiciousness, or incriminating answers), the nature of the area (high crime area), the fact that it is an unusual time of day for the presence of the suspect or the activity, tips from informants, and the training and experience of the police officer. The point is that the police officer will have to testify in court as to why he stopped the person.

In Reid v. Georgia, 65 L.Ed.2d 890 (1980), a person was stopped at an airport because he fit a "drug courier's profile." The Supreme Court held that an investigative stop must be "supported by some objective justification." It "must be supported at least by a reasonable and articulable suspicion that the person seized is engaged in criminal activity." The stop, however, was based solely on the fact that the individual met the "profile." He arrived from Ft Lauderdale, Florida, in the early morning hours, and had no luggage other than a shoulder bag. The court held that this was just too slim, as it described "a very large category of presumably innocent travelers, who would be subject to virtually random seizures were the court to conclude that as little foundation as there was in this case could justify a seizure." While there could be cases when lawful conduct could justify a stop, this wasn't such a case. The court held that the facts did not justify a reasonable suspicion that criminal activity was afoot. Thus, the seizure was unlawful.

Remember, you need an articulable basis for the stop. What is it that makes you believe that criminal activity is afoot? Once the person is lawfully stopped, the actions or appearance of the subject may then provide probable cause for an actual apprehension. In U.S. v. Thomas, 10 MJ 687 (ACMR, 1981), the suspect revealed symptoms of drug use, which (when added to the information which provided the basis for the stop) constituted probable cause. This is similar to what happened in U.S. v. Gillis, 6 MJ 570 (NCMR, 1978). When the individual has been stopped, "additional facts may be developed which, when added to the information previously obtained, create probable cause to search." In that case, the subject's nervousness and appearance combined with the initial basis for the stop, and together, produced probable cause.

Of course, if you don't have probable cause or reasonable suspicion, you could always try to check out the individual on the basis of consent. Just remember that when you rely on consent, the individual is free to walk away whenever he wants.

e. The length of the detention. The police may stop and detain a person for a "brief period of time" in order to investigate. They may question the individual, although this may require Article 31 warnings if they suspect him of having committed a crime. U.S. v. Thomas, 10 MJ 687 (ACMR, 1981). The police may also take "reasonable measures to assure that, until reasonable investigative stops can be completed, evidence is not destroyed, crime scenes are not disarranged, and suspects do not flee." Under such circumstances, an individual may be given a lawful order to halt, since the police are entitled to temporarily detain him while they investigate. The violation of such an order may result in an actual apprehension. U.S. v. Glaze, 11 MJ 176 (CMA, 1981).

The length of the detention must be reasonable under the circumstances. The detention "must be temporary and last no longer than is necessary to effectuate the purpose of the stop." The issue is "whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly." The police must act with diligence and without unnecessary delay. When they act in such a manner, a 20-minute detention was upheld as reasonable. U.S. v. Sharpe, 84 L.Ed.2d 605 (1985). Under different facts, however, a 90-minute detention was held to be unreasonable. U.S. v. Place, 77 L.Ed.2d 110 (1983). If the detention is too long, it will be regarded as having turned into an actual apprehension. Since there is no probable cause, this "apprehension" is not lawful. Florida v. Royer, 75 L.Ed.2d 299 (1983).

There is no specific point at which the investigative stop becomes an apprehension; reasonableness will depend on the facts of a specific case. It is, as stated, of limited duration, but more is involved than simply counting minutes. It is not, then, how many minutes have passed, but what the police have been doing during those minutes. If they acted unreasonably, even a short period of detention could be unlawful. If they act reasonably, on the other hand, courts will justify much longer periods of detention. The Supreme Court has "rejected hard-and-fast rules...common sense and ordinary human experience must govern over rigid criteria." U.S. v. Hernandez, 37 Cr.L. 3175 (1985).

5. Plain View.

a. General. MRE 316(d)(4) states that property may be seized for use in evidence if it qualifies under the following standard: "The person while in the course of otherwise lawful activity observed in a reasonable fashion property or evidence that the person has probable cause to seize." For this rule to apply, two elements must be present: (1) the person making the seizure must be legitimately situated in the place from which the observation is made; and (2) there must be probable cause to seize the property; i.e., a reasonable belief that it is evidence of a crime or contraband.

b. Application of the rule. Remember, both elements must be present. The rule "authorizes seizure of illegal or evidentiary items visible to a police officer whose access to the object has some prior Fourth Amendment justification and who has probable cause to suspect that the item is connected with criminal activity." U.S. v. Stoecker, 17 MJ 158 (CMA, 1958). In one case, for example, the police apprehended a person who was then allowed to enter his college dormitory room in order to obtain an identification card. The Supreme Court held that the police officer had the right to follow the suspect into his room. Since the entry was lawful, the police officer could observe marijuana which he saw on a desk in the room. This was found to be a "classic case" of plain view. As the Court explained, "when a police officer, for unrelated but entirely legitimate reasons, obtains lawful access to an individual's area of privacy, the Fourth Amendment does not prohibit seizure of evidence of criminal conduct found in these circumstances." Washington v. Chrisman, 70 L.Ed.2d 778 (1982).

This rule applies in the case of an investigator who is "lawfully searching in connection with another crime, or who otherwise is lawfully where he is." U.S. v. Cruz, 3 MJ 707 (AFCMR, 1977). When the police are at a place where they have a right to be, "they are not required to close their eyes to their surroundings." U.S. v. Beck, 35 CMR 298 (CMA, 1965). A police officer who has been admitted to a private home by the owner (consent) may seize contraband which he observes in plain sight. This does not, by itself, allow a forced entry into a private residence. The police officer must have a lawful basis for being where he is when he observes the contraband. If he is not lawfully on the premises, the plain view doctrine will not apply. Johnson v. U.S., 92 L. Ed. 436 (1948). A police officer who happens to walk by a private residence may not forcibly enter the residence because he has observed what he believes to be evidence or contraband inside. Under such facts, the Fourth Amendment generally requires a warrant. Washington v. Chrisman, 70 L.Ed.2d 778 (1982).

The plain view rule frequently comes into play when the police are in the process of executing a search warrant or authorization. In other words they are searching for item A (murder weapon) and they discover item B (drugs) during the search. Under the plain view rule, "an agent executing a search warrant may lawfully seize contraband not described in the warrant which he observes." U.S. v. Abernathy, 6 MJ 819 (NCMR, 1978). In the words of the Supreme Court, "if the police enter a home pursuant to a valid warrant authorizing the seizure of specified gambling paraphernalia but discover illegal narcotics in the process of the search, the narcotics may be seized and introduced as evidence." Alderman v. U.S., 22 L.Ed.2d 176 (1969).

In one case, the commander authorized a search of the suspect's wall locker. They were looking for "any type of weapon, sharp instrument, particularly a knife." The suspect was under investigation for a recent murder. During the search of the locker, a blood-stained towel was seized. The search, however, had been for a murder weapon. The suspect's clothing was also seized, as it bore bloodstains. The court upheld this as a plain view seizure. U.S. v. Schultz, 41 CMR 311 (CMA, 1970).

The plain view rule will also apply when the command is performing an inventory or inspection and, during the conduct of the same, contraband or evidence of a crime is discovered. U.S. v. Kazmierczak, 37 CMR 214 (CMA, 1967). It also applies where the police are performing a consent search, looking for item A (pistol), and they discover item B (a stolen wallet). U.S. v. Morrison, 5 MJ 680 (ACMR, 1978).

Remember, there are two issues here. First, you must legitimately be on the premises. Second, you must have probable cause for the seizure. "There must be facts and circumstances from which the probability of the item's contraband nature may be inferred." U.S. v. Thomas, 36 CMR 462 (CMA, 1966). In one case, the investigators were searching the suspect's room for marijuana. The commander had authorized a search thereof as a result of a marijuana detection dog's alert. Once inside the room, the agents looked through various papers, printed materials, and magazines. This resulted in a seizure of some obscene materials. The court explained that "objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure." For this to apply, however, it must be "immediately apparent to the police that they have evidence before them." It "may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges." In other words, the intrusion which afforded the view must be lawful. Once that has been established, the incriminating nature of the item seized must be "immediately apparent;" i.e., is there a sufficient factual basis to support a reasonable belief that the item is contraband or evidence of a crime? In this case, the police were legitimately present in the room. This, however, was not enough, as the incriminating nature of the items seized was not immediately apparent. "The material found was not contraband nor was its mere possession illegal." There was no reasonable cause to believe that the items were evidence of a crime. They were, then, unlawfully seized. U.S. v. Van House, 11 MJ 878 (AFCMR, 1981).

This problem confronted the U.S. Supreme Court in Arizona v. Hicks, 40 Cr.L. 3320 (1987). There, a suspect fired a shot through the floor of his apartment and injured a person on the floor below. The police responded to the scene and entered the suspect's apartment. While there, a police officer noticed two sets of expensive stereo components, which seemed to be out of place in the otherwise "squalid" apartment. Suspecting that they were stolen, the officer read and recorded their serial numbers, moving some of the components in order to locate their serial numbers. The officer phoned in the information and it was determined that they were, in fact, stolen. The Court held that merely recording the serial numbers was permissible, as this did not constitute a search: "Merely inspecting those parts of the turntable that came into view during the (search for the assailant) would not have constituted an independent search." The moving of the equipment in order to locate the serial numbers, however, "did constitute a search separate and apart from the search for the shooter, victims, and weapons that was the lawful objective of his entry into the apartment...taking action, unrelated to the objectives of the authorized intrusion, which exposed to view concealed portions of the apartment or its contents, did produce a new invasion of respondent's privacy."

There was no probable cause to believe that the equipment was stolen, or to support a search of the equipment. Here, it was not immediately apparent that the property was stolen; this wasn't discovered until the police had conducted a further search. In other words, they could record the serial numbers that they could observe without moving the components. They could not, however, turn the items over and inspect them, as this constituted a separate search. Plain view, then, didn't apply. Remember, you must be lawfully on the premises and you must have probable cause for the seizure. Here, since the police had to conduct an additional search in order to locate the serial numbers on some of the components, they could not argue that such evidence was in plain view.

The plain view rule is of one reason, adopted by the courts to take into account the realities of police work and the difficult situations which confront our law enforcement officers. It is reasonable to allow the police officer to seize evidence of a crime or contraband which is in plain view. Otherwise, the officer would have to stop and go get another warrant. If he were searching a locker for drugs and discovered something reasonably believed to be a murder weapon, this would mean he would have to go get a second warrant or authorization in order to seize something which he had already discovered while searching under the first, lawful warrant/authorization. Such a requirement would simply be unreasonable.

6. Search Under Exigent Circumstances.

a. General. This is another example of how the courts have tried to accommodate the interests of effective law enforcement. Remember, the Fourth Amendment prefers the use of a search warrant/authorization. If it is possible to obtain one, do so. This is always the safest way to go. In a close case, the fact that you did so may tip the scales in favor of the government. Sometimes, however, it is not possible to stop and obtain a search authorization or warrant. Sometimes, doing so would simply be unreasonable. As we have seen over and over, the rules governing the Fourth Amendment represent an attempt to balance the rights of the individual against the rights of society. We want our police officers to use the search authorization/warrant process when it is feasible for them to do so. If this would be unreasonable under the facts confronting the police, then such may not be required. Again, always remember that what the Fourth Amendment prohibits is an UNREASONABLE search and seizure.

The conduct of the police officer must be judged in the context in which he acted. Depending in the situation which he faced, certain emergency conditions may make the obtaining of a search authorization simply unreasonable. Under MRE 315(g)(1), a search authorization is not required if there is a "reasonable belief that the delay necessary to obtain a search warrant or search authorization would result in the removal, destruction, or concealment of the property or evidence sought." This is a probable cause search. For the exception to apply, you need BOTH the probable cause as well as the exigent circumstance(s). One without the other is not sufficient. An easy way to think of this is simply $PC + EC = AA$. In other words, probable cause (PC) plus exigent circumstances (EC) equals authority to act (AA).

b. Hot pursuit. "The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others." The "exigencies of the situation" may demand immediate action. Maryland Penitentiary v. Hayden, 18 L.Ed.2d 782 (1967). In one case, the police arrived at a private residence.

The suspect was found to be standing in the doorway. When the officers shouted "police," the suspect immediately retreated into her home. The officers followed her. The Supreme Court ruled that there was a need to act quickly, and held that "hot pursuit means some sort of a chase, but it need not be an extended hue and cry in and about the public streets. The fact that the pursuit here ended almost as soon as it began did not render it any the less "hot pursuit" sufficient to justify the warrantless entry...a suspect may not defeat an arrest which has been set in motion...by the expedient of escaping to a private place." U.S. v. Santana, 49 L.Ed.2d 300 (1976).

c. Destruction of evidence. In the Santana case, the Court also held that there was "a realistic expectation that any delay would result in destruction of evidence." Several military cases have been decided on this basis alone. In this context, the term "exigent circumstances" means "a situation where the inevitable delay incident to obtaining a warrant must give way to an urgent need for immediate action." In other words, is the police action necessary in order to preserve the evidence of appellant's recent crime?" U.S. v. Phinizy, 12 MJ 40 (CMA, 1981). Investigators must be able to take reasonable measures "to avoid destruction of evidence." U.S. v. Murray, 12 MJ 139 (CMA, 1981). The "danger of destruction of evidence," then, is an exigent circumstance. U.S. v. Mitchell, 12 MJ 265 (CMA, 1982).

In one case, a Marine Corps corporal gave two other service members a ride to their barracks. As he then drove away, he realized that they had stolen his portable television/radio set, and he then returned to the barracks. He asked the duty NCO if he had seen the two individuals, and was told that he (the duty NCO) had seen them, and that one of them had been carrying a television/radio set. The duty NCO "thought immediate action was necessary to prevent the thief from leaving the barracks through the unlocked back door. A search of the barracks was upheld, since "warrantless searches are justified when the exigencies of the situation make that course imperative...The need for effective law enforcement must be balanced against the right of privacy...Exigent circumstances include a realistic expectation that delay would result in destruction of evidence...searches without command authorization are permissible if immediate action is necessary to prevent removal or disposition of stolen property." Relevant factors include "the likelihood of flight of suspects, imminence of destruction or removal of evidence, and physical danger from delay." Again, there must be probable cause and "immediate action is necessary to prevent the flight of suspects or the removal of evidence." Here, then, the search "was justified on the basis of probable cause to believe that an offense had been committed and exigent circumstances demanding immediate action to prevent the removal of stolen property" U.S. v. Hendrickson, 10 MJ 746 (NCMR, 1981).

Remember, however, that these are probable cause searches. The presence of exigent circumstances "merely dispenses with the requirement that such be determined by the commanding officer." U.S. v. Soto, 37 CMR 203 (CMA, 1967). In one case, a Marine Corps sergeant looked through a venetian blind into a barracks room and saw the accused transfer "a white substance" to two others, who then consumed some of it. The sergeant believed that he was witnessing a drug transaction in progress. The court concluded that he then "acted reasonably in gaining entry into the

room to prevent further criminal activity." U.S. v. Wisniewski, 21 MJ 370 (CMA, 1986). The Court relied on another case, U.S. v. Acosta, 11 MJ 307 (CMA, 1981). There, the odor of burning marijuana was detected coming from underneath the door to the accused's room. When a sergeant knocked on the door, the accused opened it, and was subsequently apprehended. A search of the room was upheld: "We can conceive of no greater exigency requiring immediate action than the perceived present active use of debilitating drugs by specific servicepersons. To require a person in authority who is exposed to such an emergency situation to put the situation "on hold" while he seeks authorization from a magistrate would only exacerbate the threat. The reasonable application of the Fourth Amendment does not demand this."

In another case, an Air Force squadron duty officer detected the odor of burning marijuana while he was checking the billets on an installation in Europe. He knocked on a door and told the occupant to open it. He then heard the sound of a window being opened. The court held that he "could reasonably anticipate that if a crime was being committed behind the door on which he had knocked, evidence of it was being disposed of. Plainly, immediate steps had to be taken to preserve that evidence." U.S. v. Messler, 4 MJ 303 (CMA, 1978). On reconsideration of its decision, the court explained that "the activation of marijuana in the barracks environment in a foreign country poses such a present danger to the military mission as to create an emergency situation justifying immediate action by the squadron duty officer to prevent its continued activation...Such an entry for this legitimate command purpose is eminently reasonable as concomitant to the constitutional responsibility of the military service to be ready to defend the primary society, especially when the unit is strategically located in the, front line of our defense in foreign countries." U.S. v. Hessler, 7 MJ 9 (CMA, 1979).

d. Medical Emergency/Rescue. MRE 312(f) states: "Nothing in this rule shall be deemed to interfere with the lawful authority of the armed forces to take whatever action may be necessary to preserve the health of a servicemember. Evidence or contraband obtained from an examination or intrusion conducted for a valid medical purpose may be seized." Such evidence is not considered to be the product of an unlawful search, and is admissible in evidence. U.S. v. Nand, 17 MJ 936 (AFCMR, 1984). In U.S. v. Rays, 16 MJ 636 (AFCMR, 1983), the court held that a police entry into a private dwelling requires a warrant "unless such intrusion falls within one of the few well-delineated exceptions to this rule." In that case, the accused was notified at work that his wife had attempted suicide. He went home to where she was, and found that she had taken some pills. From his experience as a pharmacy technician, he determined that she was in no danger. Nonetheless, his superiors went to the home and ordered the accused to take his wife to the hospital. At the emergency room, it was determined that no medical treatment was required, and she was referred to the out-patient mental health clinic. Despite this, the hospital commander told the accused's first sergeant to find out what drugs had been taken. The first sergeant contacted the security police, and the home was searched. This resulted in the discovery of some stolen property. As the court noted, MRE 314(i) states: "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." Here, though, the emergency was over. "There was no emergency requiring the rendition of immediate medical aid" at the time of the search. On the contrary, "the accused's wife had been taken to the hospital, seen by medical personnel, determined to be out of danger medically, and referred to a psychologist for counseling. Notably absent in this case is any concern on the part of those searching for the medical condition of the victim. Rather, what appears of record is a command desire to know what drugs were taken for some unarticulated administrative reason rather than in aid of medical treatment. This is confirmed by the actions of the search party once the items of contraband had been discovered. The searchers immediately lost interest in discovering which type of pills were ingested and concentrated on perfecting a search for evidence of crime."

As we saw earlier, a warrantless entry into a burning building was upheld as reasonable. This situation "clearly presents an exigency." There is "compelling need for official action and no time to secure a warrant." Michigan v. Tyler, 56 L.Ed.2d 486 (1978). In another case, a room was entered as a result of "an emotional cry for help." Inside the room, a victim was found inside of a locker, barely alive. The court held that this wasn't a search for evidence of a crime, but was a good faith effort to render immediate medical aid: "It is clear the police may enter a dwelling without a warrant to render emergency aid and assistance to a person they reasonably believe to be in distress and in need of assistance...In applying the emergency doctrine, the question that must be answered is whether there is evidence which would lead a prudent and reasonable official to see a need to act." U.S. v. Mons, 14 MJ 575 (NMCMR, 1982). Such a situation is not regarded as a search for evidence of a crime, and is not the type of situation contemplated by the warrant clause of the Fourth Amendment. U.S. v. Lewis, 11 MJ 188 (CMA, 1981).

In another case, the provost marshal's secretary telephoned an individual's home to discuss a traffic citation. She spoke with the accused's 9-year-old son, and learned that he was there with his 8-year-old sister. According to the son, the parents were both at work. The secretary believed that leaving the children alone violated a post policy, so she reported the situation. An MP was dispatched to investigate. He considered it to be a "routine matter;" i.e., a report of unattended children. He did not believe it to be an emergency. "He had no information or reason to believe that the children were afraid or were threatened. He did not believe them to be in danger." He rang the doorbell and there was no answer. He was then instructed to enter the premises, which he did. "He found no sign of a struggle, no blood, odors or any other indication that the children had been abused, neglected, or in any danger." Looking in the master bedroom, he discovered marijuana and drug paraphernalia.

Faced with these facts, the court held that "police officials have the right and the duty to enter a residence in an emergency situation." The key, however, is the existence of emergency or exigent circumstances." Here, the MP had no reasonable belief that any emergency, in fact, existed. The court concluded by stating that "if reasonable grounds exist to justify immediate action to protect or preserve life or avoid serious injury, a dwelling may be entered without a warrant...The presence of an emergency demands immediate action on his part and not a delay to obtain further guidance." Under the "unique" facts of this case, however, the court could only conclude there was no emergency, so the search was unlawful. The court explained, however, that "almost any variance from the evidence presented" could have produced a different outcome. U.S. v. Gammon, 16 MJ 646 (AFCMR, 1983).

The police may also enter a residence in the case of someone who has been shot or wounded inside. U.S. v. Rodriguez, 8 MJ 648 (AFCMR, 1979). In Arizona v. Hicks, 40 Cr.L. 3320 (1987), the Supreme Court dealt with the case of a suspect who fired a bullet through the floor of his apartment, injuring someone on the floor below. The police arrived at the scene and entered the accused's apartment. This entry was "justified by the exigent circumstances of the shooting." In another case, the accused's daughter required surgery and the commander was led to believe that it was urgent that the accused's wife consult with her husband. The accused (husband) was, however, on leave. Attempts to contact him at his leave address failed, since the accused was not at the address. "Still motivated by the overriding need to put him in contact with his wife about his daughter," the commander tried a "long shot." Knowing that the accused had recently arrived from his prior duty station in Italy, and knowing that the accused had been getting letters from an APO address, the commander thought there may have been some connection between the two, and decided to look through the accused's office. Inside of a locked credenza, a stack of letters with an APO return address was discovered. The address was copied down and by checking with a directory, it was determined that the letters were from an installation in England. This finally led to locating the accused. As for the search, the court held that the emergency justified it. The commander "had a compelling duty to notify his subordinate of his child's trouble...By not being where he led his commander to believe he would be, appellant virtually invited his commander to look in his credenza drawer if it became necessary to contact him." The circumstances appeared to the commander to constitute an emergency. The commander felt that obtaining the accused's consent to the surgery, or at the very least, his advice, was imperative for the safety of the child. The court ruled that it would not fault the commander for electing not to gamble on the well-being of the child. U.S. v. Muniz, 23 MJ 201 (CMA, 1987). They then cited a "classic statement" of the emergency search doctrine, one that is worth repeating here:

"A warrant is not required to break down a door to enter a burning home to rescue occupants or extinguish a fire, to prevent a shooting or to bring emergency aid to an injured person. The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency."

e. Military necessity. Under MRE 315(g)(2), a search authorization is not required if there is "a reasonable military operational necessity that is reasonably believed to prohibit or prevent communication with a person empowered to grant a search warrant or authorization and there is a reasonable belief that the delay necessary to obtain a search warrant or search authorization would result in the removal, destruction, or concealment of the property, or evidence sought." This exception has not been extensively litigated.

f. The automobile exception. Under MRE 315(g)(3), an "operable vehicle" may be searched without a warrant/authorization. As is the case with the other exigencies, this one also requires probable cause for the search. Remember, the basis for this action is PC & EC = AA. Without both probable cause and the exigency/emergency, there is no authority to act.

The Supreme Court has held that "searches of cars that are constantly movable may make the search of a car without a warrant a reasonable one although the result might be the opposite in a search of a home." Part of the reason for this is the extensive regulation to which motor vehicles are subjected. An automobile is treated differently than a person's home. Part of this is also due to "the vagrant and mobile nature" of the automobile; i.e., its "ambulatory character" Cady v. Dombrowski, 37 L.Ed.2d 706 (1973).

The inherent mobility factor "often makes obtaining a judicial warrant impracticable." Still, the Supreme Court has also upheld such warrantless searches of automobiles "in cases in which the possibilities of the vehicles being removed or evidence in it destroyed were remote, if not nonexistent." The Supreme Court has explained that the answer also lies "in the diminished expectation of privacy which surrounds the automobile. One has a lesser expectation of privacy in a motor vehicle." U.S. v. Chadwick, 53 L.Ed.2d 538 (1977). There is a difference "between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon, or automobile for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." Carroll v. U.S., 69 L. Ed. 543 (1925).

In California v. Carney, 85 L.Ed.2d 406 (1985), a Drug Enforcement Administration agent received information that a motor home was being used in connection with a drug transaction. The motor home was parked in a parking lot in downtown San Diego, California. The investigator put it under surveillance and ultimately searched it. The Supreme Court noted that there was, as has been explained, a lesser expectation of privacy in an automobile, as opposed to a home. The factor of ready mobility is also extremely important. This mobility "creates circumstances of such exigency that, as a practical necessity, rigorous enforcement of the warrant requirement is impossible." The Court concluded: "When a vehicle is being used on the highways, or if it is readily capable of such use and is found stationary in a place not regularly used for residential purposes--temporary or otherwise--the two justifications for the vehicle exception come into play. First, the vehicle is obviously readily mobile by the turn of a switch key, if not actually moving. Second, there is a reduced expectation of privacy stemming from its use as a licensed motor vehicle subject to a range of police regulation inapplicable to a fixed dwelling." Here, then, the motor home was "readily mobile. Absent the prompt search and seizure, it could readily have been moved beyond the reach of the police." Also, based on its location, "an objective observer would conclude that it was being used not as a residence, but as a vehicle." In other words, the exception "has historically turned on the ready mobility of the vehicle, and on the presence of the vehicle in a setting that objectively indicates that the vehicle is being used for transportation."

In another case, a person told the military police that he smelled marijuana coming from an automobile at a parking lot on Fort Hood, Texas. He stated that the vehicle was occupied by two individuals. A patrol was sent to the scene to investigate. A subsequent search of the car was upheld, even though the automobile was immobilized (surrounded by six MP and its route of possible escape blocked by a patrol vehicle). The court applied the automobile exception due, in part, to the "inherent mobility factor" and also due to the vehicle's lesser expectation of privacy. U.S. v. Bishop, 4 MJ 671 (ACMR, 1977).

Understand the purpose of the exemption, and do not attempt to stretch it too far. Remember, it is based on the impracticability of obtaining a search warrant/authorization under certain circumstances. The existence of probable cause is not alone sufficient; there must also be the presence of exigent circumstances. This is a limited exception to the requirement for a warrant, and does not completely swallow up the Fourth Amendment. The exemption, then, was not applicable in a situation where the police intended to search an automobile which they expected to find at the suspect's residence, in his driveway: "Since the police knew of the presence of the automobile and planned all along to seize it, there was no exigent circumstances to justify their failure to obtain a warrant. There was, in short, no reason why the police couldn't have gotten a warrant prior to going to the suspect's home." Coolidge v. New Hampshire, 29 L.Ed.2d 564 (1971).

Remember, this search requires both probable cause and exigent circumstances. If the circumstances clearly show that there is no exigency or emergency situation, and no reason why a warrant couldn't be obtained, then the courts will not apply the exception. U.S. v. Mota Aros, 8 MJ 121 (CMA, 1979). In U.S. v. Mills, 46 CMR 630 (ACMR, 1972), the accused was apprehended at his residence for a robbery. His wife was briefly questioned at the scene, but she was not taken into custody. Although the car was there in the driveway, it wasn't searched at this time. This was true even though they had a description of the car, which was the one used by the robber. Two hours later after the accused had been apprehended and taken away, the police returned to the residence and searched the car. The court held: "Under the circumstances present in the instant case--where police at the time of appellant's apprehension knew of the probable role the car had played in the alleged robbery, where at the time of the apprehension several police officers were on the scene who could have been detailed to remain with and guard the automobile pending obtaining a search warrant, where appellant's wife had had ample opportunity during the 2-hour period between appellant's apprehension and the search of the automobile to destroy any incriminating evidence from the car had she been so disposed, where appellant was in police custody and had no access to the automobile, and where officials were on duty and available who were authorized to issue search warrants--there simply were no exigent circumstances justifying a warrantless search. In short, the facts of this case do not support the conclusion that this is an instance where it is not practicable to secure a warrant...and the automobile exception, despite its label, is simply irrelevant."

In another case, the police searched an automobile that was inoperable due to "a thrown rod in the motor." The court explained that automobiles are still entitled to Fourth Amendment protection; the exception simply dispenses with the warrant requirement under certain conditions. Here, the vehicle in question was not only not moving but was incapable in its present condition of being self-propelled." U.S. v. Garlich, 35 CMR 334 (CMA, 1965). The issue is what facts were known to the police at the time of the search.

In U.S. v. Ross, 72 L.Ed.2d 572 (1982), an informant told the police that a person was selling drugs out of the trunk of his car parked on a public street. The police went to the scene and located the car matching the description which they had been given. They circled the block (to avoid alerting anyone in the area), and returned as the vehicle was leaving. They then pulled alongside of it, and subsequently apprehended the driver (who had been determined to match the description furnished by the informant). The car was subsequently searched (including the interior passenger compartment and trunk). In the trunk, they found a brown paper bag that contained heroin. Also, \$3,200 in cash was discovered in a zipped leather pouch (also in the trunk). The Supreme Court noted the "impracticability of securing a warrant in cases involving the transportation of contraband goods...Given the nature of an automobile in transit, the Court recognized that an immediate intrusion is necessary if police officers are to secure the illicit substance."

The Supreme Court explained that this is a probable cause search. Such a search "generally extends to the entire area in which the object of the search may be found...The scope of a warrantless search of an automobile thus is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found." In other words, this is treated the same as other probable cause searches. Although the exception eliminates the need for a warrant or authorization, the scope of the search is the same as it is with any probable cause search: "If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." Stated differently, if there is probable cause to believe that the vehicle contains contraband, the search may extend to any area of the vehicle that may hold the contraband; i.e., the trunk, glove compartment, etc., U.S. v. Switzer, 17 MJ 540 (ACMR, 1983).

Suppose, for example, you have probable cause to believe the vehicle contains a stolen 19" color television set. You may search in the vehicle any area where you reasonably may expect to find what you are looking for. This would obviously include the trunk. It would not, however, warrant your taking off the hubcaps to look inside of them. Obviously, you would not reasonably expect to find the object

of the search (the 19" television set) inside of the hubcaps. Suppose, on the other hand, you have probable cause to believe that the vehicle is being used to transport drugs. Since the object of the search is different, you may now look in different places. More specifically, you may look in any areas where you reasonably may expect to find the drugs. Obviously, this will allow you to look in much smaller areas than would be the situation if you were looking for a large television set.

When performing this search, then, act the same as you would with any probable cause search. Always think: What are you looking for? In other words, what do you have probable cause to believe is in the car? Then, you may look in those areas where you reasonably may expect to find what you are looking for. Just as you would not expect to find the proverbial "elephant in a breadbox," you would also not expect to find a stolen M16 rifle in an ashtray.

7. Inventories.

a. General. An inventory is not defined as a "search." It frequently results in the discovery of evidence of a crime (stolen property) or contraband (drugs). It is, therefore, important that you understand the rules governing this sort of activity. If the inventory is valid and properly conducted, evidence found during it will be admissible at a court-martial. If it is improperly conducted, it will result in unlawfully seized evidence, and the evidence will not be admissible in court.

MRE 313(c) states that the "primary purpose" of an inventory "is administrative in nature...An examination made for the primary purpose of obtaining evidence for use in a trial by court-martial or other disciplinary proceeding is not an inventory." An inventory must "have been legitimately based, properly conducted, and not have been used as a pretext for an illegal search." It may be justified "by the need for safeguarding the property while it is in the government's custody, for protecting the government against claims or disputes arising from the loss or theft of the property, and for protecting government personnel against the potential hazards which might result should the government unknowingly come into possession of dangerous substances." U.S. v. Hines, 5 MJ 916 (ACMR, 1978).

In the Hines case, the court explained that an inventory may be based on a regulation that specifically authorizes the procedure, or upon some other legitimate government purpose: "Even in the absence of statute, regulation, or a standard procedure, government officials may conduct reasonable inventories of such property in order to properly determine administrative accountability, to safeguard the government against loss of its property, or to fix pecuniary liability on those responsible for any loss or misuse." It is not "unreasonable" simply because it is not specifically required by a regulation. Thus, when there was a change of billeting officers, an inventory done "for the purpose of verifying the records of accountability for government property" being used in the bachelor officers' quarters (BOQ) was considered to be reasonable. The inventory involved government property in the various rooms.

In Hines, when the persons conducting the inventory arrived at the accused's room, he was not there, so a passkey was used in order to gain entrance. Inside a closet, they discovered marijuana plants. The court held that this was a legitimate inventory. Prior notice was not required: "It is the individual BOQ occupant who has signed for the property that is ultimately responsible for its loss or misuse. Therefore, the inventorying officers had a legitimate interest in determining their true administrative accountability without providing notice to those occupants who would stand to lose financially by the discovery of any discrepancy." Once legitimately inside of the room, they could seize the marijuana plants under the "plain view" rule. Remember, this occurs when one "while in the course of otherwise lawful activity, observes in a reasonable fashion, property or evidence that the person has probable cause to seize." MRE 316 (d) 4.)

Another example of a lawful inventory is one done IAW AR 700-84. This authorizes an inventory of a soldier's belongings when he is absent without leave. Another example is AR 190-7, paragraph 5-8(a)(1), which requires an inventory of a soldier's belongings before he goes to a confinement or correctional facility. In U.S. v. Kazmierczak, 37 CMR 214 (CMA, 1967), the court dealt with an inventory that had been performed after the accused had been placed in pretrial confinement. It was upheld, as it served "obvious and legitimate" purposes: "The unit functions under a table of organization, in which each person assigned to it has defined responsibilities. It must be ready for emergency operation in time of peace as well as war. Consequently, even the temporary absence of a member of the unit may require an immediate replacement. If the absent member has left possessions in the unit, these must be removed to make room for those of the replacement. Common sense indicates the absentee's effects cannot be tossed casually into a sack and stored...Common sense also indicates that each article stored for the absentee should be listed to guard against a later claim of damage or loss." The inventory, then, was not a ruse or pretext for an unlawful search.

If the inventory is found to be no more than a pretext for an illegal search, it will be deemed to be an illegal search, and the evidence will not be admissible. In one case, the accused had been jailed by civilian authorities. The commander directed his executive officer to inventory the accused's gear. The accused's locker was opened with boltcutters. During the "inventory," the executive officer admitted that he did a more thorough inventory than he had done in other cases, due to the accused's arrest by the civilian authorities (he had been arrested for indecent exposure and possession of marijuana). He also admitted that he didn't look or feel in all of the pockets of all of the clothing in the locker. Although he said that safeguarding the accused's belongings was his purpose for doing the inventory, he didn't include most of the items he found on the inventory. This was true even for some items that were found in the same field jacket that contained the marijuana. Also, the normal procedure was to wait 24 hours before doing the inventory, which wasn't followed in this case. The court concluded that the entire procedure was really a search for marijuana, and not an inventory. Thus, it was simply a pretext for the unlawful search, not a legitimate inventory under the provisions of AR 700-84. The evidence was, therefore, inadmissible. U.S. v. Mossbauer, 44 CMR 14 (CMA, 1971).

In another case, the accused was administratively declared to be a deserter. Pursuant to command policy, an inventory was done on his personal belongings. Three spiral notebooks were removed from his locker, along with various other items, including marijuana. Those conducting the inventory looked through the notebooks, which turned out to contain incriminating statements regarding drug transactions. On appeal, the court explained that the accused "had to expect that the government could make an inventory of his belongings once he was away from his command for a given period of time; however, regardless of the reason for his absence, he had a right to expect that the intrusion into his belongings would go no further than necessary to meet the purposes of the inventory...appellant also retained an expectation of privacy in any writings or documents he may have had among his personal belongings." The court held that the government "must be allowed leeway to conduct as thorough an inventory procedure as necessary to accomplish the purposes of the inventory." In this case, however, the individuals who did the inventory had gone too far.

The court explained that "a general perusal of documents and books is permissible only if it is reasonable in light of the purpose to be served by that inventory." Here, there was no justification for the reading of the notebook. In fact, the person who did the reading testified that he did so "for no particular reason." The purpose of the inventory, however, was "to protect personal property, to guard against future claims for lost or stolen property, to protect others in the area from property which may be or become a threat to their health or welfare, and to make the locker space available." In view of these purposes, the court found no justification for reading the notebooks. The individual who read them had, in fact, "not opened the notebooks in furtherance of the inventory at all; rather, he was casually looking through the notebooks for no particular reason. This clearly went beyond the scope of the inventory and constituted an unreasonable intrusion into appellant's property." U.S. v. Eland, 17 MJ 596 (NMCMR, 1983).

Inventories are frequently performed on automobiles. These have been upheld, when done for a legitimate purpose and when performed in a reasonable manner. U.S. v. Watkins, 46 CMR 270 (CMA, 1973). The U.S. Supreme Court approved an inventory procedure in a case involving an automobile that had been towed to a city impound lot. Using a "standard inventory form pursuant to standard police procedure," the contents of the vehicle were inventoried, which resulted in the seizure of marijuana. Before doing the inventory, the police had observed a watch on the dashboard and other items of personal property on the back seat and rear floorboard. The Court recognized the basic purposes of an inventory, and concluded that the practice was necessary in order to deal with incidents of theft and vandalism. Thus, inventories pursuant to standard procedures are reasonable where the process "is aimed at securing or protecting the car and its contents." There were valid reasons for taking the vehicle into custody; i.e., public safety, traffic flow, etc. Once the vehicle is in police custody, an inventory is a legitimate "caretaking" function. South Dakota v. Opperman, 49 L.Ed.2d 1000 (1976).

In Colorado v. Bertine, 55 L.W. 4103 (1987), the suspect had been arrested for driving under the influence of alcohol. Before a tow truck arrived to take the vehicle to an impound lot, a police officer inventoried the vehicle. Cocaine was discovered inside of a backpack. The Court held that the inventory was done "in accordance with local police procedures, which require a detailed inspection and inventory of impounded vehicles." Such inventories "serve to protect an owner's property while it is in the custody of the police, to insure against claims of lost, stolen, or vandalized property, and to guard the police from danger." The Court recognized the need for "police caretaking procedures designed to secure and protect vehicles and their contents within police custody." Here, there was no showing of bad faith. Also, the police "were potentially responsible for the property taken into their control. By securing the property, the police protected the property from unauthorized interference. Knowledge of the precise nature of the property helped guard against claims of theft, vandalism, or negligence." Although the police could have given the owner an opportunity to make alternative arrangements (which might have been less intrusive), they were not required to do so: "Reasonable police regulations relating to inventory procedures administered in good faith satisfy the Fourth Amendment, even though the courts might as a matter of hindsight be able to devise equally reasonable rules requiring a different procedure." Also, the fact that the vehicle could have simply been taken to a secure storage area did not eliminate the need for an inventory. On the contrary, "the police may still wish to protect themselves or the owners of the lot against false claims of theft or dangerous instrumentalities."

The court cited Illinois v. Lafayette, 77 L.Ed.2d 65 (1983), another case decided by the U.S. Supreme Court. There, the Court upheld an inventory of a shoulder bag which was carried by a person who was taken to the police station under arrest. This inventory procedure "not only deters false claims but also inhibits theft or careless handling of articles taken from the arrested person. Arrested persons have also been known to injure themselves or others--with belts, knives, drugs, or other items on their person while being detained. Dangerous instrumentalities--such as razor blades, bombs, or weapons--can be concealed in innocent-looking articles taken from the arrestee's possession...Examining all the items removed from the arrestee's person or possession and listing or inventorying them is an entirely reasonable administrative procedure." The Court concluded that "every consideration of orderly police administration benefiting both police and the public points toward the appropriateness of the examination of respondent's shoulder bag prior to his incarceration." It served "important and legitimate governmental interests."

Running through these cases are two crucial points. First, the police can point to reasonable grounds for having conducted the inventory. There is a need to protect the property. When the police take an individual into custody, they do not want to simply leave his automobile on the highway. The result may be a claim against the police department for negligence. The vehicle battery or tires may be stolen; in fact, the entire car may be stolen. Unless some precaution is taken to guard against this possibility, the police may be inviting claims against the government. Again, this is a reasonable basis for the inventory. The courts recognize the need for safeguarding the property, and the related need of protecting the police against fraudulent claims.

The second, related point, is that inventories may be upheld by the courts where they are found to be reasonable, in terms of both basis and their manner of being performed. If the courts find the procedures to be unreasonable, the "inventory" will be treated as an unlawful search and the evidence will be inadmissible in court. Again, the reasonableness of the government's actions is always a critical factor. This is as true here as it is in all other cases under the Fourth Amendment. When the police act out of proper motives and for legitimate purposes, the courts will try to accommodate those interests. The inventory is simply another way that the courts have balanced the rights of the individual against the rights of the state. Where the inventory is reasonable, the balance will be struck in favor of the state.

This should be contrasted with the following: After his apprehension, the accused's private automobile was taken to a parking lot at the MP station. The apprehension was for driving an unsafe vehicle and, when searched incident to the apprehension, drugs were found on the accused. Several hours later, an MP sergeant (E5) proceeded to "inventory" the vehicle for "high value items." He searched the vehicle, which included the trunk, hood, ashtrays, glove compartment, and sunvisors. A small matchbox was found on the dashboard. When opened, it was found to contain marijuana and heroin. The sergeant subsequently testified that he was not aware of the local SOP governing inventories, or even if there was one in existence. He admitted he was looking for contraband, although he said his main purpose was inventorying the automobile for high-value items.

The court held that an inventory cannot be a pretext for an unlawful search. Here, the "inventory" wasn't conducted until after drugs had been found on the accused. The MP sergeant who did the inventory didn't know the proper procedure for performing one. Most importantly, however, the MP looked "among cigarette butts in the ashtray and under the hood, places where only an extraordinarily vivid imagination at best" would have looked for high-value items. Consequently, it was not considered to be a bona fide inventory, but was an illegal search for drugs. The MP's attempt to create his own ad hoc inventory procedure failed. U.S. v. Talbert, 10 MJ 539 (ACMR, 1980).

In another case, the accused was in pretrial confinement. His commander directed an inventory of his station wagon, which was located in the barracks parking lot. His concern was stated to be for the safety of personal property left in the vehicle (stereo equipment, television, etc.). At the time, the accused had been in the process of moving from the barracks. During the inventory, a box containing marijuana was found in the gear shift well. No regulation specifically required the inventory under these circumstances. Still the court upheld it: "Stereo equipment and television sets are always tempting targets for thieves, and the commander's responsibility to ensure that personal effects of his assigned personnel are protected does not end once they are placed in confinement." There was no requirement to obtain the accused's consent prior to doing the inventory. Also, there is no requirement that the inventory be compelled by any regulation. The test is, instead, one of reasonableness: "If the inventory process is legitimate, normal, and customary routine in military administration and not a subterfuge for an unlawful search, it will meet the test of reasonableness." In these cases, "the matter will most often turn on the motive, intent, and good faith of the commander." U.S. v. Dulus, 13 MJ 807 (AFCMR, 1982).

On appeal, the decision was upheld. The court explained: "It cannot be gainsaid that on a military base, even in time of peace, the interests of orderly military administration require the inventory of the personal effects of, for example, an absentee...By analogy, routinely inventorying and securing an automobile containing visible and valuable items legally parked on base is justifiable when the owner is detained in pretrial confinement...The protection of the vehicle and its contents in the unique command setting is not inappropriately incumbent on a superior in appellant's chain of command." The court concluded that an inventory was administratively justified, and had been conducted in a reasonable manner. U.S. v. Dulus, 16 MJ 324 (CMA, 1983).

8. Inspections.

a. General. The law governing the conduct of a military inspection is closely related to that governing the conduct of an inventory. Like an inventory, an inspection is not considered to be a "search." A "search" is regarded as being "designed to discover and seize objects to be used as evidence in a court-martial proceeding." An inspection, on the other hand, is "not directed toward discovering evidence to be used in a criminal proceeding." In other words, an inspection that is conducted for the purpose of "maintaining orderliness and cleanliness in the normal course of regulated military operations, with no purpose in mind to seek out or locate a specific item of stolen property," is not a "search" for criminal evidence. If the purpose is "a legitimate, normal, and customary routine military inspection" that is not aimed at the discovery of evidence for use in a criminal trial, the inspection will be deemed valid by the courts. U.S. v. Coleman, 32 CMR 522 (ABR, 1962).

The military courts have long recognized the commander's inherent authority to perform administrative inspections "in furtherance of the security of his command." U.S. v. Gebhart, 28 CMR 172 (CMA, 1959). Evidence found in the course of a lawful inspection is admissible. The commander has "broad discretion" in this area "to conduct inspections to assist him to maintain orderly, clean, and safe barracks, to ensure the preparedness of individual soldiers, and to enforce regulations prohibiting items of an inherently dangerous nature." U.S. v. Brashears, 45 CMR 438 (ACMR, 1972). The commander, then, has the inherent power and duty to determine his organization's ability to do its mission.

b. Inspections under the Military Rules of Evidence (MRE). An inspection, as we have seen, is aimed at determining the "fitness or readiness of the person, organization, or equipment." U.S. v. Smith, 48 CMR 155 (ACMR, 1975). This includes inspections of an organization that are aimed at the "discovery and removal of contraband weapons as a safety measure and not with a view toward prosecution." U.S. v. Ramirez, 50 CMR 68 (NCMR, 1974).

MRE 313 similarly defines an inspection as "an examination of the whole or part of a unit, organization, installation, vessel, aircraft, or vehicle, including an examination conducted at entrance and exit points, conducted as an incident of command the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit, organization, installation, vessel, aircraft, or vehicle." It includes "an examination to determine and to ensure that any or all of the following requirements are met: that the command is properly equipped, functioning properly, maintaining proper standards of readiness, sea or airworthiness, sanitation and cleanliness, and that personnel are present, fit and ready for duty." It includes "an examination to locate and confiscate unlawful weapons and other contraband." An "order to produce body fluids, such as urine, is permissible." Inspections must be "reasonable," and may utilize any reasonable natural or technological aid and may be conducted with or without notice to those inspected.

During such an inspection, "no serviceperson whose area is subject to the inspection may reasonably expect any privacy which will be protected from the inspection." The commander may use "a trained drug-detection dog as a means of enhancing his own natural senses." The use of such a dog "is a proper incident of a legitimate fitness and readiness inspection." Evidence seized during such an inspection will be admissible, unless it is determined to be merely a sham, or subterfuge, for an illegal search, designed to circumvent, or evade, the requirements of the Fourth Amendment. U.S. v. Middleton, 10 MJ 123 (CMA, 1981). An examination that is made "for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings is not an inspection." (MRE 313b.)

During an inspection, specific individuals should not be selected for an "inspection." Such an "inspection" of only one or two individuals will be viewed by the courts with great skepticism. Also, persons should not be subjected to substantially different treatment during the inspection. If an inspection includes among its purposes the location of weapons or contraband, and if one of these things has been done (inspecting only a select few individuals or subjecting those inspected to disparate treatment), then it will be very difficult for the government to convince the court that this is really an inspection, and not simply an unlawful search that has been called an inspection. Similarly, if the inspection is looking for contraband and/or weapons, and if it is directed immediately following a report of a specific criminal offense in the unit, the government's burden of proof will be a very heavy one. The government may still win, but it must prove that it is doing a legitimate inspection through the introduction of "clear and convincing evidence." (MRE 313.)

You should notice the similarities between an inventory and an inspection. Both are designed for administrative purposes, and both are NOT primarily intended to obtain evidence for use in a court-martial or other disciplinary proceeding. Both are not defined as "searches." As a matter-of-fact, it is a good idea to get used to NOT calling them searches. Call them either inventories or inspections, depending on which you are dealing with.

The rules governing the conduct of an inspection must be understood and applied in a reasonable fashion. You should understand how the courts have dealt with these issues, and should be able to distinguish between a "good" inspection and a "bad" one.

In one case, the accused's roommate saw him put some cocaine into small packets in their room. Wanting the drugs out of the room and being afraid that he might be blamed for their presence if they were to be discovered, the roommate reported the incident to their platoon sergeant, SSG Gunn. That same morning, SSG Gunn had been directed to conduct an inspection for pyrotechnical devices, since someone had set off some the night before. SSG Gunn had not, however, been told specifically when to do the inspection. SSG Gunn took no immediate action, as he was busy with other matters. When the roommate complained again (later in the day), SSG Gunn then began "what purported to be an inspection," starting with the accused's wall locker. As SSG Gunn was doing the "inspection," the roommate noticed a packet of marijuana behind the seat cushion of a chair in the room. The roommate showed this to SSG Gunn, who put it back and told the roommate to go and get the accused. When the accused appeared, SSG Gunn showed him the marijuana, and then summoned the commander.

When the commander was shown the marijuana, he had the rest of the room searched. This included a strip search of the accused, and the commander "then cut open the bottom of the chair in which the marijuana had been found." According to SSG Gunn, the chair was literally cut into shreds. This resulted in the discovery of ten packets of heroin. The court held that "literally cutting the chair to shreds" exceeded the scope of an inspection, and the requirement that such an inspection "be conducted in a reasonable fashion." Instead, the situation evolved into a search." The search was, then, not upheld as a legitimate inspection. Since the roommate had consented to a search, and since it was also in a common area of the room over which the roommate had control, the court nonetheless upheld it as a consent search. U.S. v. Thrower, 12 MJ 777 (ACMR, 1981).

In another case, at a battalion command and staff meeting, officers were informed that a soldier in the battalion had recently lost both of his hands in an explosion. Accordingly, the battalion commander advised all company commanders that they should hold inspections "to insure that none of the unit's soldiers had any of this type of munitions or anything else that was dangerous to them." The following morning, the commander in question decided to conduct an inspection of his unit. He instructed his platoon leaders and NCOs "to look for overall accountability, cleanliness, ready state of the equipment, they were to look for anything illegal such as, and I named munitions, pyrotechnics, fireworks, blanks, magazines, as in ammunition type magazines for weapons." The commander specifically mentioned the incident that had occurred with the soldier who had been injured. He testified that he decided to do a health and welfare inspection "because in his experience even good soldiers forget about small-arms ammunition or brass which they have put in their pockets or field gear."

The commander testified that his purpose "was to ensure the serviceability and the readiness of the unit and also to look for any and all munitions, flammable materials, food in the barracks which would draw bugs, illegal contraband, things of this nature." During the inspection, some savings bonds were found in a pocket of a jacket in the accused's wall locker. The bonds did not appear to have been stolen, and there was no reason to believe that they had been. The court concluded that a genuine health and welfare inspection was in progress. Indeed, there was no evidence that the commander's concern "was anything other than the general welfare and condition of his company." This, however, did not end the matter.

Although a valid inspection was in progress, the intrusion in question must be within the scope of the inspection. If, for example, the purpose of an inspection is to make sure that all stereos and televisions sets are identified with personal markings, there would be no basis for looking inside of someone's pockets during the inspection. In the present case, none of the purposes for the inspection warranted an examination of papers removed from the jacket in question. The court concluded that "commanders and persons conducting such an inspection must be ever faithful to the bounds of a given inspection, in terms both of area and purpose." U.S. v. Brown, 12 MJ 420 (CMA, 1982).

Two recent military cases illustrate application of MRE 313(b)'s subterfuge rule. In U.S. v. Taylor, 41 MJ 168 (CMA, 1994), accused's urinalysis inspection test results were properly admitted, despite the fact that the test followed reports that accused had used drugs. The commander who ordered the test results had no knowledge of the reports. The fact that the accused's section was selected for inspection because the officer-in-charge, who knew of the report, volunteered his section for testing, did not make the inspection invalid. However, in U.S. v. Taylor, 41 MJ 177 (CMA, 1994), the subterfuge full of MRE 313(b) was triggered. Accused's urinalysis inspection test results were improperly admitted where the urinalysis "inspection" was conducted because the first sergeant heard rumors of drug use in his unit and prepared a list of suspects, including accused, to be tested. CMA held that the military judge erred in ruling the government proved by clear and convincing evidence that the inspection was not a subterfuge for an illegal criminal search.

c. The Primary Purpose Rule. Remember, however, that the primary purpose of the inspection mustn't be to obtain evidence for use in a court-martial or other disciplinary proceeding. In one case, the commander scheduled a unit urinalysis examination, later testifying that his primary purpose was "(A) To find users and initiate disciplinary proceedings against those soldiers who tested positive; (B) to comply with the requirement that a unit urinalysis be conducted yearly; and (C) to ensure safety within his unit." In cases such as this, the commander's primary purpose is critical:

"If, however, there are mixed purposes behind the examination, the primary one being other than to gather evidence for disciplinary action, the evidence may be used at a later disciplinary proceeding." Here, the military judge at the trial concluded that the commander's testimony showed that his primary purpose "was to take disciplinary action against any individual who tested positive." On appeal, the court also concluded that the primary purpose was to identify drug users so that disciplinary action could be initiated against them. The inspection was, then, improper and the evidence was inadmissible. U.S. v. Austin, 21 MJ 592 (ACMR, 1985).

This should be compared with the facts in U.S. v. Rodriguez, 23 MJ 896 (ACMR, 1987). There, the battalion commander stated that "his primary purpose in conducting the urinalysis testing was to implement the Army's policy of controlling drug abuse." He explained that "he believed some form of disciplinary action would be appropriate for aviation personnel who tested positive for the use of illegal drugs," although the type of disciplinary action "would depend on the soldier." The court explained that what the rules prohibit "is an examination conducted for the primary purpose of securing evidence for use in disciplinary proceedings. Here, the most that can be said is that the battalion commander had multiple purposes when he ordered the urinalysis testing...This does not inexorably equate to an improper primary purpose." The court then concluded that "an inspection conducted for the purpose of preventing and correcting conditions deleterious to readiness of the unit is more than an effort to find evidence for prosecutorial purposes. The clear intent of the primary purpose language in the rule is to permit the use at trial of evidence that was discovered in the course of an inspection directed towards security, military fitness, or good order and discipline...A properly conducted urinalysis test of a unit is unquestionably supportive of the military mission in that it ensures the readiness of the unit to perform its mission."

Based on these factors, the court concluded: "The fact that disciplinary proceedings are incidentally supported by a properly conducted inspection does not control. So long as the primary purpose of the examination is a proper one, a secondary purpose is not dispositive, even if that secondary purpose is the contemplation of disciplinary proceedings." The court explained that as a practical matter, "a commander who does not recognize the possibility of disciplinary actions arising from a positive urinalysis test is either naive or is engaging in deliberate ignorance." There is, then, nothing wrong with having "mixed purposes." In fact, such mixed purposes "are clearly recognized through the use of the primary purpose language. No particular purpose is automatically the primary one when several purposes are involved." The courts then recognize that if there are mixed purposes, "the primary one being other than to gather evidence for disciplinary action, the evidence may be used." This is an issue of fact which will turn on the specifics of a given case. The testimony of the commander may prove critical. U.S. v. Austin, 21 MJ 592 (ACMR, 1985). Remember, if the primary purpose is to gather evidence for use at a court-martial or other disciplinary proceeding, then it is not a valid inspection. U.S. v. Vincent, 15 MJ 613 (NMCMR, 1982). Members of the unit who have previously been in trouble are also subject to the inspection. There is no requirement to exclude them due to their earlier activities; their inclusion does not transfer the inspection into an illegal search. U.S. v. Shephard, 24 MJ 596 (AFCMR, 1987).

In U.S. v. Johnston, 24 MJ 271 (CMA, 1987), the court upheld a urinalysis inspection, but noted that it could not simply be a subterfuge. Instead, it "must be ordered for a legitimate purpose" and must be conducted "in a lawful manner." Here, the inspection involved members of the staff at a Naval Brig in Seattle. The court found reasonable grounds for the inspection. One was simply "the special interest of the military in ferreting out illegal drugs and protecting the health and fitness of its members." Another was the "importance of maintaining security in the prisons." This involved the "need to detect drug abuse among members of the Brig staff who had daily contact with and were responsible for the security of the Brig prisoners." Such an inspection, however, "may still amount to a subterfuge search requiring probable cause if it were ordered primarily for the purpose of prosecution." The factors which "might convert an otherwise valid inspection to detect contraband into a subterfuge search for the fruits of crime...include whether (1) the examination was directed immediately following a report of a specific offense in the unit...and was not previously scheduled; (2) specific individuals are selected for examination; or (3) persons examined are subjected to substantially different intrusions during the same examination." As an example, the inspection mustn't simply be aimed at one individual who is suspected of drug abuse. U.S. v. Burris, 25 MJ 846 (AFCMR, 1988)." Where any of the above three factors are present, the government will have a very heavy burden of proof. U.S. v. Parker, 27 MJ 522 (AFCMR 1988).

d. The scope of the inspection. An inspection must be reasonable and "based upon and limited to a legitimate military need." Even when an inspection is being conducted, the Fourth Amendment does not totally disappear: "The private possessions of a member of the military, like that of a private citizen, are not open to indiscriminate or unreasonable search for evidence of criminal misconduct." Remember, an inspection that is intended to obtain evidence for use at a court-martial will be considered to be a search, and not an inspection. U.S. v. Neer, 9 MJ 575 (AFCMR, 1980).

It is extremely important to identify the scope of the inspection. In other words, why is it being done, and what areas are subject to it? In one case, the commander "decided to conduct a health and welfare inspection of his unit." This was designed "to check the living area of the troops to ensure the areas are sanitary, there's no safety hazards, the living conditions are proper and that there's no condition that would be harmful to the individual." A drug detection dog was used as part of the inspection. When the inspection team entered the accused's room, the dog alerted on his locker. The commander "had not told his unit to unlock their wall lockers; while several were left unlocked...most were left locked and were not disturbed in that condition unless Brandy (the dog) alerted thereon."

The court in that case noted that inspections "are time-honored and go back to the earliest days of the organized militia." They are a legitimate command tool for ensuring the overall fitness and readiness of the unit. The court ruled that "during a traditional military inspection, no serviceperson whose area is subject to the inspection may reasonably expect any privacy which will be protected from the inspection...during a legitimate health and welfare inspection, the area of the inspection becomes "public" as to the commander, for no privacy from the commander may be expected within the range of the inspection." The question, then, is what is the "established zone of the inspection?" The commander may intrude into that area, "for under the circumstances the individual lacks a reasonable expectation of privacy from the commander during the inspection."

Under the facts presented, the commander could take the dog into the room: "When the dog is in the company of the commander or a member of the commander's inspection party in an area which, by virtue of the inspection, has become "public" to the inspecting party, the dog's detection of odors emanating even from an area not included within that particular inspection--and, hence, private--is permissible and may serve to support probable cause sufficient to allow a physical intrusion into that area in search of the detection item." When the inspection began, "all areas subject to it were public as to the commander and his inspection party." In this case, however, an examination of the lockers was not found to be part of the inspection. The commander had not required his people to unlock them and, in fact, most of the lockers were locked. However, even though the intrusion into the locker was not found to be a part of the inspection, the dog's alert on the locker was held to have furnished probable cause for a search of the locker, which was authorized by the commander. U.S. v. Middleton, 10 MJ 123 (CMA, 1981).

Before an inspection is ordered, then, it is important for the commander to determine its scope. Specifically, what is its purpose? Also, what areas are to be included within the scope of the inspection? Unless these areas are clearly established, uncertainty is likely to breed confusion and litigation.

In another case, the commander determined that the billets were "in substandard condition." He also observed Army issued tools and mess hall utensils in various individual rooms. He decided to hold an inspection, and instructed the inspection team personnel to examine each individual the same way, and to inspect each room the same way. He told them to "look for tools, unsanitary conditions, lock blade knives, laundry bags stuffed with dirty laundry, prescription drugs that were out of date, and any other contraband or paraphernalia." He did not single out the accused for inspection. The accused was in the seventh room to be inspected, and marijuana was found in a pocket of his field jacket. The court concluded that the inspection had two purposes. The first was "to assure the security, military fitness and good order of the unit," and the second was "to locate and confiscate unlawful weapons and contraband." This was not a subterfuge, but was reasonable "in terms of both area and purpose." U.S. v. Tena, 15 MJ 728 (ACMR, 1983).

In another case, during a prior health and welfare inspection, the commander found a large amount of marijuana. The inspection was performed out of concern for the preparedness of the unit, as an impending move to Alaska was scheduled. The marijuana problem seemed to be concentrated in the mortar platoon, so the commander decided to reinspect it. The court concluded that this was reasonable: "A large amount of marijuana was found in one particular platoon of a unit just a few days prior to the time the unit was to deploy to Alaska. This drug problem was unusual and unexpected and the company commander was quite apprehensive about the unit's ability to perform its mission on this country's outer defensive perimeter. For that reason, he took positive action to ensure insofar as possible the readiness of his company. Anything less on his part would have been dereliction of duty." U.S. v. Mitchell, 3 MJ 641 (ACMR, 1977).

Remember, so long as the inspection serves a legitimate purpose and is reasonably conducted, the courts will uphold it, and any evidence found will be admissible. In one case, during a scheduled health and welfare inspection, the commander entered a room, only to detect the odor of marijuana. The odor was so intense that "it was necessary to open a window to ventilate the room." The commander then authorized a search of the room. The court held that the commander "planned to inspect as he had frequently done in the past...While we are aware of the appellant's reasonable expectation of privacy in his barracks room, we are unaware of any requirement for a unit commander to obtain the occupant's approval to conduct a military inspection in his room relating to readiness, security, living conditions, personal appearance, or a combination of these or other categories...Captain Glover was where he had a right to be when he was virtually overwhelmed by the odor of marijuana." U.S. v. Lopez, 6 MJ 981 (ACMR, 1979).

In U.S. v. Ellis, 24 MJ 370 (CMA, 1987), the court explained that "military inspections ordered for the purpose of insuring sanitation and cleanliness, security, military fitness, or good order and discipline do not violate any reasonable expectation of privacy which a servicemember might otherwise have in the area to be inspected." At the same time, "the reasonableness of an inspection is determined by whether the inspection is conducted in accordance with the commander's inspection authorization, both as to the area to be inspected...and as to the inspection." If the inspection goes beyond the commander's order, "either as to area or purpose," then the "inspection will be treated as a search requiring the existence of probable cause.

e. Restricted areas. The concept of reasonableness is not a rigid one; rather, it will vary with the specific facts of a case. In terms of what is a reasonable inspection, you must take into account the particular area wherein the inspection takes place. As an example, AR 190-11 covers Physical Security of Arms, Ammunition, and Explosives. Storage areas for such materials are to be designated and posted as restricted areas (paragraph 4-4). In connection with these actions, "entry and exit procedures will include checks of personnel and vehicles for unauthorized material...upon exiting, all vehicles will be thoroughly inspected to ensure that only authorized material is being removed." (Paragraph 5-9.)

A restricted area is one "to which entry is subject to special restrictions or control for security reasons or safeguarding property or material." These may be of different types, depending "on the nature and varying degree of importance, from a security standpoint, of the security interest or other matter contained therein." (AR 380-20, paragraph 5a.) Where "conditions warrant" such, the installation commander "will designate restricted areas to protect classified defense information or safeguard property or material for which they are responsible." (AR 380-20, paragraph 6a.) The commander "will post signs and notices in conspicuous and appropriate places." A warning will state "Restricted Area," and the fact that the "fort, range, plant, etc." has been declared a restricted area. It will also explain that "all persons entering herein are liable to search." (AR 380-20, paragraph 6c.)

There is a similar provision for denying access to a National Defense Area. It is to have defined boundaries and is to be marked with a physical barrier and warning signs. The basis, again, is military necessity. Persons can be removed if they "threaten the orderly administration of the emergency site." (Paragraph 6f.)

The installation commander "will cause any person who enters a restricted area without authority to be brought immediately before proper authority for questioning." (AR 190-13, paragraph 6-6a.) This person may be searched, and will be advised of his rights prior to questioning. The questioning will be done as soon as is possible. The person will be detained for only the minimum time necessary. (AR 380-20, paragraph 7a.) If the violation was "knowing," persons who are not subject to the UCMJ "will be taken without delay to civilian law enforcement officials." (AR 380-20, paragraph 7b.) Under the Internal Security Act of 1921 (50 USC Section 797), it is a federal criminal offense for anyone to violate any order or regulation "declared by a military commander to protect or secure military installations or facilities with respect to...safeguarding military installations or facilities against destruction, loss, or subversive activity."

f. Gate searches. An installation commander has the inherent power to conduct inspections of personnel and property within his control. The purpose is to determine and ensure the security, military fitness, and good order and discipline of the unit, organization, installation, etc. (AR 210-10, paragraph 2-23a). This is also a lawful inspection within the meaning of MRE 313. The power of the installation commander includes the "authority to direct authorized guard personnel to inspect their persons, their property, and vehicles at entry and exit points of the installation." (AR 210-10, paragraph 2-23(c) 1.)

Commanders will state in the authorization establishing the gate search the purpose(s) of the program, the scope of the inspections, and the means by which the program is to be executed (paragraph 2-23(c) 2).

The commander "will issue specific and complete instructions," which will include the time and location of the inspection, and "the method of selecting personnel and vehicles to be stopped and inspected."

Before looking at some specific court decisions in this area, it is important to understand why you need to know this specific area of the law. During a gate inspection, evidence is frequently discovered. If it is a properly conducted inspection, the evidence will be admissible at a subsequent trial. If the gate inspection was not properly set up, however, the evidence will NOT be admissible. As is so often true in this area, whether or not a later criminal prosecution will be possible is determined by the reasonableness of your actions. Also, a gate inspection frequently leads to another type of search, which results in the discovery of evidence. As an example, a consent search may be performed at the gate. Other types of lawful searches, even though performed at or near an entry or exit point, "have legal basis independent of the commander's authorization to inspect." (AR 210-10, paragraph 2-23(c)(3) a.) Consent is only one example where this may happen. Another would be an actual probable cause search.

A gate inspection is "reasonable and lawful" so long as it is "not a subterfuge for a search for criminal evidence." U.S. v. Flowers, 23 MJ 647 (NMCMR, 1986). Courts uphold such inspections as being valid when they are "based upon the commanding officer's authority and responsibility for the security of his command." By virtue of the installation commander's position, he has "unique responsibilities in connection with the health, safety, welfare, morale, and efficiency of those placed under his command." U.S. v. Vargas, 13 MJ 713 (NMCMR, 1982). In U.S. v. Johnson, 6 MJ 681 (NMCMR, 1978), the court held it was "eminently reasonable" to use a gate inspection "to deter incoming contraband." Such was equally true for its use "to deter outgoing contraband and stolen government property." In Johnson, the inspection was conducted one mile from the main gate. The court said this was reasonable, since there "is no location closer to the gate where a search point could be located without severely interfering with both inbound and outbound traffic." The location chosen was "the only practical location that could be selected."

In U.S. v. Harper, 8 MJ 708 (ACMR, 1979), an individual was coming through the gate when he was informed that a "contraband check" was being conducted, and he was directed to a nearby guard shack. As the soldier walked toward the building, he dropped a packet on the ground, which was later found to contain heroin. The court held such an inspection to be reasonable and sufficiently nonintrusive to pass constitutional muster." A gate inspection, then, is reasonable and does not require probable cause. The court further held that the individual's "act in discarding heroin was voluntary and not the result of illegal police activity. When the appellant dropped the packet, the unit police were in the process of conducting a legitimate gate search." The soldier's action "in discarding the heroin was unrelated to any improper police activity" and constituted an abandonment of the property.

In Harper, the court explained that gate inspections within the United States are governed by more stringent requirements. Entry to a military installation overseas is equated with an overseas border search. U.S. v. Rivera, 4 MJ 215 (CMA, 1978). In Rivera, the court noted that such "border searches" are upheld "pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into the country." The court explained that travelers "may be stopped in crossing an international border because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in." The factual similarities between an international border and the entrance onto a military installation overseas results in their similar treatment.

In U.S. v. Gauvin, 12 MJ 610 (NMCMR, 1981), the court explained that a person or his property "may also be searched without probable cause while coming aboard a Navy ship docked in a foreign port." The court also held that inspections of personnel as they boarded a Navy vessel in a domestic port were also reasonable: "The need to keep drugs off Navy vessels is certainly as great as the need to keep them off military shore installations. In addition, the need to maintain security, military fitness, and good order and discipline is perhaps more important on a ship than it is on a military installation, whether that ship is in a United States port or in foreign or international waters. Therefore, searches of personnel and their property as they come aboard any Navy vessel, regardless of its location, should also be permissible without probable cause as long as the person conducting the search has no discretion as to how he will conduct it." Here, the person doing the inspection had simply been told to inspect all packages brought aboard the ship: "He had no input into deciding who was searched, the times the searches were conducted, the location of the searches, or the procedures to be followed if something were discovered."

In U.S. v. Alleyne, 13 Mj 331 (CMA, 1982), the court dealt with an inspection of a vehicle that was leaving Camp Carroll, Republic of Korea. The MP at the gate testified that his duties were "to check all personnel coming in and going out Camp Carroll, including their baggage and any vehicle they're driving out in, to check their glove compartments, under the seats, any baggage they had, and in their trunks before they leave Camp Carroll." This was based on the fact that the installation commander "has put out that all vehicles and persons and baggage that they carry will be searched before exiting Camp Carroll." The court, again, compared this with an overseas border search: "When persons or property enter the United States, they may be subjected to searches and seizures that under other circumstances would not be reasonable...In connection with American military installations located overseas, the rationale which supports customs searches and searches at border checkpoints fully upholds the right of military authorities to search persons entering the post through a gate...Although the military installation may not come under American sovereignty and usually is leased from the foreign government, the distinction between the area within a military post located in a host country overseas and the area located outside that installation is great enough to warrant the same treatment that would apply at an international border." The court explained that it found in the border search concept "ample authority for conducting a gate search of someone entering an overseas military installation."

The court further held that it would not differentiate between an inspection of those entering the installation, as opposed to those leaving it: "Thus, both incoming and outgoing border-crossing searches have several features in common: (1) The government is interested in protecting some interest of United States citizens, such as restriction of illicit international drug trade, (2) there is a likelihood of smuggling attempts at the border, (3) there is difficulty in detecting drug smuggling, (4) the individual is on notice that his privacy may be invaded when he crosses the border, and (5) he will be searched only because of his membership in a morally neutral class." The court held that the government "demonstrates that its interest in exit searches is as great as in entry searches." Indeed, the "need to safeguard military property is particularly serious with the rise in use of tactical small arms. Obviously, the problem is acute overseas, where there are concentrations of soldiers and hazardous weaponry, both of which must be maintained in a state of readiness. Indeed, with the rise of highly organized and sophisticated international terrorist organizations, host nations would have cause for alarm and outrage should it be determined that the flow of tactical weapons and other military equipment out of a post need not be closely guarded against."

Additionally, the military "is concerned with maintaining readiness and effectiveness. Drugs post a major obstacle to this objective. In ordering gate searches or inspections, the commander's primary objective is not to apprehend a particular drug offender but rather to deter and cripple the traffic altogether. An entry-exit search program makes it difficult for the wholesaler to bring drugs on post. The exit portion of the program forces the individual drug abuser to buy and use his drugs off post, use the drug on post where the military authorities may observe him, or to carry the drug through the post gateway, where he is subject to discovery." Based on these factors, the court concluded that the entry-exit search "vastly enhances the effectiveness of both property and drug control programs, with minimum impact upon personal liberties." The court continued: "Additionally, our overseas forces constitute our first line of defense in the event of an armed conflict. There exists a special need to insure combat readiness. Because of the proximity of potentially hostile forces, there also exists the danger that military equipment or classified information may either intentionally or inadvertently fall into the hands of our potential enemies. Preventing the flow of information or military hardware from the installation is as vital a consideration as preventing contraband from entering. We are convinced that nothing in the Constitution requires a distinction between searches made upon entering a military installation overseas and those made upon departing that installation. Limiting such inspections to those at entry (as opposed to exit) points would be at odds with the rationale for border searches."

In view of all of these considerations, it is hardly surprising that the courts uphold such overseas border searches as "reasonable." Again, the concept of reasonableness is a fluid one, one that varies as the circumstances change. The determination of what is and is not reasonable is made "by balancing the need to search against the invasion which the search entails." U.S. v. Harris, 5 MJ 44 (CMA, 1978). If there is no need at all, then even a slight intrusion may be considered to be unreasonable. If the need is great, then a substantial intrusion may become "reasonable." In one case, for example, an individual objected to a search of carry-on luggage as he was about to board an airline. In view of the serious threat of hijacking, however, the court found the search to be reasonable. U.S. v. Davis, 482 F.2d 893 (9th Cir. 1973). The point to keep in mind regarding the gate inspection is that the installation commander must have a basis for acting. Those who set up the procedures governing such inspections must be familiar with the principles set forth by the courts. They should be prepared to testify (in court, if necessary) as to the basis for their actions; i.e., what is the military need, and how does it outweigh the Fourth Amendment considerations that are involved? If these questions are thought out in advance, the government will be in a good position to defend its actions against attack.

In U.S. v. Jones, 24 MJ 294 (CMA, 1987), the court held that gate inspections were valid under the Military Rules of Evidence (Rule 313). They represent a balance "between the responsibility of the commander to secure the safety and welfare of his installation and the rights of persons to be free from unreasonable searches and seizures of their persons and property." As such, one valid purpose of such an inspection is to "maintain readiness and the effectiveness of the command." In evaluating gate inspections, courts look to two basic factors: (1) was the gate inspection in furtherance of command policies and directives? (2) was the objective to focus on this particular vehicle and appellant or was it to safeguard the security of the installation? Stated differently, the inspection must be "carried out pursuant to appropriate command policies and directives." Also, it must be conducted "for the general purpose of ensuring the security of the installation" and not planned or executed "with the intention of singling out appellant or his vehicle." If the latter, courts will regard it as a subterfuge search, requiring the presence of probable cause. Remember, the purpose of allowing these inspections is not to provide a subterfuge for avoiding constitutional protection. U.S. v. Flowers, 26 MJ 463 (CMA 1988).

9. Conclusion.

The Fourth Amendment, you will recall, is a prohibition against unreasonable searches and seizures. We have examined the various types of governmental action that are viewed as both reasonable and unreasonable by the courts. In all of the areas which we have looked at, this determination involves a balance between the rights of the individual and the rights of the state. If our only interest is the rights of the individual, then law enforcement collapses and crime runs rampant. Under such conditions, society itself is endangered. On the other hand, if our only consideration is law enforcement, then individual rights are not protected. Our goal, then, is to safeguard both and somehow achieve a happy medium between the two interests.

The Fourth Amendment principles which we have examined are designed to protect individual rights while also furthering legitimate law enforcement interests. Over the last two hundred years, the courts have interpreted the Bill of Rights with this in mind. If those who enforce the laws understand the importance of the two interests involved, then BOTH may be attained. We can enforce the law, and we can also protect the rights of the individual. It is not an either-or proposition; the need is to accommodate both. The important point is that those who are responsible for the enforcement of our laws (whether they be police officers, commanders, or NCOs), must understand and appreciate the necessity for preserving this delicate balance. We can expect no more; we can tolerate no less.

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LESSON

PRACTICE EXERCISE

The following exercises are multiple choice. There are four possible choices to each. You are to select the one correct choice by CIRCLING the letter beside it directly on these pages. This is a self-graded lesson exercise. DO NOT look up the correct answer from the solution until you have finished. To do so will endanger your ability to learn this material. Also, your final examination score will tend to be lower than if you had followed these recommendations.

1. The Constitutional protection against unlawful searches and seizures is found in:
 - A. The 1st Amendment.
 - B. The 4th Amendment.
 - C. The 5th Amendment.
 - D. The 6th Amendment.
2. In order for the Constitutional prohibition against unlawful searches to apply, the following must be present:
 - A. Government action.
 - B. A reasonable expectation of privacy.
 - C. Actual ownership of the premises searched.
 - D. A. and B. only.
3. A search of abandoned property is:
 - A. Illegal unless there is consent.
 - B. Illegal unless there is probable cause.
 - C. Illegal, but the evidence will be admissible anyway.
 - D. Legal.
4. A search by one's spouse:
 - A. Is legal, but the evidence will be inadmissible.
 - B. Is illegal, and the evidence will be inadmissible.
 - C. Does not trigger the Constitutional prohibition against illegal searches and seizures.
 - D. None of the above.
5. If officials of a foreign government conduct a search overseas:
 - A. The evidence is never admissible in a U.S. court.
 - B. The search is illegal, since the Constitution protects Americans from such a search.
 - C. The evidence will be admissible in a U.S. court.
 - D. There is still "government action," so the search will be illegal and the evidence will not be admissible.

6. A search of government property:
- A. Is always legal, since the U.S. Constitution doesn't apply to a search of the government's own property.
 - B. Is always legal, since there is no right of privacy in the government's own property.
 - C. Is legal, but the evidence will not be admissible in court.
 - D. None of the above.
7. If there is an illegal search and seizure, the evidence that is seized will not be admitted in court. This is the result of the:
- A. Derivative evidence rule.
 - B. Best evidence rule.
 - C. Exclusionary rule.
 - D. Rule 56 of the Federal Rules of Criminal Procedure.
8. Which of the following is a recognized exception to the application of the rule noted in question 7 (above) ?
- A. The good faith exception.
 - B. The bad faith exception.
 - C. The extenuation exception.
 - D. The misdelivery exception.
9. Which of the following can issue a search authorization?
- A. The Staff Judge Advocate (SJA).
 - B. Any JAG officer, including the SJA.
 - C. The provost marshal.
 - D. None of the above.
10. A search authorization:
- A. Requires the existence of probable cause.
 - B. Must be based on sworn testimony.
 - C. Must be in writing.
 - D. All of the above.
11. In terms of establishing probable cause:
- A. Hearsay is not admissible.
 - B. Hearsay is admissible, but it must be substantiated by a sworn affidavit.
 - C. Hearsay is admissible, but only if in writing.
 - D. None of the above.

12. The two-part probable cause test for evaluating an informant's tip is known as:
- A. The Escobedo test.
 - B. The Redford test.
 - C. The Aguilar test.
 - D. None of the above.
13. The two-prong test referred to in question 12 (above) is composed of the following:
- A. Basis of knowledge and sworn testimony.
 - B. Reliability and sworn testimony.
 - C. Hearsay plus direct evidence.
 - D. Basis of knowledge plus reliability.
14. Even an anonymous tip may be enough to establish probable cause if the police officer can independently verify the facts by his own personal observation. The technical term for this is:
- A. Corroboration.
 - B. Verification.
 - C. Substantiation.
 - D. Reliability enhancement.
15. In order to have a valid consent search:
- A. The consent must be in writing.
 - B. The suspect must be told what the searcher is looking for.
 - C. Neither of the above.
 - D. Both of the above.
16. During an investigative stop, a suspect may be frisked:
- A. For drugs.
 - B. For contraband.
 - C. For weapons.
 - D. All of the above.
17. During the execution of a search authorization, items not named in the authorization:
- A. May be seized if a separate authorization is later obtained.
 - B. May be seized, but aren't admissible in court.
 - C. May be seized if there is probable cause to believe they are contraband or evidence of a crime.
 - D. May be seized, but only if they appear to be weapons.

18. If a suspect is apprehended in an automobile, a search incident to the apprehension may:
- A. Include the entire automobile.
 - B. Include the passenger compartment of the automobile.
 - C. Not include any part of the automobile, since such a search may only include the suspect himself.
 - D. Include the automobile, but only if there is probable cause to believe that it contains a weapon.

LESSON

PRACTICE EXERCISE

ANSWER KEY AND FEEDBACK

<u>Item</u>	<u>Correct Answer and Feedback</u>
1.	B. The 4th Amendment. "The right of the people...(page 1-2, Introduction)
2.	D. A and B only. In order for the Fourth Amendment...(page 1-2, Part A, 1)
3.	D. Legal. Abandoned Property. (page 1-10, Part A, 4, b)
4.	C. Does not trigger the Constitutional prohibition against illegal searches and seizures. The Purely Private Search. (page 1-3, Part A, 2)
5.	C. The evidence will be admissible in a U.S. court. The problem frequently arises... (page 1-5, Part A, 3)
6.	D. None of the above. Government property. (page 1-14, Part A, 4, f)
7.	C. Exclusionary rule. General. Before we examine the...(page 1-16, Part B, 1)
8.	A. The good faith exception. A third exception to the...(page 1-20, Part B, 2, d)
9.	D. None of the above. In the military, a search...(page 1-22, Part C, 2, a)
10.	A. Requires the existence of probable cause. A search authorization is...(page 1-23, Part C, 3)
11.	D. None of the above. The Probable Cause Test...(page 1-27, Part C, 5, c)
12.	C. The <u>Aguilar</u> test. This is known as...(page 1-27, Part C, 5, c)
13.	D. Basis of knowledge plus reliability. The first is basis...(page 1-27, Part C, 5, c)
14.	A. Corroboration. In effect, through their own...(page 1-30, Part C, 5, d)

- 15. C. Neither of the above.
The scope of the consent...(page 1-38, Part D, 2, c)
- 16. C. For weapons.
The person stopped may be... (page 1-47, Part D, 4, b)
- 17. C. May be seized if there is probable cause to believe they are
contraband or evidence of a crime.
The rule authorizes seizure...(page 1-51, Part D, 5, b)
- 18. B. Include the passenger compartment of the automobile.
Searches of automobiles... (page 1-43, Part D, 3, d)