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# Replacing the Exclusionary Rule with Administrative Rulemaking

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## REPLACING THE EXCLUSIONARY RULE WITH ADMINISTRATIVE RULEMAKING

*Francis Gilligan\* and Fredric Lederer\*\**

### I. INTRODUCTION

"The criminal is to go free because the constable has blundered."<sup>1</sup> This blunt criticism of the fourth amendment exclusionary rule was authored by Justice Cardozo in 1926 during his tenure on the New York Court of Appeals. As crime rates rise and society's perception of crime increases, Justice Cardozo's succinct view of all that is wrong with the exclusionary rule deserves renewed attention. This article will focus on the necessity for the exclusionary rule in the context of alternative procedures for ensuring the guaranty of the fourth amendment against unreasonable searches and seizures. The primary emphasis will be upon fourth amendment practice in the military, with appropriate analogies to the civilian community. At the outset, the article will consider the origins, rationale, and utility of the exclusionary rule. A discussion of judicial reaction to the rule will be followed by a brief description of various alternatives that have been proposed as replacements for the exclusionary rule. Finally, the article will propose as a preferred alternative the creation of rulemaking procedures governed by police review boards.

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The opinions and conclusions expressed herein are those of the individual authors and do not necessarily represent the views of the United States Army or any other governmental agency.

1. *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

## II. ORIGINS AND RATIONALE OF THE EXCLUSIONARY RULE

### A. Recent Origins

Although neither clause of the fourth amendment<sup>2</sup> expressly provides a remedy for the victim of an illegal search or seizure, in 1914 a remedy was announced by the Supreme Court in *Weeks v. United States*.<sup>3</sup> Commonly known as the "exclusionary rule,"<sup>4</sup> this remedy provides that evidence obtained in violation of the fourth amendment cannot be admitted in a criminal trial against the person whose rights were violated. The Supreme Court reasoned that without such a rule, fourth amendment rights would be of "no value" to those accused of crime and "might as well be stricken from the Constitution."<sup>5</sup> Not until the 1961 case of *Mapp v. Ohio*,<sup>6</sup> however, was the exclusionary rule held applicable to the states.

The military acquired the exclusionary rule much earlier, with the Navy adopting the rule in 1922<sup>7</sup> and the Army in 1924.<sup>8</sup> The first portion of paragraph 152 of the 1969 *Manual for Courts-Martial* states that evidence "unlawfully" obtained is inadmissible against the accused,<sup>9</sup> and

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2. U.S. CONST. amend. IV. The fourth amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

3. 232 U.S. 383 (1914).

4. The exclusionary rule has also been referred to as the "suppression doctrine." See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 418 (1971) (Burger, C.J., dissenting). For an exhaustive history of the exclusionary rule, see Burger, *Who Will Watch the Watchman*, 14 AM. U.L. REV. 1, 4-10 (1964).

5. *Weeks v. United States*, 232 U.S. 383, 393 (1914).

6. 367 U.S. 643 (1961).

7. COURT MARTIAL OPINIONS 10-1922, at 12.

8. DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY: 1912-1940, § 395(27), at 220 (C.M. 161760, 1924).

9. The exclusionary rule was initially adopted in the 1951 *Manual for Courts-Martial*, which provided in pertinent part: "Evidence is inadmissible against the accused if it was obtained as a result of an unlawful search of his property conducted or instigated by persons acting under authority of the United States . . . All evidence obtained through information supplied by such illegally obtained evidence is likewise inadmissible." MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 152 (1951). The rule was carried over into the 1969 *Manual*. MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 152 (rev. ed. 1969). Under ¶ 152 evidence is inadmissible if it (1) was obtained as a result of an unlawful search of the accused or his property, (2) was obtained as a result of an unlawful search of another's premises on which the accused was legitimately present, or (3) was obtained as a result of a seizure of the accused's property during an unlawful search of anyone's property unless the presence of the accused's property was due to trespass.

To invoke the protection of the exclusionary rule, the defendant must have standing to raise

paragraph 152 indicates that the exclusionary rule applies to derivative as well as primary evidence.<sup>10</sup> Moreover, the Analysis of Contents of the 1969 *Manual* suggests that paragraph 152 was intended to follow the exclusionary rule as formulated by the Supreme Court,<sup>11</sup> and the Court of Military Appeals has stated that it adheres to the fourth amendment standards announced by the Supreme Court.<sup>12</sup> Thus, the military law of the fourth amendment is primarily a reflection of federal civilian law.

### B. *Rationale for the Exclusionary Rule*

1. *The Judicial Integrity Rationale.*—The justifications generally cited in support of the fourth amendment exclusionary rule are twofold: judicial integrity and deterrence of improper police conduct.<sup>13</sup> With respect to the former justification, courts have often stated that judicial integrity requires the exclusion of illegally obtained evidence. Justices Brandeis and Holmes, in their dissenting opinions in *Olmstead v. United States*,<sup>14</sup> introduced the judicial integrity rationale. Arguing for the exclusion of evidence seized through illegal wiretapping, they viewed the issue of judicial integrity as a moral or ethical question not susceptible to easy solution. Mr. Justice Holmes felt that mere court disapproval of the manner in which the evidence was obtained was not enough: he would rather free the criminal than allow the Government to "play an ignoble part" in admitting the evidence at trial.<sup>15</sup> Justice Brandeis added that illegally obtained evidence must be excluded to "preserve the judicial process from contamination."<sup>16</sup> Indeed, Brandeis felt that the spectacle of the Government breaking the law "breeds contempt for law

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the issue. As the Supreme Court has made clear, the "suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence." *Alderman v. United States*, 394 U.S. 165, 171-72 (1969).

10. *MANUAL FOR COURTS-MARTIAL, UNITED STATES* ¶ 152 (rev. ed. 1969) provides: "Evidence obtained as a result of information supplied by illegal acts of the kinds mentioned above is itself considered as having been obtained as a result of the illegal acts."

11. See *DEP'T OF THE ARMY, ANALYSIS OF CONTENTS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 1969, REVISED EDITION 27-39 to -40* (Pamphlet No. 27-2, 1970).

12. See, e.g., *United States v. Poundstone*, 22 U.S.C.M.A. 277, 280, 46 C.M.R. 277, 280 (1973).

13. Compare *Mapp v. Ohio*, 367 U.S. 643, 659-60 (1961), with *Elkins v. United States*, 364 U.S. 206, 217 (1960), and *People v. Cahan*, 44 Cal. 2d 434, 445, 282 P.2d 905, 911 (1955).

14. 277 U.S. 438 (1928).

15. *Id.* at 470.

16. *Id.* at 484.

. . . [and] invites anarchy.”<sup>17</sup> The theme of judicial integrity was reemphasized in the 1968 case of *Terry v. Ohio*.<sup>18</sup> There the Supreme Court stated that courts sitting under the Constitution “cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions.”<sup>19</sup>

Carried to its logical extreme, the judicial integrity rationale would bar admission of evidence illegally seized by the police regardless of whether the violation of the fourth amendment was intentional, reckless, negligent, or made in good faith. In the recent case of *United States v. Janis*,<sup>20</sup> however, the Supreme Court declined to interpret the rule so broadly and held that “considerations of judicial integrity” do not require the exclusion of evidence in a federal civil tax proceeding when the evidence is seized in good faith by state law enforcement officials.<sup>21</sup> In *Stone v. Powell*,<sup>22</sup> decided the same day as *Janis*, Chief Justice Burger reflected the growing dissatisfaction with the rationale underlying the exclusionary rule, remarking that the judicial integrity rationale is “fatally flawed.”<sup>23</sup> In support of this charge, the Chief Justice noted that the exclusionary rule has been applied only when the defendant could demonstrate his standing to raise the objection and that the rule has not been adopted in other common-law jurisdictions.<sup>24</sup> Significantly, the Court in *Powell*, perhaps signaling the demise of judicial integrity as a justification for the exclusionary rule, suggested that “[w]hile courts . . . must ever be concerned with preserving the integrity of the judicial process, this concern has limited force as a justification for the exclusion of highly probative evidence.”<sup>25</sup>

2. *The Deterrence Rationale*.—Although the Supreme Court has recently evidenced a waning appreciation of the judicial integrity ration-

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17. *Id.* at 485.

18. 392 U.S. 1 (1968).

19. *Id.* at 13. In the earlier case of *Mapp v. Ohio*, 367 U.S. 643 (1961), the Supreme Court, rejecting Justice Cardozo's criticism of the exclusionary rule, emphasized the concept of judicial integrity: “The criminal goes free, if he must, but it is the law that sets him free.” *Id.* at 659.

20. 428 U.S. 433 (1976).

21. *Id.* at 458 n.35. See also *United States v. Peltier*, 422 U.S. 531 (1975) (fourth amendment exclusionary rule does not require the suppression of evidence obtained by roving border patrols prior to the probable cause requirement announced in *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973)).

22. 428 U.S. 465 (1976).

23. *Id.* at 499.

24. *Id.*

25. *Id.* at 485.

ale, referring to it as a "relevant, albeit subordinate factor,"<sup>26</sup> the Court reemphasized that the primary reason for the exclusionary rule is to deter police misconduct.<sup>27</sup> As the Court noted in *United States v. Calandra*,<sup>28</sup> the primary purpose of the exclusionary rule "is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."<sup>29</sup> Consistent with its evolving approach to the exclusionary rule, the Supreme Court suggested in *Janis* that the deterrence rationale and the judicial integrity rationale are "essentially the same" since the "primary meaning of 'judicial integrity' . . . is that the courts must not commit or encourage violations of the Constitution."<sup>30</sup>

The exclusionary rule has been adopted on the dual assumption that it deters illegal searches and seizures and that no alternatives are available to control such behavior. Thorough analysis of the justification for the rule's continued existence, therefore, demands a determination of whether these assumptions are correct and, if not, whether the rule should be abolished or limited.

One of the earliest attempts to statistically justify the exclusionary rule came in Justice Murphy's dissenting opinion in *Wolf v. Colorado*.<sup>31</sup> In response to 38 inquiries concerning police training in large cities, 26 replies were received. Discussing 11 of the replies, Justice Murphy indicated that police training relating to the fourth amendment was extensive in cities in five of the six states which had adopted the exclusionary rule. On this basis, he concluded that "[t]he contrast between states with the federal rule and those without it is . . . a positive demonstration of its efficacy."<sup>32</sup>

Despite Justice Murphy's early assertions of the rule's effectiveness, subsequent studies appear to offer inconclusive and inconsistent results. Probably the most comprehensive and well-known study on the subject is that conducted by Professor Oaks.<sup>33</sup> After an exhaustive

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26. *United States v. Janis*, 428 U.S. at 458 n.35; see *Stone v. Powell*, 428 U.S. at 485-86.

27. *Stone v. Powell*, 428 U.S. at 486 ("The primary justification for the exclusionary rule . . . is the deterrence of police conduct that violates Fourth Amendment rights."); see *United States v. Janis*, 428 U.S. at 445.

28. 414 U.S. 338 (1974).

29. *Id.* at 347, quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960).

30. 428 U.S. at 458 n.35.

31. 338 U.S. 25, 41-47 (1949) (Murphy, J., dissenting).

32. *Id.* at 46.

33. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970) [hereinafter cited as *Studying the Exclusionary Rule*].

review of the available data, Oaks conceded that he could not measure the deterrent impact of the rule.<sup>34</sup> Further authority for the lack of empirical data available to support the exclusionary rule as a deterrent of police misconduct is furnished by a detailed study of Chicago's search and seizure statistics, which concluded that "the deterrent rationale for the rule does not seem to be justified."<sup>35</sup> Similarly, what appears to be the most recent study on the subject, although arguing in favor of retaining the rule of exclusion, admits that the "inconclusiveness of [its] findings is real enough . . . ."<sup>36</sup> Indeed, a review of the available research brought the Supreme Court to conclude in *Janis* that "[n]o empirical researcher . . . has yet been able to establish with any assurance whether the rule has a deterrent effect even in the situations in which it is now applied."<sup>37</sup>

There are two basic reasons why the rule may not be effective as a deterrent of police misconduct. First, the rule applies only during the trial of a criminal case, and since in most instances the police in their day-to-day activities are not concerned with securing convictions but rather with the removal of suspected criminals from the streets, the value of the exclusionary rule as a device of deterrence is highly ques-

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34. *Id.* at 709. Professor Oaks did, however, suggest several research methods that might provide such a measurement. *Id.* at 716-19.

35. Spiotto, *The Search and Seizure Problem—Two Approaches: The Canadian Tort Remedy and the U.S. Exclusionary Rule*, 1 J. POL. SCI. & ADMIN. 36, 49 (1973). The Spiotto study, however, has been the subject of considerable criticism. See, e.g., Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 475 n.593 (1974); Gilligan, *The Federal Tort Claims Act—An Alternative to the Exclusionary Rule?*, 66 J. CRIM. L.C. 1, 3 (1975) [hereinafter cited as *The Federal Tort Claims Act*]; Comment, *On the Limitations of the Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra*, 69 NW. U.L. REV. 740 (1974).

36. Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY. L.J. 681, 726 (1974). Professor Canon urges retention of the exclusionary rule to give it time to take effect. In response to this argument, the *Janis* Court questioned: "One might wonder why, if the substantial amount of time necessary for the rule to take effect is extremely relevant, the study fails to take into account the fact that over half the States have had an exclusionary rule for a significantly greater length of time than *Mapp* has been on the books." 428 U.S. at 451 n.22.

37. 428 U.S. at 452 n.22. The *Janis* Court also asserted that "the deterrent effect of the exclusion of relevant evidence is highly attenuated when the 'punishment' imposed upon the offending criminal enforcement officer is the removal of that evidence from a civil suit by or against a different sovereign." *Id.* at 458. In *Powell* the Court spoke in terms of the "incremental contribution" that might be made to the protection of the right to privacy by denying admission of illegally seized evidence for impeachment. 428 U.S. at 488. The Court further suggested that even if the deterrent effect of the rule can be assumed in isolated cases, "the resulting advance of the legitimate goal of furthering Fourth Amendment rights would be outweighed by the acknowledged costs to other values vital to a rational system of criminal justice." *Id.* at 494.

tionable.<sup>38</sup> Second, the rule operates against the prosecutor rather than the police officer, and because of the complexity and inconsistency of the many rules that police are expected to follow, neither the judges nor the prosecutors often attempt to enlighten the police on the legal responsibilities of their job.<sup>39</sup>

### C. *Utility of the Exclusionary Rule*

Although the exclusionary rule applies in both fourth and fifth<sup>40</sup> amendment cases, its impact on the truth-finding process varies depending on which amendment is being invoked. When a confession has been obtained as a result of physical abuse or psychological pressure, the accuracy of the information extracted is highly suspect.<sup>41</sup> Admission of such evidence may pervert the truth-finding process. Similarly, testimony of the victim of a crime based on an unnecessarily suggestive lineup or showup, which is conducive to a mistake in identification at trial, is also inadmissible because it could have an undesirable impact on the truth-finding process.<sup>42</sup>

As opposed to the exclusion of evidence in the fifth amendment context, the suppression of a pistol or a packet of heroin seized in violation of the fourth amendment excludes reliable evidence from the truth-finding process. Because the probative value of such evidence is certain, its suppression results in the loss of public confidence in the criminal justice system.<sup>43</sup> Inflexible application of the exclusionary rule to suppress evidence, without regard to the nature of the police misconduct involved, is illogical to much of the general public. Thus, the exclu-

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38. In the police officer's efforts to rid the streets of suspected criminals, he may find that he has violated the suspect's fourth amendment right against illegal search and seizure and that the evidence is rendered inadmissible by the exclusionary rule. In order to avoid this result and obtain a conviction, the officer is often forced to fabricate the circumstances under which the search and seizure took place so that the suspect's rights will not appear to have been violated. Cf. J. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY* 214-15 (1966); Burns, *Mapp v. Ohio: An All-American Mistake*, 19 DEPAUL L. REV. 80, 96 (1969).

39. See LaFave & Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987, 1005 (1965).

40. U.S. CONST. amend. V provides that no person "shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ."

41. See *Miranda v. Arizona*, 384 U.S. 436 (1966).

42. See *United States v. Wade*, 388 U.S. 218 (1967).

43. E. CAHN, *DISSENTS OF INJUSTICE* 14, 17 (Midland ed. 1964); Hook, *The Rights of Victims*, 38 ENCOUNTER 11-13 (1972); Oaks, "Ethics, Morality and Professional Responsibility," 3 B.Y.U.L. REV. 591, 596 (1975).

sionary rule, rather than encouraging respect for the law and the administration of justice, may generate the opposite result. An additional defect of the rule is that it diverts the attention of the factfinder from the ultimate question of guilt or innocence to the subsidiary issue of whether a constitutional right has been violated. Moreover, the loss of time that results from motions to suppress substantially contributes to the problem of judicial inefficiency.<sup>44</sup>

In addition to hampering the truth-finding process, application of the exclusionary rule may free patently guilty and dangerous criminals. A police officer realizing this possibility may testify falsely in order to prevent discovery of a fourth amendment violation.<sup>45</sup> To illustrate, in a recent Oklahoma case a police officer less than 6 feet tall testified that he had seen marijuana in plain view in a coffee can between the bucket seats of a Ford Econo-Van. Evidence introduced at trial disclosed that the police officer, if he had been standing on the ground next to the van, would have had to be more than 7 feet in height to have seen the contraband in the coffee can.<sup>46</sup>

### III. JUDICIAL REACTION

Because of its questionable value as a device of deterrence, the exclusionary rule has been the object of much judicial criticism. Thus, in *Coolidge v. New Hampshire*<sup>47</sup> Justice Harlan suggested that "the law of search and seizure is due for an overhauling,"<sup>48</sup> and Justice Black charged that the fourth amendment "did not when adopted, and does not now, contain any constitutional rule barring the admission of illegally seized evidence."<sup>49</sup> Chief Justice Burger and Justice Blackmun have agreed with Justice Black's conclusion,<sup>50</sup> and Justice White in

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44. For example, in Chicago in 1969 as many as 45% of the gambling offenses, 33% of the narcotics offenses, and 24% of the concealed weapons cases were dismissed as the result of successful motions to suppress. *Studying the Exclusionary Rule*, *supra* note 33, at 685. A more recent study found the figures to be 24%, 36%, and 22%, respectively. Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEG. STUDIES 243, 247 (1973) [hereinafter cited as *Search and Seizure*].

45. See note 38 *supra*.

46. These are the facts of an unreported Oklahoma case in the Tulsa County District Court involving two young defendants aged 19 and 20. Telephone interview with Patrick Williams, attorney for defendants.

47. 403 U.S. 443 (1971).

48. *Id.* at 490 (Harlan, J., concurring).

49. *Id.* at 497 (Black, J., concurring in part and dissenting in part).

50. *Id.* at 492, 510 (separate opinions of Burger, C.J. & Blackmun, J.).

*Powell* suggested that he is willing to join in "substantially limiting the reach of the exclusionary rule . . . ."<sup>51</sup>

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,<sup>52</sup> which held that an individual has a federal cause of action for violation of his fourth amendment rights,<sup>53</sup> Chief Justice Burger took the occasion of his dissent to call for a reexamination of the federal exclusionary rule and to invite the Congress to provide a meaningful and effective substitute remedy.<sup>54</sup> In his view the new remedy should include (1) a waiver of sovereign immunity, (2) the creation of a cause of action against the government, (3) the creation of a quasi-judicial tribunal to adjudicate all claims, (4) a provision that the statutory remedy is in lieu of the exclusionary rule, and (5) a provision that the exclusionary rule should not be applied to evidence obtained in violation of the fourth amendment.<sup>55</sup>

More recently, in *Powell* the Chief Justice recognized that legislatures will be slow to create statutory alternatives to the exclusionary rule, such as direct sanctions against errant police officers, since they have "no assurance that the judicially created rule will be abolished or even modified in response to such legislative innovations."<sup>56</sup> Furthermore, Chief Justice Burger predicted that "overruling this judicially contrived doctrine . . . would inspire a surge of activity toward providing some kind of statutory remedy . . . ."<sup>57</sup> Consequently, because of the failure of legislative bodies to act, perhaps the burden falls upon local governmental bodies and individual military commands to devise an alternative, acceptable to the courts, that will both protect individual liberty and ensure effective law enforcement.

#### IV. ALTERNATIVES TO THE EXCLUSIONARY RULE

The remedy of civil action against the police has been notoriously unsuccessful in the United States. Moreover, other remedies have been slow in development. Thus, when the *Mapp* and *Weeks* cases were decided, no viable alternative to the exclusionary rule existed. This,

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51. 428 U.S. at 537.

52. 403 U.S. 388 (1971).

53. *Id.* at 397.

54. *Id.* at 411-27.

55. *Id.* at 422-23.

56. 428 U.S. at 501.

57. *Id.*

however, is no longer the case. Section IV of this paper will briefly discuss the various alternative remedies which may be available, in both civilian and military contexts, to an individual who believes that his fourth amendment rights have been violated.

### *A. Uniform Code of Military Justice*

An individual in the armed forces who believes himself wronged by his commander may submit a complaint under article 138 of the Uniform Code of Military Justice (UCMJ).<sup>58</sup> Army Regulation 27-14<sup>59</sup> spells out a two-step procedure under which the individual soldier must first seek redress from the commander who has allegedly wronged him. If relief is denied, the soldier must submit, within 90 days of the alleged wrong, a formal written complaint through the chain of command to the general court-martial convening authority. Legal counsel is available to assist the soldier in deciding whether to file a complaint or to pursue other available avenues of redress.<sup>60</sup> Upon receiving a complaint, the general court-martial convening authority investigates the allegation and, if within the scope of his authority, grants or denies relief.<sup>61</sup> The officer exercising general court-martial authority then forwards the complaint and accompanying documents to the Judge Advocate General for review and final disposition.<sup>62</sup>

Despite its potential benefits for servicemen, the article 138 complaint has a number of serious shortcomings. First, the procedure has apparently seldom been used to contest a fourth amendment violation and thus is not easily recognized as a remedy. More importantly, since only wrongs committed by commanders are cognizable under article 138,<sup>63</sup> no remedy exists under the article when a fourth amendment violation, innocent or flagrant, is committed by a law enforcement officer.

Another possible remedy exists under those provisions of the

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58. UNIFORM CODE OF MILITARY JUSTICE art. 138, 10 U.S.C. § 938 (1970) [hereinafter cited as UCMJ].

59. Army Regulation 27-14 (Dec. 10, 1973).

60. *Id.* ¶ 8, at 3.

61. *Id.* ¶ 9, at 3.

62. *Id.* ¶¶ 10, 11, at 304.

63. Paragraph 5a of the regulation provides that "[a] complaint which on its face, or after investigation or informal inquiry, is not directed at a commanding officer . . . may be returned by the general court-martial convening authority upon advice of his Staff Judge Advocate, without action, with a statement as to the reason for the return." *Id.* ¶ 5a, at 2.

UCMJ that permit the victim of a fourth amendment violation to bring criminal charges against the offender. Assuming that the other articles, such as those prohibiting physical assault,<sup>64</sup> are not applicable, and depending upon the charge, articles 98,<sup>65</sup> 133,<sup>66</sup> and 134<sup>67</sup> might be used. Prosecutions of this kind are now virtually unknown, and a great deal of education at all levels of the military would be required before such an action could be considered a legitimate and reasonable remedy.

## B. *Lawsuits Against the Offending Officer*

1. *Actions Under State Law.*—State substantive law may provide a private remedy for injuries caused by a violation of fourth amendment rights. Generally, a plaintiff may institute an action against the offending officer based on the common-law theories of trespass and false imprisonment.<sup>68</sup> Under either theory both compensatory and punitive damages may be recovered.<sup>69</sup>

One of the reasons frequently advanced for applying the exclusionary rule to the states is that private actions brought under state substantive law are generally ineffective to deter police misconduct.<sup>70</sup> Suits against offending officers have seldom been successful,<sup>71</sup> and even if recovery is granted, state and municipal governments are usually not liable for the actions of their employees absent a waiver of sovereign immunity.<sup>72</sup> A number of recent developments, however, could convince the Supreme Court that an action under state substantive law is in fact a viable alternative to the exclusionary rule. The most significant development has been the modification by many jurisdictions of the applicable common-law rule or statute to permit suits against the state for torts committed by state officials.<sup>73</sup> Generally, an action of this type may be

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64. UCMJ art. 128, 10 U.S.C. § 928 (1970).

65. *Id.* art. 98, 10 U.S.C. § 898 (1970).

66. *Id.* art. 133, 10 U.S.C. § 933 (1970).

67. *Id.* art. 134, 10 U.S.C. § 934 (1970).

68. See *Wolf v. Colorado*, 338 U.S. 25, 41 (1949) (Murphy, J., dissenting); Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955) [hereinafter cited as *Tort Remedies for Police Violations*]; Paulsen, *Safeguards in the Law of Search and Seizure*, 52 NW. U.L. REV. 65, 72 (1957).

69. See *Tort Remedies for Police Violations*, *supra* note 68, at 497.

70. See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 651-53 (1961).

71. See *id.*

72. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 131, at 975-84 (4th ed. 1971).

73. Some states have modified the rule of sovereign immunity by judicial action. See, e.g., *Stone v. Arizona Hwy. Comm'n*, 93 Ariz. 384, 381 P.2d 107 (1963); *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 115 N.W.2d 618 (1962).

brought against (1) the state and its political subdivisions,<sup>74</sup> (2) municipalities to the extent insurance is available,<sup>75</sup> and (3) municipalities regardless of the availability of insurance.<sup>76</sup>

2. *Actions Under Section 1983.*—Under Title 42, section 1983 of the *United States Code*, an individual who is deprived of a federal right by a person acting under color of state law may bring suit to recover for his injury. The scope of the section was partially defined by the Supreme Court in *Monroe v. Pape*.<sup>77</sup> In that case the Court held that the phrase "under color of state law" does not restrict relief to those cases in which the injury was inflicted with express statutory authorization.<sup>78</sup> Rather, the phrase was broadly interpreted to denote a "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law . . . ."<sup>79</sup> In addition, specific intent to deprive the injured party of a federal right need not be shown.<sup>80</sup>

Even with this expansive reading of section 1983, the Supreme Court in *Monroe* held that the statute's use of the word "person" was not intended by Congress to impose liability upon municipalities for the acts of their employees.<sup>81</sup> Because *Mapp* was decided after *Monroe*, the *Mapp* court apparently did not consider the remedy offered by section 1983 to be a viable alternative to the exclusionary rule. Since the *Mapp* decision, however, the courts have bolstered the remedy by allowing the aggrieved party to recover both compensatory and punitive damages<sup>82</sup> as well as attorney's fees in some instances.<sup>83</sup>

3. *Actions Under Federal Common Law.*—Although Congress

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74. CAL. GOV'T CODE §§ 815.2, 818 (West 1966); IOWA CODE ANN. §§ 25A.1-A.20 (West 1976); MINN. STAT. ANN. § 466.02 (West 1963); NEV. REV. STAT. § 41.031 (Supp. 1975); N.C. GEN. STAT. §§ 143-291, 143-300.1 (Supp. 1975); WASH. REV. CODE ANN. §§ 4.92.010, 4.92.060 (Supp. 1975).

75. N.H. REV. STAT. ANN. § 412.3 (1968); N.D. CENT. CODE § 40-43-07 (1968); WYO. STAT. § 15.1-4 (1965).

76. ALASKA STAT. § 09.65.070 (1962); OKLA. STAT. ANN. tit. 11, § 1753 (West 1973).

77. 365 U.S. 167 (1961).

78. *Id.* at 184-87.

79. *Id.* at 184, quoting *United States v. Classic*, 313 U.S. 299, 326 (1941). Relief under § 1983 is supplemental to any cause of action available under state law; however, denial of a state remedy is not a prerequisite for the federal remedy. 365 U.S. at 183.

80. 365 U.S. at 187.

81. *Id.* at 187-92.

82. *Gill v. Manuel*, 488 F.2d 799 (9th Cir. 1973); *Lee v. Southern Home Sites Corp.*, 429 F.2d 290 (5th Cir. 1970).

83. *First Nat'l Bank v. Dunham*, 471 F.2d 712 (8th Cir. 1973); *Donahue v. Staunton*, 471 F.2d 475 (7th Cir. 1972), *cert. denied*, 410 U.S. 955 (1973).

had not provided a tort remedy for redress of fourth amendment violations, the Supreme Court in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*<sup>84</sup> held that a complaint alleging a violation of fourth amendment rights by federal agents acting under color of their authority gives rise to a federal cause of action for damages. On remand the United States Court of Appeals for the Second Circuit held that federal officers "have no immunity . . . from damage suits charging violations of constitutional rights," but that "it is a valid defense to such charges to allege and prove that the federal agent . . . acted . . . in good faith and with a reasonable belief in the validity of the arrest and search and in the necessity for carrying out the arrest and search in the [manner] . . . conducted."<sup>85</sup>

Although a remedy against the individual officer who acts in violation of the fourth amendment may offer a satisfactory alternative to the exclusionary rule, the Supreme Court could reasonably conclude that this remedy is ineffective or inconsistent with the best interests of the public, the police, or the aggrieved party.

(a) *The public interest.*—The imposition of personal liability on an officer who violates an individual's fourth amendment rights will not necessarily promote the interests of the community. Because the municipality and the supervising official are not directly involved in the private action against the offending officer, the municipality would not be significantly motivated to guard against further violations of the fourth amendment; consequently, imposing liability on offending officers might not induce the desired systemic change in overall police operations.<sup>86</sup> Support for this conclusion can be found in studies which have established that placing liability upon an individual employee gives the corporate employer little incentive to implement a permanent solution such as employing people less likely to cause harm.<sup>87</sup> On the other hand,

84. 403 U.S. 388 (1971).

85. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 456 F.2d 1339, 1348 (2d Cir. 1972).

86. See Little, *The Exclusionary Rule of Evidence as a Means of Enforcing Fourth Amendment Morality on Police*, 3 IND. LEGAL F. 375, 406 (1970); Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L.C. & P.S. 255, 261 (1961); Note, *Excluding the Exclusionary Rule: Congressional Assault on Mapp v. Ohio*, 61 GEO. L.J. 1453, 1465 (1973); Note, *Developing Governmental Liability Under 42 U.S.C. § 1983*, 55 MINN. L. REV. 1201, 1209 (1971). But see Kates & Kouba, *Liability of Public Entities Under Section 1983 of the Civil Rights Act*, 45 S. CAL. L. REV. 131, 140-41 (1972); Plumb, *Illegal Enforcement of the Law*, 24 CORNELL L.Q. 337, 387 (1939).

87. Mathes & Jones, *Toward a "Scope of Official Duty" Immunity for Police Officers in Damage Actions*, 53 GEO. L.J. 889, 907-08 (1965).

if liability is imposed upon the municipality, the municipal governing body will be encouraged to minimize that liability by improving the training and supervision of law enforcement officials. Similarly, when the actions of one officer repeatedly subject the municipality to liability, the municipality will have an incentive for direct disciplinary action against the offending officer. Additionally, imposition of personal liability on offending officers may clash with the community interest by discouraging prospective law enforcement officers from entering the public service. Moreover, individual liability could prove detrimental to vigorous law enforcement unless officers are indemnified by the employing municipality.<sup>88</sup> Finally, public reaction, in the form of jury verdicts favoring defendants, to holding individual police officers liable in damages for fourth amendment violations could nullify the deterrent effects of the remedy.

(b) *The interests of the offending officer.*—Since a primary concern of the individual police officer is the economic well-being of his family, the threat of financial ruin through a suit against him in his professional capacity will almost certainly affect the quality of his performance.<sup>89</sup> It seems unjust to financially penalize an officer for errors made in the good faith performance of his duties, particularly in cases in which liability is imposed for failure to exercise reasonable judgment.<sup>90</sup> An intentional violation of fourth amendment rights, however, would seem to justify holding the offending officer personally liable.

(c) *The interest of the injured party.*—Fear of reprisal,<sup>91</sup> absence of actual damages,<sup>92</sup> and substantial delay in obtaining relief<sup>93</sup> are major reasons for the paucity of suits filed against individual officers.<sup>94</sup>

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88. *Id.* at 907. Several states have adopted statutes that authorize indemnification of officers. See, e.g., CONN. GEN. STAT. ANN. § 7-465 (West 1975); ILL. ANN. STAT. ch. 24, § 1-4-5 (Smith-Hurd 1962).

89. See Mathes & Jones, *supra* note 87, at 907.

90. *Id.* For example, force generally may be used to effect a warrantless felony arrest only if the officer reasonably believes that the force is necessary. The imposition of liability for miscalculations on the necessity of force might well cause an officer to err on the side of caution. *Id.* at 898.

91. Morris, *The End of an Experiment in Federalism—A Note on Mapp v. Ohio*, 36 WASH. L. REV. 407, 429-30 (1961).

92. Wingo, *Growing Disillusionment with the Exclusionary Rule*, 25 SW. L.J. 573, 579 (1971).

93. One commentator has estimated that a search and seizure damage suit would take 7 years to reach a final disposition in Illinois state courts. *Search and Seizure*, *supra* note 44, at 272.

94. Illustrative of the use and utility of the private tort remedy for fourth amendment violations are statistics showing that between 1961 and 1973 only four civil rights or tort suits were filed against Chicago policemen or the Chicago police department. *Id.* at 269-71.

The "moral aspects of the case," which usually do not favor potential plaintiffs, may also limit the number of these suits.<sup>95</sup> Generally, only a plaintiff with clean hands and a certain degree of respectability can recover from an officer, if only because the plaintiff's reputation, including prior criminal convictions, is admissible to reduce damages, impeach the plaintiff as a witness, and show that the officer was acting in good faith.<sup>96</sup> The effectiveness of the remedy is further lessened by the fact that most illegal police activity operates against members of society lacking social, economic, and educational status,<sup>97</sup> which may be true because of police awareness that the lack of familiarity and recourse to legal and official channels of complaint will limit suits and other meaningful relief. Furthermore, these individuals are usually unable to retain attorneys because most lawyers are reluctant to take such cases without an advance retainer or a substantial possibility of success if the case is to be taken on a contingent fee basis.<sup>98</sup> This practical unavailability of counsel makes the remedy of private litigation illusory at best. Consequently, some commentators have referred to members of the lower economic classes as "bait for an illegal arrest."<sup>99</sup>

Juries are often reluctant to impose damages against law enforcement officers, especially if the alleged unconstitutional activity yielded hard evidence of crime, such as contraband.<sup>100</sup> Thus, compensatory damages might not be awarded even though a violation of the fourth amendment is proved. Moreover, when a suit is successful, recovery is often limited to nominal damages because in many cases no actual damages can be shown.<sup>101</sup> Finally, recovery of punitive damages is often unlikely since in some jurisdictions the plaintiff must first prove actual damages and in other jurisdictions the plaintiff must show malice or ill will.<sup>102</sup> Even if the jury decides to penalize an overzealous officer, the plaintiff's actual recovery will hinge on his success in finding assets from which a judgment may be satisfied. Consequently, as Justice Murphy

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95. *Tort Remedies for Police Violations*, *supra* note 68, at 500.

96. *Id.* at 504-08.

97. *Id.* at 500.

98. NATIONAL CONFERENCE ON POLICE COMMUNITY RELATIONS, MATERIALS ON POLICE LITIGATION 3 (1970); *Tort Remedies for Police Violations*, *supra* note 68, at 500; *see Note, Excluding the Exclusionary Rule: Congressional Assault on Mapp v. Ohio*, 61 GEO. L.J. 1453-63 (1973).

99. *Tort Remedies for Police Violations*, *supra* note 68, at 501.

100. *Search and Seizure*, *supra* note 44, at 272.

101. *See id.*

102. *Wolf v. Colorado*, 338 U.S. 25, 43 (1949) (Murphy, J., dissenting).

noted in his dissent in *Wolf v. Colorado*, the "officer's finances may well make the judgment useless . . . ." <sup>103</sup>

### C. Government Liability

In response to the Supreme Court's decision in *Bivens*, a relentless attack upon the exclusionary rule,<sup>104</sup> and a number of well-publicized, flagrant violations of the fourth amendment,<sup>105</sup> Congress passed an amendment to the Federal Tort Claims Act (FTCA)<sup>106</sup> in March 1974.<sup>107</sup> The added provisions permit an aggrieved party to bring suit against the federal government in the event of false arrest, false imprisonment, assault, battery, abuse of process, or malicious prosecution by a federal law enforcement officer.<sup>108</sup> Since the FTCA waives sovereign immunity and creates a judicial forum for a cause of action against the Government<sup>109</sup> and since the new amendment contains most of the provisions set forth in Chief Justice Burger's model statute,<sup>110</sup> the FTCA could arguably be viewed as an alternative to the exclusionary rule.<sup>111</sup>

For a suit to be cognizable under the FTCA, the cause of action must meet the statutory conditions for waiver of sovereign immunity.<sup>112</sup> Title 28, section 1346(b) of the *United States Code* provides that the cause of action must include (1) a claim for money damages stemming from property damage or loss, personal injury, or death (2) which

103. *Id.* at 44.

104. *See, e.g., Studying the Exclusionary Rule, supra* note 33, at 754-57.

105. *See* S. REP. No. 558, 93d Cong., 1st Sess. 2-4 (1973).

106. 28 U.S.C. §§ 2671 *et seq.* (1970).

107. Act of March 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50, *amending* 28 U.S.C. § 2680(h) (1970) (codified at 28 U.S.C. § 2680(h) (Supp. V, 1975)).

108. The new provision defines a federal law enforcement officer as an "officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." *Id.* The Judge Advocate General of the Army has stated that military police and criminal investigators are included within the term "investigative or law enforcement officers." He has also expressed the opinion that unit commanders, post exchange security guards, soldiers on riot duty, disciplinary gate guards, and commissioned officers are not included. DAJA-AL 1974/4278 (May 30, 1974).

109. 28 U.S.C. § 2674 (1970).

110. *See* notes 52-55 *supra* and accompanying text.

111. The final two suggestions contained in the Chief Justice's model statute—elimination of the exclusionary rule and an express provision supplanting it with the new remedy—were not included in the 1974 amendment. *Compare* 28 U.S.C. § 2680(h) (Supp. V, 1975), *with* *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 422-23 (1971).

112. The 1974 amendment expressly states that Title 28, § 1346(b) is applicable to the new liability provision. 28 U.S.C. § 2680 (Supp. V, 1975). Section 1346(b) places exclusive jurisdiction of such claims in the federal district courts. 28 U.S.C. § 1346(b) (1970).

resulted from a negligent or wrongful act or omission (3) committed by a federal employee acting within the scope of his employment (4) under circumstances such that a private party would be liable under state law.<sup>113</sup> Since these requirements may severely limit the impact of the 1974 amendment, they are deserving of further scrutiny.

1. *The Requirement of Money Damages.*—A claim under the FTCA must be for “money damages . . . for injury or loss of property, or personal injury or death . . . .”<sup>114</sup> Thus, the federal government is liable for actual or compensatory damages. Personal injury or property damage, however, may well be the exception rather than the rule in fourth amendment cases. The harm incident to an unlawful search and seizure is far more likely to entail an invasion of privacy, permanent loss of security, damage to reputation and dignity, and emotional distress.<sup>115</sup> Moreover, the FTCA’s prohibition of punitive damages<sup>116</sup> seems to indicate that the 1974 amendment was not designed to supplant the exclusionary rule; rather, the amendment was apparently intended merely to broaden government liability by allowing damages for the intentional torts of police officers.

2. *The Requirement of a Negligent or Wrongful Act.*—The new language of the FTCA permits private suits against the federal government for certain intentional torts previously excepted from liability, including “assault, battery, false imprisonment, false arrest, malicious prosecution, [and] abuse of process . . . .”<sup>117</sup> The key language for fourth amendment purposes is the term “abuse of process.” While neither the amendment itself nor its legislative history adequately defines the term, some guidance in the fourth amendment area can be found. The amendment was introduced as a direct result of a number of incidents involving flagrant violations of fourth amendment rights and was suggested to apply in cases of law enforcement abuse involving

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113. 28 U.S.C. § 1346(b) (1970).

114. *Id.*

115. See *Search and Seizure*, *supra* note 44, at 272. Legislative history, however, indicates that the pain, suffering, humiliation, and invasion of property likely to result from unlawful searches and seizures were intended to be compensable under the amendment. Referring to one of the flagrant fourth amendment violations which prompted passage of the legislation, the Senate Committee on Government Operations noted that “[t]here is no effective legal remedy against the Federal Government for the actual physical damage, much less the pain, suffering and humiliation to which the Collinsville families have been subjected.” S. REP. NO. 588, 93d Cong., 1st Sess. 2 (1973).

116. 28 U.S.C. § 2674 (1970).

117. *Id.* § 2680(h) (Supp. V, 1975).

"constitutional torts."<sup>118</sup> Consequently, the Senate report accompanying the legislation suggested that the federal government be liable "whenever its agents act under color of law so as to injure the public through searches and seizures that are conducted without warrants or with warrants issued without probable cause."<sup>119</sup>

(a) *Exemptions for discretionary and statutorily authorized acts.*—Under the FTCA the Government is not liable for an "act or omission of an employee . . . exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid . . . ."<sup>120</sup> This provision would seem to prohibit recovery in suits in which the arrest is found to have been unlawful because the statute on which the arrest was based was later declared unconstitutional. On the other hand, when an arrest or search is unlawful because of the absence of probable cause, or when an overly broad search has taken place, a suit under the FTCA would nevertheless be appropriate.<sup>121</sup> The same provision also contains language that precludes liability for the performance of a *discretionary* function, regardless of whether the act was negligent or wrongful and even if the act constituted an abuse of discretion.<sup>122</sup> The likelihood that a court will classify an act as discretionary depends upon the existence of alternative remedies, the capacity of the court to evaluate the propriety of the officer's action, and the effect of liability on the budget or effective administration of the agency.<sup>123</sup> Generally, day-to-day police activities have not been considered discretionary.<sup>124</sup>

(b) *Detention of goods.*—Section 2680(c) of the FTCA provides for the exclusion of claims "arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise by any other law-

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118. S. REP. NO. 588, 93d Cong., 1st Sess. 3-4 (1973).

119. *Id.* at 4. The argument that the term "abuse of process" was intended to include violations of fourth amendment rights is supported by language of the amendment defining "law enforcement officer" as an "officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." 28 U.S.C. § 2680(h) (Supp. V, 1975). Surely if the amendment had not been intended to apply to illegal searches and seizures, but merely to false arrests and false imprisonments, this expansive definition would not have been necessary.

120. 28 U.S.C. § 2680(a) (1970).

121. See *The Federal Tort Claims Act*, *supra* note 35, at 13-14.

122. 28 U.S.C. § 2680(a) (1970).

123. Jaffee, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 219 (1963).

124. See *Galella v. Onassis*, 487 F.2d 986, 993 (2d Cir. 1973).

enforcement officer.”<sup>125</sup> Although intended to preclude only suits arising out of “detention of goods by customs officers,” the provision has been interpreted as prohibiting suits resulting from an illegal search or seizure by customs officials or agents of the Federal Bureau of Investigation.<sup>126</sup> Clearly, however, this interpretation is contrary to the basic purpose of the legislation.<sup>127</sup>

3. *The Requirement that the Act Be Within the Scope of Employment.*—As previously noted, in order for an act to come within the jurisdictional provisions allowing waiver of sovereign immunity, the conduct complained of must have occurred within the scope of the officer’s employment.<sup>128</sup> Factors considered in determining whether a particular act comes within the scope of employment include the degree to which the Government’s interests are being served at the time of the incident, the work commonly done by the employee, and the foreseeability of the employee’s conduct.<sup>129</sup> Consequently, the Government may be held liable for any intentional tort committed by a law enforcement officer if the officer’s purpose, however misguided or illegal, was to further the Government’s business.<sup>130</sup> Moreover, the opportunity for an expanded interpretation of the scope of employment concept is provided by language in the Senate report which suggests that the Government will be liable for acts within the scope of an officer’s employment or “under color of Federal law.”<sup>131</sup> The final phrase may or may not be broader than the varying state rules on scope of employment, but in any event, it could serve as an alternative to reliance on state law.<sup>132</sup>

4. *The Law of the Place.*—Under the FTCA the federal government is liable “in the same manner and to the same extent as a private individual under like circumstances . . . .”<sup>133</sup> Thus, the FTCA grants jurisdiction and permits recovery only under circumstances in which the Government, if a private individual, would have been liable to the aggrieved party under the law of the state where the act or omission occurred.<sup>134</sup> This fact leads to the anomalous conclusion that the im-

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125. 28 U.S.C. § 2680(c) (1970).

126. See *United States v. One 1951 Cadillac Coupe de Ville*, 125 F. Supp. 661 (E.D. Mo. 1954). But see H.R. REP. NO. 2245, 77th Cong., 2d Sess. 10 (1942).

127. See *The Federal Tort Claims Act*, *supra* note 35, at 17.

128. 28 U.S.C. § 1346(b) (1970).

129. RESTATEMENT (SECOND) OF AGENCY §§ 228 & 229 (1958).

130. Cf. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 70, at 464 (4th ed. 1971).

131. S. REP. NO. 588, 93d Cong., 1st Sess. 3 (1973).

132. See *The Federal Tort Claims Act*, *supra* note 35, at 16.

133. 28 U.S.C. § 2674 (1970).

134. *Mider v. United States*, 322 F.2d 193, 197 (6th Cir. 1963).

sition of liability for fourth amendment violations may well vary from state to state.<sup>135</sup> In the *Bivens* case the Supreme Court recognized that the interests protected by state laws concerning trespass and invasion of privacy and the interests protected by the fourth amendment guaranty against unreasonable searches and seizures "may be inconsistent or even hostile."<sup>136</sup> When the law of the place of the tort and the intent of the FTCA are inconsistent, federal law should prevail.<sup>137</sup>

5. *Viability of the FTCA as an Alternative to the Exclusionary Rule.*—The various limitations and shortcomings of the 1974 amendment to the FTCA seem to support the conclusion that the remedy supplied by the statute, at least in its present form, cannot serve as a replacement for the fourth amendment exclusionary rule. In order for the FTCA to operate as an acceptable alternative to the exclusionary rule, Congress, at a minimum, would have to (1) enact legislation eliminating the defenses of discretionary acts, scope of employment, and law of the place and (2) abolish the exclusion for claims arising out of the detention of goods in those situations in which a violation of the fourth amendment has occurred. In addition, legislation providing for substantial liquidated damages, attorney's fees, and punitive damages would be helpful in shaping the FTCA into an effective alternative to the exclusionary rule.

#### D. Rulemaking as an Alternative

Each of the above alternatives to the fourth amendment exclusionary rule has defects that limit its impact as a deterrent of police misconduct. There is, however, another alternative to the exclusionary rule that would permit the admission of illegally seized evidence while retaining the elements of deterrence. The device, police rulemaking, is applicable in both the military and civilian contexts; but since it is currently undergoing experimentation in the military community, the remaining discussion will focus primarily upon implementation of the proposal in the military context—analogs to the civilian community should appear obvious.

Although of recent origin,<sup>138</sup> the alternative of police rulemaking

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135. See *The Federal Tort Claims Act*, *supra* note 35, at 16.

136. 403 U.S. at 394.

137. See *The Federal Tort Claims Act*, *supra* note 35, at 16.

138. Police rulemaking was first advanced as an alternative to the exclusionary rule by Professor Davis. See K. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY passim* (1969).

has been recommended by a number of legal writers<sup>139</sup> and has been supported by the American Bar Association's Project on Standards for Criminal Justice.<sup>140</sup> Moreover, the International Association of Chiefs of Police has sponsored the preparation of a set of Model Rules for Law Enforcement Officers,<sup>141</sup> which are now in the draft stage and could easily be adapted for military use; indeed, the set of military rules appended to this article has been prepared for use at Fort McClellan, Alabama and will be distributed as a model throughout the Department of the Army.

The process of implementing police rulemaking as an alternative to the military exclusionary rule would involve at least four steps. Initially, the concept would have to be approved by the installation commander or the general court-martial convening authority. Secondly, it would be necessary to establish a board for the purpose of drafting the rules. Thirdly, after promulgation of the rules, a fourth amendment review board would have to be created to oversee the rules and to remedy violations. Finally, the prosecuting authority would have to convince the trial judge that police rulemaking is an effective alternative to the exclusionary rule.

*1. Initial Approval of the Concept.*—As Justice Holmes recognized: "The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong."<sup>142</sup> Thus, police rulemaking will not be effective without the support of the community in which the rules are to operate. Before the process of drafting the rules begins, those who will be affected by the system will have to be acquainted with its benefits. In the military context, these persons will include the general and special court-martial convening authorities, the provost marshal, and the staff judge advocate. Without their support the program may be impossible to establish. The support of the staff judge advocate is crucial

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139. See, e.g., Caplan, *The Case for Rulemaking by Law Enforcement Agencies*, 36 LAW & CONTEMP. PROB. 500 (1971); Dix, *Undercover Investigations and Police Rulemaking*, 53 TEX. L. REV. 203 (1975); McGowan, *Rule-Making and the Police on the Scope of Fourth Amendment Rights*, 52 J. URB. L. 25 (1974); Wilson & Alprin, *Controlling Police Conduct: Alternatives to the Exclusionary Rule*, 36 LAW & CONTEMP. PROB. 488 (1971); Wright, Book Review, 81 YALE L.J. 574 (1972).

140. See AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE URBAN FUNCTION, Rule 4.3 (1974).

141. PROJECT ON LAW ENFORCEMENT POLICY AND RULEMAKING, MODEL RULES FOR LAW ENFORCEMENT, SEARCHES, SEIZURES AND INVENTORIES OF MOTOR VEHICLES (rev. 1974).

142. O. HOLMES, THE COMMON LAW 36 (M. Howe ed. 1963).

since he will play a key role in the implementation process by furnishing an attorney to assist in drafting the model rules. Similarly, if the support of a majority of the court-martial convening authorities is not obtained, the system will likely fail. Once the support of the staff judge advocate and the majority of the special court-martial convening authorities has been gained, the support of the general court-martial authority can probably be secured. Like all staff actions on post, those who will be affected by a given action must be consulted before that action is taken and before the proposition is presented to the general court-martial convening authority. With the support of the latter, the drafting process may begin.

2. *Drafting of the Rules.*—The key to an effective set of rules for commanders and police officials is the board established to promulgate them. Those selected as draftsmen should have a broad understanding of the commander's role, a realization of the need for effective law enforcement, an awareness of the policy objectives in the area of police practices, and a knowledge of the law of search and seizure. These qualities are generally beyond any single individual; those involved in drafting should therefore have diverse backgrounds. At least one member of the board should be a commander with at least 1 year's experience. Additionally, one member of the board should be an attorney who works in the office of the staff judge advocate and who possesses a thorough knowledge of constitutional rights in the military. Finally, the board should include the provost marshal or some member of his staff and, when available, an individual who has taught at the Military Police School and possesses a background in the education of military police.

The starting point in the drafting process should be an examination of the various recurring problems that confront the commander and the military police rather than a review of the decisional law. These problems may be more numerous than the topics considered by the courts, and even in areas in which a host of decisional law can be found, there may be particular problems or significant factors not yet addressed by the courts. Moreover, if the draftsman starts with precedent rather than categories meaningful to law enforcement personnel, the result will be rules comprehensible to lawyers but not to those whose everyday conduct must conform to the rules.

Following the identification of problem areas, difficult judgments must be made concerning the constitutional limitations upon the authority of commanders and police. A tremendous amount of disagreement is likely to surface, particularly in the area of unit and gate searches.

For example, does the commander have the inherent right to conduct a unit inspection for drugs or unit cleanliness without any basis other than the health and welfare of his men? Such matters must be addressed by the rules.

3. *Enforcement of the Rules.*—The effectiveness of rulemaking as an alternative to the exclusionary rule will depend on the enforcement mechanism. The exclusionary rule presently operates without regard to whether the conduct violated police department regulations or whether any regulation was in existence. This approach to the rule does little to deter future misconduct. Following the promulgation of rules regulating police conduct, the first question presented is whether the mechanism is effective to deter intentional violations of the rules. If the rules accomplish this objective, there is no social value in applying the exclusionary rule.

Although the review board established to investigate alleged rule violations may be composed entirely of commanders or police officers, its effectiveness will be enhanced if it is composed of commanders, military police, and at least one attorney. A varied composition is desirable since the drafting process will be continuous and the rules will require revision when they prove unworkable or new situations arise. The presence of commanders and military police will permit the board to utilize their expertise when investigating the actions of other commanders and police. Since the board would be composed of military personnel intimately familiar with the realities of law enforcement, it should tend to be less tolerant of unjustified error and equally less prone to recommend severe corrective action for reasonable, technical mistakes.

The procedure followed by the board should comply with Army Regulation 15-6.<sup>143</sup> Board action would be initiated by an aggrieved individual or his lawyer through a complaint filed with a board member, commander, provost marshal, or staff judge advocate. A requirement that the complaint be filed with the commander, who may be the subject of the complaint, could result in reprisals or fear of reprisals against the individual complainant. While a provision for anonymous complaints might seem desirable, it could easily become a vehicle for harassment; the individual filing a complaint should therefore be required to reveal his identity to the board upon request. Once a complaint has been filed,

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143. Army Regulation 15-6 (Aug. 12, 1966); Army Regulation 15-6, Change No. 1 (Dec. 4, 1970); Army Regulation 15-6, Change No. 2 (Feb. 27, 1973).

the accused is entitled to notice setting forth the time and place of the hearing, the matter to be investigated, and the names of the witnesses. The notice should also inform the party under investigation that he may call and cross-examine witnesses on his own behalf and that he is entitled to have counsel present at the hearing. The testimony of all the witnesses would be presented under oath, and the substance of the testimony reduced to writing. A suggested procedure for the hearing is set forth in the appendix to Army Regulation 15-6.<sup>144</sup>

4. *Adoption of Rulemaking as an Alternative to the Exclusionary Rule.*—For police rulemaking to be accepted as a replacement for the exclusionary rule, it must be shown to deter illegal police conduct. Consequently, the military command must establish a police review board and then attempt to persuade the local trial judge that the program is a viable alternative to the fourth amendment rule. Proving the board's effectiveness as a deterrent to police misconduct requires evidence of attempts to publicize the board's existence, the number and nature of the complaints, and the action taken by the board in each case. Additionally, the military prosecutor must convince the trial judge that the exclusionary rule set forth in the *Manual for Courts-Martial*<sup>145</sup> does not apply despite its seemingly clear language.

An argument for the proposition that the exclusionary rule contained in the *Manual* is inapplicable can be constructed. The intent of paragraph 152 of the *Manual*, which sets forth the federal exclusionary rule as well as its rationale, was merely to adopt the federal rule.<sup>146</sup> Thus, if an effective alternative to the rule exists, the rule need no longer be applied in the military, particularly when the alternative does not entail the costly exclusion of probative evidence. Support for this conclusion can be found in *United States v. Clark*.<sup>147</sup> In *Clark* the Court of Military Appeals nullified the plain meaning of paragraph 140a(2) of the *Manual*, which requires the offer of free military counsel during the interrogation of any military suspect or accused without regard to the question of indigency. The court held that the purpose of the provision was simply to adopt the requirements of *Miranda* and not to mandate a more stringent standard than is constitutionally required.<sup>148</sup>

5. *Benefits of Rulemaking.*—Rules regulating police conduct in-

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144. Army Regulation 15-6, at 9-13 (Aug. 12, 1966).

145. MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 152 (rev. ed. 1969).

146. See notes 9-12 *supra* and accompanying text.

147. 22 U.S.C.M.A. 570, 48 C.M.R. 77 (1973).

148. *Id.* at 570-71, 48 C.M.R. at 77-78.

crease the efficiency of police and commanders by providing them with answers to as many specific questions as can be foreseen. The rules would serve as a basis for the continuing education of commanders and police and could be tied into the promotional scheme for officers and enlisted personnel. Under the present system the rules formulated by courts are generally not communicated to the police and commanders responsible for making decisions; when they are communicated, they frequently are not intelligible. A set of police rules, however, would be comprehensible to law enforcement officials since representatives of that group would play a significant role in the drafting process. Rule-making should increase the self-esteem of police and commanders because of the increased responsibility placed on them to formulate policy. Their role in the drafting process should remove any resentment that now exists concerning rules made by judges who are not faced with the problems encountered on the "beat." Additionally, when the rules are not obeyed, the penalty will be suffered by the errant officer, not by the criminal justice system.

Rulemaking would give the trial courts an insight into the latitude considered necessary to ensure order and discipline within a unit. It would also permit the court to extend coverage indirectly to actions that do not lend themselves to the warrant and probable cause standard. Additionally, it would guarantee fair and equal treatment throughout the command.

The use of police review boards to investigate alleged violations of rules established to guide police conduct should provide a reasonable alternative to the exclusionary rule. The "police officer's blunder" would no longer require that evidence illegally obtained be suppressed. Rather, the evidence would be admissible, and the commander or military police would be subject to an administrative proceeding that would examine the complaint to determine whether it was well founded and whether the officer acted in good faith. Absent repeated violations, a simple good faith error would require no action. When an intentional violation of the rules occurs, however, the board would recommend appropriate disciplinary action. This scheme would protect both society and the police.

## V. CONCLUSION

The rulemaking mechanism and police review board proposed above can replace the exclusionary rule *only* if it is *in fact* an effective

alternative. If in a particular command or locality it proves to be a mere pretense, reinstatement of the exclusionary rule would be necessary. This possibility does not imply constant judicial supervision of the board; rather, defense counsel can be expected to raise the issue of the board's failure adequately to serve its purpose. Simply by suppressing evidence in a given case, the judge could indicate that the board was failing to perform its function as a replacement for the exclusionary rule. In addition, the remedy of exclusion could be retained for cases involving egregious violations of the fourth amendment. Thus, rulemaking, rather than depriving individuals of constitutional protections, would for the first time create an effective protection.

While the proposal set out above could well prove fruitless in a particular installation or community, promulgation of the rules and creation of the board should, at a minimum, improve search and seizure practices. The effort to formulate an acceptable replacement for the exclusionary rule will not be simple, but haven't too many criminals gone free already?

## APPENDIX

MODEL RULES FOR COMMANDERS, MILITARY POLICE,  
AND CRIMINAL INVESTIGATORS\*

## SECTION 1. DEFINITIONS

*Apprehending Officer* or *Officer* includes commissioned officers, warrant officers, noncommissioned officers and law enforcement personnel.

Comment. *Noncommissioned officer* includes corporals, but does not include specialists or acting NCO's.

*Jurisdiction.* The rules in this manual apply to areas under the control of commanders and law enforcement personnel, thus they apply to on-post incidents in the 50 states. Overseas, depending upon the treaty agreements, they may also apply to off-post situations.

## SECTION 2. INSPECTIONS

Generally, the *commander has the inherent right to check the barracks* in which individual soldiers are housed to insure that the individuals have their *individual and organizational equipment*; that there are no *fire hazards* in the barracks; to see the *aisles and exits are not blocked*; to insure that lockers do not contain *food particles or food* that might attract rodents or roaches; to insure that soldiers can *perform the unit's mission*; and to insure *physical security*. If while conducting such inspection the commander comes across items that immediately appear to be contraband (drugs, unregistered weapons or any other item that may result in a criminal prosecution), these may be seized.

Comment. A commander conducting an inspection for these reasons may find *items he believes may aid in a criminal prosecution*. These items may be seized. A warning here is the officer conducting the inspection (or a designated person) may only look in those areas that will enable him to determine whether this equipment is present. He may not look in matchboxes or opaque bottles. When inspecting for food or flammable products, such as lighter fluid, he may look in cigar boxes or other suitable containers.

Normally a commander will conduct *periodic security checks* to insure that wall lockers and foot lockers are locked. If the commander or his representative conducts a security inspection and notices a wall locker or foot locker unlocked, he may secure the valuables from the locker and keep them in the unit supply room until the individual returns to the unit. If, while securing the valuables, the person conducting the inspection sees *items that would aid in a criminal prosecution*, these also *may be seized*.

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\* DEPARTMENT OF ARMY, TRAINING CIRCULAR 19-22, APPREHENSION, SEARCH, AND SEIZURE (1977).

The commander has the right to conduct a *search for weapons* after a unit has been firing on the range and has returned to the unit area and *found a weapon missing*. Under these circumstances the commander or his designated representative may conduct a search of all persons who were on the range and others who were in a position to steal the weapon, to include their living area and private automobiles.

*Under no circumstances may an inspection or inventory be used as a subterfuge for a search.*

Comment. If the commander is looking for *evidence of a specific crime* or suspects that an individual or group of individuals have drugs in their possession, but *does not have a probable cause for such a belief*, he may not use the inspection of the unit as a subterfuge for a search of the individual or group of individuals. Subterfuge normally takes place when a commander or military police "feels" an individual has contraband in his possession or living area but *not enough information to amount to probable cause* (discussed in Section 4) and uses an inspection of the type previously mentioned in this section to search for the contraband.

### SECTION 3. INVENTORIES

A commander may direct an inventory of an *individual soldier's* property when the soldier is absent from the unit on *ordinary or emergency leave* or when hospitalized. Such inventories are authorized under paragraphs 6-11, 6-12, 6-13, and 6-14 of AR 700-84.

If while conducting this inventory, the commander or his designated representative discovers items that would aid in a criminal prosecution, these may be seized and used as evidence.

Comment. Remember *normal policies must be applied in conducting the inventory*. That is, if the commanding officer normally waits 36 hours before an inventory, he cannot conduct an inventory one hour after an individual's absence or other circumstance that might trigger an inventory.

*Confinement inventory.* The commander or his designated representative may conduct an inventory of the property of an individual who has been placed in military or civilian confinement.

*Auto inventory.* When an individual is arrested for driving while intoxicated or is a subject under arrest which involves *transportation to the provost marshal's office*, the *vehicle* of the individual will be *secured*. When there is space at the place of apprehension, the vehicle may be secured there. However, if there is no place to secure the vehicle, it will be impounded at the provost marshal's office and inventoried.

Comment. When a person is arrested for DWI just as he pulls into his quarters' parking lot, there is no reason to impound the vehicle. However, if a person is arrested on one of the outer roads of the post and there is no place to secure the vehicle and there is a possibility that items may be stolen, the vehicle should be impounded at the provost marshal's office and inventoried.

#### SECTION 4. NARCOTIC/CONTRABAND DETECTOR DOGS

A commander conducting an inspection may use a narcotic/contraband detector dog to extend the natural senses of individuals conducting the inspection provided the dog is shown to be reliable.

Comment. When a request is made for a handler and dog to go into a particular unit, the commander requesting the team will ask the provost marshal, deputy provost marshal or NCOIC of the office of the provost marshal about the reliability of the handler.

Before the dog is used in a unit, the handler will demonstrate the *reliability* of the dog to the commander. The test for reliability consists of certification from approved training course, the training and utilization alert record and performance demonstrated to the commander.

The conduct of *barracks "shakedown inspections"* for narcotics/contraband (that is inspection for the sole purpose of detecting narcotics/contraband) without prior probable cause to justify search constitutes a lawful exercise of command authority. Narcotic/contraband detector dog teams may be used to assist in such inspections and may enter private rooms or areas of the barracks for these purposes. Narcotics/contraband found during a "shakedown inspection" should be confiscated but is not admissible as evidence against the possessor in a judicial proceeding. Reasonable "shakedown inspections" of this type may be useful as an administrative aid to a local drug control program. Caution should be exercised, however, to insure this procedure does not jeopardize an ongoing investigation by CID or MPI personnel.

A reliable dog may be used by the police in public areas or where an individual has been stopped for a vehicle offense. The intent of AR190-2 is not to prohibit use of narcotic/contraband detector dogs for personnel inspections but to prevent physical contact between the individual being inspected and an aggressive dog. A search of an individual should continue to be conducted only by Military Police personnel. The actual search of an individual, such as his pockets or under his outer garments, for the marijuana, narcotics/contraband, must be conducted by MPs.

Military police officers on patrol may have the narcotics/contraband detector dog with them and may stop to contact an individual in a public area such as one of the theaters on post. At that time the handler and the dog may get out of the car while the Military Police are making a contact. If the dog is reliable and alerts, this will furnish probable cause for an apprehension of the individual or individuals in the vehicle and for a search of the vehicle. Additionally, the dog may be with an MP who is on patrol. The MP may stop an individual for a speeding offense, at which time the detector dog team may get out of the car and go around the car that was stopped for the speeding offense. The driver may be asked to dismount the car but *he cannot be required to open his trunk or to keep his car doors ajar*. If the dog alerts, this will furnish probable cause to search the vehicle and to apprehend the individual(s) in the car.

#### SECTION 5. COMMANDER'S AUTHORIZATION

The commander, either company commander or higher, may authorize search of a person or place when there is probable cause to believe that items connected with criminal activities are located in the place or on the person to be searched. When time permits, the commander should consult the office of the staff judge advocate. A commander may delegate to another individual in the unit his authority to search.

Comment. A commander may want to delegate the authority to the executive officer; or a battalion commander may want to delegate the authority to the staff duty officer or NCO. The

delegation of authority to the staff duty officer should be placed in the staff duty officer's book and reads "You are authorized to conduct searches under paragraph 152 of the Manual for Courts-Martial and these rules."

## SECTION 6. PROBABLE CAUSE

There is probable cause when the following criteria are met:

*Search*—there are reasonable grounds to believe that items connected with criminal activity are located in the place (that is, room and barracks, POV, or quarters) or on the person to be searched.

*Apprehend*—there are reasonable grounds to believe that an offense has been committed and that the individual apprehended has committed the offense.

Comment. All commissioned officers, warrant officers, petty officers, noncommissioned officers, and, when in execution of their duties, guards or police officers may apprehend individuals for having committed offenses when there is probable cause for such apprehension. The procedure is for the individual making the apprehension to notify the individual why he is being apprehended. There are a number of ways the apprehension can be accomplished. First, tell the individual he is being apprehended and after that make the search incident to apprehension. Second, ask the individual to come to a particular office with the apprehending officer. The search will be made at that office. A third possibility is to ask individuals in the area to assist in the apprehension. Lastly, if the person is uncooperative (for example, the individual tells the apprehending officer "screw you") then the apprehending officer should try to subdue the individual or pay particular attention to any means of identifying the individual in case he tries to escape.

There is a difference between probable cause to search and probable cause to arrest. One of the key factors in the probable cause equation is the *timeliness of the information*. For example, we may have reliable information from an informant who has proven reliable in the past and has obtained his information by personal observation. He tells us that 30 days ago he saw a specific offense committed by Sgt. Freddy Hansom, and that this offense was committed at the NCO club. The fact that the offense was committed 30 days ago was based upon personal observations from a reliable informant, gives us probable cause to apprehend Sgt. Hansom, but it does not give probable cause to search any area under the exclusive control of Sgt. Hansom.

Even if a small quantity of drugs was seen in Hansom's possession 30 days ago in the company billets, this would not give probable cause to search the billets because it would be no basis to believe that the drugs are present today. However, there would still be a basis for an arrest and for a search incident to the apprehension.

*Basis of Knowledge Test.* The information furnished to the commander indicates that the information was obtained in a trustworthy manner. This has been called *the basis of knowledge test* and may be satisfied in the following way:

Personal observation.

Statement of the person to be searched or an accomplice.

Self-verifying detail.

Corroboration.

**Comment. *Personal observation.*** The trustworthiness of information can be established by showing that the commander personally observed the criminal activities himself; or that he is basing his authorization on the fact that a third party personally observed the criminal activity and this fact has been related to him and that such information has been corroborated or substantiated.

In the drug area, personal observation must also include facts indicating there is a basis for belief that what was seen was drugs (that is, the commander has had a class on drug identification, or the third party has had a class on drug identification or has furnished reliable information in the past as to the particular drug in question).

***Statement of person to be searched or accomplice.*** The person seeking the authorization from the commander or the commander may have trustworthy information that items connected with criminal activities are located in the place to be searched based on information obtained from a statement of the individual to be searched or an accomplice of the individual to be searched.

***Self-verifying detail.*** One way to pass the basis of knowledge test is by showing that the tip was so detailed the information must have been obtained as a result of a personal observation by the informant or from a statement of the defendant or an accomplice. The best example of when a tip is self-verifying is the one the Supreme Court used in *Draper v. United States*:

The arresting officer had received a tip from an informant that the defendant had departed Denver, Colorado to travel to Chicago. The informant: (1) stated the defendant would return by train on 8 or 9 September; (2) described the defendant's physical appearance; (3) indicated that the defendant would be carrying a tan zipper bag; (4) said the defendant walks with a fast gait; and (5) said the defendant would be carrying heroin.

Before making the arrest, the arresting officer verified facts (1) through (4).

The Court indicated that the tip was so detailed that we must conclude that the informant obtained his information in a trustworthy manner, such as by personal observation or a statement of the defendant or a combination of the two as was present in this case.

***Corroboration.*** Where the officer can verify a number of the items listed in the informant's tip we can draw the conclusion that the other items in the tip must also be true. Again, the best example of adequate corroboration is the *Draper*-type factual situation. A number of courts have indicated that the *Draper* factual situation could apply to not only train stations but airports or rendezvous-type situations with automobiles.

The commander must be satisfied as to the credibility of the person furnishing the information. This has been called the *reliability test* and may be established by one or more of the following:

Demeanor of the individual furnishing the information to the commander.

Statement of past reliability.

Corroboration.

Statement from victim or eyewitness of offense.

Declaration against interest.

Information from other law enforcement officials.

Information obtained from senior NCOs and above as a result of being passed through the chain of command.

**Comment. *Demeanor.*** When the information is personally given to the commander—not by a police officer, but by the third party who obtained the information—the commander can judge the individual informant's reliability at that time. In many cases the individual may be a member of the commander's unit, thus, he is in the best situation to judge the credibility of the person.

Even when the person is not a member of the authorizing commander's unit, you have an eyeball-to-eyeball situation in which the commander can question the individual and determine the consistency of statements made by the individual. The eyeball-to-eyeball situation may either lend to, or detract from, establishing credibility. The same is true when the individual is a member of the commander's unit. Again, the commander's personal knowledge of the informant can lend to, or detract from, establishing credibility.

*Statements of past reliability.* This is one of the easiest methods for passing the reliability test—knowledge that the informant has proven reliable in the past. There should be some indication as to the underlying circumstances of past reliability—such as this informant has furnished correct information three times in the past about wrongful possession of a particular type of drug, naming the drug.

*Corroboration.* Corroboration and demeanor of the person are particularly important when questioning first-time informants with no established record of past reliability. A method of corroboration based upon the basis of knowledge test is set forth in section 6.

*Declaration against interest.* The person furnishing the information to the CID and then to the commander may furnish information that is against the person's penal interest—such as he is aware that he is admitting an offense, and he has not been promised any benefit. Thus, he may be prosecuted himself. This lends a great degree of reliability to the information furnished.

*Information from other law enforcement officials.* This factor comes into play when we have an all-points bulletin put out by the desk sergeant. It is not necessary for the apprehending officer to personally obtain the information from the informant. The fact that he has obtained the information from other police officials through normal channels gives a presumption of reliability concerning the information from other police officials. Of course, the original source of the information must satisfy the reliability test, but this determination can be made later and need not be made by the MP who received the all-points bulletin.

*General.* When an officer lawfully overhears a telephone conversation in which an individual asks the other party to send some drugs to a barracks or quarters, the officer overhearing this conversation should immediately relay the information to the Criminal Investigation Detachment (CID). A member of the CID should then make arrangements for controlled delivery of the package when it arrives from its point of origin. This assumes that the package comes within three or four days, thereby creating the inference that it came as a result of the telephone conversation.

## SECTION 7. MAGISTRATES AND JUDGES AUTHORIZATION TO SEARCH

When there is a magistrate or a judge on an installation, law enforcement personnel are required to get the magistrate's or judge's authorization to search, following the procedures set forth in Chapter 14, AR 27-10. However, if a magistrate or judge is not reasonably available or is not present on the installation, law enforcement personnel can seek the commander's authorization.

## SECTION 8. SEARCH INCIDENT TO APPREHENSION

At the time of an apprehension or immediately after the apprehension, the apprehending officer should notify the individual that he is being apprehended for a specific offense. The apprehending officer may then search the person and the immediate areas surrounding the apprehended person. This search is made to detect weapons, destructible evidence, or means that might be used to effect an escape.

**Comment.** Search of an arrested person and the area subject to his immediate control at the time of the apprehension is lawful only when there is probable cause for the apprehension. This rule establishes both temporal (time) and geographical limitations. The geographical limitations means *you are limited to a search of the immediate area*. That is the area within which an individual may grab a weapon or destructible evidence. This area will include any area from which an individual may grab a weapon with a sudden lunge, leap, or dive from where he is.

In the automobile situation the officer may search the individual and the area surrounding where he was seated at the time the vehicle was stopped. This would include the driver's seat and the area under the driver's seat. If the arrest took place at an individual's house, it would include those areas of the room or rooms from which an individual may grab a weapon or destroy evidence.

Not all arrests justify a search incident to the apprehension. Generally, *you may not make a search incident to an apprehension when the offense results solely in the issuance of a traffic citation to appear in magistrate's court*. However, if the person who has been issued the traffic citation is normally required to appear before the desk sergeant for booking or release to the commanding officer, then a full search of the individual and the immediate area may be made.

Normally, you may not make a full search of a traffic offender, but if he acts in such a way to lead you to believe that he may be armed, and there is a threat to your safety, you may frisk the individual. Additionally, if something happens that gives you probable cause to believe he is concealing evidence of a crime then you may conduct a search of him and his car.

For example, when an individual is stopped for speeding you may see him make a motion to place something under the front seat or grab something under the front seat and in this type of situation, it would be permissible to frisk the individual and to examine the immediate area. While issuing a traffic citation or making an apprehension, if you view items in plain view that you believe would aid in a criminal prosecution you may seize these items even though they are not on the person or in the immediate area. Plain view will be further explained in the next section.

Prior knowledge of past violent behavior may be justification. Under unusual circumstances, search of the individual and the immediate area may be made at a different time and place. One reason for doing this is that a potentially unruly crowd is gathered where the initial apprehension took place and the search could not be conducted at the time and place of apprehension for security reasons or for crowd control reasons. Lighting conditions is another valid reason.

**Cursory view.** Where an apprehension is made at an individual's home (his on-post quarters), the apprehending officer may make a cursory view of the premises to see if other individuals are present who may impede the apprehension. If while making the cursory view other items come into plain view that would aid in a criminal prosecution, these items may be seized.

**Wearing apparel.** An individual who is apprehended at his quarters or place of business may have to obtain wearing apparel or a change of clothing for a stay at the detention cell, if detention is thought to be necessary. Where the apprehended person requires permission to gather other things to bring with him, the officer may search the immediate area where the additional materials are obtained, both to protect the apprehending officer and to prevent the destruction of evidence.

**Arrest at location where there is immediate danger to seizable items.** When the additional information gathered at the time of arrest establishes probable cause to believe that seizable items are on the premises and in immediate danger of destruction, concealment, or removal, the officer may immediately search for and seize these items.

Where an officer makes an apprehension at a location where the *apprehended person has no reasonable expectation of privacy*, the apprehending officer may make an inspection of the entire area.

Comment. Where an officer is investigating a break-in in the Auto Crafts Shop and finds the door jimmied and goes in and finds an individual in the garage itself, he may make an inspection of the entire Crafts Shop looking for other evidence of a crime, because the suspect cannot have an expectation of privacy in the crafts shop.

## SECTION 9. PLAIN VIEW

An officer who is lawfully in any place, may without obtaining a warrant or a commander's authorization, seize any item in plain view or smell which he has reasonable grounds to believe will aid in a criminal prosecution. This is so even if the seizable item is not related in any way to the crime which the officer is investigating.

Where an officer smells marijuana, an authorization to search may be necessary for further action under some circumstances. If, for example, an NCO smells marijuana in the hallway of the barracks, while he may be able to effectuate an apprehension on his own authority, he would ordinarily have to get authorization from the commander to order a search of the room.

Seeing an item in plain view in proximity to an individual *may justify an apprehension or further search* of the same area or another area.

Comment. An officer may use a *device to extend his natural senses* such as binoculars, flashlight, or in some cases, a ladder or stool. The same rationale applied for plain view also applies for plain smell.

Here are a few of the situations in which the commander or police could lawfully apprehend or search:

Areas of public or private property normally accessible to the public or to the public view.

Any place with the consent of a person empowered to give such consent.

Any place pursuant to an authorization to search a particular place.

Any place where the circumstances dictate an immediate police response to protect life or serious damage to property.

Any place to effect a lawful arrest, such as business, home, on the street or in a vehicle.

Lawful hot pursuit.

While conducting an investigation at a unit or office premises.

While on patrol an officer may observe an item in a parked car; or while making a routine spot check of a vehicle, the officer may notice something that will aid in a criminal prosecution. The officer may seize that item.

There are three distinct situations in which evidence may be seized:

1. *Plain view* that takes place after lawful entry into a place.
2. *Open view* is observation of item or conduct from public place or area accessible to the public but a basis is necessary to make the entry to seize the evidence.

3. *Visible and accessible*—both the viewing and the seizing take place in the area accessible to the public.

When an officer is lawfully at a place to make an arrest he *may not examine the entire premises solely to look for evidence*. An officer may go to the on-post quarters to arrest an individual for an offense. While at the quarters and viewing some evidence in the foyer where the officer is standing, he sees some item that will aid in a criminal prosecution. He may seize this item that is visible from the foyer. He may not, without invitation, go to the other rooms of the house.

## SECTION 10. HOT PURSUIT

An officer who is pursuing a person whom he has probable cause to believe is armed and has just committed a serious crime may enter a vehicle or building believed to be entered by the suspect and search the building or vehicle for the person or any weapons that might be used to further his escape. *Once the individual pursued is apprehended, the search will be limited by the search incident to apprehension rules.*

Comment. When the person pursued is *not found in the premises*, the officer may search the premises for evidence of the suspect's identity or the location to which he is fleeing if it is unknown.

This rule will apply when you have received a report of an armed robbery or rape and shortly thereafter you receive the description of the person who has committed the offense and notice that the person has just entered a barracks on post. You and the other officers may enter a building (for example, barracks or house) and search wherever the suspect may be hiding, and in addition, search any areas where a weapon might be hidden, such as closets, under beds, under mattresses, in toilet bowls and so forth.

*Entry and search to protect person or property.* An officer may make a warrantless entry into any premises whenever he has reason to believe that it is necessary to prevent injury to persons or to prevent serious damage to property, or to render aid to someone in danger.

Comment. While on patrol in the housing area or barracks area, you may hear sounds of a fight or cries for help coming from a building. Upon hearing these, you may enter the building to prevent injury or damage. Once the danger or emergency conditions have ceased, you may take only the necessary steps to carry out the purpose of the original entry.

When you have received a report that a wife has just shot her husband on post and you arrive at the scene to find the emergency vehicle has already removed the husband, you are authorized to enter the house to apprehend the wife and to make a cursory view to insure that no one will prevent the apprehension.

## SECTION 11. IDENTIFICATION SEARCH

An officer may examine the personal effects of any person who appears to be incapacitated to learn either the cause of the incapacitation or to identify the individual. If the identity of the individual seems important—as in a desertion case or a case involving forged identity

papers—Article 31 *Miranda* warnings must be given before the suspect can be questioned, to include asking for his name or identification card.

Comment. When police are called to a barracks, they may find an individual unconscious either because of an overdose of prescription drugs or because of a prohibited substance. The officer may gain entry to the room and call for medical help. After the call for medical help, the officer may search the immediate area and the personal effects of the individual to obtain evidence of identity. He may also search to determine the nature of the substance producing overdose, so medics can treat it properly.

An officer on patrol at night may observe a car in the parking lot of the Run-In Chef after it has closed. While examining the vehicle, if someone is observed in the vehicle apparently unconscious, it is proper for the officer to open the vehicle, learn that the individual is unconscious, notify the doctor and then obtain evidence of identification either from the individual or from the car itself.

An officer who *finds a vehicle unsecured*, one that is registered on post or has a visitor's pass and is capable of being secured, will secure the vehicle, leaving a note that the individual who owns the vehicle should secure it himself next time. If the vehicle registered on post cannot be secured, the officer will attempt to learn the identity of the owner by first calling the provost marshal's office, if time permits, and if not, by searching the vehicle for identification. If the vehicle is not registered on post or does not have a visitor's pass, the officer may search the vehicle for identification.

There is a *limitation on jurisdiction to search vehicles* for identification. Law enforcement officers may apply this rule to all areas throughout the post. Commissioned officers, warrant officers, and noncommissioned officers not in a law enforcement role may only attempt to secure those vehicles in areas under their control.

Comment. If while searching the car, the *owner of the vehicle is identified*, the person making the search for identification will attempt to contact the owner and ask him to secure his vehicle in the future. If while looking for identification, evidence of a crime is found, the evidence may be seized, and may lead to appropriate action against the individual for criminal conduct.

If the owner of the vehicle cannot be determined by looking for identification, the vehicle should be secured temporarily by the officer and an attempt should be made through all available means to determine the owner or to determine if the vehicle was stolen.

In some states, license plates may not have been computerized and it may be difficult to determine whether a vehicle is stolen unless the identity of the owner can be determined immediately.

Where the officer is permitted to make a search for identification, the scope of the *search is limited to those areas where identification of owners of vehicles is normally found*, such as glove compartments, consoles, or what appears to be documents lying in open view in the car. Once identification has been established, the search is ended.

## SECTION 12. DOMESTIC DISTURBANCE

An officer may go to the home of an individual when the officer

has been notified of a domestic disturbance. At the particular house, the officer will try to quell the disturbance, and if the officer views any contraband or any other item which he reasonably believes will aid in a criminal prosecution, these items may be seized. Additionally, the disturbance may be such as to give the officer a basis for apprehending one of the individuals at the home. Thus, a search incident to the apprehension may be conducted.

### SECTION 13. AUTO AND OTHER SEARCHES

*Automobile search.* An apprehending officer may make a warrantless search of a car at the time and place of apprehension if there is probable cause to believe the vehicle contains seizable items. The warrantless search need not take place where the apprehension of the occupants took place if there is a valid reason for conducting the search at another place such as at an MP station.

Comment. Where an individual is *stopped for a robbery* that has occurred on post and the driver is apprehended on post and taken to the MP station, the car may also be taken to the MP station. If the robbery has recently taken place, there may be probable cause to believe it contains evidence of the robbery and the car may be searched at the MP station, even though there is not authorization from the commanding officer to search the vehicle.

An individual may be *stopped for a traffic offense* and the officer may see items in plain view such as drugs or drug paraphernalia or evidence of other crime. This would give the officer probable cause to believe that other evidence is located in the vehicle. Thus, the vehicle can be searched there or it can be taken to the MP station where a search of the entire vehicle may be made. If the car was not in motion prior to being stopped and the owner of the vehicle has been taken into custody and there is no likelihood of the vehicle being removed by a third party, a search warrant should be obtained to search the vehicle.

For example, if you arrest an individual at his on-post quarters for a serious offense and the vehicle he owns is sitting in front of the quarters and his wife is not present at the quarters, there is no danger that the car will be removed unless there is evidence of other accomplices. The officer must obtain authorization to search the vehicle. Also, if a commanding officer is readily available, you should obtain an authorization to search even though it will result in a few minutes delay.

If the *search of the vehicle is not made within a short time*, usually 20 minutes, authorization to search the vehicle should be obtained.

*Abandonment.* A police officer lawfully in any place may without an authorization to search recover any abandoned property and examine its contents for seizable items.

Comment. While on patrol you may observe an individual vehicle on an isolated road. It is proper to search the vehicle for any items that may be seized.

While on patrol an officer may arrest an individual for a traffic offense. Prior to the vehicle coming to a complete halt with the offender in it, you notice him throw a small envelope from the vehicle. You may recover the envelope and seize any objects inside.

*Trash and garbage containers.* An officer lawfully in any place may, without obtaining authorization to search, examine the contents

of a trash or garbage container that is not located next to on-post quarters or not located in the driveway of the on-post quarters. Thus, the garbage cans located on any street near the curb may be searched without authorization to search.

*Search of premises without right to privacy.* Military Police may, without written authority, search any premises to which suspect no longer has a right of possession, or has demonstrated a lack of intention to return.

Comment. An individual who has been a *resident of the guest house*, but who has checked out earlier in the day, has given up the right to object to a search of his former room. Additionally, when an individual has left the guest house and has not returned for two or three days, and has not provided some intention of returning, that room may be searched. Any items found will be admissible.

#### SECTION 14. VOLUNTARY SEARCHES

A Military Police officer who wishes to make a search that is not otherwise authorized, may do so if the *person or persons in control* of the immediate area or object to be searched, *voluntarily give their consent*. To insure that the consent is voluntary, the MP should warn the individual: "I have no authorization to search you and you have a constitutional right to object to the search. I would like to search you or a particular place for . . . ."

Comment. If the person consents to a search, it probably would be considered to be voluntary. A refusal to consent to search, like evasive answers to a question, may arouse suspicion, but this evasiveness is not enough to amount to probable cause to search. As a practical matter, you should never ask for a consent to search, unless you believe you have probable cause because if the individual refuses, there is nothing you can do other than get proper authorization. When you think you have probable cause and the subject's consent, you may continue with the search without authorization. One question you may be asked, "What happens if I do not consent to search?" The answer should be that appropriate action will be taken. Do not spell out what "appropriate action" is.

Another pitfall of a consensual search is that it may alert a suspect and permit him time to dispose of evidence or to escape from the installation.

#### SECTION 15. CONTACTS AND STOPS

Unless a Military Police or commander concludes that an apprehension or stop is justifiable, communications with an individual should begin with a contact.

*Initiating a contact.* An MP may initiate contact with a person in any place the officer is lawfully situated. A contact does not authorize an officer to restrict the individual's freedom of movement or to compel answers of the individual.

**Comment.** It is difficult to define when an officer is lawfully situated. Generally, however, this may include inspecting the barracks; making a walk through the barracks; in the unit area; any place with the consent of a person in power to give consent; any place with the consent or authorization of a commander; any place in which the officer is present to effect a lawful apprehension.

Permitting an MP to make contact makes a clear distinction between activities of a commander or MP when there are no "detentions" subject to the fourth amendment. It is erroneous to equate every contact between the police and a citizen as a "detention" and thus demand a basis for the contact. Many contacts between law enforcement personnel and commanders and other individuals do not derive from a suspicion of criminal activity which might result in the disclosure of evidence of a crime.

Examples of lawful contacts include questioning of witnesses to a crime or warning a pedestrian that he is entering a dangerous neighborhood. These types of contacts are entirely reasonable and permissible and within the normal activities of law enforcement personnel and commanders. They are not "detentions" in any sense.

Other examples of encounters between MPs and others may occur without contemplation of criminal activities. Law enforcement personnel may be called upon to resolve a marital difficulty, assist a disabled person, untangle traffic congestion, escort an intoxicated person to shelter, or any other of a number of helping or crime deterrent activities which one expects of commanders and MP personnel.

**Basis for a stop.** If an officer reasonably suspects that a person has committed, is committing, or is about to commit, any crime, he has the obligation to stop that person. This obligation must be exercised in any place the officer has a right to be. Both pedestrians and occupants of vehicles may be stopped. If the individual is a suspect and is to be questioned, Article 31 *Miranda* warning should be read.

**Comment.** The term "reasonable suspicion" cannot be precisely defined. There are some factors that may serve as a checklist in determining whether, alone, or in combination, they establish reasonable suspicion for a stop: appearance; personal actions; prior knowledge of the person; demeanor during contact; area of the stop; time of day; police training and experience; police purpose; source of the information.

The stop must be based on more than a hunch. The officer making the stop should be able to state specific facts for his decision to stop the individual.

As to the person's *appearance*, does the person generally fit the description of a person wanted for a known offense? Does he appear to be suffering from a recent injury, or to be under the influence of alcohol or drugs?

As to the person's *actions*, is he running away from an actual or possible crime scene? Is he otherwise behaving in a manner to indicate possible criminal conduct?

The *reputation* of the person (whether he has an arrest or conviction record) is another factor to be considered, together with the individual's reputation on post or in the unit.

The *demeanor* of the person during the contact is important. If the individual responds to questions during the contact in such a manner as to be evasive, suspicious, or knowingly give false information, this may be a basis for a stop after the initial contact.

Is a person near an *area* known for the commission of certain crimes? Is the area a high crime area?

The *time of day* may be an important factor. Is it a very late hour? Is it usual for people to be in the area at this particular time? Is it the time of day during which criminal activity of the kind suspected usually occurs?

Military Police *training and experience* of the individual making the stop may be such that

the officer may have determined that the pattern of conduct establishes a *modus operandi* for particular criminal offenses.

Some reference should be made to the *sources of the information* to establish probable cause.

## SECTION 16. FRISK

An officer may frisk any person whom he has lawfully stopped when the officer *reasonably suspects* the person is carrying a concealed weapon or dangerous object, and the frisk is *necessary to protect the officer or others*. The frisk may be conducted immediately upon making the stop or at any time during the stop—whenever a reasonable suspicion to frisk arises.

**Comment.** A number of factors may be examined in determining whether there is *reasonable suspicion* that the individual is armed and that the frisk is necessary for the protection of the officer or others.

These factors may (alone or with the others) give grounds for a frisk: appearance; actions; prior knowledge of the individual stopped; location of the stop; time of day; purpose behind the stop; companions of the person stopped.

## SECTION 17. LINE-UPS

Prior to placing an accused or suspect in a line-up at the Military Police station, he must be warned of his rights to counsel.

The following warning should be given: "Although you do not have a right to refuse to appear in a line-up, you have a right to have a lawyer present when the witnesses to the crime view the line-up. If you are unable to afford a lawyer, a lawyer will be appointed for you, to represent you free of charge."

*On the scene identification.* When an identification procedure is used at the scene of the crime and shortly after the crime, there is no right to a lawyer.

*Photographic identification.* Generally, the use of photographic identification should be avoided when the suspect is known and is in custody or may be brought to the police station. However, when photographic identification is used, there is no right to an attorney. However, the photographic identification procedures must be fair.

*Role of counsel.* When an attorney is present to represent the accused or suspect, he *may request certain changes* in the line-up procedures; however, he has *no right to demand how police will conduct the line-up*. An individual in the line-up may be asked to perform certain physical acts such as trying on a coat, walking or squatting. However, the person may not be *asked to speak* unless the accused or suspect has

waived his Article 31 and fifth amendment rights. The line-up procedure should be conducted in a fair manner.

*Comment. Line-up Procedures.*

To insure the pretrial line-up is not necessarily suggestive, the following steps should be taken.

*MPs should not be used as fillers* in line-ups. Additionally, fillers who act in a line-up should not be informed of who the suspect is, otherwise nonverbal communication by them may be communicated to the witnesses.

*Witnesses must be separated* before and after any identification. Allowing witnesses to mingle together is not good practice but may not in and of itself amount to undue suggestiveness.

Witnesses to the line-up should not be allowed to make an identification in the presence of one another, otherwise there may be *tailoring by the witnesses*.

The individual *conducting the line-up should be an MP not involved with the specific investigation*. Suggestions by the MP may adversely affect the integrity of the line-up.

There should be *at least four fillers* in the line-up.

Fillers in the line-up should *resemble the suspect*. When the characteristics of the suspect cannot be matched, it may be well to use some sort of photographic identification.

The suspect or his counsel should be allowed to determine the *suspect's position* in the line-up. Also, he should be allowed to change his position after each viewing. This will again prevent tailoring by the witnesses.

When individuals are required to try on clothing or to perform other acts, all individuals should perform these acts, not just the suspect.

## SECTION 18. SPECIAL CONSIDERATIONS

*Search of government property.* A commanding officer or noncommissioned officer *may search government property used in connection with assigned duties* (such as desks and filing cabinets located in an individual's assigned office or building) to look for contraband or property held in a representative capacity. Any evidence found in the desk or property will be admissible at a trial.

*Bait money and controlled buys.* Commanders are encouraged to assist the MPI and CID in apprehending criminals. This can be done by having an individual serve as a confidential informant and releasing information to the MPI or CID. Additionally, individuals in the units may be asked to *make buys from pushers*. These controlled buys, when there is an indication the individual has been involved in some type of criminal activity in the past, do not constitute entrapment.

*Stomach contents and body cavity searches.* When there is probable cause to believe an individual has swallowed drugs or other paraphernalia, the MP should attempt to *obtain permission from the arrestee's commanding officer* for the individual to be taken to the hospital where the individual will be ordered to swallow an emetic solution to induce vomiting.

When an individual is arrested and there is a clear indication that he has secreted drugs in his body cavity, a search of the body cavity is

permissible if conducted by qualified medical personnel. *A clear indication that drugs are secreted in the body cavity is more than probable cause* to believe that they are so positioned.

Comment. When an individual is arrested in the barracks or while driving his car and the MP approaches and notices the individual swallowing a drug, the MP should immediately *contact the individual's commander*; inform the commander that the individual was arrested or was seen swallowing a drug, on what basis the MP thought it was a drug; and ask the commanding officer for *permission to take the individual to the hospital* so that a doctor may induce vomiting.