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Fredric I. Lederer  
*William & Mary Law School, filede@wm.edu*

Frederic L. Borch

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# DOES THE FOURTH AMENDMENT APPLY TO THE ARMED FORCES?\*

Fredric I. Lederer\*\*  
Frederic L. Borch\*\*\*

## I. INTRODUCTION

The United States Court of Military Appeals has long held that the Bill of Rights applies to members of the armed forces except where explicitly or implicitly inapplicable.<sup>1</sup> Ironically, despite the importance of the matter, the court's holdings have never been confirmed by the Supreme Court. Insofar as the Fourth Amendment is concerned, this situation was highlighted recently by an unusual exchange among four members of the Court of Military Appeals in *United States v. Lopez*.<sup>2</sup> In the process of extending to commanders<sup>3</sup> a "good faith exception" to the fourth amendment exclusionary rule, four of the five judges discussed—and potentially disagreed about—the applicability, or the nature of the applicability, of the Fourth Amendment to the armed forces. *Lopez* thus posits a fundamental question of constitutional law: *Does* the Fourth Amendment apply to the armed forces, and, if so, how?<sup>4</sup>

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\*\* Fredric Lederer is a Professor of Law at the Marshall-Wythe School of Law at the College of William & Mary. A colonel in the United States Army Reserve, Judge Advocate General's Corps, he was the principal author of the Military Rules of Evidence discussed in this essay.

\*\*\* Frederic Borch is a student at the United States Army Command and General Staff College. Major Borch, United States Army, Judge Advocate General's Corps, was a member of the Criminal Law faculty of the Judge Advocate General's School, U.S. Army, when this essay was written.

<sup>1</sup> E.g., *United States v. Jacoby*, 29 C.M.R. 244, 246-47 (C.M.A. 1960).

<sup>2</sup> 35 M.J. 35 (C.M.A. 1992).

<sup>3</sup> In the area of search and seizure, commanders have magisterial powers to grant the military equivalent of search warrants, search authorizations. MIL. R. EVID. 315(b)(1).

<sup>4</sup> One might loosely divide searches and seizures in the armed forces into two categories, traditional law enforcement-type activities and inspections. In the former case, military law is very similar to that applied daily in the nation's civilian courts, with perhaps the unique element that otherwise impartial military commanders may grant search authorizations, i.e., warrants, upon a showing of probable cause. MIL. R. EVID. 315(d); see also MIL. R. EVID. 314 (non-probable cause searches). Military inspections

In her lead opinion in *Lopez*, Judge Crawford wrote that the adoption by the Manual for Courts-Martial<sup>5</sup> of the good-faith exception was “an implicit recognition that the Supreme Court has never expressly applied the Bill of Rights to the military, but has assumed they applied.”<sup>6</sup> In support of that proposition, Judge Crawford’s footnote contained the following quotation: “Scholars have differed as to whether the Bill of Rights does apply to the armed forces. Strangely enough, in one sense the question remains open. Although the Supreme Court has *assumed* that most of the Bill of Rights does apply, it has yet to squarely hold it applicable.”<sup>7</sup>

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are, as one might expect, numerous. In addition to inspections for personnel accountability, condition of personal equipment, and health and welfare generally, military inspections can extend to searches for weapons and drugs. Although the location and removal of drugs is often justified on the grounds of the health and welfare of all personnel affected, to say nothing of mission accomplishment, Captain Fredric I. Lederer & Second Lieutenant Calvin M. Lederer, *Marijuana Dog Searches After United States v. Unrue*, ARMY LAW., Dec. 1973, at 6, the resulting scope is far broader than would ordinarily be countenanced in civilian society. In large measure, this Essay will concentrate on military inspections, for even if the Fourth Amendment applies to military searches and seizures for traditional, non-mission essential law enforcement purposes, it is highly likely that inspections are either outside the ambit of the Fourth Amendment or are reasonable searches within its meaning.

<sup>5</sup> The Manual for Courts-Martial is an executive order issued by the President pursuant to both the President’s constitutional authority as Commander-in-Chief and Article 36(a) of the Uniform Code of Military Justice, which provides:

Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

10 U.S.C. § 836(a) (1988).

In 1980 the President promulgated the Military Rules of Evidence. The traditional evidentiary provisions are nearly identical to the Federal Rules of Evidence, albeit with a privilege codification. The Military Rules, however, also contain a unique codification of the law of search and seizure, interrogation, and eye-witness identification. MIL. R. EVID. 301-321. Binding rather than expository, the search and seizure rules were designed in particular to supply certainty and predictability in those areas routinely affecting law enforcement activities.

<sup>6</sup> *Lopez*, 35 M.J. at 41 (citation omitted).

<sup>7</sup> 1 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE 26 (1991) (citing *Parker v. Levy*, 417 U.S. 733 (1974)), *quoted in Lopez*, 35 M.J. at 41 n.2. The treatise continues:

Although disturbing, the Court’s silence is only of academic interest, given that the Court of Military Appeals held in 1960 in *United States v. Jacoby* that “the protections of the Bill of Rights, except those which are expressly, or by necessary implication inapplicable, are available to members of the armed forces.”

Chief Judge Sullivan, although concurring in the result in *Lopez*, disagreed with Judge Crawford's comments about the Fourth Amendment and the Bill of Rights. He wrote:

I reject the suggestion or even the unintended implication of the opinion that Manual rules provide the exclusive protection to servicemembers from unreasonable searches and seizures. Consequently, I could not find the purportedly less demanding Manual rules dispositive of the accused's Fourth Amendment claims. Instead, it is only where these Manual rules fully satisfy the demands of the Constitution and the Bill of Rights as applied in the military context that resolution of the accused's claims on this basis would be appropriate.<sup>8</sup>

Despite the Chief Judge's strong language, his position has, at most, limited support. He cites only a plurality opinion in *Burns v. Wilson*<sup>9</sup> and two Supreme Court remands to the Court of Military Appeals ordering that court to reconsider cases "in light of" specified fourth amendment cases.<sup>10</sup> Consequently, his conclusion that "[t]he Supreme Court's express direction to consider those cases on the basis of its decisions applying the Bill of Rights contradicts the implication of Judge Crawford's opinion that these most precious and fundamental rights might not at all be available to the American servicemembers[]"<sup>11</sup> may be accurate, but it need not be.

As Chief Justice Rehnquist noted in *United States v. Verdugo-Urquidez*,<sup>12</sup> in determining whether the Fourth Amendment applied to a search and seizure of a non-resident alien outside the United States:

The Court of Appeals found some support for its holding in our decision in *INS v. Lopez-Mendoza*, . . . where a majority of Justices assumed that the Fourth Amendment applied to illegal aliens in the United States. We cannot

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1 GILLIGAN & LEDERER, *supra*, at 26 (citation omitted). It is misleading, however, to say that the issue is only of academic interest. *Lopez* itself shows that the state of the Supreme Court's decisional law may now be of practical importance.

<sup>8</sup> *Lopez*, 35 M.J. at 48 (concurring opinion).

<sup>9</sup> 346 U.S. 137 (1953) (holding that federal civil courts may review due process claims of military personnel), *cited in Lopez*, 35 M.J. at 48.

<sup>10</sup> *Lopez*, 35 M.J. at 48 (citing *Goodson v. United States*, 471 U.S. 1063 (1985); *Jordan v. United States*, 498 U.S. 1009 (1990)).

<sup>11</sup> *Id.* at 49.

<sup>12</sup> 494 U.S. 259 (1990).

fault the Court of Appeals for placing some reliance on the case, but our decision did not expressly address the proposition gleaned by the court below. . . . The Court often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions . . . and such assumptions . . . are not binding in future cases that directly raise the questions.<sup>13</sup>

These comments from the Chief Justice illustrate that remands “in light of” propositions and assumptions hardly constitute express holdings. It follows that while Chief Judge Sullivan may rely on such remands in support of his view, the issue of whether the Fourth Amendment applies to the military also properly may be considered an open question. As Judge Wiss noted in *Lopez*, the *Court of Military Appeals* “quite clearly has applied the pertinent portions of the Bill of Rights.”<sup>14</sup> His statement, however, that “I must reject the implication that this *assumed* application of the Bill of Rights has somehow left the question open”<sup>15</sup> is unjustified, as demonstrated above. Further, as Judge Wiss conceded, notwithstanding the Court of Military Appeals’ demonstrated dedication, ability, and specialized knowledge, whether the Fourth Amendment—or any part of the Bill of Rights—applies to the armed forces is ultimately the decision of the Supreme Court.<sup>16</sup> Consequently, although the Court of Military Appeals may be unwilling to reconsider its precedents, the Supreme Court has yet to resolve the issue for the first time.

## II. THE NEED FOR SUPREME COURT RESOLUTION

A thoughtful commentator might argue that there is no need for the Supreme Court to decide how, and to what extent, the Fourth Amendment applies to the armed forces. Cannot history and lower court decisions—particularly those of the Court of Military Appeals—serve as controlling precedent until the issue is otherwise decided by the Supreme Court? To some extent this question can be answered simply from a pragmatic policy position. The armed forces may wish a far broader scope to search than now permitted.

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<sup>13</sup> *Id.* at 272 (citations omitted).

<sup>14</sup> *Lopez*, 35 M.J. at 49.

<sup>15</sup> *Id.*

<sup>16</sup> Judge Wiss recognized this when he wrote, “Unless and until the Supreme Court of the United States hold [sic] otherwise, the law of this Court *closes* this question.” *Id.*

From a jurisprudential view, the authors reply with the argument that the Founding Fathers intended the Supreme Court to be the final arbiter of constitutional questions.<sup>17</sup> Ultimate questions about the extent to which the Bill of Rights, and particularly the Fourth Amendment, apply to those in uniform are the responsibility of the Supreme Court to answer. Courts of inferior jurisdiction may properly decide questions of constitutional importance, but the ultimate decision *should* come from the one, and only, court specifically established by the Framers.

Additionally, the majority of opinions expressly applying the Fourth Amendment to the armed forces come not from an Article III court, but from a lower court created by Congress under Article I. Again, constitutional questions may be properly addressed by the United States Court of Military Appeals and the Courts of Military Review, but they must ultimately be resolved by the Supreme Court.

Might it also be argued, however, that even if the applicability of the Fourth Amendment to those in uniform is an open question, the issue really is purely academic? Certainly, most aspects of the Bill of Rights have been codified in the Uniform Code of Military Justice,<sup>18</sup> or, via Executive Order, the Military Rules of Evidence or the Rules for Courts-Martial, and presumably are non-controversial.<sup>19</sup> No one seriously contends that freedom of religion, due process of law, or the right against self-incrimination—all guaranteed by the Bill of Rights—could be entirely taken away from those in uniform by an Act of Congress or an Executive Order. The lack of judicial decisions specifically guaranteeing these rights to servicemembers does not mean that their existence is an open question. Yet one cannot ignore the implications of the Supreme Court's most recent analysis of the interrelation between the Constitution and criminal law.

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<sup>17</sup> Or at least the first members of the Supreme Court decided that the Founding Fathers so intended when they established the legitimacy of judicial review in *Marbury v. Madison*, 5 U.S. 137 (1803).

<sup>18</sup> *E.g.*, the right against self-incrimination, U.C.M.J. art. 31(a), 10 U.S.C. § 831(a) (1988); the right to rights warnings, U.C.M.J. art. 31(b), 10 U.S.C. § 831(b); and the right against double jeopardy, U.C.M.J. art. 44, 10 U.S.C. § 844 (1988).

<sup>19</sup> Congress, however, could amend the Uniform Code if it so chose. On the other hand, the right against self-incrimination was codified in the Articles of War at a time when the Bill of Rights was thought inapplicable to the armed forces, and the military rights warnings predate *Miranda* by 18 years. *See generally* Captain Fredric I. Lederer, *Rights Warnings in the Armed Services*, 72 MIL. L. REV. 1, 1-6 (1976) (discussing requirement of rights warnings in the military). There is no reason to believe that, freed of constitutional requirement, Congress would abrogate those basic protections as a matter of policy.

In its January 1994 decision in *Weiss v. United States*,<sup>20</sup> the Court held that the absence of fixed terms of judicial office by military judges who are rated by military superiors did not violate due process. In holding that the Congressional “balance between independence and accountability” did not violate due process, the Court emphasized the deference it accords Congress insofar as the rights of service personnel are concerned:

[W]e have recognized in past cases that “the tests and limitations [of due process] may differ because of the military context.” . . . The difference arises from the fact that the Constitution contemplates that Congress has “plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline.” . . . Judicial deference thus “is at its apogee” when reviewing congressional decisionmaking in this area. . . . Our deference extends to rules relating to the rights of servicemembers: “Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military. . . . We have adhered to this principle of deference in a variety of contexts where . . . the constitutional rights of servicemen were implicated.”<sup>21</sup>

The due process test applied by the Court in *Weiss* was, “whether the factors mitigating in favor [of a right] are so extraordinarily weighty as to overcome the balance struck by Congress.”<sup>22</sup> At the very least, *Weiss* suggests that Congress may well have the authority to enact military search and seizure legislation that would be unconstitutional if applied to civilians.<sup>23</sup>

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<sup>20</sup> No. 92-1482, 1994 U.S. LEXIS 1137 (U.S. Jan. 19, 1994). The decision in *Weiss* addressed two cases, *Weiss*, which concerned the legality of the appointment of the military judiciary under the Constitution’s Appointments Clause, and *Hernandez v. United States*, which held that the lack of a fixed tenure by the military judiciary did not violate due process.

<sup>21</sup> *Id.* at \*26-27 (citations omitted).

<sup>22</sup> *Id.* at \*27-28 (quoting *Middendorf v. Henry*, 425 U.S. 25, 44 (1976) (holding that personnel appearing before a summary court-martial did not have a right to counsel)).

<sup>23</sup> As discussed *infra* part III, authorization of wide-ranging military inspections might be an appropriate subject for such legislation. Military law permits inspections to uncover unlawful weapons and drugs, MIL. R. EVID. 313(b), but conditions the right of commanders to conduct such inspections. MIL. R. EVID. 314, 315. Congress might wish to provide for unconstrained inspections.

If the Fourth Amendment either does not apply to the armed forces or applies in some minimal fashion, Military Rules of Evidence 311 to 317 could be rewritten to provide commanders with vastly increased search powers and greater flexibility,<sup>24</sup> even absent Congressional action. Litigation of search and seizure issues would presumably drop sharply. Senior commanders might even show greater interest in treating inappropriate privacy intrusions as command and leadership failures<sup>25</sup> rather than regarding them as “lawyer matters.”

### III. THE FOURTH AMENDMENT LIKELY DOES NOT APPLY FULLY TO THE ARMED FORCES

When debating the application of the Fourth Amendment to the military, the clearest issue is the application of the Amendment to inspections. Military Rule of Evidence 313 controls the admissibility of evidence or contraband found during a military inspection. This inspection is a search, for individuals and their property are involuntarily examined and searched. Yet, whether viewed historically or as a matter of social policy, it is by no means clear that a military inspection is a search within the meaning of the Fourth Amendment.

The intent of the Framers, the language of the amendment itself, and the nature of military life render the application of the Fourth Amendment to a normal inspection questionable. As the Supreme Court has often recognized, the “military is, ‘by necessity, a specialized society separate from civilian society.’” . . . As the Supreme Court noted . . . “Military personnel must be ready to perform their duty whenever the occasion arises. To ensure that they always are capable of performing their mission promptly and reliably, the military services ‘must insist upon a respect for duty and a discipline without counterpart in civilian life.’” . . . An effective armed force without inspections is impossible—a fact amply illustrated by the

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<sup>24</sup> Whether this is desirable is a matter of policy. Judge Cox’s oft-expressed interest in such an outcome, *see, e.g., United States v. Morris*, 28 M.J. 8, 14, 17-19 (C.M.A. 1989), demonstrates that such a position can be and is held by responsible individuals who cannot be criticized as either unaware of fourth amendment law or insensitive to the position’s implications.

<sup>25</sup> *See infra* note 59.

unfettered right to inspect vested in commanders throughout the armed forces of the world.<sup>26</sup>

Professor Lederer, the author of that statement, could have added that if a purely historical—original intent—theory of constitutional interpretation were applied, which is not uncommon in the area of fourth amendment caselaw,<sup>27</sup> inspections, at least, would not be regulated by the Fourth Amendment as either the Fourth Amendment generally was not intended to apply to the armed forces, or because military inspections would not have been within its ambit. The authors have not conducted research into the operation of the colonial militia and the Army of the 1770s and 1780s. Edward M. Coffman's *The Old Army*, an authoritative secondary source on the American Army between 1784 and 1898, indicates, however, that the Fourth Amendment had little or no importance in early court-martial practice.<sup>28</sup> Additionally, Frederick B. Wiener, a retired judge advocate and perhaps the nation's preeminent military legal scholar, writes that the "actualities of military life in the decade or so after the adoption of the Constitution utterly negative any notion that the first American soldiers were shielded against searches of any kind."<sup>29</sup> Since the Supreme Court did not give content to the Fourth Amendment in civilian criminal law until 1886,<sup>30</sup> and the concept of excluding evidence obtained through an illegal search first appeared in 1914,<sup>31</sup> it is not at all certain that the Framers intended the Fourth Amendment to apply to the armed forces. Rather, it is likely that the historical record will show that at the time the Bill of Rights was written and ratified, military commanders had unfet-

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<sup>26</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES 1984, A22-19, A22-20 (analyzing Military Rule of Evidence 313) [hereinafter MANUAL FOR COURTS-MARTIAL] (citations omitted).

<sup>27</sup> See, e.g., *United States v. Verdugo-Urquidez*, 494 U.S. 259, 261 (1990) ("[T]he Fourth Amendment [does not apply] to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country."); *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983) (alternative holding that inasmuch as the "lineal ancestor" of the instant statute (permitting the Coast Guard to search vessels) was enacted by the same Congress that "promulgated the Bill of Rights," Congress clearly did not regard this type of search as unreasonable); *United States v. Watson*, 423 U.S. 411 (1976) (holding that warrants are not necessary for arrests).

<sup>28</sup> EDWARD M. COFFMAN, *THE OLD ARMY* 21-25 (1986).

<sup>29</sup> Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice II*, 72 HARV. L. REV. 266, 272 (1958) (citation omitted).

<sup>30</sup> *Boyd v. United States*, 116 U.S. 616 (1886) (holding that compulsory production of private books and papers for use against the owner violated Fourth and Fifth Amendments).

<sup>31</sup> *Weeks v. United States*, 232 U.S. 383 (1914) (finding that improperly seized papers may not be held or used at trial).

tered authority to search their personnel for military-related purposes. If this is true, a theory of original intent would inescapably yield the conclusion that the Fourth Amendment does not affect ordinary military practice.

Application of the contemporary emphasis on the reasonableness of a search or seizure<sup>32</sup> would likely yield a similar result, at least insofar as military inspections are concerned. Certainly, a *Katz*<sup>33</sup>-related policy analysis would reinforce this conclusion. The often smaller, if not sometimes de minimis, expectation of privacy held by military personnel, coupled with the substantial social policy justification for privacy intrusions in the military framework, would at least justify a sharply different manner of fourth amendment application to the military when compared to its civilian application.<sup>34</sup>

Ironically, in its 1993 decision in *United States v. McCarthy*,<sup>35</sup> the Court of Military Appeals, holding that the Fourth Amendment did not require the equivalent of arrest warrants for apprehensions<sup>36</sup> in barracks,<sup>37</sup> determined that military personnel do not have a reasonable expectation of privacy in military barracks.<sup>38</sup> In large measure the court determined that any expectation of privacy would be unreasonable given the unique nature and needs of military life.<sup>39</sup> Although *McCarthy* was limited to whether there is a reasonable expectation of privacy in barracks for purposes of apprehensions, the court's reasoning is fully consistent with a potential holding that there is no reasonable expectation of privacy in a barracks for purposes of other searches and seizures.<sup>40</sup> Indeed, Judge Wiss, concurring in the result in *McCarthy*, voiced his concern that the majority had held

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<sup>32</sup> See, e.g., *Soldal v. Cook County, Ill.*, 113 S. Ct. 538, 548 (1992) (“[R]easonableness is still the ultimate standard. . . .”) (citation omitted).

<sup>33</sup> *Katz v. United States*, 389 U.S. 347 (1967) (finding the use of an electronic listening device in a phone booth without a warrant to be an unconstitutional search and seizure).

<sup>34</sup> The nature of our armed forces might well play a significant role in the outcome. A small volunteer professional force might implicate different values than a large drafted force. On the other hand, a large group of conscripts may require more pervasive command presence and scrutiny, increasing the need for unfettered searches and seizures. In a related vein, note that a “downsized” voluntary professional military may be sufficiently distinguishable from the expansive drafted forces of yesteryear to permit a knowing and voluntary waiver of any applicable fourth amendment rights upon entry.

<sup>35</sup> 38 M.J. 398 (C.M.A. 1993).

<sup>36</sup> The military terminology for the civilian “arrest.”

<sup>37</sup> *McCarthy*, 38 M.J. at 400-01 (construing *Payton v. New York*, 445 U.S. 573 (1980)).

<sup>38</sup> *Id.* at 403.

<sup>39</sup> *Id.* at 402.

<sup>40</sup> An arrest or apprehension is, of course, a Fourth Amendment seizure. See, e.g., *United States v. Watson*, 423 U.S. 411, 428 (1975) (Powell, J., concurring).

that there is “no reasonable expectation of privacy” rather than “a reduced or different expectation.”<sup>41</sup> Thus in the limited area of barracks inspections, the Court of Military Appeals may well be prepared to find the Fourth Amendment inapplicable.

Consequently, insofar as Military Rule of Evidence 313 is concerned, depending on the applicability of the Fourth Amendment to the armed forces, the President might choose to delete this provision altogether, since its existence might not be constitutionally required. A similar analysis might apply to other provisions of the Military Rules of Evidence governing searches and seizures of persons and property.

#### IV. THE COX VIEW OF SEARCH AND SEIZURE IN THE ARMED FORCES

As a member of the United States Court of Military Appeals, Judge Cox’s view of search and seizure in the armed forces is instructive. Although Judge Cox has accepted the application of the Fourth Amendment to the armed forces, he believes that its applicability to the military should differ radically from its civilian application. In his concurring opinion in *Lopez*, he complains of the way in which the Court of Military Appeals has applied the Fourth Amendment: “For some time now, I have been ‘urg[ing] a fresh look at the proper application of the Fourth Amendment to . . . [military] society.’”<sup>42</sup> Judge Cox would apply the Fourth Amendment to the armed forces, but he would apply it in a unique fashion:

The Fourth Amendment only protects military members against unreasonable searches within the context of the military society. . . . Something as drastic as a “shakedown inspection” can only be justified in the military because of the overriding need to maintain an effective force. Likewise, preemptive strikes on drugs and other dangers can only be reasonable because of their impact on the mission. . . . The United States Court of Military Appeals has the obligation to ensure that inspections, searches, and seizures in the military society are reasonable in their inception and in their conduct. This means that commanders must have rules which are honest, simple, forthright, and

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<sup>41</sup> *McCarthy*, 38 M.J. at 407. His opinion concludes, “The repercussions of such a broad holding are enormous.” *Id.*

<sup>42</sup> *United States v. Lopez*, 35 M.J. 35, 42 (1992) (quoting *United States v. Morris*, 28 M.J. 8, 14 (C.M.A. 1989) (Cox, J., concurring in part and dissenting in part)).

easy for both the commander and the commanded to understand.<sup>43</sup>

Whether Judge Cox is correct as a matter of policy is subject to reasonable disagreement, and indeed the authors of this Essay may differ between themselves on the point. Judge Cox's view, however, demonstrates that the nature of the applicability of the Fourth Amendment to the armed forces is subject to serious debate. Moreover, although Judge Cox applies the Fourth Amendment to the armed forces, his focus on unit mission and a commander's reasonableness as the benchmarks for deciding the legality of a search or seizure means that he reaches the same result that would be reached by a judge who ruled that the Fourth Amendment does not apply to the armed forces.

A look at how Judge Cox applies the Fourth Amendment to command-directed military inspections illustrates this point. In his concurring opinion in *United States v. Alexander*,<sup>44</sup> he writes that:

[A]ny threat to combat effectiveness or mission preparedness provides a legitimate basis for inspection. . . . [Furthermore,] any time a commander's probing actions relate directly to the ability of an individual or organization to perform the military mission . . . we have a *presumptively* valid military inspection. It does not matter whether the commander has reason to suspect that the individual or unit will fail the inspection.<sup>45</sup>

Judge Cox further writes that if a commander suspects that a soldier is a drug user, she may order a urinalysis of only that soldier, and the order would be a lawful inspection if done "to protect the safety and readiness of [her] personnel."<sup>46</sup> This example illustrates that although Judge Cox applies the Fourth Amendment in measuring the legality of command-directed military inspections, the *practical* effect of this application rarely will differ from the practical effect resulting from not applying the Fourth Amendment to the armed forces. It follows that there is an ongoing need

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<sup>43</sup> *Id.* at 45; *see also* *United States v. McCarthy*, 38 M.J. 398 (C.M.A. 1993); *United States v. Holloway*, 36 M.J. 1078, 1091-94 (N.M.C.M.R. 1993) (en banc) (Lawrence and Orr, JJ., dissenting).

<sup>44</sup> 34 M.J. 121 (C.M.A. 1992).

<sup>45</sup> *Id.* at 127 (Cox, J., concurring) (emphasis added); *see also* TJAGSA Practice Note, *Can the Government Ever Satisfy the Clear and Convincing Evidence Standard Under Military Rule of Evidence 313(b)?*, ARMY LAW., June 1992, at 33.

<sup>46</sup> *Alexander*, 34 M.J. at 128.

to clarify a most fundamental question: *Does* the Fourth Amendment apply to the armed forces and, if so, how and to what extent?

## V. OBTAINING SUPREME COURT REVIEW

Presenting this issue to the Supreme Court for resolution has appeared hopeless because of a single insurmountable obstacle, the Military Rules of Evidence. Given the Section III codification of the law of search and seizure in the Rules,<sup>47</sup> any attempt to appeal a defense-oriented fourth amendment decision to the Supreme Court would almost certainly be resolved on the grounds that the Rules present an adequate and independent grounds for decision. The President surely can provide servicemembers with rights beyond those minimally guaranteed by the Constitution. Abrogation of the Rules is highly undesirable, however, from a policy and efficiency perspective. Notwithstanding Judge Cox's attempt to urge use of Military Rule of Evidence 314(k), basically a provision permitting the use of any new type of non-probable cause search declared constitutional by the Supreme Court, as a blanket escape clause to the Rules,<sup>48</sup> Rule 314(k) ordinarily is of no avail.<sup>49</sup>

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<sup>47</sup> See generally Fredric I. Lederer, *The Military Rules of Evidence: Origin and Judicial Implementation*, 130 MIL. L. REV. 5 (1990) (discussing the Military Rules of Evidence, their drafting, and their implementation).

<sup>48</sup> Indeed, Mil. R. Evid. 314(k) itself contains the exception that swallows these "rules," stating, "A search of a type not otherwise included in this rule and not requiring probable cause under Mil. R. Evid. 315 may be conducted when permissible under the Constitution of the United States as applied to members of the armed forces."

United States v. Lopez, 35 M.J. 35, 45 n.3 (C.M.A. 1992).

<sup>49</sup> Contrary to Judge Cox's assertion that Rule 314(k) provides what might be called a "near miss" exception to the rules, Rule 314(k)'s emphasis is on the word "type." If a non-probable cause search of a *type* not codified is involved, Rule 314(k) permits an otherwise constitutional search. See MANUAL FOR COURTS-MARTIAL, *supra* note 26, at A22-24, A22-26. Most normal types of search are codified, and inspections and inventories are dealt with expressly in Rule 313. It follows that Judge Cox's conclusion that "the results of constitutional searches are not subject to exclusion under the Military Rules of Evidence," *Lopez*, 35 M.J. at 46, is simply wrong. If the Supreme Court were to determine, for example, that vehicle searches did not require probable cause, a new *type* of search would be born, and Rule 314(k) would apply. A pro-prosecution change, however, in searches incident to a lawful apprehension, see MIL. R. EVID. 314(g), would not be adopted via Rule 314(k). That *type* of search has been codified. The authors concede that Professor Lederer's interpretation of the provision may be affected by his status as its drafter, but believe that the plain meaning, framework, and intent behind Rule 314, see MANUAL FOR COURTS-MARTIAL, *supra* note 26, at A22-24, and its provisions substantiate our plain meaning and legislative intent interpretation.

There is, however, a mechanism to present this issue to the Supreme Court, a mechanism that depends somewhat ironically on the very same Rule 314(k) upon which Judge Cox has placed such great emphasis. Military Rule of Evidence 315 codifies the law pertaining to probable cause searches. Rule 315(a) declares, "Evidence obtained from searches requiring probable cause conducted in accordance with this rule is admissible at trial when relevant and not otherwise inadmissible under these rules."<sup>50</sup> Military Rule of Evidence 311(a) declares as inadmissible only the results of an "unlawful search or seizure,"<sup>51</sup> and "unlawful" is defined for searches conducted by military personnel and their agents as a search "in violation of the Constitution . . . as applied to members of the armed forces . . . or Military Rules of Evidence 312-317."<sup>52</sup> If a military search of a type that would require probable cause when conducted in civilian life is executed, and the Fourth Amendment does not apply to the armed forces, that search will not require probable cause.<sup>53</sup> It follows that Rule 315 drops out of the equation, and the search is lawful under the Rule 314(k) escape clause. Consequently, the Supreme Court can be clearly presented with a fundamental constitutional issue which would not be rendered moot by the Military Rules of Evidence.<sup>54</sup>

Constitutional clarification of this matter necessarily requires Supreme Court decision. Accordingly, the authors of this Essay recommend that the government seek writs of certiorari from the Court of Military Appeals in an inspection case and in a case in which probable cause would be necessary in civilian life and in which that cause is clearly lacking. The Supreme Court's willingness to grant certiorari in appropriate military cases is illustrated by the fact that it will have heard three military cases in its October 1993 term.

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<sup>50</sup> MIL. R. EVID. 315(a).

<sup>51</sup> MIL. R. EVID. 311(a).

<sup>52</sup> MIL. R. EVID. 311(c)(1).

<sup>53</sup> One possible example would be the United States search of a foreign dwelling inhabited by an American servicemember. *Cf.* *United States v. Chapple*, 36 M.J. 410 (C.M.A. 1993) (extending good faith exception to a commander's authorization to search a foreign civilian dwelling outside his control). *See generally* Major Borch, TJAGSA Practice Note, *COMA Further Extends the Good-Faith Exception: United States v. Chapple*, ARMY LAW., July 1993, at 39 (discussing broadening of good faith exception in *Chapple*).

<sup>54</sup> Interestingly, the recent decision of the Court of Military Appeals in *United States v. McCarthy*, 38 M.J. 398 (C.M.A. 1993), holding that the military equivalents of arrest warrants are not required for apprehensions in barracks, *see supra* text accompanying notes 35-41, would be an adequate vehicle if appealed by the defense.

The authors do *not* recommend that Staff Judge Advocates<sup>55</sup> or prosecutors intentionally advise commanders or law enforcement personnel to conduct searches which are undoubtedly unlawful under current law so as to establish test cases. Such conduct may be unethical. Rule 3.1 of both the ABA's Model Rules and the Army's Rules of Professional Conduct for Lawyers, for example, permits bringing a proceeding or asserting an issue "which includes a good faith argument for . . . reversal of existing law."<sup>56</sup> The intentional creation of a test case, however, with advice to military law enforcement that clearly contradicts not only the consistent holdings of the United States Court of Military Appeals, but also the Military Rules of Evidence, is at least troubling. Perhaps more importantly, the Military Rules of Evidence are in one sense an order of the President, the Commander-in-Chief, and it would be inappropriate to intentionally violate such a directive.<sup>57</sup> This type of test case is unnecessary in any event; there are sufficient erroneous searches to provide an appropriate vehicle.<sup>58</sup>

## VI. CONCLUSION

It is incredible that in the late twentieth century, it is not absolutely known whether the Bill of Rights, and in particular the Fourth Amendment, apply to those sworn to defend it. If it does not, then either the President or Congress should act to protect the rights and interests of

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<sup>55</sup> Staff Judge Advocates are legal advisers to commanders.

<sup>56</sup> ARMY RULES OF PROFESSIONAL CONDUCT FOR LAWYERS Rule 3.1 (1992).

<sup>57</sup> This does suggest that the President could set the stage for an appropriate challenge simply by amending the Military Rules of Evidence. This could be done. However, given the time lag between the effective date of a rules amendment and resolution of an appropriate case by the Supreme Court, an invalid amendment to the Rules would unnecessarily affect adversely the rights of numerous personnel and mandate the reversal of what potentially might be a large number of courts-martial convictions.

<sup>58</sup> See *supra* note 53 for an example of the type of case suitable for appeal to the Supreme Court. A case in which evidence is admitted on an inevitable discovery theory also might be suitable for appeal. For example, assume a military police officer searches an accused's motor vehicle for contraband. The car is legally parked on post, in the unit parking lot. The MP lacks probable cause to search, however, since it is only rumored that the accused's car contains contraband. At trial the contraband discovered and seized from the accused's vehicle is admitted under an inevitable discovery theory. The Court of Review affirms on this basis. The Court of Military Appeals reverses, holding that as a matter of law the facts developed at trial are inadequate to make inevitable discovery applicable. In this example, the search of a civilian car requires probable cause, and absent the application of inevitable discovery, the search is unlawful. If the Fourth Amendment does not apply to the armed forces, however, Military Rules of Evidence 311, 314, and 315 will operate to make the search lawful and the contraband admissible.

our citizen soldiers in a way that adequately balances their interests and those of national security.<sup>59</sup> Further, if the Fourth Amendment does apply but in a fashion far more flexible than previously thought,<sup>60</sup> the President's representatives ought to have that knowledge in order to fashion the most flexible search and seizure rules that are consistent with public policy and the needs of our military personnel.

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<sup>59</sup> Although we think that some type of search and seizure regulation is necessary, we note then Chief Judge Everett's remarks that:

In promulgating paragraph 152 of the [1951 & 1969] Manual the President may also have recognized that inherent in the command structure are some safeguards against a commander's indiscriminate invasion of the privacy of his subordinates. For one thing, combat readiness of troops depends in large part upon their motivation, but discipline and punishment cannot alone develop the necessary motivation. Leadership is also required, and one aspect of successful leadership is concern for the welfare of subordinates. Loyalty in a military unit, as in other organizations, is a two-way street. A commander who approves—or even tolerates—arbitrary invasions of the privacy of his subordinates is not demonstrating the brand of leadership likely to command the loyalty or produce the high morale associated with a combat-ready organization. Accordingly, a commander has some incentive to act reasonably and with sound judgment in acting on requests for searches and seizures which involve his personnel. Moreover, repeated failures by a commander to respect the Fourth Amendment rights of his troops might become a basis for a “complaint of wrongs” under Article 138 of the Uniform Code, . . . or, in the extreme case, even for a prosecution for dereliction of duties as a commander.

*Lopez*, 35 M.J. at 44-45 (Cox, J., concurring) (quoting *United States v. Stuckey*, 10 M.J. 347, 359-60 (C.M.A. 1981) (Everett, C.J.)).

Of course, it is clear that in promulgating the Military Rules of Evidence, the President has assumed that the Fourth Amendment, and the Bill of Rights generally, apply to the armed forces. It also may be argued that the Military Rules of Evidence generally reflect a proper balance between the needs of the armed forces and that of their soldier citizenry. That said, however, the Military Rules of Evidence may be changed by the President at any time. If the Fourth Amendment does not apply to the armed forces, there is no constitutional check on any such change.

<sup>60</sup> The Supreme Court need not resolve the Fourth Amendment question on a “yes or no basis.” It could well decide that mission related searches and seizures (“examinations”) are not within the scope of the Fourth Amendment, while pure searches for evidence of crime are.