Note. This case contains an excellent 28 page discussion of the authority of service police to arrest without a warrant on private property.

(2) *Search of the person.*

(*a*) *United States v. Florence*, 1 USCMA 620, 5 CMR 48 (1952). Certain individuals assigned to a Graves Registration Unit in Korea were suspected of stealing the effects of deceased persons. Marked money was placed among such effects and disappeared. The accused's superior sent for him and demanded his wallet. Some of the marked currency was found therein and the accused was placed in confinement. The search of the accused's wallet was lawful as being incidental to his arrest. It is immaterial that, in point of time, the search preceded the actual ordering into confinement since the search was merely the "initiatory" action in a series of interrelated events which taken together constituted an arrest.

(*b*) *United States v. Ball*, 8 USCMA 25, 23 CMR 249 (1957). When an accused is arrested on suspicion of larceny a search of a suitcase then in his possession is lawful.

(3) *Search of property.*

Illustrative cases.

(*a*) *Marron v. United States*, 275 U.S. 192, 198 (1927). When a bartender was arrested in a speakeasy on charges of maintaining a nuisance, the arresting officers could lawfully search the premises in order to find and seize the things used to carry on the criminal enterprise and such search could extend to a closet in the room used as a saloon. "The authority of officers to search and seize the things by which the nuisance was being maintained extended to all parts of the premises used for the unlawful purpose."

(*b*) *Harris v. United States*, 331 U.S. 145 (1947). When an individual is arrested in the living room of his four room apartment on suspicion of having transported forged checks in interstate commerce, a detailed search of the entire apartment for the forged checks is lawful. In view of the nature of the item which was the object of the search, the search could lawfully extend to the contents of the drawers of the bedroom bureau and the opening of an envelope labelled "personal papers" found therein.

(*c*) *United States v. Rabinowitz*, 339 U.S. 56, 60 (1949). When an individual is arrested in his one-room office on suspicion of possessing counterfeit postage stamps, a detailed search of the office for such stamps is lawful. "The

arrest was . . . valid . . . and respondent's person could be lawfully searched. Could the officers search his desk, safe and file cabinets, all within plain sight of the parties, and all located under respondent's immediate control in his one-room office open to the public? Decisions of this Court have often recognized that there is a permissible area of search beyond the person proper. . . . The right 'to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed' seems to have stemmed not only from the acknowledged authority to search the person, but also from the long-standing practice of searching for other proofs of guilt within the control of the accused found upon his arrest. . . . It became accepted that the premises where the arrest was made, which premises were under control of the person arrested and where the crime was being committed, were subject to search without a search warrant. Such a search was not 'unreasonable' . . . [other cases condemn] general exploratory searches, which cannot be undertaken by officers with or without a warrant. In the instant case the search was not general or exploratory for whatever might be turned up. Specificity was the mark of the search and seizure here . . . it seems never to have been questioned seriously that a limited search such as here conducted as incident to a lawful arrest was a reasonable search and therefore valid. It has been considered in the same pattern as search of the person after lawful arrest."

(*d*) *Abel v. United States*, 362 U.S. 217 (1960). When an individual is arrested in a hotel room under authority of an Immigration Naturalization Service warrant authorizing his seizure as a deportable alien, a search of the entire room and adjoining bath for the purpose of finding weapons or any documents pertaining to his status as an alien is lawful.

(*e*) *Agnello v. United States*, 269 U.S. 20, 30 (1925). When a person is arrested on suspicion of illegal possession of narcotics, a search of his home, situated several blocks distant from the place of the arrest, cannot be justified as being incident to the arrest. "The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruit or as the means by which it was committed, as well as weapons and other things to effect

an escape from custody is not to be doubted . . . . The legality of the arrests or of the searches and seizures made at the . . . [place of arrest] is not questioned. Such searches and seizures naturally and usually appertain to and attend such arrests. But the right does not extend to other places."

d. To avoid removal of criminal goods. A search is lawful when made under circumstances "demanding immediate action" to prevent the removal or disposal of property believed on reasonable grounds to be criminal goods.

Illustrative cases.

(1) *United States v. Swanson*, 3 USCMA 671, 673, 14 CMR 89, 91 (1954). Where a sum of money has been stolen from a member of a battery while on bivouac under such circumstances as to indicate that the thief is a member of the battery, the Field First Sergeant may, in the absence of the officers, conduct a search of the persons of all members of the unit. "No other organization was in the area. Therefore, an inference that the theft was committed by some member of that organization was clear. An opportunity to return the money without detection and with complete inpunity was offered and refused. The thief was then aware that further action to discover the fruits of the crime would probably follow. Concealing his connection with the offense was his primary objective, and this could be accomplished only by concealing the money. Delay afforded him greater opportunity to effectuate his purpose, and necessarily worked to the disadvantage of the victim, as well as to the prejudice of discipline. If successful action was to be taken at all, it had to be taken immediately. A search conducted in the manner described in the evidence was the only course reasonably open."

(2) *United States v. Davis*, 4 USCMA 577, 578, 16 CMR 151, 152 (1954). Where the theft of money from the occupants of a hut was discovered early in the morning, the First Sergeant, in the absence of the Commanding Officer who was on duty at battalion headquarters as Officer of the Day, may conduct a detailed search of the hut, including the personal possessions of the occupants. "Money is, ordinarily easy to conceal and difficult to identify. . . . The thefts became known before the reveille assembly. If the thief was an occupant of the hut in which the losses occurred, it was quite probable that he had not yet had an opportunity to conceal completely the stolen property. This probability would be even greater, if, as the First Sergeant may well have believed, the thefts were committed just before their discovery. Under the circumstances,

an immediate search would prevent removal or more effective concealment. While, as suggested by the board of review, the same result might perhaps have been accomplished had the First Sergeant isolated the occupants of the huts, and then obtained express authority from the commanding officer, the possibility of other courses of action does not destroy the reasonableness or necessity of that which was actually taken. Accordingly, we hold that the search was legal."

(3) *United States v. Alanis*, 9 USCMA 533, 536, 26 CMR 313, 316 (1958). Where military police had placed an off-post private dwelling under surveillance as a suspected narcotics outlet and arrested the accused when he approached it, the subsequent search of the building *probably* could not be justified as being reasonably necessary to prevent the immediate disposition of the narcotics found therein. "There remains the serious question of why the Government agents had not procured a search warrant. They testified that they felt the need for the search to be immediate to prevent contraband from being removed from the accused's shack. However, we note that at least six Government agents participated in the arrest. Certainly leaving some to guard the shack while others procured a warrant would not be imposing an unreasonable requirement upon the arresting officer."

Note. The court did not decide the issue because it held itself bound by the convening authority's factual determination, upon review, that the search was illegal.

Dissenting opinion of Latimer, J. (at p. 540, 320). "As to the dimly phrased assertion in the majority opinion that it would have been convenient for the Government agents to procure a warrant, I think the following excerpt from *United States v. Rabinowitz*, 339 US 56, 94 L ed 653, 70 S Ct 430 (1950), is sufficient answer:

'It is appropriate to note that the Constitution does not say that the right of the people to be secure in their persons should not be violated without a search warrant if it is practicable for the officers to procure one. The mandate of the Fourth Amendment is that the people shall be secure against *unreasonable searches*. . . . [S]earches turn upon the reasonableness under all the circumstances and not upon the practicability of procuring a search warrant, for the warrant is not required. To the extent that *Trupiano v. United States*, 334 US 699, 92 L ed 1663, 68 S Ct 1229, requires a search warrant solely upon the basis of the practicability of procuring it rather than upon the reasonableness of the search after a lawful arrest, that case is overruled. The revelant test is

not whether it is reasonable to procure a search warrant, but whether the search was reasonable. That criterion in turn depends upon the facts and circumstances—the total atmosphere of the case. It is a sufficient precaution that law officers must justify their conduct before courts which have always been and must be, jealous of the individual's right of privacy within the broad sweep of the Fourth Amendment.' "

(4) CM 388049, *Polin*, 21 CMR 352 (1956), *pet. denied*, 21 CMR 340 (1956). When a privately owned camera disappeared from a truck occupied by three soldiers during a field exercise, the senior noncommissioned officer in charge could lawfully direct a search of the cargo packs of the soldiers which had been left in the truck.

e. Consent to search. A search is lawful when made with the freely given consent of the owner in possession of the property searched. Since such consent amounts to a waiver of a fundamental right the government must produce clear and convincing evidence of a conscious surrender thereof and not mere peaceful submission to apparently lawful authority. Although there is no *requirement* that the individual be warned of his rights before being asked to consent to a search (see *U.S. v. Isani*, 10 USCMA 519, 28 CMR 85 (1959), para. 4, Chapt. X, *supra*) the fact that he has or has not been informed of his right not to give consent may be relevant to the issue of whether or not his consent was freely given.

Illustrative cases.

(1) *United States v. Wilcher*, 4 USCMA 215, 217, 15 CMR 215, 217 (1954). Where an investigator asked the accused, suspected of the larceny of money, if he "might check his personal belongings" and the accused replied "yes" and took the investigator to his quarters, there was freely given consent to the resulting search. "The general principles governing search and seizure are simple, but not always easy to apply. Essentially each case must depend upon its own facts. . . . A search made *with the consent* of the person whose property is searched is not unlawful. . . . However, mere acquiescence, by peacefully submitting to the demands of a person having the color of office does not turn an otherwise illegal search into a lawful one. . . . Hopkins did not demand the right to search; nor did he even tell the accused he had come to make a search. . . . At the time the request was made, the accused was not in his room. Nevertheless, he willingly granted permission to make the search, and he took the agent to his own room. The response was free and affirmative. Such conduct can reasonably be construed to indicate consent rather than mere acquiescence."

(2) *United States v. Whitaore*, 12 USCMA 345, 347, 30 CMR 345, 347 (1961). "As we have noted in prior decisions, it is unnecessary to warn an accused in accordance with Article 31. . . . in order to obtain his consent to a search. . . . Neither do we understand the law to require that one must be advised of his right not to consent to a search without a warrant or its military equivalent, before a search so predicated may be found to be lawful. . . . Both circumstances may, however, throw light on the question, and here the evidence clearly shows that accused was advised not only of his privilege to remain silent but also of his right to be secure against unreasonable searches, before he executed the written authorization."

(3) *United States v. Berry*, 6 USCMA 609, 20 CMR 325 (1956). When two individuals occupy a hotel room and are both present when permission to search is requested and one of them gives his consent to the search, the silence of the other will be deemed indicative of consent on his part.

(4) CM 402, 568, *Weston*, 28 CMR 571 (1959). When an individual who has been advised of his rights under Article 31 and that he is suspected of stealing a certain ring, is told that the investigator desires to check the contents of his pockets, and then himself empties his pockets and produces the ring, his conduct clearly shows full consent to being searched.

(5) ACM 16818, *Green*, 29 CMR 868, 872 (1960). A search of the accused's automobile made with the consent of his wife, after she was apprehended as a "shoplifter" in a post exchange, was lawful. "The cases are in conflict on the authority of a wife to consent to the search of her husband's property, but there is respectable Federal authority to sustain the position that she may. . . . These cases are concerned with a wife's consent to search of the husband's dwelling. But less of a showing of probable cause is required to sustain the search of an automobile."

(6) *United States v. Alaniz*, 9 USCMA 533, 26 CMR 313 (1958). A soldier arrested on a narcotics charge, informed the military police that the accused was his source of supply and operated out of a certain shack located off the military reservation. The military police placed the shack under surveillance and arrested the accused when he approached it. They then asked his consent to the shack being searched, informing him that if he refused they would get a warrant. The accused gave consent and testified that he did so because "the circumstances of the arrest had put him in fear." The law officer ruled that the search was legal. Upon review, the

convening authority adopted the recommendation of the reviewer that the search be held illegal on the ground that the consent was coerced. The Court held that it was bound by the factual determination of the convening authority.

Note. The Court refrained from expressing any opinion on the legality of the search but did quote from several federal cases holding that purported consent to a search was mere "peaceful submission" to law enforcement officers. Judge Latimer, in dissent, would find the search to have been legal.

(7) ACM S–18141, *Holiday*, 28 CMR 807, 811 (1959). The search of the accused when apprehended while leaving a suspected narcotics outlet in Korea produced a vial of what might have been narcotics. Subsequently, while still in custody the accused signed a form consenting to a search and some opium was found in his wallet. "Consent, when the accused is in custody of Government agents, is not to be lightly inferred, and the Government must establish it by clear and positive evidence. . . . In the case before us, the accused had been illegally apprehended. He was twice searched, while being held at gunpoint. Shortly thereafter, he was taken, under illegal custody, to the local detachment office of the Office of Special Investigation. There he was confronted by still other law enforcement agents who also wanted to search him. These facts negative the assertion that the consent was freely given."

f. Authority of commanding officers.

(1) *General.* Paragraph 152, MCM, provides that commanding officers, including officers in charge, have the authority to order searches of certain types of property. In general, there is plenary power to direct such a search of United States property wherever located and of privately owned property located on military reservations and owned, used or occupied by persons subject to military law. Furthermore, there is also authority to order a search under certain conditions of off-post living quarters overseas and of any private property located on military reservations and to search the persons of military personnel in places under military control. Although the Manual does not specifically so require, a search cannot be upheld as having been made under authority of a commanding officer unless there is a showing that the commander concerned had "probable cause" to direct the particular search.

(2) *United States property.* A commanding officer having jurisdiction over the place wherein is situated property which is owned or controlled by the United States and is under the

control of an armed force may lawfully authorize a search of such property. It is immaterial whether the property searched is in the United States or a foreign country.

Illustrative cases.

(*a*) *United States v. Doyle*, 1 USCMA 545, 547, 4 CMR 137, 139 (1952). "There has long existed in the services a rule to the effect that a military commanding officer has the power to search military property within his jurisdiction. . . . The basis for this rule of discretion lies in the reason that, since such an officer has been vested with unusual responsibilities in regard to personnel, property, and material, it is necessary that he be given commensurate power to fulfill that responsibility. This rule and the reasons for it have been expressly recognized and approved by the Federal courts. . . . It is unnecessary, in this connection, to spell out the obvious policy considerations which require a differentiation between the power of a commanding officer over military property and the power of a public officer to invade a citizen's privacy. That there may be limitations upon the former's power we do not doubt. Insofar as the power bears on criminal prosecutions, both trial courts and appellate forums are available to insure the commanding officer does not abuse his discretion to the extent that the rights of an individual are unduly impaired."

(*b*) *United States v. Gebhart*, 10 USCMA 606, 28 CMR 172 (1959). A commanding officer has authority to conduct a "shakedown" inspection of the wall and footlockers and beds in a barracks for the purpose of locating stolen personal property.

(*c*) *United States v. Higgins*, 6 USCMA 308, 20 CMR 24 (1955). The Naval Attache in Tripoli, acting in his capacity as commanding officer of the accused, a Navy yeoman assigned to the office of the attache, could lawfully authorize a search of the accused's family quarters which were situated in a house rented by the Government from a private owner for the use of the accused and his wife.

(3) *Private property on military reservations.* A commanding officer having jurisdiction over the place wherein is situated property which is located within a military installation and which is owned, used, or occupied by persons subject to military law or the law of war may lawfully authorize a search of such property. Furthermore, an installation commander may, "for probable cause, or other military justification, order a search of a private vehicle operated by a person

not otherwise subject to military law, when entering or leaving the post . . ." (JAGA 1954/8177, 4 Dig Ops, Search and Seizure, § 7.7). See also JAGA 1959/5552, JALS, Pam 27-101-18.

(4) *Private property overseas.* A commanding officer having jurisdiction over personnel subject to military law or the law of war may lawfully authorize a search of property situated in a foreign country or in occupied territory which is owned, used or occupied by such personnel. Such a search may extend to privately owned or rented living quarters over which the United States otherwise has no control whatsoever.

Illustrative case.

United States v. De Leo, 5 USCMA 148, 158, 17 CMR 148, 158 (1954). When a soldier stationed at a United States Army installation in France and assigned living quarters thereon rents an apartment in a nearby town a search of such apartment may be authorized by his commanding officer. Although the off-post dwelling of military personnel in the United States may not lawfully be searched without a warrant, paragraph 152 prescribes a different rule for foreign countries. Under this rule ". . . it appears that a legal search of property may be effected (1) if the property is located in a foreign country, (2) it is used by a military person and (3) if the search is authorized by his commanding officer. We consider that such a search would be reasonable within the Fourth Admendment—with the result that there can be no problem of possible inconsistency between the Manual and that Amendment—assuming that the latter is to be accorded extra-territorial effect." Furthermore, the consent of the commanding officer to such a search may be inferred from his silent acquiescence therein.

(5) *Military personnel.* Paragraph 152, MCM, recognizes that military custom may authorize searches other than those specifically mentioned therein. Pursuant to long standing military custom a commanding officer may order a search of members of his command in places under military control and searches of persons subject to military law or the law of war in places under his jurisdiction.

Illustrative case.

ACM 6172, *Turks*, 9 CMR 641, 645 (1953). The search of the person of an airman which has been authorized by his squadron commander is lawful even though it takes place on an installation other than that in which the squadron is located. "The authority of a commanding officer to make or

order an inspection or search of a member of his organization in a place under military control has long been recognized as indispensable to the maintenance of good order and discipline in the command. . . . The narrow problem, then, is whether the search of an accused's person, ordered by his squadron commanding officer, which is conducted outside the squadron area but within the confines of an Air Base which is under United States military control in Japan falls within the general category of those searches which have heretofore been declared lawful . . . we [cannot] perceive any requirement that an accused must be returned to the squadron area before he could be searched under authority of the latter's own commanding officer and our attention has not been directed to any rule, regulation, or authority to that effect. To hold otherwise might result that where one airman standing in the squadron area could be lawfully searched by the commanding officer, his barracks mate, standing a few feet away, but off the squadron area, could not be lawfully searched by his own commanding officer. Such a result would unduly impair the ability of the commander to perform his duties and, accordingly, we hold that the search and seizure in this case was not rendered unlawful by the fact that it was conducted outside the squadron area of the commanding officer who authorized it."

(6) *Probable cause required.* All commanding officer searches must be not unreasonable and must be based upon probable cause. What constitutes "probable cause" in a given case depends upon the extent and purpose of the search. For this purpose security inspections and routine inspections of military personnel when entering or leaving military areas are not considered to be "searches" but are to be treated as legitimate administrative measures.

Illustratives cases.

(*a*) *United States v. Brown*, 10 USCMA 482, 28 CMR 48 (1959). A search of a soldier's person by his commanding officer must be based on probable cause. "Only unreasonable searches are prohibited. . . . The question is simply one of whether there was probable cause to search. What is reasonable, of course, may vary according to circumstances. For example, a search which may be considered reasonable on a wartime battle front to secure evidence of spying might under different conditions, be regarded as highly irregular." (at 487, 53). "While there is substantial discretion vested in the commanding officer to order a

search of persons and property under his command, consideration of all the circumstances herein make it clear beyond cavil that Lieutenant Clark acted on nothing more than mere suspicion. Reasonable or probable cause was clearly lacking for both apprehension and the search and, although the military permits certain deviations from civilian practice in the procedures for initiating a search, the substantive rights of the individual and the necessity that probable cause exist therefor remain the same. Unreasonable searches and seizures will not be tolerated. . . . While we recognize the commanding officer's traditional authority to conduct a search in order to safeguard the security of his command, that issue is not presented here. . . . The search was general and exploratory in nature and wholly lacking in reasonable cause." (At 488, 54.)

Note. See par. 4*c*(1)(*a*), *supra*, for the circumstances of the search.

(*b*) *United States v. Gebhart*, 10 USCMA 606, 610, 28 CMR 172, 176 (1959). A "shakedown" inspection of a barracks by a commanding officer must be based upon probable cause but such an inspection "has long been regarded as reasonable" when based upon information that personal property recently has been stolen from an occupant of the barracks. The ". . . exercise of the power to order searches is not unlimited. . . . It can be said with assurance that the exercise of the authority to search must be founded upon probable cause, whether the search be general in that it includes all personnel of the command or subdivision, or limited only to persons specifically suspected of an offense. . . . A search founded upon mere suspicion is illegal. . . . [*] To hold otherwise would require us to deny to military personnel the full protection of the United States Constitution itself. This, neither we, nor Congress, nor the Executive, nor any individual can do."

*At this point the opinion inserts note 2 as follows: "Both the generalized and particularized types of searches are not to be confused with inspections of military personnel entering or leaving certain areas, or those, for example, conducted by a commander in furtherance of the security of his command. These are wholly administrative or preventive in nature and are within the commander's inherent powers."

Note. Above opinion by Quinn, C.J. The other members of the Court would dispose of the case on other grounds and did not discuss the issue of probable cause.

(*c*) *United States v. Harman*, 12 USCMA 180, 30 CMR 180 (1961). At 0600 hours, a soldier reported that some money

had been stolen from him while he slept. At 0900 hours, the detachment commander conducted a "shakedown" inspection of the barracks and the stolen currency was found in accused's possession. All members of the Court agree, in separate opinions, that the search was lawful. *Judge Latimer:* "[The search] was authorized by the Detachment Commander, and there can be no doubt that probable cause existed. A nighttime barracks theft had been reported from a guarded building at the time those billeted therein arose, and little time had elapsed in which the stolen money could have been carried away. It was, therefore, highly likely that the money was in possession of an occupant of the barracks. . . . Clearly, this search was nothing more or less than a familiar 'shakedown' inspection, the lawfulness of which has long been recognized. . . . True it is that the searchers got no further than accused. However, it is not surprising that they started with him for the evidence pointed in his direction and to two others in the barracks whose wallets had previously been found to contain more than the amount stolen. And it should be remembered that the commander had ordered, and the investigating party indeed was required, thoroughly to search the entire barracks. But when the currency was found, obviously there was no need to continue further." (At pp. 183, 184.) *Chief Judge Quinn:* ". . . [A] 'shakedown' search of this kind is lawful." And as an incident to the search each of those to be searched can be "directed to place his effects on his bunk and to stand alongside, or to open his locker and stand by it." (At p. 187.) *Judge Ferguson:* "Concededly, the search itself was authorized by a commanding officer who undoubtedly had probable cause to suspect the accused." (At p. 190.)

Note. See par. 4d, ch. X, *supra*, in connection with the application of Article 81*b* to shakedown inspections.

(*d*) *United States v. Murray*, 12 USCMA 434, 436, 31 CMR 20, 22 (1961). The discovery in a trash can of undelivered mail, which the accused normally handled, provided probable cause for a search of his quarters by his commanding officer. "The commanding officer of a unit, charged as he is with the maintenance of discipline over his command and the responsibility for United States property under his control, is upon the determination that probable cause exists so to act, authorized under military law either personally to conduct a search of the quarters and property of

a member of his command or to cause such an examination to be carried out by another. . . . There is no doubt that Mullahey [the commander] had probable cause to suspect the accused of committing a mail offense. He had been presented with a valid money order found in a trash can. His personal inspection of the container resulted in the discovery of numerous other pieces of mail, all of which were addressed to Army Post Office 172. From his normal duties, he knew that the accused was charged with the responsibility for local handling of mail directed to that address. Accordingly, he was almost compelled to infer that mail matter was being wrongfully used and that the accused was probably the criminal agent involved." (The Court also held that in the absence of any commissioned officer, the senior warrant officer present was a "commanding officer.")

(7) *Delegation of authority.* The Manual provides that a commanding officer may delegate his authority to order searches. The Judge Advocate General of the Army has rendered the following opinion on the policy factors involved in such a delegation:

"It is considered consistent with Department of the Army policy for commanding officers to delegate to persons of their command their general authority to order searches under paragraph 152 of the Manual. A commanding officer may delegate all his authority in this respect or, in his discretion, limit such delegation to the extent considered necessary under the circumstances. The official to whom such delegation is made should be one of discretion, and normally reliable, such as an Executive Officer, Deputy Command, Adjutant or Adjutant General. It is not considered advisable to select the Staff Judge Advocate who may later be called upon to pass upon the legality of his own act, nor the Provost Marshal, whose function is analogous to that of a Chief of Police and who should not be empowered to authorize his own activities. The delegation should be made to the official position or office desired, rather than to the individual occupying such position or office. It would appear necessary for the new commanding officer to accomplish a delegation of authority upon a change of commanders." (Ltr JAGS 1953/6606, 14 Aug 53; 1953 Chron 195.)

In *United States v. Weaver*, 9 USCMA 13, 25 CMR 275 (1958), the Court, by necessary implication, recognized the propriety of the delegation of a commanding officer's authority to order searches. Therein, the Court concerned itself

solely with the interpretation of a writing which delegated such authority to the holders of nine described offices and upheld the exercise of such delegated power by one of the designated individuals as being within the terms of the writing.

g. Other "reasonable" searches. The Court of Military Appeals has recognized the validity of searches other than those mentioned specifically in paragraph 152, MCM. These are those searches which in light of all the surrounding circumstances are not unreasonable. The Court has indicated its acceptance of the proposition that the term "reasonableness" as applied to military searches and seizures may have a somewhat different meaning than in the civilian sphere.

Illustrative cases.

(1) *United States v. Doyle*, 1 USCMA 545, 548, 4 CMR 137, 140 (1952). A master-at-arms who reasonably believes that a sailor is in possession of the stolen property of another sailor may lawfully search the locker of the former. Although a master-at-arms is the disciplinary representative of the commanding officer ". . . we hesitate to attribute to such a person the discretionary powers to search which are vested in the commanding officer. It is distinctly arguable that his power to search military property should be limited by a requirement that reasonable cause therefor should be shown. We would have serious doubts concerning the propriety, in the absence of express authorization, of allowing such a person to make general exploratory searches without a showing of good cause. . . . Here, an eye-witness had informed the master-at-arms that petitioner had in his possession the clothing of another. He, therefore, had reasonable and probable cause to believe that an offense had been committed by petitioner. . . . Inability to take direct and prompt action in such a situation would seriously impair the performance of a master-at-arms' duties and responsibilities in regard to enforcement of laws and regulations and, under other circumstances, the protection of government property. . . . We therefore conclude that the action of the master-at-arms in searching petitioner's locker was, according to existing military and moral law, reasonable."

(2) *United States v. Rhodes*, 3 USCMA 73, 75, 11 CMR 73, 75 (1953). A Staff Judge Advocate may, at the request of criminal investigators who suspect an officer assigned to his section of criminal activities, search the desk in the section assigned to such officer. "The office desk, the object searched, was military property safely within the ambit of the direct

responsibility of the officer who conducted the search. The latter was the superior officer of the accused. He had been informed reliably and officially that there was good reason to believe that the accused was engaged in an unlawful enterprise. Indeed, had Captain Meltz taken no action after having received intelligence of the accused's alleged misconduct, disciplinary proceedings might properly have lain against him. It is quite true, of course, that the Captain could have elected to report the matter to his commanding officer, Colonel Stanton, and to have requested authority to effect the search in fact made. However, in our opinion, he was not required to follow this latter course. The search was in no sense general and exploratory, but instead was narrowly restricted in scope, purpose, and physical area. It was, therefore—under all of the circumstances including the exigencies of the military service—entirely reasonable. . . . As the search was not, under the facts involved here, unreasonable, it was not unlawful. We are not at all to be understood as laying down the broad rule that any military person possesses inherent authority to search the effects of another who is his subordinate in rank or grade. In this field of the law, as in so many others, general propositions are apt to be illusory—for the question in each case depends so completely on the setting in which it is found."

(3) *United States v. Bolling*, 10 USCMA 82, 85, 27 CMR 156, 159 (1958). A barracks orderly noticed some marihuana cigarettes in an open, unmarked duffel bag lying on the floor. An OSI agent was summoned to the scene, removed the cigarettes and then examined the remaining contents of the bag. The board of review held that the search of the bag was illegal. "Contrary to the board of review, we find that searching through the duffel bag under the conditions then existing, was reasonable. Having lawfully taken possession of the property, and knowing it contained a narcotic, there was a duty upon the military authorities to segregate the contraband property from the personal effects of the owner of the bag and impound the prohibited material. This would necessitate some search to make certain all cigarettes and their residue was removed. The fact that in the course of performing this duty the accused's name was noticed on certain letters is only incidental to the real purpose of the search . . . if ownership of the bag was known prior to the search, then the information on the letters would merely be cumulative. However, assuming they alone furnished the lead as to the identity of the offender, we find no illegality

in the manner in which the information was obtained. There is no contention made that the investigating agent exceeded the bounds of reason in looking at all the property in the bag. The information he obtained was readily available to anyone who would be merely seeking to segregate the contraband from those goods which were legal. His activities were limited in scope and character and, so far as this record discloses, his search was narrowed to a legitimate purpose. We, therefore, conclude that the search was reasonable and the cigarettes were properly admitted in evidence."

(4) CM 354324, *Heck*, 6 CMR 223, 228 (1952). In the absence of a delegation of authority to him by the appropriate commanding officer, a Provost Marshal could not lawfully authorize a search of all bachelor apartments in three apartment houses in Germany merely on suspicion that "girls" might be found to be present in one or more apartment in violation of directives. ". . . it is clear from the evidence that the visit of the search party to the three buildings which apparently contained numerous apartments was an exploring expedition conducted by the military police and was neither directed specifically against the accused nor predicated upon any information directly involving him. . . . A search without proper foundation, as here exemplified, is unlawful and cannot be justified by what is found."

5. Lawful seizures. *a. General.* The mere fact that a certain object is discovered during a lawful search does not necessarily make a seizure thereof lawful. There are certain limitations upon the types of objects which may be seized. For this purpose it is necessary to distinguish between items of merely evidentiary value, which are seizable only incident to a lawful search of the person incident to an arrest, and so-called "fruits, tools or instrumentalities of crime" and contraband goods. The mere fact that the object seized is not related to the purpose for which the search was undertaken does not make the seizure unlawful. It is also important to note that certain items such as contraband or stolen goods, may be lawfully seized even during an unlawful search. However, the lawful seizure would not validate the search so as to make the evidence admissible.

b. Mere evidence. The general rule is that items of "merely evidentiary value" are never seizable except during a search of the person incident to a lawful arrest. Such items are those which have no connection whatsoever with the offense involved other than as proof of the commission of the offense. As is pointed out in subparagraph *c*, *infra*, the cases demonstrate a willingness on the part of the courts to go to great lengths to hold an item to be more than mere evidence with the result that ordinarily only such items as state-

ments made by an individual after the commission of a crime would fall into the category of "mere evidence." The authority to seize even pure evidence found on the person of an arrested individual springs from the plenary authority to divest such an individual of anything whatsoever found on his person. Since the arresting authorities have lawfully acquired possession of the items thus seized they are admissible in evidence.

Illustrative cases.

(1) *United States v. Higgins*, 6 USCMA 308, 20 CMR 24 (1955). A note written by an embezzler to his wife after the embezzlement had taken place, in which he mentioned the use to which he planned to put the stolen money "after I get out of the pokey," constituted "mere evidence" of the crime and, as such, would not be subject to being lawfully seized from him during a search of his quarters.

(2) *Weeks v. United States*, 232 U.S. 383, 392 (1914). There exists "the right on the part of the government, always recogognized under English and American law, to search the person of the accused when legally arrested, to discover and seize fruits or evidence of crime. This right has been uniformly maintained in many cases."

(3) *Kremen v. United States*, 353 U.S. 346 (1957). During an arrest of three individuals on charges of harboring a fugitive from justice, the FBI seized the entire contents of the cabin in which the arrests took place as well as all items found on the persons of those arrested. "The seizure of the entire contents of the house and its removal some two hundred miles away to the FBI offices for the purposes of examination is beyond the sanction of any of our cases. While the evidence seized from the persons of the petitioners might have been legally admissible the introduction against each of petitioners of some items seized in the house in the manner aforesaid rendered the guilty verdicts illegal."

o. Fruits or instrumentalities of crime. The fruits of a crime, such as stolen goods, and those items which have been used in connection with the commission of a crime are seizable. The cases set forth below demonstrate the elasticity of the term "instrumentality of crime." It must also be noted that such items are subject to lawful seizure when discovered even though they are unrelated to the purpose for which the search was conducted.

Illustrative cases.

(1) *Harris v. United States*, 331 U.S. 145 (1947). When, during a lawful search of an apartment for the cancelled checks involved in the offense for which the defendant was arrested, the seachers came across several draft registration cards which the defendant could not lawfully possess, such cards constituted the means of committing a crime and were subject to lawful seizure.

(2) *Abel v. United States*, 362 U.S. 217 (1960). During the search of the defendant's hotel room incident to his arrest as a deportable alien, the searchers could lawfully seize such items as a forged birth certificate and coded messages which were being used in connection with espionage.

(3) *United States v. Doyle*, 1 USCMA 545, 549, CMR 137, 141 (1952). Civilian police searching accused's privately owned vehicle for some stolen seat covers pursuant to a search warrant could lawfully seize a stolen master-at-arms badge found pinned to the sun-visor of the car. "The Federal Courts have frequently condemned general exploratory searches, where the result of such a search is to produce unexpected products of crime. . . . However, if the search is lawful, officers may seize items relatively apparent, even though the original purpose of the search did not relate to those items. . . . Here, the civilian authorities searching the car had procured a warrant authorizing them to search petitioner's car. During this search, the master-at-arms badge was found in plain view—pinned to the sun-visor inside the car. Under the rule set forth in *Harris v. United States*, supra, this evidence of crime was legally seized and should have been allowed in evidence at the trial."

(4) *United States v. Rhodes*, 3 USCMA 73, 75, 11 CMR 73, 75 (1953). A diary in which the accused maintained records of his black-market activities qualifies as an instrumentality of the crime and is seizable. "That there is such a [non-seizable] category—customarily characterized as 'mere evidentiary materials'—is firmly recognized. . . . However, the doctrine's boundary lines are not clear, but are shadowy, indistinct and elusive indeed. . . . Here, it is quite clear that the diary of the accused constituted in fact his means—quite apparently his only means—of preserving the records of his nefarious activities, although not in customary business form. It is, of course, the substance of the diary which must control. Viewed substantively, the diary was as much a part of the accused's unlawful undertakings as were the ledger and bills

of the prohibition law violator held subject to seizure in *Marron v. United States*, supra [275 U.S. 192]."

(5) *United States v. De Leo*, 5 USCMA 148, 161, 17 CMR 148, 161 (1954). Sample tracings of a certain signature found in a lawful search pertaining to another unrelated offense were lawfully seizable as the instrumentalities of the crime of forgery. "If the search was lawful, then what of the seizure? Of importance in this aspect of the matter is the dictinction between merely evidentiary materials on the one hand, and on the other instrumentalities of crime. . . . The items seized took the form of five nondescript slips of white writing paper on which was written the name 'Andrew D. Binz'—and which were located in the accused's writing case. As appeared subsequently, the accused had pressed certain missing travelers checks to a windowpane and thereafter traced the signature of Andrew D. Binz. Subsequently he had forged certain countersignatures by copying from the tracery to the checks. . . . The slips of paper here . . . could hardly have been adopted to a purpose other than one of forgery, past or future. Without making sample signatures on such slips—whether freehand or through a process of tracing—it is doubtful that a credible forgery could have been perfected. Those documents, while not contraband, constituted 'private papers' of De Leo only in an extremely loose and undiscriminating sense of the term. . . . They were subject to seizure."

(6) CM 401550, *Starks*, 28 CMR 476, 481 (1959), *pet. denied*, 28 CMR 414 (1959). A letter written by the accused to a friend in whose custody he had left two stolen Government pistols instructing him to dispose of them is lawfully seizable as being "an instrument designed, intended or used as the means of committing a criminal offense." Even though the larceny had been completed the letter contemplated the wrongful disposition of the property, a misprision of felony or an obstruction of justice. Furthermore, the legality of the seizure does not depend upon the offense for which the accused is actually prosecuted and the item seized need not be an instrumentality of that specific offense.

d. Unlawful searches. It is possible to have a lawful seizure during an unlawful search. This occurs when the searchers discover items of a contraband nature during the unlawful search. In such a case although the items are seizable, the illegality of the search prevents their being used as evidence.

Illustrative case.

United States v. Jeffers, 342 U.S. 48 (1951). Narcotic drugs found to be in the unlawful possession of the defendant during an unlawful search may be seized. However, the discovery of the drugs does not have retroactive effect so as to legitimate the search and the illegality of the search during which the drugs were seized renders them inadmissible in evidence.

e. "Seizure" of information. It is possible to have a "seizure" without the searchers actually taking physical possession of any object. This occurs when what is seen during a search gives the searchers information. If the search is unlawful, such information is deemed to have been obtained illegally and the testimony of the searchers as to what was seen is inadmissible.

f. Seizures without searches. It is possible to have a seizure without there having been an antecedent search. This occurs when the item seized is discovered solely as a result of being in the plain sight of an individual who is not infringing upon any right of privacy in observing it. In such a case the admissibilty of the evidence resulting from the seizure depends upon the reasonableness, under all the circumstances, of the seizure.

Illustrative case.

United States v. Bolling, 10 USCMA 82, 84, 27 CMR 156, 158 (1958). When a barracks orderly, while performing his assigned duties, observed what appeared to be marihuana cigarettes in an open duffle bag lying on the floor, the subsequent seizure of the duffle bag by the first sergeant who had been notified of the discovery, was lawful and the cigarettes were admissible. ". . . the seizure was legal for the following reasons: The room where the bag was located was open and used by all occupants of the barracks. The bay orderly's presence there was in the performance of his duties, and he was in no sense a trespasser. He observed what he concluded—and rightly so—were marihuana cigarettes and he promptly notified the first sergeant of his discovery. The sergeant testified he seized the property to prevent its removal or disposal. . . . We believe that when it appears to a noncommissioned officer, clothed with power to supervise the discipline of a command, that marihuana—the possession of which is presumed unlawful and which can be easily concealed or removed—is located in a common area within the command clearly visible to anyone who happens to look, he acts reasonably in seizing the contraband. Particularly is this so if it reasonably appears to him someone might obtain possession of the drug while he seeks permission to act."

6. Search must be official. *a. General.* Prior to the decision of the Supreme Court in *Elkins v. United States*, infra, it had been held in the Federal courts that the rule of public policy which pro-

hibits the use of otherwise competent evidence because it has been obtained as the result of an unlawful search, applied only when such search was conducted or instigated by persons acting under authority of the United States and that evidence obtained or discovered during an unlawful search conducted by officials of a foreign government or one of the United States acting *solely* as such and not acting in any manner as the agents or assistants of "federal" criminal investigators or by an individual acting in a purely private capacity was not rendered inadmissible merely because of the illegality of the search. This rule had been applied in military law by the Court of Military Appeals. In *Elkins*, the Supreme Court rejected this principle insofar as it applies to state or municipal officers.

b. Searches by state or municipal officers. The *Elkins* case indicates quite clearly that evidence seized by officers of states or municipalities will not be admissible in the Federal courts unless the circumstances of the seizure were such that it would have been lawful under Federal law if performed by Federal officials. It is to be expected that the Court of Military Appeals will apply a similar rule in courts-martial. Although searches and seizures are not mentioned in the Code and the Manual provision excludes evidence only if the unlawful search was "conducted or instigated by persons acting under authority of the United States," the prior opinions of the Court in this area indicate that they applied this limitation because it was recognized by the Federal courts and not solely because of the Manual provision. These decisions also indicate an unmistakable intent to conform the military law of search and seizure to Federal law wherever possible.

Illustrative case.

(1) *Elkins v. United States*, 364 U.S. 206, 4 L ed 2d 1669 (1960). The so-called "silver platter doctrine" which permits the use in Federal courts of evidence unlawfully seized by state officials when acting independently of Federal officers violates the Constitution. The silver platter doctrine had been based upon the assumption that the Constitution did not forbid unreasonable searches and seizures by state officials. This assumption was made false by the holding in *Wolf v. Colorado*, 338 U.S. 25 (1949) that the Fourteenth Amendment does prohibit such searches. The rule excluding evidence obtained in violation of the Fourth Amendment has been applied by virtue of "the Court's supervisory power over the administration of criminal justice in the federal courts" in order to compel compliance with the law. The Fourteenth Amendment warrants equal protection in this area. Al-

though the various states are not required to use the exclusionary rule in their own courts, it will be applied in the Federal courts.

"Free and open cooperation between state and Federal law enforcement officers is to be commended and encouraged. Yet that kind of cooperation is hardly promoted by a rule that implicitly invites Federal officers to withdraw from such association and at least tacitly to encourage state officers in the disregard of constitutionally protected freedom. If, on the other hand, it is understood that the fruit of an unlawful search by state agents will be inadmissible in a Federal trial, there can be no inducement to subterfuge and evasion with respect to Federal-state cooperation in criminal investigation. Instead, forthright cooperation under Constitutional standards will be promoted and fostered." (at 1680).

". . . we hold that evidence obtained by state officers during a search which, if conducted by Federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment is inadmissible over the defendant's timely objection in a Federal criminal trial. In determining whether there has been an unreasonable search and seizure by state officers, a Federal court must make an independent inquiry, whether or not there has been such an inquiry by a state court, and irrespective of how any such inquiry may have turned out. The test is one of Federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed." (At 1681).

(2) *Military law prior to Elkins v. U.S.*

(*a*) ACM 5009, *Gilbert*, 5 CMR 708, 711 (1952). The accused was searched by city police as he emerged from a suspected narcotics outlet which was under surveillance and marihuana was found on his person. "Assuming . . . that such search by the city police officers was unlawful, the law is well settled that where such facts exist, the fruits of the illegal search by state or local authority are admissible in Federal courts provided that the search and seizure was not accomplished at the instigation of, or in conjunction with, or as agents of the Federal Government. . . . There was no evidence direct or indirect to indicate that there was any connection between the Federal and local authorities in apprehending persons involved in the use and possession of narcotics. And in this particular instance it was affirmatively shown that it was only on the day subsequent to the apprehension of the

accused that the Federal authorities were contacted. We cannot, therefore, find anything in the evidence which would show an alliance between the Federal and State authorities so as to prohibit consideration of the evidence seized by the local authorities."

(*b*) ACM 11930, *Allen*, 21 CMR 897, 901 (1956). Where a city police officer, acting at the request of the base Provost Marshal, arrested the accused in a hotel lobby while the Provost Marshal watched the rear exit to prevent the accused's escape, the ensuing unlawful search of the accused's hotel room by the police officer which resulted in the discovery of the stolen items was "federal." According to his [the police officer's] testimony he 'was acting for the military' and 'any crime committed on Government property we have no jurisdiction unless we are authorized by the military.' He considered himself an 'agent of the United States Government' and he had no reason to believe that the accused had committed an offense against the state of Texas. Under the circumstances we can only conclude that Captain Gallagher was acting as an agent of the United States Air Force, and not in his capacity as a municipal police officer."

c. Searches by foreign officers or private individuals. The Supreme Court based its holding in the *Elkins* case upon the applicability of the Fourteenth Amendment to state officers. Since the Amendment does not apply to foreign officials or to individuals acting in a purely personal capacity, the pre-Elkins rule should continue to apply to permit the use of evidence unlawfully seized by such persons.

In *United States* v. *Seiber*, 12 USCMA 520, 31 CMR 106 (1961), the Court of Military Appeals in a unanimous opinion which declined to extend the "poisoned tree" doctrine to divulgence of marital confidences (see par. 3, ch. *XXXI*, *supra*) expressed the belief that *Elkins* does not apply to the activities of private individuals. "Manifestly, a distinction based upon misconduct by agents of the Government or under color of some authority is sound. It has long been settled that evidence taken by wrongful act of a private person, without participation by the Government will not be barred from evidence. . . . nor has that rule been sapped of any vitality by the recent decisions of the Supreme Court . . . [*Elkins* and *Mapp v. Ohio*, 367 U.S. 643]. In *Elkins*, where the so-called silver platter doctrine was overturned, the evidence was wrongfully obtained, not by an individual, but by state officers who were treated just as if they were Federal agents. Likewise, the facts in *Mapp* . . . involved lawless acts by state officers. Further, perusal of those and prior decisions demonstrate beyond peradventure that the rule of exclusion applied to both primary and

derivative evidence was calculated to deter wrongful activity by the Government, and to keep the judiciary, as an arm of the Government, from becoming accomplices to such impropriety." (At p. 523, 109.)

Illustrative cases.

(1) *United States v. De Leo*, 5 USCMA 148, 17 CMR 148 (1954). When the French authorities decided to search the quarters of the accused in connection with their investigation of a conspiracy involving the use of counterfeit American money and requested that an American investigator be present at the search because of the accused's military status, the mere presence of a CID agent during the search did not make him a participant therein and even if the search was unlawful under French law the evidence seized thereby is not inadmissible. "It is a well-established rule of Federal law that the Government may use evidence obtained through an illegal search effected by American state or by foreign police—unless Federal agents participated to some recognizable extent therein. . . . As extending in a different direction, *United States v. Byars*, 273 U.S. 28, . . . has been cited to us. There a Federal officer was present during a search conducted by state officials—his presence being attributable apparently to a hope that its accomplishment would reveal some item which might disclose the commission of a Federal offense. The Supreme Court concluded that the products of the search must, for the purposes of Federal prosecution, be treated as if all of the parties to it had been Federal agents. In our view a somewhat higher degree of participation by Federal officials must be required in an overseas area, than in one within the continental limits of the United States, as the predicate for a finding that a particular search constituted an American enterprise. . . . The situation is materially different as we meet it outside the territory of the United States. That is to say, the serviceman, who is under investigation by the police of a foreign nation, is present in that country by reason of military orders. Having sent him there, the United States labors under a duty to protect him—so far as properly can be—with respect to the criminal procedures of that foreign government." (At p. 155.) "In short, American officials in overseas areas have quite generally and properly acted in liaison with agents of the 'host' country in connection with the investigation of offenses of which American servicemen are suspected—this for the purpose of assuring that the legitimate interests of the suspect are protected in the conduct of the foreign

investigation. With this in mind, we hesitate to hold too readily that the mere presence of a military investigator during a search by foreign police necessarily renders the proceeding an activity of the United States." (At p. 156.) "When we observe, too, that the enterprise was instigated by Inspector Lestrade, and that the motive for its existence emanated solely from the French police—with Sumocks's presence a no more than incidental element—we cannot doubt that the record is sufficient to sustain the trial court's determination that the search was not an American one." (At p. 157.)

(2) *United States v. Volante*, 4 USCMA 689, 691, 16 CMR 263, 265 (1954). A search made under the following circumstances could be deemed not "official." The accused was one of four marines working in the base Exchange for extra compensation; the workers were required to make up shortages; inventory disclosed a shortage; Sergeant H., the exchange steward, suspected the accused; H phoned the Chief Steward to seek permission to search the accused's locker and was told "You had better do something about it or it will be your neck if you don't." The accused's coworkers then searched his locker and found some Exchange merchandise. ". . . evidence obtained as a result of such a [illegal] search by a private person is admissible. . . . The law officer found that Sergeant Houseman acted only as a private person motivated by personal interests. If there is substantial evidence to support that finding, it must be sustained. . . . Plainly, not every search made by persons in the military service is under the authority of the United States. However, we need not attempt to establish categories of persons or situations which will make the search either official or private. Certainly, a search by a person duly assigned to law enforcement duty and made for the sole purpose of enforcing military law, is conducted by a person acting under the authority of the United States. . . . None of the persons who made the initial search here was assigned to law enforcement duties. But the absence of such assignment is not determinative of the problem. In the military establishment, law enforcement is frequently an integral part of the broader problem of military command. Thus, a search by one having direct disciplinary power over the accused is one under the authority of the United States. . . . From an analysis of the provisions of the Marine Corps Manual dealing with the operation of exchanges, it seems that no true disciplinary relationship exists between the exchange steward

and military attendants." The evidence supports the finding that the search was motivated by the purely personal desire of the searchers to avoid being held pecuniarily liable for the shortage.

(3) *United States v. Rogan*, 8 USCMA 739, 742, 25 CMR 243, 246 (1958). The accused, a first lieutenant, was S–2 of an organization on bivouac. A camera belonging to an enlisted member of the S–2 section disappeared. Sergeant O, the Intelligence NCO, reported the loss to the accused who did nothing. A "shakedown" inspection of the enlisted men of the section, including Sergeant O, conducted by the assistant S–2 proved fruitless. Sergeant O become suspicious of the fact that the accused was carrying a gas mask and, upon the return of the unit to camp, looked into the mask, which had been left in a drawer in the accused's desk, and found the stolen camera. Sergeant O testified that he believed he was acting in an "official" capacity in making the search and that he had no personal interest in the larceny. "From the evidence here, the law officer could properly conclude that Sergeant Ontiveros acted in a private capacity. True, the Sergeant described his action as 'official' but the characterization did not bind the law officer. . . . Sergeant Ontiveros reported the loss but he did not conduct the 'shakedown.' On the contrary, he was one of the persons searched. No one gave him authority to search. He was, however, very suspicious of the accused. He found the accused's bag in the S–2 office. With no one but a fellow noncommissioned officer present he examined it. Under these circumstances, the law officer could reasonably find that he 'checked' the bag and searched the desk to satisfy his personal suspicions and not 'under the authority of the United States'."

7. Communications act violations. *a. General.* Evidence is inadmissible if obtained under such circumstances that the Communications Act of 1934 would prohibit its use against the accused if he were being tried in a United States District Court. Section 605, the pertinent portion of the Act, provides that ". . . no person not entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purpose, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect or meaning of the same or any part thereof, or use the same or any

information therein contained for his own benefit or for the benefit of another not entitled thereto . . ." (47 U.S.C. 605).

It must be remembered that evidence obtained by unlawful wiretapping is inadmissible not because wiretapping is deemed to be a violation of a fundamental right, as in the case of illegal searches, but because Congress has forbidden the use of such evidence. It follows, therefore, that an interception does not render evidence inadmissible unless it falls within the statutory prohibition. Set forth below are examples of interceptions which have been held not to be within the scope of the Communications Act.

b. Unlicensed radio circuits.

Casey v. United States, 191 F.2d 1, 4 (1951), *rv'd on other grounds*, 343 U.S. 808. Where defendants used an unlicensed radio transmitter to communicate between a race track and a confederate posted outside a bookie establishment so as to be able to place bets after the race had been run but before the bookie received the results, interception of the radio communications was not forbidden by the Communications Act. "There is no merit to appellant's contention that the trial court erred in admitting in evidence the substance of radio messages between appellants . . . the Act . . . refers to communications over licensed facilities. The appellants were unlicensed operators transmitting voice messages over an unlicensed station. . . . The protections of the Act were never intended for, nor do they cover, such communications which are themselves illegal."

c. Electronic eavesdropping.

(1) *On Lee v. United States*, 343 U.S. 747, 754 (1952). Where an informant with a radio transmitter concealed on his person entered defendant's laundry and had a conversation with the defendant which was heard by a Federal agent equipped with a radio receiver and posted on the sidewalk outside the store, the Communications Act was not violated. "There was no interference with any communications facility which he possessed or was entitled to use. He was not sending messages to anybody or using a system of communications within the Act." Furthermore, since the Act is not applicable there is no rule of law which prohibits the use of evidence of the conversation. The principles governing illegal searches and seizures have no application to eavesdropping by radio, or otherwise, unless access to the listening post has been gained illegally. Herein the informant lawfully entered a public place of business and the eavesdropper was located on a public sidewalk.

(2) *Silverman v. United States*, 365 U.S. 505, 5 L ed 2d 734 (1961). It is violative of the Fourth Amendment to insert a "spike microphone" into the party wall of two row houses

so as to make contact with the heating duct of the defendant's house. ". . . [Herein] the eavesdropping was accomplished by means of an unauthorized physical penetration into the premises occupied by the petitioners. . . . Eavesdropping accomplished by means of such a physical intrusion is beyond the pale of even those decisions in which a closely divided Court has held that eavesdropping accomplished by other electronic means did not amount to an invasion of Fourth Amendment rights. In *Goldman v. United States*, 316 U.S. 129 . . . the Court held that placing a detectophone against an office wall in order to listen to conversations taking place in the office next door did not violate the Amendment. . . . But in both *Goldman* and *On Lee* [*supra*] the Court took pains explicitly to point out that the eavesdropping had not been accomplished by means of an unauthorized physical encroachment within a constitutionally protected area. . . . Here, by contrast, the officers overheard the petitioners' conversations only by usurping part of the petitioner's house or office—a heating system which was an integral part of the premises occupied by the petitioners, a usurpation that was effected without their knowledge and without their consent. In these circumstances we need not pause to consider whether or not there was a technical trespass under the local property law relating to party walls. Inherent Fourth Amendment rights are not inherently measurable in terms of ancient niceties of tort or real property law. . . . This Court has never held that a federal officer may without warrant and without consent physically entrench into a man's office or home, there secretly observe or listen and relate at the man's subsequent criminal trial what was seen or heard." (At 5 Led 2d 738–9.)

Note 1. The Court also held that *eavesdropping* on what is being said over a telephone is not a Communications Act violation.

Note 2. The Court declined to consider the impact of modern electronic eavesdropping devices upon the law of privacy. "We need not here contemplate the Fourth Amendment implications of these and other frightening paraphernalia which the vaunted marvels of an electronic age may visit upon human society." (At 5 L ed 2d 737.)

d. Telephone extensions.

(1) *United States v. De Leon*, 5 USCMA 747, 755, 19 CMR 43, 51 (1955). Evidence obtained by listening on an existing extension with the express consent of an informant, to a telephone conversation between the informant and the accused is admissible. "In enacting Section 605, Congress did not turn a telephone conversation into a privileged commu-

nication. Either party is completely free to disclose its existence and contents to whomever he wishes, and to use it for his own benefit or the benefit of another to whatever extent he desires. . . . What meaning did Congress intend to give the word 'intercept'. . . . We think Congress contemplated a surreptitious taking; a seizure without the knowledge and consent of both communicants. It is that type of interception which is 'inconsistent with ethical standards and destructive of personal liberty.' . . . And, the secret interposition of a listening device also infringes upon the 'means of communication.' . . .Neither of these considerations obtains when one of the communicants authorizes a third party to listen to the conversation on an existing extension instrument. Except, from the standpoint of convenience, this procedure is no different from 'the overhearing of the conversation by one sitting in the same room,' which the Supreme Court sanctioned in the Goldman case [316 U.S. 129]. Neither can it be fairly described as 'dirty business.' . . . It is not unreasonable to suppose that a person who employs the telephone as a means of communication impliedly consents to the receiver's use of existing extensions on his own number. . . . Accordingly we hold that a person who overhears a telephone conversation by means of an extension instrument which he is authorized to use by one of the parties to the conversation, may testify to its contents, even though the other communicant did not know of, or expressly consent to, the listening in."

(2) *Rathburn v. United States*, 355 U.S. 107 (1957). When, with the consent of S, police officers listened on a regular telephone extension located in S's home to a conversation between S and the defendant, the evidence gained thereby was admissible at the defendant's trial for threatening to kill S. Listening in on a telephone conversation under these circumstances does not amount to the unauthorized interception of a communication within the meaning of the Communications Act.

(3) ACM 16294, *Martin*, 28 CMR 822, 830 (1959). An airpoliceman present in a commissary to investigate the discovery of several cartons of cigarettes found hidden on an outside loading platform heard an airman answer an incoming telephone call and summon X to the phone. The investigator went to an adjoining office and listened on an extension to the conversation between X and the accused which concerned the cigarettes. The accused who also worked in the commissary knew that the phone was not for X's indi-

vidual use and since he should have known of the existence of the extension instrument he assumed the risk that his call might be "monitored" on an extension and thereby gave "the implied consent referred to in the De Leon decision. . . . Accordingly, we hold there was no illegal interception here."

e. Self-contained military circuits.

United States v. Noce, 5 USCMA 715, 19 CMR 11 (1955). The monitoring of telephone calls taking place within a self-contained military telephone system for the purpose of apprehending the maker of obscene calls is not forbidden by the Communications Act. "Almost thirty years ago, the United States Supreme Court held that the admission in evidence of conversations of the defendant obtained by tapping business and home telephones did not violate the United States Constitution. . . . [in a later case] the Supreme Court also determined that, in enacting Section 605 of the Communications Act, Congress intended to establish a rule of evidence for the Federal courts. . . . Later . . . the Supreme Court concluded that the inclusive language of the statute prohibits the interception and divulgence of intrastate communications, as well as those of an interstate character." (At p. 719, p. 15.) "We are of the opinion that a self-contained military communications system is not the kind of system intended by Congress to be included under the provisions of Section 605. . . . It requires no elaborate recitation of reasons to emphasize the need in the military establishment for close supervision and control over its own communication system. Monitoring of some sort is essential to protect the armed forces from unauthorized disclosure of military secrets or just 'loose talk' about confidential military matters. Such disclosures may be made over a so-called private line on a military post as well as over official lines. This was undoubtedly appreciated by Congress. And, it seems to us that Congress would not restrict the power of the military establishment without a specific declaration to that effect." (At p. 721, p. 17.)

f. Foreign telephone calls.

United States v. Gopaulsingh, 5 USCMA 772, 773, 19 CMR 68, 69 (1955). The Communications Act does not apply to a telephone call made in Korea. ". . . it seems to us that Section 605 has no application whatsoever to a telephone communication made and completed within the boundaries of a foreign country." The Act expressly limits its applicability to communications which originate or are received in the United States and its territories and possessions, except the Canal Zone.

g. Official action not required. Under search and seizure principles some sort of official action is required in order to make evidence inadmissible. This limitation does not apply in the case of violations of the Communications Act. Evidence obtained in violation of the Act

is inadmissible regardless of who obtained it or the capacity in which he was acting at the time.

Illustrative case.

Benanti v. United States, 355 U.S. 96 (1957). Where New York City police placed a wiretap, lawful under the law of New York, on a telephone incident to a narcotic investigation and as a result overhead conversations pertaining to the possession of illicit alcohol of which they informed federal authorities, the evidence obtained by the federal authorities as a result of this disclosure is inadmissible under the Communications Act. ". . . the plain words of the statute created a prohibition against any persons violating the integrity of a system of telephonic communications and that evidence obtained in violation of this prohibition may not be used to secure a federal conviction." The legality of the wiretap under the law of New York cannot derogate from the plain meaning of the statute. ". . . we find that Congress, setting out a prohibition in plain terms, did not mean to allow state legislation which would contradict that section [of the Communications Act]."

8. The exclusion of evidence. *a. General.* When evidence is illegally obtained through search and seizure or wiretapping not only is the evidence itself inadmissible but all further evidence obtained through information supplied by such illegally obtained evidence is also excluded. Such subsequently obtained evidence is frequently referred to as "the fruit of the poisonous tree."

b. The fruit of the poisonous tree. Whether or not a particular item of evidence is so tainted by illegally obtained evidence as to be itself inadmissible frequently is difficult to decide. It is first necessary to decide whether the allegedly tainted evidence was in fact obtained *as a result* of the illegally obtained evidence. If it was so obtained it is inadmissible *unless* the prosecution can clearly establish that it would have been obtained in any event even if the unlawful search and seizure or wiretapping had not occurred, as, for example, by showing that the unlawfully obtained information was subsequently acquired by the investigator in a lawful manner.

Illustrative cases.

(1) *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 391 (1919). The same overriding policy considerations which prohibit the use in evidence of copies of documents which have been unlawfully seized necessarily also prohibit the use of information contained in such documents as the basis for a court order compelling a corporate defendant (to which the Fifth Amendment is inapplicable), to produce the originals. "The essence of a provision forbidding the acquisition of evidence in a certain way is not merely that evidence so

acquired shall not be used before the court, but that it shall not be used at all. Of course, this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the government's own wrong cannot be used by it in the way proposed."

(2) *Nardone v. United States*, 308 U.S. 338 (1939). When the conviction of the defendant was reversed because of the use of evidence directly obtained through wiretapping, it was prejudicial error not to permit the defendant, at the new trial, to attempt to show that some of the government evidence was the indirect product of the same wiretap. Evidence obtained as the result of information supplied by an illegal wiretap is "the fruit of the poisonous tree" and its use is forbidden by the Communication Act.

(3) ACM 15962, *Williams*, 28 CMR 736, 739 (1959). When analysis of the accused's urine was made solely because of the fact that suspected narcotics were found on his person during a search incident to an apprehension, held to be illegal for lack of probable cause, the reported results of the urinalysis are inadmissible as being "a direct product of the illegal search."

(4) CM 354324, *Heok*, 6 CMR 223, 231 (1952). When accused was charged with wrongfully entertaining a female in his bachelor quarters in violation of directives, and the knowledge of the authorities of her presence was gained solely through an unlawful search, her testimony at the trial should have been excluded as being the product of the unlawful search. ". . . the testimony of Miss Jacker, revealing her presence in the accused's quarters in violation of the quoted regulation was a direct consequence or product of the illegal search. It was the knowledge of her presence, gained by the illegal search, which enabled the officers to utilize her as a witness against the accused. In order to have enabled the government to make use of her testimony, the record must show that such testimony was produced upon knowledge wholly independent of the illegal search. As the record stands, it was the information unlawfully obtained which determined their course."

(5) *United States v. Ball*, 8 USCMA 25, 23 CMR 249 (1957). When CID agents who had been posted in a railway station with instructions to apprehend whoever took a suitcase from a certain public locker, on their own initiative unlawfully entered the locker, examined the contents of the suitcase to

confirm their suspicions that it contained stolen goods, repacked the suitcase and returned it to the locker, and subsequently arrested the accused when he took possession of it, the contents of the suitcase were admissible as being the product of a lawful search incident to an arrest based upon information known to the investigators independently of the illegal search and were not the product of it.

c. Confessions as "Poisoned Fruit." A confession or admission of the accused, like any other evidence, *may* be rendered inadmissible by a prior illegal search and seizure or wiretap. The "tainting" of a confession under the fruit-of-the-poisonous-tree doctrine can occur in two different ways. *First,* if the confession is obtained as the result of an interrogation which was conducted *solely* because of the unlawfully secured information, *i.e.*, if the accused would not have been interrogated but for such information, the confession is clearly the product of the unlawful search and seizure or wiretap and must be excluded. *Second,* even though the interrogation itself is not thus the product of the unlawfully seized evidence, *i.e.*, if it would have been conducted even if the search and seizure or wiretap had not occurred, the confession may nevertheless be tainted if the investigator used the illegally obtained evidence to induce the confession, as, for example, by confronting the accused with illegally seized physical objects or by making him aware that his interrogator possessed the unlawfully obtained information. In such a situation it is necessary to determine whether the accused confessed because of the interrogator's improper use of the unlawfully acquired information or for other reasons. If the confession is the product of such information it must be excluded. Furthermore, in these situations there exists the possibility that the manner of interrogation may raise an issue as to the voluntariness of the confession if the circumstances indicate that the use of the illegally obtained evidence may have so overpowered the will of the accused as to deprive him of his freedom to elect to remain silent.

Illustrative cases.

(1) *Tainted confessions.*

(*a*) *United States v. Ellwein*, 6 USCMA 25, 31, 19 CMR 151, 157 (1955). Through the use of unlawful monitoring of certain telephone lines the accused was apprehended while making an obscene telephone call. During his subsequent interview he confessed to making several lewd calls. The investigator testified that information in his files made the accused a suspect and that the latter would have been interrogated "eventually." The accused was not confronted with the information gleaned from the intercepted call. Under these circumstances the confession was not "the

fruit of the poisonous tree." ". . . there may be instances in which—despite warning of the right to remain silent and an absence of threats or coercion—a confession may be so intertwined with a previous illegal search and seizure, or a wiretapping operation, as to be inadmissible. . . . In the present case, however, the connection between the results of the monitoring scheme, on the one hand, and the confession, on the other, was infinitely more attenuated. The accused had long been under suspicion, and would ultimately have been interviewed by law enforcement agents regarding the obscene phone calls which had been the subject of complaint. . . . The accused was at no time confronted with the intercepted conversation, the contents and personnel of which were then wholly unknown to Jacks [the interrogator] himself. Ellwein did not seek to deny this assertion . . . and did not himself testify that he was influenced in any remotest degree to confess by information connected with or growing out of wiretapping."

(*b*) *United States v. De Leo*, 5 USCMA 148, 17 CMR 148 (1954). When the accused testifies that he confessed merely in order to avoid being tried by foreign authorities such testimony ". . . clearly amounts to a denial by the accused that his confession was in any measure the product of the allegedly unlawful search and seizure. Under the circumstances, we are not disposed to indulge in speculation concerning 'poisonous trees' and the fruits thereof, but will accept the accused's own view that the confession was in no way a result of the search." (At 163.) With respect to the issue of whether an illegal search can taint a subsequent confession "The Court voices no final holding in this respect. Among cases which would suggest that an illegal search may on occasion invalidate a subsequent confession are: [citing Federal cases]. . . ."

"Possibly the criterion is whether in a particular case the confession may be said to have resulted from the evidence unearthed by the illegal search. Furnishing the warning required by Article 31 might then constitute at least one circumstance indicating the interruption of a chain of causation." (At 162, n. 4.)

(*c*) ACM 11930, *Allen*, 21 CMR 897, 901 (1956). When an illegal search of the accused's hotel room resulted in the discovery of the stolen items his subsequent confession made "upon being confronted with the articles obtained by the unlawful search . . . was defiled with the same illegal taint and therefore inadmissible."

(*d*) *United States v. Dutcher*, 7 USCMA 439, 444, 22 CMR 229, 234 (1956). The accused, who was suspected of larceny, was searched off the air base by his squadron commander and currency which matched the description of the missing money was found. Thirty minutes later the accused was confined and thirty minutes thereafter when interrogated, he confessed. ". . . in presenting his evidence defense counsel's major effort was directed to showing that only about an hour intervened between the search and the accused's interrogation. . . . The simple explanation for his failure to do more is that he had no other evidence on the connection between the search and the accused's confession. The accused himself did not testify as to the reasons which induced him to confess. . . . On the other hand, the investigator who obtained the statement from the accused testified that the accused's statement was 'probably the easiest' he had ever procured from an accused in two and one-half years of investigative work. He said that after the accused had been advised of his rights under Article 31, he never 'hesitated' or showed any reluctance whatsoever about providing a statement. It was also shown that while the accused's wallet containing the stolen money was on the Desk Sergeant's desk, it was never exhibited to the accused. Moreover, neither Major Russell nor any of the others in the group at the search was present in the room in which the accused was interrogated. At the conclusion of the testimony, the law officer specifically ruled that even if the search was illegal, it did not 'taint' the confession. In my opinion, the evidence supports the ruling." (Separate opinion of Quinn, C.J., in which Ferguson, J. concurs.)

(*e*) CM 401337, *Waller*, 28 CMR 484, 491 (1959). Assuming that the accused's bloodstained pants, allegedly worn by him during the rape charged, were illegally seized, the fact that he saw the pants in his interrogator's hands at the outset of the interrogation does not *necessarily* make his subsequent confession inadmissible, despite his testimony that the sight of the clothing put him "in a shock of mind" such that he didn't realize what he was doing and that he "was frightened because of the charges." ". . . the accused made his confession after being properly warned of his rights some two and a half hours after he first saw the clothing. . . . His confession was not the product of a sudden, unexpected confrontation with illegally obtained, overwhelming evidence of guilt. . . . We are convinced he confessed because of his fear of the consequences of his

act and his sense of guilt, and not because the investigator had possession of a particular piece of incriminating evidence."

Note. Affirmed with the following remark: "Under the facts of this case, there can be no doubt that any causal connection between the possession of the clothes and the confession is so remote that we agree with the statement of the board of review that the evidence in this case shows no more than that the accused confessed because of his fear of the consequences of his act and his sense of guilt." (11 USCMA 295, 302, 29 CMR 111, 118 (1960)).

(*f*) ACM 16294, *Martin*, 28 CMR 822 (1959). Assuming that a certain telephone call made by the accused had been unlawfully intercepted, it did not render his confession inadmissible since he was a suspect independently of the interception and, even if his interrogator had mentioned the call to him, the nature of the intercepted conversation was not particularly incriminating.

(2) *Involuntary confessions.*

(*a*) *United States* v. *Alaniz*, 9 USCMA 533, 537, 26 CMR 313, 317 (1958). Where an accused was convicted of several offenses involving the possession, sale and use of marihuana and the convening authority disapproved the findings of guilty relating to the possession offenses because the evidence thereof was obtained as the result of an illegal search, he erred in failing to consider whether the illegal search also tainted the accused's confession to the remaining offenses. "Whether the results of the illegal rearch affected the voluntariness of the accused's later confession is a factual question which should have been, but apparently was not, considered by the convening authority."

(*b*) *United States v. Waller*, 11 USCMA 295, 301, 29 CMR 111, 117 (1960). When the evidence shows that the accused was fully aware of his Article 31 rights and there is no indication of "extensive examination" or "any coercion, force, improper influence, or inducements," his testimony that the sight of the bloodstained pants, allegedly worn by him during the rape charged, in the possession of his interrogator some two and one-half hours prior to his confession "shocked" him into confessing, raises no issue of voluntariness. "To raise an issue on involuntariness there must be facts produced from which it could be inferred reasonably that the use of the illegally obtained evidence caused the accused to be deprived of his right of free choice. It must in some way overcome his knowledge of his right to remain silent or it must be so closely connected with his confession

that the statement is given when the accused did not possess the mental freedom to confess or deny participation in the crime."

d. Crimes committed during unlawful searches. The exclusionary rule does not operate to prevent proof of a crime committed entirely during or after an unlawful search when such crime is not related to the purpose of the search. For example, the fact that an entry into a room might be unlawful would not allow the occupant to unlawfully kill the entrant and then have evidence of the killing excluded as being the product of the unlawful search.

Illustrative case.

United States v. Morrison, 10 USCMA 525, 528, 28 CMR 91, 94 (1959). The illegality of an entry into a hotel room which resulted in discovering the accused in the commission of an act of sodomy does not exclude evidence of his attempt, at that time, to bribe the investigator not to report the incident. The fact that the bribe attempt would not have been committed but for the illegal search, does not make evidence of the attempt the fruit of the illegal search. The exclusionary rule is designed to present the Government from profiting by the wrongdoing of its agents. This purpose is here served by excluding evidence of the sodomy and thus barring trial for that offense. However, the protection ". . . against unreasonable searches cannot be extended to pardon an offender from subsequent separate and distinct crimes. There is no constitutional or statutory provision or policy reason which should deny to the Government the right to prove a separate offense when none of the evidence is illegally obtained. Here the agent erred in going into the room, but he in no way learned of the bribery offense through his search. This crime came into existence solely through the machinations of the accused, and all the agent did was listen. The Government relied upon a testimonal utterance which was neither induced by interrogations nor by incriminating circumstances which influence persons to tell all because they have been caught in a criminal act. When placed in proper perspective, this is not a case where an accused admits or confesses to a crime because agents of the Government can display illegally obtained evidence and use it as a coercive measure or scheme to obtain an incriminating statement. Neither is it a situation where the illegally obtained evidence leads to other incriminating facts. On the contrary, this offense was non-existent at the time of the search, and it was committed only because the accused sought to corrupt an official who was in the performance of his duties." (Per Latimer, J., who then held that the evidence was insufficient to show an attempted bribe. Ferguson, J., concurred on this later point and expressed no opinion on the "admissibility" of the evidence. Quinn, C. J., in dissent, would uphold the

conviction and, therefore, by necessary implication agrees that the evidence is admissible.)

e. Use in state courts.

Mapp v. Ohio, 367 U.S. 643,6 L ed 2d 1081, 1089 (1961). The rules developed in the federal courts concerning the inadmissibility of evidence obtained by illegal search and seizure must also be applied by the courts of the several states. "Today we once again examine Wolf's [Wolf v. Colorado, 338 U.S. 25 (1949)] constitutional documentation of the right to privacy free from unreasonable state intrusion, and, after its dozen years on our books, are led by it to close the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right reserved to all persons, as a specific guarantee against that very same unlawful conduct. We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court. Since the Fourth Amendment's right of privacy has been declared enforceable against the States, through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government."

9. Disposition of the issue at trial. *a. General.* In the federal courts the issue of illegally obtained evidence normally is raised by way of a motion to suppress the evidence, or, in the case of physical objects of which the defendant claims the legal right to possession, by a motion to return the property. Military courts lack authority to grant such relief and, therefore, the issue is raised in courts-martial by an objection to the admissibility of the evidence made at the time an attempt is made to introduce it. At such time, the defense must be afforded the opportunity to show the circumstances under which the evidence was obtained, either by cross-examining prosecution witnesses or by offering defense evidence on the issue. The accused may, if he so desires, himself testify on this limited issue. Furthermore, as in the case of confessions (see par. 5*b*(3), ch. XII, supra), the defense has the right to have the evidence bearing on the issue presented and to have the law officer rule thereon at an out-of-court hearing.

b. Waiver. The right to demand the exclusion of illegally obtained evidence can be waived by the accused. Such a waiver may be either explicit or it may be implied from the conduct of the accused and his counsel.

(1) *Failure to object.* A failure to invoke the exclusionary rule ordinarily will be treated as a waiver thereof.

Illustrative cases.

(*a*) *United States v. Dupree*, 1 USCMA 665, 668, 5 CMR 93, 96 (1952). When the defense counsel's only objection to a proffered, alleged narcotic was directed to the lack of proof

of the identity of the substance, the accused may not, for the first time, urge on appeal that the substance was the product of an illegal search. The failure to object at the trial is deemed a waiver of the illegal source of the evidence. "It will necessarily be impossible for this Court to decide whether a given search is unreasonable unless, at the trial, there is placed in the record all the facts and circumstances surrounding the search. Further, we are impressed by the fact that the rule of exclusion is in no way based upon the unreliability of the evidence. We do not find here, therefore, a situation where failure to treat the matter on appeal might result in a conviction based upon untrustworthy evidence. . . . Finally, the rule, through policy and history, is calculated to protect a personal right. If the accused person involved, represented and advised by qualified counsel, does not desire to assert that right at the trial, then we perceive small reason for allowing it to be raised through afterthought on appeal. . . . We are not here concerned with rights of such an important and fundamental nature that a waiver is either not effective, or must be affirmatively and expressly shown. . . . The rule is not made applicable to military law by the Uniform Code of Military Justice, supra, and does not appear to be mandatory under the Constitution. . . . Viewing the rule of exclusion in its true character, therefore, we conclude that failure to raise the question by appropriate objection at trial is fatal to a consideration thereof on appeal. It is apparent that the Federal courts have adopted the same rule. . . . We recognize that there may conceivably be extreme circumstances under which it will be necessary for this Court to consider an issue of unlawful search, regardless of whether it was properly raised below. For example, if the evidence at the trial disclosed a flagrant and outrageous violation of the rule proscribing unreasonable searches, then the exhibit should have been rejected by the law officer of his own motion. Thus, we would be required to review his failure to do so in order to avoid a substantial miscarriage of justice. Similarly, if the accused was represented by palpably inexperienced counsel, and the facts necessary for determination of the issue fully appeared in the record, we might feel justified in permitting the question to be raised for the first time on appeal."

(*b*) *United States v. Webb*, 10 USCMA 422, 424, 27 CMR 496, 498 (1959). Three separate searches were conducted during the investigation of the accused who was ultimately

tried for five offenses. The first search produced evidence pertaining to specifications 3, 4, 5; the other two searches were relevant to specifications 1 and 2. At the trial, defense counsel raised a search and seizure issue only as to specifications 3, 4, and 5. His failure to contest the other searches at the trial is a waiver of the right to object thereto. "Considering the care with which defense counsel framed his objection and his express limitation of the objection to the evidence offered in support of specifications 3, 4, and 5, it is difficult to escape the conclusion that defense counsel believed there was no valid ground for exclusion of the evidence now challenged as inadmissible. Had there been an objection, the prosecution could have developed further the factual basis for the authority to make the second and third searches. Under the circumstances, the accused waived his right to object to the search and seizure on the ground of lack of authority." (Per Quinn, C.J. Latimer, J., also finds a "clear waiver.")

(2) *Use or explanation of evidence by defense.* The accused cannot be heard to complain of error if the defense places the illegally obtained evidence before the court. Similarly, the improper use by the prosecution of such evidence can be waived by the defense thereafter electing to itself make use of the same evidence for defense purposes. However, a waiver will not be found where the circumstances of the case are such as to indicate that the improper reception of the evidence *forced* the defense to come forward and attempt to make some explanation of it in order to overcome inferences favorable to the prosecution to be drawn therefrom.

Illustrative cases.

(*a*) *United States v. Waller*, 11 USCMA 295, 29 CMR 111 (1960). When the defense offers certain items in evidence in order to impeach the testimony of a prosecution witness, the accused may not complain on appeal that these items had been unlawfully seized.

(*b*) *United States v. Sessions*, 10 USCMA 383, 388, 27 CMR 457, 462 (1959). In a prosecution for check forgery, a piece of paper containing the forged name written several times in the accused's handwriting and found in his home, was admitted in evidence over a search and seizure objection. Thereafter, the accused took the stand and gave testimony which, if believed, gave an innocent but rather lame explanation for his having made this writing. In view of the importance of this evidence to the prosecution's

case, this conduct does not show an intent by the defense to waive the improper ruling by the law officer on the search and seizure issue. This evidence "put the accused in the position of 'explaining' that which never should have been before the court-martial. The necessary effect of this was to divert the court's thinking processes to the point where it was willing to conclude that where there is so much smoke, there must be fire."

(c) *United States v. Woodruff*, 11 USCMA 268, 270, 29 CMR 84, 86 (1960). In proving the larceny charged the prosecution established, *inter alia*, that the stolen camera was found in the accused's valise at a railroad station. The defense attempted to establish an alibi and the accused did not testify. After the prosecution produced rebuttal witnesses who placed the accused at the place of the theft, the defense counsel announced that the accused would testify "due to the evidence recently . . . that came out here." The accused then denied any knowledge of the camera being in his bag. Assuming, that the search of the bag was unlawful, the board of review's belief that *Sessions* (*supra*) ". . . demands that they reject accused's testimony as curative of any earlier error in the receipt of the items involved is not accurate. In that case, we were confronted with a peculiar situation in which the erroneously received evidence required the accused either to testify or to 'entrust the correction of the error to the sometimes untender mercies of reviewing authorities.' . . . Such is not the case here. Accused at first elected to remain silent. When he was subsequently confronted with the adverse testimony of the rebuttal witnesses, to which no hint of inadmissibility attaches, accused's counsel expressly indicated that, in view of that evidence, accused desired to testify on the merits. Thus, he chose to fight out at the trial level the issue of his possession of the cameras and the knife in the apparent hope of convincing the members of the court-martial that his control over these prosecution exhibits was innocent. . . . In short, he may not now be heard to complain that the court-martial considered against him the inferences to be drawn from his own freely given testimony concerning the fruits of the searches."

(3) *Impeachment of accused's testimony.*

Walder v. United States, 347 U.S. 62 (1954). In a narcotics prosecution, when the accused elects to testify on his own behalf and *on direct examination* testifies that he has never previously had narcotics in his possession, the govern-

ment, for the purpose of attacking his credibility, may question him over his counsel's objection concerning a previous possession which was discovered through an unlawful search. The exclusionary rule of evidence does not give the accused the right to lie with impunity and having himself raised the issue, he cannot deny the prosecution the right to explore it.

c. Deciding the issue. Whether the evidence has been illegally obtained is an interlocutory matter to be decided by the law officer and not by the court. The prosecution has the burden of establishing either that the search or interception of a communication was not unlawful or, if it was, that the proffered evidence is not "the fruit of the poisonous tree." When the proffered evidence consists of a confession or admission of the accused it is possible for the evidence bearing on the causal connection between the confession and the illegal search and seizure or wiretap to also raise an issue as to the voluntariness of the statement. (See par. 8*c*(2), *supra*.) In such a situation, after the law officer makes his ruling under the fruit-of-the-poisonous-tree doctrine, the members of the court must pass upon the voluntariness of the confession.

Illustrative cases.

(1) *United States v. Berry*, 6 USCMA 609, 613, 20 CMR 325, 329 (1956). The law officer erred in submitting the issue of the legality of a search to the court. Furthermore, his instructions to the court that "it is incumbent upon the party alleging such illegality to establish such claim with the burden of proof" indicated that his initial ruling of admissibility may have been based upon an erroneous view of the law. "Here, the issue was one of determining the admissibility of evidence. That question is interlocutory in nature, and unless otherwise provided by law, its determination rests with the law officer. . . . No special rule of law applies in regard to the admission of evidence obtained as the result of a search. Consequently, the law officer's ruling in that regard is final. . . . As a practical matter, perhaps a search may be presumed to be legal. Certainly, in the absence of objection or evidence as to the circumstances under which it was made, the results of the search are admissible. . . . Moreover, the basis of any presumption of legality of search is the broader principle that officers of the law are presumed to act properly in the performance of their duties. . . . An accused, however, has a right to object to evidence obtained as the result of a search. It then becomes 'the duty of the proper officials to justify the action taken.' . . . If the justification is consent, the Government must establish it by 'clear and positive testimony.'"

(2) *United States v. Ellwein*, 6 USCMA 25, 31, 19 CMR 151, 157 (1955). "We are aware that there is substantial authority for the position that—once illegal wiretapping has been shown—the Government labors under the burden of establishing that its evidence was not the product of such an activity, but instead had enjoyed an independent source."

d. Standing of the accused to object. In the case of illegally obtained evidence, as in the case of violations of Article 31, only the individual whose rights have been violated has standing to raise the issue of such violation. Therefore, the accused cannot invoke the exclusionary rule of evidence unless he had some lawful interest in either the property searched or the items seized or was a party to the communication intercepted. However, in a joint trial, the improper reception of evidence unlawfully obtained from one accused may so prejudice his co-accused as to permit the latter to also complain of the error.

(1) *Some interest required.*

(*a*) *United States v. Higgins*, 6 USCMA 308, 519, 20 CMR 24, 35 (1955). The wife of the accused entered their apartment with the searching party and, during the ensuing search, placed the handbag which she had carried into the apartment on a table. The searchers examined the contents of the bag and seized a note written to her by the accused. Even if it be assumed that the seizure was unlawful, it violated only her rights and the accused cannot complain thereof. "The mere fact of marital relationship does not appear to grant to one spouse standing to complain of the use against him of property illegally seized from the other. . . . Clearly, too, the accused was not the owner of the typewritten card for, as defense counsel contended strenuously at the trial, it constituted a communication from him to his wife. While the concept of privilege may be said to surround a written interspousal communication, once received by the addressee, it seems highly dubious that the sender yet retains a proprietary interest therein of such a nature as to enable him to complain of a seizure of the communications vehicle."

(*b*) *Goldstein v. United States*, 316 U.S. 114 (1942). The accused has no standing to complain that the testimony of his co-conspirators was the result of an unlawful interception of telephone calls made by them when he was not a party to the intercepted conversations. The right to object to evidence obtained in violation of the Communications Act exists only for the benefit of those persons whose right

of privacy has been violated and not for the benefit of third persons.

(2) *Nature of the required interest.* Prior to the *Jones* case, *infra*, it had been held in the federal courts that the defendant could not raise a search and seizure objection unless he established some proprietary interest in either the premises searched or the item seized. The *Jones* case modifies both aspects of this rule. In order to contest a search it is now required only that he have been lawfully on the premises searched. Furthermore, in those cases where the prosecution itself alleges that he had possession of the item seized, it is not necessary for the defendant affirmatively to establish such possession in order to contest the seizure. The considerations mentioned in paragraph 6*b*, *supra*, in connection with the *Elkins* case and the "silver-platter" doctrine, have equal application here and indicate that the *Jones* case will also be followed in military law. The *Bass* case, *infra*, shows the approach taken by the Court of Military Appeals prior to *Jones*.

Illustrative cases.

(*a*) *United States v. Jeffers*, 342 U.S. 48, 54 (1951). Even if the accused had no proprietary rights in the hotel room searched, his claim of ownership of the narcotics seized gave him standing to move to suppress their use as evidence against him. The contraband nature of the drugs does not defeat his claim of ownership for this purpose.

(*b*) *Jones v. United States*, 362 U.S. 258, 4 L ed 2d 697 (1960). During the execution of a search warrant for narcotics, a policeman stationed outside the building saw defendant put his hand on an awning outside the window of the apartment searched. Narcotics were found by the searchers in a bird's nest in the awning. Defendant's pretrial motion to suppress the narcotics because of alleged deficiencies in the warrant was denied solely on the ground that his status as a visitor in the apartment and the fact that he did not assert possession of the narcotics gave him no standing to complain of either the search or the seizure.

Only a person "aggrieved" by an unlawful search or seizure has standing to suppress evidence. "The restrictions upon searches and seizures were obviously designed for protection against official invasion of privacy and the security of property. They are not exclusionary provisions against the admission of evidence deemed inherently unreliable or prejudicial. The exclusion . . . is a means

for making effective the protection of privacy. . . . Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search . . . that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of his privacy." (At 702.) However, it is basically unjust to hold that an individual can invoke the exclusionary rule in a case such as this only by admitting to an element of the offense charged. ". . . to hold that petitioner's failure to acknowledge interest in the narcotics or the premises prevented his attack upon the search, would be to permit the Government to have the advantage of contradictory positions as a basis for conviction. Petitioner's conviction flows from his possession of the narcotics at the time of the search. Yet the fruits of that search, upon which the conviction depends, were admitted into evidence on the ground that petitioner did not have possession of the narcotics at that time. The prosecution here thus subjected the defendant to the penalties meted out to one in lawless possession while refusing him the remedies designed for one in that situation. It is not consonant with the amenities, to put it mildly, of the administration of criminal justice to sanction such squarely contradictory assertion of power by the Government." (At 703, 704.)

Independently of the foregoing, the fact that defendant was present in the apartment with the consent of its lawful tenant gives him standing to contest the validity of the search. Prior cases in the lower courts have attempted to distinguish between varied highly legalistic concepts of interests in property in passing upon this issue. "We are persuaded, however, that it is unnecessary and ill-advised to impart into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions . . . whose validity is largely historical. . . . Distinctions such as those between 'lessee,' 'licensee,' 'invitee' and 'guest,' often only of gossamer strength, ought not to be determinative in fashioning procedures ultimately referable to constitutional safeguards. . . . No just interest of the Government in the effective and rigorous enforcement of the criminal law will be hampered by recognizing that anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him. This would of course not avail those

who, by virtue of their wrongful presence, cannot invoke the privacy of the premises searched." (At 705, 706.)

(*c*) *United States v. Bass*, 8 USCMA 299, 302, 24 CMR 109, 112 (1957). When CID agents entered a Japanese hotel room and found a packet of morphine at the accused's feet, even if it be assumed that the morphine and the results of an analysis of a sample of the accused's urine taken as a result of the "raid" were the products of an unlawful search, the failure of the accused to claim any property rights in the hotel room or in the packet of morphine denies him the right to exclude the evidence. "In our view the accused simply has no standing to complain. The evidence abundantly shows that the accused had no property right in the goods seized or the premises searched, nor is any claimed by him. On the contrary, he disclaimed all property interest in the narcotics seized and by his own testimony acknowledged that he was staying at the 'R&R Center.' . . . There is no claim that the accused was either registered in the hotel room, paid the rent, or had given the Japanese girl money to do so. In the absence of a claim of some interest in the premises searched, or the property seized, the accused cannot urge the constitutional protection against unreasonable seizures. The law is well settled that the guarantee of the Fourth Amendment to the Constitution is a personal right or privilege that can only be availed of by the owner or claimant of the property subjected to unreasonable search and seizure."

Note. This case was decided *prior* to *Jones*.

e. Joint Trials. Although a co-accused cannot attack, at their joint trial, the legality of a seizure from the other accused, he nevertheless has standing to assert on appeal that evidence illegally seized from the other accused and improperly admitted at their joint trial over the other accused's objection, improperly had a prejudical effect upon his own case.

Illustrative case.

United States v. Sessions, 10 USCMA 383, 388, 27 CMR 457, 462 (1959). "The prejudice to the accused, Sessions, having been shown, we turn to a consideration of the effect of this error upon the co-accused Brown . . . we are met with a Government contention . . . that Brown has no standing to complain inasmuch as he had no propriety interest in the premises searched. If our problem turned solely on whether Brown could suppress the illegally seized exhibit, an unbroken chain of precedent would support the Government's position. . . . But we are not at all concerned with that problem here. Having

determined that the question evidence was improperly received, our inquiry is simply whether that error adversely affected the substantial rights of either or both of the accused. As we have seen, Sessions was prejudiced. We further conclude that the effect upon Brown was equally noxious."

10. Hypothetical problems. *a.* A military policeman on duty at the entrance to an installation receives a telephone call from the MP Desk Sergeant ordering him to search all outgoing cars for several hams the loss of which from a food warehouse have just been discovered.

(1) The guard stops the accused's privately owned vehicle, examines the interior and orders the accused to open the trunk. In the trunk he finds a one pound candy box which he opens and finds therein a .45 calibre pistol. The accused is tried for larceny of the pistol. Is the weapon admissible over defense objection that it is the product of an illegal search?

(2) The guard stops the car driven by the accused's sister, a civilian having no connection with the army who has been visiting the accused. Over her vehement objection he searches the car, including the trunk which she opens only when he threatens to break into it otherwise, and finds two of the stolen hams. Are the hams admissible at the accused's trial for larceny thereof over a search and seizure objection?

b. The accused is taken into custody by a military police town patrol for being drunk and disorderly. When he is searched at the MP station prior to being booked, there is found in his pocket an unmailed letter to his wife wherein he boasts of having "knocked down" certain sums of money in connection with his off-duty job as bartender at the officer's open mess. Is this letter admissible over a search and seizure objection at his subsequent trial?

c. When the prosecution offers certain exhibits the defense raises a search and seizure objection and requests an out-of-court hearing thereon. At this hearing, when the prosecution seeks to prove that the accused consented to the search, the defense establishes that the accused was so intoxicated that he did not understand the Article 31 warning given to him before his consent was requested. How should the law officer rule?

d. A command directive of Fort Blank requires the gate guards to search approximately 5% of all cars entering or leaving the post in the hours of darkness. Because of this directive and for no other reason, the accused's car is searched and a large quantity of obscene photographs found in the glove compartment. At the subsequent trial of the accused the defense objects that there is no showing that the search was based upon probable cause. How should the law officer rule?

e. The accused who is suspected of being an active homosexual and is under surveillance by military investigators is followed by them to an off-post motel where he and another soldier register in a cabin with twin beds. The agents watch through the window of the cabin, the shade of which is up, and watch the soldiers disrobe and retire to their respective beds. The agents continue to listen at the window and, after hearing certain conversations which lead them to believe that the two soldiers are now in the same bed, turn a flashlight into the room where they see the suspects engaged in an act of sodomy. How much of the foregoing is admissible against the accused over a search and seizure objection?

f. The accused officer was suspected of having stolen a large sum of money. Pursuant to authorization of his commanding officer, his on-post bachelor quarters were searched and the investigators found several money order stubs indicating that on the day after the theft the accused had purchased money orders in an amount slightly less than that stolen. The defense maintains that these stubs constitute mere evidence of the offense and were not subject to lawful seizure. How should the law officer rule?

g. While a CID agent is taking a shower in a military police station, his wallet is taken from his clothing. He notifies another agent, his close personal friend, of the loss and also reports it to his superior. His friend becomes suspicious of a certain military policeman, picks the lock of the suspect's wall locker and finds the missing wallet therein. At the trial the searcher testifies that he did so in order to try to recover the money for his friend. Was the search lawful? Is the wallet admissible?

h. W has informed the authorities that A has offered to sell him narcotics. Subsequently, on instructions from the authorities, W tells A to telephone him at his, W's, place of duty when he is ready to make a sale. An agent is on hand in the office by prearrangement to listen in on an extension when A phones. A phones but does so on a line without an extension. W tells him that he can't talk on that phone and to call him back in 15 minutes on the other line. When A does so, the agent listens in on an existing extension. Can the agent testify as to the conversation over the defense's invocation of the Communications Act?

i. As the accused returns to his off-post quarters in the United States after being interrogated by the CID as a murder suspect, he sees an individual believed by him to be a CID agent slipping out of the front door. He then discovers that a gun which he had hidden on the premises is missing. Upon thinking it over, he comes to the conclusion that since the agents have the gun he might as well confess. He returns to the CID office and asks to see his interrogator. On the latter's desk he sees a gun resembling the one which is missing

from his quarters. He tells the agent he wishes to make a statement, gesturing toward the gun and saying, "I guess you've got me now anyhow." After being warned of his rights he executes a full confession. At the trial the accused testifies to the matters set forth above and the defense establishes that a CID agent did in fact make an unlawful search of the accused's quarters and seize the gun, and that the gun seized was the one which the accused saw on the desk. Is the confession inadmissible over proper objection as being the product of an unlawful search?

j. When the alleged murder weapon is offered in evidence, the defense raises a search and seizure objection. At a closed hearing, the prosecution establishes that the gun was found by Captain X at 1500 hours in a dresser drawer in the accused's on-post quarters pursuant to a search directed by the post commander. The accused then testifies that he was in the house in the attic at 1300 hours on that same day and saw a military policeman enter the house through an open window and search the house; that the MP found the gun in the dresser and then left the house, leaving the gun where he found it. Further inquiry shows that the search by the MP was clearly illegal and that the commanding officer ordered Captain X to make the search solely because of the report of the MP. The commanding officer then testifies that immediately after he had given Captain X the order he received a telephone call from the accused's disgruntled mistress telling him that the murder weapon was in the dresser drawer.

(1) Is the gun admissible in evidence?

(2) May evidence of the accused's testimony at the closed hearing be used: (a) to rebut defense evidence showing that the accused was not on the post on the day of the search? (b) to rebut the accused's testimony in open court to the same effect?

CHAPTER XXXIII

COMPETENCY OF WITNESSES

Reference. Par. 148, MCM.

1. General. In order to be competent to testify as a witness, it is necessary only that the prospective witness understand the moral necessity of telling the truth and have the mental capacity to have accurately observed the matters at issue and to accurately recollect and describe them. This general competency is always presumed in the case of a witness who is fourteen or more years of age. Where such competency is denied the burden is upon the party claiming incapacity to prove its existence. Other than lack of mental or moral capacity there is no condition or status which operates to render a witness incompetent.

2. Children. *a. General.* Although there is no presumption that a witness under the age of fourteen is competent, there is no countervailing presumption of incompetency. The competency of such children is not dependent upon their age but upon the *fact* of whether they have the necessary mental and moral capacity. The law officer, who is the final judge of competency, may, if he so desires, conduct preliminary questioning of the prospective child witness to determine competency or, in his sound discretion, he may determine this issue from the demeanor of the witness while testifying and the substance of the testimony given.

b. Illustrative cases.

(1) *Beausoleil v. United States*, 107 F. 2d (1939). The testimony of a prospective witness, the six year old victim of an indecent assault, that although she did not believe in the devil or punishment after death she did believe that a person who tells untruths will be punished is sufficient to support the trial judge's determination in favor of competency.

(2) *United States v. Slozes*, 1 USCMA 47, 54, 1 CMR 47, 54 (1951). The fact that a thirteen year old Korean rape victim disclaims any religious beliefs whatsoever does not make her incompetent where she admits to knowing the difference between truth and falsehood and "affirms" that she will tell the truth. There is no rule of military law which requires a witness to meet any religious standards. Furthermore,