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buffer between soldiers and overzealous law enforcement agents. Implicit in her third alternative argument is the assumption that commanders will base their "investigatory detention" authorizations on "reasonable suspicion."

The Court of Military Appeals has yet to clearly define the Dunaway *rule in a military context. Both articles present potential approaches to this difficult issue.*

Investigative Detentions for Purposes of Fingerprinting

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Introduction

Following a series of barracks larcenies, Naval Investigative Service (NIS) investigators received permission from a Marine battalion commander to fingerprint approximately 100 servicemembers who had been present in the unit at the time of the offenses. Among those ordered to report to the NIS office for fingerprinting was the accused, who was later linked to the crime through his fingerprints. Before the accused reported to the NIS office there was no probable cause or reasonable suspicion to believe that he was in any way involved in the crimes. Were the fingerprints admissible?

The court in *United States v. Fagan*[1] held that they were. Relying on dicta in several Supreme Court decisions and the authority of a commander to act as a judicial officer, the court held that the presence of the commander negated the requirement for probable cause or reasonable suspicion. This case points out the difficult questions that face investigators, lawyers, and judges, when the issue is raised as to what procedures are required in investigative detentions for the purpose of obtaining fingerprints.

Unfortunately, aside from Supreme Court dicta and several state court decisions, there is little guidance in the area. It is not yet clear whether the guidance that does exist is even constitutional. This article addresses some of the major issues that surround investigative detentions and offers some suggested approaches to the problem.

Dunaway, Davis, and Dicta

In the typical investigative detention scenario, an individual is taken to the police station by law enforcement officers for the purpose of interrogation, fingerprinting, production of other body evidence, or participation in an eyewitness identification. The common element in all of these activities is the fact that these sort of appearances raise fourth amendment seizure issues. Absent an individual's voluntary appearance at the police station, the government must normally demonstrate that the police had probable cause to take the suspect to their offices. For example, in *Dunaway v. New York,*[2] the Supreme Court held that removing a suspect to the police station for purposes of custodial interrogation constitutes a seizure of the person that must be supported by probable cause. Although the military courts have recognized the applicability of *Dunaway* to military interrogations, they have not always been consistent in application of the rule.[3]

There seems to be a perceptible trend toward permitting investigative detentions for some purpose even when no probable cause is present. The trend is fueled in large part by dicta in *Davis v. Mississippi*[4] and *Hayes v. Florida.*[5] In *Davis,* the defendant was one of 24 black youths brought to a police station for fingerprinting in connection with a rape case. The Supreme Court held that the fingerprints so obtained were the result of an illegal detention. Whether these intrusions are labelled as arrests or investigative detentions, said the Court, the fourth amendment "was meant to prevent wholesale intrusions upon personal security of our citizenry. . . ."[6] In dicta, however, the Court indicated that because of the unique nature of fingerprinting, it was arguable that detentions for such purposes might comply with the fourth amendment even though there was no probable cause in the traditional sense.[7] The Court noted that "fingerprinting is an inherently more reliable and effective

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[1] 24 M.J. 865 (N.M.C.M.R. 1987).

[2] 442 U.S. 200 (1979).

[3] *See* United States v. Schneider, 14 M.J. 189 (C.M.A. 1982) (*Dunaway* is applicable to the military although the court recognized "obvious differences" between military and civilian practices; servicemember may legitimately be required to present information without probable cause in a variety of places. Court lists factors to be considered in an ad hoc approach); United States v. Scott, 22 M.J. 297 (C.M.A. 1986). *Cf.* United States v. Thomas, 21 M.J. 928 (A.C.M.R. 1986) (*Dunaway* not applicable where servicemember merely reports, even if involuntarily, to a location specified by a superior's order. The test is whether by means of force or show of authority, the person is subjected to significantly greater restraint upon their freedom of movement than other servicemembers); United States v. Price, 15 M.J. 628 (N.M.C.M.R. 1982) (*Dunaway* not applicable where accused was one of 10 individuals ordered to report to NIS office).

[4] 394 U.S.C. 721 (1969).

[5] 470 U.S. 811 (1985).

[6] 394 U.S. at 726–27.

[7] *Id.* at 727.

crime-solving tool than eyewitness identifications or confessions and is not subject to such abuses as the improper line-up and the 'third degree.'"[8]

The Court reiterated its dicta in *Davis* in the case of *Hayes v. Florida*,[9] where the defendant had been taken from his home to the police station for purposes of fingerprinting. The Court ruled that the involuntary removal of a person from his home to the police station for purposes of fingerprinting, without prior judicial approval, required probable cause.[10] Citing the familiar "stop and frisk" cases, the Court observed that there is support in those cases for the proposition that the fourth amendment would permit police to temporarily detain a person for purposes of fingerprinting: (1) if there is reasonable suspicion that the person committed an offense; (2) if there is reasonable belief that fingerprinting the individual will establish or negate his connection with the crime; and (3) if the procedure is conducted without delay.[11] The Court again noted that "the Fourth Amendment might permit the judiciary to authorize the seizure of a person on less than probable cause and his removal to the police station for the purpose of fingerprinting."[12] The Court, however, did not clarify what the level of justification should be, or what procedures would be considered sufficiently protective for station-house fingerprinting.

Given the repeated dicta that some basis less than probable cause might support station-house fingerprinting, it is not surprising that some states have promulgated specific procedures for obtaining judicial authorization for such investigative detentions.

State Response to the *Davis-Hayes* Dicta

In responding to the *Davis-Hayes* dicta, states have adopted a variety of procedures and standards. Colorado and Nebraska are illustrative.

Colorado has adopted a comprehensive state criminal procedural rule which provides guidelines for obtaining "nontestimonial identification" such as fingerprints, handwriting, blood, urine, and hair samples.[13] The procedures are specifically not applicable to interrogation procedures.[14] In summary, the Colorado procedures require a judicial order supported by a written affidavit setting out articulable, objective facts which provide probable cause to believe that a crime has been committed and reasonable grounds to believe that the suspect committed the offense. In addition, the judicial order, which is only valid for 10 days, must specify the conditions of the temporary detention and must be returned to the judge with the results of the identification procedures.[15] These procedures were held to be constitutional in *People v. Madson*,[16] in which the court specifically noted that they were instituted in response to the suggestive dicta in *Davis*.[17]

In contrast to the Colorado procedures are the statutory procedures in Nebraska which require that there be a showing of probable cause before a suspect may be taken to the police station for fingerprinting.[18] In *State v. Evans*,[19] the Nebraska Supreme Court disagreed with those states that permitted detentions on less than probable cause. In its view, the relevant United States Supreme Court cases require probable cause to remove a person to the police station.[20]

It is important to note that in each of these two cases, the investigation had focused on a particular individual. It would appear that the major disagreement was over the question of whether there should be a requisite showing of probable cause to believe that the particular suspect committed the offense. It is also important to note that these cases and procedures predated the Supreme Court's dicta in *Florida v. Hayes*, which specifically restated the proposition in *Davis* that some justification less than probable cause might suffice.

The Military Response: *United States v. Fagan*

The Navy-Marine Corps Court of Military Review addressed the applicability of the *Davis-Hayes* dicta in *United States v. Fagan*.[21] In that case, NIS investigators had reason to believe that the perpetrator of a series of barracks larcenies was one of approximately 100 servicemembers. They received the battalion commander's permission to fingerprint the servicemembers at the NIS office[22] and a staff officer was appointed to coordinate the process of taking them to the office in groups of 15 to 20.[23] The accused complied with the procedures only after he was told that his paycheck would be withheld until he appeared.[24] When the accused reported for fingerprinting, investigators noted that he had tried to scrape his fingertips but that some features of his prints matched patterns in latent prints found at

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[8] *Id.*

[9] 470 U.S. 811 (1985).

[10] *Id.* at 817–18.

[11] *Id.* at 816.

[12] *Id.* at 817.

[13] Colo. R. Crim. P. 41.1 (1973). The rule is apparently modeled after Proposed Fed. R. Crim. P. 41.1 (1971) reported at 53 F.R.D. 462 (1971).

[14] Colo. R. Crim. P. 41.1(h)(2).

[15] Colo. R. Crim. P. 41.1(e), (f).

[16] 638 P.2d 18 (Colo. 1981) (*en banc*).

[17] *Id.* at 31.

[18] Neb. Rev. Stat. §§ 29–3301, *et. seq.*

[19] 215 Neb. 433, 338 N.W.2d 788 (1983).

[20] 215 Neb. at 438, 338 N.W.2d at 793. The court nonetheless found probable cause.

[21] 24 M.J. 865 (N.M.C.M.R. 1985).

[22] *Id.* at 866.

[23] *Id.*

[24] *Id.*

the scene.[25] He was advised of his rights and interrogated. Later in the same day, his hands were photographed and his fingerprints were taken.[26]

Because the first set of fingerprints was unreadable, NIS agents approached the accused several months later at the installation hospital.[27] When he refused their request to supply additional fingerprints, a Hospitalman First Class ordered him to comply. When the accused refused that order, he was told by the NIS agents that they would eventually obtain his prints even if it meant arresting him. Rather than risk the embarrassment of being apprehended, he went to the NIS offices several days later and was fingerprinted without incident. His prints matched those taken from the crime scene.[28]

In concluding that the fingerprints were admissible as the fruits of two separate and reasonable seizures of the accused, the court noted that the initial seizure of the accused occurred when he was ordered by his battalion commander to proceed to the NIS office.[29] The court concluded that although that seizure was not supported by probable cause or reasonable suspicion that the accused was involved in the crimes, it was nonetheless reasonable considering the balance of the government's interest and the minimum intrusiveness of the fingerprinting procedures.[30] The court drew heavily upon the *Davis-Hayes* dicta in concluding that the commander in this case was acting in his magisterial capacity when he ordered the mass fingerprinting. The court stated:

> Although the commander in his quasi-judicial capacity did not issue a warrant for the production of fingerprint exemplars, as envisioned in *Hayes* and *Davis*, we conclude that within the military context, his presence safeguarded the appellant from oppressive governmental action and his order thereby qualifies as the functional equivalent of the "circumscribed procedure" prescribed in *Hayes* and *Davis* which warrant the seizure of persons for fingerprinting on less than probable cause. As there is no civilian counterpart for the military commander, our interpretation of the Fourth Amendment recognizes that it must be construed with the "context of military society." As such, we believe the presence of the commander initially negated the requirement for probable cause or reasonable suspicion, where the appellant was treated properly at NIS and without fear or stigma. . . .[31]

As for the second fingerprinting session, the court relied on additional dicta in *Hayes*, which suggested that brief field detentions could be used for fingerprinting if based upon reasonable suspicion.[32] Here, said the court, the NIS agents had more than a reasonable suspicion that the accused was linked with the crime when they approached him at the hospital. Because reasonable force could have been used to take his fingerprints, the court considered it proper to "threaten" him with forcible loss of his freedom if he did not cooperate and permit his prints to be taken.[33]

A Response to *Fagan*: Measuring the "Circumscribed Procedures"

While analyzing investigative detention cases grounded on the *Davis-Hayes* dicta, it is important to remember that the Supreme Court apparently envisions a narrow and stingy exception to the warrant and probable cause requirements. It is also important to distinguish between investigative detentions which take place in the "field" and those which involve transporting the suspect to the offices of law enforcement personnel. With regard to "field" fingerprinting, the Court in *Hayes* envisioned a narrowly defined three-pronged requirement which includes: a reasonable suspicion that the suspect committed a crime; a reasonable basis for believing that the fingerprinting will establish or negate guilt; and a fingerprinting procedure that is "carried out with dispatch."[34]

With regard to police station detentions for purposes of fingerprinting, the Court in *Davis* recognized that detentions for fingerprints might ". . . under *narrowly defined circumstances*, be found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense."[35] In *Hayes*, the Court stated that "*under circumscribed procedures*, the fourth amendment might permit the judiciary to authorize the seizure of a person on less than probable cause and his removal to the police station

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[25] *Id.* Trial testimony from a forensic pathologist indicated that the scrapes were not accidental and had apparently been made a short time before they were photographed by the NIS agents. 24 M.J. at 871.

[26] *Id.* at 869.

[27] It is not clear from the court's opinion whether the accused was at the hospital due to an illness or whether he was otherwise assigned to the hospital pursuant to his duties.

[28] 24 M.J. at 870.

[29] *Id.* at 866–67. The court concluded that the accused's freedom of movement was restrained against his will "solely for the purpose of law enforcement." *Id.*

[30] 24 M.J. at 867.

[31] *Id.* at 868–69 (citations omitted).

[32] 470 U.S. at 816.

[33] 24 M.J. at 871. It does not seem likely that this is *the sort of* conclusion that the Supreme Court had in mind in the *Hayes* dicta. Although the police may surely use reasonable force to effect an otherwise lawful seizure and investigation, it seems to stretch that case to the point where law enforcement officers may compel the suspect to appear at their office if he does not cooperate in the absence of probable cause. Here, the simple answer seems to be that when the NIS agents approached the suspect *at the hospital* they had probable cause to believe that he had committed the crime and therefore they could have brought him to their office without regard to whether they first asked his superior to order him to undergo additional fingerprinting.

[34] 470 U.S. at 817. Although the three-pronged requirement seems specific enough, as Justice Marshall pointed out in his dissent in *Hayes*, there will certainly be problems of application. For example, he noted that such field detentions would apparently be undertaken in public view—which would be a "singular intrusion" that could not be justified as necessary for the officer's safety. He also noted the difficulty of deciding how long to hold the suspect. *Id.* at 819.

[35] 394 U.S. at 727.

for the purpose of fingerprinting."[36] Although the Court did not suggest what "circumscribed procedures" would pass constitutional muster, it seems clear that the Court envisioned "judicial" authorization and supervision when the basis for seizure was premised on something less than probable cause.

Given the Court's narrow language, both for field and office detentions, the result in *Fagan* seems strained. The Court of Military Review stretched the *Davis-Hayes* dicta with regard to the basis for ordering a servicemember to report to investigative offices for the purposes of fingerprinting, and exaggerated the magisterial role of the commander in ordering such intrusions.

With regard to the permissible basis for fingerprinting detentions, the Supreme Court's dicta does not in any way suggest that, for purposes of fingerprinting, not even reasonable suspicion is required. Instead, as noted *supra*, the Court in *Hayes v. Florida* specifically envisioned that the police must have reasonable suspicion that the suspect committed a crime before taking fingerprints in the field.[37] It would be anomalous to require reasonable suspicion to support a "stop and frisk" detention for fingerprinting and yet conclude that neither probable cause nor reasonable suspicion would be necessary to support the removal of a suspect to the police station.

With regard to who may authorize office detentions for purposes of fingerprinting, the Supreme Court's dicta leaves no doubt that the Court would expect that the process would be approved and supervised by the judiciary. The question for military courts then is whether the commander might properly fill that role.[38] It seems clear that for purposes of authorizing seizures for purposes of fingerprinting, a commander may act in a quasi-judicial capacity. It seems less certain that when the commander does so, such approval negates the requirement of probable cause or reasonable suspicion. Indeed, the military law on this issue is well-settled and neither the dicta in *Hayes* and *Davis* nor military necessity calls for a new rule.[39] It also seems less certain that the commander's approval negates the requirement to follow circumscribed procedures for ensuring that the suspect's rights are not unduly abrogated.

Although in *Fagan* the NIS obtained permission from the battalion commander to fingerprint the 100 servicemembers, it is not clear from the Court's opinion what, if any, articulable facts they presented to the commander. Nor is it clear to what extent the liaison officer appointed by the commander supervised the procedures.[40] What is clear, as the court recognized, is that there was neither probable cause nor reasonable suspicion supporting the commander's order that the accused report to the NIS office for fingerprinting.[41]

Looking for Help in the Rules of Evidence

The Military Rules of Evidence provide no specific guidance on investigative detentions, either in the field or at the police station, for purposes of fingerprinting. Rule 314(f)[42] addresses searches incident to lawful stops but sets out no guidelines as to whether the "stop" may include other identification procedures such as fingerprinting.

Rule 312 governs body views and intrusions and might provide the basis of fingerprinting. For example, Rule 312(b) addresses "visual examination" of the body but hinges such examinations on other authorized intrusions such as a valid inspection,[43] a search incident to apprehension,[44] an emergency search,[45] or a probable cause search.[46] It would require a strained reading of Rule 312, however, to permit investigators to take an individual to their office for the specific purpose of fingerprinting, without some independent predicate.

Rule 316(f) may provide a vehicle for judicial adoption of the "circumscribed procedures" envisioned in the *Davis-Hayes* dicta for fingerprinting in either the field or at the police station. That rule provides:

> Other seizures. A seizure of a type not otherwise included in this rule may be made when permissible

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[36] 470 U.S. at 817. In *Davis* the Court stated:

> We have no occasion in this case, however, to determine whether the requirements of the Fourth Amendment could be met by *narrowly circumscribed procedures* for obtaining, during the course of a criminal investigation, the fingerprints of individuals for whom there is no probable cause to arrest. 394 U.S. at 728 (emphasis added).

[37] 470 U.S. at 817.

[38] *See* Schlueter, *Military Criminal Justice: Practice and Procedure*, § 5-2(A) at 152 (2d ed. 1987); Cooke, *United States v. Ezell: Is the Commander a Magistrate? Maybe*, The Army Lawyer, Aug. 1979, at 9.

[39] *Cf.* Mil. R. Evid. 313(b). The commander can obviously make some fourth amendment-type intrusions for certain noninvestigative reasons without triggering the requirements of probable cause or reasonable suspicion. Although it is conceivable that an en masse fingerprinting procedure might be justified on grounds of security, fitness, or good order and discipline, if that procedure was conducted for purposes of obtaining evidence, it could not be treated as a valid inspection under Rule 313.

[40] The court indicated that the NIS agents would call the liaison officer and ask that he provide them with "15 or 20 members of the battalion at a given time and a given place" for fingerprinting. The liaison officer apparently maintained the master list of who had been fingerprinted. 24 M.J. at 866.

[41] 24 M.J. at 868. The court noted, however, that the NIS agents had reasonable grounds to believe that one of the approximately 100 Marines had committed the offense and that the fingerprinting process would identify the perpetrator. *Id.*

[42] Manual for Courts-Martial, United States, 1984, Military Rule of Evidence 314 [hereinafter Mil. R. Evid.]. Rule 314 governs searches not requiring probable cause; Rule 314(f) is a codification of Terry v. Ohio, 392 U.S. 1 (1968). In 1984, Rule 314(f)(3) was added to incorporate the "automobile frisk" recognized in Michigan v. Long, 463 U.S. 1032 (1983). *See generally*, S. Saltzburg, L. Schinasi, and D. Schlueter, *Military Rules of Evidence Manual* at 255-56 (2d ed. 1986). As noted *supra* the Supreme Court has stated in dicta that *Terry* stops might properly include fingerprinting. Nor is there any real help in RCM 302, which governs military apprehensions. The discussion to that rule merely notes the distinction between apprehensions and investigative detention.

[43] Mil. R. Evid. 313(b).

[44] Mil. R. Evid. 314(g).

[45] Mil. R. Evid. 314(i).

[46] Mil. R. Evid. 315.

under the Constitution of the United States as applied to members of the Armed Forces.

This rule, which parallels the catch-all provision in Military Rule of Evidence 314(k) for nonprobable cause searches, permits some leeway in the application of constitutionally permissible seizures which are not otherwise specifically mentioned in the Rules.[47] Seizures for the specific purpose of fingerprinting would seem to be safe candidates for this catch-all provision.

Assuming that there is room within the Rules of Evidence for judicial adoption of some narrowly defined procedures, there is the question of actually settling upon these guidelines that may be readily and constitutionally applied in a principled fashion. Given the absence of specific guidance in the Rules themselves, it would seem preferable to consider amendments to either Rule 316, 314, or 312 that would clearly set out defined procedures tailored to military practices.[48]

Circumscribed Procedures: A Model

Using the *Davis-Hayes* dicta, Proposed Federal Rule of Criminal Procedure 41.1 (1971),[49] and a variety of state procedures adopted in reliance on that dicta,[50] it should not be difficult to adopt some procedures, either judicially or through formal amendments to the Rules of Evidence, for extending the "*Terry* stop" to fingerprinting at the scene of the stop (in Rule 314) and for removing an individual to the investigators' office for the specific purpose of obtaining fingerprints (in Rule 316). In any event, several key topics must be considered.

Characterization of the Intrusion

In addressing the issue of investigative detentions for the purposes of fingerprinting it is important to define what governmental action triggers the fourth amendment. It is well settled that an individual normally has no reasonable expectation of privacy in his or her fingerprints.[51] Thus, the process of actually taking fingerprints does not normally invoke the protections of the fourth amendment.[52] If the suspect or accused is already subject to lawful authority pursuant to an arrest or apprehension, the additional steps of obtaining fingerprints or other identification evidence, such as voice exemplars or other superficial body evidence,[53] are normally permitted without additional authorization or approval.[54]

If the suspect or accused is not already within the lawful custody of the police, it is necessary that some authorization or justification be articulated to support the "seizure" of the person for the purpose of obtaining fingerprints.[55] That justification may rest, as suggested in the *Davis-Hayes* dicta, on extending the "*Terry* stop" to include brief detentions for fingerprinting, or it may be justified by judicially supervised procedures that entail removing the individual to the police station. In either instance, the individual has been "seized" and that necessarily invokes the protections of the fourth amendment.[56] Of course, if the individual consents to the seizure, in much the same way an individual may consent to a search, then it should not be necessary to show the underlying basis or approval for the seizure.[57]

Power to Authorize Investigative Detentions

For fingerprinting in the field, the Supreme Court's dicta in *Hayes* already sets our clear guidelines which authorize those making otherwise lawful "*Terry* stops" to fingerprint those who have been detained.[58] The same rule could be easily adapted to the military.

For detentions involving removal of the suspect to the offices of law enforcement officers, the solution again seems easily applied. Although the *Davis-Hayes* dicta envisions judicial approval, for the military that would include

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[47] *See* S. Saltzburg, L. Schinasi, and D. Schlueter, *supra* note 42 at 302. Note that although there is no Drafters' Analysis for this particular subpart of the Rule, the "legislative" intent seems clear.

[48] *Id.* at 85 (there should be a preference for the "legislative" process which lends to interservice uniformity).

[49] The text of the proposed Rule, entitled Nontestimonial Identifications, is printed at 52 F.R.D. 409 (1971).

[50] *See, e.g.* Ariz. Rev. Stat. Ann. § 13-3905; Col. R. Crim. P. 41.1; Idaho Code § 19-625; and N.C. Gen. Stats. § 15A-271, et seq.

[51] *See, e.g.*, Cupp v. Murphy, 412 U.S. 291 (1973); United States v. Dionisio, 410 U.S. 1 (1973); United States v. Hardison, 17 M.J. 701 (N.M.C.M.R. 1983).

[52] In any procedure implicating "body" evidence, there is always the possibility that the procedures used "shocked the conscience" or were otherwise unreasonable and thus infringed upon the suspect's due process rights. Rochin v. California, 342 U.S. 165 (1952). *See also* S. Saltzburg, L. Schinasi, and D. Schlueter, *supra* note 42 at 224. Because of the limited physical intrusion of fingerprinting, it should not be necessary to use medically trained personnel as is required in more intrusive body inspections or intrusions. *See, e.g.*, Mil. R. Evid. 312(d), (e).

[53] United States v. Mara, 410 U.S. 19 (1973); United States v. Repp, 23 M.J. 589 (A.F.C.M.R. 1986) (no reasonable expectation of privacy in arms); United States v. Hardison, 17 M.J. 701 (N.M.C.M.R. 1983) (no expectation of privacy in appearance which would bar photographing suspect). *See also* In re Grand Jury Proceedings, 686 F.2d 135 (3d Cir. 1982) (grand jury request for hair samples did not amount to search or seizure).

[54] Different rules may apply for more intrusive procedures which are used to obtain body fluids or other evidence within the body. Mil. R. Evid. 312(d), (e). *Cf.* Mil. R. Evid. 313(b) (inspection may include order to provide body fluids).

[55] *See, e.g.*, United States v. Hardison, 17 M.J. 701 (N.M.C.M.R. 1983) (fingerprints taken of suspect already within lawful custody of NIS agents). *See also* United States v. Sechrist, 640 F.2d 81 (7th Cir. 1981); United States v. Sanders, 477 F.2d 112 (5th Cir. 1973).

[56] Although the "basis" for such limited seizures may not require probable cause, the *Dunaway-Schneider* test for determining when a servicemember has been seized within the meaning of the fourth amendment should remain useful. There is a problem with application of that principle to mass seizures, such as in *Fagan* where 100 individuals were ordered to report. Technically, all of them were targets of the investigation although the record does not indicate whether any of them, besides the accused, protested. The better starting point is to conclude that all of them were seized within the meaning of the fourth amendment, as applied in the military context, and then determine whether a sufficient fourth amendment basis, also applied in the military context, supported these seizures.

The Supreme Court has distinguished subpoenas and investigative detentions, *see, e.g.*, United States v. Dionisio, 410 U.S. 1 (1973), in large part because of the lack of stigma in the former procedure and because they are within the control and supervision of the court. Investigative detentions at the office of the law enforcement agent should not fall within that category unless they have been judicially approved and supervised.

[57] *See, e.g.*, Mil. R. Evid. 314(e). Indeed, it would seem appropriate to require investigators requesting authorization to first show that the individual has not consented, or is expected not to consent.

[58] 470 U.S. at 816-17.

commanders who already are authorized to approve probable cause searches[59] and to order inspections.[60]

Basis for Authorization

For field detentions, the Supreme Court's dicta in *Davis* and *Hayes* seems to articulate clearly what the Court envisions as the minimal constitutional basis for taking fingerprints. As noted, *supra*, the investigators must be prepared to show that they had a reasonable basis for believing that the fingerprinting procedures would either connect the suspect with the crime or clear him.[61] Thus, it would seem that the Court envisioned something beyond a routine and carte blanche authorization to fingerprint those stopped in the field.

Perhaps the most critical issue in adopting rules and procedures for fingerprinting at the offices of the investigators is the question of whether probable cause must be shown, as is now required under *Dunaway* for custodial interrogations, or whether to follow the *Davis-Hayes* dicta and adopt some lesser standard. If a lesser standard is appropriate, what should it be? Clearly, the safest and most protective constitutional route is to require probable cause for the underlying seizure of the suspect or accused. But that may unduly bind investigators who have some articulable justification amounting to less than probable cause which would reasonably expedite criminal investigation.

Good arguments for adopting a standard less than probable cause are recognized and catalogued in the *Davis* and *Hayes* cases and need only be summarized here: the fingerprinting procedures are generally more reliable; they do not entail subjecting the suspect to the abuses such as the "third degree" or an improper line-up; they need not be conducted unexpectedly; and they are usually less intrusive than other police detentions and searches.[62] These differences are not compelling enough, however, to justify seizures without any basis whatsoever.

The better route is to adopt a reasonable suspicion standard. That would be consistent with the minimum for field detentions. At the same time, this standard recognizes that, although there are always the inherent embarrassments, dangers, and fears most often associated with police station appearances, intervening judicial authorization can interpose reasonable limits upon the detention in terms of its length and scope.

There is a related problem of the scope of the suspicion. Must it focus on one individual or may it focus on a larger and more generalized population? In the state cases cited *supra*, investigators had focused on a particular suspect. In contrast, the NIS investigators in *Fagan* focused on 100 servicemembers—hardly individualized suspicion. Despite the court's characterization to the contrary, that sort of massive fingerprinting appears to be a "dragnet." Absent truly extraordinary reasons, it is probably safe to say that similar procedures would normally not be tolerated in the civilian community.[63]

There is some support in *New Jersey v. TLO*,[64] a school search case, for the proposition that in certain instances a generalized suspicion may suffice.[65] In the context of the fingerprinting, those seeking judicial approval for the fingerprinting should be prepared to show that there is reasonable suspicion to believe that an individual or identified group of individuals are implicated and that all other necessary and reasonable means of investigation have failed to identify the perpetrator. The greater the number of possible suspects, the greater should be the burden of showing necessity for the procedures, and the exhaustion of other reliable police investigative techniques. The type and severity of the offense should also be factored into the formula.[66] Investigative fingerprint detentions should never become routine to the extent that every time latent fingerprints are discovered at the scene of a crime that any and all individuals in any way remotely linked with the offense can be taken in for fingerprinting.

Although written affidavits are not required for probable cause searches,[67] good arguments can be made for requiring law enforcement officers to place their justifications for fingerprinting requests in writing, especially if the proposed procedures involve mass detentions. Similarly it would seem preferable to require the individual requesting the fingerprinting detention to be placed under oath.[68] Unlike probable cause searches which may involve an element of urgency for prompt approval and execution, fingerprinting

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[59] Mil. R. Evid. 315(d).

[60] Mil. R. Evid. 313(b).

[61] 470 U.S. 817.

[62] Davis v. Mississippi, 394 U.S. at 727 (1969).

[63] *Cf. In re* Fingerprinting of M.B., 125 N.J. Super. 115, 309 A.2d 3 (1973) (22 students fingerprinted pursuant to court order when school ring was found near homicide victim and victim's car contained fingerprints other than victim's; order included protective provision for destruction of prints at conclusion of investigation). The tolerance level no doubt rises with the severity of the crime. Whether several barracks larcenies involving stereo equipment justifies fingerprinting 100 servicemembers is open to debate. Assuming that such offenses, in the context of the time and place, are clearly and objectively viewed as serious offenses, someone other than the police should make that determination. *See* Dunaway v. New York, 442 U.S. 200, 213 (1979) (danger in permitting police to strike the balance between social and individual interests).

[64] 469 U.S. 343 (1985).

[65] *Id.* at 342, n.8. The Court stated in part:

> We do not decide whether individualized suspicion is an essential element of the reasonableness standard we adopt for searches by school authorities. In other contexts, however, we have held that although "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure . . . the Fourth Amendment imposes no irreducible requirement of such suspicion . . . Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal and where "other safeguards" are available to "assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.' " (Citations omitted.)

[66] *See* United States v. Jennings, 468 F.2d 111 (9th Cir. 1972) (court declined to apply *Davis* dictum when suspect was detained in order to match his prints with those found on marijuana wrappers). *See also* Ariz. Rev. Stat. Ann. § 13-3905 (police must show "reasonable belief" that felony has been committed).

[67] Mil. R. Evid. 315(f), Drafters' Analysis.

[68] United States v. Stuckey, 10 M.J. 347 (C.M.A. 1981).

generally does not and it would not seem unreasonable to impose these additional safeguards.

Scope of Authorization

The "judicial" authorization to conduct a police station investigative detention should specify the exact scope and purpose of the detention.[69] For example, the authorization could state that only fingerprints will be taken and that no interrogation is authorized unless there is a showing of probable cause.[70] If investigators desire to gather additional identification evidence such as voice prints or hair samples, the authorization should cover those points. If the investigators desire to obtain body evidence such as blood, urine, or saliva samples, they should be otherwise prepared to comply with Military Rule of Evidence 312. Finally, considering the possibility of police overreaching, and for pragmatic reasons associated with proof at trial, it would seem preferable to reduce the authorization to writing.

Execution

Like the provisions for executing search authorizations,[71] any authorization to fingerprint individuals or to obtain other body evidence should include a provision for notifying the individual of the purpose of the detention.[72] As has been adopted in at least one state, the execution of the authorization may be limited to a particular time, such as regular duty hours, and may be effective for a definite period of time.[73] The purpose of all of this is to reflect and maintain those unique features of fingerprinting which distinguish that procedure from interrogation and line-up procedures.[74]

Exigencies

Finally, provision should be made for the fact that in some limited situations, exigent circumstances might prevent obtaining prior authorization. Nonetheless, just as exigent circumstances will normally not warrant abrogation of the requirement for probable cause,[75] exigencies should not abrogate the requirement for reasonable suspicion. Because fingerprints are not evanescent,[76] there should be very few cases where investigators cannot obtain prior and careful review of their request to take the fingerprints.[77]

Conclusion

The *Fagan* case is an unmistakable indication that a gap exists in both the Military Rules of Evidence and military case law. Given the unique issues raised by that case and the problems it demonstrates, some careful consideration should be given to developing clear and definite principles which can be readily applied by a worldwide legal system. The most logical choice is a series of amendments to the Rules of Evidence that would address not only fingerprinting, but related evidence-gathering techniques which in themselves generally will not require a further invasion of privacy but which, at the outset, require seizure of the individual. Such changes would help ensure that the administration of criminal justice in the military is not haphazard or unprincipled.

[69] *See, e.g.* Proposed Fed. R. Crim. P. 41.1; Colo. R. Crim. P. 41.1.

[70] For example, in *Fagan* the NIS investigators, according to the court, had probable cause when they examined the suspect's fingertips and determined that he had attempted to remove his prints. 24 M.J. at 869–70.

[71] Mil. R. Evid. 315(h).

[72] Mil. R. Evid. 315(h)(1).

[73] *See, e.g.*, Colo. R. Crim. P. 41.1(f) (10 days); Proposed Fed. R. Crim. P. 41.1 (judicial order returnable within 45 days).

[74] Davis v. Mississippi, 394 U.S. at 727.

[75] *See* Mil. R. Evid. 315(g) (the exigent circumstances only relieve the requirement of the search warrant or authorization).

[76] Davis v. Mississippi, 394 U.S. at 727 (there is no danger of destruction of fingerprints).

[77] Despite the Court's assurance in *Davis supra* note 76, that fingerprints cannot be destroyed, the *Fagan* case demonstrates that suspects might attempt to remove their fingerprints and thus frustrate prompt identification.

Dunaway v. New York: Is There a Military Application?

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Introduction

In the late 1970's, the Supreme Court ruled in two cases that the illegal seizure of an individual based on less than probable cause could result in suppression of evidence obtained as a result of the seizure. The nature of traditional investigative techniques employed by military law enforcement agencies significantly elevates the importance of these decisions. The purpose of this article is to analyze the Supreme Court and military cases that have addressed this issue and to propose a rationale by which a military court might fairly reconcile these cases with accepted military investigatory practices.

In the first case, *Brown v. Illinois*,[1] police officers "arrested" the accused without a warrant. Following a lengthy

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[1] 422 U.S. 590 (1975).