SMU | Dedman School of Law

SMU Law Review

Volume 30 | Issue 3 Article 8

January 1976

# Search without Probably Cause in the Military - A Constitutional Question

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required in cases of property deprivation,[64] while *Perales* supports the theory that the Social Security Agency is run effectively.[65] The three cases were utilized to stress SSA capacities for efficiency and the importance of such efficiency under a narrow balancing test.[66] Thus, the decision in *Eldridge* was based on a limited view of due process, combined with an obvious satisfaction with SSA procedure.

### III. CONCLUSION

*Eldridge* denotes reliance on the narrow view of procedural due process found in *Arnett* and *Mitchell*, and casts new light on *Goldberg* by emphasizing the fact that only *Goldberg* has required an evidentiary pre-termination hearing in order to satisfy due process requirements. Whether this signals a narrowing of the requirement of pre-termination hearings in all situations is not clear. The adoption of the reasoning found in prior Social Security benefit cases, coupled with the emphasis placed upon the balancing approach, makes it logical to conclude that *Eldridge* delineates due process requirements only with respect to its particular fact situation. The dissimilarity of the *Eldridge* and *Goldberg* opinions, despite the similarity of their respective situations, creates speculation as to what the Court's approach to due process will be in the future.[67]

*Terri J. Lacy*

## Search Without Probable Cause in the Military—A Constitutional Question

Enlisted members of the Army's European Command alleged in a class action for declaratory and injunctive relief that various features of the drug abuse prevention plan expounded in USAREUR Circular 600-85[1] and adopted by the Command were unconstitutional. The plan included warrantless drug inspections without probable cause and provided that information obtained through its procedures could be used as a basis for further disciplinary actions. The district court held that the plan offended due process and that military necessity did not warrant unconstitutional intru-

64. *See* notes 21, 25 *supra* and accompanying text.
65. *See* note 31 *supra* and accompanying text.
66. 96 S. Ct. at 909-10, 47 L. Ed. 2d at 41-42.
67. The substantial difference in the Court's approach in *Goldberg* and *Eldridge* may be due to membership changes on the Supreme Court from 1970 to 1976. *See generally* Cord, *Neo-Incorporation: The Burger Court and the Due Process Clause of the Fourteenth Amendment*, 44 FORD. L. REV. 215 (1975), and Yarbrough, *The Burger Court and Freedom of Expression*, 33 WASH. & LEE L. REV. 37 (1976), for discussions of the Burger Court's shift in ideology from that of the Warren Court.

1. USAREUR Circular 600-85, PERSONNEL GENERAL, USAREUR Alcohol and Drug Abuse Prevention and Control Program (short title: USAREUR AADAPCP) (Sept. 10, 1973).

sions into the privacy of a soldier.[2] The Army appealed. *Held, reversed*: In light of the exigencies of military life all aspects of the drug prevention plan are constitutional. *Committee for GI Rights v. Callaway*, 518 F.2d 466 (D.C. Cir. 1975).

## I. MILITARY NECESSITY VERSUS PRIVATE INTEREST

Under military law servicemen are entitled to all the constitutional guarantees.[3] These rights, however, are viewed in light of the exigencies of military circumstances predicated upon the policy that the rights of persons in the armed forces must be conditioned upon certain overriding demands of discipline and duty necessary to maintain a ready, fighting force.[4] An analysis of what constitutional due process may require in the military must, therefore, include a determination of both the nature of the governmental function and the private interests involved.

The fourth amendment declares the right of an individual to be protected from unreasonable searches and seizures. Reasonableness is determined on a case by case basis,[5] and, although subject to close judicial scrutiny, warrantless searches within carefully defined limits have been upheld.[6] The military allows warrantless searches by order of the commanding officer provided that it can be shown that such order is based on probable cause.[7] Probable cause has been ruled a prerequisite for all searches, whether general or limited to persons suspected of the offense.[8]

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2. Committee for G.I. Rights v. Callaway, 370 F. Supp. 934 (D.D.C. 1974).

3. United States v. Jacoby, 11 U.S.C.M.A. 428, 430-31, 29 C.M.R. 244, 246-47 (1960). Some guarantees, however, are expressly inapplicable to the military, such as the fifth amendment right to a grand jury indictment.

4. In Burns v. Wilson, 346 U.S. 137 (1953), the court held that the express purpose of the armed forces is to fight or to be ready to fight. This calls for an organization built upon strict obedience and discipline. The rules which govern such an organization must be conditioned by this fundamental need. The framers of the Constitution entrusted Congress with the power to make specific rules and regulations to govern the military. These rules reflect the underlying difference between military and civilian life. *See also* Toth v. Quarles, 350 U.S. 11, 17 (1955); Orloff v. Willoughby, 345 U.S. 83, 94 (1953).

5. Terry v. Ohio, 392 U.S. 1, 15 (1968); Schmerber v. California, 384 U.S. 757, 768 (1966); Go-Cart Importing Co. v. United States, 282 U.S. 344, 357 (1931).

6. In United States v. Skipwith, 482 F.2d 1272 (5th Cir. 1973), cocaine was discovered on defendant's person pursuant to a warrantless search based on mere suspicion that defendant possessed a weapon. The court, holding the search legal, based its determination of reasonableness on three criteria: (1) public necessity, (2) efficacy of search, and (3) degree of intrusion. The defendant was in the boarding area of an airport. The magnitude of the perils created by air piracy coupled with the fact that defendant knew such searches might take place were held sufficient to make this search and seizure reasonable. The fact that the authorities were looking for a weapon and not cocaine was irrelevant since the search itself was legal. *See also* Frank v. Maryland, 359 U.S. 360 (1959), in which the Court upheld a conviction of a homeowner who refused to permit a municipal health inspector to enter his premises without a search warrant. In a similar fact situation, however, the Court held that the defendant had a right to insist on a search warrant in a non-emergency situation. *See* Camara v. Municipal Court, 387 U.S. 523 (1967).

7. United States v. Davenport, 14 U.S.C.M.A. 152, 33 C.M.R. 364 (1963) (defendant's car was searched by order of the commanding officer and the case was remanded for failure to show that the order was based on probable cause). *See also* United States v. Martinez, 16 U.S.C.M.A. 40, 42, 36 C.M.R. 196, 198 (1966); United States v. Brown, 10 U.S.C.M.A. 482, 487, 28 C.M.R. 48, 53 (1959).

8. *See* United States v. Lange, 15 U.S.C.M.A. 486, 35 C.M.R. 458 (1965) (a

There have been circumstances, however, when a more flexible standard of "reasonable cause to believe" has replaced "probable cause" as a ground for a search and seizure.[9] The common thread among military cases applying the "reasonable cause to believe" standard is that maintenance of security and discipline may necessitate a search without probable cause.[10] The "reasonable cause to believe" standard is applied, therefore, if a balancing of the interests involved shows that the need for military security and discipline outweighs the individual rights which the fourth amendment seeks to protect.[11]

In *Warden v. Hayden*[12] the Supreme Court recognized that the principal object of the fourth amendment is the protection of privacy rather than property.[13] An English decision of 1765, upon which the framers of the Bill of Rights based the fourth amendment,[14] stated that "[i]t is not the breaking of doors and rummaging of his drawers that constitutes the essence of the offense, it is the invasion of his indefeasible right to personal security."[15] In *Katz v. United States*[16] Justice Harlan found that the fourth amendment protection hinged on two requirements: (1) actual subjective expectation of privacy by the individual, and (2) that this expectation be recognized as reasonable by society under this standard.[17] Applying *Katz* to a military context, one commentator has found four criteria by which to judge the extent of the expectation of privacy of a soldier living in a barracks.[18] These are: (1) the degree of privacy afforded by the structural characteristics of the barracks; (2) the soldier's subjective belief that a particular place is private; (3) the soldier's right to exclusive use of a particular area; and (4) the

commanding officer's shakedown search for the fruits of a crime he merely suspected had been committed was unreasonable and illegal); United States v. Gebhart, 10 U.S.C.M.A. 606, 28 C.M.R. 172 (1959) (shakedown inspection of a barracks after a camera was reported stolen held to be unconstitutional).

9. For examples of constitutional searches not based on probable cause see United States v. Collins, 349 F.2d 863, 867 (2d Cir. 1965) (search of work area of customs agent by employers); United States v. Grisby, 335 F.2d 652, 655 (4th Cir. 1964) (took note of military picket's search of living quarters); Moore v. The Student Affairs Comm. of Troy State Univ., 284 F. Supp. 725, 730 (M.D. Ala. 1968) (search of dormitory rooms by college administration).

10. *See, e.g.*, Best v. United States, 184 F.2d 131 (1st Cir. 1950) (maintenance of security and discipline of United States Armed Forces based outside the fifty states may allow lessening of the constitutional requirements of probable cause).

11. Richardson v. Zuppman, 81 F. Supp. 809 (M.D. Pa. 1949).

12. 387 U.S. 294 (1967).

13. *Id.* at 304.

14. Frank v. Maryland, 359 U.S. 360, 363 (1959), used as authority the case of Entick v. Carrington, 95 Eng. Rep. 807 (K.B. 1765). *See also* Olmstead v. United States, 277 U.S. 438, 474 (1928).

15. Entick v. Carrington, 95 Eng. Rep. 807 (K.B. 1765).

16. 389 U.S. 347 (1967).

17. *Id.* at 361 (Harlan, J., concurring). In this case it was not the seizure of property but rather the exploitation of a recorded conversation obtained while defendant was talking on the phone in a public phone booth that was held to be unconstitutional under the fourth amendment. See also Jones v. United States, 362 U.S. 257 (1960); Lustig v. United States, 338 U.S. 74 (1949); Gambino v. United States, 275 U.S. 310 (1927); Carroll v. United States, 267 U.S. 132 (1925).

18. Eggers, *The Specificity Required in Military Search Warrants*, 61 MILITARY L. REV. 1, 36-37 (1975). Eggers admits that some amount of privacy is necessarily given up by the soldier upon entering the military, and that this is known by the soldier and expected by society. Eggers feels, however, that even in a barracks situation, and certainly in private rooms, some reasonable amount of privacy is constitutionally guaranteed the individual soldier.

degree to which society honors the intimacy or privacy of an activity normally carried on in such a place.[19]

A right of privacy may also be founded in a meshing of the fourth amendment freedom with the fifth amendment guarantee that a person cannot be compelled to be a witness against himself. The United States Supreme Court voiced such an opinion in *Boyd v. United States*,[20] and the principle has evolved from later cases that the two amendments work in harmony to form a comprehensive right of privacy.[21] The comprehensive right of privacy under this principle has been interpreted to encompass a right of reasonable control over personal information.[22]

The method used to insure protection of the right of privacy is the exclusionary rule.[23] In *United States v. Calandra*[24] the Court held that the exclusionary rule is a judicially created remedy and is designed as a safeguard for the fourth amendment through its deterrent effect upon unlawful police conduct rather than as redress for the party aggrieved.[25] Commentators have submitted, however, that the utility of the exclusionary rule is not exhausted by its power to deter; they suggest the rule is also a means of protecting an individual's privacy and right against self-incrimination.[26]

## II. COMMITTEE FOR GI RIGHTS V. CALLAWAY

USAREUR Circular 600-85 was designed primarily to rehabilitate members of the Armed Forces with problems attributable to alcohol and other

19. These criteria were adopted in United States v. Torres, 22 U.S.C.M.A. 96, 46 C.M.R. 96 (1973). The court of military appeals stated that the test to be applied in determining capacity to claim the protection of the fourth amendment is whether or not the particular locale is one in which there is a reasonable expectation of freedom from governmental intrusion. *See also* United States v. Adams, 5 U.S.C.M.A. 563, 570, 18 C.M.R. 187, 194 (1955) (soldier's abode for purposes of trespass in tort is place where he bunks and keeps his few private possessions).

20. 116 U.S. 616 (1886).

21. *See* Frank v. Maryland, 359 U.S. 360, 362 (1959); Stefanelli v. Minard, 342 U.S. 117, 119 (1951); Wolf v. Colorado, 338 U.S. 25, 27 (1949); Olmstead v. United States, 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting).

22. Note, *From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection*, 43 N.Y.U.L. REV. 968, 978 (1968); *see* Fried, *Privacy*, 77 YALE L.J. 475, 482 (1968). An element of control of personal information has always been analyzed as an indispensable component of all interpersonal relationships. It is, therefore, incumbent on society that its rules protect this control to some extent. The term "information" is being used here in its broadest sense. Material things may represent information in that they may be used as evidence or communicated to another.

23. This doctrine prohibits in a judicial proceeding the use of evidence obtained by methods which are unreasonable under the fourth amendment. Wolf v. Colorado, 338 U.S. 25 (1949); Weeks v. United States, 232 U.S. 383 (1914); United States v. Skipwith, 482 F.2d 1272 (5th Cir. 1973); *see* note 14 *supra* and accompanying text.

24. 414 U.S. 338 (1974).

25. *Id. See also* Elkins v. United States, 364 U.S. 206, 217 (1960); United States v. Skipwith, 482 F.2d 1272, 1279 (5th Cir. 1973).

26. The distinguishing characteristic of the fourth amendment is its limitation on the means by which the Government can acquire evidence. The exclusionary rule is a tool through which this limitation can be exercised. McKay, *The Right of Privacy: Emanations and Intimations*, 64 MICH. L. REV. 259, 278 (1965). The limitations are necessary to protect the constitutional guarantee of privacy and the right against self-incrimination. Note, *From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection*, 43 N.Y.U.L. REV. 968 (1968). It follows, therefore, that the utility of the exclusionary rule is not exhausted by its power to deter, but it has a further purpose of protecting an individual's right of privacy, which means his right to control information about himself.

drugs and to eliminate from the service those who could not be restored in a reasonable period of time.[27] Nevertheless, any evidence obtained could be used in subsequent disciplinary actions should the facts and circumstances indicate further violations of army regulations.[28] If rehabilitation failed, a confirmed drug user could be separated from the service under other than honorable conditions, and military authorities could advise prospective government or civilian employees of the soldier's drug involvement.[29] The record of a soldier's drug abuse could also be considered by the Army in connection with future personnel action, including duty assignments and promotions.[30]

The district court found serious constitutional infirmities in the inspections for drugs called for in the USAREUR Circular 600-85.[31] The court specifically held that warrantless drug inspections without a showing of probable cause were not justified by military necessity[32] since the use of information gained by these inspections as a basis for punitive sanctions violated the soldier's constitutional rights under the fourth amendment.[33] The district court stated that the Army could continue conducting drug inspections and requiring participation in a drug testing and rehabilitation program without probable cause only if evidence obtained through these procedures was not used as a basis for any punitive action.

Reversing the district court, the court of appeals relied heavily on such cases as *Parker v. Levy*[34] and *Carlson v. Schlesinger*[35] to support its underlying premise that the character of the military requires that military individuals be accorded constitutional protections different in application from those

27. The circular categorizes drug abusers as (1) suspected, (2) identified, (3) urinalysis positive, and (4) medically confirmed. A person is classified as a "suspected" abuser if he has been under the influence of drugs or has shown excessive use of alcohol. A soldier is classified as an "identified" abuser if he illegally possesses controlled substances or paraphernalia. Evidence of such illegal possession may be obtained by an inspection ordered by the commanding officer. An inspection may be for the express purpose of seeking out contraband and need not be based on probable cause. The circular provides that the individual should be present during an inspection, if possible, and treated with dignity. However, the search may be extremely thorough; military police and drug detector dogs can be used.

Once a soldier is classified as an "identified" abuser he is immediately subjected to a urinalysis test and referred to the Community Drug and Alcohol Assistance Center (CDAAC) to be medically confirmed, treated, and rehabilitated, or discharged if rehabilitation is unsuccessful. Rehabilitation may be conducted in a medical treatment facility or through such administrative "tools" as withdrawal of the privilege to wear civilian clothing, own a driver's license, or drink alcohol. Segregation and/or a requirement that an abuser keep his door unlocked when his room is occupied may also be imposed. Medically confirmed abusers are also subject to 300-day follow-ups during which unannounced urinalysis tests will be required. 518 F.2d at 468-69.

28. *Id.* at 470.

29. *Id.*

30. *Id.*

31. Committee for G.I. Rights v. Callaway, 370 F. Supp. 934, 939 (D.D.C. 1974).

32. *Id.*

33. *Id.* at 941.

34. 417 U.S. 733 (1974). The different character of the military and of the military mission requires a different application of constitutional protections.

35. 511 F.2d 1327 (D.C. Cir. 1975). This case involved a soldier's rights under the first amendment to distribute antiwar literature in the combat zone of Viet Nam. It was held that the greater the Government's interests, the greater is its right to prescribe reasonable regulations. In deciding for the Government the court noted that the governmental interest is manifest in the context of a military combat zone.

given civilians.[36] Thus, in determining the reasonableness of an intrusion the special exigencies of military needs help tip the balance in favor of constitutionality.[37]

In examining the search and seizure provisions of the circular, the court found that military needs outweighed individual liberties.[38] The court noted that widespread use of drugs hampered military effectiveness, and that the primary purpose of the drug inspections was to make disfunctional servicemen effective soldiers.[39] Furthermore, since the expectation of privacy is lower in the military and the unannounced drug inspections were the most effective means of identifying drug abusers, the searches were held constitutional.[40]

The court disagreed, however, with the lower court's finding that information obtained through such procedures could not constitutionally be used for any non-rehabilitative purpose.[41] Following strong precedent,[42] the court ruled that since the exclusionary rule is grounded on a policy of deterrence, it is applicable only when the search itself is unreasonable.[43] Evidence obtained by these procedures could, therefore, be used against the soldier for any unrelated purpose nothwithstanding the fact that the drug inspection program was supposedly for rehabilitative purposes only.[44]

## III. CONCLUSION

The test for finding unconstitutional infringement of fourth and fifth amendment guarantees involves a balancing of interests. Thus, when the need for governmental intrusions outweighs the value of individual rights, procedures necessary to assure that a search is reasonable may be relaxed. There is no doubt that these procedures are relaxed in the military context.

*Callaway* demonstrates that courts must in each case consciously balance the interests involved. In *Callaway* the court takes cognizance of the interests which the Government seeks to maintain, but spends no time discussing losses which befall the plaintiff class. The court fails to deal with the possibility that the searches would probably be unconstitutional if conducted for purely punitive reasons and that a search may be constitutional for one

36. This is not discriminatory to soldiers. The Supreme Court has held that embedded in our traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the grounds that it may conceivably be applied unconstitutionally to others in situations not before the court. Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973).

37. Carolson v. Schlesinger, 511 F.2d 1327 (D.C. Cir. 1975).

38. 518 F.2d at 466.

39. *Id.* at 476.

40. *See also* Goldberg v. Kelly, 397 U.S. 254, 263 (1970); Hagopian v. Knowlton, 470 F.2d 201, 207 (2d Cir. 1972). Although it is true that the circular attempted to safeguard the dignity of the soldier insofar as practical, the court in its opinion treated only superficially the soldier's liberties which were being infringed.

41. 518 F.2d at 479.

42. United States v. Calandra, 414 U.S. 338 (1974). *See* notes 23, 24 *supra* and accompanying text.

43. 518 F.2d at 475.

44. *Id. See also* United States v. Calandra, 414 U.S. 338, 354 (1974); United States v. Skipwith, 482 F.2d 1272, 1279 (5th Cir. 1973).

purpose yet unconstitutional for another. To apply a blanket rule that once a search is declared lawful its fruits may be used for any purpose is unwise when policy and reason dictate another approach. The express purposes of USAREUR Circular 600-85 could be achieved without a loss of constitutional rights by prohibiting the use of evidence obtained for any non-rehabilitative purpose.

*J. Nicholson Meindl*