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## CRIMINAL INVESTIGATIONS UNDER MILITARY LAW\*

ROBINSON O. EVERETT

The author served as a Commissioner of the United States Court of Military Appeals from October, 1953, until his resignation late in 1955, when he entered private law practice in Durham, North Carolina. This is the second and concluding part of his article on criminal investigation under the new Uniform Code of Military Justice and its interpretation by the Court of Military Appeals.—EDITOR.

### SEARCH AND SEIZURE

During an investigation, interviews with witnesses will often need to be supplemented by searches for and seizures of property connected with commission of the crimes being investigated. If a building to be searched is located in the United States and off a military installation, then it makes no difference whether a serviceman owns that building. To be legal, the search must be conducted on the same basis as if civilians alone were involved and if the results of the search were to be offered in evidence in a Federal civilian court. What this means is that, within the United States and its territories, a search warrant is usually needed. Under the Fourth Amendment and Federal Rule 41 of Criminal Procedure both Federal courts and State courts of record can issue such warrants if there is "probable cause" for the search and if the objects to be sought are specifically described in the warrant.

Only certain types of objects can be searched for and seized under a search warrant. For instance, a warrant cannot be obtained to search for an object or document merely because it would be evidence showing that a crime had been committed and by whom. Instead, generally speaking a Federal search warrant is obtainable only to search for the "tools of crime" or the "fruits of crime." In this context the word "crime" refers only to that which would be an offense under some Federal enactment, including the Uniform Code of Military Justice. An offense under State law is not included.

A typical example of the "fruits" would be stolen property, possession of which itself constitutes a crime. "Burglars' tools" exemplify "tools of crime," for they are objects specifically adapted to the commission of crime. The concept of "tools" goes much further, however. For instance, the Supreme Court held that various ledgers and bills for gas, water, electricity, and the like are subject to seizure as instruments for maintaining an illegal bootlegging operation.<sup>56</sup> The Court of Military Appeals has held that a diary used to record black market transactions was a tool of crime,<sup>57</sup>

\* This article is based upon material from the author's forthcoming book, *Military Justice in the Armed Forces of the United States*, which is to be published by the Military Service Publishing Company, Harrisburg, Pennsylvania.

<sup>56</sup> *Marron v. United States*, 275 US 192. See also *Harris v. United States*, 331 US 145; *Zap v. United States*, 328 US 624.

<sup>57</sup> *United States v. Rhodes*, 3 USCMA 73, 11 CMR 73. Compare *United States v. Lindenfeld*, 142 F.2d 829 (CA 2d Cir).

and so, too, a worthless check which the accused had issued and later regained possession of.<sup>58</sup> Similar treatment was accorded pieces of paper on which a suspect had traced signatures as a preliminary for forging a name.<sup>59</sup> Under these interpretations of "tools of crime" the investigator clearly is not hamstrung, and yet the suspect is protected from indiscriminate ransacking and seizure of his papers and property.

Even though a search warrant has been issued only in connection with item A, the investigator may be free to seize item B. For instance, if B is contraband or stolen property and comes to light during the search for A, it can be seized and used as evidence before a court-martial.<sup>60</sup> The same right to seize seems to exist if B is a tool of crime—even a crime completely distinct from that in connection with which the search warrant was issued. Of course, a search warrant for A cannot be used as a subterfuge to search for B.

This principle can be more broadly stated as follows: If the investigator is engaged in an activity that is not illegal and comes across the tools or fruit of crime, he may seize them then and there without a search warrant. For instance, if a policeman walks into a store to make a purchase and sees on the shelves an object he recognizes as stolen Government property, he could immediately seize this object. In the course of a lawful search, an investigator may observe various objects that he would not be entitled to seize. There is apparently no legal rule that can prevent his testifying to the court-martial about what he saw if those observations would be relevant.

*a. Incident to Arrest.* When an arrest is made, the person making the arrest has the right to search the one arrested, and to seize fruits or instrumentalities of crime for use before a court-martial.<sup>61</sup> The authorization for such a search probably came originally from the need to determine at once if the individual arrested is carrying dangerous weapons that he might use to resist arrest, or contraband that he might destroy before a search warrant could be obtained. For the search in such an instance to be lawful, the arrest itself must be lawful.<sup>62</sup> Actually, in military law the term "apprehension" is used to denote what in civilian life is often called arrest; and the latter term has a rather specialized meaning. No warrant for apprehension is required, but it must be on the basis of a reasonable belief that the person apprehended com-

<sup>58</sup> *United States v. Marrelli*, 4 USCMA 276, 15 CMR 276.

<sup>59</sup> *United States v. DeLeo*, 5 USCMA 148, 17 CMR 148. However, it would be illegal to search a suspect's property merely for handwriting samples to use in evidence against him. *United States v. Elliott*, 16 CMR 882. Not everything that might be valuable evidence against a suspect is an instrument or a fruit of crime; if it is not, it cannot be made the subject of a search. *Gouled v. United States*, 255 US 298. A different rule probably applies as to any type of evidence that is on the person of an accused at the time he is apprehended.

<sup>60</sup> *United States v. Doyle*, 1 USCMA 545, 4 CMR 137; *United States v. DeLeo*, 5 USCMA 148, 17 CMR 148; *Harris v. United States*, 331 US 145.

<sup>61</sup> *United States v. Florence*, 1 USCMA 620, 5 CMR 48; *United States v. Rabinowitz*, 339 US 56. A search was not considered to be incident to an accused's apprehension when the apprehension had occurred forty minutes before the search, and the accused had been removed from the scene. *United States v. Cascio*, 16 CMR 799.

<sup>62</sup> This was the fly in the Government's ointment in *United States v. Coplon*, 185 F.2d 629 (CA 2d Cir.). There the Court of Appeals held anomalously that an arrest by an FBI agent was unlawful, although an arrest by a private citizen would have been completely legal. *Contra: United States v. Coplon*, 191 F.2d 749 (CA DC Cir).

mitted an offense.<sup>63</sup> Without such reasonable belief, the apprehension would be illegal and so, too, would be any search based on the apprehension.

Recent Federal cases indicate that in some circumstances an entire dwelling can be searched without a warrant in conjunction with an arrest. Military law would have the same rule, so that a limited search for fruits or tools of crime can be made in the place where a suspect is apprehended.<sup>64</sup> Should the investigator come across tools or fruit of some crime other than that concerning which he is searching, he can seize that as well. Here, too, the apprehension must be valid to sustain the search, regardless of what is found in the search.<sup>65</sup> It has been commented that the rule permitting a search in conjunction with a valid arrest encourages investigators to arrest a suspect in some place which they want to search. If this could be proved about any particular search, the products thereof undoubtedly could not be received in evidence,<sup>66</sup> but obtaining such proof might be exceedingly hard for a defendant.

*b. On a Military Installation.* Searches on a military installation come under special rules. No search warrant is required, but instead only the authorization of the commanding officer who has control of the area to be searched.<sup>67</sup> Thus, the commander of a Base can authorize a search of any place or property on that Base. A company or squadron commander can authorize a search anywhere in the area occupied by his company or squadron. Of course, the commander himself does not have to participate in the actual search, and may delegate to others his general authority to order searches. Thus, the Commanding General of a Post might delegate such authority to his Provost Marshal, who is the official especially charged with investigating and controlling crime on the post. The company commander might delegate authority to order searches to his adjutant, or perhaps even to his first sergeant. How far the delegation can go is still unsettled, although apparently there would be some limitations. For instance, the commander could not delegate his authority to all the men in his unit, or probably even to all his noncommissioned officers. The delegation must be reasonably specific. It would not suffice for the commander simply to tell some subordinate to take "all necessary action" while he was

<sup>63</sup> Uniform Code, Article 7b, 50 USC § 561(b). Manual for Courts-Martial, 1951, paragraph 19a.

<sup>64</sup> United States v. Gosnell, 3 CMR 646, held that apprehension of the suspect did not justify the search of his barracks about 50 yards away. This case refers to many of the precedents. For instance, in *Agnello v. United States*, 269 US 20, the arrest did not permit search of a suspect's house "several blocks" away. A recent Federal case is *Lott v. United States*, 218 F.2d 675 (CA 5th Cir.), where it was considered illegal for investigators to search the suspect's garage and shed after they had arrested him in his house. There is some doubt about the lawfulness of a search of a house without a warrant if the suspect is standing on the sidewalk in front of his house when arrested—or in his driveway or on his lawn. For this reason an investigator may decide to make the arrest after the suspect enters his house so as to permit a search. If, however, it could be proved that the investigator delayed his arrest for this purpose, the search might be held illegal.

<sup>65</sup> Naturally, if an arrest is invalid because made without probable cause, the Government cannot justify that arrest by what is found in the search incident to the arrest. Any other rule would let the investigator lift himself by his own bootstraps. See *United States v. Thomas*, 4 CMR 729; *Johnson v. United States*, 333 US 10.

<sup>66</sup> Compare *United States v. Johnson*, 113 F.Supp. 359; compare *United States v. Ward*, 2 CMR 688.

<sup>67</sup> Manual for Courts-Martial, paragraph 152.

away. The best procedure is for the commander to prepare a written memorandum as to who has the delegated authority to conduct a search.

A problem may arise as to who is the commanding officer of a unit at certain times. For example, if the usual commander lives off post and is at home when authority for a search is desired, is the next-ranking officer in command for purposes of authorizing a search?<sup>68</sup> If all the officers are away at the time, can the first sergeant, a noncommissioned officer, be the "commanding officer" for purposes of authorizing a search?<sup>69</sup> This type of problem will become academic if the nominal unit commander has issued a well-prepared memorandum delegating authority to search in various circumstances. Lacking such delegation, the investigator will be wise if he requests some higher echelon of command for the authority to search.

When a search is authorized by a commanding officer, he does not have to execute any type of written document like a search warrant. It suffices if, even somewhat tacitly, he indicates that he is willing for the search to be conducted. Must the commanding officer, like the magistrate who issues a search warrant, be furnished evidence showing probable cause for making the search? It could be argued that the commander is simply a substitute for the magistrate, and, therefore, such evidence is essential if the search is to be legal. However, military law has never made clear the existence of any such requirement that the investigator make before the commanding officer a showing of probable cause for the search. Instead the premise has been more that the commanding officer can authorize such a search because he occupies a status very akin to that of a landowner, who can let people on his premises for whatever reason he sees fit. It is likely that the last approach will be adopted, and the commanding officer's exercise of discretion will not be inquired into. Yet, to be on the safe side, a military investigator will be well-advised to explain briefly to the commanding officer why he thinks a search is needed.

Greater doubt shrouds the question of whether the investigator himself must have probable cause for the search, whether or not he communicates it to the person who authorizes that search. Here, again, the Government would undoubtedly contend that as long as a person lives on Government property, he subjects himself to search of the belongings he has there when the military authorities see fit. One difficulty in this is that in some instances the serviceman has no choice but to live on the military installation, although conceivably he could keep many of his belongings elsewhere. It is undeniable, however, that the military authorities possess extraordinary responsibilities with reference to the area under their control, and it is quite likely that any searches thought necessary by a commanding officer, or some official duly delegated by him, would be held legal regardless of probable cause.

*c. Necessity.* Whether on or off a military installation, there are a few situations

<sup>68</sup> When the squadron commander was out of the area for a few minutes, the acting adjutant was not the commanding officer for purposes of authorizing a search. See *United States v. Guest*, 11 CMR 758.

<sup>69</sup> This possibility is raised in *United States v. Swanson*, 3 USCMA 671, 14 CMR 89; *United States v. Davis*, 4 USCMA 577, 16 CMR 151. Since an "officer" is defined by the Uniform Code in Article 1(5) as being a *commissioned* officer, it is a little hard to see how a noncommissioned officer could be a commanding officer for purposes of authorizing searches under paragraph 152 of the Manual for Courts-Martial.

in which a search is permissible without a search warrant or specific authorization from any commanding officer. For instance, if there is probable cause to believe that a vehicle contains contraband or tools of crime, the investigator generally may conduct a search thereof. The justification for this is that the vehicle and its contents might be removed while he was seeking a search warrant.<sup>70</sup> Similarly on a principle of necessity, a search can be conducted if the subject of the search might be destroyed or concealed before the usual type of authorization could be secured. For example, stolen money suspected to be on a serviceman's person or among his belongings might be searched for on this basis, because of the likelihood that later on it could not be discovered.

Actually, the Court of Military Appeals has been fairly liberal in permitting this type of search.<sup>71</sup> However, the investigator should be conscious that his action will ultimately be minutely scrutinized to see if he could feasibly have gotten the conventional authorization for the search. An investigator who conducts a search of the accused's belongings on a military post without consulting an appropriate commanding officer, and then seeks to claim that his action was necessary, will certainly be asked why he did not simply forbid anyone from going near the belongings in question until he could contact the commander.<sup>72</sup>

*d. Military Custom.* According to the Manual for Courts-Martial, a search may permissibly be conducted in accordance with military custom. The trouble is in knowing exactly what falls within military custom. Probably, the exemplar of this type of search is the "shakedown inspection" to which a serviceman quickly becomes accustomed. It has also been held that the customs of the service permitted a staff officer to search a desk in his office, although the desk was used by a suspected subordinate.<sup>73</sup> However, as matters now stand, an investigator who seeks to rely on military custom as authority for a search is on very thin ice.<sup>74</sup>

*e. Consent.* In almost every instance the investigator should ask the accused's consent for the search regardless of whatever other authority he may rely on therefor. Both in civilian courts and courts-martial, limitations have been placed on what constitutes consent for purposes of a search. Simply not to protest when a police-

<sup>70</sup> Of course, if there were clearly no urgency for the search, the investigator would be under a duty to obtain some sort of specific authorization. The point is that an investigator does not have to sit idly by while a car drives off which, with probable cause, he thinks contains contraband or tools of crime. *United States v. Pagerie*, 15 CMR 864.

<sup>71</sup> *United States v. Swanson*, 3 USCMA 671, 14 CMR 89; *United States v. Davis*, 4 USCMA 577, 16 CMR 151; see also *United States v. Wilcher*, 4 USCMA 215, 15 CMR (concurring opinion of Judge Latimer).

<sup>72</sup> In *United States v. Gosnell*, 3 CMR 646, where the search was held illegal, the Board of Review pointed out that the area to be searched could easily have been blocked off to prevent destruction of goods while specific authority was obtained for the search. This same view was urged by Judge Brosman, dissenting in *United States v. Davis*, *supra*. In *United States v. Cascio*, 16 CMR 799, the Board of Review, impressed undoubtedly by the importance to the United States of the documents being searched for, and the possibility that they might be destroyed or transferred to enemy hands, concluded that the search without any specific authorization was reasonable.

<sup>73</sup> *United States v. Rhodes*, 3 USCMA 73, 11 CMR 73.

<sup>74</sup> For instance, it was held that military custom did not permit an Air Force Officer of the Day to authorize a search. *United States v. Gosnell*, 3 CMR 646.

man or investigator says that he is going to search is not consent.<sup>75</sup> Something more positive is required. It seems clear that Article 31 of the Uniform Code will not be construed to apply to requests that a suspect consent to a search of his belongings; therefore, the investigator is under no legal duty to warn the suspect that he does not have to consent, or tell him why the search is desired.<sup>76</sup> However, as a practical matter and especially if he has some other authority under which the search could probably be conducted anyway, the investigator will be wise to tell the suspect explicitly that he does not have to give his consent. The investigator must also remember, as emphasized earlier, that a warning must be given the suspect that he does not have to say anything regarding the offense suspected before any identification of the belongings to be searched is requested.<sup>77</sup>

#### SEARCHES OVERSEAS

A special problem is presented in connection with searches overseas. Certainly, to some extent the Fourth Amendment does not apply there, for no American courts can issue search warrants in a foreign country. Yet it would not be conceded that American investigators overseas could search wherever and whenever they pleased. On an American military installation overseas, the investigator can still proceed safely in a search if he obtains the consent of the suspect's commanding officer.<sup>78</sup> Also, according to the Manual for Courts-Martial, as interpreted by the Court of Military Appeals, the investigator can search any belongings off-post with the consent of the suspect's commanding officer. If a dependent is involved, the authorization of the commanding officer of the dependent's sponsor serviceman would suffice. For civilians accompanying the Armed Forces overseas or otherwise subject to military jurisdiction, it is not clear from what headquarters consent to the search must be sought; thus, the investigator would be wise to request consent from an authorized representative of the highest command in the area.<sup>79</sup> It might also be noted that, in connection with these off-post searches by military authorization, there has been no holding as to what, if anything, is necessary before a commanding officer can authorize the off-post search. And so, must the commanding officer have probable cause for permitting the search? Or must the investigator have such probable cause? Unlike the situation on a military installation, it is hard to contend that a commander is in

<sup>75</sup> *United States v. Guest*, 11 CMR 758; *Nueslein v. District of Columbia*, 115 F.2d 690; *Amos v. United States*, 255 US 313; *Waldron v. United States*, 219 F.2d 37 (CA DC Cir.); *United States v. Guerrina*, 126 F. Supp. 609 (ED Pa.); *United States v. Hei*, 126 F.Supp. 755 (SD Idaho). Compare *United States v. Wilcher*, 4 USCMA 215, 15 CMR 215. The possibility that the consent was caused by a belief of the person consenting that otherwise the investigator would try to get a search warrant was held not to make the consent any less binding. *United States v. Marrelli*, 4 USCMA 276, 15 CMR 276.

<sup>76</sup> The consent normally will be given verbally by the suspect, but it could scarcely be regarded as a "statement" by that suspect "regarding" any offense. That consent would not be evidence one way or another as to the suspect's guilt or innocence—although, as a result of the consent given and the ensuing search, all sorts of damaging evidence may be unearthed.

<sup>77</sup> *United States v. Taylor*, 5 USCMA 178, 17 CMR 178.

<sup>78</sup> *United States v. DeLeo*, 5 USCMA 148, 17 CMR 148.

<sup>79</sup> The area commander probably should issue a directive about the persons from whom authority is to be obtained for an off-post search.

any sense the owner or landlord, or the incumbent of great responsibilities, as to the off-post belongings or dwellings of servicemen assigned to his command. Until the matter is settled by a judicial decision, an investigator who has probable cause for a search definitely should communicate to the commanding officer, or the latter's authorized delegate, the reasons which have led to the request that a search be permitted off-post.

Another route may exist for obtaining authority to search off-post. Recently, the Court of Military Appeals considered the legality of a search of a soldier's apartment located off-post, the search being conducted by a French and an American investigator. The Frenchman was acting under a commission rogatoire, a type of French judicial process roughly analogous to a search warrant, though giving much wider power to the investigator. Also, there was probable cause for the search. So far as can be ascertained from the Court's opinion in the case, this was sufficient to legalize the search and make its results admissible in a court-martial.<sup>80</sup> Accordingly, a military investigator overseas who has probable cause for a search and can get some sort of process authorizing the search from the Courts of the foreign power concerned is on firm footing.<sup>81</sup> But even in this type of situation, he will not be amiss if he also contacts the suspect's commanding officer to request authority for the search.

What if there is no probable cause of the sort that would suffice for issuance of a search warrant, and yet the American investigator obtains proper authorization from the courts of the foreign country to conduct a search? Will the products of the search be admissible in a court-martial? It can be argued that laws should be given no effect outside the country which has enacted those laws, and that accordingly American law is not involved as to searches which occur on foreign soil under the control of some other Government.<sup>82</sup> Under this approach, if the search is good under the foreign law, it is good insofar as a court-martial is concerned. This argument is particularly strong as to the serviceman or other person who voluntarily chooses to live off-post, when quarters would be available to him there, and who, therefore, may be considered willingly to have subjected himself to the rules of law of the foreign country involved.<sup>83</sup> On the other hand, it cannot be forgotten that, regardless of the foreign law, the court-martial is a creature of American military authority. An equally significant factor is that generally reliance on foreign process is unnecessary since the consent of the accused's commanding officer could be sought as an alternative basis for conducting the search. The uncertainty of the law on this point suggests that the military investigator may want to utilize some other approach, like (a) trying to obtain probable cause for a search; (b) seeking the consent to the search of an American commander; (c) or turning the investigation over to foreign investigators.

<sup>80</sup> *United States v. DeLeo*, *supra*.

<sup>81</sup> *Idem*. See also *United States v. Whitler*, 5 CMR 468 (search in England); *United States v. Trolinger*, 5 CMR 444 (in Korea).

<sup>82</sup> In *Ross v. McIntyre*, 140 US 453, 464, the Supreme Court commented: "By the constitution a government is ordained and established 'for the United States of America', and not for countries outside of their limits. . . . The constitution can have no operation in a foreign country." Of course, later cases leave the validity of this pronouncement very much in doubt.

<sup>83</sup> Compare *United States v. DeLeo*, *supra*.

## RELATIONSHIP TO NON-MILITARY INVESTIGATIVE AGENCIES

Mention of the third alternative leads ultimately to the question of the usefulness of evidence obtained by persons other than military investigators. If a private person conducts a search without any type of authorization and turns the results of the search over to military investigators, that evidence is admissible in a court-martial. It makes no difference that the searchers are servicemen if they were not conducting a search in behalf of the United States.<sup>84</sup> For example, if Vergil Victim has his wallet stolen and independently searches his barracks to locate it, the evidence he secures will be admissible even though he may have been conducting an unlawful search and improperly invading other person's property rights. The Government is only held responsible for the acts of persons seeking to act as its agents; and Victim in the case supposed was acting primarily on his own behalf.

A Federal investigator connected with some non-military agency, like the FBI or the Secret Service, would be subject to the same standards as the military investigator if the fruits of a search conducted by him were to be admissible in a court-martial.<sup>85</sup> However, evidence obtained in a search conducted solely by State or municipal officials is admissible in a court-martial even though the same search would have been grossly illegal if conducted by Federal investigators.<sup>86</sup> Similarly, the methods of search used by foreign investigators who turn their evidence over to the American Armed Forces is immaterial to the admissibility of that evidence. The only limitation would be in instances where surrounding circumstances revealed that the search by the state, municipal, or foreign investigators was actually undertaken at the instigation of and for the primary benefit of the Federal investigators.

When State officials are conducting a search and a Federal investigator goes along, he is running a risk that any evidence obtained will be inadmissible, either in a court-martial or a Federal civilian court, unless the State authorities are acting under a warrant or other authorization that would be valid as a basis for a Federal search. This principle may apply even if the Federal agent does not participate actively in the search. Overseas a less rigid standard will be invoked. Frequently, there the American investigator is under a duty to accompany the foreign officials in investigations involving American personnel. For instance, the NATO Status-of-Forces Treaty provides that:

"The authorities of the receiving and sending States shall assist each other in the carrying out of all necessary investigation into offenses, and in the collection and production of evidence, including the seizure and, in proper cases, the handing over of objects connected with an offense."<sup>87</sup>

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<sup>84</sup> *United States v. Volante*, 4 USCMA 689, 16 CMR 263.

<sup>85</sup> *United States v. Byars*, 273 US 28; *Lustig v. United States*, 338 US 74. As the Supreme Court said in the latter instance, "A search is a search by a Federal official if he had a hand in it; it is not a search by a Federal official if evidence secured by State authorities is turned over to the Federal authorities on a silver platter." *Id.* at 78-9.

<sup>86</sup> *United States v. DeLeo*, *supra*; *United States v. Haywood*, 208 F.2d 156 (CA 7th Cir.); *Johnson v. United States*, 207 F.2d 314 (CA 5th Cir.); *Jones v. United States*, 217 F.2d 381 (CA 8th Cir.).

<sup>87</sup> Article VII, Section 6(a).

Also, it is usually desirable to have an American investigator present to assure that the foreign investigators treat the servicemen fairly.

Because of these circumstances the Court of Military Appeals is less willing to hold that, merely because an American investigator is present, the search conducted overseas must be judged as to legality by American standards.<sup>88</sup> If then, in the search, the fruits or tools turn up of a crime in which the American investigator is interested, he can seize them for evidence before a court-martial. Of course, this would not be true if it were shown that the search was really instigated largely by American authorities and that the foreign investigators were simply trying to aid our Armed Forces.<sup>89</sup> Similarly, the search would be judged by American standards if the American investigator was running his own investigation of offenses in which he was interested, whether or not the foreign officials were also concerned with those offenses.

With reference to the relationship between military investigations and those conducted by other investigative agencies, it should be mentioned that evidence that would be inadmissible in a court-martial might be admissible in some other court—just as the converse holds true. For example, many State courts will receive evidence regardless of whether it was secured through an illegal search or through wire taps. Similarly a statement obtained without giving the suspect a warning as required by Article 31 of the Uniform Code of Military Justice would be admitted in any State court; and it is arguable that it would even be received in evidence in a Federal civilian court. This being so, various investigative agencies can often interchange evidence to the ultimate detriment of a suspect. If, however, the interchange becomes so formalized as to reveal a veritable plot by investigative agencies to get around rules that would limit them, and have a different agency do their “dirty work” and turn over the products, the results of the interchange will be inadmissible—certainly in Federal courts, including courts-martial.

#### POSSE COMITATUS ACT

As to the relation between civilian and military investigators, reference must also be made to the Posse Comitatus Act.<sup>90</sup> Under this statute, military personnel cannot be used in executing State laws. For this reason The Judge Advocate General of the Army has even discouraged military policemen from cruising around in “prowl” cars

<sup>88</sup> *United States v. DeLeo*, 5 USCMA 148, 17 CMR 148.

<sup>89</sup> Thus, where a Korean detective searched at the request of American investigators, it became an American search. *United States v. Cascio*, 16 CMR 799.

<sup>90</sup> 10 USC § 15. “It shall not be lawful to employ any part of the Army of the United States, as a posse comitatus, or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said forces may be expressly authorized by the Constitution or by act of Congress.” Among the few instances when troops can be used to enforce the laws are: When the President upon a State’s request intervenes with Federal troops to suppress an insurrection against that State; when it is impracticable in the President’s judgment to enforce Federal laws by the ordinary course of judicial proceedings; to protect civil rights of citizens within a State; and to protect Government property or other property or premises important for national defense. Alaska is not covered by the Posse Comitatus Act. The use of Federal troops to execute the laws in Hawaii, Puerto Rico, the Virgin Islands, and American possessions is affected by various statutes and directives. For a discussion of this subject see Army Field Manual 10-15, dated April 1952, Chapter 1; Air Force Military Affairs Handbook, Part IV, Chapter 2, dated October 1954.

with State or local law enforcement officials.<sup>91</sup> Many acts, however, constitute offenses under both State law and the Uniform Code of Military Justice. There is no doubt that State and military investigators can work hand-in-hand to determine whether or not an offense was committed by someone subject to the Uniform Code. Therefore, if service personnel are among the suspects, military detection facilities can properly be made available to civilian authorities for a joint investigation.<sup>92</sup> Of course, the Posse Comitatus Act in no way limits military investigators in interviewing any civilian witness about possible violations of the Uniform Code of Military Justice.

If foreign rather than State investigators are involved, the Posse Comitatus Act does not enter the picture, for it is limited in applicability to the United States.<sup>93</sup> Instead of being restricted in their cooperation with foreign police officials, American military investigators are, under the NATO Status-Of-Forces Treaty, commanded to aid the foreign power in carrying out investigations, collecting evidence, and making arrests.<sup>94</sup>

#### ELECTRONIC DEVICES AND WIRE TAPPING

Regardless of where an investigation is being conducted and, who, if anyone, he is cooperating with in it, the military investigator will face several problems posed by the use of electronic detection devices. If he uses a concealed microphone and a recorder to pick up a suspect's words without the latter's knowledge, he can generally rest assured that the evidence obtained will be admissible.<sup>95</sup> However, there may be difficulty if the microphone has been slipped into the suspect's room secretly; and in such a case words broadcast within the room probably cannot be testified to before a court-martial. For this reason the military investigator will try to avoid an "entry" into the suspect's room. For instance, if the suspect has a hotel room, the sleuth will, if possible, try to hear through the wall of an adjoining room, instead of slipping a microphone into the room of the suspect himself. By avoiding entry into the room of the suspect, he can avoid any later difficulties in testifying to what was overheard.

If the suspect is living in a barracks or in some other place on a military installation, it is unclear whether a commander can legally authorize the placing of microphones or other devices within the quarters to overhear conversations there. The Manual for Courts-Martial, as has been discussed, does permit the commander to order a search of property on a military post. However, there is nothing in the Manual which deals with electronic detection apparatus and the conditions under which it can be installed.

<sup>91</sup> 2 Digest of Opinions of the Judge Advocates General, Army, § 81.5.

<sup>92</sup> For instance, if there is a serviceman among the suspects, it would seem permissible for an Army lie detector expert to test not only this suspect but also civilian suspects in order to determine whether the serviceman had violated the Uniform Code of Military Justice. See generally 2 and 3 Dig. Ops. JAGAF, Army § 81.5.

<sup>93</sup> This appears to have been the Court's conclusion in *Chandler v. United States*, 171 F.2d 921 (CA 1st Cir.), cert. denied 336 US 918. Compare *D'Aquino v. United States*, 192 F.2d 338 (CA 9th Cir.), cert. denied, 343 US 935; *Gillars v. United States*, 182 F. 2d 962 (CA DC Cir.). The reasoning in the *Chandler* case is especially convincing.

<sup>94</sup> Article VII. See also *United States v. DeLeo*, 5 USCMA 158, footnote 2, 17 CMR 148.

<sup>95</sup> *On Lee v. United States*, 343 US 747; *Goldman v. United States*, 316 US 129.

Wire tapping has recently made the headlines. This detection method is illegal not because of the Constitution—as was once argued—but because of the Supreme Court's interpretation of Section 605 of the Federal Communications Act.<sup>96</sup> Neither in a court-martial nor a Federal civilian court will wire tap evidence be received—although State courts are free to adopt a different rule.<sup>97</sup> For some time there have been proposals to change the Communications Act either to clear up certain ambiguities caused by its wording or to permit wire tapping—at least in some cases—when done by Federal law enforcement agents. Quite possibly though the law will be left intact.

Under the wording of the present law the Department of Justice has maintained that it is all right to tap a call so long as the results of the tap are not “divulged.” What would be “divulgence” under this interpretation is unsure; but apparently the Department feels there is no divulgence when the information learned is kept within the Federal Bureau of Investigation. The Bureau now makes taps if the Attorney General approves.

Whether the Court of Military Appeals would share this view of the Department of Justice remains to be seen. Therefore, the military investigator cannot be sure that he will be safe in wire tapping so long as he does not disclose what he has learned. However, the Court has come to certain conclusions which give the military sleuth more leeway. For one thing, it has held that the Communications Act will normally not prevent wire tapping overseas.<sup>98</sup> Therefore, an investigator outside the United States, its territories, and possessions is free to tap wires unless some military directive forbids this. Also, the Court has ruled that the Act does not apply to a self-contained military communications system,<sup>99</sup> and that a military investigator who wishes to tap such a system will be limited only by any military regulations that might be involved. Thus, if a call is from one point on a military system—perhaps a Base or post telephone system—to another point on the same system, the investigator is free from the restrictions of the Communications Act. On the other hand, if the call went to a phone located on a commercial exchange, probably a wire tap would be illegal—no matter at what point on the circuit it had been installed.

If A talks to B by telephone and B has permitted a law enforcement agent to listen in over a phone extension, there has been no wire tapping, says the Court of Military Appeals.<sup>100</sup> However, whether A calls B from a pay phone or a phone in his house, agents would not be allowed to intercept the call and disclose what was said. It is unsettled how much authority agents have to intercept obscene or threatening phone calls from unknown callers.<sup>101</sup>

<sup>96</sup> 47 USC § 605. *Nardone v. United States*, 302 US 379; *Olmstead v. United States*, 277 US 438. See also *Manual for Courts-Martial*, paragraph 152. Even tapping of a purely intrastate call is illegal. *Weiss v. United States*, 308 US 321.

<sup>97</sup> *Schwartz v. Texas*, 344 US 199. This means that a State prosecution may be possible for certain offenses when a Federal civilian or military prosecution might fail for want of admissible evidence.

<sup>98</sup> *United States v. Gopaulsingh*, 5 USCMA 772, 19 CMR 68. Compare *United States v. Bowman* 260 US 94.

<sup>99</sup> *United States v. Noce*, 5 USCMA 715, 19 CMR 11.

<sup>100</sup> *United States v. DeLeo*, 5 USCMA 747, 19 CMR 43.

<sup>101</sup> See *United States v. Noce*, *supra*, concurring opinion.

"FRUIT OF THE POISONOUS TREE"

A wire tap case helped develop a doctrine which has been applied to other problems of criminal investigation, and of which the military investigator, like his brother in civilian life, must be aware in making his inquiry. In that case the Supreme Court held that information obtained through wire tap leads was the "fruit of the poisonous tree" and so could not be used as evidence.<sup>102</sup> In an earlier decision the Court had ruled that knowledge obtained from an illegal search and seizure could not be made the basis for a later effort to seek evidence through court process.<sup>103</sup> Similarly, the Manual for Courts-Martial provides that all evidence secured through information supplied by wire tapping or illegal searches and seizures is inadmissible.<sup>104</sup> Therefore, evidence obtained by a lawful search cannot be used if that search was conducted because of information received through a previous illegal search or through wire tapping.

There has been some question about the use in evidence of a confession that follows close on the heels of an illegal search or illegal wire tapping. Here the problem parallels that which exists when a clearly involuntary confession is followed soon after by a confession that the Government seeks to use against an accused. In such instances, an investigator can be sure that defense counsel later will claim that any confession was made by the suspect because of the previous illegal search, wire tapping, or involuntary confession. Clearly, under some circumstances, a majority of the Court of Military Appeals will accept this argument. In fact, they will sometimes accept it although the investigator specifically told the suspect, as required by Article 31 of the Uniform Code, that the latter had an absolute right to remain silent and that anything he said could be used against him.<sup>105</sup> As a practical matter, there is only one relatively sure antidote for a "fruit of the poisonous tree" contention. That remedy involves warning the suspect specifically that the evidence previously obtained may not be usable in a court-martial and that any statement he makes should not be influenced by what has gone before, but only by his desire to tell the truth and unburden his conscience.

What if incriminating evidence is secured by reason of a suspect's involuntary confession? Is only the confession inadmissible, or will its fruit also be excluded from evidence? For instance, a murder suspect under the pressure of the "third degree" might tell where a death weapon is located. This statement by him could not be

<sup>102</sup> *Nardone v. United States*, 308 US 338, at 341. Compare *United States v. Coplon*, 185 F.2d 629 (CA 2d Cir.).

<sup>103</sup> Documents illegally seized were photographed and copied, and, after they had been returned to the defendant under court order, the Government tried to subpoena them. In holding that this was improper, the Supreme Court commented: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed." *Silverthorne Lumber Co. v. United States*, 251 US 385, 392.

<sup>104</sup> Manual for Courts-Martial, paragraph 152.

<sup>105</sup> See *United States v. DeLeo*, 5 USCNA 148, 17 CMR 148 (especially the dissent of Judge Latimer); *United States v. Dandaneau*, 5 USCMA 462, 18 CMR 86 (dissent of Judge Brosman).

introduced in evidence, but could the prosecution use as evidence against him the weapon itself, which perhaps contains the suspect's fingerprints? The Manual for Courts-Martial answers that, "Although a confession or admission may be inadmissible because it was not voluntarily made, nevertheless, the circumstance that it furnished information which led to the discovery of pertinent facts will not be a reason for excluding evidence of such pertinent facts."<sup>106</sup> In one case the Court of Military Appeals appears to have accepted this provision of the Manual.<sup>107</sup> However, there was no discussion of the validity of that paragraph in light of the decisions of the Supreme Court in the "poisonous tree" situations.

Thus the issue still seems to be open. The argument against the validity of this Manual provision is, of course, that it is contrary to the spirit of Article 31. That Article, it is contended, tries to protect servicemen from being forced to make an unwilling confession. However, military investigators would have much more temptation to ignore the Article if they knew that—even if any confession they got could not be used in a court-martial—there would be nothing wrong with other evidence learned of by means of the confession. The opposite argument is the familiar one that the purpose of the law is primarily to punish guilty offenders, rather than to limit over-zealous investigators. As matters now stand, the military investigator who obtains a statement which, for one reason or another may not be usable in evidence, should try to obtain from the suspect as many leads as possible to other evidence. That evidence may be sufficient to convict without the statement. In short, the Manual for Courts-Martial gives the investigator a right to use a confession that might not stand up in court as a means to obtain evidence that will be admissible before a court-martial. Unless and until this Manual provision is declared invalid, the military investigator will have fallen short when he merely stops with a suspect's confession, if there is any chance whatsoever that the confession would not be received in court.

#### SUMMARY

The military investigator has some limitations that a civilian investigator would not be subject to. For one thing, before interrogation he is required to give a suspect a special warning of the right to remain silent about the offense. However, the investigator has some powers that the civilian would lack. For instance, he can conduct searches on a military post with only the consent of an appropriate commanding officer, and without going into court for a search warrant. He can occasionally use military orders to obtain information or evidence. Overseas he is free of the prohibition on wire tapping. Often he will be much more immune than a civilian investigator to intervention or interference by lawyers for the suspect. In the present state of military law, probably the tools of the investigator, if used with judgment, are not inadequate for the difficult detection problems that may confront him.

<sup>106</sup> Paragraph 140a, page 251.

<sup>107</sup> *United States v. Fair and Boyce*, 2 USCMA 521, 529, 10 CMR 19.