

Summer 1976

## Searches and Seizures in the Military Justice System

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### Recommended Citation

Pope, William M. (1976) "Searches and Seizures in the Military Justice System," *Indiana Law Journal*: Vol. 52: Iss. 1, Article 12.

Available at: <https://www.repository.law.indiana.edu/ilj/vol52/iss1/12>

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## Searches and Seizures in the Military Justice System

This note presents a review and analysis of the Court of Military Appeals' (COMA) recent, significant fourth amendment decisions dealing with the lawfulness of searches for and seizures of evidence.<sup>1</sup> The cases to be discussed primarily concern: procedures which will insure the validity of a consent search;<sup>2</sup> admissibility at a trial by court-martial of evidence which has been obtained by foreign officials;<sup>3</sup> searches incident to a lawful arrest;<sup>4</sup> and military inspections which result in the discovery of criminal activity or evidence.<sup>5</sup>

These cases, taken together, may represent a new trend of judicial activism in that many well established doctrines of military law are now being questioned and re-evaluated by COMA in light of contemporary circumstances. This trend should provide new guidelines for the application of the fourth amendment to the military community, guidelines which will insure maximum protection for the constitutional rights of service personnel. These guidelines, however, will be established only if COMA

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<sup>1</sup>The Manual for Courts-Martial deals with lawful search in paragraph 152, which holds evidence against the accused inadmissible at a trial by court-martial:

If it was obtained as a result of an unlawful search of the person or property of the accused conducted, instigated, or participated in by an official or agent of the United States, or any State thereof or political subdivision of either, who was acting in a Governmental capacity; or

If it was obtained without the freely given consent of the accused as a result of an *unlawful search* of another's premises on which the accused was legitimately present, and the search in question was conducted, instigated, or participated in by an official or agent of the United States, or any State thereof or political subdivision of either, who was acting in a Governmental capacity; or

If it was obtained as a result of a seizure or examination of property of the accused upon an *unlawful search* of anyone's property, unless the presence of the property of the accused was due to trespass, whether or not the accused was present, and the search in question was conducted, instigated, or participated in by an official or agent of the United States, or any State thereof or political subdivision of either, who was acting in a Governmental capacity.

Manual for Courts-Martial ¶ 152, United States, 1969 (rev.) [hereinafter cited as MCM].

<sup>2</sup>*United States v. Chase*, 24 C.M.A. 95, 51 C.M.R. 268 (1976); *United States v. Mayton*, 23 C.M.A. 565, 50 C.M.R. 784 (1975); *United States v. Jordan*, 23 C.M.A. 525, 50 C.M.R. 664 (1975), *aff'd on rehearing on other grounds*, 24 C.M.A. 156, 51 C.M.R. 375 (1976). See notes 59-72, *infra*, & text accompanying.

<sup>3</sup>*United States v. Jordan*, 23 C.M.A. 525, 50 C.M.R. 664 (1975), *aff'd on rehearing on other grounds*, 24 C.M.A. 156, 51 C.M.R. 375 (1976). See notes 28-39, *infra*, & text accompanying.

<sup>4</sup>*United States v. Kinane*, 24 C.M.A. 120, 51 C.M.R. 310 (1976). See notes 40-58, *infra*, & text accompanying.

<sup>5</sup>*United States v. Thomas*, 24 C.M.A. 228, 51 C.M.R. 607 (1976); *United States v. Miller*, 24 C.M.A. 192, 51 C.M.R. 437 (1976). See notes 6-28, *infra*, & text accompanying.

restricts the deviations from civilian constitutional protections to those areas where the need for such deviations can clearly be demonstrated to be of paramount military importance. The court's increasing reluctance to accept all governmental claims of military exigency is one indication that COMA is continuing to move in the proper direction.

#### LEGITIMATE INSPECTION OR ILLEGAL SEARCH: CONTINUING CONFUSION

It has always been the rule that inspections in the military are not subject to the requirements of the fourth amendment so long as the purpose of the inspections relates to ascertaining the fitness of the command to perform its military function and not to the discovery of evidence for use in a criminal action.<sup>6</sup> The main controversy in military law with regard to inspections centers, instead, around the question of when a legitimate inspection becomes an illegal search because evidence of criminal activity will probably be discovered.

A recent decision of the court, *United States v. Thomas*,<sup>7</sup> does little to resolve, and may even exacerbate the uncertainty present in the area of military inspections. Even though all three of the military judges in *Thomas* reached a similar result, each wrote a separate opinion with a differing rationale and analysis. None of the opinions is entirely consistent with previous case law.

#### *United States v. Thomas: A Sharply Divided Court*

The *Thomas* case involved the use of a marijuana detection dog during a barracks inspection after reports had been received that the odor of marijuana was present in the barracks. During the inspection, the dog led his handlers to the accused's locker. Marijuana was found and, ultimately, the accused was convicted for wrongful possession of marijuana. The precise question of whether the mere use of a marijuana dog was a search

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<sup>6</sup>See, e.g., *United States v. Chase*, 24 C.M.A. 95, 51 C.M.R. 268 (1976), where the Court of Military Appeals stated that an Air Force regulation providing for gateway inspections of vehicles entering or departing an Air Force installation would be permissible if done on a random basis for the purpose of safeguarding government property, but inspections undertaken in order to discover evidence of crimes involving personal non-governmental property would be impermissible. See also *United States v. Carter*, 24 C.M.A. 129, 51 C.M.R. 319 (1976), where it was stated that a commander or his delegate must determine, with regard to administrative inspections, whether or not there is probable cause to inspect whenever the inspection is for the purpose of ferreting out criminal violations. It should be noted that the court based this conclusion on *Wyman v. James*, 400 U.S. 309 (1971), which held that a warrant procedure was not necessary to conduct welfare inspections which were non-criminal in nature. The result in *Carter* would also be compelled by *United States v. Lange*, 15 C.M.A. 486, 35 C.M.R. 458 (1965), which held that if the purpose of an inspection was the discovery of evidence to be used in a criminal prosecution, then the inspection was really a search which would have to comply with the fourth amendment. See generally, H. MOYER, JUSTICE AND THE MILITARY §§ 2-185 to 189 (1972).

<sup>7</sup>24 C.M.A. 228, 51 C.M.R. 607 (1976).

*per se* was not decided by the court since there was no formal holding in the case. There was no formal holding because no two judges would agree on a theory upon which the result of the case could be predicated.<sup>8</sup> After *Thomas* the question was still undecided as to whether the use of a marijuana dog was a legal method of inspecting or of obtaining information upon which a determination of probable cause could be based. Since the usage of marijuana dogs and inspections in general are both important topics in the military, it is helpful to examine the separate opinions in *Thomas* to determine the direction of the court on those subjects.

Chief Judge Fletcher's opinion<sup>9</sup> called for allowing inspections under all circumstances, even when the purpose was the discovery of criminal activity, provided that in all instances evidence of any criminal activity so discovered would be excludable at any criminal or quasi-criminal proceeding.<sup>10</sup> This position is supported by the doctrine of military necessity,<sup>11</sup> at least to the extent that the importance of determining the fitness of the command outweighs any damage done to individual rights of privacy. Under this approach, whenever there is suspicion of criminal activity which amounts to less than probable cause to search, the military would be permitted to act without observing fourth amendment standards in order to insure that the command is continually ready to fulfill its military mission.<sup>12</sup>

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<sup>8</sup>Judge Cook based his reversal on the failure of the officer in charge to obtain proper authorization to conduct the search. Although authorization had been obtained, Judge Cook found that no valid determination of probable cause had been made because the officer in charge had either omitted or misstated material facts in obtaining the authorization from the issuing officer. Judge Fletcher's opinion called for reversal on the grounds that evidence discovered during an inspection should be excludable at any criminal or quasi-criminal proceedings. Judge Ferguson reversed because he viewed the use of the marijuana dog as a search conducted without probable cause which led to the discovery of the incriminating evidence used at the accused's trial.

<sup>9</sup>24 C.M.A. at 233, 51 C.M.R. at 612.

<sup>10</sup>See Note, *The Right to Counsel at Summary Courts-Martial: COMA at the Crossroads*, 52 IND. L.J. \_\_\_\_ (1976), *infra* for a discussion of quasi-criminal and criminal proceedings.

<sup>11</sup>See *Parker v. Levy*, 417 U.S. 733 (1974) (legal justification for the doctrine of military necessity). Generally the idea of military necessity assumes a military society, apart from the civilian world, where, due to the special nature and importance of the military function, unconstitutional activity by the government may be legitimized if such activity is for the purpose of furthering vital military needs. This is true even if the constitutional rights of individual servicemen must be sacrificed in the process.

<sup>12</sup>The primary difficulty with Judge Fletcher's approach is that the exclusionary rule is transformed from a means for protecting privacy into an end in itself. By compromising rights of privacy in general, and then relying on the exclusionary rule as the sole method for prevention of abuse, Judge Fletcher's recommendation fails to protect service personnel from violations of privacy which are not prosecution oriented. Preserving freedom from unreasonable searches and seizures should be the focus of judicial guidelines in this area and not the mere prevention of incarceration.

*But see* Committee for G.I. Rights v. Calloway, 518 F.2d 466 (D.C. Cir. 1975), which sanctioned warrantless inspections without probable cause as part of a drug abuse prevention program instituted by the Army. The program complained of involved unannounced taking of urinalyses from soldiers involved in the rehabilitative program with the possibility that adverse test results could be used as the basis for punitive action. In finding the inspections to

Judge Cook would also sanction the use of marijuana dogs during inspections but for entirely different reasons. Judge Cook's position was that service personnel have no reasonable expectation of privacy with regard to the inspection of government property, in this case a government barracks and common corridors thereof. Without a reasonable expectation of privacy or a proprietary interest in the area being searched, service personnel have no standing under the fourth amendment to object to the search/inspection which has taken place.<sup>13</sup> This position would only protect from search/inspections that personal property of service personnel which was properly stored in its designated place.<sup>14</sup> Everything else would theoretically be government property which officials would be free to "inspect" at any time regardless of whether the place to be "inspected" was a common area or an individual's room.<sup>15</sup>

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be constitutionally permissible the court relied to a great extent on the military necessity argument, emphasizing the seriousness of the drug problem in the military. *Id.* at 476-77.

Judge Fletcher's opinion in *Thomas* was very similar to the analysis used in the *G.I. Rights* case, except that he would exclude all the evidence obtained during the inspection from use in any disciplinary or criminal proceeding. By striking a balance between military necessity and individual fourth amendment rights, Judge Fletcher allows military necessity to become a two-way doctrine where governmental as well as individual rights are sometimes limited because of the special nature of the military. This approach seems to be a more reasonable solution to the problem than the one reached by the federal court in the *G.I. Rights* case, since the primary purpose of the doctrine of military necessity, *i.e.* insuring the fitness of the command, would be fulfilled without making the violation of individual rights or privacy more egregious by bringing prosecution as a result of evidence obtained during the violations. Although this kind of exclusionary rule vitiates the plain view doctrine, it is not an onerous burden for the government to bear. Its officials can still obtain criminal evidence in the usual manner if prosecution is their main concern.

It has already been mentioned that Judge Fletcher's proposal, arguably, makes the exclusionary rule an end in itself since the rule will no longer be operating as a deterrent to the invasion of individual rights of privacy. Although these allegations may be true, the exclusionary rule still serves to deter searches which had previously been disguised as legitimate inspections. A blanket rule such as the one in question could possibly be more effective in curtailing disguised searches than the "purpose rule" of *United States v. Lange*, 15 C.M.A. 486, 35 C.M.R. 458 (1965), which apparently required a specific finding of intent to discover evidence of criminal activity before the inspection would be treated as a search. It remains to be seen whether the approach of Judge Fletcher or that of Judge Perry, who advocated a purpose type inquiry in *United States v. Roberts*, 25 C.M.A. 39, 54 C.M.R. 39 (1976), *see* note 25 *infra*, will be most effective in protecting the rights of privacy of military personnel.

<sup>13</sup>*See* MCM ¶ 152, 1969 (rev.), at note 1 *supra*. *See also* *United States v. Miller*, 24 C.M.A. 192, 51 C.M.R. 437 (1976) (per curiam opinion adopting 50 C.M.R. 303 (A.C.M.R. 1975)) which adopted the proposition that service personnel also had the right to object to searches which violated their reasonable expectations of privacy; *See* note 15, *infra*, & text accompanying.

<sup>14</sup>One problem with this approach is that it fails to deal with the problem of inspections under the concept first expressed in *Katz v. United States*, 389 U.S. 347 (1967), that the fourth amendment protects people and not places or things. Judge Cook's over reliance on proprietary concepts seems to be out of line with post-*Katz* views concerning the parameters of the fourth amendment.

<sup>15</sup>*But see* *United States v. Miller*, 24 C.M.A. 192, 51 C.M.R. 437 (1976) (per curiam opinion adopting 50 C.M.R. 303 (A.C.M.R. 1975)), which adopted the position that under some circumstances service personnel could have a reasonable expectation of privacy in their rooms. Judge Cook dissented on the ground that the government had a right to inspect property in which it had a proprietary interest for any or no reason. In effect Judge Cook's inspections for no reason would be illegal exploratory searches.

The basic difference between the positions taken by Judge Fletcher and Judge Cook is that Judge Cook does not recognize the existence of any fourth amendment rights inuring to service personnel who occupy government provided rooms or barracks except the right to be free from unreasonable searches of their person. Judge Fletcher, on the other hand, recognizes the existence of servicemen's right to be free from governmental intrusion generally, without any governmental property distinction. He also feels that the doctrine of military necessity only requires that these constitutional rights should be sacrificed to the extent that it is absolutely necessary.

Judge Ferguson authored the third opinion in *Thomas*, expressing the view that the use of a dog "trained to ferret out the presence of contraband drugs"<sup>16</sup> constituted a search under the fourth amendment as applied to the military. Consequently, he felt that fourth amendment procedures and safeguards must be implemented if the fruits of the marijuana dog search are to be admissible at a trial by court-martial. Since there was no probable cause to search the accused's locker for marijuana, Judge Ferguson found the search to be unreasonable and its fruits inadmissible. In reaching his conclusions, Judge Ferguson relied less on policy arguments and more on previous case law than either Judge Cook or Judge Fletcher. The main source of case law support for his position was *United States v. Unrue*.<sup>17</sup> Although the fruits of marijuana dog inspections were admissible under the circumstances there presented, *Unrue* implicitly treated such inspections as searches which, under the fourth amendment, must be reasonable.<sup>18</sup> Basically, the argument is that *Unrue*, in holding that the marijuana dog search was "not unreasonable,"<sup>19</sup> assumes that the use of the dogs constitutes a search. The legality of the search in *Unrue* turned on the presence or absence of a reasonable expectation of privacy on the part of the subjects of the search. Only a finding of such an expectation of privacy would allow the subjects standing to challenge the marijuana dog search, which under normal circumstances would usually be conducted without probable cause and hence be violative of the fourth amendment. Although Judge Ferguson cited other cases, both civilian and military, in support of his position,<sup>20</sup> the real key to his opinion is the assumption that Thomas had an expectation of privacy in his wall locker, and for this proposition he gives no case support.<sup>21</sup> As between Judge Cook's view of no reasonable expectation of privacy for service personnel occupying government property and Judge Ferguson's finding of such an expectation, the recent case

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<sup>16</sup>24 C.M.A. at 236, 51 C.M.R. at 615.

<sup>17</sup>22 C.M.A. 466, 47 C.M.R. 556 (1973).

<sup>18</sup>See 22 C.M.A. at 470, 47 C.M.R. at 560.

<sup>19</sup>*Id.* (held that under the circumstances the subjects of the inspection no longer had an expectation of privacy).

<sup>20</sup>24 C.M.A. at 237-38, 51 C.M.R. at 616-17.

<sup>21</sup>24 C.M.A. at 238, 51 C.M.R. at 617.

law tends to support the latter position.<sup>22</sup> In *United States v. Miller*,<sup>23</sup> COMA adopted the lower court's holding that service personnel do have a reasonable expectation of freedom from unauthorized governmental activity in their rooms. Inspections were listed as an authorized governmental activity, but the validity of the use of a marijuana dog as part of a legitimate health and welfare inspection was not decided.<sup>25</sup> Although the possibility of the court's holding use of marijuana dog to be legitimate government activity is not precluded by *Miller*, the case did establish that under some circumstances an expectation of privacy does exist for service personnel occupying government property. For this very reason Judge Cook dissented in *Miller*, using the same arguments that he later employed in the *Thomas* case. Depending on the approach taken by Judge Perry, who recently replaced the retiring Judge Ferguson, if a marijuana dog inspection case were to be decided today, the court could follow any one of the opinions written in *Thomas*. In any event, the next case should address some of the difficult problems raised by the *Thomas* case in such a manner as to maintain military preparedness without sacrificing individual liberties any more than is absolutely necessary.<sup>25</sup>

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<sup>22</sup>See, e.g., *United States v. Whittler*, 23 C.M.A. 121, 48 C.M.R. 682 (1974), as another case which tends to support Judge Ferguson's assumption of an individual's having a reasonable expectation of privacy in his wall locker. *Whittler* held that a search of the accused's living quarters must be supported by a valid probable cause determination even if his personal living area is the only place where incriminating evidence is likely to be found. This decision and similar cases cited therein, *id.* at 122-23, 48 C.M.R. at 683-84, express a concern about the need for fourth amendment protection in the personal living area of service personnel quartered in barracks. As with the *Miller* case, see note 15 *supra*, *Whittler* is not conclusive as to the existence of an expectation of privacy as to a wall locker but it does undercut Judge Cook's argument of no expectation of privacy under any circumstances.

<sup>23</sup>24 C.M.A. 192, 51 C.M.R. 437 (1976) (per curiam opinion adopting 50 C.M.R. 303 (A.C.M.R. 1975)).

<sup>24</sup>*Id.*

<sup>25</sup>Shortly before this note was published COMA decided *United States v. Roberts*, 25 C.M.A. 39, 54 C.M.R. 39 (1976), which dealt with a marijuana dog inspection similar to the one conducted in *Thomas*. At approximately 4:30 A.M. a search party entered the accused's barracks and announced that an inspection was taking place. Individual barrack's rooms were searched with the marijuana detection dog. Upon entering the accused's barracks room, the dog alerted on a cabinet, indicating the presence of marijuana within. As a result of this action, a search of the cabinet was conducted and marijuana was found. The accused was later convicted for possession of marijuana in violation of Article 92 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 892 (1970).

Judge Perry, writing the lead opinion, adopted the basic position of his predecessor, Judge Ferguson, by concluding that military personnel have a reasonable expectation of privacy in their living quarters which is protected by the fourth amendment. In addition, Judge Perry found that "shakedown inspections" were unreasonable searches since they were conducted in a general manner, without probable cause and for the purpose of discovering evidence of criminal activity. According to Judge Perry, all inspections are searches with "fitness inspections" being reasonable and "shakedown inspections" unreasonable. Given Judge Perry's definition of "shakedown inspections" as those inspections which search specifically for criminal goods or evidence, it would seem that this new rule merely incorporates the purpose test of *United States v. Lange*, 15 C.M.A. 486, 35 C.M.R. 458 (1965). In any event marijuana dog inspections are considered "shakedown inspections" by Judge Perry especially

### Conclusion

One of the problems which remains unresolved by the *Thomas* decision, although recognized by Judge Fletcher, concerns the extent to which the military, on grounds of military necessity, can conduct inspections for the purpose of obtaining evidence to be used in a criminal or quasi-criminal prosecution without making such inspections in compliance with the fourth amendment. No matter which way the expectation of privacy issue is resolved, there will still be a need to establish limits on the military necessity doctrine as it applies to search and seizure law. Otherwise all fourth amendment rights will be abrogated by the doctrine. It has been suggested that a limitation of the scope of military inspections as determined by their precise purpose be worked out in a manner similar to the administrative search warrants presently employed in civilian inspections.<sup>26</sup> If some specificity of purpose were required, similar to the statutory authorization needed for a civilian inspection,<sup>27</sup> it would be easier to ascertain whether the inspectors were engaged in legitimate military procedure when they discovered the incriminating evidence or whether they were merely poking around, using the pretense of an inspection to cover impermissible investigatory behavior. If standards are established (by regulation or other) which specifically delineate the circumstances under which "fitness" inspections may be undertaken when criminal violations are suspected, then even inspections based on less than probable cause will be valid for all purposes. A procedure of this kind would increase the likelihood that rights of privacy would not be arbitrarily, and hence unreasonably, violated.

A compromise solution, which allows all inspections while employing an exclusionary rule with regard to evidence of criminal activity, thereby

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in cases like *Roberts* where the areas searched are the private rooms of members of the military.

Judge Fletcher, relying on his opinion in *Thomas*, concurred in the result reached by Judge Perry. He did not, however, agree with the rationale. Since Judge Cook dissented, *Roberts* is just like *Thomas* in that there is no formal holding in either case because no two judges would agree on a theory which would support the result the court ordered. Judge Cook dissented for reasons similar to those which he expressed in the *Thomas* case.

As a practical matter it would appear that after *Roberts* marijuana dog inspections will be useless as a police tactic since evidence obtained by such means will be inadmissible at court-martial. This remains true despite the fact that *Roberts* does not hold that such inspections are illegal. So long as Judge Fletcher is willing to exclude evidence which was not seized by illegal means this anomalous situation will continue.

<sup>26</sup>Comment, *Inspections*, 54 MIL. L. REV. 225, 246 (1971).

<sup>27</sup>In civilian inspections, the test for determining whether there is "probable cause" to issue a search warrant is not the usual test of whether it is more likely than not that the violation in question has been committed, but only that it be shown that reasonable legislative or administrative standards for conducting inspections have been satisfied. See *Camara v. Municipal Ct.*, 387 U.S. 523 (1967).

Similar rules or regulations could be promulgated in the military to safeguard service personnel from totally arbitrary invasions of privacy and at the same time meet the need of insuring that the command is fit to perform its military mission.



maintaining a semblance of fourth amendment protection, seems to be a reasonable means of dealing with an intractable problem. Nevertheless the question always remains of whether the need for ascertaining command fitness is so great, especially where domestically based non-combat troops are concerned, that the fourth amendment rights of service personnel to be free from warrantless invasions of privacy should be sacrificed.

#### FOREIGN SEARCHES

Because the activities of military personnel subject to court-martial jurisdiction involve contact with the people and governments of foreign nations, military courts have been called upon to determine the admissibility of evidence obtained by searches conducted by foreign police officials.<sup>28</sup> *United States v. Jordan*<sup>29</sup> is a significant case recently decided by COMA which deals with the problems of foreign searches.

In *Jordan* the search in question was initiated by British police who suspected the accused, an American serviceman, of having committed several burglaries. Before searching the room of the accused, which was located off-base, the British police contacted American officials, two of whom accompanied the British officers to the accused's room. The American officials unlocked the padlock on the accused's locker and provided a photographer to take pictures of the stolen property discovered in the room.

In the initial hearing of *Jordan* in 1975, the court had held that "search and seizure in a foreign country must meet Fourth Amendment standards in order [for the fruits thereof] to be admitted in evidence in a trial by court-martial, regardless of whether it is obtained by foreign police acting on their own or in conjunction with American authorities."<sup>30</sup> On rehearing, the government argued that this rule would encourage the trial of military personnel in foreign courts inasmuch as evidence which is obtained by foreign officials in searches which do not meet fourth amendment standards would be inadmissible at a trial by court-martial. Therefore, if the accused were to be prosecuted for a violation of foreign law, the trial would have to be in a foreign court. Trial in foreign courts was thought to

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<sup>28</sup>See generally H. MOYER, JUSTICE AND THE MILITARY §§ 2-118 to 120 (1969).

<sup>29</sup>24 C.M.A. 156, 51 C.M.R. 375 (1976), modifying *United States v. Jordan*, 23 C.M.A. 525, 50 C.M.R. 664 (1975).

<sup>30</sup>23 C.M.A. at 527, 50 C.M.R. at 666. COMA's decision in the first *Jordan* case had overruled *United States v. DeLeo*, 5 C.M.A. 148, 17 C.M.R. 148 (1954), which had held that the "mere presence" of American officials at the scene of a foreign search did not automatically trigger application of the fourth amendment. Rather, it was only when American officials participated to a recognizable extent in the search conducted by foreign officials that the fourth amendment requirements would be applied at a trial by court-martial. On rehearing *Jordan*, COMA again found the *DeLeo* doctrine as stated above inadequate "to safeguard the constitutional rights of servicemen stationed in a foreign country." 24 C.M.A. at 159, 51 C.M.R. at 378.

be undesirable in that service personnel would enjoy none of their constitutional rights in a foreign court, resulting in what many Americans would perceive as less than an adequate administration of justice in the form of severe penalties and general lack of "due process."<sup>31</sup>

In its decision after rehearing, the court agreed with the government that the deterrent purpose of the exclusionary rule would not be served by extending its application to foreign officials who are in no way affected by American judicial decisions.<sup>32</sup> This retrenchment, however, required that the court again examine the *DeLeo* doctrine to ascertain whether it provided an adequate standard for determining when American involvement in a foreign search reached such a level as to require observation of fourth amendment procedures and safeguards if the fruits of such a search were to be admitted at a trial by court-martial.

The new guidelines handed down by the court centered primarily on whether or not there was any *trace* of participation by American officials.<sup>33</sup> If American officials were present at the scene of a foreign search the fourth amendment procedures, as applied in the military, must have been observed. Otherwise, the fruits of the search will be inadmissible at a trial by court-martial of the person who was the subject of the search. Also, if American officials are not present but "provide any information or assistance, directive or request, which sets in motion, aids, or otherwise furthers the objectives of a foreign search,"<sup>34</sup> then fourth amendment procedures must again have been followed if the evidence is to be admissible at the subject's court-martial. Furthermore the court held that if the search is conducted solely by foreign authorities the evidence must still be suppressed, on motion, unless it is shown to have been obtained in accordance with the laws and procedures of the foreign authorities.<sup>35</sup> Finally, the evidence may also be inadmissible if the foreign search shocks the conscience of the court.<sup>36</sup>

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<sup>31</sup>24 C.M.A. at 157-58, 51 C.M.R. at 376-77.

<sup>32</sup>This result is logical in that it is obvious that exclusionary remedies such as the one used in the first *Jordan* case will not work in cases such as this, where foreign officials who are handing over the evidence are not motivated by a need to comply with the United States' criminal procedure. See *Elkins v. United States*, 364 U.S. 206 (1960), which involved the admissibility in federal court, under the so-called "silver platter" doctrine, of evidence illegally obtained by state or local authorities. In holding that all evidence must have been obtained in accordance with federal law in order for it to be admissible in federal court, without regard for who had obtained it, the Court formally repudiated the "silver platter" doctrine. By doing so, the Court removed any incentive for either state or federal officials to conspire to "legally" obtain evidence in contravention of the fourth amendment.

If there is no conspiracy between American and foreign officials, a foreign search conducted by foreign officials will be made without regard to whether the fruits of the search will be admissible at a trial by court-martial. The search will be conducted with an eye toward admissibility in the foreign courts and therefore, if the military refuses to admit such evidence at a court-martial, they leave the foreign officials no choice but to try the case under foreign law.

<sup>33</sup>24 C.M.A. at 159, 51 C.M.R. at 378.

<sup>34</sup>*Id.*

<sup>35</sup>*Id.*

<sup>36</sup>*Id.*

Applying the new guidelines to the facts of the case, the court ruled that because of the direct American participation, the foreign search and any fruits thereof were subject to fourth amendment standards at the accused's trial by court-martial.<sup>37</sup> An analysis of the holding in the latest *Jordan* case reveals that the court has successfully set up standards which should reduce uncertainty as to what is impermissible conduct and should maximize the amount of protection given to a serviceman accused of a crime. The factual determination required under the new standards, that is presence and aid in any manner, will be much easier to apply. As a result, police officials who make a good faith effort to comply with the rules will not be faced with overly precise distinctions between lawful and unlawful actions. By also allowing the admissibility of the fruits of a search in a trial by court-martial to be dependent on the validity of the search under foreign law when there is no American participation, the court increases the number of cases in which the military can take jurisdiction, thereby protecting the accused from the vagaries of foreign judicial systems.

The real reason behind the prohibition on unlawfully seized evidence as determined by foreign law may be a policy that a serviceman who is the victim of an unlawful act should not have the harm exacerbated by having the evidence admitted at his court-martial. The *Jordan* decision also, to a degree, brings the military into line with the federal courts on the question of foreign searches.<sup>38</sup> More importantly, a crucial addition not specifically included in the *Brulay-Stonehill*<sup>39</sup> doctrine of the federal courts on foreign searches was made by the court in its new guidelines. Military courts, unlike the federal courts, are free to prohibit admission of evidence, even if it is lawfully seized under foreign law, if the foreign search is unconscionable in the minds of the judges. This again exhibits notions of what the court believes to be fundamental fairness, in that servicemen should not be penalized by the admission of evidence secured by reprehensible means even if those means are sanctioned by foreign law.

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<sup>37</sup>24 C.M.A. at 160, 51 C.M.R. 379.

<sup>38</sup>The federal courts have generally held that a foreign search conducted solely by foreign officials does not have to comply with fourth amendment standards in order for the fruits of that search to be admissible at trial in the United States. See, e.g., *Brulay v. United States*, 383 F.2d 345 (9th Cir.), cert. denied, 389 U.S. 986 (1967). It should be noted, however, that in *Jordan* the military has not adopted some other aspects of the federal law concerning foreign searches. The court has not sanctioned the use of evidence which is illegally obtained under foreign law. *United States v. Stonehill*, 405 F.2d 738 (9th Cir. 1968), adopted the position that legality of the search under foreign law was irrelevant because the participation of American officials was the determining factor with regard to whether or not the evidence was admissible. If there was participation, the fourth amendment applied and the evidence would be subject to exclusion. If there was no participation the evidence would be automatically admissible.

<sup>39</sup>*Id.* There was some suggestion in the opinions that evidence *might* be excluded if the method of seizure shocked the conscience of the court. It was, however, not raised by the facts of the cases so the question was not specifically decided.

SEARCHES INCIDENT TO APPREHENSION:  
UNITED STATES V. KINANE

In *United States v. Kinane*<sup>40</sup> the court dealt with the problems of a search made incident to a lawful apprehension.<sup>41</sup> Article 9a of the Uniform Code of Military Justice (UCMJ) states that "[a]rrest is the restraint of a person by an order . . . directing him to remain within certain specified limits."<sup>42</sup> Paragraph 19c of the Manual for Courts-Martial deals with apprehension, which is co-terminous with arrest and custodial arrest in the military, and provides: "An apprehension is effected by clearly notifying the person to be apprehended that he is thereby taken into custody. The order of apprehension may be either oral or written."<sup>43</sup> The *Kinane* case was primarily concerned with two questions: when has an apprehension taken place, and may a search precede the apprehension and still be lawfully incident to apprehension.

*An Apprehension Requires An Order*

*United States v. Fleener*,<sup>44</sup> a case dealing with a search incident to lawful arrest, had held that an apprehension has occurred "[i]f the totality of facts reasonably indicate that both the accused and those possessing the power to apprehend are aware that the accused's personal liberty has been restrained, even in the absence of verbalization."<sup>45</sup> Thus, the *Fleener* court had construed the "clearly notifying" language of the Manual's paragraph 19c to have been satisfied if the accused was "aware" that his freedom of movement had been restricted.<sup>46</sup>

In *Kinane* the court found this definition to be overly broad and, referring to Article 9a, held that an order, either actual or constructive, is needed in order for apprehension to be made. This result was thought to be necessary because temporary detentions, such as the one in *Kinane*, do

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<sup>40</sup>24 C.M.A. 120, 51 C.M.R. 310 (1976). In *Kinane* the accused was suspected of stealing seven identification cards and was apparently searched before he was placed under arrest.

<sup>41</sup>MCM fl 152, 1969 (rev.), provides that the following searches are among those which are lawful:

A search conducted as an incident of lawfully apprehending a person, which may include a search of his person, of the clothing he is wearing, and of property which, at the time of apprehension, is in his immediate possession or control, and a search of the place where the apprehension is made; but a search which involves an intrusion into his body, as by taking a sample of his blood for chemical analysis, may be conducted under this rule only when there is a clear indication that evidence of crime will be found, there is reason to believe that delay will threaten the destruction of the evidence, and the method of conducting the search is reasonable.

<sup>42</sup>10 U.S.C. § 809a (1970).

<sup>43</sup>MCM fl 19c, 1969 (rev.).

<sup>44</sup>21 C.M.A. 174, 44 C.M.R. 228 (1972).

<sup>45</sup>*Id.* at 181, 44 C.M.R. at 235.

<sup>46</sup>*Id.*

not clearly communicate the "permanent deprivation of liberty" associated with custodial arrests or apprehensions.<sup>47</sup> The court also held that the order of apprehension is not limited to written or oral means of communication but may be implied from the "circumstances surrounding the arrest."<sup>48</sup>

In further developing the procedures for placing someone in custody, the court declared that an order of apprehension may be given in any of three ways: "by word of mouth, by writing, or by the circumstances surrounding the arrest."<sup>49</sup> Part of paragraph 19c of the Manual is in conflict with this ruling since it requires an order to be oral or written.<sup>50</sup> In dealing with this conflict the court held that paragraph 19c is void to the extent that it attempts to limit the validity of orders of apprehension and is inconsistent with Article 9a.<sup>51</sup>

The holding of the *Kinane* case with regard to when an apprehension occurs is somewhat anomalous. The court, while enlarging the manner in which an accused may be informed of an apprehension under the UCMJ, restricts the scope of apprehension to include only permanent deprivations of liberty. It would seem that there is only minimal difference between "circumstances surrounding the arrest" which give rise to a clear notification of apprehension and temporary detentions which do not give such notification. As a result of this lack of a well defined distinction there will be a great temptation to justify temporary detentions, after the fact, as custodial apprehensions whenever the detention produces any incriminating evidence that would be inadmissible under stop and frisk guidelines.<sup>52</sup>

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<sup>47</sup>24 C.M.A. at 124, 51 C.M.R. at 314. The idea of "permanent deprivation of liberty" as an indication of custodial arrest was derived from *Cupp v. Murphy*, 412 U.S. 291, 294 (1973). See also *United States v. Dionisio*, 410 U.S. 1 (1973); *Davis v. Mississippi*, 394 U.S. 721, 726-27 (1969); *Terry v. Ohio*, 392 U.S. 1, 19 (1968). The Supreme Court has said in these cases that in some instances, such as temporary detentions, a seizure of the person may take place which does not constitute custodial arrest.

<sup>48</sup>24 C.M.A. at 124, 51 C.M.R. at 314. In effect the only definite change which the court made in the *Kinane* case was to disallow application of the term "apprehension" to temporary detentions. The result is that now the only allowable search of one temporarily detained would be a frisk rather than a full search incident to arrest as was previously permitted. The court stated that only minimal intrusions into the privacy of the accused would be allowed prior to custodial arrest. This proposition was supported mainly by *Cupp v. Murphy*, 412 U.S. 291 (1973), which holds that a full search incident to arrest, as provided in *Chimel v. California*, 395 U.S. 752 (1969), is not justified prior to formal arrest in the absence of a search warrant. Absent exceptional circumstances, it appears that pre-arrest searches in the military are limited, as in civilian situations, to a frisk. Cf. *Davis v. Mississippi*, 394 U.S. 721 (1969); *Terry v. Ohio*, 392 U.S. 1 (1968).

<sup>49</sup>24 C.M.A. at 124, 51 C.M.R. at 314.

<sup>50</sup>See note 43, *supra*, & text accompanying.

<sup>51</sup>Article 36 of Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 836 (1970), provides for the establishment of rules of procedure in military tribunals. The authority to make such rules has been delegated to the President provided that such rules are not inconsistent with the UCMJ. The Manual for Courts-Martial is the result of the Article 36 delegation and carries the force of law. However, as the court correctly points out, any MCM provision is void to the extent it conflicts with the UCMJ.

<sup>52</sup>See *Adams v. Williams*, 407 U.S. 143 (1972); *Sibron v. New York*, 392 U.S. 40 (1968); *Terry v. Ohio*, 392 U.S. 1 (1968). Under present civilian law a pat down weapons search of a

Perhaps this temptation could best be removed by requiring oral or written notification for all apprehensions *without* an exception for "circumstances surrounding the arrest." Such a rule seems to be a small price to pay in relation to the interests involved.

The second part of *Kinane* deals with the question: may a search be justified as incident to a lawful apprehension if it takes place prior to the accused's formal custodial arrest. From the facts presented, the trial court determined that Kinane was placed under arrest *after* the search.<sup>53</sup>

A recent Supreme Court case, *Cupp v. Murphy*,<sup>54</sup> provides the major support for the position that some searches are allowable prior to custodial arrest. In *Cupp*, the Court held that when police have probable cause to arrest a suspect, they may legitimately search that person for purposes of preserving "highly evanescent evidence"<sup>55</sup> that was exposed to all who saw the accused, without actually making the arrest. The court in *Kinane* distinguished *Cupp* on the ground that the search of Kinane and the seizure of the I.D. cards he had stolen went beyond the limited scope of the *Cupp* exception. Furthermore, the court said that there was no showing of military necessity which would require a different application of the *Cupp* exception to military personnel.<sup>56</sup>

If it can be assumed that the search occurred before apprehension, then the analysis of the court would appear to be quite reasonable since the *Cupp* case is indeed a rather specific exception. The problem lies in the question of when apprehension occurred. Using the criteria laid down by the majority for determining when apprehension occurs, it could have been found that the apprehension occurred before the formal arrest under the "circumstances" test. This issue was not dealt with, however, since the court regarded the time of apprehension as a question of fact conclusively determined by the lower court.<sup>57</sup> As the dissent of Judge Cook correctly points out, all that the trial court decided was when in *fact* the accused was placed under formal custodial arrest and not when the arrest took place for constitutional purposes.<sup>58</sup> Under the guidelines established by the court,

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suspect's outer clothing is permitted even in the absence of probable cause to arrest if it appears that the temporary detention of the suspect was justified based on the facts of the situation and the officer had reason to believe that the suspect might be armed and dangerous.

<sup>53</sup>Kinane was suspected of stealing some identification cards from an area where he had been working. After being confronted Kinane produced the stolen I.D. cards. Kinane maintained at trial he was told to empty his pockets. In any event, the trial court found that the accused was placed under arrest after the I.D. cards were produced; he was then taken to the investigations office and searched again.

<sup>54</sup>412 U.S. 291 (1973).

<sup>55</sup>*Id.* at 296.

<sup>56</sup>24 C.M.A. at 126, 51 C.M.R. at 316.

<sup>57</sup>The court, it would appear, was less than candid when they decided to treat apprehension as a question of fact determined by the trial court which was binding them. In the first half of its opinion the court redefined apprehension. As a consequence, the trial court's determination of apprehension, although factual in nature, was based upon an erroneous legal premise of when apprehension or arrest actually occurs.

<sup>58</sup>24 C.M.A. at 126, 51 C.M.R. at 316.

the finding of when formal arrest in fact took place is not determinative of when the accused was clearly notified that he had been directed to remain within certain specified limits. Statutory arrest can occur without either written or oral notification if the accused is somehow clearly notified as required. Whatever justification there is for inclusion of the "circumstances" language in the definition of apprehension, it would seem to be outweighed by the risks to constitutional rights of servicemen that are inherent in a broad reading of the language. The mere presence of such language, even if narrowly construed, introduces uncertainty into the jobs of law enforcement officials. These officials would be able to do their jobs much more efficiently if there were specific procedures that had to be followed.

### *Conclusion*

It is clear that the court felt that a more objective standard was needed for making determinations concerning when apprehensions had occurred. At the same time, however, the court did not feel compelled to adopt a completely objective standard and, hence, the inclusion of the "circumstances" language in the new test.

The court's willingness to recognize that an order may be implied from the "circumstances surrounding the arrest" may indicate several things. It could be that the court is hoping to provide an objective standard for trial courts to follow in the majority of the cases while leaving open the possibility that COMA may ultimately review the small number of cases in which the order for arrest will not have been given by "word of mouth" or in "writing." This approach would allow COMA to exercise general supervisory power over the military justice system by setting out, on a case by case basis, the criteria which would be involved in determining what "circumstances" communicate the order of arrest.

On the other hand, COMA may be totally abdicating the field in favor of trial courts by making the question of apprehension a factual determination which technically should always be made by the trial court. It may be that COMA feels its time and effort could best be spent on other problems of military law. In any event, the fact that COMA declined to apply the new guidelines to the facts of *Kinane* leaves the issue, as to future consequences of those guidelines, in doubt for the time being.

### COMA AND CONSENT SEARCHES: RULE OF LAW FORBORNE

The Manual for Courts-Martial lists the consent search as one type of lawful search.<sup>59</sup> The two requirements which must be satisfied in order for

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<sup>59</sup>MCM ¶ 152, 1969 (rev.), provides that the following search is lawful:

A search of one's person with his freely given consent, or of property with the freely given consent of a person entitled in the situation involved to waive the right

a consent search to be valid in either a military or civilian setting are that the consent must be voluntarily given and the person consenting must be one empowered to waive the fourth amendment privilege with regard to the area to be searched.<sup>60</sup>

Three major cases of COMA's 1975-76 term primarily concerned the question of the voluntariness of an accused's consent to a search. In *United States v. Jordan*,<sup>61</sup> the accused replied to a request for permission to search with the answer "Yes, I can't really stop you." The court interpreted this response as indicating that the accused, already in custody, felt he was powerless to prevent the search; therefore his affirmative reply was not a free and voluntary consent. Similarly, in *United States v. Mayton*,<sup>62</sup> a reply of "Alright" or "OK" to a request to search was found to be no more than mere submission to a game warden's assertion of authority.<sup>63</sup> In *United States v. Chase*<sup>64</sup> the court focused on the law enforcement officer's language and found that the request for consent to search was made with such an assertion of authority that the accused could have reasonably believed that he was not allowed to refuse.<sup>65</sup> Furthermore, the court added in a footnote that a presumption against consent arose under the circumstances because the certain discovery of incriminating evidence would presumptively make any consent to search unreasonable; therefore, the accused must have felt that he had no alternative but to comply.<sup>66</sup> In sum, the accused exhibited an acquiescence in each case which COMA found insufficient on the facts to show free and voluntary consent.

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to immunity from an unreasonable search, such as an owner, bailee, tenant, or occupant as the case may be under the circumstances.

See also H. MOYER, JUSTICE AND THE MILITARY §§ 2-112 to 179 (1969).

<sup>60</sup>See note 59 *supra*. See also *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); *Stoner v. California*, 376 U.S. 483 (1964).

<sup>61</sup>23 C.M.A. 525, 50 C.M.R. 664 (1975), *aff'd on rehearing on other grounds*, 24 C.M.A. 156, 51 C.M.R. 375 (1976). A British police officer suspected the accused, an American serviceman, of having committed several burglaries. After interrogating the accused at the local police station, the officer informed the accused that he intended to have a look at the accused's room. Immediately thereafter the policeman requested permission to search.

<sup>62</sup>23 C.M.A. 565, 50 C.M.R. 784 (1975). In *Mayton*, the accused was stopped by two game wardens who were on patrol. After the accused told them that he was looking for a place to fish, one of the wardens said he would like to conduct a weapons and game check. The accused replied either "OK" or "alright."

<sup>63</sup>*Id.* at 566, 50 C.M.R. 758. This finding resulted despite the fact that the game warden only said he would "like" to conduct a search and not that he was going to conduct a search regardless of the accused's wishes.

<sup>64</sup>24 C.M.A. 95, 51 C.M.R. 268 (1976). *Chase* involved a gateway inspection at an Air Force base as the accused was attempting to leave the base in a van. A security policeman informed the accused that he was conducting a vehicle search and requested the production of the accused's I.D. card. It was argued by the government that the accused's cooperation in allowing the events to transpire constituted a consent to search.

<sup>65</sup>*Id.* at 98, 51 C.M.R. at 271.

<sup>66</sup>*Id.* at 98 n.7, 51 C.M.R. at 271 n.7.



*Impact on Prior Standard of Voluntariness*

The court has consistently held in the past that if the totality of the circumstances indicates that the accused merely acquiesced to a claim or show of authority then the search was illegal; but the court has usually not been easily persuaded that the accused did no more than acquiesce.<sup>67</sup> The court's increased receptiveness to the concept of acquiescence may mean that, given the inherently order-oriented nature of military life, a mere request for consent to search will become an assertion of authority to the same degree as the game warden's request in *Mayton*.<sup>68</sup> Therefore, unless the accused's answer unambiguously indicates that he knows he has the right to refuse, the defense of mere submission to a show of authority will seemingly always be available. In light of the presumption against consent which was used by the court in *Chase*,<sup>69</sup> these decisions will have the practical effect of severely curtailing the number of consent searches which may be upheld at trial.

The impact of these changes bolster the argument that it would be better to lay down a broad prophylactic rule which would always require warnings in order for a consent search to be valid.<sup>70</sup> Even though COMA seems to recognize the inherently coercive nature of the military, as evidenced by the ease with which it found acquiescence in *Mayton* and other consent cases, it has nevertheless refused to require the procedure that

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<sup>67</sup>See, e.g., *United States v. Noreen*, 23 C.M.A. 212, 49 C.M.R. 1 (1974); *United States v. Vasquez*, 22 C.M.A. 492, 47 C.M.R. 793 (1973); *United States v. Rushing*, 17 C.M.A. 298, 38 C.M.R. 96 (1967).

<sup>68</sup>Although the game wardens in *Mayton* were military personnel, they did not actually order the accused to let them search, nor did they explicitly coerce him in any manner. In effect, the court found that the search was involuntary based on the implied coerciveness of the situation. The amount of implied coercion in *Mayton* does not appear to be in excess of the amount normally present in a military atmosphere. Any confrontation between an accused and a military law enforcement officer would contain the same degree of coerciveness that was present in *Mayton* when the warden made his statement. See note 62 *supra*. This amount of coerciveness would seem to be part of everyday life in the military.

<sup>69</sup>See note 66 *supra* & text accompanying.

<sup>70</sup>The Supreme Court, however, has never accepted this position and recently held in *United States v. Watson*, 423 U.S. 411 (1976), that no warnings are necessary even though the accused has been taken into custody when the request for consent to search is made. In *United States v. Collier*, 24 C.M.A. 183, 51 C.M.R. 428 (1976), the Court of Military Appeals cited *Watson* when it found that someone in a custodial situation need not be given any additional warnings concerning consent searches if the *Miranda/Tempia* warnings had been given (in *United States v. Tempia*, 16 C.M.A. 629, 37 C.M.R. 249 (1967), COMA had found that the principles enunciated by the Supreme Court in *Miranda v. Arizona*, 384 U.S. 436 (1966), applied to military interrogations of criminal suspects). But see *United States v. Cady*, 22 C.M.A. 408, 47 C.M.R. 345 (1973), where COMA held that a consent to search was revocable either before the search had begun or while it was in progress, a view the Supreme Court has not adopted. The mere fact that the Supreme Court has yet to require the use of warnings in civilian circumstances should not automatically preclude COMA from requiring them, whether the basis be the Uniform Code of Military Justice (UCMJ) or the doctrine of military necessity. The court should extend the protection of warnings to servicemen as it did in the *Cady* case regardless of the minimum protection required by the Supreme Court. COMA nevertheless, has ill-advisedly decided to follow the lead of the Supreme Court in *Watson*. See the argument developed at pp. 239-40, *infra*.

would effectively remedy the coerciveness of the situation — preliminary warnings.<sup>71</sup>

*The Need for Preliminary Warnings*

In a society based on discipline and strict obedience of orders, it is hard to imagine a voluntary consent to search if the accused is not aware of his right to be free from unreasonable searches. The arguments for mandatory warnings are more persuasive in the military context than in civilian circumstances. A civilian does not ordinarily perceive the refusal of a police officer's "request" as a punishable offense. Disobedience of an analogous "request" in a military context will be much more likely to appear to be a punishable offense to military personnel uninformed of their right to refuse compliance. By failing to require warnings before a request for consent to search will be deemed non-coercive and hence valid, the court penalizes those who were not only ignorant of their right to refuse, but who were also, unfortunately, unable to manifest their ignorance to an extent which will compel a court to find mere acquiescence under the guidelines of *Mayton, Chase and Jordan*.

A determination regarding the voluntariness of an accused's consent should not depend on the fortuity that the accused had made some statement from which it may be inferred that he had a faulty conception of his rights. Furthermore, efficacy in law enforcement may also be undercut by not requiring warnings. This will be the effect where someone who, if he had been properly informed of his rights would nonetheless have consented to the search, is allowed to consent in ignorance of his rights. He is therefore able to successfully challenge the search at a later time on grounds of acquiescence by raising as a defense his lack of comprehension about his right to refuse to consent at the time of the search.

It may be that the court is afraid that a rule requiring warnings will go too far, in that too many cases might involve consent searches which could be invalidated because of a lack of technical conformity to the rule. This would be the case, despite the fact that the defect in the warning was trivial, unless the court would be willing to adjudicate guidelines of materiality. The current approach of acquiescence versus consent, however, does not even present this opportunity; the judges make their determinations on the facts of each particular case. Although they can limit reversals by exercising their discretion in only those cases which contain the more egregious abuses, nevertheless, the problem with this approach is the number of variables which become involved. It would seem that constitutional rights are endangered to the extent that those unpredictable variables enter into the decisionmaking process.<sup>72</sup> The changing personnel

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<sup>71</sup>See Note, *Self-incrimination in the Military Justice System*, 52 IND. L.J. — (1976), *infra*.

<sup>72</sup>A related problem is that to the extent that courts engage in open-ended "polycentric" problems, which are less justiciable than issues framed in terms of the applicability or

of the court, the type of evidence discovered, the nature of the offense and the personality of the accused can all enter into the final determination of voluntariness. The more that these subjective elements enter into the determination, the more watered down fourth amendment rights will be. These arbitrary factors could be eliminated by the requirement of a warning. Voluntariness could then be presumed in most instances after a valid warning had been given. This would insure an equal and just application of the right to be free from unreasonable searches to all military personnel and would allow consent searches to occur whenever an accused is truly willing to co-operate.

#### CONCLUSION

In recognition of our civilian society's increased sensitivity to individual rights of privacy, COMA has moved toward the establishment of a military justice system which will protect, whenever possible, the privacy of military personnel to the same degree as if they were civilians. Protecting the constitutional rights of military personnel to the maximum extent possible without jeopardizing military preparedness is a difficult task with which COMA must continue to deal. While recognizing that military personnel have rights of privacy protected by the fourth amendment, COMA must also weigh the effect that the exercise of those rights will have upon the ability of the armed forces to function in an acceptable manner.

The key to the effective implementation of this new policy is to critically differentiate between those claims of military necessity which have continued vitality and those which are justified only on grounds of tradition. A continuing re-evaluation of the role and make-up of the military justice system is an absolute necessity if COMA is to be anything more than a mere rubber stamp for governmental claims of military exigency.

Recent cases indicate that COMA is seriously reviewing the traditional governmental claims of military necessity and that they will continue to do so. It should be good news to the many Americans presently serving in the armed forces to know that their rights of privacy and right to be free from unreasonable searches and seizures will not be arbitrarily or unnecessarily abridged by the military justice system.

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propriety of legal rules, *see generally* Fuller, *Adjudication and the Rule of Law*, 1960 PROC. AM. SOC'Y INT'L. L. 1, 5, the courts undermine the adjudicative process in general and their own integrity in particular. If COMA seriously wishes to exercise general supervisory jurisdiction over the military justice system, *see* Note, *Building a System of Military Justice through the All Writs Act*, 52 IND. L.J. — (1976), *supra*, it would do well to try to cause legal determinations which now turn on factual conjuration and conclusion drawing — e.g. voluntariness — to coalesce into issues more easily justiciable — compliance with a legal rule. *See* Henderson, *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467, 469-70 (1976).