

52ND MILITARY JUDGE COURSE

SEARCH AND SEIZURE

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Standing = "Adequate Interest," Mil.R.Evid. 311(a)(2): Prop Int or Exp of Priv

Motions: Prior to arraignment or waived.

Burden: Typically on Gov't by Preponderance. Clear and Convincing if
Consent(314(e)(5))/Subterfuge(313(b))/Eyewitness Identification(321(d)(1)).

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N/A if: Private (vs. Gov't) Search;

N/A if search by Foreigners (with no U.S. participation);

N/A if no Reas Expectation of Privacy (**REP**).

REP Test: 1) Subjectively think area is private 2) Subjective view of privacy is
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Authority over person, place, or thing.

PC Test: Totality of Circumstances = A reasonable belief that the person, or property
is located in the place or on the person to be searched.

Staleness - Information must be fresh.

Neutral and detached: authorizing person must be neutral and detached.

Reasonable: Search must be reasonable in execution.

LT COL STEPHEN R. STEWART, USMC
MARCH 2009

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Exigent Circumstances - evidence is lost or destroyed if wait for W/SA.

Mil.R.Evid. 315(g).

Pretextual Arrests & Traffic Stops. Test: Objective. *Could* police stop or arrest; ignore real motivations for the stop or arrest.

Cars: Movable cars may be searched if PC as to car. Even if time for W/SA, no W/SA Req'd. S entire car, incl trunk. Mil.R.Evid. 315(g)(3).

Plain View. Seize if: 1) PC it's contraband 2) prior lawful intrusion 3) in plain view.

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Consent. Test: Voluntary under totality of circumstances; withdrawal at any time possible; Gov't Burden = Clear and Convincing.

Search Incident to Appr (I to A): S w/i lunging distance. Mil.R.Evid. 314(g).

Search of Car I to A: S entire passenger cabin & containers, NOT trunk. Mil.R.Evid. 314(g)(2).

Stop & Frisk: limited & brief intrusion based on Reasonable Suspicion (RS).

RS = specific and articulable facts, together with rational inferences drawn from those facts, which reasonably suggest crime/criminal activity.

Frisk: patdown based on officer safety. Test: reasonable belief person is armed and dangerous.

Plain Feel: may seize contraband during frisk if readily apparent - NO manipulation of object allowed.

Inspections: Subterfuge if 1) after rpt & not scheduled 2) specific people targeted 3)for substantially different intrusions. STD: Clear and convincing.

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Exclusion: evidence resulting from unlawful search or seizure is inadmissible.

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52ND MILITARY JUDGE COURSE

SEARCH AND SEIZURE

Outline of Instruction

- I. INTRODUCTION.** *The Fourth Amendment protects against unreasonable searches and seizures and requires warrants to be supported by probable cause. Although there is debate as to whether it applies to military members, military courts act as if it does. The Fourth Amendment, its requirements, and exceptions, are codified in Military Rules of Evidence 311-317.*
- A. The Fourth Amendment. “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”
- B. The Fourth Amendment in the Military.
1. The Fourth Amendment applies to soldiers. *United States v. Stuckey*, 10 M.J. 347, 349 (C.M.A. 1981). *But see* Lederer and Borch, *Does the Fourth Amendment Apply to the Armed Forces?* 144 Mil. L. Rev. 110 (1994) (this article points out that the Supreme Court has never expressly applied the Fourth Amendment to the military).
 2. The balancing of competing interests is different in military society. A soldier’s reasonable expectation of privacy must be balanced against:

National security;

a. Military necessity (commander’s inherent authority to ensure the safety, security, fitness for duty, good order and discipline of his command);

- b. Effective law enforcement
- c. The Military Rules of Evidence (Mil. R. Evid.) codify constitutional law.
- d. Military Rules of Evidence that codify Fourth Amendment principles:
 - (1) Mil. R. Evid. 311, Evidence Obtained From Unlawful Searches and Seizures.
 - (2) Mil. R. Evid. 312, Body Views and Intrusions.
 - (3) Mil. R. Evid. 313, Inspections and Inventories in the Armed Forces.
 - (4) Mil. R. Evid. 314, Searches Not Requiring Probable Cause.
 - (5) Mil. R. Evid. 315, Probable Cause Searches.
 - (6) Mil. R. Evid. 316, Seizures.
 - (7) Mil. R. Evid. 317, Interception of Wire and Oral Communications.
- e. Which law applies -- recent constitutional decisions or the Military Rules of Evidence?
 - (1) General rule: the law more advantageous to the accused will apply. Mil. R. Evid. 103(a) Drafters' Analysis. MCM, App. 22.

- (2) Minority view: “These ‘constitutional rules’ of the Military Rules of Evidence were intended to keep pace with, and apply to the military, the burgeoning body of interpretive constitutional law . . . not to cast in legal or evidentiary concrete the Constitution as it was known in 1980.” *United States v. Postle*, 20 M.J. 632, 643 (N.M.C.M.R. 1985).
- (3) Some Military Rules of Evidence provide exceptions that permit application of recent constitutional decisions to the military. *See* Mil. R. Evid. 314(k) (searches of a type valid under the Constitution are valid in military practice, even if not covered by the Military Rules of Evidence).

II. LITIGATING FOURTH AMENDMENT VIOLATIONS. A person must claim that his own expectation of privacy was violated to assert a Fourth Amendment claim. The prosecution is required to disclose evidence seized from an accused prior to arraignment. The prosecution generally has the evidentiary burden (by a preponderance of evidence) that the search/seizure was proper.

A. Standing or “Adequate Interest.”

1. General rule. To raise a violation of the Fourth Amendment, the accused’s own constitutional rights must have been violated; he cannot vicariously claim Fourth Amendment violations of the rights of others.
 - a. *Rakas v. Illinois*, 439 U.S. 128, 134 (1978). Police seized sawed-off shotgun and ammunition in illegal search of car. Only owner was allowed to challenge admissibility of evidence seized. Defendant passenger lacked standing to make same challenge.

- b. *United States v. Padilla*, 508 U.S. 77 (1993). Accused lacked standing to challenge search of auto containing drugs driven by a conspirator in furtherance of the conspiracy, despite accused's supervisory control over auto.
 - c. *But see Brendlin v. California*, 127 S.Ct. 2400 (U.S. 2007). When police make a traffic stop, a passenger in the car, like the driver, is seized for Fourth Amendment purposes and so may challenge the stop's constitutionality.
 2. Lack of standing is often analyzed as lack of a reasonable expectation of privacy. *See United States v. Padilla*, 508 U.S. 77 (1993) and *United States v. Salazar*, 44 M.J. 464 (C.A.A.F. 1996).
- B. Motions, Burdens of Proof, and Standards of Review.
 1. Disclosure by prosecution. Prior to arraignment, the prosecution must disclose to the defense all evidence seized from the person or property of the accused that it intends to offer at trial. Mil. R. Evid. 311(d)(1). See Appendix A for sample disclosure.
 2. Motion by the defense. The defense must raise any motion to suppress evidence based on an improper search or seizure prior to entering a plea. Absent such a motion, the defense may not raise the issue later, unless permitted to do so by the military judge for good cause. Mil. R. Evid. 311(d)(2).
 3. Burden of proof. When a motion has been made by the defense, the prosecution has the burden of proving by a preponderance of the evidence that the evidence was not obtained as a result of an unlawful search or seizure or that some other exception applies. Mil. R. Evid. 311(e)(1).
 - a. Exception. Consent. Government must show by clear and convincing evidence that the consent to search was voluntary. Mil. R. Evid. 314(e)(5).

- b. Exception. “Subterfuge” Rule. If the rule is triggered, the prosecution must show by clear and convincing evidence that the primary purpose of the government’s intrusion was administrative and not a criminal search for evidence. Mil. R. Evid. 313(b).
 - c. Exception. Eyewitness Identification. If military judge determines identification is result of lineup conducted w/o presence of counsel, or appropriate waiver, subsequent identification is unlawful unless Gov’t can establish by clear and convincing evidence that eyewitness identification is not tainted. Mil. R. Evid. 321(d)(1).
4. Effect of guilty plea.
- a. A plea of guilty waives all issues under the Fourth Amendment, whether or not raised prior to the plea. Mil. R. Evid. 311(i).
 - b. Exception: conditional guilty plea approved by military judge with prior consent from the convening authority. R.C.M. 910(a)(2).
5. Appellate Standard of Review. For Fourth Amendment issues, the standard of review for a military judge’s evidentiary ruling is an abuse of discretion standard. *United States v. Owens*, 51 M.J. 204, 209 (C.A.A.F. 1999). Within this context, the abuse of discretion standard becomes a mixed question of fact and law. A military judge’s “[f]indings of fact will not be overturned unless they are clearly erroneous or unsupported by the record.” *Id.* A military judge’s conclusions of law are reviewed under the *de novo* standard. The appellate courts will reverse for an abuse of discretion only if “the military judge’s findings of fact are clearly erroneous or if his [or her] decision is influenced by an erroneous view of the law.” *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995).

III. APPLICATION OF FOURTH AMENDMENT. *For the Fourth Amendment to apply, there must be a search/seizure by a U.S. government official/agent. Furthermore, the person claiming protection must have a “reasonable expectation of privacy” in the thing/area searched or item seized. Determining what is a “reasonable expectation of privacy” is done on a case-by-case basis utilizing the test set forth in Katz v. United States, which states that a person claiming an expectation of privacy must show that 1) he actually believed he had such an expectation, and 2) society views the expectation as objectively reasonable.*

- A. Nongovernment Searches. The Fourth Amendment does not apply unless there is a *government* invasion of privacy. *Rakas v. Illinois*, 439 U.S. 128, 140-49 (1978).
1. Private searches are not covered by the Fourth Amendment.
 - a. Searches by persons unrelated to the government are not covered by the Fourth Amendment.
 - (1) *United States v. Jacobsen*, 466 U.S. 109 (1984). No government search occurred where Federal Express employees opened damaged package.
 - (2) *United States v. Hodges*, 27 M.J. 754 (A.F.C.M.R. 1988). United Parcel Service employee opened package addressed to accused as part of random inspection. Held: this was not a government search.
 - b. Searches by government officials not acting in official capacity are not covered by the Fourth Amendment.

- (1) *United States v. Portt*, 21 M.J. 333 (C.M.A. 1986). Search by military policeman acting in non-law enforcement role is not covered by the Fourth Amendment.
 - (2) *United States v. Daniels*, 60 M.J. 69 (C.A.A.F. 2004). Whether a private actor serves as an agent of the gov't hinges not on the motivation of the individual, but on the degree of the government's participation/involvement.
- c. Searches by informants are covered by the Fourth Amendment. *But see United States v. Aponte*, 11 M.J. 917 (A.C.M.R. 1981). Soldier "checked" accused's canvas bag and found drugs after commander asked soldier to keep his "eyes open." Held: this was not a government search because soldier was not acting as agent of the commander.
- d. Searches by AAFES detectives are covered by Fourth Amendment. *United States v. Baker*, 30 M.J. 262 (C.M.A. 1990). Fourth Amendment extends to searches by AAFES store detectives; *Baker* overruled earlier case law that likened AAFES personnel to private security guards.
2. Foreign searches are not covered by Fourth Amendment.
- a. Searches by U.S. agents abroad. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). Fourth Amendment does not apply to search by U.S. agents of foreigner's property located in a foreign country.
 - b. Searches by foreign officials.
 - (1) The Fourth Amendment is inapplicable to searches by foreign officials unless the search was "participated in" by U.S. agents. Mil. R. Evid. 311(c) and 315(h)(3).

- (a) “Participation” by U.S. agents does not include:
 - (i) Mere presence.
 - (ii) Acting as interpreter.
 - (b) *United States v. Morrison*, 12 M.J. 272 (C.M.A. 1982). Fourth Amendment did not apply to German search of off-post apartment, even though military police provided German police with information that led to search.
 - (c) *United States v. Porter*, 36 M.J. 812 (A.C.M.R. 1993). Military police officer participated in Panamanian search by driving accused to Army hospital, requesting blood alcohol test, signing required forms and assisting in administering test.
- (2) A search by foreign officials is unlawful if the accused was subjected to “gross and brutal maltreatment.” Mil. R. Evid. 311(c)(3).

B. No Reasonable Expectation of Privacy. The Fourth Amendment only applies if there is a reasonable expectation of privacy. *See Katz v. United States*, 389 U.S. 347 (1967) (holding that the Fourth Amendment protects people, not places).

- 1. For the expectation of privacy to be reasonable:
 - a. The person must have an actual subjective expectation of privacy; and,
 - b. Society must recognize the expectation as objectively reasonable.

2. Public view or open view. “What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.” *Katz v. United States*, 389 U.S. 347, 351 (1967).
 - a. Abandoned property. Mil. R. Evid. 316(d)(1).
 - (1) Garbage. *California v. Greenwood*, 486 U.S. 35 (1988). There was no expectation of privacy in sealed trash bags left for collection at curbside.
 - (2) Clearing quarters. *United States v. Ayala*, 26 M.J. 190 (C.M.A. 1988). There was no reasonable expectation of privacy in blood stains found in quarters accused was clearing when accused removed majority of belongings, lived elsewhere, surrendered keys to cleaning team, and took no action to protect remnants left behind.
 - (3) Voluntarily abandoned property. *United States v. Flores*, 64 M.J. 451 (C.A.A.F. 2007). An accused has no privacy interest in voluntarily abandoning his property prior to a search, and subsequently lacks standing to complain of the search or seizure of such property.
 - b. Aerial observation.
 - (1) *California v. Ciraolo*, 476 U.S. 207 (1986). Observation of a fenced-in marijuana plot from an airplane was not a search.
 - (2) *Florida v. Riley*, 488 U.S. 445 (1989). Observation of a fenced-in marijuana greenhouse from a hovering helicopter was not a search.

- c. Peering into Automobiles. *United States v. Owens*, 51 M.J. 204 (C.A.A.F. 1999). Peering into an open door or through a window of an automobile is not a search. *See also United States v. Richter*, 51 M.J. 213 (C.A.A.F. 1999). If the car is stopped by a law enforcement official and then peered into, the investigative stop must be lawful.
 - d. The “passerby.”
 - (1) *United States v. Wisniewski*, 21 M.J. 370 (C.M.A. 1986). Peeking through a 1/8 inch by 3/8 inch crack in the venetian blinds from a walkway was not a search.
 - (2) *United States v. Kaliski*, 37 M.J. 105 (C.M.A. 1993). Security police’s view through eight to ten inch gap in curtains in back patio door was unlawful search because patio was not open to public.
 - e. Private dwellings. *Minnesota v. Carter*, 525 U.S. 83 (1998). Cocaine distributors were utilizing another person’s apartment to bag cocaine. The distributors were in the apartment for two and a half hours and had no other purpose there than to bag the cocaine. Supreme Court held that even though the drug distributors were in private residence at consent of owner, they had no expectation of privacy in the apartment, and police discovery of their activity was not a Fourth Amendment search.
3. Plain view. Mil. R. Evid. 316(d)(4)(c).
- a. General rule. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *United States v. Fogg*, 52 M.J. 144 (C.A.A.F. 1999). Property may be seized when:
 - (1) The property is in plain view;
 - (2) The person observing the property is lawfully present; and,

- a. *United States v. Maxwell*, 45 M.J. 406 (C.A.A.F. 1996). Accused had reasonable expectation of privacy in electronic mail transmissions sent, received and stored on the AOL computer server. Like a letter or phone conversation, a person sending e-mail enjoys a reasonable expectation of privacy that police will not intercept the transmission without probable cause and a warrant.
- b. *United States v. Monroe*, 52 M.J. 326 (C.A.A.F. 2000). Accused did not have a reasonable expectation of privacy in e-mail mailbox on government server which was the e-mail host for all “personal” mailboxes and where users were notified that system was subject to monitoring.
- c. *United States v. Ohnesorge*, 60 M.J. 946 (N.M.Ct.Crim.App. 2005). There is no reasonable expectation of privacy in subscriber information provided to a commercial internet service provider. *United States v. Allen*, 53 M.J. 402 (C.A.A.F. 2000). No warrant/authorization required for stored transactional records (distinguished from private communications). Inevitable discovery exception also applied to information sought by government investigators.
- d. *United States v. Long*, 64 M.J. 57 (C.A.A.F. 2006). Reasonable expectation of privacy found in e-mail communications regarding drug use on a government computer, over a government network, when investigation was conducted and ordered by law enforcement instead of originating with computer network administrator. (This is a narrow holding as USMC log-on banner described access to “monitor” the computer system –not to engage in law enforcement intrusions by examining the contents of particular e-mails in a manner unrelated to maintenance of the e-mail system).

- e. *U.S. v. Larson*, 66 M.J. 212 (C.A.A.F. 2008). Accused had no Fourth Amendment expectation of privacy in his government compute. He failed to rebut presumption that he had no reasonable expectation of privacy in the government computer provided to him for official use. *See* Mil. R. Evid. 314(d).
6. Bank records.
- a. *United States v. Wooten*, 34 M.J. 141 (C.M.A. 1992). No reasonable expectation of privacy exists in bank records. Even though records were obtained in violation of financial privacy statute, exclusion of evidence was inappropriate, because statute did not create Fourth Amendment protection.
 - b. *United States v. Dowty*, 48 M.J. 102 (C.A.A.F. 1998). Servicemember may avail himself of the Right to Financial Privacy Act (RFPA), to include seeking federal district court judge to quash subpoena for bank records. However, Article 43, UCMJ, statute of limitations is tolled during such litigation.
7. Enhanced senses. Use of “low-tech” devices to enhance senses during otherwise lawful search is permissible.
- a. Dogs.
 - (1) *United States v. Place*, 462 U.S. 696 (1983). There is no expectation of privacy to odors emanating from luggage in a public place. “Low-tech” dog sniff is not a search (no Fourth Amendment violation).
 - (2) *United States v. Alexander*, 34 M.J. 121 (C.M.A. 1992). Dog sniff in common area does not trigger Fourth Amendment.

- (3) *United States v. Middleton*, 10 M.J. 123 (C.M.A. 1981). Use of drug dogs at health and welfare inspection is permissible. Dog is merely an extension of human sense of smell.
 - (4) *See* AR 190-12 (4 Jun. 2007), Military Working Dogs. Detector dogs are not to be used to inspect people. See AR 190-12 at Ch 4-5c.
 - b. Flashlights. *Texas v. Brown*, 460 U.S. 730 (1983). Shining flashlight to illuminate interior of auto is not a search.
 - c. Binoculars. *United States v. Lee*, 274 U.S. 559 (1927). Use of field glasses or binoculars is not a search.
 - d. Cameras. *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986). Aerial photography with “commercially available” camera was not a search, but use of satellite photos or parabolic microphones or other “high-tech devices” would be a search.
 - e. Thermal Imaging Devices. *Kyllo v. United States*, 533 U.S. 27 (2001). Supreme Court ruled that police use of thermal imaging device without a warrant was unreasonable. The thermal imaging device detected higher than normal heat radiating from house. Heat source was lamps used for growing marijuana in private dwelling. The Court found use of thermal imaging device during surveillance was a “search” and, absent a warrant, presumptively unreasonable.
- 8. Interception of wire and oral communications. Communications are protected by the Fourth Amendment. *Katz v. United States*, 389 U.S. 347 (1967).
 - a. One party may consent to monitoring a phone conversation.

- (1) *United States v. Caceras*, 440 U.S. 741 (1979). A person has no reasonable expectation that a person with whom she is conversing will not later reveal that conversation to police.
 - (2) *United States v. Parrillo*, 34 M.J. 112 (C.M.A. 1992). There is no reasonable expectation of privacy as to contents of telephone conversation after it has reached other end of telephone line.
 - (3) *United States v. Guzman*, 52 M.J. 218 (C.A.A.F. 2000). There are still regulatory requirements for (one-party) consensual wiretapping but exclusion of evidence is not proper remedy except in cases where violation of regulation implicates constitutional or statutory rights.
- b. The “bugged” informant. *United States v. Samora*, 6 M.J. 360 (C.M.A. 1979). There is no reasonable expectation of privacy where a “wired” informant recorded conversations during drug transaction.
- c. Special rules exist for the use of wiretaps, electronic and video surveillance, and pen registers/trap & trace devices. Rules for video surveillance apply if “communications” are recorded.
- (1) Federal statutes provide greater protections than the Fourth Amendment. See 18 U.S.C. §§ 2510-22, 2701-11, 3117, and 3121-27 (2000). The statutory scheme is referred to as the Electronic Communications Privacy Act (ECPA).
 - (a) The ECPA prohibits the unauthorized interception of wire and oral communications. 18 U.S.C. § 2511 (2000).

- (b) The ECPA contains its own exclusionary rule in the event of violation. 18 U.S.C. § 2515 (2000).
 - (c) The ECPA applies to private searches, even though such searches are not covered by the Fourth Amendment. *People v. Otto*, 831 P.2d 1178 (Cal. 1992).
- (2) Approval process requires coordination with HQ, USACIDC and final approval from DA Office of General Counsel. *See* Mil. R. Evid. 317; AR 190-53, Interception of Wire and Oral Communications for Law Enforcement Purposes (3 Nov. 1986).
 - (3) An overheard telephone conversation is not an “interception” under the statute. *United States v. Parillo*, 34 M.J. 112 (C.M.A. 1992).
 - (4) *See* Clark, *Electronic Surveillance and Related Investigative Techniques*, 128 MIL. L. REV. 155 (1990).
- d. The USA PATRIOT ACT has enlarged the government’s ability to access electronic communications and stored information. For details on the Act, see www.cybercrime.gov.

9. Government property.

- a. General rule. Mil. R. Evid. 316(d)(3) and Mil. R. Evid. 314(d).
 - (1) Normally a person does not have a reasonable expectation of privacy in government property that is not issued for personal use. *United States v. Weshefelder*, 43 C.M.R. 256 (1971).

- (2) A reasonable expectation of privacy normally exists in personal-use items such as footlockers and wall lockers.
- b. Government desks.
- (1) *O'Connor v. Ortega*, 480 U.S. 709 (1987) (plurality opinion). Search of desk by employer, for “work-related” purpose, does not require probable cause or warrant; however, search of desk by employer may require search authorization if purpose of search is criminal in nature.
 - (2) *United States v. Muniz*, 23 M.J. 201 (C.M.A. 1987). No expectation of privacy existed in locked government credenza when commander performed search for an administrative purpose.
 - (3) *United States v. Craig*, 32 M.J. 614 (A.C.M.R. 1991). No expectation of privacy existed in government desk at installation museum where search was conducted by sergeant major.
- c. Barracks rooms.
- (1) There generally is a reasonable expectation of privacy in items in a barracks room. *See* Mil. R. Evid. 314(d).
 - (2) *United States v. Conklin*, 63 M.J. 333 (C.A.A.F. 2006). While recognizing the limited expectation of privacy in a barracks room, CAAF acknowledges that a servicemember sharing a two-person dormitory room on a military base has a reasonable expectation of privacy in the files kept on a personally owned computer.

- (3) *But see United States v. McCarthy*, 38 M.J. 398 (C.M.A. 1993). Warrantless intrusion and apprehension in barracks upheld. Court rules there is no reasonable expectation of privacy in barracks.
- (4) *But see United States v. Curry*, 46 M.J. 733 (N.M.Ct.Crim.App. 1997) *aff'd* 48 M.J. 115 (C.A.A.F. 1998) (per curiam). No need to read *McCarthy* so broadly: according to Navy Court, there is, instead, a *reduced* expectation of privacy in a barracks room.
- (5) *United States v. Battles*, 25 M.J. 58 (C.M.A. 1987). Drugs discovered during 0300 hours “inspection” in ship’s berthing area and box near a common maintenance locker were admissible because there was no reasonable expectation of privacy in these areas.
- (6) *United States v. Moore*, 23 M.J. 295, 299 (C.M.A. 1987) (Cox, J., concurring). “I am unable intellectually to harmonize the implicit assumption . . . that service members have legally enforceable expectations of privacy . . . in barracks rooms.”

C. Open fields. The Fourth Amendment does not apply to open fields. Mil. R. Evid. 314(j).

1. *Hester v. United States*, 265 U.S. 57 (1924). Open fields are not “persons, houses, papers, and effects” and thus are not protected by the Fourth Amendment.
2. *United States v. Dunn*, 480 U.S. 294 (1987). Police intrusion into open barn on 198-acre ranch was not covered by the Fourth Amendment; barn was not within “curtilage.” *Dunn* articulates a 4-part test to define “curtilage.”
 - a. The proximity of the area to be curtilage to the home;

- b. Whether the area is included within an enclosure surrounding the home;
- c. The nature of the uses to which the area is put;
- d. And the steps taken by the resident to protect the area from observation by people passing by.

IV. SEARCHES BASED ON AUTHORIZATION AND PROBABLE CAUSE. *A search is valid if based upon probable cause and a proper search warrant. Probable cause is evaluated by looking at the “totality of the circumstances” to determine whether evidence is located at a particular place. In the military, the equivalent to a search warrant is called a search authorization, and may be issued by an appropriate neutral and detached commander, military judge, or military magistrate. Even if a search is based upon probable cause and is conducted pursuant to a proper search warrant/ authorization, it must be conducted in a reasonable manner.*

- A. General Rule. A search is proper if conducted pursuant to a search warrant or authorization based on probable cause. Mil. R. Evid. 315.
 - 1. A search *warrant* is issued by a civilian judge; it must be in writing, under oath, and based on probable cause.
 - 2. A search *authorization* is granted by a military commander; it may be oral or written, need not be under oath, but must be based on probable cause.
- B. Probable Cause.

1. Probable cause is a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched. Mil. R. Evid. 315(f). It is a “fluid concept---turning on the assessment of probabilities in particular factual contexts---not readily, or even usefully, reduced to a neat set of legal rules.” *Illinois v. Gates*, 462 U.S. 213, 232 (1982).
2. Probable cause is evaluated under the totality of the circumstances. *Illinois v. Gates*, 462 U.S. 213 (1982). The Court rejected a lower court’s attempt to “overlay a categorical scheme” on the *Gates* TOC analysis, see *United States v. Banks*, 540 U.S. 31 (2003). See also, *United States v. Leedy*, 65 M.J. 208 (C.A.A.F. 2007) where CAAF emphasizes TOC as the key in any probable cause analysis.
 - a. Probable cause will clearly be established if informant is reliable (*i.e.* believable) and has a factual basis for his or her information under the two-pronged test of *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969).
 - b. Probable cause may also be established even if the *Aguilar-Spinelli* test is not satisfied. *Illinois v. Gates*, 462 U.S. 213 (1982). *But see United States v. Washington*, 39 M.J. 1014 (A.C.M.R. 1994). No probable cause existed to search accused’s barracks room because commander who authorized search lacked information concerning informant’s basis of knowledge and reliability. The *Gates* TOC test was re-articulated in *United States v. Bethea*, 61 M.J. 184 (C.A.A.F. 2005) in which the CAAF held that there was sufficient probable cause to authorize a seizure of a hair sample to establish wrongful use of cocaine based on a prior positive urinalysis despite fact that hair sample would not necessarily indicate a prior one-time use of cocaine. Hair sample revealed that the accused had used cocaine multiple occasions.

- c. *United States v. Evans*, 35 M.J. 306 (C.M.A. 1992). Evidence that accused manufactured crack cocaine in his house gave probable cause to search accused's vehicle. *Devenpeck v. Alford*, 543 U.S. 146 (2004), the probable cause upon which investigation and arrest are based need not be the same or even closely related to the probable cause for the ultimate criminal conviction, so long as both are legitimate.
 - d. *United States v. Figueroa*, 35 M.J. 54 (C.M.A. 1992). Probable cause existed to search accused's quarters where commander was informed that contraband handguns had been delivered to the accused and the most logical place for him to store them was his quarters.
 - e. *Maryland v. Pringle*, 540 U.S. 366 (2003). A police officer suspected that one, or all three, of a group in a vehicle possessed drugs and arrested them. The Court found it reasonable for the officer to infer a common enterprise, and ruled the arrest constitutional as to Pringle, even though the officer had no individualized PC regarding Pringle.
3. Staleness. Probable cause will exist only if information establishes that evidence is currently located in area to be searched. PC may evaporate with passage of time.
- a. *United States v. Henley*, 53 M.J. 488 (C.A.A.F. 2000). Magistrate's unknowing use of information over five years old was not dispositive. In addition, good faith exception applied to agents executing warrant.
 - b. *United States v. Queen*, 26 M.J. 136 (C.M.A. 1988). Probable cause existed despite delay of two to six weeks between informant's observation of evidence of crime (firearm) in accused's car and commander's search authorization; accused was living on ship and had not turned in firearm to ship's armory.

- c. *United States v. Agosto*, 43 M.J. 745 (A.F.Ct.Crim.App. 1995). Probable cause existed for search of accused's dormitory room even though 3 1/2 months elapsed between offense and search. Items sought (photos) were not consumable and were of a nature to be kept indefinitely.
4. See Appendix B for a guide to articulating probable cause.

C. Persons Who Can Authorize a Search. Mil. R. Evid. 315(d).

1. Any commander of the person or place to be searched (“king-of-the-turf” standard).
 - a. The unit commander can authorize searches of:
 - (1) Barracks under his control;
 - (2) Vehicles within the unit area; and
 - (3) Off-post quarters of soldiers in the unit if the unit is overseas.
 - b. The installation commander can authorize searches of:
 - (1) All of the above;
 - (2) Installation areas such as:
 - (a) On-post quarters;
 - (b) Post exchange (PX); and,
 - (c) On-post recreation centers.
 - c. Delegation prohibited. Power to authorize searches is a function of command and may not be delegated to an executive officer. *United States v. Kalscheur*, 11 M.J. 378 (C.M.A. 1981)
 - d. Devolution authorized. *United States v. Law*, 17 M.J. 229 (C.M.A. 1983). An “acting commander” may authorize a search when commander is absent. *See also United States v. Hall*, 50 M.J. 247 (C.A.A.F. 1999). Commander may resume command at his discretion; no need not have written revocation of appointment of acting commander.

- e. More than one commander may have control over the area to be searched. *United States v. Mix*, 35 M.J. 283 (C.M.A. 1992). Three commanders whose battalions used common dining facility each had sufficient control over the parking lot surrounding facility to authorize search there.
2. A military magistrate or military judge may authorize searches of all areas where a commander may authorize searches. *See* chapter 9, AR 27-10, Military Justice (6 Sep. 2002), for information on the military magistrate program.
 3. In the United States a state civilian judge may issue search warrants for off-post areas.
 4. In the United States a federal civilian magistrate or judge may issue search warrants for:
 - a. Off-post areas for evidence related to federal crimes; and,
 - b. On-post areas.
 5. Overseas a civilian judge may authorize a search of off-post areas.
- D. Neutral and Detached Requirement. The official issuing a search authorization must be neutral and detached. *See* Mil. R. Evid. 315(d). *See also* *United States v. Ezell*, 6 M.J. 307 (C.M.A. 1979) (discusses four separate cases where commanders' neutrality was attacked).
1. A commander is not neutral and detached when he or she:
 - a. Initiates or orchestrates the investigation (has personal involvement with informants, dogs, and controlled buys); or,
 - b. Conducts the search.

2. A commander may be neutral and detached even though he or she:
 - a. Is present at the search;
 - b. Has personal knowledge of the suspect's reputation;
 - c. Makes public comments about crime in his or her command; or,
 - d. Is aware of an on-going investigation.
3. Alternatives. Avoid any potential "neutral and detached" problems by seeking search authorization from:
 - a. A military magistrate; or,
 - b. The next higher commander.

E. Reasonableness. Even if based upon a warrant or authorization and probable cause, *a search must be conducted in a reasonable manner.*

1. *Wilson v. Arkansas*, 514 U.S. 927 (1995). The common law requirement that police officers "knock and announce" their presence is part of the reasonableness clause of the Fourth Amendment.
2. *United States v. Banks*, 540 U.S. 31 (2003). In a case involving easily disposable illegal drugs, police were justified in breaking through an apartment door after waiting 15-20 seconds following knocking and announcing their presence. This time was sufficient for the situation to ripen into an exigency.

3. *Richards v. Wisconsin*, 520 U.S. 385 (1997). Every no-knock warrant request by police must be evaluated on a case-by-case basis. Test for no-knock warrant is whether there is reasonable suspicion that evidence will be destroyed or there is danger to police by knocking. *United States v. Ramirez*, 523 U.S. 65 (1998). Whether or not property is damaged during warrant execution, the same test applies -- reasonable suspicion.
 4. *Hudson v. Michigan*, 547 U.S. 586 (2006). Violation of the Fourth Amendment “knock and announce” rule, without more, will not result in suppression of evidence at trial.
 5. Depending on the circumstances, law enforcement officials may “seize” and handcuff occupants of a residence while they execute a search warrant of that residence. *Muehler v. Mena*, 544 U.S. 93, 125 S.Ct. 1465 (2005).
 6. *L.A. County v. Rettele*, 127 S.Ct. 1989 (2007). When officers execute a valid warrant and act in a reasonable manner to protect themselves from harm, however, the Fourth Amendment is not violated.
- F. Reasonableness and Media “Ride-Alongs.” Violation of Fourth Amendment rights of homeowners for police to bring members of media or other third parties into homes during execution of warrants. *Wilson v. Layne*, 526 U.S. 603 (1999).
- G. Seizure of Property.
1. Probable cause to seize. Probable cause to seize property or evidence exists when there is a reasonable belief that the property or evidence is an unlawful weapon, contraband, evidence of crime, or might be used to resist apprehension or to escape. Mil. R. Evid. 316(b). *United States v. Mons*, 14 M.J. 575 (N.M.C.M.R. 1982). Probable cause existed to seize bloody clothing cut from accused’s body during emergency room treatment.

2. Effects of unlawful seizure. If there is no probable cause the seizure is illegal and the evidence seized is suppressed under Mil. R. Evid. 311.
- H. External Impoundment. Reasonable to secure a room (“freeze the scene”) pending an authorized search to prevent the removal or destruction of evidence. *United States v. Hall*, 50 M.J. 247 (C.A.A.F. 1999). But freezing the scene does not mean that investigators have unrestricted authorization to search crime scene without a proper warrant/authorization. *See Flippo v. West Virginia*, 528 U.S. 11 (1999) (holding that no general crime scene exception exists).
- I. Seizure (Apprehension) of Persons.
1. Probable cause to apprehend. Probable cause to apprehend exists when there are reasonable grounds to believe that an offense has been or is being committed and the person to be apprehended committed or is committing it. RCM 302(c). *See also* Mil. R. Evid. 316(c).
 2. Effects of unlawful apprehension. If there is no probable cause the apprehension is illegal and evidence obtained as a result of the apprehension is suppressed under Mil. R. Evid. 311. *See United States v. Dunaway*, 442 U.S. 200 (1979) (holding that fruits of illegal apprehension are inadmissible).
 3. Situations amounting to apprehension.
 - a. There is a seizure or apprehension of a person when a reasonable person, in view of all the circumstances, would not believe he or she was free to leave.

- b. In “cramped” settings (*e.g.* on a bus, in a room), there is an apprehension when a reasonable person, in view of all the circumstances, would not feel “free to decline to answer questions.” *Florida v. Bostick*, 501 U.S. 429 (1991). *But see United States v. Drayton*, 536 U.S. 194 (2002) (finding that there was no requirement to inform bus passengers that they could refuse to cooperate with police).
- c. Armed Texas police rousting a 17-year old murder suspect from his bed at 0300, transporting him handcuffed, barefoot and in his underwear to the police station was an apprehension, despite suspect’s answer of “Okay”, in response to police saying “We have to talk.” *Kaupp v. Texas*, 536 U.S. 626 (2003).
- d. Asking for identification is not an apprehension. *United States v. Mendenhall*, 446 U.S. 544 (1980).
 - (1) Asking for identification and consent to search on a bus is not apprehension. *Florida v. Bostick*, 501 U.S. 429 (1991). *See also United States v. Drayton*, 536 U.S. 194 (2002) (finding no requirement to inform bus passengers they could refuse to cooperate with police); *Muehler v. Mena*, 544 U.S. 93 (2005) (asking person who had been handcuffed about immigration status did not constitute seizure).
 - (2) State may prosecute for failure to answer if the ‘stop and ID’ statute is properly drawn. Thus, there was no Fourth Amendment violation in *Hiibel v. Sixth Judicial District Court*, 542 U.S. 177 (2004).
- e. A police chase is not an apprehension.

- (1) *Michigan v. Chestnut*, 486 U.S. 567 (1988). Following a running accused in patrol car was not a seizure where police did not turn on lights or otherwise tell accused to stop. Consequently, drugs accused dropped were not illegally seized.
- (2) *California v. Hodari D.*, 499 U.S. 621 (1991). Police officer needs neither probable cause nor reasonable suspicion to chase a person who flees after seeing him. A suspect who fails to obey an order to stop is not seized within meaning of the Fourth Amendment.

f. An order to report to military police.

- (1) An order to report for non-custodial questioning is not apprehension.
- (2) An order to report for fingerprints is not apprehension. *United States v. Fagan*, 28 M.J. 64 (C.M.A. 1989). Accused, who was ordered to report to military police for fingerprinting was not apprehended. Fingerprinting is a much less serious intrusion than interrogation, and may comply with the Fourth Amendment even if there is less than probable cause.
- (3) Transporting an accused to the military police station under guard is apprehension. *United States v. Schneider*, 14 M.J. 189 (C.M.A. 1982). When accused is ordered to go to military police station under guard, probable cause must exist or subsequent voluntary confession is inadmissible.

4. Apprehension at home or in quarters: a military magistrate, military judge, or the commander who controls that dwelling (usually the installation commander) must authorize apprehension in private dwelling. R.C.M. 302(e); *Payton v. New York*, 445 U.S. 573 (1980).
 - a. A private dwelling includes:
 - (1) BOQ/BEQ rooms;
 - (2) Guest quarters;
 - (3) On-post quarters; or,
 - (4) Off-post apartment or house.
 - b. A private dwelling does not include:
 - (1) Tents.
 - (2) Barracks rooms; *see United States v. McCarthy*, 38 M.J. 398 (C.M.A. 1993). Warrantless apprehension in barracks room was proper.
 - (3) Vehicles.
 - c. Exigent circumstances may justify entering dwelling without warrant or authorization. *See Mil. R. Evid. 315(g). United States v. Ayala*, 26 M.J. 190 (C.M.A. 1988). Accused was properly apprehended, without authorization, in transient billets. Exigent circumstances justified apprehension. *See also Kirk v. Louisiana*, 536 U.S. 635 (2002) (absent exigent circumstances, police may not enter a private dwelling without a warrant supported by probable cause to search the premises or apprehend an individual); *United States v. Khamsouk*, 57 M.J. 282 (C.A.A.F. 2002) (finding that the DD Form 553 is not the equivalent of an arrest warrant issued by a civilian magistrate judge).

- d. Consent may justify entering dwelling without proper warrant or authorization. *See* Mil. R. Evid. 316(d)(2). *United States v. Sager*, 30 M.J. 777 (A.C.M.R. 1990), *aff'd on other grounds*, 36 M.J. 137 (C.M.A. 1992). Accused, awakened by military police at on-post quarters, in his underwear, and escorted to police station was not illegally apprehended, despite lack of proper authorization, where his wife “consented” to police entry.
- e. Probable cause may cure lack of proper authorization. *New York v. Harris*, 495 U.S. 14 (1990). Where police had probable cause but did not get a warrant before arresting accused at home, statement accused made at home was suppressed as violation of *Payton v. New York*, but statement made at police station was held to be admissible. The statement at the police station was not the “fruit” of the illegal arrest at home.
- f. Exigent circumstances may also allow warrantless seizure of dwelling and/or occupants while waiting for search warrant to be issued. *Illinois v. McArthur*, 531 U.S. 326 (2001).

V. EXCEPTIONS TO AUTHORIZATION REQUIREMENT.

Not all searches require warrants or search authorizations, if there is probable cause that evidence is at a certain location. If there is probable cause that evidence will be destroyed, a law enforcement official may dispense with the warrant/ authorization requirement. Searches of automobiles generally do not require warrants/authorizations.

A. Exigent Circumstances.

1. General rule. A search warrant or authorization is not required when there is probable cause but insufficient time to obtain the authorization because the delay to obtain authorization would result in the removal, destruction, or concealment of evidence. Mil. R. Evid. 315(g).
2. Burning marijuana. *United States v. Lawless*, 13 M.J. 943 (A.F.C.M.R. 1982). Police smelled marijuana coming from house, looked into a window and spotted drug activity. Police then entered and apprehended everyone in the house, and later obtained authorization to search. *Held*: this was a valid exigency. *See also United States v. Dufour*, 43 M.J. 772 (N.M.Ct.Crim.App. 1995) (Observed use of drugs in home allowed search and seizure without obtaining warrant.)
3. Following a controlled buy.
 - a. *United States v. Murray*, 12 M.J. 139 (C.M.A. 1981). Commander and police entered accused's barracks room and searched it immediately after a controlled buy. *Held*: Search was valid based on exigent circumstances.
 - b. *But see United States v. Baker*, 14 M.J. 602 (A.F.C.M.R. 1982). OSI agents and civilian police entered accused's off-post apartment immediately after a controlled buy. Search was improper because there were no real exigencies, and there was time to seek authorization.
4. Traffic Stops (Pretextual):

- a. *Whren v. United States*, 517 U.S. 806 (1996). A stop of a motorist, supported by probable cause to believe he committed a traffic violation, is reasonable under the Fourth Amendment regardless of the actual motivations of the officers making the stop. Officers who lack probable cause to stop a suspect for a serious crime may use the traffic offense as a pretext for making a stop, during which they may pursue their more serious suspicions by utilizing plain view or consent. *See also Arkansas v. Sullivan*, 532 U.S. 769 (2001) (holding state supreme court erred by considering subjective intent of arresting officer when there was a valid basis for a traffic stop and probable cause to subsequently arrest motorist for a speeding violation), and *United States v. Moore*, 128 U.S. (2008) (holding the police did not violate the Fourth Amendment when they made an arrest that was based on probable cause, but prohibited by state law, or when they performed a search incident to arrest).

- b. *United States v. Rodriguez*, 44 M.J. 766 (N.M.Ct.Crim.App. 1996). State Trooper had probable cause to believe that accused had violated Maryland traffic law by following too closely. Even though the violation was a pretext to investigate more serious charges, applying *Whren*, the stop was lawful.

- c. Seizure of drivers and passengers. *Pennsylvania v. Mimms*, 434 U.S. 106 (1977). The police may, as a matter of course, order the driver of a lawfully stopped car to exit. *See Maryland v. Wilson*, 519 U.S. 407 (1997) (holding that *Mimms* rule is extended to passengers). *But cf. Wilson v. Florida*, 734 So. 2d 1107, 1113 (Fla. Dist. Ct. App. 1999) applying *Mimms* and *Wilson* in holding that a police officer conducting a lawful traffic stop may not order a passenger back in the stopped vehicle.

5. Hot pursuit. *Warden v. Hayden*, 387 U.S. 294 (1967). Police, who chased armed robber into house, properly searched house.
6. Drugs or alcohol in the body.
 - a. *Schmerber v. California*, 384 U.S. 757 (1966). Warrantless blood alcohol test was justified by exigent circumstances.
 - b. *United States v. Porter*, 36 M.J. 812 (A.C.M.R. 1993). Warrantless blood alcohol test was not justified by exigent circumstances where there was no evidence that time was of the essence or that commander could not be contacted.
 - c. *United States v. Pond*, 36 M.J. 1050 (A.F.C.M.R. 1993). Warrantless seizure of urine to determine methamphetamine use was not justified by exigent circumstances because methamphetamine does not dissipate quickly from the body.
 - d. Nonconsensual extraction of body fluids without a warrant requires more than probable cause; there must be a “clear indication” that evidence of a crime will be found and that delay could lead to destruction of evidence. Mil. R. Evid. 312(d). See *United States v. Carter*, 54 M.J. 414 (C.A.A.F. 2001).

B. Automobile Exception.

1. General rule. Movable vehicles may be searched based on probable cause alone; no warrant is required. Mil. R. Evid. 315(g)(3).

- a. *Chambers v. Maroney*, 399 U.S. 42 (1970). The word “automobile” is not a talisman, in whose presence the Fourth Amendment warrant requirement fades away. *See also Pennsylvania v. Labron*, 518 U.S. 938 (1996). The auto exception is not concerned with whether police have time to obtain a warrant. It is concerned solely with whether the vehicle is “readily mobile.”
 - b. Ability to Obtain a Warrant Irrelevant. *Maryland v. Dyson*, 527 U.S. 465 (1999) (per curiam). Police in Maryland waited for 13 hours for suspect to return to state and did not attempt to obtain a warrant. Supreme Court reaffirmed that automobile exception does not require a “separate finding of exigency precluding the police from obtaining a warrant.”
 - c. Rationale:
 - (1) Automobiles are mobile; evidence could disappear by the time a warrant is obtained; and,
 - (2) There is a lesser expectation of privacy in a car than in a home.
2. Scope of the search: any part of the car, including the trunk, and any containers in the car may be searched.
- a. *United States v. Ross*, 456 U.S. 798 (1982). Police may search any part of the car and any containers in car if police have probable cause to believe they contain evidence of a crime.
 - b. *United States v. Evans*, 35 M.J. 306 (C.M.A. 1992). Military police who had probable cause to search auto for drugs properly searched accused’s wallet found within vehicle.

3. Automobile is broadly defined. *California v. Carney*, 471 U.S. 386 (1985). Recreational vehicle falls within auto exception unless it is clearly used solely as a residence.
4. Timing of the search. *United States v. Johns*, 469 U.S. 478 (1985). Police had probable cause to seize truck but did not search it for three days. There is no requirement that search be contemporaneous with lawful seizure.
5. Closed containers in vehicles may also be searched. *California v. Acevedo*, 500 U.S. 565 (1991). Probable cause to believe closed container located in vehicle contains evidence of crime allows warrantless search of container. This case overruled *United States v. Chadwick*, 433 U.S. 1 (1977), which required police to have warrant where probable cause relates solely to container within vehicle. Accord *United States v. Schmitt*, 33 M.J. 24 (C.M.A. 1991).
6. No distinction between containers owned by suspect and passengers: both sorts of containers may be searched. *Wyoming v. Houghton*, 526 U.S. 295 (1999).
7. Applies to Seizure of Automobiles Themselves. *Florida v. White*, 526 U.S. 559 (1999). Automobile exception applies to seizure of vehicle for purposes of forfeiture and police do not need to get a warrant if they have probable cause to believe that car is subject to seizure. If seized, police are then allowed to conduct a warrantless inventory of the seized vehicle.

VI. EXCEPTIONS TO PROBABLE CAUSE REQUIREMENT.

Many searches require neither probable cause nor a search warrant/authorization. If a person voluntarily consents to a search, no probable cause or warrant is needed. Searches incident to apprehension/arrest need no other probable cause than the underlying p.c. for the arrest/ apprehension. Certain brief detentions – called “stops” - require only “reasonable suspicion,” and pat-down searches – called “frisks” - require only reasonable suspicion that the person is armed and dangerous. Inspections are technically not searches at all, but are rather administrative in nature, not criminal searches for evidence. A variety of inspections are excepted from Fourth Amendment requirements. Finally, emergency searches are also excepted from Fourth Amendment requirements.

A. Consent Searches.

1. General rule. If a person voluntarily consents to a search of his person or property under his control, no probable cause or warrant is required. Mil. R. Evid. 314(e).
2. Persons Who Can Give Consent.

- a. Anyone who exercises actual control over property may grant consent to search that property. Mil. R. Evid. 314(e)(2). *United States v. Reister*, 44 M.J. 409 (C.A.A.F. 1996). House sitter had actual authority to consent to search apartment, books and nightstand. *United States v. Clow*, 26 M.J. 176 (C.M.A. 1988). When police requested consent to search family dwelling, wife consented to search, but husband who was also present refused consent. The Supreme Court held that consent is not constitutionally valid if one *physically* present co-tenant grants consent, but another *physically* present co-tenant refuses consent. *Georgia v. Randolph*, 547 U.S. 103 (2006). [See the novel application of *Georgia v. Randolph* in *United States v. Weston*, 65 M.J. 774 (N.M.Ct.Crim.App. 2007), *reconsidered on appeal*, 66 M.J. 544 (N.M.Ct.Crim.App. 2008), where accused and wife were determined “physically present” when both were asked for consent to search their residence while detained in the same CID building, but different interrogation rooms]. See, *United States v. Wallace*, 66 M.J. 5 (C.A.A.F. 2008) (affirming the limited scope of *Randolph*).
- b. Anyone with apparent authority may grant consent.
- (1) *Illinois v. Rodriguez*, 497 U.S. 177 (1990). Girlfriend with key let police into boyfriend’s apartment where drugs were found in plain view. Police may enter private premises without a warrant if they are relying on the consent of a third party whom they reasonably, but mistakenly, believe has a common authority over the premises.

- (2) *United States v. White*, 40 M.J. 257 (C.M.A. 1994). Airman who shared off-base apartment with accused had apparent authority to consent to search of accused's bedroom. The Airman told police that the apartment occupants frequently borrowed personal property from each other and went into each other's rooms without asking permission.
 - (3) *See also, United States v. Rader*, 65 M.J. 30 (C.A.A.F. 2007). Accused's roommate had sufficient access to and control over accused's computer to give valid consent to its search, where the computer was located in roommate's bedroom, it was not password protected, accused never told roommate not to access his computer or any of its files, accused's roommates used the computer to play computer games with accused's consent, and the consenting roommate accessed the computer approximately every two weeks to perform maintenance.
3. Voluntariness. Consent must be voluntary under the totality of the circumstances. Mil. R. Evid. 314(e)(4); *United States v. Frazier*, 34 M.J. 135 (C.M.A. 1992).
- a. Traffic stop. *Ohio v. Robinette*, 519 U.S. 33 (1996). A request to search a detained motorist's car following a lawful traffic stop does not require a bright line "you are free to go" warning for subsequent consent to be voluntary. Consent depends on the totality of the circumstances.
 - b. Coerced consent is involuntary. *But see United States v. Goudy*, 32 M.J. 88 (C.M.A. 1991). Accused's consent was voluntary despite fact that he allegedly took commander's request to be an implied order.

- c. It's OK to Trick. *United States v. Vassar*, 52 M.J. 9 (1999). Accused taken to hospital for head injury and told that a urinalysis was needed for treatment. CAAF held it is permissible to use trickery to obtain consent as long as it does not amount to coercion. Urinalysis was admissible, despite military judge applying wrong standard for resolving questions of fact.
 - d. Right to counsel. Reading Article 31 rights is recommended but not required. *United States v. Roa*, 24 M.J. 297 (C.M.A. 1987). Request for consent after accused asked for lawyer was permissible. *United States v. Burns*, 33 M.J. 316 (C.M.A. 1991). Commander's failure to give Article 31 warnings did not affect voluntariness of consent to urinalysis test.
4. Scope. Consent may be limited to certain places, property and times. Mil. R. Evid. 314(e)(3). Consent to search computer necessarily implicated consent to seize and remove computer even though standard consent form did not explicitly state that computer could be seized and removed. *United States v. Rittenhouse*, 62 M.J. 504 (A. Ct.Crim.App. 2005). *See United States v. Gallagher*, 65 M.J. 601 (N.M.Ct.Crim.App. 2007) *affirmed*, 66 M.J. 250 (C.A.A.F. 2008) where the issue is whether the search of the accused's closed briefcase, located in the garage of accused's home, did not exceed the scope of his wife's consent to search the areas of the home over which she had actual or apparent authority.
5. Withdrawal. Consent may be withdrawn at any time. Mil. R. Evid. 314(e)(3). *But see United States v. Roberts*, 32 M.J. 681 (A.F.C.M.R. 1991). Search was lawful where accused initially consented, then withdrew consent, and then consented again.
6. Burden of proof. Consent must be shown by clear and convincing evidence. Mil. R. Evid. 314(e)(5).

7. Consent and closed containers. *Florida v. Jimeno*, 500 U.S. 248 (1991). General consent to search allows police to open closed containers. See also,

B. Searches Incident to Apprehension.

1. General rule. A person who has been apprehended may be searched for weapons or evidence within his “immediate control.” Mil. R. Evid. 314(g).
 - a. Scope of search. A person’s immediate control includes his person, clothing, and the area within his wingspan (sometimes expansively defined to include “lunging distance”).
 - b. Purpose of search: to protect police from nearby weapons and prevent destruction of evidence. *Chimel v. California*, 395 U.S. 752 (1969).
 - c. Substantial delay between apprehension and seizure will not invalidate the search “incident.” *United States v. Curtis*, 44 M.J. 106 (C.A.A.F. 1996) (citing *United States v. Edwards*, 415 U.S. 800 (1974) (10 hours)). *Curtis* was later reversed on other grounds and the sentence was subsequently reduced by the Navy-Marine Corps Court of Criminal Appeals; this reduction to life imprisonment was upheld by the CAAF. *United States v. Curtis*, 52 M.J. 166 (C.A.A.F. 1999).
2. Search of automobiles incident to arrest.
 - a. When a policeman has made a lawful arrest of an occupant of an automobile he may search the entire passenger compartment and any closed containers in passenger compartment, *but not the trunk*. Mil. R. Evid. 314(g)(2).

- b. Search may be conducted after the occupant has been removed from the automobile, as long as the search is “contemporaneous” with the apprehension. Mil. R. Evid. 314(g)(2); *New York v. Belton*, 453 U.S. 545 (1981). Search of zipped jacket pocket in back seat of car following removal and arrest of occupants upheld; new bright line rule established.
- c. *Belton* rule extended in *Thornton v. United States*, 541 U.S. 615 (2004), to include search of a vehicle if the arrestee was a “recent occupant” of the vehicle. How recent remains unclear.
- d. Arrest means arrest. A search incident to a traffic citation, as opposed to an arrest, is not constitutional. *Knowles v. Iowa*, 525 U.S. 113 (1999). *But cf. Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (Petitioner was arrested for not wearing a seatbelt and then handcuffed, searched at the police station, and held in jail for an hour. The Court found that the arrest for this minor infraction was reasonable).

C. Stop and Frisk.

- 1. General rule. Fourth Amendment allows a limited government intrusion (“stop and frisk”) based on less than probable cause (“reasonable suspicion”) where important government interests outweigh the limited invasion of a suspect’s privacy. *Terry v. Ohio*, 392 U.S. 1 (1968); Mil. R. Evid. 314(f).
- 2. Reasonable suspicion.

- a. Reasonable suspicion is specific and articulable facts, together with rational inferences drawn from those facts, which reasonably suggest criminal activity. *Terry v. Ohio*, 392 U.S. 1, 21 (1968); *United States v. Bair*, 32 M.J. 404 (C.M.A. 1991). See *United States v. Robinson*, 58 M.J. 429 (C.A.A.F. 2003), for an excellent framework for a reasonable suspicion analysis.
 - (1) Reasonable suspicion is measured under the totality of the circumstances; and,
 - (2) Reasonable suspicion is less than probable cause.

- b. Reasonable suspicion may be based on police officer's own observations. *United States v. Peterson*, 30 M.J. 946 (A.C.M.R. 1990). Reasonable suspicion existed to stop soldier seated with companion in car parked in dead end alley in area known for drug activity at night; car license plate was from out-of-state.

- c. Reasonable suspicion may be based on collective knowledge of all police involved in investigation. *United States v. Hensley*, 469 U.S. 221, 229 (1985). Information in police department bulletin was sufficient reasonable suspicion to stop car driven by robbery suspect.

- d. Reasonable suspicion may be based on an anonymous tip. *Alabama v. White*, 496 U.S. 325 (1990). Detailed anonymous tip was sufficient reasonable suspicion to stop automobile for investigative purposes. *But see Florida v. J.L.*, 529 U.S. 266 (2000) (stating that anonymous tip needs to be reliable in "its assertion of illegality").

- e. Reasonable suspicion may be based on drug courier “profile.” *United States v. Sokolow*, 490 U.S. 1 (1988). “Innocent” non-criminal conduct amounted to reasonable suspicion to stop air traveler who paid \$2,100.00 cash for two tickets, had about \$4,000.00 in cash; was traveling to a source city (Miami); was taking 20 hour flight to stay only 2 days; was checking no luggage (only carry-on luggage); was wearing same black jumpsuit and gold jewelry on both flights; appeared nervous; and, was traveling under alias. Cocaine found in carry-on bag after dog alerted was admissible.
 - f. Reasonable suspicion may be based on “headlong flight” coupled with other circumstances (like nervous and evasive behavior and high-crime area). *Illinois v. Wardlow*, 528 U.S. 119 (2000).
3. Nature of detention. A stop is a brief, warrantless investigatory detention based on reasonable suspicion accompanied by a limited search.
- a. Frisk for weapons.
 - (1) The police may frisk the suspect for weapons when he or she is reasonably believed to be armed and dangerous. Mil. R. Evid. 314(f)(2).
 - (2) Plain feel. Police may seize contraband items felt during frisk if its contraband nature of items is readily apparent. *Minnesota v. Dickerson*, 508 U.S. 366 (1993) (seizure of cocaine during frisk held unconstitutional because the contraband nature of cocaine was not readily apparent). But looking down the front of a suspect’s pants to determine if “bulges” were weapons was reasonable. *United States v. Jackson*, No. ACM 33178, 2000 CCA LEXIS 57 (A.F.Ct.Crim.App. Feb. 28, 2000) (unpublished opinion).

- b. Length of the detention.
 - (1) 15 minutes in small room is too long. *Florida v. Royer*, 460 U.S. 491 (1983). Suspect was questioned in a large storage closet by two DEA agents was unreasonable: “investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop.”
 - (2) 20 minutes may be sufficiently brief if police are hustling. *United States v. Sharpe*, 470 U.S. 675 (1985). 20-minute detention by highway patrolman waiting for DEA agent to arrive was not unreasonable.

- c. Use of firearms.
 - (1) *United States v. Merritt*, 695 F.2d 1263 (10th Cir. 1982). Pointing shotgun at murder suspect did not turn legitimate investigative stop into arrest requiring probable cause.
 - (2) *United States v. Sharpe*, 470 U.S. 695 (1985); *United States v. Hensley*, 469 U.S. 221 (1985). Merely displaying handgun did not turn an investigative detention into a seizure requiring probable cause.

- d. Use of dogs. *Illinois v. Caballes*, 543 U.S. 405 (2005) (holding that otherwise lawful traffic stop was not expanded into an illegal search or seizure for contraband when officer walked a drug detection dog around vehicle during a routine traffic stop).

- (1) *United States v. Alexander*, 901 F.2d 272 (2d Cir. 1990). Approaching car with drawn guns and ordering driver out of car to frisk for possible weapons did not convert *Terry* stop into full-blown arrest requiring probable cause.

4. Important government interests.

- a. Police officer safety. *Terry v. Ohio*, 392 U.S. 1 (1968). Frisk was justified when officer reasonably believed suspect was about to commit robbery and likely to have weapon.
- b. Illegal immigrants. *I.N.S. v. Delgado*, 466 U.S. 210 (1984); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). But Border Patrol Agent's squeezing of a canvas bag during a routine stop of bus at checkpoint violated Fourth Amendment. *Bond v. United States*, 529 U.S. 334 (2000).
- c. Illegal drugs. *United States v. De Hernandez*, 473 U.S. 531 (1985). "[T]he veritable national crisis in law enforcement caused by smuggling of illicit narcotics . . . represents an important government interest." *United States v. Sharpe*, 470 U.S. 675 (1985); *United States v. Place*, 462 U.S. 696 (1983); *United States v. Mendenhall*, 446 U.S. 544 (1980). *But see Indianapolis v. Edmond*, 531 U.S. 32 (2000) (finding that use of roadblock for general search of drugs violated the Fourth Amendment).
- d. Solving crimes and seeking justice. *United States v. Hensley*, 469 U.S. 221 (1985). There is an important government interest "in solving crime and bringing offenders to justice."

5. House frisk (“Protective Sweep”). *Maryland v. Buie*, 494 U.S. 325 (1990). Police may make protective sweep of home during lawful arrest if they have “reasonable belief based on specific and articulable facts” that a dangerous person may be hiding in area to be swept; evidence discovered during protective sweep is admissible.
 - a. *United States v. Billings*, 58 M.J. 861 (A.Ct.Crim.App. 2003). Police may conduct a protective sweep of a house, even though the arrest takes place outside the house.

D. Administrative Inspections.

1. The military’s two-part test. Mil. R. Evid. 313(b).
 - a. Primary purpose test.
 - (1) Inspection. The primary purpose of an inspection must be to ensure the security, military fitness, or good order and discipline of the unit (administrative purpose).
 - (2) Criminal search. An examination made for the primary purpose of obtaining evidence for use in a court-martial or in other disciplinary proceedings (criminal purpose) is not an inspection.
 - b. Subterfuge rule. If a purpose of an examination is to locate weapons and contraband, and if the examination:
 - (1) Was directed immediately following the report of a crime and not previously scheduled; or,
 - (2) Specific persons were selected or targeted for examination; or,

- (3) Persons were subjected to substantially different intrusions; then,

the prosecution must prove by clear and convincing evidence that the purpose of the examination was administrative, not a subterfuge for an illegal criminal search.

2. The Supreme Court's test. *New York v. Burger*, 482 U.S. 691 (1987) (warrantless "administrative" inspection of junkyard pursuant to state statute was proper).
 - a. There are three requirements for a lawful administrative inspection:
 - (1) There must be a substantial government interest in regulating the activity;
 - (2) The regulation must be necessary to achieve this interest; and,
 - (3) The statute must provide an adequate substitute for a warrant.
 - (a) The statute must give notice that inspections will be held;
 - (b) The statute must set out who has authority to inspect; and,
 - (c) The statute must limit the scope and discretion of the inspection.
 - b. A dual purpose is permissible. A state can address a major social problem both by way of an administrative scheme and through penal sanctions.

3. Health and welfare inspections. *United States v. Tena*, 15 M.J. 728 (ACMR 1983). Commander's unit inspection for substandard conditions is permissible. *United States v. Thatcher*, 28 M.J. 20 (C.M.A. 1989). Stolen toolbox was discovered in short-timer's room. Government failed to show by clear and convincing evidence that examination was an "inspection" and not an "illegal search."
4. Unit urinalysis.
 - a. Invalid inspection.
 - (1) *United States v. Campbell*, 41 M.J. 177 (C.M.A. 1994). Urinalysis inspection test results were improperly admitted where inspection was conducted because the first sergeant heard rumors of drug use in unit and prepared list of suspects, including accused, to be tested. The military judge erred in ruling the government proved by clear and convincing evidence that the inspection was not a subterfuge for an illegal criminal search.
 - (2) Commander must have jurisdiction and authority over accused to order urinalysis. *See United States v. DiMuccio*, 61 M.J. 588 (A.F.Ct.Crim.App. 2005) (Commander of 162nd FW, a national guard unit, had no authority to order accused to submit to urinalysis because accused was at the time in "Title 10" status vice "Title 32" status even though accused was still part of 162nd FW).
 - b. Valid inspection.

- (1) Knowledge of “Reports.” *United States v. Brown*, 52 M.J. 565 (A. Ct.Crim.App. 1999). Commander directed random urinalysis after report that several soldiers were using drugs in the command. The court found that the urinalysis was a valid inspection with the primary purpose to protect the morale, safety and welfare of the unit, despite the recent report. In *United States v. Taylor*, 41 M.J. 168 (C.M.A. 1994), the accused’s urinalysis results were properly admitted, despite the fact that the test followed report to commander’s subordinate that accused had used drugs. Knowledge of a subordinate will not be imputed to the commander.
- (2) Primary Purpose. *United States v. Shover*, 44 M.J. 119 (1996). The primary purpose for the inspection was to end “finger pointing, hard feelings,” and “tension.” The commander “wanted to get people either cleared or not cleared.” The primary purpose was to “resolve the questions raised by the incident, not to prosecute someone.” This was a proper administrative purpose.
- (3) Primary Purpose. *United States v. Jackson*, 48 M.J. 292 (1998). Commander stated primary purpose of inspection of barracks rooms, less than 2 hours of receiving anonymous tip about drugs in a soldier’s barracks room, was unit readiness. Court held inspection was proper.

5. Gate inspections.

- a. Procedures. *See* AR 210-10, Installations, Administration (12 Sep. 1977), para. 2-23c (summarizes the legal requirements for gate inspections) (the regulation has been rescinded but is being revised for future promulgation).

- (1) A gate search should be authorized by written memorandum or regulation signed by the installation commander defining the purpose, scope and means (time, locations, methods) of the search.
- (2) Notice. All persons must receive notice in advance that they are subject to inspection upon entry, while within the confines, and upon departure, either by a sign or a visitor's pass.
- (3) Technological aids. Metal detectors and drug dogs may be used. *See* AR 190-12, Military Police Working Dogs (4 Jun. 2007).
- (4) Civilian employees. Check labor agreement for impact on overtime and late arrivals.
- (5) Female pat-downs. Use female inspectors if possible.
- (6) Entry inspections.
 - (a) Civilians: must consent to inspection or their entry is denied; may not be inspected over their objection.
 - (b) Military: may be ordered to comply with an inspection and may be inspected over their objection, using reasonable force, if necessary.
- (7) Exit inspections.
 - (a) Civilians: may be inspected over objection, using reasonable force, if necessary.

- (b) Military: may be ordered to comply with an inspection and may be inspected over their objection, using reasonable force, if necessary.
- b. Discretion of inspectors. *United States v. Jones*, 24 M.J. 294 (C.M.A. 1987). Police may use some discretion, per written command guidance, to select which cars are stopped and searched.
- c. Scope of search. *United States v. Burney*, 66 M.J. 701 (A.F.Ct.Crim.App. 2008), AFCCA found that it was reasonable for security forces personnel conducting a lawful inspection of vehicles entering an Air Force base to look inside the closed glasses pouch found in the accused's vehicle for contraband, considering that the intrusion was very minimal, the purpose of the inspection was to protect the base from contraband, and the search was conducted at a practical and completely logical location.

E. Border Searches.

- 1. Customs inspections.
 - a. Customs inspections are constitutional border searches. *United States v. Ramsey*, 431 U.S. 606 (1977) (finding a longstanding right of sovereign to protect itself).
 - b. Customs inspections in the military. Border searches for customs or immigration purposes may be conducted when authorized by Congress. Mil. R. Evid. 314(b); *United States v. Williamson*, 28 M.J. 511 (A.C.M.R. 1989). Military police customs inspector's warrantless search of household goods was reasonable since inspection was conducted pursuant to DOD Customs Regulations.
- 2. Gate searches overseas.

- a. General rule. Installation commanders overseas may authorize searches of persons and property entering and exiting the installation to ensure security, military fitness, good order and discipline. Mil. R. Evid. 314(c).
 - (1) Primary purpose test is applicable.
 - (2) Subterfuge rule is inapplicable.
- b. *United States v. Stringer*, 37 M.J. 310 (C.M.A. 1993). Gate searches overseas are border searches; they need not be based on written authorization and broad discretion can be given to officials conducting the search.

F. Inventories.

- 1. General rule. Inventories conducted for an administrative purpose are constitutional; contraband and evidence of a crime discovered during an inventory may be seized. Mil. R. Evid. 313(c).
 - a. Primary purpose test is applicable.
 - b. Subterfuge rule is inapplicable.
- 2. Purpose. *Illinois v. Lafayette*, 462 U.S. 640 (1983). Inventories of incarcerated persons or impounded property are justified for three main reasons:
 - a. To protect the owner from loss;
 - b. To protect the government from false claims; and,
 - c. To protect the police and public from dangerous contents.

3. Military inventories. Military inventories that are required by regulations serve lawful administrative purposes. Evidence obtained during an inventory is admissible. Inventories are required when soldiers are:
 - a. Absent without leave (AWOL), AR 700-84, Issue and Sale of Personal Clothing (18 Nov. 2004);
 - b. Admitted to the hospital, AR 700-84, Issue and Sale of Personal Clothing (18 Nov. 2004); and,
 - c. Placed in pretrial or post-trial confinement, AR 190-47, The U.S. Army Corrections System (15 Jun. 2006).
4. Discretion and Automobile Inventories. *Florida v. Wells*, 495 U.S. 1 (1990). When defendant was arrested for DWI and his car impounded and inventoried, the police improperly searched a locked suitcase in the trunk of car despite fact that there was no written inventory regulation. This search was insufficiently regulated to satisfy the Fourth Amendment.
5. See Anderson, *Inventory Searches*, 110 Mil. L. Rev. 95 (1985) (examples and analysis of military inventories).
6. Sobriety Checkpoints.
 - a. General rule. The Fourth Amendment does not prohibit the brief stop and detention of all motorists passing through a highway roadblock set up to detect drunk driving; neither probable cause nor reasonable suspicion are required as the stop is constitutionally reasonable. *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990).
7. Crime Prevention Roadblocks. *Indianapolis v. Edmond*, 531 U.S. 32 (2000). Public checkpoints/roadblocks for the purpose of drug interdiction violate the Fourth Amendment. Stops for the purpose of general crime control are only justified when there is some quantum of individualized suspicion.

8. Information Gathering Roadblocks. *Lidster v. Illinois*, 540 U.S. 419 (2004). A roadblock conducted in order to gather information regarding a crime committed one week earlier did not violate the *Edmond* rule, and was not unconstitutional.

G. Emergency Searches.

1. General rule. In emergencies, a search may be conducted to render medical aid or prevent personal injury. Mil. R. Evid. 314(i). *See Brigham City, Utah v. Stuart et al.*, 547 U.S. 398 (2006). Police may enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously threatened with such injury.
2. *Michigan v. Taylor*, 436 U.S. 499 (1978). Entry into burning or recently burnt building is permissible.
3. *United States v. Jacobs*, 31 M.J. 138 (C.M.A. 1990). Warrantless entry into accused's apartment by landlord was permissible because apartment was producing offensive odor because of spoiled food.
4. *United States v. Korda*, 36 M.J. 578 (A.F.C.M.R. 1992). Warrantless entry into accused's apartment was justified by emergency when supervisor thought accused had or was about to commit suicide.

H. Searches for Medical Purposes.

1. General rule. Evidence obtained from a search of an accused's body for a valid medical purpose may be seized. Mil. R. Evid. 312(f). *See United States v. Stevenson*, 53 M.J. 257 (C.A.A.F. 2000) (holding that the medical purpose exception applies to members of the Temporary Disability Retired List), *cert. denied*, 532 U.S. 919 (2001).

2. *United States v. Maxwell*, 38 M.J. 148 (C.M.A. 1993). Blood alcohol test of accused involved in fatal traffic accident was medically necessary, despite the fact that the test result did not actually affect accused's treatment. Test result was admissible.
 3. Drug Treatment Programs. *Ferguson v. City of Charleston*, 532 U.S. 67 (2001). The Court rejected "special needs" exception for warrantless (urinalysis) searches of pregnant women involved in a hospital drug treatment program. The ultimate purpose of the program was for law enforcement and not to get women in the program into substance abuse treatment.
- I. School Searches. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). School officials may conduct searches of students based upon "reasonable grounds" as long as the search is not "excessively intrusive." *See also Board of Education v. Earls*, 536 U.S. 822 (2002) (holding that a policy adopted by the school district to require all students to consent to urinalysis testing in order to compete in extracurricular activities did not violate the Fourth Amendment, but was reasonable).

VII. EXCLUSIONARY RULE AND ITS EXCEPTIONS. *The exclusionary rule is the remedy for illegal searches and/or illegally seized evidence: such evidence is excluded from trial. However, there are exceptions to this rule. If evidence was obtained in good faith by law enforcement officials; was discovered independent of a "tainted" source; or, would have been inevitably discovered, despite a "tainted" source, the evidence may be admitted. Illegally obtained evidence may also be introduced for impeachment purposes by the government.*

- A. The Exclusionary Rule.

1. Judicially created rule. Evidence obtained directly or indirectly through illegal government conduct is inadmissible. *Weeks v. United States*, 232 U.S. 383 (1914); *Nardone v. United States*, 308 U.S. 338 (1939); *Mapp v. Ohio*, 376 U.S. 643 (1961) (the exclusionary rule is a procedural rule that has no bearing on guilt, only on respect for “dignity” or “fairness”).
2. Mil. R. Evid. 311(a). Evidence obtained as a result of an unlawful search or seizure made by a person acting in a government capacity is inadmissible against the accused.
3. Violation of regulations does not mandate exclusion.
 - a. Urinalysis regulations.
 - (1) *United States v. Pollard*, 27 M.J. 376 (C.M.A. 1989). Deviation from Coast Guard urinalysis regulation did not make urine sample inadmissible.
 - (2) *But see United States v. Strozier*, 31 M.J. 283 (C.M.A. 1990). Gross deviations from urinalysis regulation allow exclusion of positive test results.
 - b. Financial privacy regulations. *United States v. Wooten*, 34 M.J. 141 (C.M.A. 1992). Failure to comply with federal statute and regulation requiring notice before obtaining bank records did not mandate exclusion of records.

B. Exception: Good Faith.

1. General rule. Evidence is admissible when obtained by police relying in good faith on facially valid warrant that later is found to lacking probable cause or otherwise defective.

- a. *United States v. Leon*, 468 U.S. 897 (1984).
Exclusionary rule was inapplicable even though magistrate erred and issued warrant based on anonymous tipster's information which amounted to less than probable cause.
 - b. Rationale. Primary purpose of exclusionary rule is to deter police misconduct; rule should not apply where there has been no police misconduct. There is no need to deter a magistrate's conduct.
2. Limitations. *United States v. Leon*, 468 U.S. 897 (1984).
Good faith exception does not apply, even if there is a search warrant, where:
- a. Police or affiant provide deliberately or recklessly false information to the magistrate (bad faith by police);
 - b. Magistrate abandons his judicial role and is not neutral and detached (rubber-stamp magistrate);
 - c. Probable cause is so obviously lacking to make police belief in the warrant unreasonable (straight face test); or,
 - d. The place or things to be searched are so clearly misidentified that police cannot presume them to be valid (glaring technical deficiencies).
3. Mil. R. Evid. 311(b)(3): Evidence obtained from an unlawful search or seizure may be used if:
- a. "competent individual" authorized search or seizure;
 - b. individual issuing authorization had "a substantial basis" to find probable cause;
 - c. official executing authorization objectively relied in "good faith" on the authorization.

4. What is a “substantial basis” under Mil. R. Evid. 311(b)(3)(B)? *United States v. Carter*, 54 M.J. 414 (C.A.A.F. 2001). The rule is satisfied if the law enforcement officer has a reasonable belief that the magistrate had a “substantial basis” for determining probable cause.
5. Good faith exception applies to searches authorized by a commander. *United States v. Lopez*, 35 M.J. 35 (C.M.A. 1992). Good faith exception applied to allow admission of ration cards discovered during search authorized by accused’s commander.
6. Good faith exception applies to searches authorized by military magistrate. *United States v. Carter*, 54 M.J. 414 (C.A.A.F. 2001). Regardless of whether the military magistrate had a substantial basis to issue an authorization for a blood sample, the CID SA acted in good faith in collecting the sample, and it was admissible.
7. The good faith exception applies to more than just “probable cause” determinations; it may also save a search authorization where the commander who authorized the search did not have control over the area searched.
 - a. On-post searches. *United States v. Mix*, 35 M.J. 283 (C.M.A. 1992). The good faith exception applied where a commander had a good faith reasonable belief that he could authorize a search of an auto in a dining facility parking lot, even though the commander may not have had authority over the parking lot.
 - b. Off-post searches overseas. *United States v. Chapple*, 36 M.J. 410 (C.M.A. 1993). The good faith exception applied to search of accused’s off-post apartment overseas even though commander did not have authority to authorize search because accused was not in his unit.

8. The good faith exception may apply even when a warrant has been quashed. *Arizona v. Evans*, 514 U.S. 1 (1995). The exclusionary rule does not require suppression of evidence seized incident to an arrest based on an outstanding arrest warrant in a police computer, despite the fact the warrant was quashed 17 days earlier. Court personnel were responsible for the inaccurate computer record, because they failed to report that the warrant had been quashed.
9. *But cf. United States v. Maxwell*, 45 M.J. 406 (C.A.A.F. 1996). Anticipatory search of e-mail by online company, at behest of government and prior to service of warrant shows “no reliance on the language of the warrant for the scope of the search.” Thus, good faith exception was not applicable. Evidence suppressed.

C. Exception: Independent Source.

1. General rule. Evidence discovered through a source independent of the illegality is admissible.
 - a. *Murray v. United States*, 487 U.S. 533 (1988). Police illegally entered warehouse without warrant and saw marijuana. Police left warehouse without disturbing evidence and obtained warrant without telling judge about earlier illegal entry. Evidence was admissible because it was obtained with warrant untainted by initial illegality.
 - b. Rationale. Police should not be put in worse position than they would have been in absent their improper conduct.
2. Evidence obtained through independent and voluntary acts of third parties will render evidence admissible under independent-source doctrine. See *United States v. Fogg*, 52 M.J. 144, 151 (C.A.A.F. 1999) (discussing independent-source doctrine as alternative basis for not invoking the exclusionary rule) .

3. Search based on both legally and illegally obtained evidence. *United States v. Camanga*, 38 M.J. 249 (C.M.A. 1993). Independent source doctrine applied where affidavit supporting search authorization contained both legally and illegally obtained evidence. After excising illegal information, court found remaining information sufficient to establish probable cause.
4. Mil. R. Evid. 311(e)(2). Evidence challenged as derived from an illegal search or seizure may be admitted if the military judge finds by a preponderance of evidence that it was not obtained as a result of the unlawful search or seizure.

D. Exception: Inevitable Discovery.

1. General rule. Illegally obtained evidence is admissible if it inevitably would have been discovered through independent, lawful means.
 - a. *Nix v. Williams*, 467 U.S. 431 (1984). Accused directed police to murder victim's body after illegal interrogation. Body was admissible because it would have inevitably been discovered; a systematic search of the area where the body was found was being conducted by 200 volunteers.
 - b. Rationale. The police should not benefit from illegality, but should also not be put in worse position.
2. Mil. R. Evid. 311(b)(2). Evidence that was obtained as a result of an unlawful search or seizure may be used when the evidence would have been obtained even if such unlawful search or seizure had not been made.

3. *United States v. Kozak*, 12 M.J. 389 (C.M.A. 1982). Illegal search of train station locker and seizure of hashish, which exceeded authority to wait for accused to open locker and then apprehend him, did not so taint apprehension of accused as to make subsequent seizure of drugs after accused opened locker inadmissible. Drugs would have been inevitably discovered.
4. *United States v. Carrubba*, 19 M.J. 896 (A.C.M.R. 1985). Evidence found in trunk of accused's car admissible despite invalid consent to search. Evidence inevitably would have been discovered as police had probable cause and were in process of getting search authorization.
5. *United States v. Kaliski*, 37 M.J. 105 (C.M.A. 1993). Inevitable discovery doctrine should be applied to witness testimony only if prosecution establishes witness is testifying of her own free will, independent of illegal search or seizure. Testimony of accused's partner in sodomy should have been suppressed where she testified against accused only after police witnessed sodomy during illegal search.
6. Distinguish between "independent source" and "inevitable discovery."
 - a. Independent source deals with *facts*. Did police in fact find the evidence independently of the illegality?
 - b. Inevitable discovery deals with hypotheticals. *Would* the police have found the evidence independently of the illegal means?

E. Exception: Attenuation of Taint.

1. General rule. Evidence that would not have been found *but for* official misconduct is admissible if the causal connection between the illegal act and the finding of the evidence is so attenuated as to purge that evidence of the primary taint. *See Wong Sun v. United States*, 371 U.S. 471, 484-87 (1963)(holding that the unlawful arrest did not taint subsequent confession where it was made after his arraignment, release on own recognizance, and voluntary return to the police station several days later). *See also U.S. v. Conklin*, 63 M.J. 333 (C.A.A.F. 2006) which establishes three factors to determine whether an accused's consent was an independent act of free will, breaking the causal chain between the consent and a prior unconstitutional search: (1) the temporal proximity of the illegal search and the consent; (2) the presence of intervening circumstances; and (3) the purpose and the flagrancy of the initial search. *See also U.S. v. Jones*, 64 M.J. 596 (Army Ct.Crim.App., 2007).
2. *United States v. Rengel*, 15 M.J. 1077 (N.M.C.M.R. 1983). Even if accused was illegally apprehended, later seizure of LSD from him was attenuated because he had left the area and was trying to get rid of drugs at the time of the seizure.
3. *But see Taylor v. Alabama*, 457 U.S. 687, 691 (1982). Defendant was arrested without probable cause, repeatedly questioned by police who took fingerprints and put him in line-up without counsel present. Confession was obtained six hours after arrest was inadmissible.
4. Mil. R. Evid. 311(e)(2). Evidence challenged as derived from an illegal search or seizure may be admitted if the military judge finds by a preponderance of evidence that it was not obtained as a result of the unlawful search or seizure.

F. Exception: Impeachment.

1. Illegally obtained evidence may be used to impeach accused's in-court testimony on direct examination or to impeach answers to questions on cross-examination. *United States v. Havens*, 44 U.S. 962 (1980). Defendant's testimony on direct that he did not know his luggage had a T-shirt that was being used for smuggling cocaine allowed admissibility of illegally obtained T-shirt on cross-examination to impeach defendant's credibility. *See also Walder v. United States*, 347 U.S. 62 (1954).
2. Mil. R. Evid. 311(b)(1). Evidence that was obtained as a result of an unlawful search or seizure may be used to impeach by contradiction the in-court testimony of the accused.

VIII. CONCLUSION.

IX. APPENDIX A: SECTION III DISCLOSURE

UNITED STATES)
) Fort Blank, Missouri
 v.)
) DISCLOSURE OF
 William Green) SECTION III EVIDENCE
 Private (E-1), U.S. Army)
 A Co., 1st Bn, 13th Inf.) 22 July 200X
 8th Inf. Div. (Mech))

Pursuant to Section III of the Military Rules of Evidence, the defense is hereby notified:

1. Rule 304(d)(1). There are (no) relevant statements, oral or written, by the accused in this case, presently known to the trial counsel (and they are appended hereto as enclosure ____).

2. Rule 311(d)(1). There is (no) evidence seized from the person or property of the accused or believed to be owned by the accused that the prosecution intends to offer into evidence against the accused at trial (and it is described with particularity in enclosure ____) (and it is described as follows:
_____).

3. Rule 321(d)(1). There is (no) evidence of a prior identification of the accused at a lineup or other identification process which the prosecution intends to offer against the accused at trial (and it is described with particularity in enclosure ____) (and it is described as follows:

_____).

A copy of this disclosure has been provided to the military judge.

PETER MUSHMAN
CPT, JA
Trial Counsel

X. APPENDIX B: GUIDE TO ARTICULATE PROBABLE CAUSE TO SEARCH

1. Probable cause to authorize a search exists if there is a *reasonable belief, based on facts*, that the person or evidence sought is at the place to be searched. Reasonable belief is more than mere suspicion. Witness or source should be asked three questions:

A. What is where and when? Get the facts!

1. Be specific: how much, size, color, etc.

2. Is it still there (or is information stale)?

a. If the witness saw a joint in barracks room two weeks ago, it is probably gone; the information is stale.

b. If the witness saw a large quantity of marijuana in barracks room one day ago, probably some is still there; the information is not stale.

B. How do you know? Which of these apply:

1. "I saw it there." Such personal observation is extremely reliable.

2. "He [the suspect] told me." Such an admission is reliable.

3. "His [the suspect's] roommate/wife/ friend told me." This is hearsay. Get details and call in source if possible.

4. "I heard it in the barracks." Such rumor is unreliable unless there are specific corroborating and verifying details.

C. Why should I believe you? Which of these apply:

1. Witness is a good, honest soldier; you know him from personal knowledge or by reputation or opinion of chain of command.
2. Witness has given reliable information before; he has a good track record (CID may have records).
3. Witness has no reason to lie.
4. Witness has truthful demeanor.
5. Witness made statement under oath. (“Do you swear or affirm that any information you give is true to the best of your knowledge, so help you God?”)
6. Other information corroborates or verifies details.
7. Witness made admission against own interests.

2. The determination that probable cause exists must be based on facts, not only on the conclusion of others.

3. The determination should be a common sense appraisal of the totality of all the facts and circumstances presented.

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