

MILITARY LAW REVIEW VOL. 61

Articles

THE SPECIFICITY REQUIRED IN MILITARY SEARCH WARRANTS

THE ADMINISTRATION OF JUSTICE
IN THE PAKISTAN AIR FORCE

SEARCH OF PREMISES, VEHICLES, AND THE
INDIVIDUAL INCIDENT TO APPREHENSION

Comments

THE IDENTIFICATION OF ORIGINAL, REAL EVIDENCE

Book Reviews

MILITARY LAW REVIEW

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SUBSCRIPTIONS AND BACK ISSUES: Interested persons should contact the Superintendent of Documents, United States Government Printing Office, Washington, D. C. 20402. Subscription price: \$4.50 a year, \$1.50 for single copies. Foreign subscription, \$5.75 per year.

REPRINT PERMISSION: Contact Editor, *Military Law Review*, The Judge Advocate General's School, Charlottesville, Virginia 22901.

This Review may be cited as 61 MIL. L. REV. (number of page (1973).)

PAMPHLET
 No. 27-100-61

HEADQUARTERS
 DEPARTMENT OF THE ARMY
 WASHINGTON, D.C., *Summer 1973*

MILITARY LAW REVIEW – VOL. 61

Page

Articles:

The Specificity Required in Military Search Warrants Captain Howard C. Eggers	1
The Administration of Justice in the Pakistan Air Force Squadron Leader Sheikh Mohammad Anwar	41
Search of Premises, Vehicles, and the Individual Incident to Apprehension Major Francis A. Gilligan	89

Comments:

The Identification of Original, Real Evidence Captain Edward J. Imwinkelried	145
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Book Reviews: 183

Books Received: 187

THE SPECIFICITY REQUIRED IN MILITARY SEARCH WARRANTS*

By Captain Howard C. Eggers **

This article discusses a need for a definite description of the place to be searched and the things to be seized in military search warrants. The specificity standards for search warrants are identified, defined and analyzed. These standards, revealed in federal case law and present military practices, establish certain guidelines to be followed and that the standards of specificity must be applied to the place, the person, and the thing.

I. INTRODUCTION

Historically, the Fourth Amendment to the United States Constitution is a product of the abuses which British officials visited on the American colonists by means of general warrants and writs of assistance.¹ To combat these abuses, the drafters of the Constitution adopted the fourth amendment which prohibits unreasonable searches and seizures and provides that warrants to search are valid only if there is probable cause for their issuance and they specifically describe the place to be searched and the things to be seized.²

Recognizing the historical bases for the amendment, the Supreme Court, as early as 1886, noted that it was intended to protect against indiscriminate, governmental invasions "of the sanctity of a man's home and the privacies of life."³ But the Court at

* This article is adapted from the author's thesis prepared as a member of the 21st Advanced Class, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia. The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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¹ *Boyd v. United States*, 116 U.S. 616, 624-630 (1886); *Warden v. Hayden*, 387 U.S. 294, 301 (1967).

² U.S. CONST. amend. IV

³ *Boyd v. United States*, 116 U.S. 616, 650 (1886).

first emphasized the protection of the "home" concept rather than "privacy." It tied protection to property law concepts, analyzing the validity of searches in terms of constitutionally protected geographic areas and granting more protection to certain places than to others.⁴

In the modern, electronic age, when individuals have become more susceptible to governmental surveillance, the Supreme Court has steadily moved to liberate the fourth amendment from artificial property law concepts.⁵ In recent years the Court has emphasized the concept of a right of personal privacy. In *Griswold v. Connecticut*,⁶ Mr. Justice Douglas, speaking for five members of the Court, described the various guarantees of the Bill of Rights as creating "zones of privacy." He specifically recognized that the role of the fourth amendment is to insure the "right of the people to be secure in their persons, homes, papers, and effects, against unreasonable searches and seizures."⁷ Mr. Justice Stewart in *Katz v. United States*⁸ reiterated this approach when he pointed out that "the Fourth Amendment protects people, not places."⁹

A. THE ROLE OF THE SEARCH WARRANT

Since the first clause of the fourth amendment proscribes unreasonable searches, reasonableness is the general standard which both civilian and military courts use when examining a search.¹⁰ Such a standard, of course, must ordinarily be applied on an ad hoc basis.¹¹ However, the courts are in agreement that any general or exploratory search so endangers the right of privacy that it could never be reasonable.¹²

⁴ *Warden v. Hayden*, 387 U.S. 294, 304 (1967).

⁵ *Id.*

⁶ 381 U.S. 479 (1965).

⁷ *Id.* at 484 (emphasis added).

⁸ 389 U.S. 347 (1967).

⁹ *Id.* at 351.

¹⁰ *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931); *United States v. Doyle*, 1 U.S.C.M.A. 545, 4 C.M.R. 137 (1952); *United States v. Ball*, 8 U.S.C.M.A. 25, 23 C.M.R. 249 (1957).

¹¹ *United States v. Rabinowitz*, 339 U.S. 56 (1950); *United States v. Doyle*, 1 U.S.C.M.A. 545, 4 C.M.R. 137 (1952); *United States v. Swanson*, 3 U.S.C.M.A. 671, 14 C.M.R. 89 (1954); *United States v. Rhodes*, 24 C.M.R. 776 (ABR 1957).

¹² *Boyd v. United States*, 116 U.S. 616 (1886); *United States v. Wroblewski*, 105 F.2d 444 (7th Cir., 1939); *United States v. Brown*, 10 U.S.C.M.A. 482, 28 C.M.R. 48 (1959); *United States v. Hartsook*, 15 U.S.C.M.A. 291, 35 C.M.R. 263 (1965); *United States v. Hillan*, 26 C.M.R. 771 (NBR 1958).

It is the role of the search warrant to prevent the general or exploratory search; and while some warrantless searches have been found to be reasonable under the first clause of the fourth amendment,¹³ searches under the authority of warrants must conform to the requirements of the amendment's second clause. Such warrants must be issued only upon probable cause and must specifically describe the place to be searched and the things to be seized.¹⁴

The Supreme Court of the United States has always considered the use of a search warrant to be the best means of limiting an intrusion into an individual's privacy.¹⁵ More recently the United States Court of Military Appeals has also expressed its opinion that written authorizations to search are very desirable,¹⁶ even though written warrants are not required under the Uniform Code of Military Justice.¹⁷ The court has clearly stated that it would like to see written search authorization, and there is a possibility that it might make such authorizations mandatory at some time in the future.¹⁸

In partial response to the Court of Military Appeals' expressed preference for written authorizations to search, the Department of Army recently promulgated Chapter 14 to Army Regulation 27-10. This chapter authorizes the issuance of written search warrants by military judges.¹⁹

¹³ See *Chimel v. California*, 395 U.S. 752 (1969); *Chambers v. Maroney*, 399 U.S. 42 (1970); *Warden v. Hayden*, 387 U.S. 294 (1967).

¹⁴ U.S. CONST. amend. IV.

¹⁵ *Agnello v. United States*, 369 U.S. 20 (1952); *Jones v. United States*, 362 U.S. 257 (1960); *Chimel v. California*, 395 U.S. 752 (1969). This article will not consider whether a warrant is a prerequisite to a search wherever practicable or whether it is only one of a number of factors to be considered in judging the reasonableness of a given search. See, T. Taylor, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION*, 38-46 (1969).

¹⁶ See *United States v. Martinez*, 16 U.S.C.M.A. 40, 36 C.M.R. 196 (1966) where the court indicated a written authorization would spell out the facts upon which a search authorization was based and would also enumerate the article to be seized. See also *United States v. Sparks*, 21 U.S.C.M.A. 184, 44 C.M.R. 188 (1971).

¹⁷ *MANUAL FOR COURTS-MARTIAL, 1969 (REV. ED.)* para. 152; Army Reg. No. 190-22, Chap. 2 (12 June 1970); *United States v. Grisby*, 385 F.2d 652 (4th Cir. 1964).

¹⁸ See *United States v. Hartsook*, 15 U.S.C.M.A. 291, 294, 35 C.M.R. 263, 266 (1965), where the court discusses the difficulty of establishing the grounds for issuing a warrant because it is necessary to take extensive testimony long after the events have transpired.

¹⁹ Army Reg. No. 27-10, Chap. 14 (Change No. 9, 19 July 1972). The legality of such an authorization is beyond the scope of this thesis. Language in paragraph 152, *MANUAL FOR COURTS-MARTIAL, 1969 (Rev. ed.)*, however,

Even though the new chapter does not prohibit search authorizations by commanding officers,²⁰ it is very likely that the military will increasingly rely upon warrants to avoid the difficulties caused by the use of the commanders' oral authorizations. For example, the Supreme Court has required that warrants be issued by an independent magistrate.²¹ The Court discussed the reason for this rule in *Johnson v. United States*:²²

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave people's homes secure only in the discretion of police officers . . . when the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent.²³

In *Coolidge v. New Hampshire*,²⁴ the Court enforced this rule by invalidating a search warrant issued by the State Attorney General who was supervising a murder investigation. Condemning a practice which showed that warrants were rarely sought from independent magistrates, Mr. Justice Stewart said:

. . . prosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to their own investigations — the "competitive enterprise" that must rightly engage their single-minded attention.²⁵

The State argued that a system which "permitted a law enforcement officer himself to issue a warrant was one of those 'workable rules governing arrests, searches and seizures to meet the practical demands of effective criminal investigation and law enforce-

states that searches conducted under the authority of a lawful search warrant are lawful. This language indicates that someone must have the authority to issue warrants, and that searches conducted under the authority of a warrant, issued through an appropriate procedure, would be deemed "reasonable" searches under the fourth amendment and the UNIFORM CODE OF MILITARY JUSTICE.

²⁰ Army Reg. No. 27-10, para. 14-1 (Change No. 9, 19 July 1972).

²¹ See Note 15, *supra*.

²² 333 U.S. 10 (1948).

²³ *Id.* at 13-14.

²⁴ 403 U.S. 443 (1971), See also *Shadwick v. City of Tampa*, 407 U.S. 345 (1972).

²⁵ *Coolidge v. New Hampshire*, 403 U.S. 443, 450 (1971).

ment,'²⁶ but Mr. Justice Stewart stated that such a method clearly violated the fourth amendment:²⁷

The security of one's privacy against arbitrary intrusion by the police — which is at the core of the Fourth Amendment — is basic to a free society. It is therefore implicit in "the concept of ordered liberty" The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned.²⁸

The Court of Military Appeals now generally treats a search authorized by a commanding officer as the equivalent of a search under the authority of a warrant, to be measured by the standards applied by civilian courts.²⁹ As a result, the commanding officer has been treated as the equivalent of a magistrate;³⁰ however, it may not be long before the neutrality and independence of the commanding officer are challenged. Considering the *Coolidge* Court's strong condemnation of a method allowing warrants to be issued by enforcement agents, it is doubtful that a commanding officer, responsible as he is for discipline and the protection of government property,³¹ will meet the criterion of neutrality. It is likely, therefore, that more emphasis will be placed on the issuance of search warrants by military judges to moot the troublesome question of the commander's impartiality.³²

B. THE IMPORTANCE OF SPECIFICITY

Since an added emphasis on warrants issued by military judges is likely, it is important to examine the nature of a warrant, to ascertain rules which will enable judges to draft warrants sufficiently limited in scope to be valid under the fourth amendment but sufficiently broad to authorize an effective search. It is this requirement that a warrant be adequately specific which enables courts to protect the right of individual privacy against overbroad searches, while at the same time recognizing the government's legitimate need to conduct limited searches.³³

²⁶ *Id.* at 452.

²⁷ *Id.* at 453.

²⁸ *Id.*, quoting Justice Frankfurter in *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949).

²⁹ *United States v. Davenport*, 14 U.S.C.M.A. 152, 33 C.M.R. 364 (1963); *United States v. Hartsook*, 15 U.S.C.M.A. 291, 35 C.M.R. 263 (1965).

³⁰ *United States v. Hartsook*, 15 U.S.C.M.A. 291, 35 C.M.R. 263 (1965).

³¹ Army Reg. No. 190-22, para. 2-1 (12 June 1970).

³² Army Reg. No. 27-10, Chap. 14 (Change No. 9, 19 July 1972).

³³ See *Johnson v. United States*, 333 U.S. 10 (1948), concerning the need to balance the right of privacy against the desire for effective law enforcement.

The recent promulgation of Chapter 14, Army Regulation 27-10, makes this an especially opportune time to analyze the specificity requirement. This analysis relies heavily on federal civilian cases. There are three reasons for the reliance.

First, since the military has used written warrants infrequently, there are only a few military decisions dealing with the subject of specificity.³⁴ Second, Chapter 14's language, requiring that the warrant "command the person to conduct the search to search forthwith the person or place named for the property specified,"³⁵ is exactly the same as the language used in Federal Rule of Criminal Procedure 41.³⁶ Since this language is identical, it would seem that warrants issued under Chapter 14 should generally comply with the standards applicable to federal civilian warrants.³⁷ Third, it is difficult to deduce a specificity standard from the military cases involving search authorizations because these cases have usually been decided on the basis of the reasonableness of the search, blurring any distinction between probable cause and specificity.³⁸ This blurring, of course, is a natural result of the fact that military authorizations to search have ordinarily been requested and given orally.³⁹ The civilian practice of using a warrant that is separate from the request and supporting affidavit facilitates a discrete analysis of the probable cause and specificity issues.

C. SPECIFICITY IN MILITARY SEARCHES

Probable cause and specificity are two distinct requirements that operate together to validate an invasion of individual priv-

³⁴ *United States v. Hartsook*, 15 U.S.C.M.A. 291, 35 C.M.R. 263 (1965); *United States v. Jeter*, 21 U.S.C.M.A. 208, 44 C.M.R. 262 (1972); *United States v. Martinez*, 16 U.S.C.M.A. 40, 36 C.M.R. 196 (1966).

³⁵ Army Reg. No. 27-10, para. 14-5 (Change No. 9, 19 July 1972).

³⁶ FED. R. CRIM. P. 41(c).

³⁷ This approach is also in keeping with the practice of the Court of Military Appeals to apply the protections of the fourth amendment to persons in the military in accordance with the guidance provided by the decisions of the federal courts. *E.g.*, *United States v. Ross*, 18 U.S.C.M.A. 432, 32 C.M.R. 432 (1963); *United States v. Penn*, 18 U.S.C.M.A. 194, 39 C.M.R. 194 (1969). To the same effect see Judge Ferguson's opinion in *United States v. Jacoby*, 11 U.S.C.M.A. 428, 480-481, 29 C.M.R. 244, 246-247 (1960).

³⁸ See *United States v. Schafer*, 13 U.S.C.M.A. 83, 32 C.M.R. 83 (1962); *United States v. Jeter*, 21 U.S.C.M.A. 208, 44 C.M.R. 262 (1972).

³⁹ See *United States v. Martinez*, 16 U.S.C.M.A. 40, 36 C.M.R. 196 (1966); *United States v. Sparks*, 21 U.S.C.M.A. 134, 44 C.M.R. 188 (1971).

acy.⁴⁰ However, civilian courts have long recognized that they are intimately related because:

... probable cause for the issuance of a search warrant necessarily implies, not simply that there are reasonable grounds to believe that some violation of law exists, but that there is a violation in respect to some property located on some premises or on some person — each of which can be unmistakably identified, so as to be capable of being particularly described in the warrant, from the information in the affidavit.⁴¹

The need for specificity, as distinct from probable cause, has not been as evident in military cases, possibly because search authorizations have been informal and oral.

In its earliest cases the Court of Military Appeals applied a broad "reasonableness" standard to the question of a search's validity.⁴² Gradually, however, the court has been adopting the position that a reasonable search authorization must conform to the particular requirements of the fourth amendment. In *United States v. Brown*,⁴³ the court adopted the probable cause requirement: a commanding officer must have a "probable cause" to believe that a crime has been committed before he can authorize a search.

At this point, however, the court had not imposed an additional requirement that the place searched or the item sought be specifically identified. In *United States v. Gebhart*⁴⁴ the court said:

... that the exercise of the authority to search must be founded upon probable cause, whether the search be general in that it includes all personnel of the command or subdivision, or limited only to persons specifically suspected of an offense.⁴⁵

Thereafter the court continued to apply this general "probable cause" standard, seemingly without regard to any need for specificity.⁴⁶

Eventually, however, the court recognized the need for specificity. The first case in which the court expressly addressed the

⁴⁰ *Warden v. Hayden*, 387 U.S. 294, 309-310 (1967).

⁴¹ *Lowery v. United States*, 161 F.2d 30, 33 (8th Cir. 1947), cert. denied, 331 U.S. 849 (1947).

⁴² *United States v. Doyle*, 1 U.S.C.M.A. 545, 4 C.M.R. 137 (1952), where a search by a master-at-arms was found to be reasonable in light of his duties and responsibilities in regard to the enforcement of laws and regulations; *United States v. Swanson*, 3 U.S.C.M.A. 671, 14 C.M.R. 89 (1954).

⁴³ 10 U.S.C.M.A. 482, 28 C.M.R. 48 (1959).

⁴⁴ 10 U.S.C.M.A. 606, 28 C.M.R. 172 (1959).

⁴⁵ 10 U.S.C.M.A. at 610, 28 C.M.R. at 176; accord, *United States v. Davenport*, 14 U.S.C.M.A. 152, 156, 33 C.M.R. 364, 368 (1963).

⁴⁶ See *United States v. Harman*, 12 U.S.C.M.A. 180, 30 C.M.R. 180 (1961); *United States v. Schafer*, 13 U.S.C.M.A. 83, 32 C.M.R. 83 (1962).

specificity issue was *United States v. Hartsook*.⁴⁷ In *Hartsook*, testimony at trial indicated that investigators had informed the Battalion Commander that the accused was suspected of using an altered bingo card to win \$1,000.00. The evidence indicated that the agents requested permission to talk to the accused and "if possible shake his property down and see what we could determine." ⁴⁸ One agent testified that the commander was told that they would like to search the accused's property for "anything we may find." ⁴⁹ The court invalidated the search because from the evidence it was unclear whether the Battalion Commander had limited his authorization to certain specific items or whether his authorization allowed a general rummaging through the accused's belongings. The authorization of a general rummaging would clearly have been invalid.

The second case in this line of authority was *United States v. Jeter*.⁵⁰ In *Jeter*, a commanding officer was presented with evidence that an accused was probably responsible for the disappearance of money from another's wall locker. Knowing that the accused had requested to go to town to pay bills and had been gone that day, the officer authorized a search of accused's locker for the missing money and "anything that would relate to the accused's finances." ⁵¹ When receipts were seized under this authorization, the court was confronted with the issue whether the search authorization was too broad. The court found the authorization valid because the knowledge that accused had wanted to pay bills made all the accused's financial records relevant to the question whether he had spent more than he had been paid.

In *Hartsook* and *Jeter* the Court of Military Appeals clearly adopted the fourth amendment requirement that the items to be seized be particularly described.⁵² In subsequent cases, the court has indicated that general exploratory searches for evidence will not be allowed.⁵³ The question then arises whether authorizations to search an entire barracks or area are still valid or whether the fourth amendment requires that the searches of military barracks be limited to a single living unit, measured by the area occupied by one soldier.

⁴⁷ 15 U.S.C.M.A. 291, 35 C.M.R. 263 (1965).

⁴⁸ *Id.* at 293, 35 C.M.R. at 265.

⁴⁹ *Id.* at 298, 35 C.M.R. at 270.

⁵⁰ 21 U.S.C.M.A. 208, 44 C.M.R. 262 (1972).

⁵¹ *Id.* at 213, 44 C.M.R. at 267.

⁵² *United States v. Jeter*, 21 U.S.C.M.A. 208, 44 C.M.R. 262 (1972); *United States v. Hartsook*, 15 U.S.C.M.A. 291, 35 C.M.R. 263 (1965).

⁵³ *United States v. Martinez*, 16 U.S.C.M.A. 40, 36 C.M.R. 196 (1966).

At first, the reader might suppose that *Hartsook* and *Jeter* lead inexorably to the conclusion that broad searches of an entire barracks are invalid, but it must be remembered that with almost the same breath that it announced the decision in *Hartsook*, the court in *United States v. Drew*⁵⁴ again validated a search of an entire barracks. *Drew* seemingly restricted *Hartsook* to a requirement that the items sought be adequately limited while imposing no need for a specific limitation as to the place to be searched. However, it now appears that the court is prepared to extend this specificity requirement to the area to be searched as well as the item to be seized. As Judge Ferguson noted in his dissenting opinion in *United States v. Sparks*:⁵⁵

. . . central to the law of search and seizure is that probable cause must exist to believe, not only that a crime has been committed, but that the evidence sought to be seized is where the authorizing official thinks it is.⁵⁶

Prudence dictates that commanders granting oral authorizations and military judges issuing written warrants proceed on the assumption that the Court of Military Appeals will apply the specificity requirement to the description of the place to be searched as well as that of the item to be seized.

II. WHERE DOES ONE LOOK TO FIND THE SPECIFIC DESCRIPTION?

The civilian courts have uniformly resorted to written warrants while, until recently, the military legal system relied almost exclusively on oral search authorizations by commanders. Although the civilian and military legal systems have used different authorization procedures, both systems have had to grapple with the threshold question: Where does one look to find the necessary description?

A. THE MILITARY PRACTICE: ORAL AUTHORIZATIONS AND WRITTEN WARRANTS

Until recently, when an accused moved to suppress the fruits of a commander-authorized search, the trial judge often found it extremely difficult to determine the scope of the authorization. Prior to the promulgation of Chapter 14, Army Regulation 27-10,

⁵⁴ 15 U.S.C.M.A. 449, 35 C.M.R. 421 (1965).

⁵⁵ 21 U.S.C.M.A. 134, 44 C.M.R. 188 (1971).

⁵⁶ *Id.* at 142, 44 C.M.R. at 196, citing *United States v. Alston*, 20 U.S.C.M.A. 581, 44 C.M.R. 11 (1971).

61 MILITARY LAW REVIEW

there was no provision in military law for the issuance of a written search warrant. The power to authorize a search had been granted only to commanding officers.⁵⁷ But no formal procedure was ever established for the commanding officer to issue written authorizations, and his power to authorize the search has generally been exercised on a mere verbal presentation of facts by an investigator.⁵⁸

While the courts have upheld the oral search authorization procedure in the military,⁵⁹ the Court of Military Appeals has repeatedly suggested that the military adopt a more formal, written procedure. The Department of Army adopted the suggestion by promulgating Chapter 14, Army Regulation 27-10. Chapter 14 provides that a warrant issued by a military judge must:

- 1) Be directed to a military policeman, a Criminal Investigation Detachment investigator, or a commanding officer or his designee;

- 2) State the facts establishing the probable cause for its issuance and the names of the persons whose affidavits have been taken in support; and

- 3) Command the person to search forthwith the place named for the property specified.⁶⁰

Chapter 14 contains model forms for both the supporting affidavits and the warrant proper.⁶¹ It must be remembered, of course, that these model forms are furnished as guidance, not a straitjacket. As long as constitutional and regulatory requirements are met, the judge need not use any particular forms.⁶² It is worth noting, however, that the Department of Army model warrant⁶³ provides for the incorporation by reference of named and attached affidavits in much the same manner as the federal criminal practice.⁶⁴

⁵⁷ MANUAL FOR COURTS-MARTIAL, UNITED STATES 1969 (REV. ED.), para. 152.

⁵⁸ See *United States v. Jeter*, 21 U.S.C.M.A. 208, 44 C.M.R. 262 (1972).

⁵⁹ *United States v. Grisby*, 335 F.2d 652 (4th Cir. 1964).

⁶⁰ Army Reg. No. 27-10, para. 14-5 (Change No. 9, 19 July 1972).

⁶¹ Affidavit Supporting Request for Warrant for Search and Seizure, DA Form 3744-R, 1 July 1971, Figure 14-1, Army Reg. No. 27-10 (Change No. 8, 7 September 1971); Warrant, DA Form 3745-R, 1 July 1971, Figure 14-3, Army Reg. No. 27-10 (Change No. 8, 7 September 1971).

⁶² *United States v. Longfellow*, 408 F.2d 415 (4th Cir. 1969), cert. denied, 394 U.S. 998 (1969).

⁶³ DA Form 3745-R, 1 July 1971.

⁶⁴ This is another indication that when looking for precedents to determine the validity of a warrant issued by a military judge, it would be wise to consult federal, civilian cases.

While the military courts have not yet had an opportunity to pass on any cases involving warrants issued under Chapter 14, the Court of Military Appeals has occasionally dealt with a written search authorization issued by a commander.⁶⁵ In these cases the court has equated a commanding officer to a federal magistrate issuing a written warrant⁶⁶ and considered him "bound by the same rules in authorizing a search."⁶⁷

United States v. Fleener,⁶⁵ while a case dealing with a written search authorization issued by a commander and not a warrant, provides some indication that the Court of Military Appeals recognizes the need to treat warrants more strictly than oral authorizations. In *Fleener*, special agents for the Air Force learned that cartons containing opium had been delivered to the accused's quarters. At the request of these agents, the base commander filled out a document entitled "Authority to Search and Seize." This document was a form used to authorize searches; and in this instance it expressly authorized a search of the accused's quarters. The word "person" had been stricken wherever it appeared on the form.

Faced with an attempt to suppress evidence found on the accused's person when he was arrested at the site of the search, the court would not validate the search of his person on the basis of the written authorization even though the base commander testified that he assumed that the agents had authority to search the accused's person and the agents testified that they had requested such authority. Judge Duncan, writing for the majority, felt that a written authorization to search and seize must provide its own specificity. Such specificity should not be established or modified by resorting to inferences drawn from what the investigators had orally requested permission to search or what the commander thought would happen but did not expressly authorize. The written authorization must control and govern the validity of the search.

In dissent Judge Quinn felt that testimony regarding what actually transpired when the search authorization was sought and

⁶⁵ See *United States v. Vierra*, 14 U.S.C.M.A. 48, 33 C.M.R. 260 (1963); *United States v. Fleener*, 21 U.S.C.M.A. 174, 44 C.M.R. 228 (1971).

⁶⁶ *United States v. Battista*, 14 U.S.C.M.A. 70, 33 C.M.R. 282 (1963); *United States v. Davenport*, 14 U.S.C.M.A. 152, 33 C.M.R. 364 (1963) and *United States v. Hartsook*, 15 U.S.C.M.A. 291, 35 C.M.R. 263 (1965).

⁶⁷ *United States v. Hartsook*, 15 U.S.C.M.A. 291, 294, 35 C.M.R. 263, 266 (1965).

⁶⁸ 21 U.S.C.M.A. 174, 44 C.M.R. 228 (1971).

what the commander intended when giving written permission should be considered to supplement the written authorization. In fact, it would appear that Judge Quinn would not only allow oral supplementation of a written search authorization, but he would allow a limitation on the scope of the search authorization to be implied from the surrounding circumstances known to the person who authorized the search.⁶⁹ Such an implied limitation seems far removed from the express specificity demanded by the fourth amendment.

While Judge Quinn's position is consistent with a practice allowing the oral authorization of searches, it is not acceptable where written warrants are issued by independent magistrates. Where the authorization to search is in writing, the description limiting the scope of the search must be written into the warrant proper or incorporated by reference.⁷⁰

B. THE INCLUSION OF THE DESCRIPTION IN "THE WARRANT": INCORPORATION BY REFERENCE

The *Fleener* decision is a clear indication that when the military resorts to a written procedure, the Court will judge the written authorization or warrant by the standards ordinarily applied to federal, civilian search warrants. Both Federal Rule 41 and Army Regulation 27-10 require that the warrant describe "the person or place named for the property specified."⁷¹ This language suggests that the judge's order, the warrant proper, must itself contain a complete description of the place to be searched and the things to be seized. Under such a restrictive view, of course, the warrant proper's lack of a complete description would invalidate the warrant and any search conducted under its authority.

While the Federal Rule appears to require that the warrant proper contain a complete description of the place to be searched and the things to be seized, federal courts have interpreted the term "warrant" more broadly than merely the document drawn by the issuing magistrate.⁷² "Warrant," as used in the fourth

⁶⁹ See Judge Quinn's dissent in *United States v. Hartscock*, 15 U.S.C.M.A. 291, 35 C.M.R. 263 (1965).

⁷⁰ *United States v. Meeks*, 313 F. 2d 464 (6th Cir. 1963).

⁷¹ FED.R. CRIM. P. 41(c); Army Reg. No. 27-10, para. 14-5 (Change No. 9, 19 July 1972).

⁷² See *Townsend v. United States*, 253 F.2d 461 (5th Cir. 1958), where the supporting affidavit which had been referred to in the warrant was used to provide the necessary information that the premises which the warrant ordered searched were used and occupied by the defendant.

amendment, has been interpreted to include documents which are physically connected to and expressly referred to in the warrant proper.⁷³ For example, a form search warrant was not insufficient even though the only description of the property to be searched was typewritten on an unsigned strip of paper stapled to the form, where the printed form expressly referred to the stapled-on attachment and the two papers appeared to be one complete document, regular on its face.⁷⁴

To incorporate documents into a search warrant, the documents and the warrant proper must in effect constitute one document; federal courts generally agree that this means that the documents must be physically connected and the warrant must expressly refer to the attached document.⁷⁵ It is only necessary, however, that the incorporated documents be attached to the warrant proper at the time that it is signed; they need not be attached to the warrant served at the time the search is conducted, even if the place to be searched and the objects to be seized are only described in these supporting documents.⁷⁶

If the warrant does not properly incorporate the related documents, the warrant proper must contain the complete description. For example, in *United States v. Marti*⁷⁷ the search warrant directed officers to seize any materials found by them to be in violation of the state obscenity laws, without stating guidelines as to what was obscene. The circuit court found that the warrant was unconstitutionally deficient for failing to describe with particularity the items to be seized. The warrant's fatal generality was not cured by the fact that the accompanying affidavits were specific as to the matter to be seized because the warrant proper did not incorporate the affidavits. The court pointed out that the warrant must set forth a specific description, either actually or by incorporation, to limit the discretion of the executing officials.

In summary, federal practice requires no particular form for a search warrant. The warrant proper need not contain a complete description defining the scope of a search. But some writing con-

⁷³ *United States v. Ortiz*, 311 F. Supp. 860 (D.C. Colo. 1970), *aff'd*, 445 F.2d 1100 (10th Cir. 1971); *United States v. Hartsook*, 15 U.S.C.M.A. 391, 395, 35 C.M.R. 263, 267 (1965).

⁷⁴ *United States v. Meeks*, 313 F.2d 464 (6th Cir. 1963).

⁷⁵ *Id.* For some indication that attachment alone is sufficient, see *Vinto Products Co. v. Goddard*, 43 F.2d 399 (D.C. Minn. 1930). *Contra*, *United States v. Marti*, 421 F.2d 1203 (2d Cir. 1970).

⁷⁶ *Serrick v. Eyman*, 389 F.2d 648 (9th Cir. 1968); *United States v. Averell*, 296 F.Supp. 1004 (E.D. N.Y. 1969).

⁷⁷ 421 F.2d 1263 (2d Cir. 1970).

taining such a description must at least be incorporated by reference in and attached to the warrant proper. Without such a written description, a warrant to search is both constitutionally and statutorily invalid.⁷⁵

III. WHAT STANDARDS DETERMINE WHETHER A DESCRIPTION IS SUFFICIENTLY SPECIFIC?

In the mid-1920's the United States Supreme Court established the basic standards by which the adequacy of a warrant's description is to be determined. The Court said that when designating the place to be searched "it is enough if the description is such that the officer with a search warrant can with reasonable effort ascertain and identify the place intended."⁷⁶ When specifying the items to be seized, the Court ruled that the description must be so definite that "nothing is left to the discretion of the officer executing the warrant."⁷⁷

As he attempts to conform a search warrant to these basic standards, a magistrate must avoid two pitfalls. On the one hand he must not formulate a *vague* description, that is, one which is not sufficiently definite on its face or one which is made ambiguous by circumstances omitted from the warrant. The problem with a vague description is that the warrant does not clearly define the limits of the search. On the other hand the magistrate must not formulate an *over-broad* description, that is, one which sets definite limits on the search, but limits which exceed the justification for the search.

Both pitfalls create the danger of a general search which unduly invades privacy; but the sources of the difficulty are different. Vagueness results from the judge's failure to state any meaningful limits in the description. Thus, on its face a warrant simply authorizing the seizure of "obscene material" is invalid for vagueness; it provides no guidelines by which an officer can determine what is obscene.⁷⁸ The word "obscene" by itself is a vague term. In addition, a description definite on its face can be made ambiguous by circumstances either unknown to or unheeded by the magistrate. For example, the address 512 Main Street, Old Forge, Pennsylvania becomes ambiguous when it is learned that the town

⁷⁵ U.S. CONST. amend. IV; FED. R. Crim. P. 41(c).

⁷⁶ *Steele v. United States*, 267 U.S. 498, 503 (1925).

⁷⁷ *Marron v. United States*, 275 U.S. 192, 196 (1927).

⁷⁸ *United States v. Marti*, 421 F.2d 1263 (2d Cir. 1970).

of Old Forge has South and North Main Streets, on both of which there is an address "512." ⁸² In both instances, vagueness results from the warrant's failure to set forth the peculiar characteristics necessary to enable the executing officers to distinguish the particular place or item described in the warrant from any other place or item.

Likewise, the description of the place to be searched or the item to be seized can be overbroad. The permissible breadth of a description of the item to be seized depends, in part, on the item's nature. Less specificity is usually demanded in a warrant for contraband, such as gambling equipment and paraphernalia, where possession of all items of that nature is illegal, than in one for stolen goods.⁸³ When specific stolen items, such as sport jackets are sought, a very detailed description is normally required, since it is very likely that the area searched will contain similar items completely unrelated to any offense. The mere designation "sport jackets," while not vague, would be overbroad.

The issue of overbreadth is particularly acute when the item's nature places it within the protection of the first amendment. Specificity is "to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain."⁸⁴ In *Stanford v. Texas*,⁸⁵ the warrant described the items to be seized as "books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments concerning the Communist Party of Texas."⁸⁶ Due to the nature of the items, this seemingly detailed description was held too broad when the subsequent search resulted in the seizure of more than two thousand items, including the defendant's stock in trade (mail order books) and personal books, papers and documents (including writings of Mr. Justice Black), but no records of the Communist Party. The obvious chilling effect of such a mass

⁸² *Bucari v. File*, 31 F. Supp. 433 (D.C. Pa. 1940); *accord*, *United States v. Alexander*, 278 F.308 (D.C. Fla. 1922), describing a place to be searched as on the corner of two streets without specifying which corner; *United States v. Rykowski*, 267 F.866 (D.C. Ohio, 1920), where the warrant failed to specify if the designated address was on the north or south portion of the named street.

⁸³ *E.g.*, *United States v. Joseph*, 174 F. Supp. 539 (E.D. Pa. 1959), *aff'd on other grounds*, 278 F.2d 504 (3d Cir. 1960), *cert. denied*, 364 U.S. 823 (1960).

⁸⁴ *Stanford v. Texas*, 379 U.S. 476, 485 (1965).

⁸⁵ *Id.*

⁸⁶ *Id.* at 485.

seizure on the exercise of first amendment rights pointed up the need for a stricter standard of specificity when the items are printed materials, seized because of their contents.

The description of a place to be searched is usually considered too broad if it includes more than one living unit.⁸⁷ When a building contains several living units,⁸⁸ a warrant describing that whole building (usually by address and nothing more) as the place to be searched is overbroad without a showing that the building is being used as a single unit.⁸⁹ The description is not vague; designation of a particular building provides a definite limit for the search, but that limit is too broad.

A. PROBLEMS RELATED TO SPECIFICITY

Before attempting to establish guidelines which a military magistrate can use to avoid the problems of overbreadth and vagueness in a search warrant, we should consider and distinguish related problems which are also of concern when dealing with a warrant-authorized search.

1. *Items Subject to Seizure.*

While a warrant might be invalid because its description is vague or overbroad as defined above, it also might be invalid on the completely distinct ground that it describes an object which is not subject to seizure. A military authorization for a search "may issue with respect to a search for fruits or products of an offense, the instrumentality or means of committing the offense, or contraband or other property the possession of which is an offense, and under certain circumstances for evidentiary matters."⁹⁰ This listing of the items which are subject to seizure is substantially identical to the types of items for which a federal, civilian warrant may be issued.⁹¹

Until the decision of *Warden v. Hayden*,⁹² evidentiary matters were not considered appropriate subjects for seizure. In 1921,

⁸⁷ *United States v. Hinton*, 219 F.2d 324 (7th Cir. 1955).

⁸⁸ A living unit is considered comparable to a house for the purposes of fourth amendment protections and involves an area specifically set aside for the exclusive use of an individual or his family.

⁸⁹ *United States v. Hinton*, 219 F.2d 324 (7th Cir. 1955).

⁹⁰ Instructions to DA Form 3744-R, 1 July 1971, Affidavit Supporting Request for Warrant for Search and Seizure, Figure 14-1, Army Reg. No. 27-10 (Change No. 8, 7 September 1971).

⁹¹ FED. R. CRIM. P. 41(c).

⁹² 387 U.S. 294 (1967).

SPECIFICITY

the Supreme Court formulated what came to be known as the "mere evidence rule":

Although search warrants have thus been used in many cases ever since the adoption of the Constitution, and although their use has been extended from time to time to meet new cases within the old rules, nevertheless it is clear that . . . they may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding, but that they may be resorted to only when the public or the complainant may have in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful, and provides that it may be taken.⁹³

The distinction between "mere evidence" and "instrumentalities of a crime" was never clearly defined; and while courts, including the Court of Military Appeals, paid lipservice to the rule, it was recognized more in the breach than in the observance.⁹⁴ Mr. Justice Brennan, speaking for the Supreme Court in the *Warden* cases between seizure of items of evidentiary value only and seizure of instrumentalities, fruits or contraband has been criticized by courts and commentators.⁹⁵ He further recognized that the rule had "spawed exceptions so numerous and confusion so great"⁹⁶ that it had outlived its usefulness.

As the Supreme Court gradually eschewed property concepts and focused on the individual's "right of privacy," it was inevitable that the Court would eventually discard the mere evidence rule, based as it was on whether the state or the individual had a greater property interest in the items seized. In overruling this rule, the Supreme Court did not, however, authorize the seizure of any and all items without regard to individual privacy. As the Court of Military Appeals recognized in *United States v. Whisenant*,⁹⁷ there still must be an affirmative showing that the

⁹³ *Gould v. United States*, 255 U.S. 298, 309 (1921).

⁹⁴ *E.g.*, *United States v. Webb*, 10 U.S.C.M.A. 422, 27 C.M.R. 496 (1959); *United States v. Starks*, 28 C.M.R. 476 (ABR. 1958); *United States v. Simpson*, 15 U.S.C.M.A. 18, 34 C.M.R. 484 (1964). But see *United States v. Vierra*, 14 U.S.C.M.A. 48, 38 C.M.R. 260 (1963) (where a calling card was not considered an instrumentality and was not admitted into evidence) and *United States v. Askew*, 14 U.S.C.M.A. 257, 34 C.M.R. 37 (1963) (where personal letters were held inadmissible).

⁹⁵ 387 U.S. at 300.

⁹⁶ *Id.* at 309.

⁹⁷ 17 U.S.C.M.A. 117, 37 C.M.R. 381 (1967).

evidence sought will aid in a particular apprehension or conviction. In addition to requiring this relevance, the decision in *Warden* would appear to preclude the seizure of an accused's self-incriminating writings, matters protected by the fifth amendment which was a consideration in the *Gouled* decision.⁹⁸

Just as the magistrate must observe the specificity standards when he drafts a warrant, he must bear in mind that the warrant can be issued only for an item subject to seizure. He need no longer concern himself with whether an item sought is "mere evidence," but he must ascertain that it has relevance to the investigation and is not an item "testimonial" or "communicative" in nature.

2. *The Length of the Intrusion.*

The premises to be searched might contain more than one item which is relevant to the investigation and is subject to seizure. So in drafting an adequate description, the magistrate must keep in mind that the search must be discontinued when the item specified in the search warrant has been located.⁹⁹ A warrant which fails to describe all the items that might be found bearing a relationship to the suspected crime might prevent an effective search. In *United States v. Highfall*¹⁰⁰ a warrant was issued for the seizure of a package of toys thought to contain hashish. After they had seized the package, the officers continued the search until they found evidence indicating that the accused knew of the contents of the parcel. In granting the defendant's motion to suppress this subsequently-found evidence, the district court said:

While this Court might possibly . . . doubt the wisdom and propriety of an interpretation of the Fourth Amendment which would require the suppression of non-described items accidentally discovered during a search for properly described items, it has no doubt that items discovered in a search continued after the described items have been found must be suppressed. The very fact that the search continued after discovery of the items described indicates that the search had a further objective. If it is a specific

⁹⁸ In this regard, Judge Quinn in *United States v. Simpson*, 15 U.S.C. M.A. 18, 34 C.M.R. 464 (1964) in a critical analysis of the "mere evidence" rule had indicated that a writing amounting to a confession by the accused could be the subject of a search and seizure. It is very doubtful, however, that this approach would prevail under the ruling in *Warden v. Hayden*, 387 U.S. 294 (1967), where Mr. Justice Brennan specifically noted that the items seized were "not 'testimonial' or 'communicative' in nature, and their introduction therefore did not compel respondent to become a witness against himself in violation of the Fifth Amendment." 387 U.S. at 302-3.

⁹⁹ J.C. KLOTTER AND J.R. KANOVITZ, *CONSTITUTIONAL LAW FOR POLICE* 138 (2d ed. 1971).

¹⁰⁰ 334 F. Supp. 700 (E.D. Ark. 1971).

object for which probable cause exists, it could, and should, be described in the warrant. Absent this, the Court can only conclude that the continued search is a general one which the Constitution prohibits.¹⁰¹

The judge can avoid this problem, especially when the items sought are contraband, by using generic terminology. A warrant describing a class of related items, such as "narcotics consisting of dangerous drugs, heroin and marijuana, together with paraphernalia instrumental in the uses of said contraband,"¹⁰² authorizes an extensive search, limited only by the rule that it may encompass only areas wherein the contraband is likely to be found.¹⁰³ Armed with this type of description, having found one item of the class, the officer is justified in continuing the search for others. With care, a magistrate can draft a warrant, describing more than one item to be seized, without violating the vagueness and overbreadth tests even where the search is for a specific stolen item. For example, if a locker has been pried open and a watch stolen, a warrant to search a suspect's area should not only include a description of the watch but it should also include authority to seize an instrument which could have been used to pry open the locker.

3. *Plain View Seizures.*

The Supreme Court has said:

If entry upon the premises be authorized and the search which follows be valid, there is nothing in the Fourth Amendment which inhibits the seizure by law-enforcement agents of . . . property the possession of which is a crime, even though the officers are not aware that such property is on the premises when the search is initiated.¹⁰⁴

There are numerous military and civilian authorities to the effect that when officers are executing a valid search warrant or are otherwise legally on a premises, they may seize fruits and instrumentalities of crime, along with contraband, which come into their "plain view" during the course of their search.¹⁰⁵

¹⁰¹ *Id.* at 702.

¹⁰² *People v. Walker*, 257 Cal. App. 2d 424, 58 Cal. Rptr. 495 (1967), cert. denied, 389 U.S. 1038 (1967).

¹⁰³ *E.g.*, *Woo Lai Chun v. United States*, 274 F.2d 708 (9th Cir. 1960).

¹⁰⁴ *Id.* at 155.

¹⁰⁵ *United States v. Ross*, 13 U.S.C.M.A. 432, 32 C.M.R. 432 (1963); *United States v. Decker*, 16 U.S.C.M.A. 397, 37 C.M.R. 17 (1966); *United States v. Dennis*, 36 C.M.R. 884 (AFBR 1966); *United States v. Owens*, 36 C.M.R. 909 (AFBR 1966); *Adams v. New York*, 192 U.S. 585 (1904); *Ludwig v. Wainwright*, 434 F.2d 1104 (5th Cir. 1970); *Woodbury v. Beto*, 426 F.2d 923 (5th Cir. 1970); *United States v. Barry*, 423 F.2d 142 (10th Cir. 1970); *United States v. Bridges*, 419 F.2d 963 (8th Cir. 1969); *Vitali*

There are even some indications that the courts are liberalizing the plain view doctrine. While such seizures have usually been limited to instrumentalities of a crime or contraband, the Supreme Court's rejection of the "mere evidence" rule in *Warden v. Hayden*¹⁰⁶ brings into question the continued validity of such a limitation.¹⁰⁷ In *Coolidge v. New Hampshire*,¹⁰⁸ Mr. Justice Stewart, speaking for four members of the Supreme Court,¹⁰⁹ indicated a readiness to approve the seizure of any relevant items when the intrusion by the police is valid either under the authority of a warrant or one of the exceptions to a warranted search.¹¹⁰ Recognizing that "searches deemed necessary should be as limited as possible," Mr. Justice Stewart saw no inconsistency in allowing a "plain view" seizure, because "given the initial intrusion, the seizure of an object in plain view . . . does not convert the search into a general or exploratory one."¹¹¹ As long as the discovery by the searching officers is inadvertent, there is no violation of the specificity requirements of the fourth amendment.¹¹²

v. United States, 383 F.2d 121 (1st Cir. 1967); *Johnson v. United States*, 293 F.2d 539 (D.C. Cir. 1961), cert. denied, 375 U.S. 888 (1963); *Seymour v. United States*, 369 F.2d 825 (10th Cir. 1966).

¹⁰⁶ 387 U.S. 294 (1967).

¹⁰⁷ The argument runs that the seizure of non-enumerated items had been inhibited, not by the Constitution, but by the common law rule. When the *Hayden* decision repudiated that rule in respect to a search incident to an arrest, it implicitly made any relevant evidentiary items seizable incident to a warrant. Cook, *Requisite Particularity in Search Warrant Authorization*, 38 TENN. L. REV. 496, 509 (Summer, 1971).

¹⁰⁸ 403 U.S. 443 (1971).

¹⁰⁹ Justices Stewart, Douglas, Brennan and Marshall.

¹¹⁰ Speaking of the justification for the "plain view" doctrine, Justice Stewart noted that "[w]hat the 'plain view' cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification — whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused—and permits the warrantless seizure. Of course, the extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them; the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges." *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971).

¹¹¹ *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971).

¹¹² *Id.* at 469. But see *North v. Superior Court*, 41 U.S. L.W. 1092 (1972), where the California Supreme Court held that since Mr. Justice Harlan's concurring opinion in *Coolidge* did not expressly adopt the inadvertence requirement, there was an equal split on that issue and, hence, the language in Justice Stewart's opinion regarding inadvertence is not binding. Dis-

In the light of *Coolidge's* permissive approach to plain view seizures, the importance of the requirement that the warrant adequately describe the things to be seized has been questioned. Certainly, there is no longer a blanket prohibition against "the seizure of one thing under a warrant describing another."¹¹³ But this does not necessarily mean that the fourth amendment's requirement for a specific description is no longer necessary.

The elements of the plain view doctrine show why the specificity requirement is important. A plain view seizure is only valid if it is inadvertent,¹¹⁴ results from an initially legal intrusion, and is made during the bona fide course of the search for the specified item. These latter two requirements are closely related to the need for specificity in a warrant. In the first instance an intrusion is only valid under a warrant when that warrant specifically describes the place to be searched and the items to be seized.¹¹⁵

Furthermore, specificity plays an important part in the third requirement for a valid "plain view" seizure because the specific description of the items to be seized significantly limits the scope of the search which may be conducted once the officers have entered the premises. The search is limited by the nature of the item which is being sought and the officers may conduct a bona fide search of only those places where the described items might be concealed.¹¹⁶

In conducting the search as directed by the warrant the officer may and should search thoroughly in every part of the described premises where there is a possibility that the object searched for may be found. This would include the searching of things within the premises such as a washing machine in which narcotics may be hidden and in other areas where the articles searched for may be located. If the article in question is too large then a search of small containers would be unreasonable. For example, if the article to be seized is described on [sic] the warrant as an automobile tire, the officers cannot search small drawers of a desk or such where the automobile tire cannot possibly be hidden. To this extent the search is illegal.¹¹⁷

senting, Justice Sullivan, however, felt that, fairly interpreted, Justice Harlan's opinion adopted Justice Stewart's view.

¹¹³ *Marron v. United States*, 275 U.S. 192, 196 (1927).

¹¹⁴ [I]f the initial intrusion is bottomed upon a warrant that fails to mention a particular object, though the police knew its location and intended to seize it, then there is a violation of the expressed constitutional requirement of 'warrants... particularly describing... [the] things to be seized.' " *Coolidge v. New Hampshire*, 403 U.S. 443, 471 (1971).

¹¹⁵ U.S. CONST. amend. XIV.

¹¹⁶ *United States v. White*, 122 F. Supp. 644 (D.D.C. 1954).

¹¹⁷ J. C. KLOTTER AND J. R. KANOVITZ, *CONSTITUTIONAL LAW FOR POLICE* 139 (2d ed. 1971).

In *Stanley v. Georgia*¹¹⁸ officers with a valid warrant to search defendant's home for gambling materials came upon a film, the nature of which was not readily apparent. The officers went outside the bona fide scope of the search, projected the film and seized it. While the seizure of the film was invalidated on the basis of first amendment protections, three concurring justice¹¹⁹ condemned the search for being excessively broad.¹²⁰ As Justice Stewart remarked in *Coolidge*, a "plain view" seizure "is legitimate only where it is immediately apparent to the police that they have evidence before them."¹²¹ Items which are not obviously seizable to the officers while they are in the bona fide course of their search, as defined by the description in the warrant, are not subject to a "plain view" seizure.¹²²

The specificity required in a search warrant limits the scope of the invasion into an individual's privacy and controls the conduct of the searching officers.¹²³ Thus, the specificity requirement continues to have significance:

The warrant requirement has been a valued part of our constitutional law for decades, and it has determined the result in scores and scores of cases in courts all over this country. It is not an inconvenience to be somehow "weighed" against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the "well-intentioned but mistakenly overzealous executive officers" who are a part of any system of law enforcement.¹²⁴

B. SPECIFICITY

The fourth amendment requires that a warrant's descriptions be so specific that the place to be searched can be ascertained with reasonable effort and the things to be seized can be easily dis-

¹¹⁸ 344 U.S. 557 (1969).

¹¹⁹ Justice Stewart, Brennan and White.

¹²⁰ "To condone what happen here is to invite a government official to use a seemingly precise and legal warrant only as a ticket to get into a man's home, and, once inside, to launch forth upon unconfined searches and indiscriminate seizures as if armed with all the unbridled and illegal power of a general warrant." *Stanley v. Georgia*, 344 U.S. 557, 572 (1969).

¹²¹ *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971).

¹²² *Woo Lai Chun v. United States*, 274 F.2d 708 (9th Cir. 1960); cf. *United States v. Hendrix*, 21 U.S.C.M.A. 412, 45 C.M.R. 18 (1972), where an officer was said to have wrongfully extended a search for drugs by reading a letter addressed to the accused.

¹²³ *United States v. Wroblewski*, 105 F.2d 444, 446 (7th Cir. 1939).

¹²⁴ *Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971), quoting in part from: *Gouled v. United States*, 255 U.S. 298, 304 (1921).

tinguished from other items on the premises.¹²⁵ Since this requirement for specificity limits the scope of the police invasion into individual privacy and controls the conduct of the searching officers,¹²⁶ the judge must carefully draft these descriptions lest the warrant be construed as authorizing an illegal general search.

While the judge must draft the descriptions carefully and precisely, he should keep in mind that courts generally do not favor highly technical attacks upon affidavits requesting and warrants authorizing searches.¹²⁷ The Supreme Court has noted that in the area of search warrants:

. . . the Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants . . . must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting.¹²⁸

As long as the citizens' substantial rights are preserved, courts do not attach undue importance to purely formal defects.¹²⁹

1. *Overcoming Vagueness.*

Vagueness often results from the fact that affidavits requesting warrants and the warrants themselves "are . . . drafted . . . in the midst and haste of a criminal investigation."¹³⁰ In this haste, magistrates sometimes do not carefully evaluate the facts with which they draft their description. The judge must pay as much attention to the facts determining the description as he pays to the facts establishing probable cause.¹³¹ Before issuing a warrant,

¹²⁵ *Steele v. United States*, 267 U.S. 498 (1925); *Marron v. United States*, 275 U.S. 192 (1927).

¹²⁶ *United States v. Wroblewski*, 105 F.2d 444, 446 (7th Cir. 1939).

¹²⁷ *United States v. Bowling*, 351 F.2d 236 (6th Cir. 1965), *cert. denied*, 383 U.S. 908 (1968), *reh. denied*, 383 U.S. 973 (1966).

¹²⁸ *United States v. Ventresca*, 380 U.S. 102, 108 (1965), while the Court was speaking primarily of affidavits accompanying a warrant, the same view would seem equally applicable to the warrant proper.

¹²⁹ *United States v. Nestori*, 10 F.2d 570 (N.D. Calif. 1925).

¹³⁰ *United States v. Ventresca*, 380 U.S. 102, 108 (1965).

¹³¹ The warrant requirement of the fourth amendment contains two conditions for a valid warrant: probable cause providing the necessary condition precedent to initiating the invasion, *Camara v. Municipal Court*, 387 U.S. 523 (1967); and specificity defining the limits of the invasion. *United States v. Wroblewski*, 105 F.2d 444, 446 (7th Cir. 1939).

the military judge should carefully examine the affidavit; and if he finds the facts insufficient to formulate a specific description, he

... may examine under oath the affiant and any witnesses he may produce, provided that the information or evidence obtained is incorporated in an affidavit or such proceeding is taken down by a court reporter or recording equipment and attached to the affidavit.¹³²

Since the military courts have not yet established a set of standards to judge a description's vagueness, we must consult federal, civilian cases for guidance. By using the standards evolved by the federal, civilian courts, military judges will be able to determine what facts are necessary to draft constitutionally adequate descriptions in warrants which they issue. The civilian cases of most concern to the military deal with the application of the specificity requirement to premises, automobiles, persons, and items to be seized.

a. Premises

The primary factor which determines the sufficiency of the description of the premises to be searched is not whether the description given is technically accurate in every detail; the test is whether the executing officer can locate and identify the premises with a reasonable effort and whether there is reasonable probability that another premises might be searched.¹³³

Minor discrepancies in a description will not invalidate a warrant. In *United States v. Contee*,¹³⁴ for example, the warrant described "premises 810 C St. N.E. (entire Apt. A), Washington, D.C., occupied by Joan Williams per records of Gas & Elec. Co." Though the premises contained two apartments and neither bore the letter "A," the police entered and searched the apartment on the ground floor occupied by the defendant. The court found that the description was sufficient because the warrant set forth both the address of the premises and the name of the occupant. In *United States v. Joseph*,¹³⁵ the court validated a warrant which described the premises to be searched as "209 Court Terrace" even though the address searched was 209 Minersville Street." The evidence showed that Court Terrace was merely a continuation of Minersville Street. While it would have been better if the magistrate had named the right street, there was only one place which

¹³² Army Reg. No. 27-10, para. 14-4 (Change No. 9, 19 July 1972).

¹³³ *United States v. Sklaroff*, 323 F. Supp. 296 (S.D. Fla. 1971).

¹³⁴ 170 F. Supp. 26 (D.D.C. 1959).

¹³⁵ 174 F. Supp. 539 (E.D. Pa. 1959), *aff'd*, 278 F.2d 504 (3d Cir. 1960), *cert. denied*, 364 U.S. 823 (1960).

the officers could have searched. In fact, when the warrant lists unique, distinguishing characteristics of a particular premises, courts usually do not concern themselves with a minor error in the address.¹³⁸

Moreover, while the better approach is to include the name of the owner or occupier as well as the address in the premises' description, courts have permitted the name's omission where the warrant otherwise adequately describes the distinguishing characteristics of the place to be searched.¹³⁷ Conversely, where the name of the occupant is used, the name should be correct; inaccuracy might well invalidate the warrant.¹³⁵

The warrant should be sufficiently accurate to insure that it can be properly executed by an officer who is not personally familiar with the premises to be searched.¹³⁹ If the warrant is executed by officers who are familiar with the place to be searched through surveillance, however, a lesser degree of particularity may be necessary where the judge is aware of the surveillance.¹⁴⁰

¹³⁶ *E.g.*, *United States v. Goodman*, 312 F. Supp. 556 (N.D. Ind. 1970). Here the description was "the room on the first floor level at the front of a two-story building located at 517 Conkey Street, Hammond, Indiana." The premises searched was actually 579 Conkey Street. The description in the probable cause affidavit, however, described the premises as being "the room located immediately next door to Marty's Tap." The court, in validating the search, noted that no mistake in the building to be searched could have been made because "no building or room on the block displays the number 517" and the reference to Marty's Tap "unmistakably locates the premises to be searched." *Hanger v. United States*, 398 F.2d 91 (8th Cir. 1968), *cert. denied*, 393 U.S. 119 (1969). Here the warrant clearly described the structure to be searched as a two family dwelling and accurately stated the address on the outside of the structure. The warrant was not invalidated by the fact that one of the apartments in the building was found to have a different address because it was clear from the description that the search was to cover the entire structure.

¹³⁷ *E.g.*, *United States v. Ortiz*, 311 F. Supp. 880 (D.C. Colo. 1970), *aff'd*, 445 F.2d 1100 (10th Cir. 1971) ("premises known as a mountain cabin, approx. 1.9 miles south of the intersection of Highway #40, and the road leading into Hyland Hills development area. (See attached map)"); *see also* *Townsend v. United States*, 253 F.2d 461 (5th Cir. 1958) and *Dixon v. United States*, 211 F.2d 547 (5th Cir. 1954).

¹³⁸ *United States v. Walters*, 193 F. Supp. 788 (D.C. Ark. 1961).

¹³⁹ *United States v. Kenney*, 164 F. Supp. 891 (D.D.C. 1958), where the court observed that officers without actual knowledge of the place to be searched could search premises for which a warrant had been issued without probable cause where the address in the warrant was inaccurate.

¹⁴⁰ *United States v. Gomez*, 42 F.R.D. 347 (S.D. N.Y. 1967). Here the warrant described a basement apartment at a stated address where there was more than one basement apartment. But the officers who had obtained the warrant had the basement apartment in question under surveillance and could identify it. It is doubtful that courts will permit too much reliance on the familiarity of the executing officers, however, because a specific de-

b. *Automobiles*

The description of a motor vehicle to be searched must be so definite that the identity of the vehicle can reasonably be ascertained and though it is preferable to do so, it is not necessary to identify the owner.¹⁴¹ A search authorization describing the automobile by its license number, year, make, model and color has been held sufficient in the military.¹⁴² Once again, minor inaccuracies will not invalidate a search where the description is otherwise specific enough to permit the officer to identify the vehicle with a reasonable amount of effort.¹⁴³

c. *Persons*

For the search of an individual, the test is once again a reasonably definite description. This does not necessarily require the inclusion of his name;¹⁴⁴ but the absence of a name would necessitate a very particular description of the individual. A warrant to search a particular place will not authorize the search of all persons who may be present.¹⁴⁵ But, as the court in *United States v. Festa*¹⁴⁶ noted:

Perhaps it is permissible for an officer validly executing a warrant to seize property having the characteristic of being easily removed and concealed, particularly property consisting of several different items, to order a person on the premises to remain until the officer can be certain that the detainee is not engaged in removing the property specified in the warrant.¹⁴⁷

One court went so far as to allow the investigation of a brown paper bag held by an individual on the front porch of the premises described in the warrant.¹⁴⁸ Likewise, it would appear that

scription is a constitutionally required part of a warrant for a valid intrusion. This liberal approach probably has validity only in the surveillance situation.

¹⁴¹ See *Wangrow v. United States*, 399 F.2d 106 (8th Cir., 1968), cert. denied, 393 U.S. 933 (1968).

¹⁴² *United States v. Ness*, 13 U.S.C.M.A. 18, 32 C.M.R. 18 (1962) ("1955 Pontiac, 2 door Sedan, Black and Creme, bearing Lic. 3E 9055").

¹⁴³ *Wangrow v. United States*, 399 F.2d 106 (8th Cir. 1968), cert. denied, 393 U.S. 933 (1968) (Where a variance in one letter of the license plate did not invalidate the search of an otherwise adequately described vehicle).

¹⁴⁴ *United States v. Kaplan*, 286 F.963 (S.D. Ga. 1923).

¹⁴⁵ *United States v. Haywood*, 284 F. Supp. 245 (E.D. La. 1968); *United States v. Festa*, 192 F. Supp. 160 (D. Mass. 1960).

¹⁴⁶ *United States v. Festa*, 192 F. Supp. 160 (D. Mass. 1960).

¹⁴⁷ *Id.* at 163.

¹⁴⁸ *Clay v. United States*, 246 F.2d 298 (5th Cir. 1957), cert. denied, 355 U.S. 863 (1957).

the executing officers may seize an object which an individual is holding in his hand if it might contain or be the item specified in the warrant, as long as they do not conduct a full search of an individual who has not been identified in the warrant.¹⁴⁹ When authorizing the search of a premises where certain people are likely to be present, the better course of action for the magistrate would seem to be to describe both the premises and the persons in the warrant.

d. Items To Be Seized

As a general rule courts have not required the same degree of particularity in describing the things to be seized as they have in the description of the place to be searched.¹⁵⁰

Technical precision of description is not required. It is only necessary that there be reasonable particularity and certainty as to the identity of the property to be searched for and seized, so that the warrant shall not be a mere roving commission. . . .

When dealing with property which is inherently innocuous, the affidavit and warrant should contain at least a designation by generic terms of the class, or classes, of property to be searched for and seized. The executing officer's sole function is to apply the description to its subject matter. Performance of that function may frequently involve the exercise of a limited discretion in identifying the property described. A description of such generality, however, as to lodge in the executing officer virtually unlimited discretion as to what property shall be seized, is repugnant . . . to the Constitution . . . which requires that the property to be seized shall be particularly described.¹⁵¹

In addition, courts have generally treated descriptions of contraband more leniently than descriptions of other types of property to be seized.¹⁵² Since contraband is property the possession of which is unlawful, the courts feel that there is no need to severely restrict its seizure. However, where the item sought is stolen property of the same nature as other property that might be located on the searched premises, the warrant must particularly delineate, as much as possible, the distinguishing characteristics of the sought property.¹⁵³

¹⁴⁹ *Walker v. United States*, 327 F.2d 597 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 956 (1964).

¹⁵⁰ *United States v. Quantity of Extracts, Bottles, Etc.*, 54 F.2d 643 (S.D. Fla. 1931).

¹⁵¹ *Id.* at 644.

¹⁵² *Steele v. United States*, 267 U.S. 498 (1925); *Nuckols v. United States*, 99 F.2d 353 (D.C. Cir. 1938), *cert. denied*, 305 U.S. 826 (1938).

¹⁵³ *E.g.*, *People v. Prall*, 145 N.E. 610 (Ill. 1924), where the property sought was stolen tires.

To avoid vagueness the magistrate must clearly set out the peculiar characteristics that make the property described in the warrant distinct and unique.

2. *The Problem of Overbreadth.*

Before considering the standard to be followed to avoid overbreadth in a description in a warrant, it is well to recall that the principal object of the fourth amendment is the protection of privacy rather than property.¹⁵⁴ Nothing demonstrates the Supreme Court's concern for this right of privacy more than the preferred status that it has accorded the individual in his home. The Supreme Court observed in *Silverman v. United States*¹⁵⁵ that "[a]t the very core stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion."¹⁵⁶ In speaking of this privileged status of a man in his home, Judge Frank in *United States v. On Lee*¹⁵⁷ pointed out that:

A man can still control a small part of his environment, his home; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizeable hunk of liberty — worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle.¹⁵⁸

For this reason, the Court has applied higher standards of reasonableness to searches of dwellings than to other locations where searches are conducted.¹⁵⁹

a. *Single Living Unit Concept*

In cases involving warrants authorizing searches of multiple-dwelling buildings, the courts have developed the rule that such warrants are too broad when they do not describe a particular subunit to be searched with sufficient specificity to prevent other units occupied by innocent people from being invaded.¹⁶⁰

¹⁵⁴ *Warden v. Hayden*, 387 U.S. 294, 304 (1967).

¹⁵⁵ 365 U.S. 505 (1961).

¹⁵⁶ *Id.* at 511.

¹⁵⁷ 198 F.2d 806 (2d Cir. 1951) (dissenting opinion), *aff'd*, 343 U.S. 747 (1952).

¹⁵⁸ *Id.* at 315-6.

¹⁵⁹ *Davis v. United States*, 328 U.S. 582 (1945).

¹⁶⁰ *United States v. Hinton*, 219 F.2d 324 (7th Cir. 1955); *United States v. Barkouskas*, 38 F.2d 837 (D.C. Pa. 1930); *United States v. Diange*, 32 F. Supp. 994 (D.C. Pa. 1940).

For purposes of satisfying the Fourth Amendment, searching two or more apartments in the same building is no different than searching two or more completely separate homes. Probable cause must be shown for searching each house or, in this case, each apartment.¹⁶¹

Federal courts have consistently held that the Fourth Amendment's requirement that a specific "place" be described when applied to dwellings refers to a *single living unit* (the residence of one person or one family).¹⁶²

The basic requirement is that the officers who are commanded to search be able from the "particular" description of the search warrant to identify the specific place for which there is probable cause to believe that a crime is being committed. This requirement may be satisfied by giving the address of the building and naming the person whose apartment is to be searched.¹⁶³

The rule that a search must be limited to a single unit comprising only the residence of one person or one family is not absolute however. If there is probable cause to believe that the entire multiple-dwelling is being used for illegal purposes, a search warrant authorizing a search of the entire structure is justified.¹⁶⁴ Likewise, where the fact that the structure to be searched is a multiple dwelling could not be known by the magistrate issuing a warrant to search the entire building, a search actually restricted to areas occupied by the person who was thought to occupy the whole building can be valid.¹⁶⁵

b. Treatment of Common Areas

There is some authority for the proposition that a search need not be limited to a single living unit where the entire premises is occupied by several families or persons in common rather than individually.¹⁶⁶ In *United States v. White*,¹⁶⁷ the building searched was shut off from the public by a single locked door even though two different tenants occupied it. The court observed that the executing officers could not tell the nature of the building from the outside and their search was directed to a particular source from which a whiskey smell was emanating. The case supports the proposition that the executing officers will not be penalized if

¹⁶¹ *United States v. Hinton*, 219 F.2d 324, 325-6 (7th Cir. 1955).

¹⁶² *Id.* at 326 (emphasis added).

¹⁶³ *Id.*

¹⁶⁴ *Tynan v. United States*, 297 F.177 (9th Cir. 1924), *cert. denied*, 266 U.S. 604 (1924); *Hogrefe v. United States*, 30 F.2d 640 (9th Cir. 1929).

¹⁶⁵ *United States v. Poppitt*, 227 F. Supp. 73 (D.C. Del. 1964).

¹⁶⁶ *United States v. White*, 29 F.2d 294 (D.C. Neb. 1928); *People v. Gorg*, 157 Cal. App. 2d 515, 321 P. 2d 143 (1958).

¹⁶⁷ 29 F.2d 294 (D.C. Neb. 1928).

the warrant describes what appeared to be a single unit but which turns out to be occupied by more than one person. Likewise, in *People v. Gorg*,¹⁶⁸ the court upheld a search under a warrant directed against the entire lower flat of a two-story building. Although only one person was named in the warrant, in fact, three persons lived there, each occupying a separate bedroom but using a living room, kitchen, bath and a hall in common. The court refused to limit the search to the named individual's bedroom, saying that the separate unit rule "only applies where there are separate and distinct living quarters occupied by different persons. A rule of reason must be applied. Here the living unit was one distinct unit occupied by three persons."¹⁶⁹ There was ample evidence that the sale and use of drugs, for which the search was conducted, were common throughout the entire flat.

Other cases have allowed the search of areas that multiple tenants hold in common, but they have not gone so far as to allow an unwarranted intrusion into the tenant's exclusive living area. In *United States v. Conti*¹⁷⁰ Internal Revenue Service agents entered the hall door of an apartment building and kept the defendant's apartment under surveillance. On the basis of their observations the agents obtained a warrant with which they searched the apartment. The court in passing on the validity of the agents' original intrusion found that the area was a common area, semi-public in nature, and not within the curtilage of the tenant's apartment so as to enjoy the constitutional protection of the fourth amendment. Information obtained by officers in "relatively public corridors" can provide a valid basis for issuance of a search warrant.¹⁷¹

In summary, while the courts have generally held that a single living unit is the outer limit for a search within a multiple-dwelling unit,¹⁷² there are certain areas of a multiple-dwelling building, such as a lobby or public halls, which courts have permitted officials to enter without a warrant.¹⁷³ One court has even gone so far as to suggest that where unrelated people sleeping in separate bedrooms, which might thereby constitute separate living units,

¹⁶⁸ 157 Cal. App. 2d 515, 321 P. 2d 143 (1958).

¹⁶⁹ *Id.* at 520; 321 P. 2d at 148.

¹⁷⁰ 361 F.2d 153 (2d Cir. 1966).

¹⁷¹ *United States v. Buchner*, 164 F. Supp. 836 (D.D.C. 1958), *cert. denied*, 359 U.S. 908 (1959).

¹⁷² *United States v. Hinton*, 219 F.2d 324 (7th Cir. 1955).

¹⁷³ *United States v. Miguel*, 340 F.2d 812 (2d Cir. 1965), *cert. denied*, 382 U.S. 859 (1965).

share all other living facilities in common, the entire unit which they occupy is subject to a search.¹⁷⁴

c. Overbreadth in Military Searches

As previously stated, the Court of Military Appeals originally used a general reasonableness test to judge searches' validity. *United States v. Swanson*¹⁷⁵ is an illustrative case. In *Swanson*, the court approved the commander's calling of a company formation and his search of the entire unit when the loss of \$73.00 was reported. Conceding that the "Fourth Amendment to the Constitution recognizes and protects the right to security from unreasonable searches and seizures,"¹⁷⁶ the court still found the search reasonable without considering whether there was probable cause to search everyone or whether the scope of the search of an entire unit was overly broad.

In *United States v. Brown*,¹⁷⁷ the court applied the particular requirement of probable cause rather than a general reasonableness test; the court invalidated the search of a truckload of men. Judge Ferguson, speaking for the majority in that case, said that the

action . . . was utter disregard for the rights of the accused and the others. He (the commanding officer) acted upon mere suspicion with no factual basis for his actions. He ordered a wholesale search of all those in the truck, those "suspected" and those regarded as completely innocent. He ordered that any suspicious objects be seized and turned over to him. The search was general and exploratory in nature and wholly lacking in reasonable cause.¹⁷⁸

While the *Brown* case is commonly regarded as one of the first cases where the Court of Military Appeals applied the fourth amendment requirement of probable cause to military searches, it is clear from subsequent cases that the court had not yet adopted the specificity requirement, prohibiting broad, general searches. In *United States v. Gebhart*,¹⁷⁹ decided the same year as *Brown*, the court approved the search of an entire barracks. Chief Judge Quinn, writing for the court, said that as long as there was prob-

¹⁷⁴ *People v. Gorg*, 157 Cal. App. 2d 515, 321 P. 2d 143 (1958). (Where there are three separate unlocked bedrooms in an apartment, "[a]ll of the rooms constitute one living unit").

¹⁷⁵ 3 U.S.C.M.A. 671, 14 C.M.R. 89 (1954).

¹⁷⁶ *Id.* at 673, 14 C.M.R. at 91.

¹⁷⁷ 10 U.S.C.M.A. 482, 28 C.M.R. 48 (1959).

¹⁷⁸ *Id.* at 489, 28 C.M.R. at 55.

¹⁷⁹ 10 U.S.C.M.A. 606, 28 C.M.R. 172 (1959).

able cause the search was valid "whether the search be general in that it includes all personnel of the command or subdivision, or limited only to persons specifically suspected of an offense."¹⁸⁰ The Chief Judge, while making no mention of the single unit concept, treated the entire barracks as a single living unit because of the "freedom of access occupants of military quarters have to all parts thereof."¹⁸¹ The court did not concern itself with the fact that many innocent persons were subjected to search as it had in the *Brown* decision.¹⁸² Similarly, in *United States v. Harman*,¹⁸³ a case involving barracks larceny, the Court of Military Appeals again approved the search of an entire barracks. Its approval was predicated on good cause to believe that the stolen money was still somewhere in the general area; the barracks had been guarded at night and the theft had been immediately reported. Furthermore, immediate action was necessary because many of the occupants of the barracks were transients, due to transfer that afternoon. Once again the court treated an entire barracks as a unit, though there was no mention of the single unit concept. At this point in the development of the military law of search and seizure, the court seemed more concerned with the need for immediate action than with imposing the specificity requirement of the fourth amendment on the military.

The disregard for specificity which the court displayed in *Gebhart* and *Harman* culminated in *United States v. Schafer*.¹⁸⁴ *Schafer* presents the extreme example of a generalized search. It involved an authorization "to search the so-called '26th area'—a block in which some twenty barracks, three mess halls, and two other structures were located—and to seize items pertinent to investigation of the murder."¹⁸⁵ A body had been found with a trail of blood into the area. Once again concerned with the need for immediate action, the Court of Military Appeals validated the search even though at the time that it was authorized the commanding officer did not appear to have any reason to believe that any particular item would be found in the area that was broadly described only as the "26th area." The court made no attempt to conform the search's broad scope of the fourth amendment requirement

¹⁸⁰ *Id.* at 610, 28 C.M.R. at 176.

¹⁸¹ *Id.*

¹⁸² *United States v. Brown*, 10 U.S.C.M.A. 482, 489, 28 C.M.R. 48, 55 (1959).

¹⁸³ 12 U.S.C.M.A. 180, 30 C.M.R. 180 (1961).

¹⁸⁴ 13 U.S.C.M.A. 83, 32 C.M.R. 83 (1962).

¹⁸⁵ *Id.* at 86, 32 C.M.R. at 86.

that the place to be searched be specifically described, nor did the court in finding probable cause for the search consider the need to believe that a specific item is located in a particular place.¹⁸⁶ Viewing the search as "somewhat generalized," the court determined that it was valid nonetheless because the murder scene "shrieked of foul play"¹⁸⁷ and the search "was virtually compelled by the circumstances" since "[c]learly a grave crime had been committed."¹⁸⁸

The *Schafer* decision validated a general search which seemed to fly in the face of the fourth amendment requirement for particularity. Realistically, the gravity of the crime committed probably played a large role in the court's decision. In addition, when *Schafer* was decided in 1962, the Court of Military Appeals had not yet begun to consider the issue of specificity in search authorizations. Since 1965, however, the court has increasingly recognized the need for specificity¹⁸⁹ and has noted that an authorization to search must be based on probable cause to believe that the particular item sought is in the particular place for which the search is authorized.¹⁹⁰ It is, therefore, doubtful that an authorization as general as the one in *Schafer* will again be found valid. The validity of such broad authorizations is especially suspect in light of the Supreme Court's decision in *Katz v. United States*.¹⁹¹

d The Effect of Katz v. United States on the Single Living Unit Concept

Before determining whether military judges must limit search authorizations in a barracks to a single living unit it is necessary to consider the effect of *Katz*. In discussing the protection that the fourth amendment afforded to an individual using a public telephone booth, Mr. Justice Stewart, who delivered the opinion of the Court in *Katz*, stated that phrasing the issue in terms of whether a particular area was constitutionally protected

deflects attention from the problem presented by this case. For the Fourth Amendment protects people, not places. What a person

¹⁸⁶ *Lowery v. United States*, 161 F.2d 30 (8th Cir. 1947), cert. denied, 331 U.S. 849 (1949).

¹⁸⁷ *United States v. Schafer*, 13 U.S.C.M.A. 83, 86, 32 C.M.R. 83, 86 (1962).

¹⁸⁸ 13 U.S.C.M.A. at 87, 32 C.M.R. at 87.

¹⁸⁹ *E.g.*, *United States v. Hartsook*, 15 U.S.C.M.A. 291, 35 C.M.R. 263 (1965); *United States v. Jeter*, 21 U.S.C.M.A. 208, 44 C.M.R. 262 (1972); *United States v. Martinez*, 16 U.S.C.M.A. 40, 36 C.M.R. 196 (1966).

¹⁹⁰ *United States v. Alston*, 20 U.S.C.M.A. 581, 44 C.M.R. 11 (1971).

¹⁹¹ 389 U.S. 347 (1967).

61 MILITARY LAW REVIEW

knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.¹⁰²

Mr. Justice Harlan in his concurring opinion also emphasized that the fourth amendment protects people, not places, but he was of the opinion that what protection the amendment afforded must be measured in terms of "place." In his view, the decision of the Court had posited

a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable." Thus, a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.¹⁰³

The Supreme Court followed *Katz* in the later case of *Mancusi v. De Forte*.¹⁰⁴ In *Mancusi*, the Court laid down the principle that the protection of the fourth amendment depends not upon whether there might be an intrusion by anyone but rather upon "whether the area was one which there was a reasonable expectation of freedom from governmental intrusion."¹⁰⁵ Thus even in an office area which a union official shared with others, he had a reasonable expectation that his papers would not be subjected to perusal and seizure by persons who did not use that office, including agents of the Government.

In still another post-*Katz* case, involving the privacy afforded by a motel room, a court refused to protect the occupants of the room from surveillance during which agents overheard their conversation about heroin and observed one occupant with narcotics paraphernalia through an open window.¹⁰⁶ The court commented that the occupants of the room had shown little reliance on privacy because the shades had not been drawn nor the window closed. The court further noted that while the occupant of a motel room:

¹⁰² *Id.* at 351-2.

¹⁰³ *Id.* at 361.

¹⁰⁴ 392 U.S. 364 (1968).

¹⁰⁵ *Id.* at 368.

¹⁰⁶ *Ponce v. Craven*, 409 F.2d 821 (9th Cir. 1969), *cert. denied*, 397 U.S. 1012 (1970).

is entitled to the same protections as the owner of a house against unreasonable searches and seizures, there is an element of shared property in motel surroundings that is entirely lacking in a person's home.

Katz reinforces the validity of the concept that each individual living unit within a multiple dwelling should be afforded the protection of the fourth amendment. Each living unit constitutes an area of expected privacy. If, as Mr. Justice Harlan suggested in *Katz*, the protections of the fourth amendment must still be measured in terms of "place," it is fair to say that the one place within which everyone has a reasonable expectation of privacy is his individual living unit. At the same time, *Katz* has not completely invalidated the warrantless, governmental intrusions into common, public areas of multiple dwellings. A person living in an apartment or hotel can reasonably expect that his own living unit will not be subjected to search without probable cause, but it is unreasonable for him to expect that a public corridor, lobby or wash-room would not be visited by other persons, even government officials.

e. The Application of Katz to Barracks Searches

In the military setting, the preferred place accorded the home raises serious questions because the soldier's "home," this is, his barracks living quarters, is often the subject of searches.¹⁰⁷ Though he lives in a barracks with many other men, his bunk and his living area are for his use; and from his point of view they constitute his home. The Supreme Court has duly recognized that a "hotel room, in the eyes of the fourth amendment, may become a person's 'house,' and so, of course, may an apartment."¹⁰⁸ It is arguable that the same is true of a soldier's living area, especially as the increased use of partitions and separate rooms creates a greater degree of privacy.

The Court of Military Appeals has given limited recognition to the general concept of "an expectation of privacy" in *United States v. Torres*.¹⁰⁹ The question is whether the court will analogize a living area in a barracks to an apartment or hotel room and hold that like the apartment or hotel room dweller, the soldier has a reasonable expectation of freedom from government intru-

¹⁰⁷ *E.g.*, *United States v. Racz*, 21 U.S.C.M.A. 24, 44 C.M.R. 78 (1971); *United States v. Miller*, 21 U.S.C.M.A. 92, 44 C.M.R. 146 (1971).

¹⁰⁸ *Lanza v. New York*, 370 U.S. 139, 143 (1962).

¹⁰⁹ 22 U.S.C.M.A. 96, 46 C.M.R. 96 (1973).

sion in his barracks living area.²⁰⁰ By requiring that a commanding officer have probable cause before authorizing a search, the court has impliedly assumed that some expectation of privacy on the part of soldiers living in barracks is reasonable.²⁰¹ Of course, as the court has noted, barracks by their very nature involve an element of shared, communal living based on "the freedom of access occupants of military quarters have to all parts thereof."²⁰² It is, therefore, necessary to determine what effect this communal living should have on the privacy to be accorded the soldier in his individual living unit.

There are essentially three criteria for judging the extent of the privacy to which a soldier living in a barracks should be entitled.²⁰³ The physical layout of the area in which he lives is one major factor in determining whether an individual's expectation of privacy is reasonable. The degree of privacy afforded by structured characteristics, such as partitions or walls, is important in determining whether an individual living unit is clearly defined and separated from the rest of a multiple dwelling. For example, if a soldier shares a cubicle with another soldier, partitioned off from the rest of the barracks, it is reasonable for him to expect that he would be subjected to searches only if there is probable cause to search his goods and the areas he shares in common with the other individual.²⁰⁴

The soldier's right to exclusive use of an area or facility is the second factor which should be considered in judging his expectation of privacy. A soldier assigned a locked wall or foot locker, even in an open bay, might reasonably expect that it will not be

²⁰⁰ *E.g.*, *Clinton v. Commonwealth of Virginia*, 377 U.S. 158 (1964); *Jones v. United States*, 362 U.S. 257 (1960); *Stoner v. State of California*, 376 U.S. 483 (1964); *Hoffa v. United States*, 385 U.S. 293 (1966).

²⁰¹ *United States v. Davenport*, 14 U.S.C.M.A. 152, 33 C.M.R. 364 (1963).

²⁰² *United States v. Gebhart*, 10 U.S.C.M.A. 606, 610, 28 C.M.R. 172, 176 (1959).

²⁰³ Comment, *From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection*, 43 N.Y.U. L. Rev. 969, 983-4 (1968).

²⁰⁴ See *United States v. Ferrel*, 41 C.M.R. 452 (ABR 1969), where a search prompted by a belief that one soldier possessed drugs resulted in discovery of marijuana belonging to a bunk mate.

²⁰⁵ Note that we are not here concerned with the subject of inspections since they involve the exercise of a governmental function other than criminal investigation. See Comment *Inspection*, 54 Mil. L. Rev. 225 (1971). The fact that a person's property may be subject to an inspection should not reduce his expectation that it will be free from intrusion as the result of a crime having been committed unless probable cause can be shown to believe that he has some connection with the crime.

subject to search²⁰⁵ unless there is probable cause pertaining specifically to him.

The third and final consideration is the degree to which society honors the intimacy or privacy of the activity normally carried on in such a place. The Supreme Court has long recognized the sanctity of a man's home and a living area within a barracks should be considered a soldier's home.²⁰⁶ Furthermore, the Court of Military Appeals has long recognized that a soldier is entitled to a certain degree of privacy by requiring probable cause before his personal property can be subjected to a search.²⁰⁷

The requirement of particularity in a warrant further protects the privacy to which a soldier is entitled. To be valid, a warrant may authorize a search of only a particular place to the exclusion of all other places where the privacy of someone other than a suspect might be invaded. It is necessary, therefore, for the military judge to examine the nature of the barracks in which a search is to be conducted before he can describe the particular limits of the search. A barracks consisting of open bays, for example, is least like an apartment house or hotel, and since an individual's living area is surrounded by space to which everyone has access, his reasonable expectation of privacy does not extend beyond his bed and lockers. A search directed against a particular individual living in the bay could encompass his own personal belongings and the common areas to which he has access without being overbroad. The only limitation in the open bay search would be that it be directed against a particular occupant of the bay and that it not include any places designated for the exclusive use of any other soldier.

A barracks which is partitioned into individual or group cubicles would be more akin to an apartment house or hotel. Each cubicle would constitute a single living unit, subject to search only if there is probable cause to search that unit. Of course, common areas to which the individual has access could be included in the search,²⁰⁸ although they would be less extensive than in the open bay situation.

²⁰⁵ *Silverman v. United States*, 365 U.S. 505 (1961).

²⁰⁷ *United States v. Davenport*, 14 U.S.C.M.A. 152, 33 C.M.R. 364 (1963).

²⁰⁸ The area immediately adjacent to the individual's living unit should be considered an integral part of his area, subject to the same protections as the curtilage of a normal dwelling. See *Work v. United States*, 243 F.2d 660 (D.C. Cir., 1957).

The single living unit concept seeks to prevent the search of areas controlled by innocent people. In the barracks with open bays, the judge should permit the search of no other bed or lockers than those of the suspect. In a partitioned barracks he should limit the search to a specific cubicle in order to meet the fourth amendment requirements. Common areas to which the suspect has access along with everyone else could be searched in both instances; but the warrant should indicate that the search is particularly directed against the suspect.

IV. CONCLUSION

As the military services move toward more extensive use of search warrants, magistrates must become familiar with the standards by which these instruments are judged. Since warrants are new to the military, judges will find it necessary to seek guidance for their issuance and utilization. Guidance can be found not only in cases decided by the Court of Military Appeals but also in the vast number of federal, civilian cases which have reviewed warrants. While at first glance such cases do not always appear to be relevant to the military lifestyle, they do provide basic research material from which appropriate guidelines can be derived.

Two such guidelines are immediately evident. The warrant must specifically describe a particular place to be searched, and it must contain a specific description of the item or items which are to be seized.

With respect to the first guideline, the description of the place to be searched must be sufficiently definite to enable the executing officer to locate it with a reasonable amount of effort. While this does not require any particular formalized description, a magistrate should include as many distinguishing characteristics as possible to avoid vagueness. In the military community an adequately definite description of a premises would include the building number, its location on the installation and the name of the occupant. If the individual who is the subject of a search lives in a barracks, to avoid overbreadth, the warrant should contain a description limiting the search to his individual living unit, that is, his living area and the adjacent common areas to which he has free access. In most instances this can be accomplished by naming the individual and describing the specific things within his area which may be searched, such as a bed, footlocker or wall locker. While

there is some military authority for searching an entire barracks, the warrant provision of the fourth amendment, as interpreted by the federal courts, seems to limit searches within a multiple-dwelling to a single living unit; and it is submitted that a soldier's living area must be viewed as a single living unit. While this is especially true in barracks which are partitioned or divided into separate rooms, even in a barracks with open bays a soldier has exclusive use over certain areas, such as a bed and locker, which can be said to comprise his living unit. Military warrants must conform to the single living unit concept or be considered invalid under the fourth amendment. Only if the military judge is convinced that an entire barracks is being used as a single unit would he be justified in authorizing the search of the entire building.

There seems to be no circumstances, however, under which a premises search as extensive as that authorized in *United States v. Schafer*²⁰⁹ would be justified. Such a general search of an area encompassing more than a score of buildings, including several barracks, could never satisfy the requirements for particularity. This is not to say that all *investigation* should be curtailed in the *Schafer* situation. As the Court of Military Appeals pointed out "it was reasonable to conclude *leads* might be developed in the '26th area.'"²¹⁰ To prohibit all investigation in the area would have been unreasonable. However, it is equally unreasonable to issue a warrant under these circumstances because the place to be searched could not be particularly defined nor the items sought specifically described. The only search that could be constitutionally sustained at the time the body was found would be one that encompassed merely the open areas within the "26th area." This, in turn, might uncover further evidence which would justify the issuance of a warrant to search a particular place. The initial search, though not authorized by warrant, would be reasonable because it would involve only open²¹¹ or public²¹² areas outside the protection of the warrant provision of the fourth amendment. Mr. Justice Harlan recognized the continued validity of this view even after the decision in *Katz v. United States*,²¹³ when he said that "conversations in the open would not be protected against

²⁰⁹ 13 U.S.C.M.A. 83, 32 C.M.R. 83 (1962).

²¹⁰ *Id.* at 87, 32 C.M.R. at 87 (emphasis added).

²¹¹ *Hester v. United States*, 265 U.S. 57 (1924).

²¹² *United States v. Conti*, 361 F.2d 153 (2d Cir. 1966); *United States v. Buchner*, 164 F. Supp. 836 (D.D.C. 1958), *cert denied*, 359 U.S. 908 (1959).

²¹³ 389 U.S. 347 (1967).

being overheard, for the expectation of privacy under the circumstances would be unreasonable." ²¹⁴

The first guideline applies to vehicles and persons as well as buildings. Where a warrant is issued for the search of a vehicle it should contain the name of the owner (when known), the license number and the make, model and color of the vehicle in order to avoid vagueness. An authorization to search or arrest an individual should include his name and a full, definite description. If a search of the person as well as the premises of an individual is intended, the warrant should describe both the individual and the premises.

The second guideline that the things to be seized be specifically described, albeit of diminished significance since the *Coolidge v. New Hampshire* ²¹⁵ expansion of the "plain view" doctrine, continues to have importance for two reasons. If the intrusion is pursuant to a warrant and the warrant does not adequately describe the things to be seized, the initial intrusion is invalid, making the "plain view" doctrine inoperable. Furthermore, the description of the items to be seized controls the course of the search; officers may search only in areas where the items to be seized are likely to be located. The "plain view" doctrine cannot be invoked unless the item came into plain view during the bona fide course of the search.

It is this author's hope that the use of search warrants will reduce the number of invalid searches in the military. This is a highly desirable goal, not only because it would reduce the number of reversals required on technical grounds but also, and perhaps more importantly, because it would increase servicemen's freedom from unjustified intrusions. The Constitution clearly protects against the evils of vague, overbroad warrants; and men who volunteer to defend the Constitution should be entitled to the full measure of its protection.

²¹⁴ *Id.* at 361.

²¹⁵ 403 U.S. 443 (1971).

THE ADMINISTRATION OF JUSTICE IN THE PAKISTAN AIR FORCE*

Squadron Leader Sheikh Mohammad Anwar **

Major Aspects of Military Justice in the Pakistan Air Force are discussed. Based on a comparative analysis of Pakistan and United States military law, recommendations for improvements in limited areas of both systems are presented.

INTRODUCTION

This article's primary purpose is to acquaint American readers with some important areas of administration of justice in the Pakistan Air Force. While it is unlikely that an officer of the U. S. Armed Forces will ever be required to implement Pakistan Air Force law, knowledge of the subject will be useful in promoting better understanding between the forces of the two countries while working as allies. Another point of interest, from the view of American readers, is that both Pakistan and the United States share the historical experience of inheriting their judicial systems from the same source—the British. While the American legal system has remained welded to the common law, a happy combination of common law and continental civil law has formed the basis of criminal law in Pakistan, of which military justice is only a part. How this blended law is meeting the requirements of discipline of the Armed forces of a developing country will be yet another point of interest in the paper.

The secondary aim of this article is to gain, by appropriate comparisons, useful and practicable ideas from the progress made by the United States in the field of military justice, which might in

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

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turn be helpful in improving the system in Pakistan. Since every human endeavor, howsoever accomplished, leaves room for improvement, something perhaps can also be learned by the United States from the Air Force law, in spite of its simplicity.

While the paper deals with only Pakistan Air Force law, it will provide a sufficient understanding of the laws of the Pakistan Army and Navy which, though separate, are very similar.¹ For a better understanding of the subject, it seems worthwhile to provide at the outset some background information about the country and its armed forces, in particular the Pakistan Air Force, its legal system and the characteristics of the personnel with which the system deals.

A. HISTORICAL BACKGROUND

1. General

Pakistan became an independent nation on August 14, 1947 when in accordance with the Indian Independence Act,² the Indian sub-continent was partitioned into the dominions of Pakistan and India. This marked the end of about two centuries of British rule in the country, then known as British India.

During their rule, the British trained and organized three separate defense forces. The Army was the first to be raised on a regular basis in 1754 under British Crown Act, 27 Geo. II Ch. 9,³ followed by the Navy in 1830 and the Air Force, last to be established in 1932. By the time of the partition, these forces had been highly organized and were being governed under three

¹ Unlike the United States, the three defense forces of Pakistan have their own separate laws which are contained in separate manuals:

- a. Pakistan Air Force Act and Rules in the Manual of Pakistan Air Force Law (MPAFL);
- b. Pakistan Army Act and Rules in the Manual of Pakistan Army Law (MPAFL); and
- c. Pakistan Navy Ordinance and Rules in the Manual of Pakistan Naval (MPAFL).

The nomenclature and composition of military courts vary slightly according to the service, but the courts procedures, type of offenses, scale of punishments, jurisdictional authority, appeal, review and procedures for commutation and suspension of sentences are almost identical for all the services.

See also U.S. DEPT OF ARMY PAMPHLET No. 550-48, AREA HANDBOOK FOR PAKISTAN, 883-505 (1971).

² Indian Independence Act (1947) (10 and 11, Geo. 6, Ch. 3) dated July 18, 1947.

³ A. L. VANKATESWARAN, DEFENSE ORGANIZATION IN INDIA 21; DAULAT RAM PREM, COMMENTARIES ON MILITARY LAW 218 (1966).

separate but similar laws, viz. Indian Army Act, 1911, Indian Navy Discipline Act, 1934 and Indian Air Force Act, 1932. The partition entailed division of the armed forces on the basis of religious identification and a portion of the armed forces also became Pakistan's share. The present defense forces of Pakistan are an outgrowth of the same heritage.

To keep the continuity of the legal system, it was provided under the Indian Independence Act that the existing laws of British India, including the Service's laws, were to continue to operate in the new countries until superseded by subsequent legislation.⁴ The three Services' laws, therefore, continued to operate initially in Pakistan until they were repealed by the present laws, viz., Pakistan Army Act of 1952, Pakistan Navy Ordinance of 1961 and the Pakistan Air Force Act of 1953. The present laws, though greatly improved in language and form, are in substance the same as their respective predecessors and continue to retain their inter-se similarity.

Unlike the American legal system, the criminal law system of Pakistan is a unique blend of common law and continental civil law.⁵ The country's judiciary has only one system of courts, unlike the dual state and federal court system of America.⁶ This legal system is essentially the same as handed down by the British. The laws of the country are contained in elaborate codes. The most important criminal codes of the British era, viz. Pakistan (formerly "Indian") Penal Code, 1860, Evidence Act—1872 and Code of Criminal Procedure, 1898, are still in force in Pakistan with little change. A member of the armed forces is subject to all the laws of the land as a citizen of the country and to the respective disciplinary codes as a member of the defense forces.⁷

2. *History of the Air Force Law*

The dawn of the air age was ushered into the Indian subconti-

⁴ Indian Independence Act (1947), § 18(3):

Save as otherwise expressly provided in this Act, the law of British India and of the several parts thereof existing immediately before the appointed day shall, so far as applicable and with necessary adaptations, continue as the law of each of the new Dominions on the several parts thereof until other provision is made by the laws of the legislature of the Dominion in question or by any other legislature or other authority having power in that behalf.

See also Friedman, *International Law*, 847 (1969).

⁵ MUHAMMAD MAZHAR HASAN NIZAMI *THE CODE OF CRIMINAL PROCEDURE I-IV* (3RD ED.) and *THE PAKISTAN PENAL CODE*, ai-a7 (3rd ed.).

⁶ A. K. BROHI, *FUNDAMENTAL LAW OF PAKISTAN* 62 (1958).

⁷ *Id.* at 651.

ment in December, 1918, when a few planes of the Royal Air Force of Great Britain arrived in the country, mainly for communication purposes. Realizing the growing need and importance of an Air Force, the then government of India (headed by the Governor General representing the crown), on the recommendation of "The Skeene Committee,"⁸ decided to constitute an independent Air Force on the lines of the Indian Army and the Navy. Accordingly, the Indian Air Force Act of 1932 based on the Indian Army Act 1911 and incorporating some provisions of the British Air Force Act was enacted; this marked the beginning of the Indian Air Force. The Air Force started with four training aircraft, six officers and nineteen men, transferred from the Royal Air Force.⁹ The birthplace of this small flight was, incidentally, Karachi (now in Pakistan).¹⁰ The Indian Air Force Act of 1932 and the rules thereunder, with little change, continued to apply to the Indian Air Force in British India and subsequently to its offshoot, the new Pakistan Air Force. After a few years of use, extensive changes in the Act were visualized because of the experience of past years and the changed conditions consequent upon the partition. Rather than have a multitude of amendments in the Act, it was decided to draft a new bill on the lines of the Pakistan Army Act, 1952, which by then had been passed by the legislature. New offenses relating to aircraft and flying were added and some changes in the punishments were also made. The bill was ultimately passed as the Pakistan Air Force Act of 1953 (hereinafter referred to as PAF Act). The PAF Act became operative on 23rd March 1958¹¹ after the procedural rules, The Pakistan Air Force Act Rules 1957 (hereinafter referred to as PAF Act Rules), had been promulgated by the Ministry of Defense, Central Government¹² (equivalent to the United States De-

⁸ MANUAL OF PAKISTAN AIR FORCE LAW 1 (1968) (hereinafter cited as MPAFL).

⁹ A. A. DAVID KNOW YOUR ARMED FORCES 77.

¹⁰ ENCYCLOPEDIA BRITANNICA, Vol. 12 at 197 (1958).

¹¹ PAKISTAN AIR FORCE ACT (hereinafter cited as PAF ACT) § 2(1) (1953) and Gazette of Pakistan Notification no. 37-88.

¹² PAF ACT § 202 (1953). The purpose of the PAF Act Rules is to provide for procedural matters for implementing the provisions of the PAF Act. It was held in *Ganpat Nhiargappa 1962 Bombay (India) 104, 105* that the rules may in some cases explain the provisions of the Act in order to find out true intention of the Legislature in enacting the latter, but the rules cannot be construed to override the provisions of the Act. These rules compare with the United States Army Regulations which derive their force from the power of the President as Commander-in-Chief and are binding upon within the sphere of his legal and constitutional authority and which have

partment of Defense). The PAF Act and the PAF Act Rules, which have been amended from time to time without making any fundamental changes in the law, contain 206 sections and 224 rules respectively.

In order to bring the Air Force law within easy reach of an average officer and airman, a Manual of Pakistan Air Force Law (hereinafter referred to as MPAFL) containing elaborate explanatory "notes" (commentary) of the PAF Act and Rules, a summary of the law of evidence and other material was prepared by the Judge Advocate General's Department¹³ and issued under the authority of the Ministry of Defense in 1968. The MPAFL is presently the only standard source for guidance on Air Force law. Similar manuals have also been published by the Pakistan Army and Navy.¹⁴

B. GENERAL SCHEME OF PAKISTAN AIR FORCE LAW

The object of Air Force law is to provide for the maintenance of discipline and good order among the members of the Service. Its scheme is designed to ensure quick disposal of offenses and effective punishments. The individual rights of servicemen have been tailored to be consistent with these objectives. The statutory scheme of the law is simple and is designed to operate without the help of legally trained personnel.

Many procedural irregularities can be ignored if no real injustice is done to the accused. Similarly, some other procedural requirements can be waived because of exigencies of the service. Since discipline is the function of the command, the commanding officer plays an important role in the entire scheme of justice which is based on the traditional philosophy: military justice is the military's business.

The Pakistan Air Force is a relatively small but well knit organization. The chain of command runs from the Chief of Staff, Deputy Chief of Staff to Base and Unit Commanders (in-

the force and effect of law (*Ex Parte Reed*, 100 U.S. 13 (1879)). See also DAULAT RAM PREM *Commentaries on Military Law* 229 (1966).

Section 203 of the PAF ACT also authorized the Central Government to make "regulations for all or any of the purposes of the Act other than those matters covered in the Rules." These regulations have not been published so far for various reasons. The Regulations for the Indian Air Force, with suitable modifications, continue to be used in the PAF, supplemented by other administrative Air Force Orders (A.F.O.'s), etc.

¹³ See p. 40 *infra*.

¹⁴ See *supra* note 1.

cluding Officers Commanding Wings and Squadrons). The President of Pakistan, who has been the "Supreme Commander of the Armed Forces" in the earlier two constitutions of Pakistan¹⁵ and is now the "Commander in Chief" of the three forces under the present Interim Constitution,¹⁶ has seldom interfered with the disciplinary matters of the Services.

The Base and Unit Commanders are primarily responsible for discipline, the investigation of charges and are also empowered to award summary punishments, the equivalent of nonjudicial punishment under the American Uniform Code of Military Justice, 1950.¹⁷ The powers of summary punishment for officers and warrant officers and convening courts-martial have been delegated only to certain Base Commanders and higher staff officers. Three types of courts-martial have been provided in the PAF Act: General Court-Martial (GCM) for trial of all servicemen with full powers of punishment; District Court-Martial (DCM) for trial of airmen (Flight Sergeant and below) with power to adjudge imprisonment up to two years, and Field General Court-Martial (FGCM) with the same powers as the GCM, but essentially meant for wartime. No appeal to civilian courts from any disciplinary action is allowed. The aggrieved person may, however, submit a petition to the appropriate authority. Details of the above will be explained elsewhere in this paper.

C. ROLE OF THE JUDGE ADVOCATE GENERAL'S DEPARTMENT, PAKISTAN AIR FORCE

The Pakistan Air Force has a Judge Advocate General's Department (hereinafter referred to as JAG Department) which functions at Air Headquarters directly under the Chief of Staff. The JAG Department renders legal advice to the Chief of Staff, other staff officers and commanders "on matters relating to Air Force Law."¹⁸ The JAG Department is a small organization which is divided into two cells known as the "Pre-trial Section" and "Post-trial Section." The former renders pre-trial advice to the convening authorities and, as a matter of practice, provides

¹⁵ THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF PAKISTAN 1956, art. 40; THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF PAKISTAN 1962, art. 55.

¹⁶ THE INTERIM CONSTITUTION OF THE ISLAMIC REPUBLIC OF PAKISTAN 1972, art. 56.

¹⁷ 10 U.S.C. §815 (1970), UNIFORM CODE OF MILITARY JUSTICE (hereinafter cited as UCMJ), art. 15.

¹⁸ PAF Act §4 (xx) (1953) and PAF Act Rule 24.

a prosecutor at GCM trials and at important DCM trials. The latter section prepares reviews of all courts-martial proceedings, reviews summary punishments and must provide a judge advocate for all GCM trials and may provide one at the DCM trials.¹⁹ Neither the pre-trial advice nor the post-trial review is a requirement of law but they have been made compulsory through administrative orders. The work of both the pre-trial and post-trial sections is supervised by the Judge Advocate General who also approves all GCM and DCM post-trial reviews, renders legal opinions and deals with petitions arising out of court-martial trials. The JAG Department's other functions include drafting legislation and the legal training of officers. Unlike their counterpart in the United States Army, the JAG Department does not deal with contracts nor render legal assistance to individual servicemen nor provide staff judge advocates to advise commanders.

All officers of the JAG Department belong to the "Legal Branch."²⁰ The Branch was established in 1959 in response to a need for introducing specialization in the legal field. All officers of the Branch are law graduates but not necessarily members of a bar. The Pakistan Air Force at the present is the only service which has established such a Branch.

D. CHARACTERISTICS OF THE PERSONNEL

Since the study of law cannot be divorced from the study of the people, a few general remarks in this respect will not be out of place.

Pakistan is not a rich country. Its economy is predominately agricultural and the rate of literacy is not high. The common man is brought up in an extended family unit, under influence of the Muslim religion and the supervision of an assertive family patriarch. From childhood he is taught to respect and obey elders and to discipline himself.

Democratic institutions and values are young and developing. Common men generally trust those in authority; open criticism of the government and its functionaries is not a usual phenomena. With rapid industrialization, improvement in education and progress towards democratization taking place in the country things are, however, changing.

¹⁹ The Judge Advocate is the equivalent of the "Military Judge" under the UCMJ.

²⁰ Equivalent of The Judge Advocate General's Corps in the United States Army.

Service in the armed forces of Pakistan is, as it has always been, on a voluntary basis. Its membership traditionally enjoyed prestige in the society. In addition, the Services offer rewarding careers. For these reasons people join the services and don the uniform, not reluctantly for a few years, but with a keenness for making it a lifetime career. An unceremonious exit from the service is the last thing which an individual or his family circle would want. When, therefore, any disciplinary action is taken against a serviceman, he either accepts it without demur, trusting the fairness of law and judgment of those who administer it, or takes it as a part of the vicissitudes of service life which he has willingly accepted. The occurrence, howsoever stirring, seldom reaches the press or public and even if it does, deference to the military prevents the creation of any furor. All these factors have an important bearing on the attitude of an individual toward the Service and discipline which in turn largely affects the administration of law in the Pakistan Air Force.

II. JURISDICTION

A. JURISDICTION OVER PERSONS

1. *General*

Persons subject to Air Force law fall in two categories, those who are permanently subject and those whose subjection is only temporary. In the former category are commissioned officers, warrant officers (junior commissioned officers) and airmen who join the Air Force on a regular basis and remain permanently subject to Air Force law until "duly retired, discharged, released, removed or dismissed from the service." These individuals form the bulk of the Air Force personnel. Into the second category fall Air Force reservists, persons seconded (transferred) from the Pakistan Army and Pakistan Navy and civilians who become temporarily subject to Air Force law under certain contingencies.²¹ Subjection of civilians to Air Force law provides the most interesting legal issues.

2. *Civilians Employed with or Accompanying the Air Force*

In the interest of discipline, it is considered necessary that civilians who are employed by the Air Force, including those

²¹ PAF Act §§ 2, 3 and 3A (1953).

whose services are lent to the Air Force,²² should be amenable to Air Force law under certain circumstances. Accordingly, it has been provided under section 2(d) of the PAF Act that the Act will be applicable to:

Persons not otherwise subject to Air Force law who are on active service in camp, on the march, or at any frontier post specified by the central government by notification in this behalf, are employed by, or are in the service of or are followers of, or accompany any portion of, the Air Force. (emphasis provided.)

The term "active service" means the time during which the Air Force or a part of it is "engaged in operations against an enemy."²³ The Central Government may also place the Air Force on active service even when there are no such operations.²⁴

The above provision compares with Article 2(11) of the UCMJ that has been held to be unconstitutional if applied to civilians (dependents) in time of peace.²⁵ The validity of section 2(d) PAF Act has not been questioned in any court in Pakistan. Plain reading of the provision of the Act, however, leaves no doubt that jurisdiction over civilians, in the given situations, can be exercised at home or abroad, both in time of peace and war. Yet, the word "accompany" has never been interpreted to cover civilian dependents who may go with the Air Force.

3. *Civilians Accused of Spying and Other Related Offenses*

Through a recent amendment of sections 2 and 71 of the PAF Act, new provisions somewhat similar to Articles 104 and 106, UCMJ have been added to the Act.²⁶ Under these amendments, any person accused of:

- (a) seducing or attempting to seduce any person subject to the Act from his duty or allegiance to the Government, or
- (b) having committed in relation to the Pakistan Armed Forces any offense punishable under the Official Secrets Act, 1923.²⁷

is liable to be tried or otherwise dealt with under Air Force law for such an offense "as if the offense were an offense under the

²² E.g. members of the Post and Telegraph Departments and civilians who accompany the Pakistan Air Force as newspaper correspondents and contractors.

²³ PAF ACT § 4(i) (1953).

²⁴ PAF ACT § 10 (1953).

²⁵ Reid v. Covert, 354 U.S. 1 (1957).

²⁶ DEFENSE SERVICES LAWS AMENDMENT ORDINANCES 1967 (III of 1967) and (IV of 1967).

²⁷ Act XIX of 1923, which deals with spying, wrongful acquisition or communication of classified information and other related offenses.

Act and were committed at a time when such person was subject to this Act; and the provision of this section shall have effect accordingly." 28

The intention behind the above legislation was to deter people from compromising the security of the services, for which the ordinary civil law was found ineffective. To that end, the law has been a success. Only one case, which in fact had prompted the above legislation, has so far been tried. There, by retroactively applying the law, a few civilians accused of spying and other related offenses were tried by a general court-martial and sentenced to various terms of imprisonment. The case was challenged in the Provincial High Court. The court upheld the trial on the grounds, *inter alia*: (a) the amendments did not amount to *ex post facto* legislation as they neither created a new offense nor provided a new punishment, but merely created a "new forum of trial, namely court martial;" (b) the amendments involved only changes in procedural law and "no person can have a vested right in the course of procedure and it is an elementary principle that alteration in a procedure is always retrospective unless there can be some good reason against it or by necessary intendment the procedural law is stated to be prospective;" and (c) the case involved no violation of the fundamental rights of "protection against retrospective punishment." 29

4. *Extension of Jurisdiction over Ex-Servicemen*

Normally officers, warrant officers or airmen cease to be subject to the PAF Act when they are "duly" retired, discharged, released, removed or dismissed from service, either upon completion of their normal tenure of service or as a result of administrative action or as a result of the sentence by court-martial. In the case of civilians, their subjection to the Act normally ceases when the subjecting "conditions" no longer exist. The following are, however, important exceptions to the general rule:

- (a) When an offense under the PAF Act had been committed by any person while subject to the Act, and he has ceased to be so subject, he may be taken into the Air Force custody, tried and punished for such offense as if he had continued to be so subject. However, trial for the offense *must commence within six months* after he was ceased to be subject, except where he is accused of desertion, fraudulent enrollment or mutiny for which there is no time limit.
- (b) When a person is sentenced to imprisonment, the Act applies

28 PAF ACT § 71 (3) (1953).

29 Raza Khan and others v. Government of Pakistan, P.L.D. 1967 Peshawar (Pakistan) 118.

to him during the term of imprisonment, though he is dismissed or has otherwise ceased to be subject to the Act.³⁰

The provision at (a) is meant to cover those situations where either on account of the cleverness of the accused or indolence of others, or for some other reason, the offense is not discovered until its perpetrator has been separated from the service. But for the provision, prosecution would have to be initiated in civilian courts provided the offense is also punishable under the civil law.³¹ Otherwise, the culprit goes scot-free. While the provision safeguards the ends of justice and service discipline, it also, by imposing a time limit of 6 months, ensures that the investigation does not unduly linger on and cause unnecessary anguish to the accused or prejudice his defense.

The above provision is similar to Article 3(a) of the UCMJ³² except that the latter does not provide any time limit for the trial of ex-servicemen for offenses committed by them while in the service. Article 3(a) has been held to be unconstitutional by the U.S. Supreme Court in the case of *Toth v. Quarles*,³³ inter alia, on the ground:

. . . Army discipline will not be improved by court-martialling, rather than trying by jury some civilian exsoldier who has been wholly separated from the service for months, years, or perhaps decades.³⁴

Article 3(a) UCMJ, however, is still applicable to ex-servicemen if they subsequently return to the status of a person subject to the Code.³⁵

B. JURISDICTION OVER OFFENSES

1. General

Offenses denounced by the PAF Act are of two types: (1) Air Force offenses such as misbehavior before the enemy, mutiny, desertion, AWOL, disobedience, false official statements or malingering; and (2) civil offenses, that is to say, acts which would normally be crimes in civilian life but are made more severely

³⁰ PAF Act § 121 (1953).

³¹ The expression "civil law" is being used in the paper to denote ordinary criminal law of the land, which applies to civilians and servicemen alike, in contradiction to Pakistan Air Force Law.

³² 10 U.S.C. §803(a) (1970).

³³ 350 U.S. 11 (1955).

³⁴ *Id.* at 22.

³⁵ "Note" under Article 3(a) UCMJ at Appendix A2-3, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (REV. ED.).

punishable when committed by servicemen, such as assault, theft of the government's or a comrade's property, fraud, extortion or perjury. For example, ordinary theft under civil law is punishable by 3 years imprisonment, but the punishment for theft of a comrade's property extends to 14 years imprisonment under Air Force law. Besides the above, the PAF Act also contains general sections under which prejudicial or unbecoming acts as well as other offenses under the civil law can be punished. These will be subsequently discussed. A maximum awardable punishment has been provided under each punitive section. On the whole, military type offenses are punishable more severely under the PAF Act than under the Manual for Courts-Martial.³⁶

Except when charged with desertion, fraudulent enrollment, mutiny or theft (including other cognate offenses), a person subject to the PAF Act is not liable to be tried by a court-martial after 3 years from the date of commission of an offense.³⁷ A court-martial has no jurisdiction to try war crimes or war criminals in the sense that these powers are exercisable by a general court-martial under article 18 of the UCMJ.³⁸

2. General Sections

Similar to the now-contested articles 133 and 134 of the UCMJ, the PAF Act contains sections 45 and 65 which deal respectively with conduct unbecoming an officer or warrant officer and acts or omissions prejudicial to good order and Air Force discipline. The scope and use of section 65 is however, more restrictive than that of Article 134.

Unlike Article 134, section 65 deals with only one class of offenses, that is, those acts or omissions which are prejudicial to good order and Air Force discipline and for which no specific provision exists in the Act. The section does not apply to civil offenses because they are dealt with under a separate provision of the Act. Use of section 65 is, therefore, limited essentially to infractions of customary standards of discipline or other derelictions of service duties which have not, and possibly cannot be, spelled out in all details under the Act. The MPAFL provides certain examples of such acts, which are by no means exhaustive, for example, issuing a bad check, improperly wearing badges of

³⁶ MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (REV. ED.) (hereinafter cited as MCM).

³⁷ PAF Act § 120 (1953).

³⁸ 10 U.S.C. §818 (1970).

rank, misuse of service vehicle, giving false name to police, and causing disturbance in the camp.³⁹ But offenses like assault, indecent acts, drunkenness or perjury which are chargeable under Article 134 are not chargeable under section 65 because they are made punishable elsewhere in the Act.

Another restriction on use of section 65 is that when the accused has been charged with a specific offense he cannot, on failure of proof of that offense, be found guilty of a lesser included offense under section 65, as permissible under the UCMJ.

In short, use of section 65 is quite circumscribed in the PAF and it may be for this reason that it has not, as yet, earned the notoriety of being a "Devil's Article," a "catch-all" or a "trap."⁴⁰

3. Civil Offenses

A person who joins the Air Force continues to be subject to the penal laws of the country. If he commits any civil offense, he is liable to be tried and punished by the civilian criminal courts, like any other citizen. By an enabling provision,⁴¹ the Air Force can, however, assert jurisdiction under Air Force law over almost any offense committed by a serviceman. Unlike the American system, jurisdiction is not restricted to central laws (federal crimes) but extends to *all* penal laws of the country. Exceptions, however, have been made in the case of three offenses, namely, murder, culpable homicide not amounting to murder and rape when committed against a person *not* subject to the Act. Jurisdiction to try these offenses cannot be asserted unless the Act is committed while the individual is on active service,⁴² outside Pakistan or at any frontier post specified by the central government.⁴³ After jurisdiction of an offense is claimed by the Air Force, it can be disposed of summarily or by a court-martial as if it were an offense under the Act, provided that the punishment cannot exceed the one provided for under the civil law.

³⁹ See, e.g., MPAFL, at 245, 283, and 284.

⁴⁰ For criticism of Article 134, UCMJ, see generally Hagan, *The General Article — Elemental Confusion*, 10 MIL. L. REV. 63 (1960); Nicholas, *The Devil's Article*, 22 MIL. L. REV. 111 (1963); Hodson, *The Manual for Courts-Martial 1984*, 57 MIL. L. REV. 1 (1972).

⁴¹ PAF Act §71 (1953).

⁴² See notes 18 and 19 and the accompanying text, *supra*.

⁴³ PAF Act §§ 71 and 72 (1953), and Gazette of Pakistan Notification no. 1067/57, November 15, 1957 (for list of frontier posts).

4. *Conflict of Jurisdiction*

Section 123, PAF Act empowers the "prescribed" Air Force authority, the Chief of Staff in a case involving death and the Base Commander in other cases, to claim a civil offense from civil authorities for disposal under the Act. This claim can be made either before or after the proceedings are instituted before a magistrate.⁴⁴ However, if the civilian court is of the opinion that it should try the offense, it may require, by written notice, the prescribed Air Force authority "either to deliver over the offender to the nearest magistrate to be proceeded according to law or to postpone the proceedings pending a reference to the central government."⁴⁵ Other procedural details have been laid down in the rules⁴⁶ framed by the central government under section 491 of the Code of Criminal Procedure, 1898.

As a matter of general policy, the Air Force tries to claim almost all civil offenses for disposal under the PAF Act. Exceptions are made for those offenses which relate to the "property or person of a civilian or are committed in conjunction with a civilian, or if the civil authorities intimate a desire to bring the case before a civil court."⁴⁷ The system in practice works well, and the author is not aware of any case in which a confrontation has arisen between the civil and Air Force authorities which had to go to the central government for decision.

5. *Service Connection*

Amenability of a serviceman to be dealt with under the Air Force law depends upon his Air Force "status" and not on whether the crime committed by him is also connected with the service. Such a service connection is, of course, necessary where the legislature has made the "connection" a necessary ingredient of the offense. For instance, in a crime like sleeping on post, breaking out of the camp, or an act prejudicial to good order and Air Force discipline, it would be necessary to show that the crime was committed on the "post" or in the "camp" or was directly prejudicial to Air Force discipline. But such proof is obviously superfluous in civil offenses where no such connection is relevant. For such offenses a serviceman is tried in his capacity as an ordinary citizen of the country—with his military status superim-

⁴⁴ *C. Ramanujan v. The State of Mysore*, A.I.R. 1962 Mys (India) 196.

⁴⁵ PAF Act § 124 (1953).

⁴⁶ See Gazette of Pakistan Notification no. 3RO 1157, October 13, 1970.

⁴⁷ MPAFL, para. 8 at 118.

posed upon him. Thus, subject to the exceptions of section 72 of the Act, a serviceman is liable to be tried by a court-martial for any crime committed by him, regardless of the victim, time, place or other circumstances of the offense.

In the United States "[F]or longer than 100 years the Supreme Court . . . held that jurisdiction of military courts over a person, punishable by the code and its precursors, depended upon 'status' of the individual rather than on the nature of the offense."⁴⁸ The Supreme Court has since 1969 changed the law declaring in the case of *O'Callahan v. Parker*⁴⁹ that "status" alone is no longer a constitutional justification for the exercise of court-martial jurisdiction over servicemen. In addition to the status of the accused, the "nature, time and place of the offense" must demonstrate that it is "service connected" before military jurisdiction can be exercised and the accused deprived of the "benefits of an indictment by a grand jury and a trial by a jury of his peers."⁵⁰

Several exceptions to the *O'Callahan* rule have been made in subsequent decisions of the United States Court of Military Appeals, but the United States military now has very limited jurisdiction over off-post offenses committed against civilians in the Continental United States.⁵¹

6. *Double Jeopardy*

Prior to 1967, civil law was considered supreme in Pakistan. Accordingly, it was provided in (old) section 125 of the Act that a person acquitted or convicted of a civil offense under Air Force proceedings could be retried by a civilian criminal court "for the same offense or on the same facts," with the prior sanction of the central government. This was in a way an exception to the general law⁵² of the country which prohibited retrial of a person after conviction or acquittal. Under the Pakistan Air Force (Amendment) Act of 1967, the section was deleted and the discrimination removed. Now a person, once convicted or acquitted

⁴⁸ *U.S. v. Bell*, 18 U.S.C.M.A. 495, 40 C.M.R. 207 (1969). See also *Ex parte Milligan*, 71 U.S. (4 Wall) 213 (1866) and *Kinsella v. Singleton*, 361 U.S. 234 (1960).

⁴⁹ 395 U.S. 258 (1969).

⁵⁰ *Id.* at 278.

⁵¹ *U.S. v. Peak*, 19 U.S.C.M.A. 19, 41 C.M.R. 19 (1969); *U.S. v. Sharky*, 19 U.S.C.M.A. 26, 41 C.M.R. 26 (1969); *U.S. v. Davis*, 20 U.S.C.M.A. 27, 42 C.M.R. 219 (1970). See also *Relford v. Commandant*, 401 U.S. 335 (1972).

⁵² GENERAL CLAUSES ACT §26 (1897) and CODE OF CRIMINAL PROCEDURE § 403 (1898).

either by a court-martial or by an officer exercising power of summary disposal, cannot be retried for the same offense in a civilian criminal court. Retrial under the Air Force law after a prior summary disposal, court-martial or trial by civilian criminal court has always been barred.⁵³

In general, United States military personnel continue to be subject to civil court jurisdiction for the transgression of ordinary criminal law. But after a prior trial by a court-martial, former jeopardy may be asserted only when later prosecution is by federal authorities and not by state authorities, except where a state statute expressly so provides.⁵⁴ The converse also seems to be true, that is, a military person who has been tried by a civil court *can* be subsequently tried by a court-martial or punished under Article 15 for the same offense though "normally" ⁵⁵ this may not be done.

III. ARREST AND CUSTODY

A. GENERAL

A person subject to the PAF Act who is charged with an offense may be taken into Air Force custody by the order of any superior officer.⁵⁶ Such an action is by no means obligatory and depends on the sound discretion of the person empowered to arrest. The law places only one restriction, namely, that a person charged with a minor offense shall not "ordinarily" ⁵⁷ be placed under arrest. The arrest is generally ordered orally and can be effected upon a complaint ⁵⁸ that an offense has been committed.

The term "superior officer" ⁵⁹ is wide enough to include warrant officers and non-commissioned officers who can, on their own, exercise the power of arrest over their juniors if an offense war-

⁵³ PAF Act § 119 (1953).

⁵⁴ *State v. Rankin*, 44 Tenn. (4 Cold) 145 (1967); *Abbate v. United States*, 359 U.S. 187 (1959).

⁵⁵ Army Reg. No. 27-10, para. 6-2 (26 Nov. 1966); *U.S. v. Borys*, 18 U.S.C.M.A. 517, 40 C.M.R. 259 (1969). "The American Legion has long lobbied for statutory prohibition against dual sovereign double jeopardy." See H.R. 3455, 86th Cong., 1st Sess. (1959) cited in Willis, *The Constitution, The United States Court of Military Appeals and the Future*, 57 MIL. L. REV. 42 (1972).

⁵⁶ PAF Act § 101 (1953).

⁵⁷ PAF Act, Rule 39(1).

⁵⁸ MPAFL, note 3 at 3.

⁵⁹ PAF Act § 4 (XXIX) (1953).

ranting arrest is committed before them or reported to them.⁶⁰ An officer ordering arrest of his juniors can also, while acting as Provost Marshal or exercising authority on his behalf, or in cases of quarrel, affray or disorder, arrest any person who may be senior to him.⁶¹ Under certain circumstances, civil authorities may, pursuant to Air Force law, arrest without warrant any person who is a deserter or found travelling without authority.⁶²

A person ordering an arrest is required to submit within 48 hours an "account in writing" of the offense with which the person arrested is charged. The account is to be submitted to the person to whose custody the person arrested has been committed.⁶³ Misuse of the powers of arrest is an offense.⁶⁴

B. KINDS OF ARREST

Basically Air Force custody includes two types of arrests, the "open arrest" and the "closed arrest." The restraint imposed under each type is according to the usages of the service and the regulations.⁶⁵ Under closed arrest a person is usually confined to a room (B.O.Q. or barracks) and remains under the escort of a person of equal rank. Under open arrest he remains under a moral restraint not to go beyond a certain area, usually the camp. Other restrictions under open and close arrest are about the same⁶⁶ as apply to "arrest" and "confinement," respectively, under United States Army Regulation 633-1, paragraph 5.

Under a recent amendment to the PAF Act, the scope of "close arrest" has been enlarged to include "detention in a civil prison."⁶⁷ Such type of detention can be ordered only by the commanding officer and is limited to 15 days at a time. The provision is meant to be used only in those rare cases, like riot or mutiny, when the arrest and the segregation of a large number of offenders becomes necessary and when adequate facilities do not exist at a base.

⁶⁰ In practice warrant officers and NCOs, not performing provost or other disciplinary duties, seldom exercise their powers of arrest. Usually, they report the matter to the Adjutant or another responsible officer who orders the arrest, if required.

⁶¹ PAF Act §§ 107 and 101(3) (1953).

⁶² PAF Act § 105 (1953).

⁶³ PAF Act § 50(b) (1953).

⁶⁴ See *infra* note 71.

⁶⁵ PAF Act § 4 (VII) (1953) and PAF Act Rule 38.

⁶⁶ For other restrictions under open and close arrest see MPAFL, Chapter III, paras. 5 through 15.

⁶⁷ See PAKISTAN AIR FORCE ACT (Amendment) ORDINANCE VII of 1972.

C. SAFEGUARDS AGAINST UNNECESSARY OR
PROLONGED ARREST

Once a serviceman has been placed under arrest, the proper authority to release him from arrest is the commanding officer of the accused or other superior Air Force authority.⁶⁸ Neither open nor close arrest can be imposed as a punishment. There is also no law or practice regarding the imposition of "restrictions in lieu of arrest," as provided in paragraph 20b of the MCM.

A commanding officer is under a legal duty to commence investigation of the charge within 48 hours after the arrest is reported to him. If it is impracticable to do so, a commander is required to explain the reasons in writing to the court-martial convening authority and to follow it up with periodic reports in case the detention prolongs.⁶⁹ An accused awaiting trial is not supposed to be under arrest unless he is charged with a serious offense, or is undermining discipline, or is a habitual absentee or deserter.⁷⁰ The above provisions are reinforced by section 50 of the Act making unnecessary detention without trial or failure to bring the case of an arrested person before proper authority for investigation an offense punishable by two years imprisonment. Additionally, if a person is unnecessarily detained, he can apply to the civil court⁷¹ and demand that he be dealt with according to law or that he be set at liberty.⁷²

In spite of the above precautions, undue delays in bringing the accused to trial do at times occur in the Pakistan Air Force. In such cases, the court while sentencing the accused may⁷³ take into consideration the period of the accused's custody "awaiting trial," which begins after the submission of the application for trial.

⁶⁸ PAF Act, Rule 39 (2).

⁶⁹ PAF Act §§ 102 and 103 (1953); PAF Act, Rule 45.

⁷⁰ PAF Act, Rule 46.

⁷¹ High Court of the Province.

⁷² The highest court of a province (state) of Pakistan is called the High Court of the Province. These High Courts are headed by one Supreme Court of Pakistan (equivalent of the Supreme Court of the United States). A High Court besides acting as appellate court of the province is also empowered to issue writs under the constitution of Pakistan. While the constitution places a bar against issue of writs in respect of any action taken against a serviceman as a member of the service, there is no bar against issue of writ of habeas corpus, in appropriate cases, under § 491 of the Code of Criminal Procedure, 1898. See discussion *infra* and also MPAFL, para. 22 at 22.

⁷³ Pretrial delay is not included among the presentencing considerations under the MPAFL, pp. 56-59.

Pretrial delay, howsoever long, cannot be urged as a ground for dismissal of the charge as provided under article 10 of the UCMJ.⁷⁴

IV. SUMMARY PUNISHMENTS

A. GENERAL

The basic philosophy behind summary punishments under Air Force law is that in all cases court-martial is not an appropriate means for preservation of discipline and effectiveness of the service. Commanders, therefore, must have the authority to act swiftly, effectively, and inexpensively in minor cases. In such cases elaborate rules of trial procedure give way to a rather summary procedure which, nonetheless, should be fair in order to be effective.

Summary punishments do not apply to officers of the rank of Squadron Leader (Major) and above who can only be punished by a court-martial. Other junior officers and warrant officers can be punished by certain Base Commanders⁷⁵ and certain higher staff officers, who have been delegated this power by the Chief of Staff.⁷⁶ Airmen⁷⁷ can be summarily punished by all the Base Commanders and Unit Commanders, subject to the limitations of their rank or position.⁷⁸

Although the summary punishment is meant for minor offenses, the term "minor offense" has not been used in the PAF Act and Rules nor defined in the MPAFL, as done in the MCM.⁷⁹ Theoretically, therefore, any offense can be disposed of summarily. However, to prevent the abuse of the power at lower levels, section 83, PAF Act lists a number of serious offenses which if committed by airmen cannot be punished summarily by a commander without prior sanction in writing of the DCM convening authority.

The charges for summary disposal are formally prepared but are not sworn. The accused is not represented, yet the procedure is rather formal and structured.

⁷⁴ 10 U.S.C. § 810 (1970).

⁷⁵ Of the rank of Group Captain (Colonel) and above.

⁷⁶ PAF Act, § 96 (1953) and MPAFL, para. 3 at 310. In the Pakistan Army, officers up to the rank of Major are punishable summarily. See PAKISTAN ARMY ACT, Rule 17.

⁷⁷ Flight Sergeant and below

⁷⁸ PAF Act § 82 (1953) and PAF Act, Rules 47, 48 and 49.

⁷⁹ Para. 128b, MCM.

B. PROCEDURE

1. *Airmen*

The charge in the first instance is always "heard" by the Unit Commander of the accused. The Commander reads out and explains the charge to the accused; the prosecution witnesses are then called individually and heard in the presence of the accused who has a right to cross-examine them. The accused then may give a statement (not under oath) and produce his witnesses. The witnesses are not administered oaths and the entire proceedings are conducted orally. After the hearing the Commander may, after consulting the record of the accused, take any of these actions: (1) dismiss the charge; (2) adjudge punishment within his power; (3) refer the case to higher authority; or (4) order a summary of evidence³³ (similar to an investigation under Article 32, UCMJ). If a summary of evidence has been recorded, the Commander is to rehear the case and may take any of the first three actions or apply for a court-martial. If the case is referred to higher authority, a similar hearing is conducted by the latter.

The maximum punishments that can be adjudged are: (1) severe reprimand to a Sergeant and Flight Sergeant; (2) relinquishment of substantive rank to a Corporal; and (3) the same punishment plus 28 days detention and 14 days confinement, or field punishment up to 28 days (on active service only), to a person below the rank of Corporal. Additionally, six other punishments including a fine and penal deductions of up to 14 days pay are provided in the Act which may be awarded in lieu of, or in conjunction with, the above punishments. There is no right of appeal or option for trial by court-martial in regard to any punishment. On the whole, the punishments provided for airmen (below non-commissioned officer rank) are more severe than those for enlisted personnel under the UCMJ.

Through an amendment of the Act (presently underway), the punishment of relinquishment of substantive rank is being

³³ Summary of evidence is usually recorded by an officer detailed by the commanding officer. The evidence of all witnesses is taken on oath in the presence of the accused who can cross-examine those witnesses, give a statement (not on oath) and produce his own witnesses. The evidence is usually recorded in narrative form and the rules of evidence are followed. A civilian witness can be compelled to attend the proceedings through issue of summons (subpoena). The accused is not represented and the officer recording the summary of evidence also makes no recommendation as to the disposition of charges as done in the American system. See also PAF Act, Rule 42 and MPAFL Part I, Chapter VII, paras. 7 through 23.

abolished and the punishment of forfeiture of 12 months service or seniority is being added in addition to other minor changes.

2. *Officers and Warrant Officers*

In the case of officers and warrant officers, the procedure is slightly different. Unless the charge is dismissed, the unit commander straightaway orders a summary of evidence and forwards the case to the proper authority authorized to deal with the case. If the accused has not, by prior consent in writing, dispensed with the attendance of witnesses, the case is formally heard by the proper authority much the same way as done in other cases. Exceptions are that the accused is given the right to ask for an adjournment if he is not prepared, the witnesses are examined under oath and a brief record of their evidence is made. In addition, the accused is given the option to elect court-martial trial in case certain punishments are to be adjudged.⁸¹ No right of appeal is allowed in any event.

Officers and Warrant Officers can be given one or more of the following punishments: (1) forfeiture of service or seniority for 12 months; (2) stoppages of pay and allowances for 3 months; (3) forfeiture of pay and allowances (for negligent flying or negligent handling of aircraft); and (4) severe reprimand or reprimand. In the case of either of the first two punishments, the accused, before the imposition, is given the option to elect trial by court-martial.

3. *Finality of Disposal*

Once a person has been dealt with summarily, that is, either punished or acquitted, he cannot subsequently be tried for the same offense by a court-martial or by a civilian criminal court.⁸² Since the law makes no distinction between a minor offense and a serious offense, once a case has been dealt with summarily the disposal becomes final. As a rule, a transaction is not split allowing a minor offense to be disposed of summarily and letting a serious offense arising out of the same transaction be tried by a court-martial. In the case of minor offenses accompanying a serious offense, the accused is only charged with the serious offense and the rest are dropped. Thus, where the use of violence to a

⁸¹ PAF Act, Rule 50 and Form (3) Third Appendix to PAF Act Rules (1953).

⁸² PAF Act § 119 (1953).

superior officer is also accompanied by insubordinate language, the accused, *as a rule*, will be charged only with the violence.⁸⁴

4. *Review of Punishments*

The commanding officer who imposes the punishment has no power to increase or decrease the punishment after imposition. These are, however, automatically reviewed by the next superior authority. The punishment adjudged by the unit commander is reviewed by the base commander and those given by the latter are reviewed in the JAG Department on behalf of the Chief of Staff. On review, the punishment may be cancelled, varied or remitted if found to be illegal, unjust or excessive.⁸⁵ As stated previously, the accused has no right of appeal as such, but he may submit a petition to the reviewing authority under section 25 or 26, PAF Act ⁸⁶ at any time after the punishment has been imposed.

C. *BRIEF COMPARISON WITH NONJUDICIAL PUNISHMENTS UNDER UCMJ*

The purpose of nonjudicial punishments in the American system is the same as that of summary punishment under Air Force law. However, quite a few dissimilarities exist between the two systems. The main distinguishing factors of the American system are briefly as follows:

- (1) Article 15 punishments may be imposed by a commanding officer on all officers (irrespective of rank) and other military persons under his command.
- (2) The accused has a right to elect trial by court-martial in every case except when attached to, or embarked on, a vessel.⁸⁷ He is also entitled to consult with counsel before exercising his option.⁸⁷
- (3) The accused has a right to appeal in every case.⁸⁸
- (4) Article 15 punishments can be imposed for "minor offenses" only, and it is "not a bar to trial by court-martial for a serious crime or offense growing out of the same act or omission and not properly punishable under this article . . ."⁸⁹ No specific definition of a minor offense, is, however,

⁸³ MPAFL, note 1(e) at 435.

⁸⁴ PAF ACT §§ 87, 88 and 89 (1953); PAF Act, Rules 51 through 55.

⁸⁵ Equivalent of Art. 138, UCMJ.

⁸⁶ UCMJ, art. 15 (e).

⁸⁷ Army Reg. No. 27-10, para. 3-12 (26 Nov. 1968).

⁸⁸ UCMJ, art. 15 (e).

⁸⁹ *Id.*

provided in the MCM or the relevant United States Army Regulation 27-10. Generally, whether an offense is minor depends upon its nature, the circumstances surrounding the offense and the maximum punishment authorized for it. Legally, the determination of a commander that an offense is minor can be upset by the higher commander who may order the accused to be retried by a court-martial.⁹⁰

V. COURTS-MARTIAL

A. GENERAL

A court-martial trial is not a frequent happening in the Pakistan Air Force. Absent unusual circumstances, they may average about fifteen in one year. Offenses do not generally have any particular trend. "Drug" cases are, however, non-existent and sexual offenses are rare; AWOL and desertion cases are also few. Other cases may involve disobedience, negligent performance of duties, theft, or low flying. But again, their incidence changes from year to year. Because of the relatively smaller size of the installations and infrequency of occurrence, a court-martial trial still carries its traditional stirring effect on the personnel; it is not awe, but concern for something unusual having happened at the base.

As previously stated, three types of courts-martial have been provided under the PAF Act: the general court-martial (GCM), the district court-martial (DCM) and the field general court-martial (FGCM);⁹¹ there is no provision for a summary court-martial.⁹² The courts differ in their composition, jurisdiction and the authorities who can convene them. A GCM is composed of a minimum of five officers having at least three years commissioned service, four of whom should be at least Flight Lieutenants (Captains).⁹³ The senior member (President) is at least a Group Captain (Colonel), unless none are available owing to exigencies of

⁹⁰ See *U.S. v. Fretwell*, 11 U.S.C.M.A. 377, 29 C.M.R. 193 (1960).

⁹¹ PAF Act § 108 (1953).

⁹² Summary Court-Martial is, however, provided under the Pakistan Army Act 1952 for trial of persons other than an officer, warrant officer or N.C.O. It can adjudge sentence up to one year imprisonment. See PAKISTAN ARMY Act, §§ 59, 99 and 101.

⁹³ PAF Act § 113 (1953).

the service.¹⁴ The court can be convened by the Chief of Staff or a person authorized by him;¹⁵ at the present time, only the Deputy Chief of Staff is so authorized. It can try any person subject to the Act and pass any sentence authorized thereby.¹⁶ The DCM on the other hand is composed of a minimum of three officers having at least two years commissioned service. The senior member is to be at least of the rank of Squadron Leader (Major), unless an officer of that rank is unavailable owing to exigencies of service.¹⁷ The court can be convened by a GCM convening authority or by a base commander of at least the rank of Group Captain who has been delegated this authority.¹⁸ It can only try persons other than officers and warrant officers and impose a maximum sentence of imprisonment up to two years.¹⁹ Both courts can try any offense punishable under the Act (including a civil offense) and they follow the same procedure except that the detailing of a judge advocate (similar to the military judge under UCMJ) is a must in a GCM, but optional in a DCM case.²⁰ No person other than a commissioned officer can, under any circumstances, be detailed as a member of any court-martial.

The FGCM is a special type of court-martial, essentially meant for war or active service conditions. It is subject to different rules which are discussed separately and does not form part of the following discussion.

B. PRETRIAL MATTERS

1. *Duties of the Convening Authority*

After considering a summary of the evidence, if the commanding officer determines that the case is fit for trial he has to apply for trial ordinarily within 48 hours, to the appropriate convening authority.²¹ It is then the duty of the convening authority to determine whether the trial should be held and if so by what type of court-martial. Before making his decision he is "required" under administrative orders to obtain a pretrial legal advice from the JAG Department. Based on the advice, the case is either in-

¹⁴ PAF Act, Rule 69.

¹⁵ PAF Act § 109 (1953).

¹⁶ PAF Act §§ 71 and 117 (1953).

¹⁷ PAF Act § 110 (1953) and PAF Act, Rule 70.

¹⁸ PAF Act § 110 (1953).

¹⁹ PAF Act § 118 (1953).

²⁰ PAF Act § 127 (1953).

²¹ PAF Act, Rule 43(2).

investigated further, disposed of summarily, brought to trial before an appropriate court, or dismissed. The advice is rendered in the form of a comprehensive "confidential" letter. It is essentially meant only for the convening authority and cannot ordinarily be evidence before the court.

If a decision to convene a court-martial has been made, the convening authority selects the members of the court, the prosecutor (trial counsel),¹⁰² the venue and date of the trial, endorses the charge-sheet and issues the convening order.¹⁰³ He has absolute discretion in selecting the members of the court provided they are not otherwise ineligible or disqualified under the rules because of personal interest, involvement in the crime as an investigator, as a witness for the prosecution, insufficient rank, or length of service.¹⁰⁴ There is no requirement in the MPAFL that members should be "best qualified by virtue of age, education, training, experience, length of service and judicial temperament" as provided in the MCM.¹⁰⁵

2. *Rights of the Accused Before Trial*

Before the trial is convened the accused is "afforded proper opportunity of preparing his defense" and "allowed free communication with his witnesses, and with any one whom he may wish to consult."¹⁰⁶ At least 48 hours before the trial, the accused is also asked to furnish the names of the witnesses whom he wishes to call in defense and for whose attendance "reasonable" steps are taken. If the accused fails to do so, the responsibility for the attendance of his witnesses shifts to him.¹⁰⁷ The accused is provided with an officer of his choice, who is called "defending officer" (defense counsel), to represent him at the trial—"if a suitable officer should be available." If service exigencies preclude detailing of such an officer, the trial may proceed.¹⁰⁸ The defending officer could be "any officer subject to the Act"¹⁰⁹ and need not be legally qualified. The accused may, at his own expense, engage a civilian

¹⁰² In simple cases the officer who has recorded the summary of evidence is usually detailed as the prosecutor. In other cases the prosecutor is provided by the JAG Department. See discussion *supra*.

¹⁰³ For specimen of charge-sheet and convening order see Fourth and Fifth Appendices to the PAF Act Rules.

¹⁰⁴ PAF Act Rule 68.

¹⁰⁵ MCM, para. 4(d). See also UCMJ, art. 25(d)(2).

¹⁰⁶ PAF Act, Rule 73(1).

¹⁰⁷ PAF Act, Rules 74(1) and 151.

¹⁰⁸ PAF Act, Rules 73(2) and 139(2).

¹⁰⁹ PAF Act, Rules 139(1).

counsel¹¹⁰ in which case he cannot as a matter of right also have a defending officer.¹¹¹ A civilian counsel may be disallowed in certain cases because of expediency,¹¹² (for example, interest of security). The accused, in the alternative, may have any person subject to the Act as "friend of the accused" who, however, has no right of audience but can act as his advisor.¹¹³

In practice, the system of providing a defending officer for the accused works like this: Officers of the JAG Department are not detailed for such duty because of the conflict with their duties regarding the pretrial and post-trial matters. It is also otherwise impracticable. Officers having legal qualifications, the necessary aptitude and the training are rare in other branches and in many cases remain busy on more important duties. Hence, they cannot be spared owing to "exigencies of service." Ultimately, therefore, the accused may have a defending officer who is not fully qualified for the job. The accused's other alternative—a civilian counsel worth the name—is generally beyond his means.

This contrasts with the position under United States military law where the trial counsel and the defense counsel in a GCM must be certified judge advocates and be equal in other qualifications.¹¹⁴ The accused also is generally entitled to a qualified defense counsel at a special court-martial unless, on account of "physical conditions or military exigencies," it is not possible¹¹⁵ "rare circumstances such as on isolated ship on high seas or in a unit in an inaccessible area, provided compelling reasons exist why trial must be held at that time and place."¹¹⁶ But in any case when a qualified trial counsel has been detailed, the accused must have a similarly qualified defense counsel.¹¹⁷

C. DUTIES OF PERSONNEL DETAILED ON THE COURT

1. Judge Advocate (Military Judge)

An officer who is not "disqualified from serving on a court-martial" and "in the opinion of The Judge Advocate General" possesses "necessary qualifications" can be detailed as the judge

¹¹⁰ PAF Act, Rules 141 to 145 as to qualifications and duties.

¹¹¹ MPAFL, note 1 at 496.

¹¹² PAF Act, Rule 140 (2).

¹¹³ PAF Act, Rule 139(1) and (4).

¹¹⁴ UCMJ, art. 27(a) and (b).

¹¹⁵ UCMJ, art. 27 (c) (1).

¹¹⁶ MCM, para. 6c and Army Reg. No. 27-10, para. 2-14 (28 Nov. 1968).

¹¹⁷ UCMJ, art. 27(c) (2).

advocate at a trial.¹¹⁵ In practice, as may be recalled,¹¹⁹ only officers of the JAG Department are detailed for such duty. Unlike the military judges in the United States Army who "now have almost the same powers and prerogatives as judges of federal district courts,"¹²⁰ a judge advocate under the Air Force law only acts as an adviser to the members of the court who alone are the sole judges of questions of law and fact. The PAF Act Rules, however, provide that the court "shall be guided by his opinion and not disregard it except for very weighty reasons" and also "must consider the grave consequences which may result from their disregard of the judge advocate on a legal point."¹²¹ The judge advocate normally conducts the proceedings and remains present with the court at all sessions except when they are deliberating on the findings. Unlike the practice in United States Army,¹²² members of the court are free to, and they do, consult the MPAFL at all times irrespective of the availability of the judge advocate.

The judge advocate is required to notify the court of any irregularity in the proceedings and also to inform the court and the convening authority of any defect in the charge or composition of the court. He is to maintain an entirely impartial position and he has, equally with the president, "the duty to take care that the accused does not suffer any disadvantages in consequence of his position as such or of his ignorance or incapacity to examine or cross-examine witnesses. . . ."¹²³ At the conclusion of the case, he sums up the evidence and advises the court on the law applicable to the case. In preparation of his address, he is not guided by any written instructions, still an attempt is made by the judge advocate to make the address as instructive and as comprehensive as possible.

¹¹⁸ PAF Act, Rule 147.

¹¹⁹ See pages 46-47, *supra*.

¹²⁰ WILLIS E. SCHUG, UNITED STATES LAW AND THE ARMED FORCES, 234 (1972).

Under the American system, the military judge presides over the court, gives final ruling on interlocutory questions and questions of law, and at the accused's option can try the case alone (UCMJ, Articles 16(1)(B), 26, 37 and 51). Also, under the "Uniform Rules of practice before Army Courts-Martial," among other things, a military judge is to wear judicial robe during sessions and all persons in the courtroom, including court members, are supposed to rise when the military judge enters or leaves the court.

¹²¹ PAF Act, Rule 147(b) and (f).

¹²² U.S. v. Rinehart, 8 U.S.C.M.A. 402, 24 C.M.R. 212 (1957).

¹²³ PAF Act, Rule 147(b).

2. *President*

The president is responsible for the trial being conducted "in proper order and in accordance with the Act and these rules, and in a manner befitting a court of justice." Further, it "shall be his duty to see that justice is administered, and that the accused has a fair trial and that he does not suffer any disadvantage in consequence of his position as a person under trial or of his ignorance or of his incapacity to examine or cross-examine witnesses or to make his own statement clear or intelligible, or otherwise."¹²⁴ In matters other than challenge, findings or sentence, the president has a second or casting vote.¹²⁵ He also conducts the proceeding when there is no judge advocate in a DCM case.

3. *Defense Counsel and Prosecutor*

The accused is allowed "great latitude in making his defense." The court may caution him as to the relevance of his defense but "should not, unless in special cases, stop his defense *solely on the ground of irrelevance.*"¹²⁶ The defense counsel has thus a much larger scope in defending the accused under Air Force law, than provided to his counterparts in the civil law of the country or even under the American law.

The prosecutor on the other hand is responsible to "assist the court in the administration of justice, to behave impartially, to bring the whole transaction before the court and not to take unfair advantage or suppress any evidence in favor of the accused." He can not refer to any matter not relevant to the charge and can be stopped by the court for "want of fairness or moderation"¹²⁷ on his part. The same concept of impartiality of the prosecutor is also visualized under the civil law of the country as evident from the following classic rulings:

The Public Prosecutor is not a protagonist of any party. In theory he stands for the State in whose name all prosecutions are conducted.¹²⁸

A Public prosecutor should avoid any proceeding likely to intimidate or unduly influence witnesses on either side. There should be on his part to unseemly eagerness for, or grasping at, conviction.¹²⁹

¹²⁴ PAF Act, Rule 113(1) and (2).

¹²⁵ PAF Act § 130(2) (1953). See also MPAFL, Part I, Chapter VII, paras. 32 through 52 for duties of the court, generally.

¹²⁶ PAF Act, Rule 114.

¹²⁷ PAF Act, Rule 113.

¹²⁸ Murarje Gokuldas, 13 Bombay 389, 390-391 (India).

¹²⁹ Per Westropp C.J. in Kashinath Dinkar 8 B.H.C. (Cy.C.) 126, 153 (India) (1971).

While both the courts-martial and civil courts follow adversary procedures, the above statements do indicate the extent of the influence which the laws of Pakistan have received from the continental civil law system. Nevertheless, impartiality of a prosecutor only exists in theory. In practice, prosecutors in almost all cases do assume a partisan role and cannot help their "eagerness" for securing convictions. The same is true in the civil courts as well as in the courts-martial.

D. TRIAL PROCEDURE AND RELATED MATTERS

1. General

The trial is conducted in a sober atmosphere, with simple dignity and speed. The physical arrangements and facilities of a courtroom are austere. The proceedings are conducted in open court and in the presence of the accused except when the court is deliberating on any matter.¹³⁰ The court can also sit in camera when, for example, "publicity would endanger public safety or life of a witness."¹³¹ No member of a court can be substituted or added after arraignment.¹³²

There is no provision in the Air Force law for trial by judge advocate alone as provided under the UCMJ.¹³³ There is also no provision for holding an "article 39a session."¹³⁴ nor is there any law or practice permitting "negotiated pleas" between the accused and the convening authority.¹³⁵

2. Preliminary Closed Session

Unlike the American system where the accused remains present throughout the trial, the Air Force court-martial disposes of certain preliminary matters before the accused is brought before it. These matters include insuring the availability of a copy of the summary of evidence,¹³⁶ the charge-sheet and the convening order

¹³⁰ PAF Act, Rule 117(4).

¹³¹ MPAFL, note 2(c) at 486.

¹³² PAF Act, Rule 125.

¹³³ 10 U.S.C. § 816 (1970).

¹³⁴ 10 U.S.C. § 839(a) (1970).

¹³⁵ U.S. DEPT OF ARMY, PAMPHLET No. 27-10, TRIAL COUNSEL AND DEFENSE COUNSEL (1969).

¹³⁶ A copy of the summary of evidence is earlier supplied to the President, judge advocate, prosecutor, accused and defending officer for out-of-court study. A copy of the same is placed also before the court at the commencement of the trial. It does not form part of the trial record but can be used by the court for confronting a witness with his previous testimony, should the occasion arise. See PAF Act, Rules 66(4), 73(2) and 76.

before the court, an inquiry as to the eligibility of the individual court members and judge advocate (his presence is presumed for the purpose of present discussion), an inquiry into validity of the charge-sheet and the jurisdiction over the accused.¹³⁷ After these matters are over, the court opens and the accused and others concerned are brought in.

3. *Pleas and Motions*

At the outset, the accused is given the opportunity to challenge any members of the court.¹³⁸ The judge advocate and the prosecutor are not subject to challenge. No *voir dire* or preemptory challenge of the members is allowed. The accused has to state the grounds of his objection and may call witnesses. The member objected to is allowed to give a reply and then the matter is decided by the court in the absence of the challenged member. In practice, objections to the members are rarely raised absent special reason; their integrity and impartiality is generally presumed by an accused person. As a logical corollary to this faith, once an objection is raised, it is customarily allowed, unless patently unreasonable. After the challenges, if any, are over, the court, the judge advocate and the reporter take the oath.¹³⁹ The form of the oath for court members is about the same as it is in the United States system except that it does not include the word "conscience," the emphasis being placed on the evidence alone.

Most of the "motions" stated in the MCM¹⁴⁰ are also allowed under the Air Force law although they are not termed as such.¹⁴¹ Exceptions are: denial of the right to a speedy trial, grant of a change of venue, suppression of evidence, reinvestigation of the case or an amendment of the charges and specifications. Determination of venue is considered a prerogative of the command to which the accused cannot object. No "right" to a speedy trial as contemplated in the MCM and the United States Constitution

¹³⁷ PAF Act, Rules 76 and 77.

¹³⁸ PAF Act § 128 (1953) and PAF Act, Rule 78.

¹³⁹ PAF Act, Rule 80, and PAF Act Rules, Fifth Appendix Form 3.

¹⁴⁰ MCM, paras. 68 and 69.

¹⁴¹ The accused may object to be tried jointly, or object to the charge and particulars being defective, or may raise "special plea to the jurisdiction of the court," or may raise "plea in bar of trial" (urging that the trial is time barred or that he has already been punished or acquitted for the same offense by a court-martial, civilian criminal court or by an officer exercising power of summary punishment or that he has been pardoned by the competent authority) or he may raise "plea of insanity." See PAF Act, Rules 75, 83, 85, 87 and 161.

exists. Delay, at best, can be urged as a mitigating factor. Request for "suppression of evidence," is not made before hand but only at the appropriate time when the evidence is about to be produced. The court has no power to amend the charge or specifications except for clerical errors; any other amendments must be referred to the convening authority. A request for obtaining the attendance of additional witnesses not notified by the accused earlier is invariably granted¹⁴² though legally it can be refused. Additionally, the plea that he has been pardoned or his offense condoned can be raised by the accused in respect to any offense.¹⁴³

During the arraignment, the accused can plead guilty, not guilty or guilty to a lesser included offense.¹⁴⁴ A plea of guilty cannot be accepted for a capital offense.¹⁴⁵ Unlike United States military law,¹⁴⁶ if the accused flees after arraignment, he cannot be tried *in absentia*.

4. *Guilty and Not Guilty Plea Procedures*

If the accused pleads guilty, the plea is recorded as the finding of the court. Before it is recorded, the president, or the judge advocate on behalf of the court, is to ascertain that the accused understands the nature of the charge and its elements, the difference in procedure and his right to withdraw the plea if from the summary of evidence it appears that he ought not to have plead guilty.¹⁴⁷ If, from his statement, from the summary of the evidence or otherwise, it appears that he did not understand the effect of his plea, a plea of not guilty shall be recorded.¹⁴⁸ The procedural requirements under Air Force law in the case of a plea of guilty, in short, are fairly structured and appear closer to the *Care*¹⁴⁹ rule than to the *Alford*¹⁵⁰ rule. If the plea of guilty is finally accepted, evidence is usually not offered by the government. The court refers to the summary of evidence for details of the offense without formal proof of its contents. The accused has a right to make a statement in mitigation and call witnesses as to his charac-

¹⁴² PAF Act, Rule 151.

¹⁴³ Unlike American system, under Air Force law every commanding officer has the legal authority to pardon the accused or condone his offense. In practice, this power is generally exercised for petty, first time, offenses.

¹⁴⁴ PAF Act, Rules 86(1) and 98(8).

¹⁴⁵ PAF Act, Rule 86(4).

¹⁴⁶ MCM, para. 11c.

¹⁴⁷ PAF Act, Rule 86(2).

¹⁴⁸ PAF Act, Rule 86.

¹⁴⁹ United States v. Care, 18 U.S.C.M.A. 535, 40 C.M.R. 247 (1960).

¹⁵⁰ North Carolina v. Alford, 400 U.S. 25 (1970).

61 MILITARY LAW REVIEW

ter. The prosecution then produces previous record of service, former convictions¹⁵¹ and the period of custody the accused spent awaiting trial. After receiving all the data, the court adjudges the sentence.¹⁵²

In the case of a plea of not guilty, it becomes the duty of the prosecutor to prove the charge against the accused beyond reasonable doubt. The prosecutor makes an opening address and calls his witnesses who are examined individually on oath. They are then cross-examined by the defense counsel and reexamined by the prosecutor. The court or the judge advocate may then put any questions after which the witness is excused.¹⁵³ The evidence is mostly recorded in "narrative form in as nearly as possible the words used" by the witness. Question and answer form is used only for that portion of evidence which is considered "material" by the court, the judge advocate or the parties.¹⁵⁴ After the prosecution's case is over, the accused may make a statement (not on oath) and produce his witnesses as to the facts, his character or both.¹⁵⁵ These witnesses are examined like other witnesses. The court may also call or recall any witness on their own or at the request of the parties. After all the evidence is presented, the parties argue their case, followed by the summing up of the judge advocate.¹⁵⁶ After this, the court is closed for deliberation on the findings and everyone but the court members is excluded from this session. While deliberating on the findings, the court members are required to follow the same principles of law as are observed in the American system, namely: (1) An accused is presumed to be innocent until his guilt is established beyond reasonable doubt; (2) that if there be such a doubt its benefit must go to the accused and he should be acquitted; and (3) the burden of proof rests upon the prosecution. After the court has reached its findings, it reopens and the verdict is announced. A tie vote constitutes acquittal; consequently, only a majority vote is required to convict.¹⁵⁷

The finding upon each charge is announced as guilty, not guilty or guilty by special finding—all being subject to confirmation by

¹⁵¹ Including summary punishments and civilian court convictions.

¹⁵² See *infra* pp. 73-74.

¹⁵³ PAF Act, Rules 90, 156, 157 and 158.

¹⁵⁴ PAF Act, Rule 132(1).

¹⁵⁵ PAF Act, Rules 92 and 93.

¹⁵⁶ PAF Act, Rules 92, 93, and 94.

¹⁵⁷ PAF Act § 130 (1953).

the convening authority.¹⁵⁵ The special finding may relate to a change of some words or figures in the specifications or as to a lesser included offense.¹⁵⁹ The rules regarding special findings on lesser included offenses are more limited and strict than under United States military law.¹⁶⁰ The former prescribes only a few situations under which the special finding can be made for Air Force offenses. For instance, the court can find the accused guilty of AWOL when he is charged with desertion, of simple disobedience when he is charged with disobedience of a superior officer in the execution of his office or of an attempt or abatement when charged with the main offense.¹⁶¹ If the accused is convicted on any charge, the subsequent procedure for admitting the statement of the accused in mitigation and his record of service, convictions and the period of custody the accused spent awaiting trial, is the same as in the case of a plea of guilty.¹⁶²

5. Sentence

The table of punishments includes death, "long imprisonment" (extending up to fourteen years), "short imprisonment" (extending up to two years), detention up to two years (for airmen only), dismissal and seven other lesser punishments, including reprimand.¹⁶³ Imprisonment automatically results in dismissal in the case of officers and reduction in the case of warrant officers and airmen.¹⁶⁴ Imprisonment in all cases is executed in civil jails, there being no adequate stockade facilities in the Pakistan Air Force. Subject to statutory limitations, a court-martial has absolute discretion to set the punishment it considers appropriate under the circumstances.

Unlike the U.S. military law,¹⁶⁵ under Air Force law the court can award only "one" sentence (including permissible combination with lower punishments) "in respect of all the offenses of which the accused is found guilty, and such sentence shall be deemed to be awarded in respect of each charge of which it can be legally given, and not to be awarded in respect of any offense

¹⁵⁵ PAF Act, Rule 97.

¹⁵⁹ PAF Act § 137 (1953) and PAF Act, Rule 96.

¹⁶⁰ UCMJ, art. 79.

¹⁶¹ For other cases see PAF Act § 137 (1953) and MPAFL, notes 1 through 4 at 342.

¹⁶² *Supra*, pp. 71-72.

¹⁶³ PAF Act § 73 (1953). Imprisonment can be simple or rigorous, *i.e.* with hard labor.

¹⁶⁴ PAF Act §§ 76 and 79 (1953).

¹⁶⁵ MCM, paras. 76a(5) and 127(c).

in a charge in respect of which it cannot be legally given."¹⁶⁶ If, for example, an offender has been found guilty by a general court-martial of two charges, first, punishable up to two years rigorous imprisonment and, second, up to fourteen years rigorous imprisonment, the maximum sentence the court can award is fourteen years rigorous imprisonment for both the offenses. The sentence shall be deemed to be valid in respect to the first charge although maximum punishment prescribed for it is only two years rigorous imprisonment.¹⁶⁷ The concept of "one" punishment can be appreciated in another situation where a general court-martial finds an accused guilty of seven charges all punishable up to two years rigorous imprisonment. The court cannot award a cumulative sentence of fourteen years rigorous imprisonment to run consecutively but can only award a maximum of two years rigorous imprisonment, which will be deemed to have been awarded for all the charges.

Like findings, all sentences require an absolute majority vote except a sentence of death which requires a two-third majority.¹⁶⁸ The judge advocate remains present with the court to advise them on the legal aspects of the punishment but does not take part in the voting.

E. RULES OF EVIDENCE

Section 131 of the PAF Act provides, "subject to the provisions of this Act, the rules of evidence in proceedings before court-martial shall be the same as those which are followed in criminal courts."¹⁶⁹ These rules are embodied in the Evidence Act of 1872, which is "mainly based on the English law of evidence, but modified to suit local conditions."¹⁷⁰ The special provisions relating to evidence are few and are contained in sections 132 and 138 to 142 of the PAF Act. These relate to taking judicial notice of facts within the general service knowledge of the court members and to the presumption of certain official documents.

Generally speaking, the law of evidence applicable to courts-martial in regard to the competency of witnesses and the contents of their testimony is the same as followed in courts-martial in the

¹⁶⁶ PAF Act §§ 75 and 100(2) (1953).

¹⁶⁷ MPAFL, note 2 (e) at 473.

¹⁶⁸ PAF Act § 130(1) (1953).

¹⁶⁹ PAF Act § 131 (1953).

¹⁷⁰ MPAFL, para. 1 at 70.

United States. Following are, however, some of the important exceptions:

1. An accused person is not obliged to make any statement before the court but if he does give one "he shall not be sworn or affirmed and no question shall be put to him by the court or by any other person."¹⁷¹ He cannot be prosecuted for giving a false statement before the court except when the statement is defamatory or levels false allegations on others.¹⁷²
2. A confession in order to be admissible must be voluntary. It is not deemed to be voluntary if it "appears" to have been caused by "any inducement threat or promise having reference to the charge against him,"¹⁷³ proceeding from a person in authority, for example the prosecutor, or commanding officer. Further, no confession made to a police officer, including M.P.'s, or made to anyone else while in police custody unless made in the immediate presence of a magistrate, is admissible. An exception to this rule is that facts discovered in consequence of such confession and so much of the confession as distinctly relates to the facts discovered thereby can be proved.¹⁷⁴

Miranda or Article 31, UCMJ type of warnings (extending right to counsel) is necessary only during the taking of the evidence or when a judicial confession is being recorded by a magistrate.¹⁷⁵ In practice, however, a confession is always accepted with great caution by the courts and any *appearance* of threat, inducement or promise is a sufficient ground for its rejection.

3. The law in regard to search and seizure is extremely complex in the United States and cannot possibly be discussed within the limited scope of this article. In over-simplified terms, the MCM in pertinent parts gives a commander the authority to conduct or direct the search of any person or property located in a place under his control if there is "probable cause" to justify the search.¹⁷⁶ "Probable cause"

¹⁷¹ PAF Act, Rule 92(a).

¹⁷² MPAFL, note 4 at 464.

¹⁷³ Evidence Act, § 24 (1872).

¹⁷⁴ *Id.*, §§ 25, 26 and 27. Compare these with the exclusionary rules followed in the American system.

¹⁷⁵ PAF Act, Rule 42(4) and Code of Criminal Procedure, §§ 164 and 364.

¹⁷⁶ MCM, para. 152.

has become a term of art and is supposed to lie somewhere between suspicion and actual knowledge. It is a source of endless litigation because if probable cause does not exist not only does the search carried out become illegal, but the item seized during the search becomes inadmissible in evidence. Thus, if any irregularity is committed before or during the search, the conviction of the accused is much more difficult.¹⁷⁷

By contrast, the law in regard to search in the Pakistan Air Force is rather simple as evident from the following language of the MPAFL:

A commanding officer has by virtue of his position and responsibilities an *inherent* power without a warrant to make a full search of any camp, barracks, and married or other quarters within his command, and may, while doing so search the persons of personnel subject to the Act and any kit bags, boxes or other receptacles or any vehicles belonging to such persons.¹⁷⁸

The authority, however, does not extend to off base quarters occupied through private arrangements or to the person or belongings of the family members who do not consent to the search.

The above provision is based on the British Military law.¹⁷⁹ No condition of "probable cause" has been laid down for the above authority, the exercise of which has been left to the sound discretion of the commanding officer. However, if he acts unreasonably, he can be held responsible therefor but the property seized will be admissible as real evidence.¹⁸⁰

F. CONFIRMATION AND REVISION

The post-trial review of all the proceedings is conducted in the JAG Department. The initial review is prepared by an officer of the post-trial section of the Department who has not been associated with the case before. The review is then finally approved by

¹⁷⁷ See *United States v. Weshenfelder*, 20 U.S.C.M.A. 416, 43 C.M.R. 256 (1971); *Spinelli v. United States*, 393 U.S. 410 (1969); *Aguilar v. Texas*, 378 U.S. 108 (1964).

¹⁷⁸ MPAFL, para. 28 at 24 (emphasis added).

¹⁷⁹ *MANUAL OF BRITISH MILITARY LAW* 113 (1956).

¹⁸⁰ Such is also the position under the civil law which only requires a "reasonable belief" on the part of the magistrate before issuing a search warrant, or existence of "reasonable grounds" before a police officer can carry out warrantless search, under certain circumstances. A defect in either of the two situations is at best taken a procedural irregularity which is curable and does not vitiate the proceedings, unless it has occasioned in a failure of justice. See Code of Criminal Procedure, §§ 98, 165, 529 and 537.

the JAG and forwarded to the convening authority in the form of an "advice." The review is fairly exhaustive and covers all aspects of the case including jurisdiction, sufficiency of the evidence, legality of the findings and adequacy of the sentence. The convening authority invariably agrees with the advice given.

The convening authority may be advised to take one of the following actions: he may confirm the finding or sentence or confirm the finding but remit, mitigate or commute the sentence¹⁸¹ or confirm the finding on some charges (if more than one) and remit, mitigate or commute the sentence¹⁸² or not confirm the proceedings.¹⁸³ Confirmation is withheld: where the court did not have jurisdiction; where prejudicial evidence was admitted; where the accused was unduly restricted in his defense; where court by special findings has convicted the accused of an offense not recognized under the Act; where the charge is incorrect in law even though the accused pleaded guilty; or where there has been such a deviation from the rules that injustice has been done to the accused.¹⁸⁴ As a conviction and sentence are not valid unless confirmed, non-confirmation of the proceedings annuls the whole trial.¹⁸⁵ In such a case the accused can be retried but in practice this is seldom done.

The convening authority can also order a revision of the finding or sentence only once, stating the reasons for revision.¹⁸⁶ The revision of the finding is ordered only in those cases where there is clear and convincing evidence to justify the conviction that the court has been unable to appreciate. Similarly, revision of the sentence is only ordered when the punishment is so disproportionately inadequate to the gravity of the offense that it looks ridiculous. At any rate, the court is given the option either to revise their earlier decision or adhere to it. Unlike the U.S. military law,¹⁸⁷ the court under Air Force law¹⁸⁸ can also be directed to record additional evidence while revising their finding, though such an action is rarely taken. Under the UCMJ the original sentence cannot be enhanced unless the sentence is based upon

¹⁸¹ PAF Act §§ 151 and 156, (1953).

¹⁸² PAF Act, Rule 196.

¹⁸³ PAF Act, Rule 105.

¹⁸⁴ MPAFL, note 3 at 352. *See also* PAF Act, Rule 108 which allows confirmation of the proceedings notwithstanding any deviation from the rules in certain cases.

¹⁸⁵ MPAFL, note 5 at 352.

¹⁸⁶ PAF Act § 158 (1953) and PAF Act, Rules 103 and 104.

¹⁸⁷ UCMJ, art. 63(a).

¹⁸⁸ PAF Act, Rule 104(4).

a finding of guilty of an offense not considered upon the merits in the original proceedings or unless the sentence prescribed for the offense is mandatory. No such restrictions have been provided under the Air Force law.

All proceedings of court-martial are required to be promulgated to the accused which gives finality to the confirmation or non-confirmation action.¹⁸⁹ However, as will be discussed later, an accused has a right to petition against the finding or sentence of a court-martial if he feels aggrieved. To enable him to exercise this right, the accused is provided, on request, a copy of the court-martial proceedings free of cost.

G. FIELD GENERAL COURT-MARTIAL

The foregoing discussion left out an exceptional kind of court-martial provided under Air Force law, the field general court martial (FGCM) which has no parallel in the American law. The court can consist of three officers with one year service¹⁹⁰ it can try any person subject to the Act for any offense committed under the Act and pass any sentence authorized thereby.¹⁹¹

The court can be convened during "active service" as well as during peacetime. Under the latter situation it can only be convened by officers empowered by the central government or Chief of Staff.¹⁹²

The court is subject to exceptional rules which provide a procedure of a more summary character than that of an ordinary court-martial.¹⁹³ But provision has been made whereby a large number of rules should, as far as "practicable," be applied to a field general court-martial as if it were a district court-martial.¹⁹⁴ A brief record of evidence is required to be taken unless it is impracticable due to "exigencies of service or other circumstances."¹⁹⁵ Detailing of a judge advocate is not necessary. It has also been provided that "any statement in an order convening a field general court-martial as to the opinion of the convening authority . . . shall be the conclusive evidence."¹⁹⁶

The scheme of the FGCM clearly suggests that such a type of

¹⁸⁹ PAF Act, Rule 110.

¹⁹⁰ PAF Act § 115 (1953) and PAF Act, Rule 165.

¹⁹¹ PAF Act § 117 (1953).

¹⁹² PAF Act § 112(a) (1953).

¹⁹³ PAF Act, Rules 163 to 180.

¹⁹⁴ PAF Act, Rule 181.

¹⁹⁵ PAF Act, Rule 174(1).

¹⁹⁶ PAF Act, Rule 180.

court is essentially meant for combat situations. In this respect the Air Force law contains a great amount of flexibility that allows a court-martial not to be bogged down with procedural formalities which are impracticable under unforeseen and extreme situations of war. But under what conditions a FGCM can be convened in peacetime have neither been spelled out in the Act nor the Rules nor explained in the MPAFL. The Manual of Pakistan Military Law, however, does provide some guidance in this respect:

A court of this character is not suited to peace conditions, but it may sometimes be necessary to convene such a court at a remote station where a sufficient number of officers to constitute a general court martial are not available.¹⁹⁷

VI. APPELLATE AND CONSTITUTIONAL RIGHTS OF SERVICEMEN

A. REMEDY PROVIDED UNDER THE ACT

There is no right of appeal as such against the finding or sentence of a court-martial, but the aggrieved person may, after confirmation of the proceedings, submit a petition to the Chief of Staff or the central government (President) who both have concurrent jurisdiction in the matter.¹⁹⁸ The authorities concerned may annul the proceedings if they are considered illegal or unjust, accord pardon or remission,¹⁹⁹ or may suspend the sentence if it involves imprisonment or detention.²⁰⁰ There is no time limit for the submission of such petitions. All these petitions, whether meant for the Chief of Staff or the central government, are processed by an officer of the JAG Department, preferably the same one who had earlier prepared the post trial review for the confirming authority. A brief containing comments on the points raised in the petition together with the recommendations approved by the JAG are submitted for review to the authorities concerned. The authorities invariably adhere to the advice of the JAG on questions of law, but exercise their discretion in matters of remission, commutation, or suspension of the sentence. The test for

¹⁹⁷ MANUAL OF PAKISTAN MILITARY LAW, para. 106 at 40.

¹⁹⁸ PAF ACT § 160(1). The accused may also submit a petition to the convening authority before confirmation. Such a petition is also reviewed by the JAG Department, in the same manner as those referred to Chief of Staff or to the Central Government, and may serve as a ground for advising non-confirmation of the proceedings or other actions discussed, *supra* pp. 76-77.

¹⁹⁹ PAF ACT §§ 161 and 177 (1953).

²⁰⁰ PAF ACT § 180 (1953).

interference with the finding or sentence is whether the petitioner has been "really prejudiced," that is, whether the decision of the court-martial "appears to be perverse or diametrically opposed to the weight of evidence or for any other sufficient cause, the burden of proving which will be on the petitioner."²⁰¹ Because of the limited scope of scrutiny, the conviction is rarely set aside at this stage, especially since the legality of the proceedings has already been checked in the JAG Department at the time the post-trial advice was rendered. Usually, however, the petitioner does manage to get some remission in the sentence of imprisonment or detention, if not immediately on the petition then at a later stage.

B. APPEAL TO CIVILIAN COURTS

Section 162, PAF Act provides:

No court shall question the correctness, legality or propriety of any proceedings or decision of any court-martial and no remedy shall lie in respect of any such proceedings save as provided in this Act.

This provision removes all doubts that the superior courts of the country²⁰² have little power to interfere with court-martial proceedings and the only remedy available to an aggrieved person is as provided in this Act. The prohibition, however, is not absolute and the High Courts, both in India and in Pakistan, have entertained collateral attacks on court-martial proceedings on limited jurisdictional grounds under section 491 of the Code of Criminal Procedure.²⁰³ The scope of interference was clearly spelled out in case No. 1203 of 1945 by the Lahore High Court in these terms:

If a court-martial is convened by competent authority, is properly constituted and the person arraigned before it is subject to military law and the offense on which he is arraigned is triable by a court-martial and the sentence awarded is permissible under the military code, the High Court has no jurisdiction whatsoever to interfere even if there is a defect in the proceedings of that court, or the finding is incorrect in law or in fact unless the error affects jurisdiction itself in one or more of its aspects.²⁰⁴

The principles enunciated in the above ruling are still good law and the superior courts have, on various occasions, refused to depart from them.²⁰⁵

²⁰¹ MPAFL, note 2(a) at 357.

²⁰² See note 58 *supra*.

²⁰³ *Id.*

²⁰⁴ Mohammad Mohyuddin v. Crown Criminal Miscellaneous Case No. 1283 of 1945 (India).

²⁰⁵ MPAFL, note 2 at 358.

In short, the position of the civilian courts vis-à-vis courts-martial is still the same as it was in the United States prior to the introduction of UCMJ:

It is well settled that by habeas corpus the civil courts exercise no supervisory power or correcting power over the proceedings of a court-martial. The single inquiry, the test is jurisdiction.²⁰⁶

However, the conditions in the United States have considerably changed. Apart from the statutory legal reviews at the Staff Judge Advocate and The Judge Advocate General's level, the proceedings of special (bad-conduct discharges adjudged) and general courts-martial can be reviewed by the Court of Military Review, and subsequently referred to or appealed before the Court of Military Appeals, depending upon the nature of the case.²⁰⁷ The Supreme Court has also changed its traditional approach to allow a determination as to whether the military has given "full and fair"²⁰⁸ consideration to an accused's constitutional claims. *O'Callahan v. Parker*²⁰⁹ is an outstanding example of the new approach.

C. CONSTITUTIONAL RIGHTS OF SERVICEMEN

In the brief history of Pakistan since gaining independence in 1947, the country has seen three different constitutions. The first was framed in 1956, the second in 1962 and the current, "Interim Constitution" in 1972.²¹⁰ For the purpose of this paper, it is not necessary to go into the causes of the different constitutional experiments. It is, however, pertinent to point out that like its predecessors, the present Constitution of Pakistan unequivocally gives exceptional treatment to servicemen in the following respects:

(a) The constitution grants about 20 fundamental rights (similar to the Bill of Rights) to every citizen and declares supremacy of those rights over all the laws of the land, but exception is made in

²⁰⁶ *Haitt v. Brown*, 339 U.S. 103 (1950).

²⁰⁷ UCMJ, arts. 61, 65, 66, 67 and 69. The Court of Military Appeals "has done more than any other tribunal ever has in securing constitutional due process in courts-martial." It has "advanced the individual rights of military accused far greater in appreciably less time than two centuries of legislative and executive rulemaking." Willis, *The United States Court of Military Appeals; Its Origin, Operation and Future*, 55 Mil. L. Rev. 39 (1972).

²⁰⁸ *Burns v. Wilson*, 346 U.S. 137 (1953).

²⁰⁹ 395 U.S. 258 (1969).

²¹⁰ THE INTERIM CONSTITUTION OF THE ISLAMIC REPUBLIC OF PAKISTAN (1973).

respect of the law relating to Defense Service and Police Force "for the purpose of ensuring the proper discharge of their duties or the maintenance of discipline among them."²¹¹

(b) The constitution empowers the High Courts to issue writs to protect the rights of the citizens but the remedy is unavailable to a "person in the Defense Services of Pakistan in respect of any matter arising out of his service or in respect of any action taken in relation to him as a member of the Defense Services of Pakistan."²¹²

The statutory and constitutional schemes clearly suggest that interference by the civilian courts in the military affairs of the armed forces of Pakistan has not been favored because of the armed forces peculiar disciplinary requirements and also on the assumption that an equally satisfactory arrangement of review can be established within the Services' headquarters.

VII. CONCLUSIONS AND RECOMMENDATIONS

A. PAKISTAN AIR FORCE LEGAL SYSTEM

In the foregoing pages important areas of the administration of justice in the Pakistan Air Force were discussed. It would appear from the discussion that Pakistan Air Force law is basically a disciplinary code. Its scheme is designed to insure speedy disposal of offenses and effective punishment through a system which is simple, flexible and severe. It is a completely separate jurisprudence which has its own purpose and, therefore, has no parallel in the civilian laws. The Constitution of Pakistan recognizes this position and requires the administration of justice in the armed forces to be governed by the services' respective laws without interference from the civilian courts. Besides military necessity, there is an additional reason for non-interference in the system. Service in the armed forces of Pakistan is on a voluntary basis. Those who join of their own free will should, therefore, be willing to follow their rules without grudge.

The system, however, is not as harsh as it may appear to be. While laying great emphasis on discipline and efficiency of the service, Pakistan Air Force law grants as many rights to the individual serviceman as are possible under the various situations. These have been explained in detail and need not be repeated here. On the whole, the Air Force legal system is working satisfactorily.

²¹¹ *Id.*, art. 7(2) (a).

²¹² *Id.*, art. 201(3) (a).

This, however, does not mean that the system has no need for improvement.

The system can be made fairer and more efficacious first by improving some of its existing practices and second by borrowing fresh ideas from the American system that are suitable and practicable, having due regard for the needs of the Air Force and the country's limited resources. These are incorporated into the following recommendations:

1. Courts-martial account for only a fraction of the cases; maximum utilization of the disciplinary law is summary punishments which have received little attention. For most airmen, summary punishment is a reflection of the whole Pakistan Air Force system of justice—the rest of which they never see. While retaining the speed and effectiveness of the system, the following suggestions are offered to make it, in fact and in appearance, more fair:

a. The right to elect court-martial instead of accepting severe summary punishment, for example, forfeiture of service/seniority or penal deductions, should also be given to airmen on the same basis it is available to officers and warrant officers for similar punishments under section 86(a) and (c) of the PAF Act. Further, witnesses in the case of airmen should also be examined under oath as in the case of officers and warrant officers. The present differences in the two procedures seem unreasonable.

b. A summarized record of evidence should be made in the case of the two punishments mentioned in paragraph a above, if adjudged summarily on the airman's election. This would not only facilitate better review of the punishments but would also give greater assurance of fair disposal to the accused. Unless the accused specifically requests otherwise, the record can be dispensed with when a summary of evidence has already been recorded.

c. At the accused's option, the hearing should be made open except when the interest of security requires otherwise.

d. Commanders should be encouraged to exhaust counselling, warning, censures and other rehabilitative measures before giving summary punishment.

e. Since minor punishments are basically meant to be corrective, they should not be categorized as "convictions." They should be expunged from the airman's documents after the corrective effect has been fully demonstrated, perhaps after subsequent exemplary service of five years. Such a system of expiation will prevent a stray minor punishment from haunting an airman

throughout his career. It will also induce more disciplined conduct to earn the expunction rather than the indifferent conduct which the present record-blemished-for-good practice is likely to produce.

2. Under the present procedure, the only period of accused's custody, "awaiting trial," that counts is that which occurs after the submission of the court-martial application. This may, in some cases, be only a portion of the total restraint the accused might have actually undergone. It is recommended that the entire period of custody after preferral of charges should be made part of the record. Additionally, the nature and character of pretrial custody should be incorporated in the MPAFL as a factor which must be considered by a court when sentencing the accused.²¹³

3. Post-trial scrutiny as well as examination of the petition arising out of the trial takes place in the JAG Department. There is no provision for appellate review in the sense that the term normally implies. In order to improve the efficacy of the system, it is recommended that an independent agency be established to review confirmed court-martial proceedings. Since the law and the practice in all three Services are similar, constitution of an Armed Services Board of Review comprised of one experienced legal officer from each Service would be a practical and economical solution. The Board may review such proceedings as may be referred to them by the respective Service Judge Advocates General or the Board may grant review in appropriate cases upon petition by the accused when the finding involves an error of law or when there was material irregularity in the proceedings of the trial resulting in a miscarriage of justice. Such a Board would not only provide double scrutiny of the proceedings, but would also reinforce the confidence of servicemen in the fairness of the system.

4. Under the existing arrangements, the prosecution at most trials is conducted by a legal officer. By contrast, the defense of the accused in most cases is entrusted to an officer who may have neither legal qualifications nor experience. This is diametrically opposite to the basic principle of the adversary system which requires equal representation of both the parties in the interest of justice. It is, therefore, necessary that the services of a competent legal officer are available to the accused for his defense.

5. Considering its exceptional nature, a field general court-martial should not be convened during peacetime except when a general court-martial cannot be convened in a remote area and

²¹³ See note 59 *supra*.

there are compelling reasons exist why the trial must be held at that time and place. Even then, as a minimal safeguard, a record of the evidence and the accused's right to representation by a suitable officer should not be dispensed with. A provision to this effect should be incorporated in MPAFL.

6. Last, but not least, improvement should be made in the functioning of the JAG Department, and utilization of legal officers in the following respects:

- a. A staff legal officer be provided at every major base to act as an adviser to the base commander on all legal matters. It is too much to expect legal expertise of commanders who are saddled with so many other pressing duties.
- b. The importance and utility of the legal branch of the PAF largely depends upon the professional competence of its members. Efforts should, therefore, be made to provide broad-based legal training to such officers for which no facility exists at present.
- c. The JAG Department should issue detailed legal instructional material for the guidance of legal officers, commanders and other officers who may be called upon to do duties of legal nature.²¹⁴

It is realized that most of the above recommendations, except those in paragraph 1, cannot be effectively implemented without recruiting more officers in the legal branch and incurring other expenses. Considering the improvements these proposals are likely to bring to the administration of justice and the consequent effect they will cause on the morale of the servicemen, the expense is negligible and a worthwhile investment. Thus, it is hoped that all, or at least some, of these proposals will become realities.

B. THE MILITARY JUSTICE SYSTEM OF THE UNITED STATES

While it was easy for the author to pick up ideas from the American system which could be usefully employed in the Pakistani system, to do vice versa might appear to be too presumptuous. At any rate, it would require a more thorough knowledge of the theoretical and practical aspects of the United States military law

²¹⁴ Few publications such as U.S. DEP'T OF ARMY, PAMPHLET No. 27-9, MILITARY JUDGE'S GUIDE (1969); U.S. DEP'T OF ARMY, PAMPHLET No. 27-10, TRIAL COUNSEL AND DEFENSE COUNSEL (1969); U.S. DEP'T OF ARMY, PAMPHLET No. 27-172, EVIDENCE (1962); U.S. DEP'T OF ARMY, PAMPHLET No. 27-19, LEGAL GUIDE FOR COMMANDERS (1972), are available in the PAF.

than possessed by the author. Notwithstanding these considerations, the foregoing discussion evokes some thoughts which the United States might like to consider.

1. Presently, the United States military ceases to have jurisdiction over a serviceman from the moment he is cleared from the service. This jurisdiction can only be resumed if the individual happens to rejoin the service. It is conceivable that a crime could be committed by the individual and not revealed until after his exit from the service. If the crime is a military type offense, there is no way he can be punished. The problem can become more acute when an offense (any type) is committed overseas. Consideration may, therefore, be given to appropriately amend Article 3(a) of UCMJ to provide a time limit of six months for the trial of ex-servicemen for offenses committed by them while in service. Notwithstanding the ruling of the U.S. Supreme Court in the *Toth* case, there is a good chance of showing the validity of the suggested amendment. Because, in *Toth*, as the author reads it, what really concerned the Supreme Court was that they saw an expansion of military jurisdiction into the civilian court's arena without any limit of time, "months, years or perhaps decades" after the offense. The six month limit will provide a definite cut-off point and could be justified for its effect on promoting discipline and good order in the service in two ways: (a) by punishing the ex-soldier while his crime and his exit from service are still fresh in the minds of his peers and (b) by deterring others from following suit and taking advantage of the present situation.

2. No specific definition of a "minor offense" has been provided in the MCM or Army Regulation 27-10. Consideration should be given to including a provision in the UCMJ similar to section 83 of PAF Act whereby offenses which are considered serious either in themselves or in conjunction with aggravating circumstances, for example when committed on duty or in the execution of office, are listed. The lower commander could then be required to obtain written approval from the appropriate superior authority before imposing Article 15 punishment in those cases. For the remaining offenses, the decision of the lower commander empowered to adjudicate Article 15 punishment should be respected. This will be fair to the accused as it will provide finality to the disposition and will also avoid subsequent disagreement between a lower and higher commander whether a particular offense should have been treated as minor or not, as happened in the *Fretwel* case.

3. The exclusionary rules of evidence relating to search and

seizure, in the author's view, appear to have grown to such a complexity that they tend to affect the course of justice and ascertainment of the truth in some cases. Both in the Pakistan Air Force and in the British Army, the right to order searches inside the camp and of off-post service quarters is considered the "inherent" right of the commander. Consideration may, therefore, be given to simplify the law as applied to United States military installations in the interest of security and discipline of the service. Among other things, thought should be given to substituting the words "reasonable belief" for "probable cause" in the MCM which, in author's opinion, will be more in line with the spirit of the protection against *unreasonable* searches and seizures given under the Fourth Amendment to the United States Constitution.

4. The existing United States court-martial procedure is rather inflexible and may not be suitable in combat situations where time will be an important factor in disposal of crimes. While constitution of a separate tribunal like FGCM may not be a feasible alternative, consideration may be given to incorporate a provision in the UCMJ whereby certain procedural requirements like the Article 32 investigation, the verbatim record of proceedings and legal qualifications of counsel can be dispensed with if the exigencies of service so dictate.

5. Article 134²¹⁵ UCMJ is too broad and complicated. It, in fact, combines three separate classes of offenses into one punitive article. The following suggestions are submitted to simplify the law:

- a. A separate article, say 134A, may be created to deal with crimes and offenses not capital. The existing offenses like negligent homicide, fleeing from scene of accident, drug offenses which also might be federal crimes should be removed from the existing list of Article 134 offenses as they would be automatically chargeable under the proposed article 134A.
- b. Offenses like assault and drunkenness which are directly or indirectly addressed under other punitive articles of the UCMJ should likewise be removed from Article 134 and placed under appropriate specific articles which may be suitably amended.
- c. The provision "conduct of a nature to bring discredit upon the armed forces" should be dropped as it appears superfluous as an act of the accused which lowers the good reputation of

²¹⁵ 10 U.S.C. § 934 (1970).

the armed forces will as well prejudice good order and discipline of the armed forces.²¹⁶ Article 134 should therefore contain only one provision, disorders and neglects (preferably "acts or omissions") to the prejudice of good order and discipline of the armed forces. This diminutive Article 134 should then be invoked only for military offenses such as disorderly conduct, possession of unauthorized military pass, unclean uniform or other breaches of military customs which have a direct bearing on good order and discipline and are not covered elsewhere in the UCMJ. To bring further specificity, prejudicial acts of a military nature could be spelled out in the MCM under the table of maximum punishments. These would serve as guidance in detailing left-over situations which, in any case, would be rare.

In the end, it must be emphasized that both Pakistani and American law seek to make a better soldier out of a civilian. Both employ different techniques which suit the genius of their people and the requirements of discipline of the respective armed forces. It is difficult to say which one is fulfilling its role more efficiently, but each has a scope for learning from the other.

²¹⁶ "It is the duty of all ranks to uphold the good reputation of the service. Any act or omission, therefore, which amounts to a failure in that duty by an individual may well prejudice Air Force discipline although it has no direct bearing on the discipline of the unit to which the offender belongs." MPAFL, para. 6(b) at 283. For similar commentary see also *MANUAL OF BRITISH MILITARY LAW*, para. 5(a) at 351 (1972).

SEARCH OF PREMISES, VEHICLES, AND THE INDIVIDUAL INCIDENT TO APPREHENSION*

By Major Francis A. Gilligan **

I. INTRODUCTION

The Supreme Court has been plagued over the years with the problem of adequately defining the permissible scope of a search incidental to a lawful apprehension, both as to the arrestee's person and the area immediately surrounding the arrestee. In attempting to solve the problem, the Court has changed directions five times, the last time in *Chimel v. California*.¹ One of the reasons for the indecisiveness is the debate over the warrant clause of the Fourth Amendment. This debate focuses on whether a warrant is a prerequisite to a reasonable search or whether the practicability of obtaining a warrant is only one of a number of factors to be considered in judging the reasonableness of a search.² A preference for search warrant has been expressed by both the Supreme Court and the Court of Military Appeals on a number of occasions, but the Supreme Court has said where exigent circumstances are present, a warrantless search may be permissible.³ Before determining whether this preference should be applied to the search of the person, premise, and automobile, it is necessary to examine *Chimel* and the *per-Chimel* cases.

* The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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¹ 395 U.S. 752 (1969).

² See LaFave, 8 CRIM. L. BULL. 9 (1972); T. TAYLOR, TWO STUDIES OF CONSTITUTIONAL INTERPRETATION 38-46 (1969); Note, *The Fourth Amendment in Housing Inspection*, 77 YALE L. J. 521, 522 n. 8, 524 n. 13, 529 n. 35 (1968).

³ See *Vale v. Louisiana*, 399 U.S. 30, 35 (1970). See also *Chimel v. California*, 395 U.S. 752 (1969); *Katz v. United States*, 389 U.S. 357-58 (1967).

II. PREMISES

A. FIVE SHIFTS

In order to understand the boundaries of *Chimel*, we must first look to the history of the concept of the search incident to apprehension.

The precise origin of the search incident to apprehension doctrine in American law is not apparent. Dicta in some Supreme Court opinions announced in the early decades of this century refer to the intensity and scope of such searches. However, these early formulations of the doctrine were imprecise. The first apparent major statement of the doctrine is found in *United States v. Weeks*.⁴ Dictum in the opinion contains the following language:

What then is the present case? Before answering that inquiry specifically, it may be well by a process of exclusion to state what it is not. It is not an assertion of the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested, to discover and seize the fruits or evidence of crime. This right has been uniformly maintained. . . .⁵

This statement in *Weeks* made no mention of any right to search the place where an arrest occurs, but was strictly limited to a right to search the arrestee's "person." Eleven years later, the Supreme Court in *Carroll v. United States*⁶ embellished the *Weeks*' statement: "When a man is legally arrested for an offense, whatever is found upon his person or in his control which is unlawful for him to have, and which may be used to prove the offense, may be seized and held as evidence in the prosecution."⁷ It should also be noted that here again the Court did not go so far as to state that the "place" where one is apprehended may be searched so long as there is a valid apprehension. Even so, in

⁴ *Weeks v. United States*, 232 U.S. 388 (1914). The Court held the warrantless seizure of envelopes and letters by the United States marshal in the accused's house while the latter was away was invalid.

⁵ *Id.* at 392.

⁶ 267 U.S. 132 (1925).

⁷ *Id.* at 158. *Carroll* was not based on the search incidental to apprehension doctrine, but on "exigent circumstances" doctrine. This doctrine provides that, when probable cause to search is combined with exigent circumstances, a warrantless search may be permissible. The Court held the exigency was that the vehicle believed to contain contraband would be out of reach by the time that a warrant could be obtained. These facts led the court to validate the search.

SEARCH INCIDENT TO APPREHENSION

*Agnello v. United States*⁸ the Court added the following to the gratuitous statements in *Weeks* and *Carroll*, again by way of dictum:

The right without a search warrant contemporaneously to search persons lawfully arrested while committing a crime, and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits, or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted.⁹

Two years later, the dictum in *Agnello* served as the foundation of the Court's decision in *Marron v. United States*.¹⁰ In that case, the Federal officers had secured a search warrant authorizing the seizure of liquor and certain articles used in its manufacture. Upon arriving at the place to be searched, they observed "that the place was used for retailing and drinking intoxicating liquors."¹¹ Since the accused was in charge of the premises to be searched, their observation led them to conclude that an offense was being committed in their presence justifying an arrest and an incidental search. The officers searched a closet for the items that were listed in the warrant. When they came across an incriminating ledger not listed in the warrant, it was seized. The Court upheld the seizure of this ledger reasoning that since the agents had made a lawful apprehension "[T]hey had a right without a warrant contemporaneously to search the place in order to find and seize the things used to carry on the criminal enterprise."¹²

Shift 1

A few years later, this broad language in *Marron* was limited by Mr. Justice Butler the author of the opinions in *Go-Bart Importing Company v. United States*¹³ and *United States v. Lefkowitz*.¹⁴ The search of a desk safe and other parts of an office in *Go-Bart* and a search of the desk drawer and a cabinet in *Lefkowitz*, and the seizure of private papers as a result of these searches

⁸ 269 U.S. 20 (1925). The Court held that the search of the defendant's home which resulted in the seizure of a can of cocaine was invalid since *Agnello's* earlier arrest at the home of a co-conspirator had terminated the conspiracy.

⁹ *Id.* at 30.

¹⁰ 275 U.S. 192 (1927).

¹¹ *Id.* at 194.

¹² *Id.* at 199.

¹³ 282 U.S. 344 (1931).

¹⁴ 285 U.S. 452 (1932).

- 15 Go-Bart Importing Co. v. United States, 282 U.S. 344, 358 (1931).
 16 381 U.S. 145 (1947).
 17 *Id.* at 151.
 18 334 U.S. 699 (1948).
 19 *Id.* at 705.
 20 *Id.* at 705, 708.
 21 339 U.S. 56 (1950).

Despite this language in *Trupiano* dealing with the practicality of obtaining a warrant, the case was overruled in *United States v. Rabinowitz*.²¹ In that case, the federal officers obtained a warrant on the basis of information that the accused was dealing in stamps bearing forged over-prints. They executed this warrant

Shift 4

A search or seizure without a warrant as an incident to a lawful arrest has always been considered to be a strictly limited right. It grows out of the inherent necessities of the situation at the time of the arrest. But there must be something more in the way of necessity than merely a lawful arrest.²⁰

[U]pon the desirability of having magistrates rather than police officers determine when searches and seizures are permissible and what limitations should be placed upon such activities. . . . To provide the necessary security against unreasonable intrusions upon the private lives of individuals, the framers of the Fourth Amendment required adherence to judicial processes wherever possible. . . .

One year later, the pendulum swung in the other direction. In *United States v. United States*,¹⁸ the Court held that such broad searches were not permissible if it was "reasonably practicable"¹⁹ to obtain a search warrant.

Shift 3

Despite this limitation, sixteen years later in *Harris v. United States*¹⁶ a detailed search of a four-room apartment was upheld as "incident to arrest."¹⁷

Shift 2

"[The] officers executing a valid search warrant for intoxicating liquors found and arrested one Birsall, who in pursuance of a conspiracy was actually engaged in running a saloon. As an incident to the arrest, they seized a ledger in a closet where the liquor or some of it was kept and some bills beside the cash register. These things were visible and accessible in the offender's immediate custody. There was no threat or force or general search or rummaging of the place."¹⁵

Following the arrest of the accused, were held unlawful. The Court distinguished the language in *Marion* by stating

SEARCH INCIDENT TO APPREHENSION

at his one-room business office. At the time of the arrest, the officers "searched the desk, safe, and file cabinets in the office for about an hour and a half."²² As a result of this search, the officers seized stamps with forged over-prints. The Court in affirming the conviction rejected the accused's contention that the warrantless search had been unlawful. The Court held that the search in its entirety fell within the concept of a search incident to apprehension stating that there is a "right 'to search the place where the arrest is made in order to find and seize things connected with the crime. . . .'"²³ The Court cited *Harris* as "ample authority" for its conclusion.²⁴ The Court rejected the practicability test of *Trupiano* stating that the test "is not whether it was reasonable to procure a search warrant, but whether the search was reasonable."²⁵

Shift 5

*Chimel v. California*²⁶ and *Vale v. Louisiana*²⁷ have renewed the debate over the exceptions to the warrant requirements, that is, whether a warrant is a prerequisite to a search whenever practicable or whether it is only one of a number of factors to be considered in judging the reasonableness of a search.

1. *Chimel*

The facts of *Chimel* are relatively simple. Late in the afternoon three police officers arrived at the defendant's home with a warrant for his arrest for burglary of a coin shop approximately thirty days before. This warrant had been procured earlier in the morning. Introducing themselves to the defendant's wife, they learned he was not at home. They were invited in the house by Chimel's wife and waited there until he arrived from work, approximately fifteen minutes later. Upon entering the house Chimel was immediately apprehended. The police officers asked for permission to search the premises, but the defendant objected. Over his objection the officers searched the entire three bedroom house including the attic, the garage and small workshop. This search of the defendant's residence resulted in the seizure of numerous items which were admitted at trial over defense objection.

The Court indicated that a search incident to an apprehension

²² *Id.* at 59.

²³ *Id.* at 61.

²⁴ *Id.* at 63.

²⁵ *Id.* at 66.

²⁶ 395 U.S. 752 (1969).

²⁷ 399 U.S. 30 (1970).

may include a "search of the arrestee's person and the area 'within his immediate control—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.'" ²⁸ The Court also defined the area that might be searched as that "area into which an arrestee might reach in order to grab a weapon or evidentiary items. . . ." ²⁹ This spatial limitation on the search does not depend on a showing of an arrest timed to take place at a certain location so that the police might search the premises under the pre-*Chimel* rule.³⁰ In the absence of one of the well recognized exceptions to obtaining a warrant,³¹ there is no justification for "routinely searching" every room on the premises where the arrest occurs or for "searching through all the desk drawers or other closed or concealed areas."³² The Court said it would not apply the standard of reasonableness, citing Mr. Justice Frankfurter's dissent in *Rabinowitz*:

To say that the search must be reasonable is to require some criterion of reason. It is no guide at all either for a jury or for district judges or the police to say that "an unreasonable search" is forbidden — that the search must be reasonable. What is the test of reason which makes a search reasonable? The test is the reason underlying and expressed by the Fourth Amendment: the history

²⁸ *Chimel v. California*, 395 U.S. 752, 763 (1969).

²⁹ *Id.*

³⁰ *Id.* at 767. *Cf. Hoffa v. United States*, 385 U.S. 293, 310 (1966). By implication the Court approved of the gambit of delaying the arrest until the individual reaches a place they would like to search stating, "There is no Constitutional right to be arrested. . . . The police are not required to guess at their peril the precise moment at which they have probable cause to arrest. . . ." Nevertheless, a number of lower courts have held search incident to a timed arrest illegal. *See, e.g., Gilbert v. United States*, 291 F.2d 586 (9th Cir. 1961), *vacated and remanded on other grounds*, 370 U.S. 650 (1962); *Lott v. United States*, 218 F.2d 675 (5th Cir. 1955), *cert. denied*, 351 U.S. 953 (1956); *United States v. Ortiz*, 331 F. Supp. 514 (D.P.R. 1971). *Contra, Niro v. United States*, 388 F.2d 535 (1st Cir. 1968); *United States v. Frazier*, 304 F. Supp. 467, 473 (D.Md. 1969), *cert. denied*, 402 U.S. 986 (1971). Both *Chimel* and *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), limit the usefulness of a timed arrest. In *Coolidge*, four members of the Court placed a limitation on police reliance on the plain view doctrine when the apprehension takes place at a residence by imposing a requirement of inadvertence. *But see North v. Superior Court*, — Cal. 3d —, 502 P.2d 1305, 106 Cal. Rptr. 731 (1972).

³¹ *Id.* at 763 (Citing *Katz v. United States*, 389 U.S. 347, 357-58 (1967)). The only significant language the Court was probably referring to was again cited in *Vale v. Louisiana*, 399 U.S. 30, 34-35 (1970), that is, that a warrantless search is recognized in "a few specifically established and well-delineated" situations. In *Vale* the Court cited a number of cases dealing with the "exigent circumstances" doctrine.

³² *Chimel v. California*, 395 U.S. 752, 768 (1969).

SEARCH INCIDENT TO APPREHENSION

and experience which it embodies and the safeguards afforded by it against the evils to which it was a response.³³

In *Chimel* the Supreme Court indicated it could not distinguish the search of a single room in *Rabinowitz* from the search of a four room apartment in *Harris*; once the search goes beyond the arrestee's immediate control, there is no practical limitation.³⁴

It is difficult to quarrel with the *Chimel* holding because no sound reasoning supported the broad scope of the search authorized in *Rabinowitz*. However, some points made by the dissent deserve mention. First, warrantless searches based upon exigent circumstances have long been approved by the Court,³⁵ provided that there is "probable cause to believe that seizable items are on the premises."³⁶ This rule rests on the possibility that once the police tip their hand an accomplice might destroy the evidence³⁷ or the accused might flee.³⁸ Secondly, it would be unreasonable to require the police to leave when there is "clear danger" that the items for which they might search will be removed or destroyed.³⁹ Thirdly, Justice White posed a fact situation similar to *Chimel* in which three officers arrested a man in his home. Being unable to search the house under the majority opinion in *Chimel*, two officers left with the arrestee to complete the arrest and obtain a search warrant while the third officer remained behind to prevent removal or destruction of evidence. In making his point, Mr. Justice White indicated "[I]f he [the remaining officer] not only could have remained in the house against petitioner's wife's will, but followed her about to assure that no evidence was being tampered with, the invasion of privacy would be almost as great as that accompanying an actual search."⁴⁰

The first two arguments fell on deaf ears since there was no need for an immediate arrest; thus, no exigent circumstances justified the warrantless search. The burglary for which *Chimel* was arrested occurred one month prior to the arrest. During this period the accused had not fled, but continued to reside and work

³³ *United States v. Rabinowitz*, 339 U.S. 56, 83 (1950).

³⁴ *Chimel v. California*, 395 U.S. 752, 766 (1969).

³⁵ *Id.* at 773. "The Court has always held, and does not deny today, that when there is probable cause to search and it is 'impracticable' . . . to get a search warrant . . . [and] there are exigent circumstances . . . then the search may be made without a warrant, reasonably."

³⁶ *Id.* at 773.

³⁷ *Id.* at 774, 775.

³⁸ *Id.* at 779.

³⁹ *Id.* at 774.

⁴⁰ *Id.* at 775 n.5. See also *Chambers v. Maroney*, 399 U.S. 42, 52 (1970).

in the same area. In addition, the police officers delayed the arrest of the accused until several hours after obtaining the warrant. The importance of showing exigent circumstances was again the key factor in *Vale v. Louisiana*.⁴¹

2. *Vale*

In *Vale*, the police had the appellant's home under surveillance and, while they were watching the home they witnessed what they believed to be an illegal narcotics transaction in Vale's driveway. The officers subsequently arrested Vale on the front steps of his home, informed him that they were going to search the house and advised him of his constitutional rights. One officer then entered the house, made a cursory security inspection, and found no one else present. A few minutes later Vale's mother and brother arrived. In the ensuing search, narcotics were found in the rear bedroom of the house and were subsequently used as a basis for Vale's conviction.⁴² In affirming the appellant's conviction, the Supreme Court of Louisiana stated that the warrantless search was reasonable because the officers did not know if other persons were present who could easily destroy the evidence.⁴³ Upon appeal the Supreme Court disagreed.

The search could not be justified as incident to arrest since the arrest was not confined to the area within the appellant's immediate control.⁴⁴ The Court went on to say that the exigent circumstances doctrine could not be applied since the "arresting officers satisfied themselves that no one else was in the house when they first entered the premises."⁴⁵ The majority also emphasized that the officers had already procured two warrants for the appellant's arrest and pointed out that there was "no reason . . . to suppose it was impracticable for them to obtain a search warrant as well."⁴⁶ Thus, "an arrest on the street can [not] provide its own "exigent circumstances so as to justify the warrantless search. . . ."⁴⁷ Mr. Justice Black's dissent pointed out that the appellant's mother and brother returned home before the fruitful search had been executed and, hence, they were capable of destroying the evidence.⁴⁸ He believed that the circumstances presented to

⁴¹ 399 U.S. 30 (1970).

⁴² *Id.* at 83.

⁴³ *State v. Vale*, 252 La. 1056, 1070, 215 So.2d 811, 816 (1968).

⁴⁴ *Vale v. Louisiana*, 399 U.S. 30, 33 (1970).

⁴⁵ *Id.* at 34.

⁴⁶ *Id.* at 35.

⁴⁷ *Id.*

⁴⁸ *Id.* at 36.

SEARCH INCIDENT TO APPREHENSION

the police officers justified a search without a warrant. It makes no difference, he asserted, whether the search was incident to an arrest or not; the mere fact that the mother and brother arrived home and might destroy evidence coupled with probable cause to believe incriminating evidence existed within the house placed the search under the probable cause-exigent circumstances exception.⁴⁹ Moreover, he stated that the majority had placed too much weight on the fact that the officers had already procured two warrants for the appellant's arrest.⁵⁰ He pointed out that the arrest warrants were issued because the appellant's bail bond had been increased on two pending charges, not because of the present misconduct. Thus, Mr. Justice Black believed that the officers would have had no probable cause to obtain a search since probable cause did not arise until the officers saw what they believed to be an illegal narcotics transaction minutes before they arrested Vale.

*B. Chimel Scope*⁵¹

Absent exigent circumstances or movement to another area to get apparel to go to a stationhouse, the police officer may only search the arrestee's person and the area within his immediate control, the latter being defined as the area from which the arrestee might grab a weapon or destructible evidence.⁵² Before discussing whether the officer may go beyond this area, it is necessary to determine the exact limits of the area within the arrestee's "immediate control." An ambiguity in *Chimel* is whether the standard is meant to define: (1) an area with a specified radius; (2) an area that depends on the arresting officer's subjective evaluation of the arrestee's capability, or (3) an area that depends on the officers' reasonable evaluation of the capability of the arrestee.

1. Radius.

The radius test would allow the police to search within a specified radius of the area where the individual was arrested. Setting forth a linear measurement or similar standard as the proper area that might be searched would be unsatisfactory. Applying this test may result in allowing a search much broader than nec-

⁴⁹ *Id.* at 39.

⁵⁰ *Id.* at 40.

⁵¹ See generally Cook, *Warrantless Searches Incident to Arrest*, 24 ALA. L. REV. 607, 621-23 (1972); Note, *Search and Seizure Since Chimel v. California*, 55 MINN. L. REV. 1011 (1971).

⁵² See notes 65-88 and accompanying text.

essary. Regardless, many courts have applied the radius test.⁵³ Conversely, in other instances, this test would so severely limit the search that the officer would not be adequately protected. Assume the accused is arrested in his dining room adjacent to the kitchen. Although a door leads into the kitchen, the door is open. If there is a weapon on a counter in the kitchen which cannot be seen by the arresting officer but which is beyond the linear distance, a search of the area would be impermissible.⁵⁴ Such a rule would not serve to protect the police, assuming they would not go beyond the limit set in their jurisdiction.⁵⁵ The advantages of such a rule are that they would be more understandable to the law enforcement official and might eliminate litigation on the subject.⁵⁶ These factors, although entitled to some weight, are not controlling since the test is inconsistent with *Chimel*.⁵⁷ It is permissible to search the individual and his immediate area on the bases that the safety of the arresting officer may be jeopardized, the potential for the arrestee to escape should be minimized and possibility of destruction of evidence should be eliminated.⁵⁸

2. Subjective Evaluation

The intent of *Chimel* may be satisfied by applying a test which recognizes the arresting officer's evaluation of the arrestee's capability. The test could be subjective or objective. A subjective test would place a heavy burden on the defense and would encourage perjury or "education" of police officers concerning the proper scope of search.⁵⁹ Additionally, it would mean that the accused's right against governmental intrusion would be dependent on the

⁵³ *United States v. Mehciz*, 437 F.2d 145 (9th Cir.), cert. denied, 402 U.S. 974 (1971) (Search of suitcase permissible after arrestee has been handcuffed and placed in patrol car.); *United States v. Lipscomb*, 435 F.2d 795 (5th Cir. 1970), cert. denied, 401 U.S. 980 (1971); *People v. Perry*, 47 Ill.2d 402, 408, 266 N.E.2d 330, 333 (1971) (A subsequent search of dresser and purse in room in which the defendant was arrested but removed sustained "since it was within the area from which defendant could have obtained a weapon or something that could have been used as evidence against him.").

⁵⁴ *Cf. United States v. Mehciz*, 437 F.2d 145 (9th Cir. 1971), cert. denied, 402 U.S. 974 (1971).

⁵⁵ See Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 727-29 (1970); *United States v. Robinson*, 471 F.2d 1082, 1101 n. 31 (D.C. Cir. 1972).

⁵⁶ *Cf. Application of Kiser*, 419 F.2d 1134 (8th Cir. 1969).

⁵⁷ *Cf. Kirby v. Illinois*, 406 U.S. 682 (1972) sets forth the rule which would minimize litigation.

⁵⁸ *Chimel v. California*, 392 U.S. 752 (1969).

⁵⁹ See CHEVIGNY, *POLICE POWER* (1969); Chevigny, *Police Abuses in Connection with the Law of Search and Seizures*, 5 CRIM. L. BULL. 3 (1969); Younger, *The Perjury Routine*, THE NATION, May 8, 1967, at 596-97.

SEARCH INCIDENT TO APPREHENSION

frailties and idiosyncrasies of the arresting officer. This test must also be rejected.

3. *Objective-Subjective Evaluation.*

But a test which would recognize the rationale of *Chimel* is one based on the objective and subjective belief of the arresting officer.⁶⁰ This test would (1) require that the officer entertain a subjective belief and (2) measure the belief's reasonableness. Some courts, while not articulating this test, have so held.⁶¹ The police to counteract this test might publish a regulation that the police are not to handcuff arrestees. Since the police are safety conscious this is unlikely.

C. OBTAINING APPAREL OR ITEMS TO BE TAKEN TO THE STATIONHOUSE.

The police may search beyond the "immediate area" when a suspect has been arrested in one area but goes to another to get apparel for the trip to the stationhouse for booking. To prevent escape the officer accompanies the arrestee into the other area. The normal reaction of the officer is to examine this area, too; such action has been sustained.⁶² Likewise, the courts have permitted the officer to search the apparel to be doned⁶³ and to seize items in plain view while obtaining a wallet from a dresser at the defendant's request.⁶⁴

D. EXCEEDING CHIMEL SCOPE.

Since both the majority⁶⁵ and the dissent⁶⁶ seem to agree that the search of Vale's premises would have been valid if the exi-

⁶⁰ See note 58 and accompanying text.

⁶¹ See e.g., *People v. Floyd*, 26 N.Y.2d 558, 563, 260 N.E. 2d 815, 817, 312 N.Y.S.2d 193, 195 (1970). "Nothing is within grabbing distance once the individual is handcuffed." *Contra United States v. Ciotti*, 469 F.2d 1204, (3d Cir. 1972); *United States v. Mechiz*, 437 F.2d 145 (9th Cir.), cert. denied, 402 U.S. 974 (1971).

⁶² *Giagalone v. Lucas*, 445 F.2d 1238 (6th Cir. 1971), cert. denied, 405 U.S. 992 (1972); *United States v. Kee Ming Hsu*, 424 F.2d 1286 (2d Cir. 1970), cert. denied, 402 U.S. 982 (1971).

⁶³ See, e.g., *Abel v. United States*, 362 U.S. 217 (1960); *United States ex rel. Falconer v. Pate*, 319 F. Supp. 206 (N.D. Ill. 1970); *Rennow v. State*, 47 Ala. App. 419, 255 So.2d 602 (Crim. App. 1971).

⁶⁴ *Neam v. State*, 14 Md. App. 180, 286 A.2d 540 (1972).

⁶⁵ *Vale v. Louisiana*, 399 U.S. 30, 34 (1970). "[O]nly 'in a few specifically established and well-delineated' situations . . . may a warrantless search of a dwelling withstand constitutional scrutiny, even though the authorities have probable cause to conduct it."

⁶⁶ *Id.* at 39. "Whether the 'exceptional circumstances' justifying such a search exist or not is a question that may be, as it is here, quite distinct from whether or not the search was incident to a valid arrest."

gent circumstances existed, the questions presented are when do exigent circumstances exist and if they do not exist what may the police officer do when there is a possibility of destruction or removal of the evidence.

1. *Exigent Circumstances.*

Exigent circumstances exist if probable cause to search exists prior to the search in question and there is reasonable grounds to believe that items subject to seizure would be removed or destroyed before a search warrant could be obtained.⁶⁷ In applying this test, there are various factors to consider: (1) probable cause to search the premises did not exist before the arrival of the police at the premises; (2) presence of confederates, accomplices, accessories, or relatives who might destroy evidence or assist in an escape; (3) the feasibility of the police keeping the premises under surveillance until a warrant is obtained; (4) the feasibility of temporary detention of the occupants of the premises; (5) lack of concern for evidence being destroyed. This first factor would insure that the "exigent circumstances" are not of the arresting officer's own making, thereby emphasizing the emergency nature of the exception. It would also insure that the warrant requirement is closely guarded.⁶⁸ If this first factor was not present, law enforcement officials might keep a house under surveillance until third parties were on the premises and then make a search. Some thought was given to making the no prior

⁶⁷ Cf. ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § SS 230.5 (Draft No. 1, 1972).

⁶⁸ The Supreme Court's statement in *Terry v. Ohio*, 392 U.S. 1, 20 (1968) that "... the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure. . . ." emphasizes the belief of the court. In *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967), the Court said that the principle of requiring a warrant "has consistently been followed: except in certain carefully defined classes of cases. . ." The rationale behind this principle has been expressed in varying ways, but is best summarized in *Johnson v. United States*, 333 U.S. 10, 13-14 (1948):

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. . . . The right of officers to thrust themselves into a house is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent.

SEARCH INCIDENT TO APPREHENSION

probable cause factor a prerequisite before exigent circumstances could be found rather than just a factor.⁶⁹ But, because of the infinite number of factual situations when such a prerequisite would be absurd, it is only a factor. For example, where there are co-actors in an offense, this prerequisite could not be applied because in many cases there may be probable cause to search the premises before arrival at the residence; in fact, one co-actor may have been apprehended immediately prior to the arrival at the premises. Hence, it was decided that this should only be a factor but a very important factor when there is only one accused.

As to the second factor, Mr. Justice Black dissenting in *Vale*⁷⁰ mentioned certain factors that might be considered: (a) is the premise an apparent base of criminal activities;⁷¹ (b) was the apprehendee or an accomplice attempting to destroy the evidence;⁷² (c) and did an arrest take place where confederates could easily see it and then destroy the evidence.⁷³ Although these items were not cited in *United States v. Manarite*,⁷⁴ the second factor was relied upon. After the accused and his wife had been arrested and the FBI agents were about to leave, the agent in charge asked the accused's wife if she wanted a raincoat. She replied yes. Upon being told the raincoat was in the closet, the agent in charge walked over to the nearest closet located in the hallway entrance. When he stepped through the entrance hallway, he notice two men lying on two couches in the living room. After placing the accused and his wife in the custody of another agent, he directed the two men to stand. Neither the arresting officer, nor one of the other officers, could identify the two men. One stood two feet from a small table while the other was within reaching distance of another table. Neither was restrained. The officer, aware that weapons had already been found on the premises, and seeing some of the evidence he was looking for on the top of one of the tables, proceeded to search the two tables. The Court held:

[It] was entirely reasonable and absolutely necessary for the safety of the law enforcement officials to consider the two men as [the defendant's] possible agents or accomplices, in effect as ex-

⁶⁹ See Comment, *Third Party Destruction of Evidence in the Warrantless Search of Premises*, 1971 U. ILL. FORUM 111, 121.

⁷⁰ *Vale v. Louisiana*, 399 U.S. 30, 36 (1970).

⁷¹ *Id.* at 40.

⁷² *Id.* at 41.

⁷³ *Id.*

⁷⁴ 314 F. Supp. 607 (S.D.N.Y. 1970), *aff'd*, 448 F.2d 53 (2d Cir.), *cert. denied*, 404 U.S. 947 (1971). *Accord* *United States v. Patterson*, 447 F.2d 424 (10th Cir. 1971), *cert. denied*, — U.S. — (1972).

tensions of [defendant's] physical presence, constructively placing [the defendant] within the reach of the two . . . tables. Moreover, since a gun and ammunition had already been found in the apartment, it was not unlikely that other weapons would be secreted throughout the apartment. . . .

The searches of, and seizures from, the . . . tables which were within the reach of the two unidentified men and therefore could be reasonably considered to be in the constructive reach of the arrested person, were properly incident to the lawful arrest as defined in *Chimel*. . . .

There was no search of any room which was not occupied by [defendants] . . . In fact, they did not conduct a search of any area of the living room or the . . . bedroom [wherein the arrest occurred] which was not proximate to either [of the defendants] or the unidentified men. . . .

They made a quick search of the bathroom before [one defendant] went in to change and a search of one of the living room chairs before [the other defendant] sat down. . . .⁷⁵

The Court was concerned with a protective search⁷⁶ although its analysis would be equally applicable to evidentiary searches.⁷⁷ Would this same rationale justify the search in *Chimel*? Had the police simply arrested *Chimel*, his wife would probably have destroyed the evidence. Even so, this would not have justified searching the area within her immediate control as it was practicable for the police to obtain a warrant.

The third factor does not impose an unreasonable burden on law enforcement officials. This factor will be relevant where the warrant would be issued for the seizure of large items which cannot be easily destroyed. Surveillance would prevent the removal of these items from the premises.⁷⁸

The Court in *Chimel* seemed to reject the argument that the house and its occupants at the time of arrest may be detained until a warrant is obtained. In rejecting the government argument that once an arrest has taken place, a search of the entire premise would be a minor intrusion, the Court stated:

[W]e can see no reason why, simply because some interference with an individual's privacy and freedom of movement have lawfully taken place, further intrusions should automatically be allowed despite the absence of a warrant that the Fourth Amendment would otherwise require.⁷⁹

If the Court would not allow the search of the premises, it is doubtful if it would allow what would amount to restraining the

⁷⁵ *Id.* at 614-16.

⁷⁶ See notes 200-201 and accompanying text.

⁷⁷ *Id.*

⁷⁸ See generally, Griswold, *Criminal Procedure, 1969 — Is It a Means or an End?* 29 MD. L. REV. 307, 317 (1969).

⁷⁹ *Chimel v. California*, 395 U.S. 752, 767, n.12 (1969).

SEARCH INCIDENT TO APPREHENSION

freedom of action of all the occupants of the premises without probable cause to arrest all the persons present. This conclusion is supported by the language in *Chambers*:

The probable-cause factor still obtained at the stationhouse and so did the mobility of the car unless the Fourth Amendment permits a warrantless seizure of the car and the denial of its use to anyone until a warrant is secured. In that event, there is little to choose in terms of practical consequences between an immediate search without a warrant and the car's immobilization until a warrant is obtained.⁶⁰

The Court left open the question as to whether there may be a warrantless seizure of a car until a warrant is obtained. Assuming that the vehicle could be held,⁶¹ the Court saw no difference in terms of "practical consequences" between holding the car until a warrant is obtained or searching the car without a warrant. However, the Court stated, "The same consequences may not follow where there is unforeseeable cause to search a house."⁶² There are at least two inferences to be drawn from this language. First, the Court would not make the same assumption, that is, that the police may maintain a status quo while obtaining a warrant to search the premises. Second, making such an assumption they would not allow a search on the basis that they cannot distinguish as between the premises here and the automobile in *Chambers* which is the "greater" or "lesser" intrusion. Apart from this language where the premises are unoccupied, the holding in *Vale* seems to imply that the police may maintain the status quo until a warrant is obtained. A recent case has gone further and implied that where a cursory examination of the premises reveals occupants, they may be detained in the house until a warrant is obtained.⁶³ The Court in *Vale* and *Chambers* did not cite *United States v. Van Leeuwen*.⁶⁴ In that case, at about 1:30 p.m., a postal clerk in Mount Vernon, Washington, advised a policeman in the post office that he was suspicious of two packages of coins just mailed to California and Tennessee. The policeman immediately noted that the return address was fictitious. At 3:00 p.m. the policeman determined that the California ad-

⁶⁰ *Chambers v. Maroney*, 399 U.S. 42, 52 (1970).

⁶¹ See, e.g., *United States v. Mills*, — C.M.R. — (ACMR 1972); but see *United States v. Menke*, 468 F.2d 20 (3d Cir. 1972).

⁶² *Id.*

⁶³ *United States v. Christophe*, 470 F.2d 865, 868-69 (2d Cir. 1972). But see *Shuey v. Superior Court*, — Cal. App. 3d —, — P.2d —, 106 Cal. Rptr. 452 (1973).

⁶⁴ 397 U.S. 249 (1970).

dressee was under investigation for trafficking in coins. However, because of the time difference he did not contact the police in Tennessee until the following morning when he learned that the second addressee was under investigation for the same crime. Upon this information a warrant to search both packages was issued at 4:00 p.m. and the packages were searched one and one half hours later. A unanimous Court, although acknowledging that "detention of mail could at some point become an unreasonable seizure within the meaning of the Fourth Amendment,"⁸⁵ cited *Terry*⁸⁶ in upholding the one day "detention, without a warrant, while an investigation was made."⁸⁷ This same rationale may support *United States v. Christophe*.⁸⁸ Assuming that it does, is there any basis for a search beyond the area outlined in *Chimel* without obtaining a warrant?

2. *Civilian Application.*

Must there be reasonable cause to believe that the evidence will be secreted or destroyed prior to obtaining a warrant? Some cases have allowed the police to make a cursory view of the premises without expressly requiring any further justification.⁸⁹ The court in *United States v. Bridle*⁹⁰ stated that law enforcement officials when executing a search warrant may conduct a cursory view of the premises for the presence of other persons who might present a security risk.⁹¹

Such reasoning weakens the holding in *Chimel* although even this extension would not allow "searching through all the desk drawers or other closed or concealed areas in that room itself."⁹² This effect of permitting a cursory view of the premises was recognized by the California Supreme Court when it indicated that such an overview of the premises will not be permitted unless the officers have reasonable cause to believe that other participants are on the premises.⁹³ In either case, items in plain

⁸⁵ *Id.* at 252.

⁸⁶ *Terry v. Ohio*, 392 U.S. 1 (1968).

⁸⁷ *United States v. Van Leeuwen*, 397 U.S. 249, 252 (1970).

⁸⁸ 470 F.2d 865 (2d Cir. 1972).

⁸⁹ See, e.g., *United States v. Christophe*, 470 F.2d 865, 869 (2d Cir. 1972); *United States v. Bridle*, 436 F.2d 4 (8th Cir. 1970), cert. denied, 401 U.S. 921 (1971); *People v. Mann*, 61 Misc. 2d 107, 305 N.Y.S.2d 226 (1969).

⁹⁰ 436 F.2d 4 (8th Cir. 1970), cert. denied, 401 U.S. 921 (1971).

⁹¹ *Id.* at 7. Cf. *United States v. Looney*, — F.2d — (5th Cir. 1973).

⁹² *Chimel v. California*, 395 U.S. 752, 763 (1969).

⁹³ *People v. Block*, 6 Cal. 3d 239, 499 P.2d 961, 103 Cal. Rptr. 281 (1971).

SEARCH INCIDENT TO APPREHENSION

view will be admissible in evidence.⁹⁴ If justification for the cursory inspection is required, the police might argue that there is always a "strong possibility" of confederates destroying evidence.⁹⁵ The court in *United States v. Broomfield*⁹⁶ recognized that there must be some justification for a cursory view of the premises in which the arrest occurs. In *Broomfield*, the accused, a Detroit resident, was convicted of the wrongful possession of heroin. On July 8, 1971, Detroit based agents of the Bureau of Narcotics and Dangerous Drugs received information from their counterparts in Texas that the accused and his wife flew to Texas and returned within 24 hours after meeting with known narcotics sellers from whom the accused allegedly obtained a large quantity of heroin. The Detroit agents also learned that the accused had a prior conviction for carrying a concealed weapon and aggravated assault. In addition, "he was known to be involved in the narcotics trade and to associate with other narcotics traffickers in the Latin-American community."⁹⁷

On the basis of this information the agents decided to "stake-out" the accused's house. Shortly after this surveillance was established by two agents, Mrs. Broomfield was observed leaving the premises. She was followed to a nearby pizza store and arrested. In the meantime the accused was in front of his house dressed in Bermuda shorts and slippers and a T-shirt. Four agents approached the accused and arrested him in the front yard. The agents testified that after being advised of his rights the accused asked if they could go in the house to avoid the embarrassment of the arrest and possible search outside of the house. The agents acquiesced. Upon entering the house, one agent and the accused stayed in the first floor living room while the other agents spread throughout the house "in accordance with regular police procedures to 'secure' the premises."⁹⁸ One of the officers who went to the second floor of the house observed on the dresser of the bedroom some guns, drugs and drug paraphernalia which were later seized on the basis of a warrant. The question in the case was whether the agent who observed these items was lawfully in the bedroom at the time of his observation. The guns

⁹⁴ *United States v. Bridle*, 436 F.2d 4 (8th Cir. 1970), *cert. denied*, 401 U.S. 921 (1971); *United States v. Manarite*, 314 F. Supp. 607, *aff'd*, 448 F.2d 583 (2d Cir.), *cert. denied*, 404 U.S. 947 (1971); *People v. Block*, 6 Cal. 3d 239, 499 P.2d 961, 103 Cal. Rptr. 281 (1971).

⁹⁵ *Chimel v. California*, 395 U.S. 752, 774 (1969) (J. White, dissenting).

⁹⁶ *United States v. Broomfield*, 386 F. Supp. 179 (E. D. Mich. 1972).

⁹⁷ *Id.* at 180.

⁹⁸ *Id.* at 181.

were seized prior to the issuance of the warrant which could not be obtained until the next day.⁹⁹ The court stated that *Chimel* indicates that there was no justification for the "search of the entire premises. . . . If . . . the search is to be justified . . . it must be . . . on the basis of the plain view doctrine."¹⁰⁰ The court said the question is whether the intrusion can be justified on the basis of "exigent circumstances." "That is to say, that 'plain view alone' . . . is not sufficient basis to justify a warrantless search, there must also be, contemporaneously, an urgency or immediacy that is pervading and compelling."¹⁰¹ The exigent circumstance in this case is the fear "that other persons may have been in the house who would have come to the aid of the defendant and harm the agents in the house or in the vicinity."¹⁰² Under these circumstances, the court decided that the officers acted reasonably and properly. In addition, ". . . defendant's prior conviction for carrying a concealed weapon permits an inference that weapons may be located on the premises and any confederate or accomplice could have access to them."¹⁰³ The court stated that the offense in this case "does not bespeak of a minor or solo participant in drug traffic. . . . drug trafficking itself is, as of this time and place, a violence-prone business."¹⁰⁴ "Additionally, where there was no generalized search for narcotics or other evidence in drawers, desks or other places not open to view, but a quick, spontaneous search for anyone who might cause harm or place the police officers in jeopardy. The agents had not had ample time for surveillance which would permit any conclusion that no one else was in the house."¹⁰⁵

3. Military Application.

The only military case decided by the Court of Military Appeals dealing with scope of the search of premises incident to an arrest since *Chimel* is *United States v. Goldman*.¹⁰⁶ For an extensive period of time prior to the accused's arrest, the military authorities had been investigating counterfeiting activities by American personnel in Saigon, Vietnam. During this investigation

⁹⁹ *Id.* at 181.

¹⁰⁰ *Id.* at 183.

¹⁰¹ *Id.*

¹⁰² *Id.* at 184.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 184-185.

¹⁰⁵ *Id.* at 185.

¹⁰⁶ 18 U.S.C.M.A. 389, 40 C.M.R. 101 (1969). In *United States v. Bunch*, 19 U.S.C.M.A. 308, 41 C.M.R. 309 (1970), the court held *Chimel* was not to be applied retroactively.

SEARCH INCIDENT TO APPREHENSION

and up to his capture, the accused was absent without authority. On 17 March 1968, the investigators arrested Papke, another absentee from the U. S. Army. He told the police that he knew Goldman through his association with a person named Ashlock and two others. He also stated that the accused admitted passing counterfeit currency. Shortly after the arrest of Papke, Ashlock was also apprehended. Ashlock told the police about counterfeit currency located at 333 Cong Ly, Saigon. The accused was to meet him there. He also stated that a search of his room, Room 5 at that address, would turn up counterfeit currency. Twenty-one days after the arrest of Papke and Ashlock, the military police accompanied by a Vietnamese "judicial officer" conducted a "raid" at the address given to them by Ashlock. A search of Room 5 revealed counterfeit currency in a closet and in a small case concealed in a suitcase placed under the bed. As the search began, the accused walked in the room. Upon being recognized he was placed under apprehension and warned of his rights. At about the same time \$5,000.00 in counterfeit currency was found in the pocket of a coat taken from a closet. Spontaneously, the accused said, "You'll find some more of the same in that suitcase," pointing to the partially concealed suitcase under the bed. The suitcase was opened and found to contain 25 additional \$50 counterfeit bills. When the other occupants of the house told the police of the accused's occupancy of Room 6, they searched that room. This search resulted in the seizure of 13 counterfeit Military Payment Certificates found in a cigarette carton on a desk. Twenty-four \$50.00 bills were discovered in the pockets of shirts hanging in the closet.

The court, after indicating that there was sufficient probable cause to support the apprehension of the accused, citing *Agnello*¹⁰⁷ for the proposition that "a search incident to an arrest can extend beyond the person of the one arrested to include 'the place where the arrest is made.'" ¹⁰⁸ the court stated

Numbered rooms are usually descriptive of separate unrelated occupancies that can be likened to the separate rooms of a hotel or rooming house. . . . But even so, in this case countering evidence suggests something more akin to a tenancy in common. The testimony is that the occupants of Rooms 5 and 6 lived, associated, and worked together on a common criminal endeavor. All seem to have had access to each room. The suitcase found under the bed in Room 5 was said to have common ownership. . . . In short, the record of trial supports persuasively the argument of appellate Government

¹⁰⁷ *Agnello v. United States*, 289 U.S. 20 (1925).

¹⁰⁸ *United States v. Goldman*, 18 U.S.C.M.A. 389, 393, 40 C.M.R. 101, 105 (1969).

counsel that Rooms 5 and 6 were but separate bedrooms of common quarters.

Finally the *extent* of the search, which was restricted to evidence of counterfeiting, had the mark of "specificity."¹⁰⁹

Ten days after the Court of Military Appeals opinion, the Supreme Court decided *Chimel v. California*.¹¹⁰ Judge Ferguson indicated that based on *Chimel* "good cause exists for reconsideration of this Court's opinion and that counsel should be given the opportunity to present briefs and arguments on the applicability" of *Chimel*.¹¹¹ Following the suggestion of Judge Ferguson, appellate defense counsel filed a petition for reconsideration. However, this petition was denied.¹¹² In denying the petition, the majority of the court stated that the search in *Goldman* "was not so unlimited in scope and reasonableness as to offend against constitutional authority. The agents here acted upon probable cause and necessity. It is one thing to construe the scope of police operations narrowly within the calm and orderly atmosphere of this nation, another to delimit them in a foreign and strife-torn city."¹¹³ Judge Ferguson dissented from the denial of the petition for reconsideration, stating that ". . . in the absence of a search warrant, a search conducted incidental to an arrest may not extend beyond the person of the individual and the area from within which he might obtain either a weapon or something that could be used as evidence against him."¹¹⁴ Judge Ferguson felt that the search of Room 6 violated the principles set forth in *Chimel*.¹¹⁵ Even though the court seemed to indicate that *Chimel* would not apply in Vietnam,¹¹⁶ the same search would have been permissible applying the aforementioned factors. Although there was probable cause to search Room 5, probable cause did not exist as to Room 6 until after the accused arrived at the apartment and was arrested. At this time the police were told by the other occupants of the house that the accused occupied Room 6. In addition, two other known accomplices of the accused had not been apprehended prior to the search. Arguably, the police showed little concern for the evidence since it took them approxi-

¹⁰⁹ *Id.* (emphasis in original).

¹¹⁰ 395 U.S. 752 (1969).

¹¹¹ *United States v. Goldman*, 18 U.S.C.M.A. 389, 395, 40 C.M.R. 101, 107 (1969).

¹¹² *United States v. Goldman*, 18 U.S.C.M.A. 516, 40 C.M.R. 228 (1969).

¹¹³ *Id.* at 517, 40 C.M.R. at 229.

¹¹⁴ *Id.* (emphasis in original).

¹¹⁵ *Id.*

¹¹⁶ *Id.* Cf. *United States v. Poundstone*, 22 U.S.C.M.A. 277, 46 C.M.R. 277 (1973).

SEARCH INCIDENT TO APPREHENSION

mately 20 days before they made the search of Room 5. Whether this is the case or not, it is not clear since this point was not developed by the court.

E. SUMMARY.

Accepting the facts set forth by the majority, neither *Chimel* or *Vale* can be faulted for their holdings. These cases in overruling *Harris* and *Rabinowitz* applied a spacial limitation on a search incident to an apprehension. Absent a showing that there is probable cause to search the premise and probable cause to believe evidence will be destroyed or removed before a warrant could be obtained, such a warrantless search will be invalid.

Moreover, if these requirements are met, the rule would eliminate "routine" searches of premises as incident to lawful apprehension and timed arrest.¹¹⁷ It does not, however, rule out searches where the premises in which the apprehension has been made contain seizable items which are likely to be removed or destroyed before a warrant could be obtained. What options are open to the police officer if "exigent circumstances" do not exist? Where such circumstances do not exist, then the officer is limited to the area defined in *Chimel*.¹¹⁸

III. SEARCH OF AUTOMOBILE

A. INTRODUCTION

Although *Chimel* involved the search of premises incident to arrest, the rule announced in that case seemed applicable to the search of an automobile incident to apprehension, as the lower courts soon concluded.¹¹⁹ The Ninth Circuit Court of Appeals concluded that *Carroll*¹²⁰ could no longer be utilized to justify a

¹¹⁷ *Simpson v. State*, 486 S.W.2d 807, 810 (Tex. Crim. App. 1972). "Chimel only prohibits routine searches of the area beyond the arrestee's reach."

¹¹⁸ *Id.*

¹¹⁹ *See, e.g.*, *Application of Kiser*, 419 F.2d 1134, 1137 (8th Cir. 1969) (Court upheld the search under a blanket on the back seat only because the defendant was "within leaping range of the guns in the back seat."); *United States v. Sandoval*, 41 C.M.R. 407 (ACMR 1969) (Attache case located behind driver's seat of pickup truck was within the immediate control of the accused even though he had dismounted.); *United States v. Warfield*, 44 C.M.R. 759 (NCMR 1971) (Apprehension for possession of LSD. Although the accused was ordered to dismount and directed to the rear of the vehicle, the search of the vehicle was upheld.).

¹²⁰ *Carroll v. United States*, 267 U.S. 132 (1925).

search of a vehicle as incident to apprehension.¹²¹ The Court stated that "[E]xigencies do not exist when the vehicle and the suspect are both in police custody."¹²² Some students saw *Chimel* as a "potential roadblock to vehicle searches,"¹²³ but the Supreme Court in *Chambers*¹²⁴ dispelled these notions when it noted that a ". . . search of auto on probable cause proceeds on a theory wholly different from that justifying the search incident to an arrest. . . ."¹²⁵ When the arresting officer searches an area beyond the arrestee's "immediate control," there are alternative grounds for determining the legality of the search.¹²⁶

B. "FLEETING OPPORTUNITY TO SEARCH" EXCEPTION

The rule enunciated in *Carroll*, laid dormant until *Chambers v. Maroney*,¹²⁷ *Chambers* involved the nighttime robbery of a gas station by two individuals, each of whom carried a gun. Two witnesses who had earlier noticed a blue compact stationwagon circling the block in the vicinity of the gas station saw the same vehicle speed away from a parking lot near the station. Immediately thereafter, they learned the gas station had been robbed. When the police arrived on the scene, the witness told them that four men were in the station wagon and one was wearing a green sweater. The gas station attendant had already told the police that one of the men who robbed him was wearing a green sweater and the other a trench coat. A description of the car and of the two robbers was broadcast over the police radio. Within an hour, a vehicle answering the description and carrying four men was stopped in a parking lot about two miles from the

¹²¹ *Ramon v. Cupp*, 423 F.2d 248 (9th Cir. 1970). *But see*, *United States v. King*, 42 C.M.R. 1004, 1006 (AFCMR 1970) (Reliance on *Chimel* misplaced where the apprehending officer, who stopped the vehicle the accused was driving, knew the accused had contraband in the trunk of the car.).

¹²² *Ramon v. Cupp*, 423 F.2d 248, 249 (9th Cir. 1970).

¹²³ Comment, *Chimel v. California: A Potential Roadblock to Vehicle Searches*, 17 U.C.L.A. L. REV. 626 (1970).

¹²⁴ *Chambers v. Maroney*, 399 U.S. 42 (1970).

¹²⁵ *Id.* at 49, citing *Carroll v. United States*, 267 U.S. 132 (1925).

¹²⁶ *Id.* at 47, 62. "[T]he Court has recognized that an arrest creates an emergency situation justifying a warrantless search of the arrestee's person and of 'the area within which he might gain possession of a weapon or destructible evidence'. . . . a further limited exception to the warrant requirement. . . ." *Id.* at 61-62. *See also* *United States v. Free*, 437 F.2d 631, 633-34 (D.C. Cir. 1970) (*Chambers* is an alternative basis for justifying a search; thereby, it avoids the question of permissible scope of the search and retroactivity.).

¹²⁷ 399 U.S. 42 (1970).

SEARCH INCIDENT TO APPREHENSION

gas station. The accused, one of the four men in the station wagon, was arrested. The car was driven to the police station and a thorough search of the car resulted in the seizure of two pistols found concealed in a compartment under the dashboard. This search and seizure and another conducted at the accused's home were alleged to have produced inadmissible evidence.

The Supreme Court agreed with the lower courts that there was probable cause to conduct an evidentiary search of the car.¹²⁸ The search at the police station could not be justified as a search incident to apprehension.¹²⁹ It could not be justified under *Chimel's*¹³⁰ rationale. There were, however, "alternative grounds" for justifying the search.¹³¹ "[P]ractically since the beginning of the government, [the Court has recognized] a necessary 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."¹³² The Court indicated that *Carroll* upheld the warrantless search for contraband of "an automobile stopped on the highway."¹³³ Such a search is authorized on the basis of "exigent circumstances,"¹³⁴ that is, ". . . the opportunity to search is fleeting since a car is readily movable."¹³⁵ Mr. Justice White indicated that only the immobilization of the vehicle, a "lesser" intrusion, is permitted prior to a magistrate authorizing a search, the "greater" intrusion.¹³⁶ However, "[F]or constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magis-

¹²⁸ *Id.* at 43. "As the state court correctly held, there was probable cause to arrest the occupants of the station wagon that the officers stopped; just as obviously there was probable cause to search the car for guns and stolen money." *Id.* at 47-48.

¹²⁹ *Id.* at 47. "Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest," citing *Preston v. United States*, 376 U.S. 364, 367 (1964).

¹³⁰ *Id.* at 62 n. 6. "[T]he Court recognizes, the search here exceeded those limits . . . imposed by [*Chimel* and] by pre-*Chimel* law for searches incident to arrest; therefore, the retroactivity of *Chimel* is not drawn into question in this case."

¹³¹ *Id.* at 47.

¹³² *Carroll v. United States*, 267 U.S. 132, 153 (1925).

¹³³ *Chambers v. Maroney*, 399 U.S. 42, 51 (1970).

¹³⁴ *Id.* at 51.

¹³⁵ *Id.*

¹³⁶ *Id.*

trate and on the other hand carrying out an immediate search without a warrant."¹³⁷ The Court stressed that the exigent circumstances doctrine could not be applied to every search of an automobile, thereby foretelling some limitations.¹³⁸ One year later, the Court in *Coolidge v. New Hampshire*¹³⁹ indicated that the exigent circumstances doctrine could not be used to justify a search under the factual situation presented. Some commentators have indicated that *Coolidge* has "significantly undermined the *Chambers* decision."¹⁴⁰ In order to determine the exact effect of *Coolidge*, an extensive examination of the facts of the case and the majority, concurring, and dissenting opinions, keeping in mind the changes in the membership of the Court, must be made.

The facts in *Coolidge* are relatively detailed. The accused was charged with the murder of a 14-year old girl whose body was found approximately eight days after the murder had taken place. The police, having learned on the 28th of January that the accused was not home on the evening of the murder, went to his house to question him. They asked him if he owned any guns and in response he produced three: two shotguns and a rifle. They also asked whether he would be willing to take a lie detector test. He agreed to do so on the following Sunday. During this interview the accused's wife was in the house, and the police described *Coolidge's* attitude on the occasion of this first visit as "fully cooperative." The following Sunday the accused went to the police station where the lie detector test was to be administered. That same evening, two policemen arrived at the accused's house, where Mrs. *Coolidge* was waiting with her mother-in-law for her husband's return. After the policemen had been invited into the house, they told Mrs. *Coolidge* that her husband was in serious trouble and probably would not be home that evening. They asked the mother-in-law to leave and then proceeded to question the accused's wife. During the interview, the police asked Mrs. *Coolidge* whether her husband had been home

¹³⁷ *Id.* at 52. This reasoning assumes that the police can hold the car until a warrant is obtained.

¹³⁸ *Id.* at 50. "Neither *Carroll* . . . nor other cases in this Court require or suggest that in every conceivable circumstance the search of an auto even with probable cause may be made without the extra protection for privacy that a warrant affords."

¹³⁹ 408 U.S. 443 (1971).

¹⁴⁰ Comment, 47 NOTRE DAME L. REV. 868 (1972). See also Comment, *Auto Search: The Rocky Road From Carroll to Coolidge*, 17 S.D.L. REV. 98, 111 (1972).

SEARCH INCIDENT TO APPREHENSION

on the night of the murder and she replied he had not. Then they asked her if her husband owned any guns. According to her testimony at the pretrial suppression hearing, she replied, "Yes, I will get them in the bedroom." In response, one of the officers replied, "We'll go with you." The three then went into the bedroom and Mrs. Coolidge produced four guns from the closet. She asked if the officers wanted the guns. The first officer replied "No." However, the other officer indicated, "We might as well take them." Mrs. Coolidge responded, "If you would like them, you may take them." These policemen were not aware that the accused had displayed three guns for inspection during the first visit by two other policemen.

During the following two weeks, the police accumulated a quantity of evidence to support the theory that the accused had murdered the victim. On the 19th day of February, a warrant was signed by the State Attorney General who, as an acting Justice of the Peace under a New Hampshire law which no longer is in effect, had personally conducted the investigation. On the same day, the police arrested the accused at his house. His wife, who was home at the time, asked if she might remain in the house with her small child, but was told that she must stay elsewhere, apparently because the police believed that she would be harassed by reporters. When she asked if she might take her car, the police responded that both cars had been impounded and that they would provide her with transportation to the home of a friend some miles from Coolidge's home. Approximately two and one-half hours after the accused was taken into custody, his two cars were towed to the police station. At the time of the arrest, these cars were parked in the driveway and, although darkness had fallen, they were plainly visible from the street and from inside the house where the accused was arrested. Two days later the police vacuumed the car. It was the particles obtained from this vacuuming, as well as the particles obtained 11 months and again 14 months after the arrest, that were introduced in evidence. One of the guns taken by the police on their Sunday evening visit to the Coolidge house was also introduced into evidence. Conflicting ballistics testimony was offered as to whether bullets fired from this gun were found in the body of the victim. In addition, particles taken from the clothes seized from the Coolidge house that same Sunday evening were introduced to show the high probability that the accused's clothes had come in contact with the victim's body.

The three part majority opinion concurred in by Justices Douglas, Brennan and Marshall was written by Mr. Justice Stewart. The second part of the opinion was subdivided into four portions. Section A dealt with the question of whether the search and seizure of the accused's car was incident to a valid arrest,¹⁴¹ Section B dealt with the question as to whether the search and seizure of the particles from the car could be upheld under the *Carroll* and *Chambers* rationale,¹⁴² Section C addressed the plain view doctrine,¹⁴³ whereas Section D, joined in by Mr. Justice Harlan, dealt with the principle ". . . that a search or seizure carried out on a suspect's premises without a warrant is per se unreasonable, unless the police can show that it falls within one of the carefully defined set of exceptions based on the presence of 'exigent circumstances.'" ¹⁴⁴ Mr. Justice Harlan did not join in Mr. Justice Stewart's opinion specifically limiting *Chambers*, but did join in the result and that portion of the opinion defending the proposition that warrantless searches are unlawful in the absence of exigent circumstances.¹⁴⁵ The exigent circumstances doctrine articulated in *Carroll* and *Chambers* applied only when the automobile is "stopped on the highway"¹⁴⁶ and the "opportunity to search is fleeting."¹⁴⁷ However, the following facts indicate that the opportunity to obtain a warrant can hardly be described as fleeting: (1) the police had known for approximately two weeks that the Pontiac was associated with the crime; (2) the accused had been "extremely cooperative throughout the investigation;" (3) there was no indication the accused might flee; (4) the Pontiac was regularly parked in the driveway; (5) the Pontiac was guarded prior to being moved to the police station; (6) there were no known accomplices; (7) Mrs. Coolidge spent the night at the home of a relative "miles" from her residence; (8) Mrs. Coolidge had been extremely cooperative; and (9) No proof that anyone else had a motive to interfere with the vehicle.¹⁴⁸ "Since *Carroll* would not have been justified a warrantless search of the Pontiac at the time Coolidge was arrested,"¹⁴⁹ the

¹⁴¹ *Coldige v. New Hampshire*, 403 U.S. 448, 455 (1971).

¹⁴² *Id.* at 453.

¹⁴³ *Id.* at 464.

¹⁴⁴ *Id.* at 474-75, citing *Katz v. United States*, 389 U.S. 347 (1967).

¹⁴⁵ *Id.* at 490-92.

¹⁴⁶ *Id.* at 460.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 462. "[N]o confederates waiting to move the evidence. . . ."

¹⁴⁹ *Id.* at 463.

SEARCH INCIDENT TO APPREHENSION

Court stated that the search at the station house was "plainly illegal."¹⁵⁰

In his dissent, Mr. Justice White¹⁵¹ agreed with Mr. Justice Stewart that *Chambers* was inapplicable but "disagreed strongly with the majority's reason for refusing to apply it."¹⁵² Since the car was searched two days,¹⁵³ eleven months and fourteen months after the seizure of the automobile, Mr. Justice White indicated that *Chambers* would not apply. "*Chambers* did not authorize indefinite detention of seized automobiles; it contemplated some expedition in completing the search so that the automobile could be released and returned to their owners."¹⁵⁴ He also indicates that the plurality would only apply *Chambers* to "vehicles in motion when seized."¹⁵⁵ This is, in the author's opinion, too narrow a reading of the plurality opinion.

C. POST COOLIDGE TEST

1. Introduction

In *Coolidge*, Mr. Justice Stewart merely indicated that there was no reasonable suspicion or probability that the evidence would be destroyed or removed prior to the police obtaining a search warrant. This is similar to the standard suggested for the search of premises.¹⁵⁶ Applying this test, some appellate courts have held that it is not necessary to show that the vehicle was stopped on the highway before this standard may be met.

2. Civilian Cases

In *United States v. Ellis*,¹⁵⁷ the accused was convicted of robbery. Shortly after the bank robbery by four individuals (the individuals discarded their weapons upon fleeing from the bank), a police officer discovered the stolen vehicle used by the robbers in a parking lot near the bank. Returning to the police station, this officer learned that a set of Ford keys had been found in the

¹⁵⁰ *Id.*

¹⁵¹ Chief Justice Burger concurred in this portion of the opinion. *Id.* at 493.

¹⁵² *Id.* at 523.

¹⁵³ *Id.* at 448. Mr. Justice White refers to this search as being conducted "immediately" after the seizure of the automobile. *Id.* at 523.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 524. "Although I am not sure, it would seem that, when police discover a parked car that they have probable cause to search, they may not immediately search but must seek a warrant." *Id.* at 524-25.

¹⁵⁶ See notes 65-105 and accompanying text.

¹⁵⁷ 641 F.2d 962 (2d Cir. 1972), *cert. denied*, — U.S. — (1973).

possession of one of the alleged robbers who was arrested about ten minutes after the robbery. Returning to the parking lot where the stolen vehicle was located, the police officer opened the door and looked into the glove compartment for the vehicle registration. While inside the car, he saw a watch bearing the accused's initials, lying on top of the console between the two front seats. Three hours later, after the car had been towed to the station house, an FBI agent, checking the car for fingerprints, found and seized the watch. The accused contended on appeal that there was no exigent circumstances justifying the warrantless search of the parked car. The court held that exigent circumstances justified the warrantless search of the vehicle since three of the robbers were still at large and could have driven the vehicle away using a second key, thus preventing the police from recovering potentially valuable evidence. In addition, the robbers had abandoned their revolvers while fleeing from the bank, thus it was possible that they might return to the vehicle to obtain weapons to assist in their escape. The court stated that "it would have been impractical at a time when the police manpower was being drained in an attempt to find the two robbers still at large"¹⁵⁸ to place the automobile under guard. The court distinguished *Coolidge*¹⁵⁹ stating:

[T]here had been ample time to apply for a valid warrant. Moreover, Coolidge had given no indication of fleeing with the vehicle during the previous two weeks of the investigation. Furthermore, at the time of arrest, Coolidge's wife left the house at the request of the police, and the house was placed under guard, effectively precluding the possibility that the car or the evidence inside might be tampered with while the officers took time to secure a warrant. Finally, unlike the situation here, in *Coolidge* there was "no alerted criminal bent on flight, . . . no confederates waiting to move the evidence, not even the inconvenience of a special police detail to guard the immobilized automobile."¹⁶⁰

The Third Circuit Court of Appeals used similar reasoning in deciding *United States v. Menke*.¹⁶¹ Custom officials in Seattle,

¹⁵⁸ *Id.* at 966.

¹⁵⁹ *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

¹⁶⁰ *United States v. Ellis*, 461 F.2d 962, 967 (2d Cir. 1972), *cert. denied*, —U.S.— (1973), citing *Coolidge*, 403 U.S. 443, 462 (1971). See also *United States v. Castaldi*, 458 F.2d 506, (7th Cir. 1971), *cert. denied*, 405 U.S. 992 (1972) (Court upheld warrantless search of an occupied auto parked near the scene of a burglary on the basis that warrant could not be obtained at 3:00 a.m., accomplices were still at large, and the car was parked on the street and not on private property); accord, *United States v. Bozada*, 478 F.2d 389 (8th Cir. 1973); *United States v. Julian*, 450 F.2d 575 (10th Cir. 1971).

¹⁶¹ 468 F.2d 20 (9d Cir. 1972).

SEARCH INCIDENT TO APPREHENSION

Washington, intercepted a package of marijuana from Korea addressed to the accused. These officials made arrangements for a "controlled delivery" of the package to the accused and after the delivery of the package, the accused's mailbox was placed under surveillance. At 4:12 p.m. the same afternoon, customs agents observed the accused driving his car to the mailbox located about two hundred yards from his residence. He removed the package from the mailbox and placed it in his trunk. He then drove the car to his residence, removed a thin package from the trunk and entered the house. The agents then secured a warrant to search the accused's house; the warrant was issued at approximately 5:00 p.m. With the search warrant in hand, two customs agents and a postal inspector returned to the accused's residence to execute the warrant. When the search was conducted, there were three people in the residence other than the accused: his father, mother and sister. A search of the residence failed to uncover any package. At this time the agents proceeded to Menke's car, which was parked in the driveway. There is some dispute as to who initiated the search of the accused's vehicle. The court assumed, for the purposes of discussing the legality of the search, that there was no consent and that the search had to be justified by the application of *Chambers*.¹⁶²

The district court had held that *Chambers* applied only when it is not practical to secure a warrant and in the instant case the district court stated that the "agents were not confronted with 'exigent circumstances'. . . and there was surely enough police officers involved in the operation to make one expendable for the purpose of securing a search warrant covering the automobile."¹⁶³ The court of appeals indicated the district court erred by assuming that a search warrant could be obtained after 5:00 p.m. in this rural area of Western Pennsylvania. The court also indicated that this case was distinguishable from *Coolidge*. In *Coolidge*, the accused could not conceivably have gained access to his automobile and additionally, the accused's wife was driven to a relative's home in another town for the evening. "In contrast here there was contraband. Here, there were three persons in the residence. . . . The agents could not have known whether these persons were confederates. And, if they had been, there was nothing to have prevented their moving their car, for they were

¹⁶² *Chambers v. Maroney*, 399 U.S. 42 (1970).

¹⁶³ *United States v. Menke*, 468 F.2d 20 (3d Cir. 1972).

neither in custody nor under arrest."¹⁶⁴ State courts have also upheld the warrantless searches of parked cars on the exigent circumstances doctrine.¹⁶⁵

Another interpretation might be that *Coolidge* preserves both the requirement of mobility and exigency but would allow a search under severe conditions. In *Chambers*, the automobile was stopped in the middle of the night in a dark parking lot where an immediate search would have been ineffective and possibly dangerous. Certainly this is a factual distinction but not a significant one. Such a distinction could be made since in *Chambers* there was a possibility that the evidence would be destroyed if the car was not removed from the scene, while in *Coolidge* this possibility was nonexistent. Another distinguishing factor is that the vehicle in *Chambers* was apparently stopped in a public parking lot while in *Coolidge* the police did not have access to the vehicle until they entered upon private property.¹⁶⁶ These factors were not controlling in *Menke*. Where the vehicle is located has no bearing on the possibility of destruction of the evidence. However, when the vehicle is legitimately located on private property, the police must have reasonable grounds to believe that the evidence will be destroyed, otherwise, it may be sufficient to have reasonable suspicion that evidence will be destroyed. The latter rationale appears to have been applied in *Chambers*—all of the known accomplices were in custody shortly after their arrest and even if the vehicle was left at the scene and not removed, the police did not have probable cause to believe evidence would be destroyed.

3. Military Cases.

Two military cases have been decided since *Coolidge*: *United States v. Mills*¹⁶⁷ and *United States v. Warfield*.¹⁶⁸ In *Warfield*, the police had arranged for an informer to purchase heroin from the defendant and a third party at a specific parking lot while the agents had the parking lot under surveillance. According to the plan, the informer signaled the agents after he had passed the money to the third party and while the defendant was apparently obtaining drugs from "some place" in an automobile under his

¹⁶⁴ *Id.* at ____.

¹⁶⁵ *State v. Bukoski*, 41 Mich. App. 498, 200 N.W.2d 373 (1972).

¹⁶⁶ *Cf.* ALI, MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, § SS 6.03, Comment (Tent. Draft, No. 4, 1971).

¹⁶⁷ ____ C.M.R. ____ (ACMR 1972).

¹⁶⁸ 44 C.M.R. 759 (NCOMR 1971).

SEARCH INCIDENT TO APPREHENSION

control.¹⁶⁹ When the agents arrived at the vehicle, the informer and the third party were sitting near the door and the accused was sitting on the front passenger seat with his feet on the ground. Announcing that the individuals were under apprehension, the agents directed the group to the rear of the auto where they were searched. Although the Court seemed to distinguish *Chimel* from *Chambers-Coolidge* it stated "We believe that under the circumstances of interrupting a criminal act in progress, the situation dictated a prudent search of that immediate area³ without recourse to the practicality of obtaining a warrant."¹⁷⁰ In footnote 3 the Court limited its decision to the facts: "We leave to another time and other circumstances whether a detailed search of locked compartments and [the] trunk would have been justified without [a] warrant."¹⁷¹

The defendant in *Mills* was convicted of conspiracy, robbery, assault and battery. Pursuant to a detailed description furnished by the victims the accused was apprehended at his on-post quarters. The accused's car was in the driveway, but it was not searched. While one of the CID agents remained at the accused's residence a few minutes to question the accused's wife, the accused was transported back to the police station. After the accused was positively identified as the perpetrator of the offenses, one CID agent returned to the accused's quarters with two of the victims who identified the accused's car as the one used in the crime. Thereupon, the agents searched the car. This search, which the court held unlawful, resulted in the seizure of the stolen property. The court stated:

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 two-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 officers were on duty and available who were authorized to issue search warrants — there simply were no exigent circumstances justifying the warrantless search. In short, the facts in this case do not support the conclusion that this is an incidence where "it is not practicable to secure a warrant."¹⁷²

¹⁶⁹ *Id.* at 760.

¹⁷⁰ *Id.* at 761-62.

¹⁷¹ *Id.* at 762.

¹⁷² *United States v. Mills*, — C.M.R. — (ACMR 1972).

Three of the five factors relied upon by the Court of Military Review were also the basis for the holdings in *Ellis* and *Menke*. These five factors are:

- (1) Ample time to get the warrant after establishing probable cause;
- (2) Maintaining status quo;
- (3) Possibility of confederates gaining access to the vehicle;
- (4) Availability of judge to issue warrant; and
- (5) Lack of concern for destruction of the evidence either before or after the appellant's arrest.

The first factor—ample opportunity to obtain a warrant after establishing probable cause—was relied upon by the court in *Mills* and *Menke* with different results. It was not mentioned by the court of appeals in *Ellis*. Although the court in *Menke* indicated that there was no opportunity to obtain a warrant at 5:00 P.M. in rural Pennsylvania, it did not consider a search incident to apprehension or a conditional warrant for the accused's arrest and a warrant to search his car. Customs agents in that case could have obtained a warrant for the arrest of the accused immediately upon the accused getting a package from his mailbox. This would have been a conditional type warrant that has been justified in a number of cases. Certainly the police had more than ample time to get the warrant but this fact was rejected by implication by the Third Circuit Court of Appeals.

The second factor, maintaining status quo, was mentioned by all three courts. The Court of Military Review in *Mills* assumed that the accused's car could have been impounded until proper authorization for a search had been obtained,¹⁷³ while the Third Circuit Court of Appeals took the position that there "was nothing to have prevented their (the accused's wife, father, mother and sister) moving the car, for they were neither in custody nor under arrest."¹⁷⁴ In *Chambers* the Supreme Court was not clear as to whether a car might be immobilized prior to obtaining a search warrant. On one hand the Court stated "[E]ither the search must be made immediately without a warrant or the car itself must be seized and held without a warrant for whatever period is necessary to obtain a warrant for the search."¹⁷⁵ While in the next breath, the Court stated:

¹⁷³ *Id.* at ——. See also *State v. Bukoski*, 41 Mich. App. 498, 200 N.W. 2d 373 (1972).

¹⁷⁴ *United States v. Menke*, 468 F.2d 20, 22 (3d Cir. 1972).

¹⁷⁵ *Chambers v. Maroney*, 399 U.S. 42, 51 (1970).

SEARCH INCIDENT TO APPREHENSION

"The probable-cause factor still obtained at the station house and so did the mobility of the car unless the Fourth Amendment permits a warrantless seizure of the car and the denial of its use to anyone until a warrant is secured."¹⁷⁶ In reaching its holding, one must assume that it is permissible to immobilize a car prior to obtaining a warrant. Thus under the *Chambers* rationale, there is no constitutional difference between immobilizing the car until a warrant is obtained or immediately searching the car.¹⁷⁷ Mr. Justice Harlan, dissenting as to this portion of the opinion, stated:

Because the officers might be deprived of valuable evidence if required to obtain a warrant before effecting any search or seizure, I agree with the Court that they should be permitted to take the steps necessary to preserve evidence and to make a search possible. . . . The Court concedes that the police could prevent removal of the evidence by temporarily seizing the car for the time necessary to obtain a warrant.¹⁷⁸

He concluded that where the occupants of the vehicle are in custody a warrantless nonconsensual search of the car would be impermissible.¹⁷⁹

Reasonable ground to believe that confederates, accomplices, or friends may gain access to the vehicle will be a strong factor in showing the existence of exigent circumstances.¹⁸⁰ This same rationale will apply when a magistrate is not available,¹⁸¹ but when the police are not worried about the possible destruction of evidence, a warrantless search of the vehicle will not be permitted.

In addition to showing the existence of probable cause to believe evidence would have been destroyed or removed before a warrant could have been obtained, the prosecution must also show probable cause to search the vehicle.¹⁸² It is not sufficient to show that probable cause to arrest an occupant of the vehicle did exist.¹⁸³ Where probable cause to search the vehicle does not arise

¹⁷⁶ *Id.* at 52.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 62-63.

¹⁷⁹ *Id.* at 64-65.

¹⁸⁰ *United States v. Mills*, — C.M.R. — (ACMR 1972); *United States v. Warfield*, 44 C.M.R. 759 (NCOMR 1971); *United States v. Menke*, 468 F.2d 20 (3d Cir. 1972); *United States v. Ellis*, 461 F.2d 962 (2d Cir. 1972), *cert denied*, — U.S. — (1972). See also authorities at note 160.

¹⁸¹ *United States v. Mills*, — C.M.R. — (ACMR 1972); *United States v. Menke*, 468 F.2d 20 (3d Cir. 1972).

¹⁸² *Chambers v. Maroney*, 399 U.S. 42, 46, 47-48 (1970).

¹⁸³ *United States v. Gomori*, 437 F.2d 312 (4th Cir. 1971).

until after the car is properly impounded, a different situation is presented. Since the opportunity to search can hardly be described as "fleeting" a warrantless search and seizure would be invalid unless sustainable under an inventory rationale.¹⁵⁴

Once probable cause to search the vehicle is shown, an issue as to the intensity of the search is presented. Like a search conducted incident to apprehension, the search of the vehicle is limited to those areas within the car which the police have reason to believe may contain the item sought.¹⁵⁵

D. CHIMEL SCOPE

1. *Introduction.* When the search of the vehicle cannot be justified under *Chambers*, it may be justified as incident to a lawful apprehension if the search is within the time and space limitations set out in *Chimel*¹⁵⁶ and *United States v. Preston*.¹⁵⁷ The time limitation was set forth in *Preston*. In that case, the defendant and three others were arrested for vagrancy, searched for weapons and transported to the police station. Their car, which was not searched at the time of the arrest, was transported to the police station and then to a garage for storage. A search of the car at the garage resulted in the seizure of a number of articles pertaining to a robbery. The Court stated these articles were inadmissible. Although a search for weapons and evidence may be justified as a search incident to an apprehension when the search is contemporaneous with the arrest, the Court stated:

The search of the car was not undertaken until the petitioner and his companions had been arrested and taken into custody. . . . At this point there was no danger that any of the men arrested could have used any weapons in the car or could have destroyed any evidence of the crime — assuming that there are articles which can be the "fruits" or "implements" of the crime of vagrancy. . . . Nor, since the men were under arrest at the police station and the car was in police custody at a garage, was there any danger that the car would be moved out of the locality or jurisdiction.¹⁵⁸

The logical extension of the spatial limitation set forth in *Chimel* would prohibit a full search of the vehicle incident to a lawful apprehension since some areas of the car could not be de-

¹⁵⁴ *Coolidge v. New Hampshire*, 403 U.S. 443, 463 (1971).

¹⁵⁵ See *United States v. Leazer*, 460 F.2d 982, 984 (9th Cir. 1972); *United States v. Parham*, 458 F.2d 438, 439 (8th Cir. 1972).

¹⁵⁶ See notes 124-26 and accompanying text.

¹⁵⁷ 376 U.S. 364 (1964). See also *United States v. Herberg*, 15 U.S.C. M.A. 247, 35 C.M.R. 219 (1965).

¹⁵⁸ *Preston v. United States*, 376 U.S. 364, 368 (1969).

SEARCH INCIDENT TO APPREHENSION

scribed as an area from which the defendant might grab a weapon or destructible evidence.¹⁸⁹ Depending on the interpretation of the area within the arrestee's immediate control, such a search may be broader in scope thus permitting a search of the vehicle where such search would not have been justified under *Chambers* since it is not necessary to show exigent circumstances and probable cause to search the vehicle. Assuming part of the vehicle is within the immediate control of the arrestee, the courts are divided as to whether the arrest by itself will justify a search of that portion of the vehicle.

2. Search of Immediate Area Without any Justification.

In *United States v. Sandoval*¹⁹⁰ the court determined what area was within the "immediate control" of the arrestee. Two military policemen, while patrolling an area off-post where the presence of persons or motor vehicles off the road was unusual, observed a pickup truck parked in the woods. They also saw a man dressed in fatigues pointing what appeared to be a pistol at another individual in civilian attire. They had turned their patrol car around and approached the area to investigate when they met the pickup truck departing the area; the pickup truck was driven by the accused. After both vehicles had halted, one of the military policemen walked over to the vehicle. While inquiring about the pistol, he simultaneously observed what appeared to be a pistol lying on the seat and as far as the military policeman could tell, was identical to the one he had seen earlier. The military policeman asked the accused and his passenger to get out of the vehicle. They complied and, once they were out of the vehicle the military policeman asked the accused if he could look around. The accused replied, "Go ahead." The military policeman then seized an attache case which he discovered behind the driver's seat; the case could be obtained only by pushing the seat forward and moving the spare tire. Under the bottom flap of the attache case the policeman found some marijuana which formed the gravamen of the charge of which the accused was convicted. The court did not address the issue as to whether there was a consensual search since they held the search of the attache case was an area within the immediate control of the appellant. Like some federal decisions,¹⁹¹ this opinion permits a full search of a ve-

¹⁸⁹ See note 119 and accompanying text.

¹⁹⁰ 41 C.M.R. 407 (ACMR 1969), *rev'd on other grounds*, 19 U.S.C.M.A. 281, 41 C.M.R. 281 (1970).

¹⁹¹ *United States v. Castle*, No. 1899 (4th Cir. Dec. 20, 1971 (per curiam) (auto console); *United States v. Birdsong*, 446 F.2d 325, 329 (5th Cir. 1971)

hicle at the time of arrest, but fails to articulate whether the terms "immediate area" defines an area with a specific radius or an area which fluctuates depending on the arresting officer's evaluation of the capability of the arrestee.¹⁹²

This interpretation is broader than *Chambers* since there is no requirement to show probable cause to search the vehicle. In fact, the court in *Sandoval* did not address the issue of whether the police must have any justification to search the area within the immediate control of the arrestee, nor did the court make a distinction between a protective or evidentiary search.¹⁹³ The Court of Military Review seems to be divided on the issue as to whether the search of the area within the immediate control of the arrestee, be he the driver or passenger of automobile, requires some sort of justification.

3. *Protective Search Without Justification.* In *United States v. Williams*¹⁹⁴ the accused was apprehended for running a red light. He and his passenger were asked to dismount the vehicle. One of the military policemen then searched the interior of the car. After searching under the seat for weapons and in the glove compartment for evidence of ownership, the policeman seized a matchbox which he observed on the front seat. Upon opening the matchbox, he found that it contained traces of a green vegetable-like substance which later analysis revealed to be traces of marijuana. The court held that the police officers' seizure and the subsequent examination of the matchbox could not be justified as reasonably relating to the protection of the officer. Thus the marijuana was held to be inadmissible. In dictum, the court stated: "We have no doubt that the appellant was lawfully apprehended and that the search by the military policeman for weapons and for evidence of ownership of the vehicle was reasonable."¹⁹⁵ Thus, the Court of Military Review would allow the police officer to make a protective search even though he has no reasonable suspicion of probable cause to believe that the arrestee has a weapon. As the basis for an evidentiary search, that is for evidence of ownership, the court would allow the policeman to look for ownership even though the accused had already showed the police officer his identification card and driver's license and was questioned

(search of auto trunk); *United States v. Miles*, 449 F.2d 1272, 1273 (10th Cir. 1971) (auto trunk).

¹⁹² See notes 53-64 and accompanying text.

¹⁹³ See notes 200-201 and accompanying text.

¹⁹⁴ 41 C.M.R. 426 (ACMR 1969).

¹⁹⁵ *Id.* at 429.

SEARCH INCIDENT TO APPREHENSION

concerning insurance and ownership of the vehicle. The *Williams* decision would allow a much broader search than might be possible under the *Chambers* case. Less than one year later in *United States v. Pullen*¹⁹⁶ the court held that an arrest for driving while intoxicated where the accused has been asked to dismount the car would not justify as incident to the apprehension a search of the entire vehicle since the accused "did not have ready physical access to the car and could not have destroyed any evidence of the crime."¹⁹⁷ Although there were grounds for the apprehension of the accused for driving while intoxicated, the court indicated this would not allow a warrantless search of the car unless the police had some basis for believing that the car contained weapons or evidence. This same reasoning has been applied by the Court of Appeals for the District of Columbia in *Dickerson v. United States*.¹⁹⁸

Dickerson was stopped by the arresting officers because the license plates on his car appeared to be old and faded. In addition, they appeared to be altered. A check of the accused's driver's license indicated that it was in order but the car's registration showed evidence of alteration by changing of the date. Since it was a violation of the local traffic regulations to drive a car without dated license plates, the accused was ordered to get out of his car and to get into the police car with the other arresting officer. The first arresting officer, with the intent of driving the accused's car to the police station, entered the accused's car; he observed nothing unusual in the car. After starting the motor, he reached under the front seat and found a loaded .38 caliber revolver, the basis of the charge against the accused. The court stated:

Here the search was not for fruits of the offense because there were none. It was not for evidence of the offense because the officers already had the altered tags and registration. It was not a protective search for weapons because appellant had already been removed from his car and placed in the police car. No action by appellant had indicated an attempt to conceal contraband in the car, and the officers had no reason to believe that the car contained weapons or other contraband. . . . Under present conditions . . . we must hold that his action constituted an illegal search.¹⁹⁹

E. SUMMARY

The reasoning in *Dickerson* and *Pullen* squares with the fourth amendment principle that the invasion of privacy should not be

¹⁹⁶ 41 C.M.R. 698 (ACMR 1970).

¹⁹⁷ *Id.* at 702.

¹⁹⁸ 296 A.2d 708 (D.C. Ct. App. 1972).

¹⁹⁹ *Id.* at 709.

broader than necessary to achieve the objectives of the apprehension. If the area within the arrestee's immediate control was properly defined in *Sandoval*, once the prosecution has shown a lawful apprehension the police officer would be able to make a full search of the vehicle without any justification for the intrusion. Or, if as in *Williams*, the officer is allowed to make a protective search without any justification, the arresting officer could make a complete search of the car looking for weapons and evidence found during this search would be admissible. In either case, the reasoning in *Sandoval* and *Williams* would emasculate *Chimel* and the principle stated above.

IV. SEARCH OF INDIVIDUAL

A. INTRODUCTION

When examining the cases concerning the search of the individual incident to an apprehension (including the occupants of a vehicle), it is necessary to distinguish between evidentiary searches²⁰⁰ and protective searches.²⁰¹ Many courts have expressed the view that an arrest of the individual, in and of itself, justifies a full search of the individual for evidence and weapons.²⁰² Some courts, however, have held that there may not be a full search of the individual incident to arrest unless there is reasonable suspicion or probable cause to believe the individual possesses evidence or weapons.²⁰³

²⁰⁰ An evidentiary search is a search for any item that would aid in the criminal prosecution for the offense for which the individual was apprehended. See *Warden v. Hayden*, 387 U.S. 294 (1967).

²⁰¹ A protective search involves a search for weapons or a like material which the individual may use to escape or resist apprehension. See also *United States v. Brashears*, 45 C.M.R. 438, 441 (ACMR 1972). "[T]he general rule is that a search conducted incident to a lawful arrest for a crime may have as its purpose one or more of the following: (1) the fruits of the crime; (2) instrumentalities used to commit the crime; (3) weapons or a like material which would put the arresting officer in danger or which might facilitate escape; (4) material which constitutes evidence of the crime or evidence that the person arrested has committed the crime."

²⁰² See *Agnello v. United States*, 269 U.S. 20, 30 (1925) (dictum); *Carroll v. United States*, 267 U.S. 132, 158 (1925) (dictum); *Weeks v. United States*, 232 U.S. 383, 392 (1914) (dictum); *United States v. Brashears*, 21 U.S.C.M.A. 552, 45 C.M.R. 826 (1972). See also *MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (REV. ED.)* para. 152: "A search conducted as an incident of lawfully apprehending a person . . . may include a search of this person, of the clothing he is wearing, and of property . . . in his immediate possession or control."

²⁰³ See notes 252-303 and accompanying text.

SEARCH INCIDENT TO APPREHENSION

B. FULL SEARCH WITHOUT ANY JUSTIFICATION.

There are four reasons given for a full search without any justification: (1) Common law permits a full search incident to apprehension; (2) Once an individual has been arrested, there can be no further invasion of privacy; (3) The right of privacy is not advanced by limiting searches at the time of the arrest more narrowly than the right of inventory at the police station; and (4) It is as great an intrusion conducting a full search without a warrant as it is holding an individual until a warrant can be obtained.

1. *Common law.* That the common law permitted such a full search of the person is generally attributable to the language in *Weeks*,²⁰⁴ *Carroll*,²⁰⁵ *Agnello*,²⁰⁶ and more recently to the unqualified statement in *Rabinowitz*,²⁰⁷ that "no one questions the right, without a search warrant, to search the person after a valid arrest."²⁰⁸ However, the rule is as follows:

[I]f by hue and cry a man was captured when he was still in seisin of his crime—if he was still holding the gory knife or driving away the stolen beasts . . . he could not be heard to say that he was innocent.²⁰⁹

Taking an individual "red-handed by hue and cry" was sufficient proof of the crime.²¹⁰ It appears from the two passages quoted above that it is the fact the arrested person has evidence of the crime upon his person rather than the arrest itself which provides the basis for the seizure. In *People v. Chiagles*²¹¹ these passages are used to support the proposition that it is the arrest itself which provides the basis for the full search of the individual.

Halsbury's *Laws of England* also reflexes the scope limitation theory²¹² rather than the dictum in the Supreme Court cases:²¹³

A constable may search a prisoner, if he behaves with such violence of language or conduct that the constable may reasonably think it prudent to search him in order to ascertain whether he has any weapon, etc., with which he might do mischief.

²⁰⁴ See notes 4-5 and accompanying text.

²⁰⁵ See notes 8-9 and accompanying text.

²⁰⁶ See nn. 8-9 and accompanying text.

²⁰⁷ *United States v. Rabinowitz*, 339 U.S. 56 (1950).

²⁰⁸ *Id.* at 60.

²⁰⁹ 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 557 (2d ed. 1898) (emphasis added).

²¹⁰ *Id.* at 580.

²¹¹ 237 N.Y. 193, 196, 142 N.E. 583, 584 (1923).

²¹² See notes 252-303 accompanying text.

²¹³ See note 202 and accompanying text.

61 MILITARY LAW REVIEW

A constable . . . may upon lawful arrest of a suspect offender take and retain property found in the offender's possession, if the property is likely to afford material evidence for the prosecution in respect of the offense for which the offender has been arrested.²¹⁴

Thus the historical development of incident searches furnishes no support for a full search of the individual solely on the basis of a lawful apprehension. The early courts in pronouncing the full search approach failed to examine the factual situations in each case.

2. *No further invasion of privacy after arrest.* The leading military case holding that there may be a full search of the arrested individual without any further justification is *United States v. Brashears*.²¹⁵ Specialist Jones, a military policeman, was directed by the desk sergeant to apprehend the accused for the barracks larceny of a wallet. The desk sergeant told Jones that there was also a possibility that they might find narcotics on the accused. When Jones and two other patrolmen spotted the accused driving a vehicle they stopped him and asked him to dismount. The accused was ordered into a wall search position and Jones conducted a thorough search of the accused's clothing.²¹⁶ A vial of heroin was found in the accused's rolled-up sleeve and several other vials containing a residue of heroin were found in his pockets. The aggregate of the heroin²¹⁷ resulted in his conviction for the wrongful possession of heroin which specification was set aside by the Court of Military Review.²¹⁸ Contemporaneously with searching the accused, the other two military policemen searched the vehicle finding "a certain amount of money" in the ashtray. Jones gave a detailed description of the search of Brashears:

He asserted that he followed a standard military procedure and that he follows the same procedure in every search he conducts. He

²¹⁴ 10 HALSBURY, LAWS OF ENGLAND 356 (3d ed. SIMONDS 1955) (footnotes omitted).

²¹⁵ 21 U.S.C.M.A. 552, 45 C.M.R. 326 (1972).

²¹⁶ *Id.* at 553, 45 C.M.R. at 327. Before the trial judge, Jones "testified that he first searched appellant's hat; then ran his fingers through appellant's hair 'to see if there were any particles or anything hidden in his hair;' moved to the inside of appellant's collar; proceeded to search the right half of appellant's body by searching the front of his fatigue shirt, including the inside of his pockets, rolling down the shirt sleeves, searching his right pants leg down to the boots, and searching inside his pants pockets, front and back; finally, this order of search was repeated on the left side." *United States v. Brashears*, 45 C.M.R. 438, 440 n. 1 (ACMR 1972).

²¹⁷ Article 134, UNIFORM CODE OF MILITARY JUSTICE, 10 U.S.C. § 934 (1951).

²¹⁸ *United States v. Brashears*, 21 U.S.C.M.A. 552, 45 C.M.R. 326 (1972).

SEARCH INCIDENT TO APPREHENSION

testified he would have conducted the same search had he arrested Brashears for a uniform violation. . . . Jones rolled down the sleeve because it is "normal procedure to search the entire uniform." When asked what he was looking for when he rolled down the sleeve, Jones testified: "Again, I say I'm looking for anything that the individual shouldn't have on his person that is not authorized for him to have."²¹⁹

The Court of Military Review set aside the conviction for the wrongful possession of heroin on the ground that the search of Brashears was exploratory in nature and bore no relationship to the larceny:

That the search of appellant was of a general exploratory nature which bore no relationship to and was not tailored to *the only permissible objects of the search (finding the wallet and its contents, and possible weapons)*, and that Specialist J in fact did not expect to find the wallet or its contents, or a weapon, when searching appellant's sleeves or inside his pockets. . . .²²⁰

Citing *Preston*²²¹ the Court of Military Appeals reversed:

Since in this case the search was incidental to an arrest for a serious offense, a *relatively extensive exploration of the person of Brashears* may have been justified in order to "prevent the destruction of evidence . . . which might easily happen where the . . . evidence is on the accused's person or under his immediate control."²²²

Recognizing that the facts in this case did not indicate that the search of Brashears' sleeves was for the stolen money or weapons, the court stated that the exploration of the person may extend to a search for evidence of a crime which the apprehending officer "subjectively, but without probable cause, believes may be present."²²³ The reasoning behind this principle is that "once a valid arrest is made, the privacy for the most part has been lawfully destroyed."²²⁴ The court went on to say, "[i]nasmuch as a similarly thorough search at the police station, which discloses evidence of crime other than that for which the arrest is made, is not considered unreasonable . . . there is no reason in law or

²¹⁹ *United States v. Brashears*, 21 U.S.C.M.A. 552, 555-56, 45 C.M.R. 326, 329-30 (1972). Jones testified before the trial judge that he did not expect to find anything in the accused's right sleeve. He further testified that he did not feel that he would find money in the sleeve. *United States v. Brashears* 45 C.M.R. 438, 441-42 (ACMR 1972).

²²⁰ *United States v. Brashears*, 21 U.S.C.M.A. 552, 553, 45 C.M.R. 326, 327 (1972) (emphasis in original).

²²¹ *Preston v. United States*, 376 U.S. 364, 367 (1964).

²²² *United States v. Brashears*, 21 U.S.C.M.A. 552, 554, 45 C.M.R. 326, 328 (1972) (emphasis in original).

²²³ *Id.*

²²⁴ *Id.* See also *State v. Cloman*, 254 Or. 1, 456 P.2d 67 (1969).

logic to cause a different result simply because the appellant was searched at the scene of the arrest."²²⁵

3. *Inventory rationale.* As to the inventory rationale, the police officer should not be allowed to rely on the possibility that the person he is arresting will be confined and not released on bail. First, the probability is that he will not be confined, thus undermining any inherent right in the officer to search in anticipation of confinement.²²⁶ Secondly, to say that once a person is arrested "privacy for the most part" has been destroyed overlooks the reality of an arrest. Certainly, privacy as it pertains to freedom of movement has been destroyed, but arrest does not by itself violate the sanctity of a person's pockets or cause the humiliation which accompanies a search in public. The latter two would cause a person to become more indignant and resentful. Hence, to say that arrest alone destroys privacy is illogical if the degree of community resentment to particular practices is relevant in determining whether this privacy is, in fact, destroyed. As the Court in *Terry*²²⁷ stated "[T]he degree of community resentment aroused by particular practices is clearly relevant to an assessment of the quality of the intrusion upon the reasonable expectations of personal security caused by those practices."²²⁸ Thirdly, if an arrest destroys privacy, thus limiting the inquiry concerning the scope of the search, why did the Supreme Court speak about a dual inquiry,²²⁹ that is, whether the invasion of privacy is reasonable at all at its inception and secondly, whether the scope of intrusion is "reasonably related in scope to the circumstances which justified the interference in the first place."²³⁰ Lastly, a similar argument was rejected in *Chimel* where the dissent argued "that as long as there is probable cause to search the place where an arrest occurs, a search of that place should be permitted even though no search warrant has been obtained."²³¹ The court stated:

[W]e cannot join in characterizing the invasion of privacy that results from a top-to-bottom search of the man's house as "minor." And we can see no reason why, simply because some interference with an individual's privacy and freedom of movement has lawfully taken place, further intrusions should automatically be allowed de-

²²⁵ *United States v. Brashears*, 21 U.S.C.M.A. 552, 556, 45 C.M.R. 326, 330 (1972).

²²⁶ *See State v. Elkins*, 245 Or. 279, 422 P.2d 250 (1966).

²²⁷ *Terry v. Ohio*, 392 U.S. 1 (1969).

²²⁸ *Id.* at 16 n. 14.

²²⁹ *Id.* at 18-19, 20.

²³⁰ *Id.* at 20.

²³¹ *Chimel v. California*, 395 U.S. 752, 766 n. 12 (1969).

SEARCH INCIDENT TO APPREHENSION

spite the absence of a warrant that the Fourth Amendment would otherwise require.²³²

In *Charles v. United States*²³³ the accused was arrested at the door of his home on two arrest warrants for assault and battery. The arresting officers were invited inside at which time the accused was frisked. One officer testified that as he walked into the house he smelled burning marihuana. A third officer accompanied the accused's sister-in-law outside to get the accused's eyeglasses. Upon their return, this officer stated to another officer that the accused was supposed to have marihuana on his person. The accused was asked to empty his pockets on a table and among the articles placed on the table was a packet of marihuana which resulted in one of the charges upon which the accused was convicted. The court of appeals, citing *Weeks, Carroll, and Agnello*, stated: "It is beyond dispute that an officer making a valid arrest may search the person of the accused as an incident of arrest."²³⁴ The court justified the seizure of marihuana for the reasons stated in *Brashears*.²³⁵

4. *Chambers rationale*. One other ground that has been advanced for the full *evidentiary* search without any further justification is the *Chambers* rationale.²³⁶ In *United States v. Mehcz*²³⁷ the appellant conceded that he was lawfully arrested for unlawfully possessing LSD deplaning from an airplane. At the time of the arrest the accused was carrying a suitcase. The Federal Bureau of Narcotics agent took the suitcase from the accused and handcuffed him so that there would be no danger that he would get to the suitcase and obtain a weapon or destroy any evidence that might be inside. The agent searched the suitcase at the terminal and found LSD that formed that basis of the charge on which the accused was convicted.

The appellant argued that the federal agents should have maintained their control over the suitcase and secured a warrant authorizing them to open and search it. The court, relying on *Chambers*, expressly rejected such suggestion stating:

The Court in *Chambers* expressly rejected such suggestion stating that "[f]or constitutional purposes, we see no difference between on the one hand seizing and holding a car presenting the probable

²³² *Id.*

²³³ 278 F.2d 386 (9th Cir.), *cert. denied*, 364 U.S. 831 (1960).

²³⁴ *Id.* at 388.

²³⁵ *United States v. Brashears*, 21 U.S.C.M.A. 552, 45 C.M.R. 826 (1972).

²³⁶ *Chambers v. Maroney*, 399 U.S. 42 (1970). See also notes 127-55 and accompanying text.

²³⁷ 437 F.2d 145 (9th Cir.), *cert. denied*, 402 U.S. 974 (1971).

cause issue to a magistrate and on the other hand carrying out an immediate search, either course is reasonable under the Fourth Amendment." We believe that the factors underlying the decision in *Chambers*, i.e., mobility and the lack of undue intrusion, apply with at least equal force to the suitcase involved here.²³⁴

The dissenting judge, however, stated that *Chambers* does not apply to suitcases

[W]hich have neither wheels nor independent motive power, do not provide only that "fleeting" opportunity for a search as may exist as to automobiles. Additionally, one's need for an automobile in our mobile society, which surely is a factor in any determination that an immediate search is a "lesser" intrusion than impoundment until a warrant can be issued, does not apply with quite the same force to a suitcase. Finally, to require that private baggage be impounded and a warrant obtained for its search would not likely impose an onerous burden upon investigation authorities, as might a similar rule with respect to automobiles.²³⁵

The majority's rationale in *Mehriz* was rejected in *United States v. Colbert*.²³⁶ In *Colbert*, two police officers on the way to investigate an incident noticed the appellants, Colbert and Reese, standing empty-handed in front of a nightclub. At the time one of the officers recognized Colbert as fitting the general description of a man wanted on a charge of assault with the intent to commit murder. Ten minutes later, after completing the other investigation, the two officers returned to the nightclub and again observed the appellants who at this time were each carrying expensive briefcases. When the officers stopped for a traffic light, they observed the appellants walking toward a parked vehicle. As Colbert and Reese approached the vehicle, an individual in the vehicle gestured to them and sped away. The two officers followed the appellants and stopped in front of them. At this point Colbert and Reese turned and began walking away from the police car and after the officers got out of the vehicle and approached them, the appellants placed their briefcases on the sidewalk. When Colbert and Reese did not respond to questions concerning their identity, the officers frisk them with no result. After the patdown, the appellants started to walk away from the officers, leaving their briefcases behind. Again the officers stopped the two and asked them to produce their selective service cards. When both denied possessing such cards, they were placed under arrest. As the appellants were being placed in the patrol car,

²³⁴ *Id.* at 147 (emphasis in original).

²³⁵ *Id.* at 151.

²³⁶ 454 F.2d 801 (5th Cir. 1972), *rev'd*, 474 F.2d 174 (5th Cir. 1973) (en banc).

SEARCH INCIDENT TO APPREHENSION

one of the officers noticed one of the accused withdraw a number of shotgun shells from his pocket and throw them on the ground. As the accused were sitting in the car, one of the officers searched the briefcases which were three to five feet away on the sidewalk and seized an illegal sawed-off shotgun from each briefcase. These weapons predicated the charges against the accused. The majority of the court held that this seizure could not be justified as necessary for the officers' safety since neither briefcase was within the arrestee's control nor could the appellants have concealed any evidence connected with the offense of failing to possess selective service cards.²⁴¹ The court stated that the rationale of *Carroll* and *Chambers* could not be applied as there was not a "single circumstance which created only a fleeting opportunity to search the defendant's briefcases. Here, as in *Coolidge*, there are no exigent circumstances as to which the Government can point to demonstrate that it was not practicable for the police officers to detain the briefcases and procure a search warrant."²⁴²

The dissent stated that the briefcases were within the immediate control of the accused as "one short lunge by either defendant would have made their briefcases and weapons really accessible to them."²⁴³

Neither *Charles* nor *Brashears* make the distinction between an evidentiary search and a protective search although both dealt with evidentiary searches, that is, a search for fruits of a crime.

The broad language of the courts in *Charles*, *Brashears*, and *Coakley*²⁴⁴ would seem to indicate that there may be a full search for weapons that the apprehendee might use to resist arrest or escape.²⁴⁵ Where an arrest is made for an offense of violence, for example, aggravated assault with a dangerous weapon, there is reasonable cause to believe that the individual might be harmed. It may be persuasively argued that a protective search should be allowed no matter how minor the offense which led to the apprehension.²⁴⁶ Even a person apprehended for a minor offense, a traffic offense, an off-limits violation may respond with force.²⁴⁷

²⁴¹ *Id.* at 803.

²⁴² *Id.* at 804 (emphasis in original).

²⁴³ *Id.* at 805.

²⁴⁴ *United States v. Coakley*, 18 U.S.C.M.A. 511, 40 C.M.R. 223 (1969).

²⁴⁵ *But see United States v. Brashears*, 21 U.S.C.M.A. 552, 556, 45 C.M.R. 326, 330 (1972) (J. Quinn concurring).

²⁴⁶ *See United States v. Brashears*, 45 C.M.R. 438, 441 (ACMR 1972).

²⁴⁷ Between July 1, 1970, and June 30, 1971, 6 police officers died and 92 others were injured in the course of making traffic arrests. *See International*

As Justice Daily stated, "When experience has proved to the contrary, on occasions at the cost of the life of an arresting officer, it is illogical that we should establish by judicial fiat that all minor traffic offenders must be accepted by arresting officers as persons who pose no threat to their personal safety."²⁴⁸ This broad rule finds some support in *United States v. Williams*²⁴⁹ where the court stated that an individual stopped for running a red light could be searched for "weapons and for evidence of ownership of the vehicle."²⁵⁰ But the court held that after completing such search a seizure of marihuana from a matchbox on the seat was impermissible.²⁵¹ The dictum in *Williams* runs afoul of the language in *Terry* that the scope of the search must be reasonably related to the grounds for the stop and no broader than necessary to further the legitimate objectives of the police officers.

C. SCOPE LIMITATION PRINCIPLE

In the housing inspection²⁵² and the stop and frisk²⁵³ cases, the Supreme Court has reemphasized the fundamental principle underlying fourth amendment rights that a search complies with the fourth amendment requirements only if its scope is no broader than necessary to accomplish legitimate objectives. In upholding the on-the-scene stop and frisk for weapons in *Terry*, the Court found that the police officer had "adequate constitutional grounds," but not probable cause, to believe that the men he detained and searched were going to commit a crime.²⁵⁴ The Court stressed that the fourth amendment governs all intrusions on personal security by agents of the public²⁵⁵ and that the manner in which the search and seizure are conducted is as much the test of their reasonableness as whether the search and seizure were war-

Association of Chiefs of Police, Annual Law Enforcement Casualty Summary 11, Fig. 8 (July 1970—June 1971).

²⁴⁸ *People v. Watkins*, 19 Ill. 2d 11, 23, 166 N.E.2d 433, 439, cert. denied, 364 U.S. 833 (1960) (concurring opinion).

²⁴⁹ 41 C.M.R. 426 (ACMR 1969).

²⁵⁰ *Id.* at 429.

²⁵¹ *Id.* at 430.

²⁵² *Camara v. Municipal Court*, 387 U.S. 523 (1967); *See v. Seattle*, 387 U.S. 541 (1967).

²⁵³ *Adams v. Williams*, 407 U.S. 143 (1972); *Terry v. Ohio*, 392 U.S. 1 (1968); *Sibron v. New York*, 392 U.S. 40 (1968). *See also* *Cupp v. Murphy*, ___ U.S. ___ (1973); *United States v. Mara*, ___ U.S. ___ (1973); *United States v. Dionisio*, ___ U.S. ___ (1973).

²⁵⁴ *Terry v. Ohio*, 392 U.S. 1 (1968).

²⁵⁵ *Id.* at 18 n. 15.

SEARCH INCIDENT TO APPREHENSION

ranted at all.²⁵⁶ Citing a number of earlier cases, the Court stated that:

This Court has held in the past that a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope. . . . [and that] [t]he scope of the search must be "strictly tied to and justified by" the circumstances which rendered its initiation permissible.²⁵⁷

In citing the earlier cases, the Court seemed to indicate that the underlying rationale of *Terry* was a restatement of, rather than a departure from, the existing case law even though *Terry* itself involved a search based upon less than probable cause.

In *Peters v. New York*, which was consolidated with *Sibron v. New York*,²⁵⁸ the Court again emphasized the scope limitation principle when it applied this principle to an arrest-based search and found that the search, which took the form of a frisk followed by further intrusion into the arrestee's pockets, was "reasonably limited in scope by [its] purpose" and was not so "unrestrained and thoroughgoing" as to violate the Constitution.²⁵⁹

This scope limitation principle was also set forth in *Chimel*.²⁶⁰ In holding the search unlawful, the Court stated that the search of the premises must be "'strictly tied to and justified by' the circumstances which rendered its initiation permissible."²⁶¹ The Court implied there is ample justification for a warrantless search of "the arrestee's person and the area 'within his immediate control.'" ²⁶²

In determining whether there is a lawful search of the apprehendee, it is necessary to examine the legitimate objectives of search of the person incidental to lawful apprehension. These objectives might be described in terms of the end result, that is, evidentiary searches and protective searches. The former is a search for the fruits, instrumentalities, and other evidence that might be related to criminal prosecution of the crime for which the arrest is made; the latter is a search for any weapons that the apprehendee might seek to use to resist arrest or effect his escape.²⁶³ According to *Preston*:

²⁵⁶ *Id.* at 28.

²⁵⁷ *Id.* at 17-19.

²⁵⁸ 392 U.S. 40 (1968).

²⁵⁹ *Id.* at 67.

²⁶⁰ *Chimel v. California*, 395 U.S. 752 (1969).

²⁶¹ *Id.* at 762.

²⁶² *Id.* at 763.

²⁶³ See notes 200-01 and accompanying text.

The rule allowing contemporaneous searches is justified, for example, by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime—things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control.²⁶⁴

Whether the Supreme Court will continue to distinguish between evidentiary and protective searches and what, if any, justification in addition to the arrest will be required to justify either will soon be decided. In March 1973, certiorari was granted in two cases, *State v. Gustafson*²⁶⁵ and *United States v. Robinson*²⁶⁶ in which these issues will be faced. Both arose from incidents involving traffic offenses.

Gustafson was stopped at 1:30 a.m. when he was observed weaving from one traffic lane to another. Unable to produce a driver's license, he was arrested for failing to have a driver's license in his possession pursuant to state statute.²⁶⁷ The arresting officer searched the defendant and found several homemade marijuana cigarettes which formed the basis of his conviction. The district court in suppressing the evidence stated that it would not "blindly follow the categorical rule that a search incident to any arrest for the commission of any crime is lawful under the fourth amendment . . ." ²⁶⁸ It went on to say that an evidentiary search incidental to an arrest may only be for evidence relating to the crime for which the person was arrested.²⁶⁹ A protective search for weapons, apparently without any justification, is limited to a frisk for weapons.²⁷⁰ The district court stated the test to be as follows: "There must be a nexus between the offense and the object sought for a search conducted in connection with an arrest to be truly incident to it."²⁷¹

In upholding the search, the Florida Supreme Court stated that "reasonable suspicion . . . that the driver was intoxicated not only justified searching for intoxicants or drugs, inasmuch as our

²⁶⁴ *Preston v. United States*, 376 U.S. 364, 367 (1964).

²⁶⁵ — Fla. —, 258 So.2d 1 (1972), cert. granted, — U.S. — (1973).

²⁶⁶ 471 F.2d 1082 (D.C. Cir. 1972), cert. granted, — U.S. — (1973). The Court of Appeals for the District of Columbia has refused to follow *Robinson*. *United States v. Simmons*, 302 A.2d 728 (D.C. Ct. App. 1973).

²⁶⁷ FLA. STAT. § 322.15, F.S.A. (1969).

²⁶⁸ *State v. Gustafson*, — Fla. —, —, 258 So.2d 1, 3 (1972), cert. granted, — U.S. — (1973).

²⁶⁹ *Id.* at —, 258 So.2d at 4.

²⁷⁰ *Id.*

²⁷¹ *Id.*

SEARCH INCIDENT TO APPREHENSION

statute make the influence of either an offense." ²⁷² Although objectively there was such basis for an evidentiary search, there is no indication that the arresting officer believed the defendant to be intoxicated.

The federal courts have held that the burden of proof of showing the legality of the search incident to a lawful apprehension is on the government.²⁷³ Assuming this is a constitutional requirement and that the government must show that the arresting officer subjectively believed there was reasonable suspicion he would find intoxicants or drugs,²⁷⁴ the court may not reach the issue of the scope limitation principle. If the arresting officers did not subjectively believe he would find evidence, he should not have conducted the search.

Robinson was stopped for a routine driver's license spot-check. At this time a police officer observed some discrepancies between the appellant's temporary operator's permit, automobile registration and his selective service card. After permitting the accused to continue on his way, the police officer went to the police traffic records and discovered that an operator's permit issued to "Willie Robinson, Jr." born in 1927 had been revoked and that a temporary permit had been issued to a "Willie Robinson," born in 1938. The pictures on both the permit and the application for a temporary permit were of the same person. Four days later, the same police officer again observed the appellant operating the same vehicle. He stopped him and asked him for his driving permit and registration card. Upon being shown the same permit he was shown four days earlier, the officer placed the appellant under arrest for operating a motor vehicle after the revocation of his operator's permit and for obtaining a new permit by misrepresentation.²⁷⁵ Since a stationhouse arrest was required, the police officer was required to make a full field search of the ap-

²⁷² *Id.* at —, 258 So.2d at 2.

²⁷³ *United States v. Elgisser*, 334 F.2d 103 (2d Cir. 1964); *Rogers v. United States*, 330 F.2d 535 (5th Cir. 1964); *United States v. Rivera*, 321 F.2d 704 (5th Cir. 1963).

²⁷⁴ *Cf. United States v. Atkins*, 22 U.S.C.M.A. 244, 46 C.M.R. 244 (1973); *United States v. Alston*, 20 U.S.C.M.A. 581, 44 C.M.R. 11 (1971). *But see Ricehill v. Brewer*, 459 F.2d 537 (8th Cir. 1972); *Klinger v. United States*, 409 F.2d 299 (8th Cir.), *cert. denied*, 396 U.S. 859 (1969); *United States v. Atkins*, — C.M.R. — (ACMR 1972), *rev'd* 22 U.S.C.M.A. 244, 46 C.M.R. 244 (1973).

²⁷⁵ These offenses are defined by statute and ordinance. *See* 40 D. C. CODE Sec. 302 (D) (1967); Traffic regulations of the District of Columbia, Section 157 (E). The former is subject to punishment by a fine of \$100 to \$500, or imprisonment for thirty days to one year, or both. The latter carries the fine of not more than \$300 or ten days in jail. *Id.* at n. 11.

pellant as an incident to his arrest. In complying with the police department instructions, he placed his right hand on the appellant's left breast and felt an object. There was no suggestion that he believed the object to be a weapon. In fact, he testified he did not have any specific purpose in mind when he searched the appellant: "I just searched him. I didn't think about what I was looking for." After extracting a wadded-up cigarette package from the appellant's pocket, the police officer opened the package and found it to contain fourteen gelatin capsules of heroin. The officer then placed the appellant under arrest for possession of narcotics and continued his search without finding any weapons or additional narcotics.²⁷⁶

The court stated that "all searches, whether or not based on probable cause, are governed by the rule . . . that in determining the constitutionality of any particular search 'our inquiry is a dual one—whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the inference in the first place.'" ²⁷⁷ The court indicated before there may be an evidentiary search, the police officer must have "probable cause to believe" that evidence which will aid in the prosecution of the crime for which the accused was apprehended will be found on the person. For most traffic offenses, no evidentiary search will be allowed.²⁷⁸

In most cases the fact that the person has been arrested for an offense which involves possession of fruits, instrumentalities

²⁷⁶ *Id.* at 1089 n. 7. "The relevant features of the search, however, included a search around the appellant's waistline and down his trouser legs and into his pockets. Officer Jenks testified that he was too embarrassed to examine the appellant's groin area."

²⁷⁷ *United States v. Robinson*, 471 F.2d 1082, 1093 (D.C. Cir. 1972), citing *Terry v. Ohio*, 392 U.S. 1, 19-20 (1968); accord: *People v. Superior Court of Los Angeles County (Simon)*, 7 Cal.3d 186, 496 P.2d 1205, 101 Cal. Rptr. 837 (1972); *People v. Superior Court of Yolo County (Kiefer)*, 3 Cal.3d 807, 478 P.2d 449, 91 Cal. Rptr. 729 (1970). See also W. RINGEL, *SEARCHES & SEIZURES, ARRESTS AND CONFESSIONS* 274, 283-84 (1972); B. GEORGE, *CONSTITUTIONAL LIMITATIONS ON EVIDENCE* 74 (1969 ed.); C. MCCORMICK, *THE LAW OF EVIDENCE* 396-97 (2d ed. 1972).

²⁷⁸ *United States v. Robinson*, 471 F.2d 1082, 1094 (D.C. Cir. 1972). See also *People v. Superior Court of Los Angeles County (Simon)*, 7 Cal.3d 186, 202, 496 P.2d 1205, 1217, 101 Cal. Rptr. 837, 849 (1972); *People v. Superior Court of Yolo County (Kiefer)*, 3 Cal.3d 807, 814-15, 478 P.2d 449, 452, 91 Cal. Rptr. 729, 732 (1970); B. GEORGE *CONSTITUTIONAL LIMITATIONS ON EVIDENCE* 70 (1969 ed.). As the Court stated in *Kiefer*:

[I]n the typical traffic violation case . . . the "circumstances justifying the arrest"—e.g., speeding, failing to stop . . . do not furnish probable cause to search the interior of the car. . . . To justify that search, there must be independent probable cause to believe the vehicle does in fact contain contraband.

SEARCH INCIDENT TO APPREHENSION

or other evidence may by itself justify an evidentiary search. As the Supreme Court stated, "the circumstances justifying the arrest are also those furnishing probable cause for the search."²⁷⁹ The factual holding in *Brashears* does not violate the scope limitation principle.²⁸⁰ The other language in the opinion, however, seems to go far beyond the principle.²⁸¹ The Court of Military Review seems to indicate that they will follow the scope limitation rationale. In dictum the court in *Karo*²⁸² stated the apprehension for off-limits "fell far short of establishing probable cause for their [police officers] seizure of heroin."²⁸³

In deciding the legality of the searches incident to an arrest for a traffic offense or other minor offense, there are a number of options available to the Supreme Court of the United States. It could rely on those cases that in turn have relied on its earlier dictum. Following the rationale of these cases, the Court could hold that the arrest itself justifies a search for both weapons and evidence provided the arrest is not a subterfuge for a search.²⁸⁴ Alternatively, the Court could hold that there may be no evidentiary search incident to an arrest absent reasonable suspicion or probable cause to believe that evidence may be found.²⁸⁵

On its face the protection provided by the first option is illusory. It is extremely difficult, absent an unusual factual situation for the defense to show that the arrest was a ploy to search the defendant.²⁸⁶ Additionally, adopting this rationale would also eliminate the distinction between probable cause for arrest and probable cause for a search of the person, the latter being a higher standard.²⁸⁷ To show that the arresting officer has rea-

²⁷⁹ *Chambers v. Maroney*, 399 U.S. 42, 47 n. 6 (1970).

²⁸⁰ *United States v. Brashears*, 21 U.S.C.M.A. 552, 45 C.M.R. 326 (1972).

²⁸¹ See notes 219-24 and accompanying texts.

²⁸² *United States v. Karo*, — C.M.R. — (ACMR 1972).

²⁸³ *Id.* at —. See also *United States v. Pullen*, 41 C.M.R. 698, 701 (ACMR 1970). In that case the accused was apprehended for driving while intoxicated. As an alternative basis for its holding, the Court, citing *Terry*, stated that search was not justified by the circumstances which rendered its initiation permissible.

²⁸⁴ See notes 204-51 and accompanying text.

²⁸⁵ See notes 252-303 and accompanying text.

²⁸⁶ Compare *United States v. Watkins*, 22 U.S.C.M.A. 270, 46 C.M.R. 270 (1973); *People v. Watkins*, 19 Ill.2d 11, 166 N.E.2d 433, cert denied, 364 U.S. 833 (1960), with *United States v. Mossbauer*, 20 U.S.C.M.A. 584, 44 C.M.R. 14 (1971); *Taglavore v. United States*, 291 F.2d 262 (9th Cir. 1961).

²⁸⁷ See, e.g., *MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969* (REV. ED.), paras. 19 and 152; *United States v. Duncan*, — C.M.R. — (ACMR

sonable grounds to believe that the individual has committed an offense is easier than requiring the prosecution to show that the officer had reasonable grounds to believe that items connected with criminal activity are on the arrestee's person. Lastly, such a rule would be historically erroneous.²⁵⁶

A reasonable suspicion test would also eliminate the distinction between probable cause to search and arrest. The probable cause standard would meet the objective that an intrusion is no broader than necessary to meet the objectives of detecting and preventing crimes while at the same time guaranteeing individual rights. If the police officer believes that evidence will be destroyed unless seized, the probable cause test will protect the evidence. At the same time it would eliminate the limitation on a search absent sufficient justification. The probable cause standard does not forsake the safety of the arresting officer because that would be another alternative for justifying a search incident to an apprehension.

Most of the cases that follow the common law and permit a full search without any further justification do not distinguish between evidentiary and protective searches. Those military cases that have drawn the distinction have permitted a protective search without requiring the Government to show any justification. In *United States v. Brashears*²⁵⁶ the court stated:

An arresting officer may always conduct a reasonable search of the suspect for weapons, as a natural precaution for his own safety and to reduce the likelihood of escape. . . . However, where, as here, the crime was nonviolent and where there was no reason to believe that the suspect might be armed, a careful precautionary pat-down search of the appellant would have sufficed to find any weapons.²⁵⁷

Again, in *United States v. Williams*²⁵⁸ the accused was apprehended for running a red light. The court stated "that the search by the military policemen for weapons and for evidence of ownership of the vehicle was reasonable."

In *Robinson* the court stated:

Thus, *Terry* and *Sibron*, when read together, stand for the proposition that in the stop-and-frisk situation where, as in the routine traffic arrest, there can be no evidentiary basis for a search, the most intrusive search the Constitution will allow is a limited frisk

1973); LaFave, *Search and Seizure: "The Course of True Law . . . Has Not . . . Run Smooth,"* 1966 ILL. L. FORUM 255, 259-62.

²⁵⁶ See notes 209-14 and accompanying text.

²⁵⁷ 45 C.M.R. 438 (ACMR 1972).

²⁵⁸ *Id.* at 441.

²⁵⁹ 41 C.M.R. 426, 429 (ACMR 1969).

SEARCH INCIDENT TO APPREHENSION

for weapons, and even then only when the officer reasonably believes himself to be in danger.²⁹²

One argument is that there is a difference between the degree of evidence required to justify a stop and the evidence needed to justify a lawful apprehension.²⁹³ This argument has been rejected:

When the sole legitimate goal of the search is the protection of the officer, the paramount factor in determining the reasonableness of the intrusion is the danger actually presented, and it is of no moment whether the protective search for weapons is incident to and "arrest" based on reasonable suspicion. "In short, the physical risk to the officer is created by the circumstances of the confrontation taken as a whole, not by the technical niceties of the law or arrest."²⁹⁴

Different factors must be weighed when there is a stationhouse arrest, that is, when the accused will be transported to the stationhouse for booking. Where there has been a routine arrest which does not require taking the accused to the stationhouse, the dangers presented to the officers are no greater than those presented in the stop-and-frisk situation involved in *Terry*. This is not to say that there is no element of danger present, but this element or possibility of danger cannot justify a full search without additional justification. As the California Supreme Court stated, "[T]o allow the police to routinely search for weapons and all such instances . . . constitution 'intolerable and unreasonable' intrusion into the privacy of the vast majority of peaceful citizens who travel by automobile."²⁹⁵ Thus, the most intrusive search the Constitution will allow when a person is arrested for a nonviolent crime for which there are no fruits, instrumentalities or other evidence is a frisk for weapons and then only when the officer has reasonable suspicion that the person with whom he is dealing is armed and presently dangerous.²⁹⁶

²⁹² *United States v. Robinson*, 471 F.2d 1082, 1095 (D.C. Cir. 1972). See also *People v. Superior Court of Los Angeles County (Simon)*, 7 Cal.3d 186, 204, 496 P.2d 1205, 1219, 101 Cal. Rptr. 837, 850 (1972); *People v. Superior Court of Yolo County (Kiefer)*, 3 Cal.3d 807, 829, 478 P.2d 449, 464, 91 Cal. Rptr. 729, 744 (1970). Cf. *People v. Marsh*, 20 N.Y.2d 98, 281 N.Y.S.2d 789, 228 N.E.2d 783 (1967) (probable cause required).

²⁹³ *Id.*

²⁹⁴ *United States v. Robinson*, 471 F.2d 1082, 1096 (D.C. Cir. 1972), citing *People v. Superior Court of Los Angeles County (Simon)*, 7 Cal.3d 186, 204, 496 P.2d 1205, 1218, 101 Cal. Rptr. 837, 850 (1972) (en banc).

²⁹⁵ *People v. Superior Court of Yolo County (Kiefer)* 3 Cal.3d 807, 829, 478 P.2d 449, 464, 91 Cal. Rptr. 729, 744 (1970) (en banc).

²⁹⁶ *United States v. Robinson* 471 F.2d 1082, 1097 (D.C. Cir. 1972). Cf. *People v. Superior Court of Los Angeles County (Simon)*, 7 Cal.3d 186, 204, 496 P.2d 1205, 1219, 101 Cal. Rptr. 837, 850 (1972) (probable cause required).

Where there is a stationhouse arrest the dangers to the police, unlike the minor traffic offense, are "sharply accentuated by the prolonged proximity of the accused to the police personnel following the arrest."²⁹⁷ As the California Supreme Court has noted, the distinguishing feature of the stationhouse arrest situation" is not the greater likelihood that a person taken into custody is armed, but rather the increased likelihood of danger to the officer if in fact the person is armed."²⁹⁸ In the light of this increased danger, the arresting officer may conduct a frisk without any justification of the suspect's outer clothing in order to remove any weapons that the suspect may have in his possession.²⁹⁹ A counter argument to this might be that if the police officer was allowed to make a full search at the time of a stationhouse arrest this would result in fewer people being taken to the stationhouse. Where the full search at the scene does not result in the seizure of any evidence, the person will be released without going to the stationhouse for booking. However, if you do not allow the full search, what some police officers will do is decide to make a stationhouse arrest, take the person to the stationhouse for booking and in the case of an enlisted man place him in a cell until his company commander can be notified. Prior to placing the person in the cell, his goods will be inventoried for safekeeping, at which time there will be in effect a full search of the person who has been apprehended. Another argument is that a full search should be allowed because a frisk does not provide reasonable protection. This argument was rejected in *United States v. Robinson*.³⁰⁰ The Court stated that a properly conducted frisk is far more than "a petty indignity." On the contrary, "[e]ven a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be annoying, frightening and perhaps humiliating experience."³⁰¹ Looking at the interest of the police officers rather than the interest of the individual, the Court felt that a carefully conducted frisk offers "substantial protection to the officers."³⁰² Certainly, a frisk will not remove all dangers; there will always be the possibility of danger to the police officer, but

²⁹⁷ *United States v. Robinson*, 471 F.2d 1082, 1098 (D.C. Cir. 1972).

²⁹⁸ *People v. Superior Court of Los Angeles County* (Simon), 7 Cal.3d 186, 214, 496 P.2d 1205, 1225, 101 Cal. Rptr. 837, 857 (1972) (concurring opinion) (emphasis in original).

²⁹⁹ *United States v. Robinson*, 471 F.2d 1082, 1098 (D.C. Cir. 1972).

³⁰⁰ 471 F.2d 1082, 1098-1100 (D.C. Cir. 1972).

³⁰¹ *Terry v. Ohio*, 392 U.S. 1, 24-25 (1968).

³⁰² *United States v. Robinson*, 471 F.2d 1082, 1099 (D.C. Cir. 1972).

SEARCH INCIDENT TO APPREHENSION

even the ordinary citizen may be subject to similar dangers in a high crime area. As far as the statistics showing the number of police officers injured when making an arrest for a minor offense, the statistics do not show whether these injuries could have been prevented if a full search were allowed. Probably most of these injuries occurred before the person could have been frisked or searched; thus, this rationale used by the Government would not support a full search. Two other arguments were rejected in *Robinson*, that is, a full search is necessary to protect the arrestee from injuries he might inflict upon himself, and that if the full search is not allowed, the decision of the court restricting the officers to a frisk will not deter the police officers from conducting unlawful searches since their goal in such searches is to protect themselves rather than to obtain evidence.⁸⁰³

D. SUMMARY

The cases providing that an arrest by itself justifies a full search of the individual do not withstand historical analysis. Additionally, these cases conflict with the fourth amendment principle that an intrusion into a protected area should be no broader than necessary to achieve the objectives of the intrusion. The scope limitation principle meets both of these objectives while at the same time protecting society and its law enforcement agents. Under this principle there may only be an evidentiary search based on probable cause. A protective frisk may be justified on reasonable suspicion and where an in-custody arrest is required, no justification is required for such a search.

V. CONCLUSION

There are common threads that run through the search of the premises, vehicles and individuals incident to a lawful apprehension. A search of premises and vehicles beyond the scope set forth in *Chimel* can only be justified by showing exigent circumstances, that is, the prosecution must show probable cause to search the premises or vehicle and probable cause to believe evidence will be destroyed or removed before a search warrant can be obtained.

Whether a search of the immediate area is permissible, which could be a portion of a residence or vehicle and the area surrounding the individual, should depend on the scope limitation principle. The principle squares with the fourth amendment

⁸⁰³ *Id.* at 1101 n. 31 (D.C. Cir. 1972).

principle that the invasion of privacy should not be broader than necessary to achieve the objectives of the apprehension. It is also consonant with the principle that a warrant for a search should be obtained whenever practicable. The test to be applied in determining the "immediate area" within the arrestee's control will also foster these principles if correctly defined. This area must be defined as the area from which the arresting officer subjectively believes the arrestee may obtain a weapon or destructible evidence provided this belief is reasonable.

COMMENTS

THE IDENTIFICATION OF ORIGINAL, REAL EVIDENCE*

By Captain Edward J. Imwinkelried**

*(T)hese exhibits were identified as the container of the illegally sold narcotics by long and tortuous testimony*¹

I. INTRODUCTION

A trial practitioner must be both artist and logician. As artist, he must be creative and imaginative; he cannot permit his resourcefulness to be limited by the traditional methods of proof. As logician, he must be sensitive to all rational inferences his evidence will support. In this light, the counsel's use of circumstantial evidence is an important measure of his skill as a trial practitioner. When the counsel cannot invoke an accepted method of proof, he must resort to an innovative, circumstantial method; and he must fashion that method out of the rational inferences from his circumstantial evidence. The authentication of real evidence illustrates the challenge facing the trial practitioner.

The common law has always had a healthy tradition of skepticism. The common law refuses to accept proffered evidence at face value; it challenges the proponent to prove that the item is what it purports to be or he claims that it is.² The common law will not ascribe any logical relevance to an item of evidence until its proponent authenticates the item. "Authentication" is simply the generic term for the process of proving that an item of evi-

* The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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¹ United States v. Allocco, 234 F.2d 955, 956 (2d Cir. 1956), cert. denied, 352 U.S. 931 (1956), reh. denied, 352 U.S. 990 (1956).

² C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 218 (2d ed. 1974).

dence is what its proponent claims that it is.³ The authentication of real, physical evidence is usually styled the identification of the evidence.⁴

This article focuses on the identification of original, real evidence. Original, real evidence is physical evidence directly connected with the incident or transaction in question. Some texts use the terms "real" and "demonstrative" evidence interchangeably⁵ but this article uses the phrase "demonstrative evidence" in the narrow sense of evidence admitted for solely illustrative purposes.⁶

The importance of original, real evidence cannot be overemphasized. A recent study by Dr. Brian Parker of the University of California at Berkeley indicates that 88% of the crime scenes policemen visit could yield valuable real evidence.⁷ In possessory offense prosecutions, the identity of the item the accused was found in possession of is a critical element of proof; the prosecution must identify the item as contraband or stolen property. In cases where the accused is charged with DWI (driving while intoxicated), the single most important item of evidence is ordinarily a blood sample extracted from the accused; and the judge will not permit the prosecution to introduce the results of the sample's blood alcohol concentration analysis until the prosecution has identified the sample analyzed as the sample extracted from the accused. In any prosecution where the perpetrator's identity is in issue, real evidence found in the accused's possession may help to connect him with the offense and thereby prove that he was the perpetrator.

The frequency of use of real evidence underscores its importance, but the experienced trial practitioner knows that there is another reason why he must master the techniques of identifying real evidence. A trial is a psychological contest.⁸ Both counsel strive to use the types of evidence which will have the most dramatic impact upon the court members or jurors. Melvin Belli,

³ *Id.*

⁴ 29 Am. Jur. 2d *Evidence* § 774 (1967).

⁵ C. MCCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* § 212 (2d ed. 1972).

⁶ Comment, *Demonstrative Evidence in Iowa*, 10 *DRAKE L.J.* 44 n. 1 (1960).

⁷ B. Parker, *Physical Evidence Utilization in the Administration of Criminal Justice*, University of California at Berkeley (1972). Dr. Parker and his associates studied a total of 750 cases within the jurisdiction of the Berkeley Police Department.

⁸ Hinshaw, *Use and Abuse of Demonstrative Evidence: The Art of Jury Persuasion*, 40 *A.B.A.J.* 479 (1954).

a practitioner well versed in the use of real evidence, has opined that like Liza Doolittle, jurors often want to exclaim: "Words, words, words — I'm so sick of words. Is that all you lawyers can do? Show me."⁹ However whimsically the importance of real evidence may be expressed, it is clear that real evidence can have a significant, and often decisive, impact upon a trial's outcome.

In light of the importance of real evidence, it is both surprising and disappointing to note that little has been written on the subject of the identification of real evidence. The textwriters give the subject summary treatment;¹⁰ and while many commentators have dealt with the use of demonstrative evidence,¹¹ few have addressed the threshold question of the identification of real evidence.¹²

This article analyzes that neglected, threshold question. The first part of the article lists the more important methods of identifying real evidence. The second part of the article discusses related evidentiary problems. The conclusion sets forth a practical technique which counsel can employ to ensure the admission of their real evidence.

II. THE METHODS OF IDENTIFYING ORIGINAL, REAL EVIDENCE

A. PROOF THAT THE ITEM IS "READILY IDENTIFIABLE"

The simplest method of identifying real evidence is by proving that it is a readily identifiable item which the witness recognizes.¹³

⁹ Belli, *An Introduction to Demonstrative Evidence*, 8 J. FOR. SCI. 355, 363 (1968).

¹⁰ Most texts devote one or at most a very few sections to the identification of real evidence. C. McCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE*, § 212 (2d ed. 1972); 2 WHARTON'S *CRIMINAL EVIDENCE* §§ 673-75 (12th ed. 1955); J.A.G. School, U.S. Army, School Text, *Military Criminal Law Evidence* § 1-2 (January 1973).

¹¹ Belli, *An Introduction to Demonstrative Evidence*, 8 J. FOR. SCI. 355 (1968); Comment, *Demonstrative Evidence in Iowa*, 10 DRAKE L.J. 44 (1960); Lay, *The Use of Real Evidence*, 37 NEB. L. REV. 501 (1958); Hinshaw, *Use and Abuse of Demonstrative Evidence: The Art of Jury Persuasion*, 40 A.B.A.J. 479 (1954); Belli, *Demonstrative Evidence and the Adequate Award*, 22 MISS. L.J. 284 (1951); Comment, *Real Evidence: Use and Abuse*, 14 BROOK. L. REV. 261 (1948); Comment, *Real Evidence in Mississippi*, 17 MISS. L.J. 180 (1945). Several of these articles use the phrase "demonstrative evidence," in the broad sense, referring to both original and illustrative evidence.

¹² See Comment, *Preconditions for Admission of Demonstrative Evidence*, 61 NW.U.L. REV. 472 (1966).

¹³ C. McCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* § 212 (2d ed. 1972).

This method involves the use of direct evidence.¹⁴ The issue is the item's identity, and the witness testifies that he recognizes the item as the article in question. A line of questioning using this method can be very brief.¹⁵ First, the proponent asks the witness whether he can recognize the item. Then the proponent asks the witness to specify the physical characteristics the witness is relying upon to identify the item.

1. Categories of "Readily Identifiable" Items

The courts have treated four categories of items as readily identifiable.

The first category includes serially numbered items. If an item is serially numbered, it is a one-of-a-kind item. It is readily identifiable in an absolute sense. Probably the best example of such an item is a serially numbered pistol. The identification of such a pistol is a simple process. The proponent hands the pistol to the witness and asks whether the witness can identify the item. If the witness responds that he can identify the item, the proponent inquires how the witness can identify the pistol. If the witness testifies that he remembers the serial number, the identification is complete; and the pistol has been authenticated.

The second category includes items with distinctive natural markings or characteristics. The courts have categorized the following items as readily identifiable: a "very unusual looking hat,"¹⁶ a coin of unusual thinness,¹⁷ a ball and socket assembly with a distinctive abrasion,¹⁸ a peculiarly twisted and battered bullet,¹⁹ and an automobile transmission with special marks.²⁰ Perhaps the most interesting case in this category is *United States v. Bridle*.²¹ In *Bridle*, the prosecution attempted to introduce a button to help identify the accused as the perpetrator of the offense. The Government conceded that it could not establish a chain of the button's custody. The trial court treated the button

¹⁴ An item of evidence is directly relevant if the immediate inference from the item is the existence or non-existence of a material fact. If the material fact in question is an article's identity, a witness' testimony that he can identify the article is direct evidence.

¹⁵ U.S. Dept. of Army, Pamphlet 27-10, Military Justice Handbook: The Trial Counsel and the Defense Counsel, App. VII(B)1, (August 1969).

¹⁶ *United States v. Reed*, 392 F.2d 865, 867 (7th Cir. 1968), cert. denied, 393 U.S. 984 (1968).

¹⁷ *Jenkins v. United States*, 361 F.2d 615 (10th Cir. 1966).

¹⁸ *Jenkins v. Bierschenk*, 333 F.2d 421 (8th Cir. 1964).

¹⁹ *State v. Shawley*, 334 Mo. 352, 87 S.W.2d 74 (1933).

²⁰ *State v. Augustine*, 1 Or. App. 372, 462 P.2d 693 (1969).

²¹ 443 F.2d 443 (8th Cir. 1972), cert. denied, 404 U.S. 942 (1971).

as readily identifiable; the court admitted the button on the basis of a witness' direct testimony that he recognized the button. The button in question was a split, leather, dark brown button with a picture of a whale on the front and a sticky substance on the back. The Court of Appeals upheld the button's admission. The Court pointed out that the trial judge may dispense with proof of a chain of custody if the item is readily identifiable. The Court held that "the uniqueness of the button" justified the trial judge's admission of the button.²² If the witness identifies the item on the basis of the item's natural distinctive features, the authentication is sufficient.

The third category includes items on which witnesses have made distinctive markings. There is substantial authority for the proposition that even if an article's natural features would not qualify it as a readily identifiable item, a witness can convert it into a readily identifiable item by placing distinctive markings on it. The courts have permitted witnesses to identify the following items on the basis of markings the witnesses placed on the items when the witnesses first seized them: a pistol grip,²³ a coin,²⁴ a dollar bill,²⁵ a jar,²⁶ a bullet,²⁷ a catheter,²⁸ a crowbar,²⁹ and a shotgun.³⁰

The reader's initial reaction might be that this result is improper. At first, it seems plausible to argue that the item's ready identifiability should turn on its natural features rather than any markings the witness places on the article. It could be argued that markings the witness places on the item should cut only to proof of the chain of custody. However, in principle, the result is clearly correct. The ultimate issue is not the item's nature; the issue is the item's identity. If the witness places a distinctive marking on the item at the time of seizure, that marking tends to identify the item as certainly as any natural feature of the article. Whether natural or artificial, a distinctive marking makes the article readily identifiable.

²² *Id.* at 449.

²³ *United States v. Madril*, 445 F.2d 827 (9th Cir. 1971), *vacated*, 404 U.S. 1919 (1971).

²⁴ *United States v. Bourassa*, 411 F.2d 69 (10th Cir. 1969), *cert. denied*, 396 U.S. 915 (1969).

²⁵ *Rosemund v. United States*, 386 F.2d 412 (10th Cir. 1967).

²⁶ *O'Quinn v. United States*, 411 F.2d 78 (10th Cir. 1969).

²⁷ *State v. Ross*, 275 N.C. 550, 169 S.E.2d 875 (1969).

²⁸ *State v. Ball*, 1 Ohio App.2d 297, 204 N.E.2d 557 (1964).

²⁹ *People v. Horace*, 186 Cal. App.2d 560, 9 Cal. Rptr. 43 (1960).

³⁰ *Dixon v. State*, 243 Ind. 654, 189 N.E.2d 715 (1963).

This doctrine has special significance to military counsel. In pertinent part, Army Regulation 195-5 provides that:

All evidence should be marked to identify the date, time, and initials of the individual who obtained the evidence. The only exception for not marking evidence directly on the item itself is when the item is of apparently high value and such markings will deface or alter the value of this type item.³¹

In the decided cases, such markings have been held sufficient to convert the item into a readily identifiable article.³² Whenever the Military Policeman or C.I.D. investigator complies with the Army Regulation, the proponent can always argue that the policeman or investigator has converted the item into a readily identifiable article.

Surprisingly, the courts have created a fourth category of readily identifiable items: rather common items without any apparent distinctive characteristics. The courts have admitted the following items on the basis of a witness' direct testimony that he identified the item: a screwdriver,³³ a pair of scissors,³⁴ a money bag,³⁵ a bottle,³⁶ a leather key case,³⁷ a blackjack,³⁸ a brake,³⁹ a piece of rope,⁴⁰ a motorcycle headlight frame,⁴¹ a piece of hose,⁴² a tire,⁴³ and a wheel rim.⁴⁴ By and large, the courts have obviously been quite liberal in deciding whether an item qualifies as a readily identifiable article.

2. Tests for Ready Identifiability

Some of these decisions might seem too liberal. The treatment of common items as readily identifiable articles raises the question: What test do the courts use in deciding whether to treat an item as readily identifiable?

³¹ Army Reg. No. 195-5, para. 2-6h(3) (15 Nov. 1970).

³² *United States v. Bourassa*, 411 F.2d 69 (10th Cir. 1969), *cert. denied*, 396 U.S. 915 (1969); *Rosemund v. United States*, 386 F.2d 412 (10th Cir. 1967); *People v. Horace*, 186 Cal. App.2d 560, 9 Cal. Rptr. 43 (1960).

³³ *Lopez v. State*, 490 S.W.2d 565 (Tex. Crim. App. 1973).

³⁴ *Riggins v. State*, 490 S.W.2d 124 (Ark. 1973).

³⁵ *Overton v. State*, 490 S.W.2d 556 (Tex. Crim. App. 1973).

³⁶ *State v. Paladine*, 2 Conn. Cir. 457, 201 A.2d 667 (1964).

³⁷ *Raullerson v. People*, 157 Colo. 462, 404 P.2d 149 (1965).

³⁸ *State v. McKenna*, 78 Ida 647, 309 P.2d 206 (1957).

³⁹ *Friesen v. Schmelzel*, 78 Wyo. 1, 318 P.2d 368 (1957).

⁴⁰ *Burris v. American Chicle Co.*, 120 F.2d 218 (2d Cir. 1941).

⁴¹ *Allen v. Porter*, 19 Wash. 2d 503, 143 P.2d 328 (1943).

⁴² *Isaacs v. National Bank of Commerce*, 50 Wash. 2d 548, 313 P.2d 684 (1957).

⁴³ *United States v. Pagerie*, 15 C.M.R. 864 (AFBR 1954).

⁴⁴ *Chicago, R.I. & P. Ry. v. Murphy*, 184 Okl. 240, 86 P.2d 629 (1939).

At first, the courts did not articulate a test. The courts seemed to accept at face value a witness' statement that he could recognize the item. The courts' attitude was that "(w)here a party positively identifies an article as the one involved in the case, such identification is prima facie sufficient . . ."45 In numerous cases, the trial judge treated the item as readily identifiable; and the appellate court upheld the judge's ruling without any mention of a test for ready identifiability.⁴⁶

Sensing a need to rationalize their decisions, some appellate courts began to invoke the phrase, "readily identifiable article."⁴⁷ Analytically, their resort to the phrase represented some progress; while the courts had still not articulated a manageable judicial standard or test, these courts at least refused to accept the witness' testimony at face value. The courts indicated that they would look beyond the witness' testimony to the nature of the article. It is evident that the courts used the phrase as a conclusory label; but to the courts' credit, it should be equally evident that they were not using the label as a legal fiction. By focusing on the article's nature, the courts were using a more realistic, analytic approach than other courts which simply accepted the identification at face value.

The soundest classical analysis of the problem was premised on the observation that the witness' identification constituted opinion evidence.⁴⁸ The witness' statement that he recognizes an item is an expression of an opinion of identity.⁴⁹ Viewed in this light, the problem becomes one of determining the sufficiency of the basis for the opinion. Opinion testimony is not accepted at face value; a witness generally may express an opinion only if he has observed facts which adequately support the opinion.⁵⁰ To decide whether the opinion of identity had an adequate basis, the courts subscribing to this approach turned their attention to the article's physical characteristics which the witness relied upon as the basis for his opinion.

⁴⁵ 32 C.J.S. *Evidence* § 607a n. 59.15 (1964).

⁴⁶ See, e.g., *Lopez v. State*, 490 S.W.2d 565 (Tex. Crim. App. 1973); *United States v. Pagerie*, 15 C.M.R. 864 (AFBR 1954); *Allen v. Porter*, 19 Wash.2d 503, 143 P.2d 328 (1943); *Burris v. American Chicle Co.*, 120 F.2d 218 (2d Cir. 1941).

⁴⁷ This technique is, of course, indicative of a result-oriented approach to judicial decision-making.

⁴⁸ 7 WIGMORE ON EVIDENCE § 1977 (3rd ed. 1940).

⁴⁹ *Id.*

⁵⁰ C. McCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* §§ 10 and 11 (2d ed. 1972); *MANUAL FOR COURTS-MARTIAL, 1969 (REV. ED.)*, para. 138e.

Modernly, the courts are beginning to realize that in the final analysis, identification problems are probability problems. When a witness purports to identify an item, he is saying that he can recognize the item as a unique article. The proponent of the item's admission should be required to prove that the observed characteristics the witness relies upon in his identification make it more likely than not that the item is the unique article the witness says he can identify. The courts have already begun to apply probability theories such as population frequency to the identification of persons.⁵¹ If the proponent wants to elicit testimony from the witness that he identified a particular person, the physical characteristics the witness observed must be sufficient to establish the person's uniqueness and individuality.⁵² The courts are now applying the same approach to the identification of objects. When faced with questions of the sufficiency of the identification of objects, the courts are inquiring whether the record indicates that the object possessed any "unusual" or "singular" characteristics.⁵³ If the observed characteristics make the article "unique,"⁵⁴ the trial judge can treat it as a readily identifiable article and dispense with proof of a chain of custody.

Wigmore presaged the application of probability theories to identification problems:

Where a certain circumstance, feature, or mark may commonly be found associated with a large number of objects, the presence of that feature or mark in two supposed objects is little indication of their identity because, on the general principle of Relevancy . . . , the other conceivable hypotheses are so numerous, i.e. the objects that possess that mark are numerous and therefore any two of them possessing it might well be different. But where the objects possessing the mark are only one or a few, and the mark is found in two supposed instances, the chances of the two being different are "nil" or are comparatively small. Hence, in the process of identification of two supposed objects, by a common mark, the force of the inference depends on the degree of necessariness of association of that mark with a single object. (I)n practice it rarely occurs that the evidential mark is a single circumstance. The evidencing feature is usually a group of circumstances, which as a whole constitute a feature capable of being associated with a single object. Rarely

⁵¹ Finkelstein and Fairley, *A Bayesian Approach to Identification Evidence*, 83 HARV. L. REV. 489 (1970); Cullison, *Identification by Probabilities and Trial by Arithmetic (A Lesson for Beginners in How to be Wrong with Greater Precision)*, 6 HOUSTON L. REV. 471 (1969); Sassouni, *Physical Individuality and the Problem of Identification*, 31 TEMP. L. Q. 341 (1958).

⁵² Sassouni, *Physical Individuality and the Problem of Identification*, 31 TEMP. L. Q. 341 (1958).

⁵³ *United States v. Reed*, 392 F.2d 865 (7th Cir. 1968), cert. denied, 392 U.S. 984 (1967); *State v. Granberry*, 484 S.W.2d 295 (Mo. 1973).

⁵⁴ *Gallagher v. Pequot Spring Water Co.*, 2 Conn. Cir. 354, 199 A.2d 172 (1963).

can one circumstance alone be inherently peculiar to a single object. It is by adding circumstance to circumstance that we obtain a composite feature or mark which as a whole cannot be supposed to be associated with more than a single object. The process of constructing an inference of Identity thus consists usually in adding together a number of circumstances, each of which by itself might be a feature of many objects, but *all of which together make it more probable that they coexist in a single object only.*⁵⁵

It is submitted that the most realistic method of analyzing identification problems lies in a combination of the opinion and probabilistic methods. The courts which have treated the witness' statement of identification as an expression of opinion are correct. Since the court must test the basis for the opinion, the witness should be required to specify the physical characteristics he relies upon in making the identification. The judge should then apply a common-sense, probabilistic test: Is the combination of physical characteristics the witness has testified to sufficiently unusual to make it more likely than not that the item possessing that combination of characteristics is a unique, singular item?

It would certainly be helpful if the proponent offered expert testimony of the population distribution frequency of each of the physical characteristics. In the absence of such expert testimony, the judge will have to rely upon his own experience of the incidence of the characteristic's occurrence. As long as the judge realizes his responsibility for assessing the sufficiency of the opinion's basis and judges its sufficiency by a simple, probability standard, he should in most cases reach a defensible result.

B. PROOF OF THE CHAIN OF THE ITEM'S CUSTODY

If the item is not readily identifiable, the proponent usually resorts to proof of the chain of the item's custody. An analysis of the topic of chain of custody requires a discussion of four questions.

1. When must the proponent prove a chain of custody?

There are three situations in which the proponent ordinarily resorts to proof of a chain of custody.

⁵⁵ 2 WIGMORE ON EVIDENCE § 411 (3rd ed. 1940) (emphasis added). In § 412, Wigmore amplifies his comment:

A mark common to two supposed objects is receivable to show them to be identical whenever the mark does not in human experience occur with so many objects that the chances of the two supposed objects are too small to be appreciable. But it must be understood that this test applies to the total combination of circumstances offered as a mark, and not to anyone circumstance going with others to make it up.

The first situation is where the item is not readily identifiable. As previously stated, the courts are exceedingly liberal in deciding to treat articles as readily identifiable items. However, there are some items which even the most liberal court would not label readily identifiable. If the issue is the identity of a specimen of blood,⁵⁶ urine,⁵⁷ or drugs,⁵⁸ the court will not admit the specimen solely on the basis of the witness' purported identification of the substance. To identify a fungible item, the proponent ordinarily must prove a chain of the item's custody.

The second situation is where by its nature the item is readily identifiable but the witness neglected to note the characteristics which make the item readily identifiable. For example, suppose that the item is a serially numbered pistol but the witness failed to note the serial number. If he had noted the number, the court would treat the item as readily identifiable; as long as the witness testified that he remembered the number, the pistol's identification would be complete. However, if the witness failed to note the number, the proponent could still identify the pistol by proving the chain of its custody. Where the witness fails to note the special identifying characteristics of a readily identifiable item, proof of the chain of its custody is "a more than adequate substitute."⁵⁹

The third situation is where the item is a delicate article and its condition at the time of seizure is a pivotal issue in the case. The chain of custody is a method of establishing both the item's identity and its condition at the time of seizure. McCormick takes the position that if the item is "susceptible to alteration by tampering or contamination, sound exercise of the trial court's discretion may require" proof of a chain of custody.⁶⁰ He gives the example of chemical specimens.⁶¹ Another illustration would be a delicate part of the engine of a crashed aircraft. Suppose that the instrument is serially numbered. Assume further that the setting of the instrument at the time of crash would determine the ultimate liability for the accident; if the instrument was set as originally produced, the manufacturer would be liable but if

⁵⁶ See, e.g., *United States v. Martinez*, 43 C.M.R. 434 (ACMR 1970).

⁵⁷ See, e.g., *United States v. Spencer*, 21 C.M.R. 504 (ABR 1956).

⁵⁸ See, e.g., *United States v. Sears*, 248 F.2d 377 (7th Cir. 1957), *rev'd on other grounds*, 355 U.S. 602 (1957).

⁵⁹ *United States v. Hooks*, 23 C.M.R. 750, 754 (AFBR 1956).

⁶⁰ C. MCCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* § 212 (2d ed. 1972).

⁶¹ *Id.*

the instrument had a different setting, the airline company would be liable. In a personal injury action arising from the crash, the plaintiff's counsel attempts to offer the instrument in evidence. He calls as a witness a Federal Aviation Administration investigator. The investigator testifies that he found the instrument at the crash site. The plaintiff's counsel hands the instrument to the witness and asks him to identify it. The witness identifies it on the basis of the serial number. The plaintiff's attorney then offers the item in evidence. Would the trial judge be justified in requiring proof of a chain of the instrument's custody? The answer is probably "yes." The witness' testimony proves the item's identity, but the critical question is whether the instrument was at the same setting at the time of crash as it is as when offered in evidence. Since the item is a delicate instrument, the judge would be justified in exercising discretion to require proof of a chain of custody. If the item has been subject to careless or rough handling in the interim between seizure and trial, the handling might have jarred the instrument into a different setting. Even though the item is readily identifiable, the posture of the case warrants the requirement for proof of the chain of custody.

2. What is the length of the chain of custody? What period of time must the proponent account for?

If counsel is convinced that the judge will require proof of a chain of custody, the next question the counsel must consider is the length of the chain: What period of time will the judge require that the counsel account for? To answer this question, counsel should distinguish between two fact situations.

The first situation is where the item's logical relevance depends upon a witness' in-court identification of the item. Suppose that the article is a pen knife, allegedly used in an assault. Since the knife is quite common, the judge refuses to treat it as a readily identifiable item. The trial counsel wants to authenticate the knife by proving a chain of custody. In this situation, the chain must run from the time of seizure to the time the knife is offered in evidence. The proponent must prove an identity between the item seized and the item offered, and he must assume the burden of proving a chain running from the time of seizure to the time of offer.⁶²

⁶² In *States v. Conley*, 32 Ohio App.2d 54, 288 N.W.2d 296 (1971), the court stated that in this sort of case, the "material moment" occurs at trial rather than at the time of analysis.

The second situation is where the proponent is relying upon the real evidence as the basis for expert testimony of the evidence's chemical analysis. There is some authority that even in this situation, the chain of custody must run from the time of seizure to the time of trial.⁶³ In *Novak v. District of Columbia*⁶⁴ and *State v. Weltha*,⁶⁵ the courts seemed to assume that the proponent must produce the analyzed substance in court and that he must trace the custody from the time of seizure to the time of trial.

However, the overwhelming, majority view is that the chain must run only from the time of seizure to the time of analysis or test.⁶⁶ In *United States v. Singer*,⁶⁷ the court stated that the evidence of the analysis is admissible even if the sample analyzed is lost or destroyed after the test. In fact, it is "nowise customary to produce in court a specimen or part upon which an analysis has been made."⁶⁸ The majority view is the better-reasoned rule. If the proponent is offering only the results of the analysis, he must prove identity between the substance seized and the substance analyzed. There is no rule of evidence or logic which compels him to offer the substance in evidence. In some jurisdictions, the party opponent is entitled to inspect the substance and subject it to an independent test;⁶⁹ but it is specious to suggest that the proponent's duty to formally offer the substance into evidence is a necessary correlative of the opponent's right to discover and examine the substance. The military cases have not expressly adverted to the division of authority on this issue; but the cases follow the majority view. In *United States v. Hughes*,⁷⁰ the Air Force Board of Review accepted a showing of custody which ran from the time of acquisition to the time of laboratory analysis.

3. Which persons comprise the links in the chain of custody?

Once the counsel has discovered the period of time he must account for, he then attempts to identify the links in the chain during that period. The links are the various persons who handled the article during the accountable period.

⁶³ Annot., 21 A.L.R.2d 1216, 1236 (1952).

⁶⁴ 160 F.2d 588 (D.C. Cir. 1947).

⁶⁵ Annot., 21 A.L.R.2d 1216, 1236 (1952).

⁶⁷ 43 F.Supp. 863 (E.D.N.Y. 1942).

⁶⁸ Annot., 21 A.L.R.2d 1216, 1236 (1952).

⁶⁹ *State v. McArdle*, 12 Cr. L. 2418 (W.Va. Sup. Ct. 1973).

⁷⁰ 16 C.M.R. 559 (AFBR 1954). See also *United States v. Martinez*, 48 C.M.R. 434 (ACMR 1970).

It is well-settled that persons who merely had access to the item do not constitute links in the chain and that the proponent need not make any affirmative showing of their conduct with respect to the item.⁷¹ Such persons have an opportunity to come in contact with the item; but unless there is some indication that they in fact came into contact with the item, they do not constitute links in the chain of proof.⁷²

There is some authority that the proponent need not make any affirmative showing of the conduct of a person who handled the article but who (1) held the item for a very short time and (2) performed only mechanical functions with the item. In *Commonwealth v. Thomas*,⁷³ the court held that the proponent did not have to make any showing of the conduct of the laboratory technician who merely placed the brushings in question under a microscope. Certainly, at least for a short time, the technician had possession of, and was technically custodian of, the article. The court emphasized that the technician possessed the article only momentarily and that her duties were "mechanical in nature."⁷⁴ The court did not explicitize its reasoning; but the reasoning probably ran along these lines: proof of a chain of custody is a method of negating any probability that substitution or tampering occurred; a person should be held to be a link, whom the proponent must account for, only if the person had a substantial opportunity to substitute for or tamper with the item; and, finally, persons who handle the item momentarily to perform purely mechanical functions do not have a substantial opportunity for substitution or tampering. There is a strong counter-argument that in the case of fungible, malleable goods even a person who possesses the article only momentarily has a substantial opportunity for substitution or tampering. To date, the counter-argument has prevailed and the *Thomas* doctrine remains a distinct minority view. It remains to be seen whether the doctrine will grow into a substantial line of authority.

The most significant concession the courts have made is their rule that the proponent need not make any affirmative showing of postal employees' handling of mailed items.⁷⁵ Here the courts

⁷¹ *People v. Hines*, 131 Ill. App.2d 638, 267 N.E.2d 696 (1971); *Gallego v. United States*, 276 F.2d 914 (9th Cir. 1960).

⁷² *Wright v. State*, 501 P.2d 1360 (Alaska 1972). See also *People v. Herman*, 8 Misc. 2d 991, 166 N.Y.S.2d 131 (1957).

⁷³ 448 Pa. 352, 292 A.2d 352 (1972).

⁷⁴ *Id.* at —, 292 A.2d at 356.

⁷⁵ *State v. Jordan*, 14 N.C. App. 453, 188 S.E.2d 701 (1972); *People v. Jamison*, 29 App. Div.2d 973, 289 N.Y.S.2d 299 (1968).

apply presumptions that postal employees properly discharge their duties and that articles "regularly mailed are delivered in substantially the same condition in which they were sent."⁷⁶ It is indisputable that the postal employees who handle a mailed article are custodians of the article. However, if the sender uses the mail, it is virtually impossible to identify all the postal employees who handled the article; and the courts are understandably reluctant to adopt a rule of evidence which, in practical effect, would prevent evidence custodians from using the mail to transmit articles.

In summary, the general rule appears to be that any person who has had possession of the article is a link in the chain of proof. With the notable exception of postal employees, the courts would probably unanimously agree that any person who had possession of the article for a relatively long period of time or who had a substantial opportunity for tampering or substitution constitutes a link in the chain. There is some authority that the proponent can dispense with proof of a person's handling if the person handled the item momentarily and mechanically, but that authority is so scant that counsel would be unwise to plan their foundational evidence on the assumption that the judge will follow the *Thomas* doctrine.

4. *What showing must the proponent make to prove the chain of custody?*

The courts have expressed the proponent's burden in various ways. Some have said that he must prove the chain by a "clear preponderance" of the evidence.⁷⁷ Others have said that he must establish a "reasonable certainty."⁷⁸ Others say that he must prove the chain "unequivocally."⁷⁹ Still others say that he must create a "clear assurance."⁸⁰ The most definite and often used expression is that the proponent must prove a "reasonable probability."⁸¹

⁷⁶ *Rodgers v. Commonwealth*, 197 Va. 527, 90 S.E.2d 257 (1955).

⁷⁷ *State v. Williams*, 273 So.2d 280 (La. 1973); *State v. Anderson*, 261 La. 244, 259 So.2d 310 (1972); *State v. Davis*, 259 La. 35, 249 So.2d 193 (1971); *State v. Square*, 257 La. 743, 244 So.2d 200 (1971); *State v. Coleman*, 254 La. 264, 2223 So.2d 402 (1969).

⁷⁸ *Sorce v. State*, 497 P.2d 902 (Nev. 1972); *State v. Tillman*, 208 Kan. 954, 494 P.2d 1178 (1972).

⁷⁹ *Raskey v. Hulewicz*, 185 Neb. 608, 177 N.W.2d 744 (1970).

⁸⁰ *State v. Baines*, 394 S.W.2d 312 (Mo. 1965), *cert. denied*, 385 U.S. 992 (1966).

⁸¹ *Doye v. State*, 299 A.2d 117 (Md. 1973); *State v. Tumminello*, 298 A.2d 202 (Md. 1972); *Bailey v. State*, 16 Md.App. 83, 294 A.2d 128 (1972); *Smith v. State*, 12 Md. App. 130, 277 A.2d 622 (1971).

What is the nature of the probability the proponent must establish? In the leading federal case, *United States v. S.B. Penick & Co.*,⁸² the Court of Appeals attempted to define the content of the showing the proponent must make. Affirmatively, he must show it is probable that the item offered in evidence is the same item originally acquired in substantially the same condition it was in at the time of acquisition.⁸³ Negatively, he must show that it is improbable that either substitution or tampering occurred.⁸⁴ In making this determination, the judge must weigh three factors: the nature of the article, the circumstances surrounding its preservation and custody, and the likelihood of any tampering by intermeddlers.⁸⁵

With respect to each link in the chain, the proponent must demonstrate: (1) his receipt of the item; (2) his ultimate disposition of the item, *i.e.*, transfer, destruction, or retention; and (3) his safeguarding and handling of the item between receipt and ultimate disposition. The third element poses the most difficult problem of proof for the proponent.

The courts have held that proof that the article was kept in a sealed container in the interim is an adequate showing of safe-keeping and handling.⁸⁶ The very "nature of a sealed container" makes substitution or tampering unlikely.⁸⁷ It is now the standing operating procedure of law enforcement agencies to place seized fungibles in locked, sealed envelopes. *United States v. Picard*⁸⁸ illustrates the strong probative value of evidence that the item was kept in a sealed container. In *Picard*, the seized substance was suspected heroin. The agents placed the heroin in a locked, sealed envelope. An agent delivered the envelope to the chief chemist. The chief chemist received the item and thereby became a link in the chain of proof. However, there was no affirmative evidence of the manner in which the chief chemist safeguarded the envelope. The only other available evidence was that the chief chemist subsequently delivered the envelope to the examining chemist with the seal unbroken. The court upheld the chain of custody. The court inferred from the unbroken seal that neither

⁸² 136 F.2d 413 (2d Cir. 1943).

⁸³ *Id.* at 415.

⁸⁴ *Id.*

⁸⁵ *Id.* See also *Gallego v. United States*, 276 F.2d 914 (9th Cir. 1960).

⁸⁶ *United States v. Picard*, 464 F.2d 215 (1st Cir. 1972).

⁸⁷ *West v. United States*, 359 F.2d 50, 55 (8th Cir. 1966), *cert. denied*, 385 U.S. 867 (1966).

⁸⁸ 464 F.2d 215 (1st Cir. 1972).

substitution nor tampering had occurred. A recent case, *State v. Simmons*,⁸⁹ demonstrates the probative value of sealed containers even more dramatically. In *Simmons*, a tissue sample taken from a girl's body was placed in the hospital's tissue laboratory refrigerator. The tissue sample was in a sealed bag. The evidence next indicated that a policeman picked the bag up at the hospital desk. There was no evidence of the bag's safekeeping in the interim between its deposit in the refrigerator and the time when the officer picked up the bag at the desk. There was no evidence identifying the person who transported the bag from the refrigerator to the desk. Nevertheless, the court held that the proof of the chain of custody was sufficient. The court emphasized that although there was a gap in the chain of proof

[t]here was, however, testimony that each of the specimens had been sealed in a bag and that the seals were intact at all times and did not reveal evidence of tampering.⁹⁰

The courts have also held that proof that the article was kept in a secure area in the interim is an adequate showing of safekeeping.⁹¹ The courts have held that articles kept in the following areas were adequately safeguarded: a secured closet,⁹² a locked automobile,⁹³ an evidence locker,⁹⁴ a police safe,⁹⁵ a police lock box,⁹⁶ a locked evidence cabinet,⁹⁷ a locked evidence file,⁹⁸ a police department evidence room,⁹⁹ and a locked narcotics cabinet.¹⁰⁰

Finally, even in the absence of other proof of safekeeping, the courts have upheld showings of chain of custody where (1) the proponent at least accounted for the article's whereabouts and (2) the whereabouts were places where it was unlikely that intermeddling would occur.¹⁰¹ As the court asserted in *Butler v. State*,

⁸⁹ 203 N.W.2d 887 (Wis. 1973).

⁹⁰ *Id.* at 894.

⁹¹ Annot., 21 A.L.R.2d 1216, 1229-31 (1952).

⁹² *Forrester v. United States*, 210 F.2d 923 (5th Cir. 1954).

⁹³ *State v. Walker*, 202 Kan. 475, 449 P.2d 515 (1969).

⁹⁴ *Id.*

⁹⁵ *People v. Waller*, 260 Cal. App.2d 131, 67 Cal. Rptr. 8 (1968).

⁹⁶ *Robinson v. State*, 163 Tex. Crim. 499, 293 S.W.2d 781 (1956).

⁹⁷ *State v. Baines*, 394 S.W.2d 312 (Mo. 1965), *cert. denied*, 384 U.S. 992 (1966).

⁹⁸ *State v. Tokatlian*, 203 N.W.2d 116 (Iowa 1972).

⁹⁹ *State v. Seifried*, 505 P.2d 1257 (N.M. 1973).

¹⁰⁰ *Gomez v. Texas*, 486 S.W.2d 338 (Tex. Crim. App. 1972). *See also Mitchell v. State*, 488 S.W.2d 786 (Tex. Crim. App. 1973) (locked evidence box).

¹⁰¹ *Cartwright v. State*, 289 N.E.2d 763 (Ind. 1972); *Stunson v. State*, 228 So.2d 294 (Fla. 1969).

"(e)vidence which strongly suggests the exact whereabouts of the exhibit at all times will often be sufficient for chain of custody purposes."¹⁰²

As a practical matter, the standard of proof in chain-of-custody cases is rather slight. The standard is not absolute.¹⁰³ The proponent need not negate every possibility of substitution or tampering.¹⁰⁴ In an early decision, *Hobday v. Compensation Commissioner*,¹⁰⁵ the court indicated that it would sustain a chain of custody on appeal as long as there was not a "total lack of identification."¹⁰⁶ In two recent decisions, the Minnesota Supreme Court stated that it would sustain a chain of custody showing except where foundational evidence was "entirely absent."¹⁰⁷ The decided cases demonstrate how remarkably low the standard of proof is.

In *Williams v. United States*,¹⁰⁸ the Court verbally chastised the officers who had had custody of the heroin exhibit. The Court charged that they had been "inexcusably lax and (were) subject to court criticism on that ground . . ." ¹⁰⁹ Nevertheless, the Court sustained the showing of chain of custody. In *State v. Belcher*,¹¹⁰ the court frankly conceded that the evidence of chain of custody was "weak."¹¹¹ Nevertheless, the court upheld the chain.

It is well-settled that the chain can be sufficient even if the opponent can show that the item was left unattended¹¹² or in an insecure area.¹¹³ In one of the earliest chain-of-custody cases, *State v. Cook*,¹¹⁴ the appellate court upheld the trial judge's refusal to instruct the jurors that the article must be kept under lock and

¹⁰² 289 N.E.2d 772, 777 (Ind. 1972).

¹⁰³ Annot., 12 A.L.R.2d 1216, 1236 (1952).

¹⁰⁴ *Id.* at 1237.

¹⁰⁵ 126 W.Va. 99, 27 S.E.2d 608 (1943). It should be remembered that the rules of evidence in workmen's compensation proceedings are quite liberal. The court expressly referred to "the liberality permitted in such proceedings."

¹⁰⁶ *Id.* at 106, 27 S.E.2d at 611.

¹⁰⁷ *State v. Coy*, 200 N.W.2d 40, 44 (Minn. 1972); *State v. Daby*, 197 N.W.2d 670, 671 (Minn. 1972).

¹⁰⁸ 381 F.2d 20 (9th Cir. 1967).

¹⁰⁹ *Id.* at 21.

¹¹⁰ 83 N.M. 130, 489 P.2d 410 (1971).

¹¹¹ *Id.* at 192, 489 P.2d at 416.

¹¹² *United States v. Von Roeder*, 435 F.2d 1004 (10th Cir. 1971), cert. denied, 403 U.S. 934 (1970), vacated sub. nom., *Schreiner v. United States*, 404 U.S. 67 (1971); *State v. Smith*, 222 S.W. 455 (Mo. 1920).

¹¹³ *State v. Huffman*, 181 Neb. 356, 148 N.W.2d 321 (1967); *Wright v. State*, 420 S.W.2d 411 (Tex. Crim. App. 1967).

¹¹⁴ 17 Kan. 392 (1877).

key. The Army Court of Military Review adopted the same position in *United States v. Martinez*.¹¹⁵

The courts have repeatedly sustained chains of custody even where some of the custodians did not personally appear to testify.¹¹⁶ In *Oliver v. State*,¹¹⁷ the Nevada Supreme Court flatly rejected the contention that the proponent must place every custodian upon the witness stand. In the most recent case, *Kilburn v. Texas*,¹¹⁸ the court sustained the chain of proof even though neither the mail clerk who received the envelope nor the chemist who opened the outer envelope personally testified.

The courts have even gone so far as to sustain chains when there were glaring discrepancies in the proponent's evidence.¹¹⁹ In one case, the court sustained the chain even though the name written on the narcotics container was a name other than that of the government special employee who allegedly obtained the narcotics.¹²⁰ In another case, the envelope containing the drug stated an analysis date which conflicted with the government chemist's testimony.¹²¹ Again the chain was sustained. In still another case, the police lost the knife before trial.¹²² The police found the knife after trial began. A government witness testified that he could identify the knife because of the "brown envelope in which it was placed." Again the chain was upheld.

There are two types of cases in which the courts tend to impose a strict standard of proof.

The first type of case is one in which there is a strong possibility that the article has been confused with other, similar articles. In *Nichols v. McCoy*,¹²³ the item in question was a blood sample. The sample had been extracted from a body at the coroner's mortuary. The evidence indicated that bodies were customarily kept at the mortuary and that samples were ordinarily extracted there. The proponent did not make any affirmative showing that the body or blood sample had been segregated from

¹¹⁵ 43 C.M.R. 434, 438 (ACMR 1970).

¹¹⁶ *Kilburn v. Texas*, 499 S.W.2d 551 (Tex. Crim. App. 1973); *State v. Burton*, 201 N.W.2d 492 (Iowa 1972); *State v. McClure*, 258 La. 999, 249 So.2d 109 (1971); *State v. Robinson*, 203 Kan. 304, 454 P.2d 527 (1969); *Oliver v. State*, 85 Nev. 10, 449 P.2d 252 (1969); *State v. Anderson*, 242 Or. 368, 409 P.2d 681 (1966); *State v. Ford*, 145 N.E.2d 638 (Iowa 1966).

¹¹⁷ 85 Nev. 10, 449 P.2d 252 (1969).

¹¹⁸ 490 S.W.2d 551 (Tex. Crim. App. 1973).

¹¹⁹ *United States v. Allocco*, 234 F.2d 955 (2d Cir. 1956), cert. denied, 352 U.S. 931 (1956), reh. denied, 352 U.S. 990 (1956).

¹²⁰ *Id.*

¹²¹ *United States v. Barcella*, 432 F.2d 570 (1st Cir. 1970).

¹²² *State v. Brewer*, 263 La. 113, 267 So.2d 541 (1972).

¹²³ *Nichols v. McCoy*, 106 Cal.App.2d (Adv. 661), 235 P.2d 412 (1951).

the other bodies and blood samples at the mortuary. The evidence raised a serious question concerning the blood sample's identity, and the court held that the proof of the chain was insufficient.

The second type of case is one in which the article is delicate and malleable. The trial judge has discretion to determine the amount of evidence necessary to lay a proper foundation; and he can vary the standard of proof, depending upon the ease or difficulty with which the item can be altered.¹²⁴ If, in a particular case, the judge has "more than a captious doubt about the authenticity of the exhibits," he may require "a very substantial foundation . . ." ¹²⁵ Some courts frankly admit that they impose a higher standard of proof when the object is "easily alterable" ¹²⁶ or "easily susceptible to undetected alteration." ¹²⁷ In contrast, they apply a lower standard of proof if the article is a solid object.¹²⁸

Blood samples are malleable articles. One commentator remarked that blood samples are:

easily susceptible to accidental alteration through carelessness in taking, storing, or testing, and to wilful tampering by intermeddling litigants. In addition, the mechanics of calculating alcoholic content will greatly magnify even a slight change in the condition of the specimen, whatever its cause.¹²⁹

For this reason, the courts tend to impose a stricter standard of proof for the chain of a blood sample's custody.¹³⁰ For example, in *Erickson v. North Dakota Workmen's Compensation Bureau*,¹³¹ the court held insufficient a showing of chain of custody virtually indistinguishable from showings held sufficient in other cases involving less changeable items.¹³²

Like a blood sample, a suspected marijuana specimen is easily susceptible to tampering or substitution.¹³³ For that reason, the

¹²⁴ *People v. Riser*, 47 Cal.2d 572, 305 P.2d 1 (1957).

¹²⁵ *American Reciprocal Insurers v. Bessonette*, 241 Or. 500, 506, 405 P.2d 529, 532 (1965).

¹²⁶ *Walker v. Firestone Tire & Rubber Co.*, 412 F.2d 60, 62 (2d Cir. 1969).

¹²⁷ *State v. Limerick*, 169 N.W.2d 538, 542 (Iowa 1969).

¹²⁸ *State v. Grady*, 201 N.W.2d 493 (Iowa 1972).

¹²⁹ 110 U.P.A.L.REV. 895, 896 (1962).

¹³⁰ See generally Bradford, *Handling and Preserving Blood Alcohol Test Samples*, 41 J.CRIM.L. & CRIMINOLOGY 107 (1950). Cf. Rehling, *Legal Requirements of Preserving and Processing Evidence in Arson and Other Criminal Investigations*, 48 J.CRIM.L.C. & P.S. 339 (1957).

¹³¹ 123 N.W.2d 292 (N.D. 1963).

¹³² Compare *Erickson with Sweeney v. Matthews*, 9 Ill.App.2d 6, 236 N.E.2d 439 (1968) (nails).

¹³³ *State v. Lunsford*, 204 N.W.2d 613 (Iowa 1973).

Iowa Supreme Court recently stated that the judge trying a marijuana prosecution should require "a more elaborate foundation" than he would require in a typical chain-of-custody case.¹³⁴

There is a statement in one case to the effect that the standard of proof is higher in criminal cases than in civil actions.¹³⁵ It is true that in a particular criminal prosecution, the judge has discretion to impose a higher standard of proof than we would ordinarily apply.¹³⁶ However, there is no absolute rule of law that the standard for admissibility is higher in criminal prosecutions than in civil actions.¹³⁷ The federal chain-of-custody cases often cite civil and criminal precedents interchangeably.¹³⁸

C. A COMBINATION OF THE FIRST TWO METHODS

If the proponent uses strict chain-of-custody reasoning, he does not have to physically present the article to each witness for inspection and identification.¹³⁹ If the proponent is offering solely the results of a chemical analysis of the object, theoretically he need not present the article to any witness. If the proponent intends to formally introduce the object, the only witness he must present the object to is the last link in the chain.¹⁴⁰

If the proponent submits the object to each witness for inspection and identification and the witness testifies that as far as he can tell, the object is the same object in substantially the same condition, in effect the proponent has combined the first two methods of identifying real evidence; he is using both strict chain-of-custody reasoning and the witness' direct testimony that he recognizes the object. In *United States v. Martinez*,¹⁴¹ the Court of

¹³⁴ *Id.* at 616.

¹³⁵ *Hafner's Wagon Wheel, Inc. v. Woolley*, 22 Ill.2d 413, 176 N.E.2d 757 (1961).

¹³⁶ *West v. United States*, 359 F.2d 50 (8th Cir. 1966), *cert. denied*, 385 U.S. 867 (1966). The trial judge has discretion to determine the foundation's sufficiency. In the absence of a clear abuse of discretion, the appellate court will sustain the trial judge's ruling.

¹³⁷ 110 U.P.A.L.REV. 895, 897 (1962).

¹³⁸ See, e.g., *United States v. S. B. Penick & Co.*, 136 F.2d 413, 415 (2d Cir. 1943) (The court cited civil and criminal precedents).

¹³⁹ *United States v. Lauer*, 287 F.2d 633 (7th Cir. 1961).

¹⁴⁰ *Id.*

¹⁴¹ 43 C.M.R. 434 (ACMR). The Court of Military Review asserted that:

Authentication of the evidence and establishing that it has remained substantially unchanged may be accomplished (1) by establishing a "chain of custody" from the significant point of time to its examination or (2) by the testimony of a witness with personal knowledge, or (3) by a combination of these methods. 43 C.M.R. at 437.

Military Review recognized the possibility of combining the two methods.

If the object qualifies as a readily identifiable item, the witness' direct identification alone would establish its admissibility. The combination of the direct testimony with chain-of-custody evidence would simply be added insurance of admissibility. If the object does not qualify as a readily identifiable item, the combination of the two methods might result in the admission of an article which would otherwise be excluded. Suppose that the condition of an article is a critical issue in the case. The article does not qualify as a readily identifiable item. The chain-of-custody is very weak and leaves serious doubt in the judge's mind. However, the proponent handed the exhibit to each link in the chain; and after examining the object, each witness testified that he believed that the exhibit was the same object he had previously seen and that it appeared to be in the same condition. The witness' testimony has probative value above and beyond the chain-of-custody evidence. The additional testimony might remove the judge's lingering doubts and result in the admission of the exhibit. Standing alone, the testimony would not support the exhibit's admission since the object is not readily identifiable. Yet the testimony is logically relevant and admissible, and the cumulative effect of the testimony and the chain-of-custody evidence might persuade the judge to admit the object.

The persuasiveness of the witness' additional testimony will depend upon the nature of the article. If the object is a solid object such as a knife, the witness' testimony could be highly probative. However, if the object is a blood or urine specimen, the witness' purported identification of the substance itself would be almost worthless. Here, rather than asking the witness to identify the substance itself, the proponent should ask the witness to identify the container which the specimen was transported in. Using strict chain-of-custody reasoning, the proponent need not hand the object or its container to each witness; but if the proponent elects to use strict chain-of-custody reasoning rather than a combination of the first two methods, he is foolishly denying himself the opportunity to lay a more complete foundation for the object's admission. Whenever appropriate, the proponent should hand the substance or its container to each witness and attempt to elicit the witness' identification of the substance or container.

*D. PROOF THAT AN ITEM FOUND IN THE ACCUSED'S
POSSESSION IS SIMILAR TO AN ITEM CONNECTED
WITH THE CASE*

There are some situations in which an item can be admitted without chain-of-custody evidence or a witness' testimony that he can identify the item. In some circumstances, an item found in the accused's possession can be admitted if it is similar to an item involved in the case. This doctrine has been applied to instrumentalities of the crime, clothing, and fruits of crime.

1. Instrumentalities of Crime

There is a division of authority whether the prosecution may prove that after the offense's commission the accused was found in possession of instrumentalities which could have been used to commit the offense.

The minority view is that such evidence is inadmissible. The courts subscribing to the minority view hold that the article found in the accused's possession is admissible only if a witness can identify the item as the very article connected with the case. In *People v. Miller*,¹⁴² the accused was charged with armed robbery. When the police arrested the accused, they found a revolver on his person. A witness testified that the revolver looked like the revolver used in the robbery. The trial judge admitted the revolver, but the appellate court reversed. The court noted that the evidence of the revolver amounted to proof of prejudicial, uncharged misconduct.¹⁴³ The court stated that:

In our opinion, such testimony is wholly insufficient to identify the revolver as the specific one used in the robbery; hence, its admission was reversible error.¹⁴⁴

In a similar case, *State v. Slauson*,¹⁴⁵ the Iowa Supreme Court held that proof that the revolver was similar to the perpetrator's revolver was "too remote or collateral" to justify the revolver's admission.¹⁴⁶

The courts following the minority view realize that the proffered evidence is logically relevant. Evidence is logically relevant if it makes the desired inference more likely than it would be without the evidence.¹⁴⁷ Proof that the accused possessed a pistol

¹⁴² 22 App.Div.2d 958, 256 N.Y.S.2d 110 (1964).

¹⁴³ *Id.* at 958, 256 N.Y.S.2d at 111.

¹⁴⁴ *Id.*

¹⁴⁵ 249 Ia. 756, 88 N.W.2d 806 (1958).

¹⁴⁶ *Id.* at 761, 88 N.W.2d at 809.

¹⁴⁷ C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 185 (2d ed. 1972).

similar to the perpetrator's pistol slightly increases the probability that the accused is the perpetrator. However, these courts invoke the doctrine of legal relevance; albeit logically relevant, evidence is legally irrelevant and inadmissible if the attendant probative dangers outweigh the evidence's probative value.¹⁴⁸ The minority jurisdictions reason that since the evidence is both prejudicial and remote the evidence should be excluded.

There is an intermediate view that even if no witness is prepared to identify the item as the very instrumentality the perpetrator used, the item can be admitted if it has substantial probative value. On the one hand, the intermediate view rejects the proposition that the article is inadmissible unless a witness can identify the item as the specific article the perpetrator used. On the other hand, the intermediate view rejects the proposition that the article is admissible solely because it is similar to the item the perpetrator used. The intermediate view requires that considering all the surrounding circumstances, the similarity be so strong that the article has substantial probative value. The leading case, espousing the intermediate position, is *State v. Thompson*.¹⁴⁹ In *Thompson*, the accused was charged with armed robbery. The police arrested the accused two months after the offense's commission at a place 75 miles from the crime scene. At the time of the arrest, the police discovered a pistol in the accused's home. The trial judge admitted the pistol. The appellate court held that the pistol's admission was error. The court did not hold that a trial judge may never admit an article which cannot be positively identified as an instrumentality the perpetrator used. Rather the court held that the admission of such evidence depends upon

. . . the time and place where the accused is apprehended and weapons found in respect to (the) time and place of the crime committed, or, . . . evidence of some unique character of the weapon.¹⁵⁰

In short, the intermediate view is that if no witness can identify the item as the instrumentality the perpetrator used, the trial judge may admit the article only if there is a strong showing of similarity.

¹⁴⁸ See proposed Federal Rule of Evidence 403. The Rule permits the trial judge to exclude logically relevant evidence if the evidence's probative value is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

¹⁴⁹ 228 Or. 496, 364 P.2d 783 (1961).

¹⁵⁰ *Id.* at 501, 364 P.2d at 785.

The third, majority view is that the article is admissible if there is competent evidence that the article is similar to the perpetrator's instrumentality.¹⁵¹ The majority view represents a judgment that although the evidence might be prejudicial and somewhat remote, its logical relevance justifies its admission. If the article would have been a suitable instrumentality for the offense's commission, its discovery in the accused's possession strengthens the desired inference that the accused perpetrated the offense.¹⁵²

Although the courts subscribing to the majority view agree on the statement of the basic doctrine, they seem to disagree on three narrower issues.

The first issue they seem to disagree upon is the theory of admissibility. Some courts indicate that the evidence is admissible for solely illustrative purposes.¹⁵³ Other courts assert that the evidence is admissible for the purpose of showing that instrumentalities suitable for the offense's commission were available to the accused.¹⁵⁴ The latter view is sounder. The former view treats the proof as mere demonstrative evidence. An item of demonstrative evidence can be admitted for illustrative purposes even if the item has no connection whatsoever with the original incident or transaction.¹⁵⁵ Moreover, the former view overlooks the indis-

¹⁵¹ *State v. Rollins*, 271 So.2d 519 (La. 1973); *People v. Randolph*, 338 N.Y.S.2d 229 (1972); *Jackson v. State*, 486 S.W.2d 764 (Tex. Crim. App. 1972); *United States v. Johnson*, 401 F.2d 746 (2d Cir. 1968); *Futch v. State*, 376 S.W.2d 758 (Tex. Crim. App. 1964); *People v. Riser*, 47 Cal.2d 572, 305 P.2d 1 (1957).

¹⁵² *People v. Moore*, 42 Ill.2d 78, 246 N.E.2d 299 (1969); *People v. Miller*, 40 Ill.2d 154, 238 N.E.2d 407 (Ill. 1968), *cert. denied*, 393 U.S. 961 (1968).

¹⁵³ *State v. Mays*, 7 Ariz. App. 90, 436 P.2d 482 (1968); *People v. Player*, 161 Cal.App.2d 360, 327 P.2d 83 (Cal. 1958).

¹⁵⁴ *State v. Dillon*, 161 N.W.2d 788 (Iowa 1968).

¹⁵⁵ C. McCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* § 212 (2d ed. 1972):

It is today increasingly common to encounter the offer of tangible items which are not contended themselves to have played any part in the history of the case, but which are instead tendered for the purpose of rendering other evidence more comprehensible to the trier of fact. Examples of types of items frequently offered for purposes of illustration and clarification include models, maps, photographs, charts, and drawings. If an article is offered for these purposes, rather than as real or original evidence, its specific identity or source is generally of no significance whatever. Instead, the theory justifying admission of these exhibits requires only that the item be sufficiently explanatory or illustrative of relevant testimony in the case to be of potential help to the trier of fact.

putable fact that the evidence increases the rationality of the inference that the accused is the perpetrator.

The second issue is whether the item is admissible in the absence of a witness' personal testimony that it is similar to the instrumentality the perpetrator used. In some cases, the evidence has been admitted although such testimony was lacking.¹⁵⁶ In these cases, one witness described the perpetrator's instrumentality, another witness described the instrumentality found in the accused's possession, and the finders of fact were permitted to draw the inference of similarity. In other cases, the proponent displayed the article found in the accused's possession to an eyewitness to the offense; and the eyewitness gave affirmative testimony that the item appeared to be similar to the instrumentality the perpetrator used.¹⁵⁷ Although the cases differ on their facts, it is doubtful that the courts are in genuine disagreement. In the cases in which there was personal testimony that the article was similar, the courts simply did not address the question whether the item would have been admissible in the absence of such testimony. If they had addressed the question, they probably would have held that if the other evidence of similarity is sufficiently persuasive, personal testimony is unnecessary. It is the fact of similarity which renders the evidence logically relevant; and in principle, the fact of similarity admits of both direct and circumstantial proof. Direct, personal testimony of similarity is unnecessary.

The third issue is whether the item is admissible only if it is found in the accused's possession at the time of arrest. In many cases, the courts refer only to items found in the accused's possession at the time of his arrest.¹⁵⁸ However, there is a line of California cases that state the rule more broadly; they refer to items found in the accused's possession "some time after the crime."¹⁵⁹ Again, it is doubtful that there is a genuine dispute. In the cases in which the courts referred to items found in the

¹⁵⁶ In *Barnwell v. Rundle*, 337 F.Supp. 688 (E.D.Pa. 1972), the victim testified that the accused struck him on the head with a rifle, but there is no indication in the opinion that the victim testified that the rifle found in the accused's possession was similar to the one the accused used to strike him with.

¹⁵⁷ *State v. Rollins*, 271 So.2d 519 (La. 1973); *People v. Randolph*, 338 N.Y.S.2d 229 (Sup. Ct. 1972); *Jackson v. State*, 486 S.W.2d 764 (Tex. Crim. App. 1972); *People v. Miller*, 22 App. Div.2d 958, 256 N.Y.S.2d 110 (1964); *Futch v. State*, 376 S.W.2d 758 (Tex. Crim. App. 1964).

¹⁵⁸ See, e.g., *People v. Hall*, 19 Mich. App. 95, 172 N.W.2d 478 (1969).

¹⁵⁹ *People v. Linday*, 227 Cal. App.2d 482, 38 Cal. Rptr. 755 (1964); *People v. Riser*, 47 Cal.2d 572, 305 P.2d 1 (1957).

accused's possession at the time of arrest, the courts used the language to uphold the item's admission; in each case, the item was found in the accused's possession at the time of his arrest. In each case, it was unnecessary for the court to reach the question whether the article would have been admissible if the item had been discovered at another time. If the courts had reached that question, they probably would have held that unless the time and place of discovery were very remote, an article discovered at a time other than arrest is admissible. The probative fact is the article's discovery in the accused's possession. The discovery's proximity to or remoteness from the time of the offense's commission determines the probative value of the discovery; in and of itself, the time of the arrest is irrelevant.

2. Clothing

There is a small body of authority that if the accused is found in possession of clothing similar to that worn by the perpetrator, the clothing is admissible. In *United States v. Chibbaro*,¹⁶⁰ the court upheld the admission of a hat similar to the hat a bank robber wore. Similarly, in *State v. Moore*,¹⁶¹ the court upheld the admission of pants resembling those of a rapist.

3. Fruits of Crime

The courts have divided on the admissibility of evidence similar to the stolen property.

Some courts take the position that even if a witness cannot positively identify the items in the accused's possession as the stolen property, the items are admissible if they are similar to the stolen property.¹⁶² For example, in *State v. Palmer*,¹⁶³ the trial judge admitted a suitcase, pants, shirts, footlocker, and Fruit-of-the-Loom underwear found in the accused's possession. No witness was capable of positively identifying the property as the stolen items. However, the court upheld the items' admission because "the burglarized establishments did have items of the same type and brand taken from their stock."¹⁶⁴ In effect, these courts adopt logical relevance as the standard of admissibility. The evi-

¹⁶⁰ 361 F.2d 365 (3rd Cir. 1966).

¹⁶¹ 353 S.W.2d 712 (Mo. 1962). See also *Caldwell v. United States*, 338 F.2d 385 (8th Cir. 1964) (hat and overcoat).

¹⁶² *State v. Ulriksen*, 504 P.2d 232 (Kan. 1972); *State v. Withers*, 504 P.2d 1151 (Wash. 1972); *State v. Dess*, 154 Mont. 231, 462 P.2d 186 (1969).

¹⁶³ 251 La. 759, 206 So.2d 485 (1968).

¹⁶⁴ *Id.* at 767, 206 So.2d at 488.

dence is logically relevant because it strengthens the inference that the accused is the thief.

Other courts demand more than mere logical relevance. These courts require persuasive proof of the identity between the items found in the accused's possession and the stolen property. In *Dawson v. State*,¹⁶⁵ the accused was charged with burglary. Some boots had been stolen during the burglary. The police found similar boots in the accused's possession. The trial judge admitted the boots. The appellate court held that the boots' admission was error. The court declared that:

We are . . . of the opinion the boots found were not shown to have been the identical ones stolen at the time of the commission of the burglary.¹⁶⁶

One court emphatically stated that if the State uses proof of the accused's possession of allegedly stolen goods to prove that the accused is the thief, "the identity of the stolen articles (must) be indisputably established."¹⁶⁷

Perhaps it would be useful to distinguish between (1) cases where the possession or receipt of stolen goods is an essential element of the offense;¹⁶⁸ and (2) cases where the prosecution uses proof of the possession of allegedly stolen goods as circumstantial evidence of a separate substantive offense.¹⁶⁹ In the former cases, it is arguable that the gravamen of the charge justifies the imposition of a requirement of proof of identity rather than mere similarity. It is true that even if the judge admits merely similar items, he would instruct the jurors that the prosecution has the ultimate burden of proving the items' identity beyond a reasonable doubt; but the substantive law makes the items' identity such a critical issue in the case that as a matter of discretion, the judge should be permitted to demand proof of identity. In the latter cases, the evidence forms a link in the chain of proof; but the evidence does not have the central importance it has in the former cases. In the latter cases, the judge could accept a showing of mere similarity, that is, logical relevance. The judge would

¹⁶⁵ 43 Ala. App. 254, 188 So.2d 283 (1966).

¹⁶⁶ *Id.* at 255, 188 So.2d at 285.

¹⁶⁷ *Jones v. State*, 106 Ga. App. 814, 127 S.E.2d 855, 856 (1962).

¹⁶⁸ See MANUAL FOR COURTS-MARTIAL, 1969 (REV. ED.), app. 6c, specification 179.

¹⁶⁹ MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (REV. ED.), para. 138a states that: "When it is shown that a person was in possession of recently stolen property or a part thereof, it may be inferred that the person stole the property. . . ."

weigh the cumulative probative value of all evidence, including the articles similar to the stolen property, when he ruled on a demurrer to the evidence or a motion for a finding of not guilty, directed verdict, or acquittal. To date, no court has recognized or utilized a distinction between the two types of cases.

E. OTHER CIRCUMSTANTIAL PROOF OF THE IDENTITY OF REAL EVIDENCE

Only the first method, proof that the item is readily identifiable, involves the use of direct evidence of the item's identity. All the other methods entail the use of circumstantial evidence. The second, third, and fourth methods have become widely accepted. However, the acceptance of those circumstantial methods of proof does not preclude other circumstantial methods. In the final analysis, the only absolute limitation on the use of circumstantial evidence is the outer boundary of rational inference. If a given set of circumstances creates a permissive, rational inference of the item's identity, the circumstances should be held to be an adequate foundation for the item's admission.

*Peden v. United States*¹⁷⁰ illustrates the use of circumstantial evidence to authenticate an item of real evidence. In *Peden*, a police informer was to purchase narcotics from the accused. A policewoman searched the informer before the informer left to meet the accused. The search revealed that there were no narcotics on the informer's person. The police kept the informer under constant visual surveillance. The informer met the accused. The police again searched the informer immediately after the meeting. The second search produced a vial of morphine. At the trial, the prosecution offered the vial in evidence. The accused objected that the prosecution could not identify the vial as a vial the accused had transferred to the informer. The prosecution elicited testimony as to the two searches, but the informer did not appear to testify. There was no direct evidence that the informer had received the vial from the accused. Nevertheless, the trial judge admitted the vial. The appellate court sustained his ruling. Even though the evidence did not fall within any of the settled methods of identifying real evidence, there was a compelling inference from the circumstantial evidence that the accused had given the informer the vial which was discovered during the second search.

¹⁷⁰ 223 F.2d 819 (D.C. Cir. 1955), cert. denied, 359 U.S. 971 (1959).

If counsel can invoke one of the widely-accepted methods of identifying his exhibit, he can virtually ensure its admission. However, the proponent should not feel constrained by the accepted methods. Whenever counsel can prove a set of circumstances creating an inference of the item's identity, he should unhesitatingly rely upon those circumstances as the foundation for the item's admission.

III. RELATED EVIDENTIARY PROBLEMS

Trial practitioners face several recurrent problems in their efforts to lay a foundation for the admission of items of real evidence. The remainder of this article attempts to identify and discuss some of those problems.

A. THE INTRODUCTION OF THE CHAIN OF CUSTODY RECEIPT AS SUBSTANTIVE EVIDENCE

When Military Policemen and C.I.D. investigators acquire an item of real evidence, they ordinarily execute a DA Form 19-31, Receipt for Property. The form is a detailed record of the date the evidence custodian received the item, the recipient custodian's identity, the date the custodian relinquished the item, the identity of the person the custodian relinquished the item to, and the purpose of the transfer.¹⁷¹ This information is obviously helpful to the item's proponent. In fact, if the item's custodians are unavailable to give personal testimony, the receipt's introduction as substantive evidence might be absolutely essential to the item's admission.

Evidence custodians routinely prepare these receipts in the course of their official duties.¹⁷² Consequently, the trial counsel can argue that the receipt qualifies as a business entry or an official record.¹⁷³ When the trial counsel makes this argument, the defense counsel ordinarily rejoins that the receipt is inadmissible because it was prepared primarily for purposes of prosecution. The Manual expressly provides that even if a document would otherwise qualify as a business entry or official record, the document is incompetent hearsay if it was prepared primarily for purposes of prosecution.¹⁷⁴

¹⁷¹ Army Reg. No. 195-5, figure 2-3 (15 Nov. 1970).

¹⁷² See generally Army Reg. No. 195-5 (15 Nov. 1970).

¹⁷³ MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (REV. ED.), paras. 144a-c.

¹⁷⁴ *Id.* at para. 144d.

At first, it might seem almost self-evident that a Military Police property receipt is prepared primarily for purposes of prosecution. Law enforcement officials are as cognizant as counsel of the importance of real evidence in criminal prosecutions. Military law enforcement officials are trained to be constantly aware of the necessity to "preserve items of possible evidentiary value."¹⁷⁵ Moreover, when illustrating the prohibition of the admission of documents prepared primarily for purposes of prosecution, the Manual specifically mentions Military Police reports such as the DA Form 19-32:

Thus, a report of a military policeman concerning his investigation of an offense and the statements of witnesses accompanying the report are not admissible under either of these exceptions as evidence of the truth of the facts stated therein. . . .¹⁷⁶

Realistically, it must be conceded that one of the primary reasons for preparing Military Police property receipts is that the receipt may subsequently be useful in a criminal prosecution.

There is only one military case in point, *United States v. Bowser*.¹⁷⁷ In *Bowser*, an Air Force Board of Review decision, the court president permitted the trial counsel to introduce an OSI Form 67 Chain of Custody Receipt as an official record. On appeal, the accused argued that the receipt was inadmissible because it had been prepared primarily for purposes of prosecution. The Board summarily rejected the accused's argument.

While some military trial judges have followed *Bowser*, others have refused to do so. The judges who refuse to follow *Bowser* seem to be of the opinion that the Air Force Board gave the Manual language, "made principally with a view to prosecution,"¹⁷⁸ an unrealistically narrow reading.

To date, the Court of Military Appeals has not passed on the question of the admissibility of a Military Police property receipt as substantive evidence. Technically, the question is unsettled. However, it is suggested that *Bowser* is a stronger precedent than many military trial judges seem to think.

It must be remembered that the military courts have generally given the Manual language a restrictive interpretation. The issue has arisen most frequently in AWOL prosecutions. In such prosecutions, the trial counsel customarily introduces a DA Form 188

¹⁷⁵ Leeson AA 126: Crime Scene Protection, Advanced Officer Group, United States Army Military Police School (August 1972).

¹⁷⁶ MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (REV. ED.), para. 144d.

¹⁷⁷ 33 C.M.R. 844 (AFBR 1963).

¹⁷⁸ MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (REV. ED.), para. 144d.

SEARCH INCIDENT TO APPREHENSION

Extract Copy of Morning Report to prove the unauthorized absence. As its title suggests, the DA Form 188 is an extract of original DA Form 1 Morning Report. The forms are admitted into evidence under the official record exception to the hearsay rule.¹⁷⁹ Since the forms are admitted as official records, they are subject to the attack that they have been prepared principally for prosecution purposes. In a few extraordinary cases, the courts have sustained the attacks and excluded the reports. In *United States v. Jewell*,¹⁸⁰ the Army Court of Military Review held that a morning report extract, prepared during a trial recess, was inadmissible. However, such holdings are the exception rather than the rule. In the overwhelming majority of cases, the military courts have rejected defense arguments that morning reports were prepared principally for purposes of prosecution; the courts have rejected the arguments even where the originating official admitted that he transmitted the information "with perhaps an eye towards prosecution. . . ." ¹⁸¹

More importantly, in its latest pronouncement on the subject, the Court of Military Appeals interpreted the Manual language even more narrowly than the Air Force Board did in *Bowser*. In *United States v. Evans*,¹⁸² the accused was charged with a narcotics offense. The trial counsel introduced a North Carolina State Bureau of Investigation laboratory report. The report established the contraband character of the substance found in the accused's possession. On appeal, the accused argued that the police laboratory report had been prepared principally for purposes of prosecution. The Court rejected the argument. In rejecting the argument, the Court stated that:

We are not persuaded that a chemical examiner's report is made principally for purpose of prosecution. The report has that ultimate effect if the analysis establishes the forbidden nature of the substance. On the other hand, a negative report eliminates the possibility of prosecution. Just as a pathologist's report is admissible because it is not his function "to determine that the death was caused by any particular person or even that the death was the result of any unlawful conduct," Manual, supra, paragraph 144d, so also should the examiner's report be admissible because his duty ends with the examination of the sample submitted and he has no responsibility to determine either that its possession was illegal or that the accused was the guilty party involved. He does no more

¹⁷⁹ *Id.* at para. 144b.

¹⁸⁰ — C.M.R. — (CM 426627, 16 August 1972).

¹⁸¹ *United States v. Menard*, 39 C.M.R. 575, 580 (ABR 1968). See J.A.G. School, U.S. Army, School Text, Military Criminal Law, The Law of AWOL § 4-4 (May 1973).

¹⁸² 21 U.S.C.M.A. 579, 45 C.M.R. 353 (1972).

than seek to establish an intrinsically neutral fact, the identity of the substance itself.¹⁸³

On the basis of *Evans*, the trial counsel can contend that the evidence custodian's position is analogous to that of the chemical examiner; by preparing a chain-of-custody receipt, the custodian "does no more than seek to establish an intrinsically neutral fact, the identity of the substance itself."¹⁸⁴ In most cases, this contention would be valid. In the typical drug case, where a chemical analysis is necessary to establish the contraband character of the seized substance, the custodian's act of preparing the receipt is as neutral an act as the chemist's act of analyzing the substance. Indeed, since the preparation of the receipt might help protect the Government against subsequent claims liability, the preparation of the receipt is arguably less prosecution-oriented than the chemical analysis. However, the trial counsel probably cannot invoke *Evans* where the contraband character of the item should have been obvious to the evidence custodian from mere visual inspection. Suppose that evidence custodian is assigned to an installation where there is a valid general regulation, proscribing the possession of sawed-off shotguns. If the custodian prepares a property receipt which will help to trace a sawed-off shotgun to the accused, the custodian can hardly argue that his act is intrinsically neutral. If the article's contraband character is obvious, the custodian must realize that by connecting the accused to the article, he does more "than seek to establish an intrinsically neutral fact. . . ." ¹⁸⁵

We cannot predict whether the Court of Military Appeals will retreat from the broad language it used in *Evans*. However, until and unless the Court retreats, *Evans* will probably have the effect of reinforcing *Bowser*.

B. TESTIMONY BY THE TRIAL COUNSEL

In some rare cases, it becomes necessary for the trial counsel to testify to the chain of custody.¹⁸⁶ Both the old Canons of Professional Ethics and the new Code of Professional Responsibility discourage counsel from testifying in a case in which they appear.¹⁸⁷ The question arises whether the trial counsel's testimony

¹⁸³ *Id.* at 582, 45 C.M.R. at 356.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *See, e.g.*, United States v. Cathey, 7 C.M.R. 609 (AFBR 1952).

¹⁸⁷ ABA CODE OF PROFESSIONAL RESPONSIBILITY: Disciplinary Rules 5-101 and 5-102. ABA CANONS OF PROFESSIONAL ETHICS No. 19.

as to chain of custody is a ground for reversal. The Court of Military Appeals faced that question in *United States v. Whitacre*.¹⁵⁸ The Court answered the question in the negative. However, the Court did not announce an absolute rule that the trial counsel's testimony can never constitute a ground for reversal. The Court emphasized that it was limiting its holding to the facts of the case before it:

Here the prosecutor did not pit his credibility against that of any other witness. He merely stated he had taken custody of the items of Government property which were turned over to him. It was other evidence which indicated the items were the same articles seized at accused's apartment. . . . Furthermore, in arguing on the merits, trial counsel did not attempt to capitalize on his own testimony. Rather, he simply commented that the proof showed a chain of custody from the time the agents recovered the articles from the accused until they were offered in evidence.¹⁵⁹

Thus, the Court limited its holding to the fact situation where (1) there is no serious factual dispute concerning chain of custody and (2) the trial counsel refrains from expressly referring to his testimony in closing argument.

In the *Whitacre* decision, the Court made no reference to the Canons of Professional Ethics. At the time of the decision, neither the Code nor the Manual nor any Army Regulation expressly applied the Canons to military counsel. However, Change 10 to AR 27-10 now provides that:

The . . . Code of Professional Responsibility of the American Bar Association . . . (is) applicable to judges and lawyers involved in court-martial proceedings in the Army.¹⁶⁰

Even before the Change, the military courts indicated a willingness to apply and enforce the new Code and its implementing Standards.¹⁶¹ Disciplinary Rule 5-102 of the Code states a general rule that a lawyer must withdraw from any case in which it becomes obvious that he will have to testify.¹⁶² The rule is subject to exceptions stated in Disciplinary Rule 5-101.¹⁶³ In pertinent part, those exceptions permit an attorney to remain in the case after testifying:

- (1) If the testimony will relate solely to an uncontested matter.

¹⁵⁸ 12 U.S.C.M.A. 345, 30 C.M.R. 345 (1961).

¹⁵⁹ *Id.* at 349, 30 C.M.R. at 349.

¹⁶⁰ Army Reg. No. 27-10, para. 2-32 (23 Feb. 1973).

¹⁶¹ See, e.g., *United States v. Perez*, — C.M.R. — (SPCM 7929, 10 October 1972). (The court invoked the ABA Standards' provisions on representation of multiple defendants.)

¹⁶² ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 5-102.

¹⁶³ *Id.*

61 MILITARY LAW REVIEW

- (2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.¹⁹⁴

On its facts, *Whitacre* falls within exception (1).

By virtue of Change 10 to AR 27-10, Disciplinary Rules 5-101 and 5-102 apply directly to military counsel. The military courts might very well enforce those rules by treating violations as prejudicial error. If the situation compels the trial counsel to testify as to chain of custody, he would be wise to withdraw from the case or seek an express waiver from the accused. Certainly, before testifying, the counsel should ensure that his testimony will fall within one of the exceptions listed in Disciplinary Rule 5-101. The trial counsel should inquire of the defense counsel whether the accused intends to contest the issue of chain of custody. If the defense counsel assures the trial counsel that the accused does not intend to contest that issue, the trial counsel's testimony and subsequent participation in the case would be permissible.

C. THE PRESUMPTION OF REGULARITY

As previously stated, if the proponent must prove a chain of custody, he must account for the item's safekeeping and handling by the links in the chain.¹⁹⁵ The links are often public employees and officials. There is a common presumption that public officers properly execute their duties.¹⁹⁶ The proponent can argue that the presumption applies to the public officials' handling of the item.

A cursory reading of the decided cases might lead the reader to conclude that there is a sharp split of authority on the issue whether the presumption applies to public officials' handling of evidence. Some cases contain statements to the effect that the proponent cannot use the presumption to "supply missing links in the chain."¹⁹⁷ However, most of the cases hold that the presumption "attaches to the handling of evidence within the control of public officials."¹⁹⁸ The military cases follow the majority view.¹⁹⁹ While the cases seem conflicting, the conflict is illusory. In the leading case refusing to apply the presumption, the pro-

¹⁹⁴ ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 5-101.

¹⁹⁵ Section I.B.4, *supra*.

¹⁹⁶ MANUAL FOR COURTS-MARTIAL, 1969 (REV. ED), para. 138a.

¹⁹⁷ *Bauer v. Veith*, 374 Mich. 1, 3, 130 N.W.2d 897, 899 (1964). See also 29 Am.Jur.2d *Evidence* § 775 (1967).

¹⁹⁸ *West v. United States*, 359 F.2d 50, 55 (8th Cir. 1966), *cert. denied*, 385 U.S. 867 (1966).

¹⁹⁹ *United States v. Martinez*, 43 C.M.R. 434, 438 (ACMR 1970).

ponent's showing did not satisfy the normal standard of proof for chain of custody.²⁰⁰ In most of the cases purporting to apply the presumption, the proponent's showing satisfied the normal standard; and the court referred to the presumption when the defense view raised the spectre of possible tampering.²⁰¹ In effect, the cases applying the presumption (1) treat the proponent's showing as the foundational facts giving rise to the presumption and (2) use the term, "presumption," in the technical sense of a device for shifting the burden of going forward.²⁰² Once the proponent has presented a showing satisfying the ordinary standard of proof, he gains the benefit of the presumption; and the accused must then assume the burden of going forward with evidence of tampering.²⁰³ It is believed that even the jurisdictions recognizing the presumption would not apply it if the proponent's circumstantial showing did not satisfy the normal standard of proof. In short, the cases can be reconciled on their facts.

A few civilian jurisdictions have extended the presumption to private persons in responsible positions such as doctors and nurses.²⁰⁴ The military courts have not as yet recognized this extension.

D. THE PRESUMPTION OF PROPER HANDLING OF MAILED ARTICLES

Policemen often seize articles at location far from police laboratories. If the articles require chemical analysis, it is standing

²⁰⁰ *Bauer v. Veith*, 374 Mich. 1, 130 N.W.2d 897 (1964) (There was no competent evidence that the body fluid had been extracted from the proper body).

²⁰¹ See, e.g., *United States v. Marks*, 82 F.Supp. 459 (D.Conn. 1940) (The circumstantial evidence, including the markings the arresting officer placed on the packages, was sufficient to support an inference that the chemist received and analyzed the same packages the officer seized from the accused).

²⁰² C. McCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* §§ 345-46 (2d ed. 1972); U.S. DEP'T OF ARMY PAMPHLET No. 27-2, *ANALYSIS OF CONTENTS, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969, REVISED EDITION* (JULY 1970) p. 27-1. A true presumption can be regarded as a procedural device for shifting the burden of going forward to the opponent. The presumption arises when the proponent sustains his burden or going forward to the extent that he subjects the opponent to the possibility of a preemptory ruling against the opponent.

²⁰³ In *Gallego v. United States*, 276 F.2d 914, 917 (9th Cir. 1960), the court stated that it would apply the presumption "[w]hen no evidence indicating otherwise is produced. . . ." This language is still another indication that the courts are using the term, "presumption," as a shorthand expression for their decision to shift the burden of going forward to the opponent.

²⁰⁴ *Gass v. United States*, 416 F.2d 767 (D.C. Cir. 1969); *Pasadena Research Laboratories v. United States*, 169 F.2d 375 (9th Cir. 1948), cert. denied, 335 U.S. 853 (1948).

operating procedure to send the article to the laboratory by registered mail.²⁰⁵ If the proponent can prove that a link in the chain mailed the article to the next link and that the addressee link received the article, the proponent does not have to make any affirmative showing of the postal employees' handling of the article.²⁰⁶ The proponent need not identify the postal employees who handled the article or call those employees as witness.²⁰⁷ The courts have been willing to presume that the postal employees properly execute their duties and that the employees deliver the article in substantially the same condition it was in when it was mailed.²⁰⁸ The courts have applied this presumption to registered,²⁰⁹ first class,²¹⁰ and special delivery mail.²¹¹

The courts permit the proponent to use the presumption to bridge the gap between mailing and delivery to the addressee. However, the courts have refused to allow the proponent to use the presumption to bridge the larger gap between a custodian's mailing and his receipt of a report from the laboratory. In *Kansas v. Foster*,²¹² the officer mailed a sample to the police laboratory. By reply mail, he received a laboratory report of the sample's analysis. There was no other competent evidence that the chemist had analyzed the mailed sample. The court held that the showing of chain of custody was insufficient.

IV. CONCLUSION

This article does not purport to be an exhaustive analysis of the identification of original, real evidence. Its principal purpose has been to identify the analytically separate methods of identifying real evidence. The listing of methods should enable counsel to better discern the distinct requirements and discrete probative value of each method. In planning his foundational evidence, the proponent should use the technique of combining as many methods as possible in his line of questioning. Having laid his foundation in this fashion, the proponent can make several, alternative argu-

²⁰⁵ Army Reg. No. 195-5, para. 2-8c(2) (c) (15 Nov. 1970).

²⁰⁶ *People v. Jamison*, 29 App. Div.2d 973, 289 N.Y.S.2d 299 (1968).

²⁰⁷ *Id.*

²⁰⁸ *Rodgers v. Commonwealth*, 197 Va. 527, 90 S.E.2d 257 (1955).

²⁰⁹ *Gomez v. Texas*, 486 S.W.2d 338 (Tex. Crim. App. 1972); *United States v. Baca*, 444 F.2d 1292 (10th Cir. 1971), *cert. denied*, 404 U.S. 979 (1971).

²¹⁰ *State v. Jordan*, 14 N.C.App. 453, 188 S.E.2d 701 (1972).

²¹¹ *Louisville & N.R. Co. v. McCoy*, 261 Ky. 435, 87 S.W.2d 921 (1935).

²¹² 198 Kan. 52, 422 P.2d 964 (1967).

ments for the admission of his evidence. The greater the number of arguments the proponent avails himself of, the greater the likelihood that the judge will admit his evidence. Moreover, if the proponent understands the nature of the various methods, he will not be constrained by the orthodox methods; he will naturally and justifiably resort to the argument that the cumulative probative effect of his circumstantial evidence creates a permissive inference of the article's identity.

The law governing the identification of real evidence exemplifies the common law's skepticism and rationality. On the one hand, the law steadfastly insists that the proponent authenticate his real evidence; it refuses to accept his evidence at face value. On the other hand, the law does not irrationally limit the proponent to any particular mode of proof; the law will accept any persuasive, circumstantial showing. A practitioner who understands the law's skepticism understands why, of necessity, chains of proof are sometimes long. However, if he appreciates the fact that all the methods of identifying real evidence are bottomed on simple rationality, he knows that even a long chain of proof need not be tortuous.

BOOK REVIEWS

The Conscience of a Lawyer, David Mellinkoff
West Publishing Co., 1973

The military defense counsel often can find himself at odds with his "boss," the Staff Judge Advocate. His resolution of that problem may well be critical to his client and to the administration of military justice. The role of the defense counsel — the counsel for the accused — is a difficult one to pin down with precision. But because he is "counsel for the accused" he is often looked at warily as some strange breed more akin to the criminal than to the law. At times, his actions on behalf of his client are viewed by his superiors as "unethical" or "unprofessional" because they believed the accused is guilty and should be convicted and punished without question. The conflict is thus drawn between the moral and legal questions of guilt.

An article appeared recently in *The Washington Post*¹ discussing the work and social plight of the criminal defense lawyer. It looked at the misconception that a criminal lawyer is no better than his client, and countered with the observation that many nonfelonious Americans find it necessary to call upon the criminal defense lawyer when they find themselves "sucked into the criminal justice system." The criminal lawyer is pictured as a man of humble origins who worked his way through law school and who accepts the label of "outcast" because he believes he is the champion of causes, a la "Judd for the Defense."

This general view of the defense counsel exists in the military community. Many Commanders and Staff Judge Advocates see the defense counsel as a threat to good order and discipline, or as the apostle of the legal "technicality" which defeats the Army's needs. For both the defense counsel (who needs to know his role) and the senior judge advocate (who needs to understand the defense counsel's role), *The Conscience of a Lawyer* is a valuable book.

An excellent blend of history, legal writings and story-telling, Mellinkoff's work is as entertaining as it is informative, and

¹ The Washington Post, Feb. 18, 1973, at E-1, col. 4.

thus is a far cry from being a dry rehash of ethics opinions and case commentaries. Only one case is considered in depth — the English murder trial of *Regina v. Courvoisier*² — and it is presented in a perceptive, journalistic manner reminiscent of Jim Bishop's classic *The Day Lincoln was Shot*. It is here that the historical perspective comes into play, as Mellinkoff recounts the passage of the Prisoner's Counsel Bill in 1836, ending centuries of English criminal practice wherein the court was counsel for the accused. *Courvoisier's Case*, coming only four years later, raised all the horrors predicted in the debate on the bill. Particularly, it revealed a lawyer urging the cause of a man who had secretly confessed his guilt. This horrified many nineteenth century English moralists who saw justice as a search for truth in which the guilty man either pleads his guilt or holds his peace while the prosecutor conducts the search. This view obscures the fact that a man is entitled to what "the law giveth him" and that the lawyer's truths are the law and the evidence, not an absolute "Truth" or the guilt feeling of an individual accused.

Herein lies the dilemma for the lawyer: How do you support a cause which you know to be bad? Mellinkoff gives Johnson's reply that "you do not know it to be good or bad till the Judge determines it."³ Yet Mellinkoff does not stop with this bit of rationalization of the defense lawyer's quandary. Looking at the English and American writers of legal ethics and the precursors of the ABA Code of Professional Responsibility, he finds little comfort for the defense lawyer trying to determine his moral obligation in the defending of a guilty man. Even the present ABA Code and the American College of Trial Lawyers' Code of Trial Conduct provide limited guidance. One of the more interesting aspects of Mellinkoff's examination of the English and American traditions is that the military defense counsel's role as appointed defender is more analogous to the role of the English barrister who, unlike his American cousin,⁴ is bound to take the cases that come to him.

Courvoisier's Case serves as a jumping off point for the discussion, often through the writings of various legal scholars, of a wide range of topics. Mellinkoff reveals the public opinion reaction and the religious influence on the issue of defending a

² 173 Eng. Rep. 869 (1840).

³ 2 BOSWELL'S LIFE OF JOHNSON 47 (G.B. Hill ed. 1887).

⁴ See Ethical Consideration 2-29, ABA CODE OF PROFESSIONAL RESPONSIBILITY (1969).

guilty man. He considers the problem of how far a lawyer might go in his defense in casting the guilt on another, discrediting the truthful witness (for he, like all of us, has some flaw), or in commenting on his personal belief in a client's case. The varying opinions of legal scholars in these areas give greater understanding to the common disdain the public has for the lawyer (whose profession they rarely understand), which is the commentary for Mellinkoff's introduction.

As his introduction is depressing for the lawyer, so is his conclusion a sign of hope for the lawyer and the subjects of the criminal justice system. He states:

The lawyer, as lawyer, is no sweet kind loving moralizer. He assumes he is needed, . . . [and is] a man with a strange devotion to his client. . . . It is a devotion that cannot be dismissed as the natural product of a fee. . . . [A]s a profession, the independent lawyer like the free press is unpopular with those who consider democracy only an inefficiency and other people's liberties an inconvenience. . . . [T]he lawyer's mission is the nonetheless awesome task of trying to make a reality of equality before the law.

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61 MILITARY LAW REVIEW

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