THE USE OF FORCE

TO PROTECT GOVERNMENT PROPERTY

A Thesis

Presented To

The Judge Advocate General's School, U. S. Army

The opinions and conclusions expressed herein are those of the individual student author and do not necessarily represent the views of either The Judge Advocate General's School, U. S. Army, or any other governmental agency. References to this study should include the foregoing statement.

by

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SCOPE

A study of the general principles of United States municipal law applicable to the use of force in connection with the protection of property of the federal government in peacetime, with particular emphasis accorded to the legal problems confronting military personnel in performing this function.

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CHAPTER I

INTRODUCTION

His rifle slung loosely over his shoulder, the young soldier looked over the Nike site in the dim moonlight. This was his first time on sentry duty and he had not realized how lonely it could be. Suddenly he was startled by a sound near the fence. Straining his eyes, he made out a crouching figure moving from the fence toward the center of the site. "Halt", he cried, unslinging his rifle. The figure stood erect for an instant, then began to run. "Halt! Halt or I'll shoot," shouted the sentry. The figure continued across the site. The rifle cracked, once, then again, resounding in the stillness of the night, as the sentry fired into the air. Still the figure ran, faster than ever. The sentry aimed his weapon after the retreating figure and pulled the trigger.

A rare incident? Unfortunately, it is not. For example, in a period of only two months the United States Army Air Defense Command experienced twelve known penetrations or attempted penetrations into its Nike sites. In five of these

twelve cases, the sentry fired at the intruder.[1]

Who was the intruder? Perhaps it was a saboteur, or possibly an espionage agent seeking important information for a foreign power. More likely, however, it was a thoughtless teen ager taking a short cut, or a nearby resident looking for his cat, or, at worst, a petty thief out to get a few gallons of gasoline. Is the sentry justified in shooting at any or all such intruders?

Unless he is specifically instructed to the contrary, the sentry will very likely assume that he is. He is required to memorize general orders which direct him to "take charge of this post and all government property in view" and "to challenge all persons on or near my post and to allow no one to pass without proper authority."[2] He is given a weapon and, in many

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1 See JAGA 1961/4826 (Aug. 25, 1961). No injury was inflicted in any of these cases.

2 See U.S. Dep't of Army, Field Manual No. 26-5 [hereinafter referred to as FM _____], Interior Guard para. 5 (1956).

cases, live ammunition. Quite naturally he assumes that he is expected to use them. As one young private put it after wounding a fleeing civilian, ". . . that is what weapons were there for, to use."[3]

Thus, because the sentry is armed with a deadly weapon the problem of when and how much force he may legally use in protecting government property[4] is a particularly acute one. But the same basic problem extends to every person entrusted with the custody of government property or the responsibility for protecting it. What may the military driver do when he discovers someone slashing the tires of the vehicle assigned to him? Or the motor sergeant when he sees someone stealing a can of gasoline?

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3 Lewis v. United States, 194 F. 2d 689, 692 (3rd Cir. 1952).

4 The term property as used herein refers to real and personal property in general. There is no discussion of legal problems peculiar to any particular type of property or arising from the special nature of such property (e.g., nuclear materials, property of a classified or restricted nature).

In each case the serviceman[5] will act according to his own best judgment to protect the property intrusted to his care, even though this may involve the use of force.

But what are the legal consequences of his use of force? What law will be applied in passing judgment on his conduct? What are the general legal principles governing the use of force in such cases? These are some of the problems which will be dealt with in the following discussion.

CHAPTER II

THE PARTIES AND THE LAW

A. THE UNITED STATES AS DEFENDANT

If an injury is caused by the unprivileged or excessive use of force in protecting government property, the injured party could conceivably seek compensation either from the individual serviceman or, under the principle of respondeat superior, from the United States. It is to be expected that the injured

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5 The term serviceman is used for convenience. With the exception of the Posse Comitatus Act, 18 U.S.C. § 1385 (1958), discussed below, the same legal principles are generally applicable to civilian guards and other employees of the United States who have no specific statutory law enforcement authority.

party would prefer to recover directly from the United States since servicemen in general, and especially those usually performing guard duty, are not noted for their affluence.

A formidable obstacle to any civil action directly against the United States, however, is the fact that claims based on assault, battery, false imprisonment, and false arrest, all the torts most likely to be committed in connection with the defense of government property, are specifically excluded[6] from the Federal Tort Claims Act.[7] Nor are such claims payable administratively.[8]

This has not prevented imaginative plaintiffs from suing the United States, however. There have been several cases, for example, in which negligence has been alleged in connection with the serviceman's unprivileged or excessive use of force.

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6 See 28 U.S.C. § 2680 (h) (1958).

7 Ch. 753, 60 Stat. 842 (1946), as amended (codified in scattered sections of 28 U.S.C.).

8 See, e.g., Army Regs. No. 25-25 (hereinafter cited as AR ____, para. 5 m (6) (Oct. 1, 1959); AR 25-30, para. 8 g (Oct. 1, 1959).

Typical of these is the case of Collins v. United States[9] in which suit was brought under the Federal Tort Claims Act alleging negligence on the part of a military policeman. The military policeman had parked his duly assigned Army vehicle outside of a hotel in the civilian community and had gone inside. When he came out he discovered Collins partly in the cab of the vehicle and two other civilians standing just outside of it. The military policeman, drawing and cocking his .45 pistol, demanded an explanation of what the three men were doing and lined them up at gun point. Collins attempted to seize the pistol but the weapon discharged, wounding him.

Although the use of a pistol may possibly have been excessive under the circumstances and therefore might have constituted an assault, the allegation of negligence seems somewhat strained. Apparently the court thought so too, since it found that there was no evidence of negligence on the part of the military policeman and dismissed the suit.

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9 95 F. Supp. 522 (W.D. Pa. 1951).

Recovery against the United States on the theory of negligence was allowed under similar facts in the Tastor case,[10] where a person trying to disarm a soldier guarding a ship was killed when the soldier's pistol discharged during the scuffle, and in the Cerri case,[11] where a bullet fired by a soldier without sufficient justification at a person escaping from arrest struck an innocent bystander.[12] However, no suit against the United States has been successful when the serviceman intentionally fired at the plaintiff or plaintiff's decedent.[13]

Thus, it appears that any suit for damages arising from the intentional use of unprivileged or excessive force against the injured party is not properly brought against the United

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10 Tastor v. United States, 124 F. Supp. 548 (N.D. Cal. 1954).

11 Cerri v. United States, 80 F. Supp. 831 (N.D. Cal. 1948).

12 It may be significant that both cases in which recovery was allowed were decided in the same division of the same district court, although not by the same judge.

13 See, e.g., Stepp v. United States, 207 F. 2d 909 (4th Cir. 1953), cert. denied, 347 U.S. 933 (1954); Lewis v. United States, 194 F. 2d 689 (3rd Cir. 1952); Ferran v. United States, 144 F. Supp. 652 (D.C. P.R. 1956).

States. And, of course, the United States is never criminally liable for the acts of its agents.

B. THE INDIVIDUAL AS DEFENDANT

With regard to the individual serviceman, the possibility of criminal liability to both state and federal governments must be considered in addition to any possible civil liability for damages.[14]

It has long been recognized that an officer of the United States is not subject to the criminal jurisdiction of a state for acts done within the scope of his duties.[15]

> Where an officer from excess of zeal or misinformation, or lack of good judgment in the performance of what he conceives to be his duties as an officer, in fact transcends his authority, and invades the rights of individuals, he is answerable to the government

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14 A detailed analysis of the criminal and civil liability of federal employees for acts done in the performance of their duties is beyond the scope of this thesis. Only a brief resume' is included here.

15 See In re Neagle, 135 U.S. 1, 75 (1890); In re Waite, 81 Fed. 359 (N.D. Iowa 1897), aff'd, 88 Fed. 102 (8th Cir. 1898), appeal dismissed, 180 U.S. 635 (1901); Brown v. Cain, 56 F. Supp. 56 (E.D. Pa. 1944).

> or power under whose appointment he is acting, and may also lay himself liable to answer to a private individual who is injured or oppressed by his action; yet, where there is no criminal intent on his part, he does not become liable to answer to the criminal process of a different government.[16]

This rule is also applicable to enlisted members of the armed forces.[17]

This relative immunity from state prosecution is somewhat misleading, however, since the reasonableness of the serviceman's conduct will be closely scrutinized in determining whether his actions were done in good faith within the scope of his duties and without criminal intent.

For example, in Brown v. Cain,[18] Coast Guardsman Brown, guarding a shipyard, was struck by a brick during a riot. He shot at the legs of a man running away, thinking that was the guilty person and seeking to arrest him. The man tripped and

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16 In re Lewis, 83 Fed. 159, 160 (N.D. Wash. 1897).

17 See In re Fair, 100 Fed. 149 (C.C.D. Neb. 1900).

18 56 F. Supp. 56 (E.D. Pa. 1944).

fell just as Brown fired, and as a result the bullet inflicted a fatal wound. Brown was indicted by the state for murder and applied to the federal court for a writ of habeas corpus. Although the court eventually granted the writ, saying Brown was "amenable to the law of the United States and to no other",[19] the reasonableness of Brown's conduct was thoroughly examined. The court indicated that it would have held that Brown's act was beyond his authority, and therefore without protection, if the evidence had not been so clearly in his favor.

With regard to criminal responsibility to the United States, the serviceman has no immunity from prosecution. However, the acts of a subordinate, done in good faith in compliance with his supposed duty or orders, are justifiable unless those acts are manifestly beyond the scope of his authority, or the order is such that a man of ordinary sense and understanding would

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19 Id. at 60.

know it to be illegal.[20]

An extreme example of a serviceman's liability for an act done in obedience to an order is the case of Airman First Class Kinder.[21] Kinder was on guard duty when he apprehended a Korean civilian prowling in a bomb dump shortly before midnight.

Lieutenant Schreiber ordered Kinder, accompanied by Airman First Class Toth, to take the Korean out and shoot him to discourage other prowlers. Kinder did so. He was convicted of premeditated murder since the order was so clearly illegal that it afforded him no protection.[22]

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20 See United States v. Clark, 31 Fed. 710, 717 (E.D. Mich. 1887); Manual for Courts-Martial, United States, 1951 [hereinafter referred to as the Manual and cited as MCM, 1951], para. 197b; Model Penal Code § 2.10 (Prop. Off. Draft 1962).

21 See ACM 7321, Kinder, 14 CMR 742, 774 (1953).

22 Lt. Schreiber was also convicted of premeditated murder, United States v. Schreiber, 5 USCMA 602, 18 CMR 226 (1955). Toth was discharged before any action could be taken against him and later attempts to exercise jurisdiction over him were unsuccessful, Toth v. Quarles, 350 U.S. 11 (1955).

Obedience to an apparently lawful order is generally recognized as a defense to a serviceman's civil liability as well.[23] Except for this limited protection for military subordinates acting under orders, it had long been established that agents of the United States were personally liable for their own torts, though committed in performing their duties.[24] In recent years, however, there has been a considerable erosion of this concept.

The leading case in support of the proposition that federal employees are immune from liability for torts committed in performing their duties is Gregoire v. Biddle.[25] In that case

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23 See McCall v. McDowell, 15 Fed. Cas. 1235, 1240 (No. 8673) (C.C.D. Cal. 1867); Neu v. McCarthy, 309 Mass. 17, 33 N.E. 2d 570 (1941). Contra, Bates v. Clark, 95 U.S. 204 (1877); Mitchell v. Harmony, 54 U.S. (13 How.) 115 (1851); Little v. Barreme, 6 U.S. (2 Cranch.) 169, 179 (1804).

24 See Sloan Shipyards v. United States Fleet Corp., 258 U.S. 546, 567-8 (1922); McCall v. McDowell, supra note 23, at 1238; Towle v. Ross, 32 F. Supp. 125 (D.C. Ore. 1940).

25 177 F. 2d 579 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950).

Judge Learned Hand used very broad language in holding that the Attorney General and another Department of Justice official were not subject to civil suit by the plaintiff who claimed to have been falsely imprisoned by them. This case was extensively quoted by the Supreme Court in Barr v. Matteo,[26] a libel suit which appears to turn as much on the theory that a statement made in connection with official duties is privileged as upon any theory of general immunity from suit. Nevertheless, because the broad and persuasive language of Judge Hand was quoted with approval by the Supreme Court, other federal courts are accepting it as the law.[27]

> The Supreme Court's acceptance of Gregoire v. Biddle impels us to the conclusion that the law has changed, and that it is now considered wise to leave some government agents entirely free from suit when

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26 360 U.S. 564 (1959).

27 See Ove Gustavsson Contracting Co. v. Floete, 229 F. 2d 655 (2d Cir. 1962), cert. denied, 374 U.S. 827 (1963) (suit against govt. inspector for causing cancellation of plaintiff's contract with govt.); Garnage v. Peal, 217 F. Supp. 384 (N.D. Cal. 1962) (medical malpractice suit).

they are acting within an area intrusted to their discretion.[28]

Because this legal concept is still in a stage of development, it is impossible to say how far it will extend.[29] At present, it does not appear to guarantee immunity from civil suit to the serviceman who uses unprivileged or excessive force in the protection of government property.[30]

In any event, if the use of force is sufficiently flagrant, the serviceman may be held to have exceeded the limits of his authority and thereby to have lost any protection from either civil or criminal liability otherwise available to a federal

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28 Bershad v. Wood, 290 F. 2d 714, 719 (9th Cir. 1961) (suit against Internal Revenue Service officials for erroneously impounding bank account).

29 Since Barr v. Matteo, the only case in which a federal employee has been specifically determined to have acted outside the scope of his employment so as to make the immunity doctrine inapplicable is Wheeldin v. Wheeler, 373 U.S. 647 (1963), in which an investigator for a Congressional committee filled in names without authorization on subpoenas which had been signed in blank.

30 See Selico v. Jackson, 201F. Supp. 475 (S.D. Cal. 1962) (city policeman held liable, in spite of immunity principle similar to that of federal employees, for use of excessive force).

employee.

C. THE APPLICABLE LAW

Although there are many federal statutes designed for the protection of government property,[31] there is no provision specifically authorizing the use of force for this purpose. The closest thing to a statutory authorization of force is the following:

> Whoever, within the jurisdiction of the United States, goes upon any military, naval or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation; or
>
> Whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or installation, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof --
>
> Shall be fined not more than $500 or imprisoned not more than six months, or both.[32]

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31 Some of these statutes are discussed in more detail in Chapter IV, infra.

32 18 U.S.C. § 1382 (1958). (Emphasis added)

By implication, at least, this provision would seem to authorize an installation commander to have persons removed from the installation, an action which may involve some degree of force.[33]

Section 21 (a) of the National Security Act of 1950[34] also implies authority to promulgate regulations relating to the removal of persons from restricted areas, since it makes it a misdemeanor to violate such regulations. Pursuant to this authority,[35] commanders have been authorized to apprehend, interrogate, and search any person who enters a restricted area without authority.[36]

Obviously these provisions, even if they are conceded to authorize the use of force in certain cases, are of very limited application and provide little help to the person charged with the responsibility for protecting government property.

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33 See JAGA 1954/9901 (Jan. 6, 1955).

34 Ch. 1024, tit. I, § 21, 64 Stat. 1005, 50 U.S.C. § 797 (1958).

35 As implemented by Dep't of Defense Directive No. 5200.8 (Aug. 20, 1954).

36 See AR 380-20, para. 6a (Feb. 6, 1958).

In the absence of any more specific federal statutes, recourse must be had to the law generally applicable to the place where the use of force occurs. This, of course, will depend upon the nature of federal and state jurisdiction over the situs.[37]

1. Situs Subject to Exclusive Federal Jurisdiction

By definition, state laws are not effective in an area subject to exclusive federal jurisdiction. In the absence of any federal common law,[38] this leaves a considerable legal vacuum. The Assimilative Crimes Act[39] fills this void very adequately in the field of criminal law. It provides:

> Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 [under the

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37 The term jurisdiction, used in this sense, refers to legislative jurisdiction. The various types of such jurisdiction and their basic incidents are set forth in some detail in Report of the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States, Part II, A Text of the Law of Legislative Jurisdiction, at 10-11 (1957).

38 See Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

39 18 U.S.C. § 13 (1958).

> exclusive or concurrent jurisdiction of the United States/ of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.[40]

Thus, in the absence of any specific federal provision, the criminal liability of a person using unprivileged or excessive force in protecting government property will be determined by the current state law even though the act occurs in an area subject to exclusive federal jurisdiction.

With respect to civil liability, the law is slightly more complicated because there is no equivalent of the Assimilative Crimes Act. However, the Supreme Court in the McGlinn case[41] applied an international law principle which does serve to fill the legal vacuum with regard to civil law, though not as

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40 Ibid.

41 Chicago, R.I. & Pac. Ry. v. McGlinn, 114 U.S. 542 (1885).

efficiently as the Assimilative Crimes Act does in the criminal field.

The Court determined that the state law in effect in the area when the United States acquires exclusive jurisdiction, and not incompatible with the laws of the United States, remains in force until changed or abrogated by the United States. A substantial difficulty with this rule is that it continues in effect only those state laws in force at the time federal jurisdiction is acquired, without regard to subsequent changes by the state.[42] Therefore, a military installation made up of several parcels of land, over each of which the United States acquired exclusive jurisdiction at a different time, could conceivably have several different rules of law.

2. Situs Subject to the Jurisdiction of the State.

If the place where the incident occurs is subject to the jurisdiction of the state, obviously the current substantive law rules of the state are applicable. The fact that the United States may have concurrent jurisdiction makes no difference

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42 See Arlington Hotel Co. v. Fant, 278 U.S. 439 (1929).

at all in a civil case since there are no applicable federal statutes in this area of law and there is no federal common law.[43]

When a federal criminal prosecution is instituted on the basis of concurrent jurisdiction in the United States, federal substantive law is technically applicable. However, unless there is a specific federal criminal statute applicable to the offense charged,[44] the Assimilative Crimes Act[45] would apply. Under that act the state law in force at the time of the incident is adopted and applied, so the result is the same.

CHAPTER III

GENERAL LEGAL THEORIES JUSTIFYING THE USE OF FORCE

A preliminary excursion into American case law concerning

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43 See Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

44 Although there are federal criminal statutes dealing with assault, 18 U.S.C. § 113 (1958), murder, 18 U.S.C. § 1111 (1958), and manslaughter, 18 U.S.C. § 1112 (1958), in areas subject to concurrent federal jurisdiction, these contain no provisions relating to justification so, in the absence of any federal common law, reference must be made to state law even in the case of these offenses.

45 18 U.S.C. § 13 (1958).

the privilege to use force when property is threatened is very likely to leave the researcher quite confused. A more detailed analysis of the law, and especially of its historical common law background, brings the realization that it is not so much the researcher as it is the law that is confused. Careful examination of the various cases purporting to deal with the protection of property reveals that there are actually three entirely different areas of law involved. These concern defense of property, prevention of a criminal offense against the property, and effecting an arrest for a criminal offense against the property.[46]

The difficulty with trying to discover the basic rule of law in any one of these three areas is that the courts usually fail to distinguish between them. In Commonwealth v. Beverly,[47] for example, the court's discussion included principles of defense of property, prevention of a felony, and arrest when the

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46 There are still two more areas of law (not within the scope of this thesis, however) which are involved in many of the cases, self-defense and defense of another.

47 237 Ky. 35, 34 S. W. 2d 941 (1931).

accused, lying in wait, had simply shot down and killed two men in the act of stealing his chickens. In State v. Beal[48] the court discussed the rules pertaining to the use of force to prevent a crime but, without making any reference to arrest, included a basic rule from that area of law.[49]

In the only case in which it has discussed a serviceman's use of force in protecting government property, the Court of Military Appeals showed a similar tendency.[50] Judge Latti-mer, after extensively quoting provisions of the Manual and Warren on Homicide on the rules applicable to the use of force in preventing a crime, then continued: "The two foregoing authorities fairly suggest at least two factors which must be considered in connection with the defense to a killing in the protection of property".[51]

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48 55 N.M. 382, 234 P. 2d 331 (1951).

49 See id. at 389, 234 P. 2d at 335-36.

50 See United States v. Lee, 3 USCMA 501, 13 CMR 57 (1953).

51 Id. at 507, 13 CMR at 63. (Emphasis added.)

Such confusion of what are, or at least once were, distinct areas of law may be harmless in many cases but in others it will have a substantial effect on the outcome. This will be discussed in greater detail after separate examination of each of the three areas of law.

Before undertaking such an examination, however, certain aspects of the method of approach should be explained. First of all, no distinction will be made between criminal and civil cases because the substantive rules are basically the same.

> Rules of law covering the liability of the owner of property for an assault in defending it against aggression are applicable alike to a civil action for damages and to a criminal prosecution, with the exception of the rule of evidence, which, in a criminal cause, gives the defendant the benefit of a reasonable doubt.[52]

Thus, state criminal statutes justifying the use of force in protecting property are also applied in civil cases within the same

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52 Redmon v. Caple, 159 S.W. 2d 210, 212 (Tex. Civ. App. 1942). Accord, Brown v. Martinez, 68 N.M. 271, 361 P. 2d 152 (1961).

jurisdiction.[53]

Secondly, the rules of law as generally stated refer to acts by the owner of property. However, since the United States, like a corporation, can act only through agents, the person who acts in protecting government property will not be the owner. In practical application, there is no legal distinction made between acts done by the owner personally and acts done by an agent on his behalf.[54] Therefore no such distinction will be made in this discussion. The right of military personnel to take necessary action for the protection of government property intrusted to their care has long been recognized.

> ...the questions...concerning the removal of trespassers on the United States lands...appear to involve no other legal question than that of the right of the officer in command of a military post to protect it by force from occupation or injury at the hands of trespassers. There can be no doubt upon this point. Due caution should be observed,

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53 See Redmon v. Caple, supra note 56.

54 See, e.g., Montgomery Ward & Co. v. Freeman, 199 F. 2d 720 (4th Cir. 1952); Applewhite v. New Orleans Great Northern R.R., 148 So. 261 (La. App. 1933); Wis. Stat. Ann. § 939.49 (2) (1958).

> however, that in executing this duty there be no unnecessary or wanton harm done either to persons or property.[55]

Finally, the United States as a property owner will not be distinguished from private owners of property since there appears to be no legal basis for such a distinction in either the cases or statutes dealing with the protection of property. It is well established that the United States is a legal entity with the same remedies for the protection of its property rights as other persons.[56]

A. DEFENSE OF PROPERTY

The right to use force in defense of property is not denied by any jurisdiction in the United States, and by using broad enough language, it is possible to state a general rule.

> It is the generally accepted rule that a person owning, or lawfully in possession of, property may use such force as is reasonably necessary under the circumstances in order to protect that property, and for the exertion of such force he is not liable either criminally or civilly.... It is also the

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55 9 Ops. Att'y Gen. 476 (1860).

56 See Cotton v. United States, 52 U.S. (11 How.) 229 (1850).

> general rule, however, that the use of a deadly weapon in the protection of property is unjustifiable, except in extreme cases.[57]

It should be noted that this rule is easily divisible into two parts on the basis of the degree of force involved. In order to understand the current application of the rule, it is necessary to make this division.

1. The Basic Rule - Nondeadly Force

A very succinct statement of the basic rule relating to defense of property has been enacted into legislation in Wisconsin:

> A person is privileged to threaten or intentionally use force against another for the purpose of preventing or terminating what he reasonably believes to be an unlawful interference with his property. Only such degree of force or threat thereof may intentionally be used as the actor reasonably believes is necessary to prevent or terminate the interference.[58]

As long as the defense of property involves only the use of

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57 Peasley v. Puget Sound Tug & Barge Co., 13 Wash. 2d 485, 506, 125 P. 2d 681, 691 (1942).

58 Wis. Stat. Ann. § 939.49 (1) (1958).

nondeadly force, that is, force neither intended nor likely to cause death or serious bodily harm, this basic rule is generally recognized in the United States.[59] When deadly force is used, however, the various American jurisdictions are widely divided. An examination of the origin of the law relating to defense of property is helpful in understanding the reason for this difference.

The basic rule relating to the defense of property is derived from the old English common law. It was stated by Blackstone as follows:

> So likewise in defense of my goods or possessions, if any man endeavors to deprive me of them, I may justify laying hands upon him to prevent him; and in case he persists with violence, I may proceed to beat him away.... And, if sued for this or the like battery, he may set forth the whole case, and plead that he laid hands upon him gently, molliter manus imposuit, for this purpose.[60]

It should be noted that this is the entire rule stated by Blackstone as to the use of force in the defense of property.

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59 See generally Annot., 25 A.L.R. 508 (1923), 32 A.L.R. 1541 (1924), 34 A.L.R. 1488 (1925).

60 3 Blackstone, Commentaries * 121.

There is no reference to the use of deadly force. Nor later, in discussing justification of homicide, does Blackstone make any reference to the defense of property.[61]

Ignoring for the moment the problem as to the use of deadly force, it may be seen that the old common law rule, so far as it was specifically stated by Blackstone, is still followed.

A qualification of the rule which is widely recognized requires that the person interfering with the property of another be requested to desist before any force whatsoever may be used - unless the intrusion is forcible or it would obviously be useless or dangerous to make such a request.[62]

2. The Use of Deadly Force

The lack of any specific reference in the old common law rule to the possible use of deadly force in defense of property

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61 See 4 Blackstone, Commentaries * 179-*181.

62 See Hughes v. Babcock, 349 Pa. 475, 37 A. 2d 551 (1944); Cornell v. Harris, 60 Idaho 87, 88 P. 2d 498 (1939); Restatement, Torts § 77 (d) (1934); Model Penal Code § 3.06 (3) (a) (Prop. Off. Draft 1962).

left this area of the law open to interpretation. It is only to be expected that in the United States, with its many independent jurisdictions, various ways would be found to remedy this omission. There are now several varying rules and numerous shades of difference as to the use of deadly force in defense of property. There is not even agreement as to what constitutes deadly force, some jurisdictions holding that the use of a deadly weapon to frighten an intruder, even though there is no intent to injure or kill him, constitutes the use of deadly force[63] while others would allow such use of the weapon even in situations where deadly force is not justified.[64]

The following five variations offer a cross-section of the different forms the rule as to the use of deadly force has taken. It should be kept in mind, however, that no more force than the actor reasonably believes necessary may be used

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63 See State v. Pallanck, 146 Conn. 527, 152 A. 2d 633 (1959); People v. Doud, 223 Mich. 120, 193 N. W. 884 (1924); Ill. Crim. Code § 7-8 (1961).

64 See State v. Nickerson, 126 Mont. 157, 247 P. 2d 188 (1952); Ind. Ann. Stat. § 10-4707 (1956).

under any form of the rule.[65]

a. Prohibition of Deadly Force. As previously mentioned, the old common law rule pertaining to the use of force in defense of property, as stated by Blackstone, was silent with regard to the use of deadly force , and defense of property was not mentioned in his discussion of justification of homicide. Although many subsequent decisions have served to correct this omission, it is quite possible that the omission was not inadvertent in the first place, but that Blackstone's failure to say more than he did was significant in itself. Use of deadly force may not have been mentioned in connection with defense of property simply because it was not within the rule. Defense of property may not have been mentioned in discussing justifiable homicide because it did not constitute justification.

If this interpretation is correct, then the old common law rule never allowed the use of deadly force solely in defense of property. This view is taken by some American jurisdictions.

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65 There are exceptions. Under the Texas rule, for example, a person committing a theft at night or burglary may be slain rather indiscriminately, Tex. Pen. Code art. 1222 (1961).

> It is not reasonable to intentionally use force intended or likely to cause death or great bodily harm for the sole purpose of defense of one's property.[66]

Some writers, in fact, indicate this is the prevailing view.

> And since the law has always placed a higher value upon human safety than upon mere rights in property, it is the accepted rule that there is no privilege to use any force calculated to cause death or serious bodily injury where only the property is threatened.[67]

However, relatively few jurisdictions expressly hold that deadly force may never be used in defense of property. This will be discussed in more detail after the other variations of the rule have been considered.

b. Defense of the Person. Many of the cases which purport to deal with defense of property also involve defense of the person, that is, either self-defense or defense of another. In deciding these cases, the courts are obviously influenced by the danger to human safety involved in the acts against the

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66 Wis. Stat. Ann. § 939.49 (1) (1958).

67 Prosser, Torts § 21 at 93 (2d ed. 1955).

property, but seldom specifically base their decision on that factor. This has led to another version of the rule:

> The intentional infliction upon another of harmful or offensive contact or other bodily harm by a means which is intended or likely to cause death or serious bodily harm for the purpose of preventing or terminating the other's intrusion upon the actor's possession of land or chattels is privileged if, but only if, the actor reasonably believes that the intruder, unless expelled or excluded, is likely to cause death or serious bodily harm to the actor or to a third person whom the actor is privileged to protect.[68]

Of course defense of property and defense of the person are two different things, and the latter has no place in this discussion.[69] However, defense of the person as described in the above rule does not refer to the ordinary rules relating to self-defense and defense of another. Rather it is a special rule applicable to cases where an interference with

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68 Restatement, Torts § 79 (1934). Accord, La. Rev. Stat. Ann. §§ 14.19-.20 (1951). Compare Model Penal Code § 3.06 (3) (d) (Prop. Off. Draft 1962).

69 As mentioned in note 46, supra, self-defense and defense of another are not within the scope of this thesis.

property bears with it some threat to the person. The only real difference between this special rule and the ordinary principles of defense of the person is that, in the former, the danger to the actor or the third person whom he is privileged to protect need not be as imminent as is required under the latter.[70]

It should be noted that those acts which constitute both an interference with property and a threat of death or serious bodily harm to the person are, for the most part, dangerous felonies[71] such as robbery, burglary, and arson.

c. Dangerous Felonies. The majority rule regarding the defense of property by the use of deadly force limits the use of such force to situations in which the victim is committing a dangerous felony, that is, one involving violence, force or

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70 See Restatement, Torts § 79 at 182 (1934).

71 A criminal offense is generally classified as a felony or a misdemeanor. Whether a particular offense is a felony or a misdemeanor must be determined by reference to the law of the situs or, in the case of a federal offense, by 18 U.S.C. § 1 (1958). Under the latter provision any offense punishable by death or imprisonment for a term exceeding one year is a felony, and any lesser offense is a misdemeanor. The majority of states use this same dividing line.

surprise.

The rule is not stated in exactly the same way in every jurisdiction which follows it, but the variations are not too great. Thus, it is said that deadly force may be used in defense of property only "against one who manifestly intends or endeavors by violence or surprise, to commit a known felony",[72] or when there is "a felonious use of force on the part of the aggressor",[73] or "a felony which is either an atrocious crime or one attempted to be committed by force (or surprise)".[74]

The Court of Military Appeals appeared to adopt this majority view in United States v. Lee.[75] In that case, Corporal Lee had made a pretrial statement in explanation of his shooting two Korean civilians. According to this statement, Lee

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72 Ark. Stat. Ann. § 41-2231 (1947).

73 State v. Lee, 258 N.C. 44, _____, 127 S.E. 2d 774, 776 (1962).

74 Commonwealth v. Emmons, 157 Pa. Super. 495, 498, 43 A. 2d 568, 569 (1945).

75 3 USCMA 501, 13 CMR 57 (1953).

had discovered the two victims stealing radios from his jeep and had shot them in the act. Then, completely ignoring his victims, he replaced the radios in the jeep and returned to his unit without even bothering to report the incident.

At the trial level, no argument was made to the effect that Lee's acts were justifiable as defense of government property and, in fact, the pretrial statement was only admitted into evidence over the objection of Lee's counsel. However, after Lee was convicted of murder and aggravated assault, the case was appealed on the theory that the law officer erred in not instructing on the issue of justification. The Court, although holding that the facts were insufficient to raise the issue, indicated that homicide would be justified in defense of property only in the case of a crime of "a forceful, aggravated, or serious nature."[76]

The use of "or" rather than "and" in this phrase could raise some doubt as to whether the Court was making reference to the same dangerous felonies included in the majority

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76 Id. at 507, 13 CMR at 63.

rule. However, the offense which Lee's victims were supposedly committing was a serious one, so obviously the Court was requiring more than just that. Furthermore, additional reference was made to the fact that the victim's offense was not a forcible one.

> The offense, if any, being committed by the Koreans would be no more than a taking without force or violence. There was no necessity for repelling any force against the accused. ... there was no violence on the part of the Koreans, no fear on the part of the accused....[77]

Therefore it appears that the Court of Military Appeals accepts the majority view and will consider the use of deadly force in defense of property to be justified only in case of a dangerous felony.

This majority rule seems to have its origin in the early common law relating to a somewhat different proposition.

> ... homicide is justifiable ... where it is committed for the prevention of some atrocious crime, which cannot otherwise be avoided. ... such homicide as is committed for the prevention of any forcible and atrocious crime, is justifiable by

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77 Ibid.

> the law of nature; and also by the law of England. ... If any person attempts a robbery or murder of another, or attempts to break open a house, in the night-time (which extends also to an attempt to burn it), and shall be killed in such attempt, the slayer shall be acquitted and discharged. This reaches not to any crime unaccompanied with force, as picking of pockets.[78]

Although this language appears to be very similar to the current majority rule regarding defense of property by deadly force, here Blackstone was speaking of the prevention of felonies as distinguished from defense of property. As previously seen, Blackstone made no reference to the use of deadly force in connection with defense of property. However, since many felonies are against property rights, including the examples of robbery, burglary, and arson cited by Blackstone, the eventual confusion of the two rules was not surprising.

d. Any Felony. Somewhat broader than the majority rule is the following:

> A man may use force to defend property in his actual possession against one who endeavors to dispossess him, without right,

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78 4 Blackstone, Commentaries *179-*180. Before Blackstone's time, the law imposed less restriction on the slaying of a felon, 3 Coke, Institutes *56.

> however, taking care that the force used does not exceed what reasonably appears to be necessary for the purpose of defense and prevention. And if a trespass on the property of another amounts to a felony, the killing of the trespasser is justified, if necessary to prevent it.[79]

This rule would allow the use of deadly force to defend property from any felony. Under this theory, for example, a railroad guard was held not liable for shooting a man attempting to steal the contents of a freight car, a simple larceny.[80]

e. The Texas Rule. Undoubtedly, the jurisdiction allowing the greatest use of deadly force in defense of property is Texas. There is a general statutory provision declaring homicide to be justifiable when committed in protecting property against "unlawful and violent attack".[81] This is similar to the

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79 Wharton, Homicide § 526 at 784 (3d ed. 1907).

80 See Applewhite v. New Orleans Great Northern R.R., 148 So. 261 (La. App. 1933). Louisianna has since adopted a more restrictive rule, La. Rev. Stat. Ann. § 14.19-.20 (1951).

81 Tex. Pen. Code art. 1224 (1961).

majority rule in that the attack on the property must be violent, but there is no requirement that the attack constitute a felony, only that it be unlawful.

There is another statute declaring homicide justifiable in the case of certain specified felonies, basically the same dangerous felonies included under the majority rule, and also in the case of theft at night,[82] even though that is not a felony if less than fifty dollars is taken.[83]

Thus, it appears that Texas permits the use of deadly force in defending property not only against the usual dangerous felonies, but also against any other unlawful and violent attack, even though not a felony,[84] and even against theft at night when no violence whatsoever is involved.[85]

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82 See Tex. Pen. Code art. 1222 (1961).

83 See Tex. Pen. Code art. 1421-1422 (1953).

84 See Gilliam v. State, 100 Tex. Crim. 67, 272 S. W. 154 (1925).

85 See Teague v. State, 84 Tex. Crim. 169, 206 S. W. 193 (1918).

f. Comparison of the Various Rules. From the foregoing it may be seen that the attitude of the various jurisdictions toward the use of deadly force in defense of property ranges over a considerable spectrum. It is impossible to reconcile all these different views but between the first three, at least, there is a similar underlying principle. This principle is that deadly force is permissible only when human life is endangered, either actually or potentially, by the threat to the property.

Saying that deadly force cannot be used "for the sole purpose of defense of one's property"[86] is basically no different than saying such force can be used only when the interference with the property is also "likely to cause death or serious bodily harm"[87] to the one in possession. And saying that deadly force may be resorted to only in case of a felony involving force and violence is really saying nothing different because such felonies, by their very nature, constitute a threat to human safety.

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86 Wis. Stat. Ann. § 939.49 (1) (1958). (Emphasis added.)

87 Restatement, Torts § 79 (1934).

> The law is that a man may oppose force with force in defense of his person, his family or property against one who manifestly endeavors by violence to commit a felony, as murder, robbery, rape, arson or burglary. In all these felonies, from their atrocity and violence, human life, either is, or is presumed to be in peril.[88]

This same principle could perhaps be applied to that portion of the Texas rule allowing deadly force in case of "violent and unlawful attack",[89] but hardly to a nonviolent theft at night. The same problem arises in attempting to apply this principle to the rule allowing deadly force in the case of any felony, since many felonies involve no threat to human safety.

g. The Duty to Yield. The fact that there is a limitation on the use of deadly force in defense of property raises an interesting problem. What does the person protecting property do when nondeadly force is ineffective, yet deadly force is not permissible? For example, if an armed guard sees a person placing government property in a truck but is too far away

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88 United States v. Gilliam, 25 Fed. Cas. 1319, 1320 (No. 15, 205a) (C.C.D.C. 1882).

89 Tex. Pen. Code art. 1224 (1961).

to reach the scene in time to prevent the thief from driving off with it, may the guard use his weapon to prevent the loss of the property?

Most jurisdictions which have dealt with the problem would not hold the use of deadly force justifiable in such a case.[90] Thus, under the majority rule, a person must suffer the loss of his property rather than use deadly force to protect it, unless a dangerous felony is involved.

3. Mistake.

Although it is generally agreed that no more force may be used in defense of property than is necessary, it is the view of most jurisdictions that this necessity is determined by the reasonable belief of the actor rather than by the actual facts.[91] Thus, the serviceman is protected if he makes a reasonable mistake as to whether the property he acts to defend is really threatened. Many states have included this principle

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90 See Turpen v. State, 89 Okla. Crim. 6, 204 P. 2d 298 (1949); Brown v. State, 149 Ark. 588, 233 S.W. 762 (1921). Contra, Hassel v. State, 80 Tex. Crim. 93, 188 S.W. 991 (1916).

91 See State v. Lee, 258 N.C. 44, 127 S.E. 2d 774 (1962); Restatement, Torts §§ 77 (b), 79 (1934).

in their statutes dealing with the justifiable use of force[92] or justifiable homicide.[93]

4. Subsequent Actions.

In addition to the actual defense of the property, force may also be used in certain subsequent actions which are closely connected. For example, it has long been recognised that the right to use force in defense of property extends to prompt pursuit of the thief and recovery of the property.[94] In fact, if the recovery of the property is immediate, the case is often treated as one of defense rather than recaption.[95]

However, recaption is subject to an important limitation not applicable to defense of property. As has already been

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92 See, e.g., Ill. Crim. Code § 7-3 (1961); Wis. Stat. Ann. § 939.49 (1) (1958).

93 See, e.g., Ariz. Rev. Stat. § 13-462 (2) (1956); Cal. Pen. Code §§ 197-8; Idaho Code Ann. § 18-4010 (1947).

94 See Crawford v. State, 90 Ga. 701, 17 S.E. 628 (1892); Riffel v. Letts, 31 Cal. App. 426, 160 Pac. 845 (1916) (dictum); Prosser, Torts § 24 at 100 (2d ed. 1955).

95 See Curlee v. Scales, 200 N.C. 612, 158 S.E. 89 (1931); Branston, The Forcible Recaption of Chattels, 28 L.Q. Rev. 262, 270 (1912).

seen, action taken in defense of property may be justified by the reasonable belief of the actor even though he may in fact be mistaken. When seeking to recover property, however, the actor is liable if he is in fact mistaken regardless of what he reasonably believed.[96] Thus, if the owner of property pursues and uses force against one whom he believes has stolen it, he is liable if that person is in fact not guilty.[97] This distinction between the rules of defense and recaption has been attributed to the importance attached to possession by the early common law.[98]

Another problem area closely related to the defense and recaption of property concerns the right to temporarily detain, question, and search the person suspected of having interfered with the property. At common law such conduct constituted false imprisonment and battery and was not privileged even

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96 See Restatement, Torts § 100, comment d (1934).

97 See Little Stores v. Isenberg, 26 Tenn. App. 357, 172 S. W. 2d 13 (1943); Dunlevy v. Wolferman, 106 Mo. App. 46, 79 S. W. 1165 (1904); Estes v. Brewster Cigar Co., 156 Wash. 465, 287 Pac. 36 (1930) (dictum).

98 See Branston, The Forcible Recaption of Chattels, 28 L. Q. Rev. 262 (1912).

though the suspect was in fact guilty.[99]

The first major departure from the older rule came with a group of cases allowing the owner or his agent to detain for a reasonable time and to question a person suspected of acts against his property.[100] This principle has gained wider recognition in recent years,[101] and is apparently being broadened to allow a search of the suspect.[102] One of its more important features is that it exempts the owner or his agent from liability if there was probably cause for his action, even though the

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99 For a detailed treatment of the common law background on this point, see Comment (pt. 1), 46 Ill. L. Rev. 887 (1952). Later modifications in the law are discussed in Comment (pt. 2), 47 Nw. U. L. Rev. 82 (1952).

100 See Piggly-Wiggly Co. v. Rickles, 212 Ala. 585, 103 So. 860 (1925) (allowing detention but not search); Jacques v. Childs Dining Hall Co., 244 Mass. 438, 138 N. E. 843 (1923); Rezeau v. State, 95 Tex. Crim. 323, 254 S. W. 574 (1923).

101 See Burnamen v. J. C. Penny Co., 181 F. Supp. 633 (S. D. Tex. 1960); Montgomery Ward & Co. v. Freeman, 199 F. 2d 720 (4th Cir. 1952).

102 See Burnamen v. J. C. Penny Co., supra note 101.

suspect was in fact not guilty of any misconduct toward the property.[103] Although this departure from the common law appears to be growing trend, it is only followed by a few jurisdictions at present, some of which have adopted it by statutes applicable only to shoplifters.[104]

By regulation the Army has adopted a position substantially in accordance with this trend.[105] A commander is specifically authorized to apprehend, search and interrogate any person who enters a restricted area without competent authority. The individual is then either warned and released or, if sufficient cause exists, is turned over to a United States marshal. Unless a restricted area is involved, however, there is no specific authorization for such action.

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103 See Collyer v. S.H. Kress & Co., 5 Cal. 2d 175, 54 P. 2d 20 (1936).

104 See Minn. Stat. Ann. § 622.27 (1957).

105 See AR 380-20, para. 6a (Feb. 6, 1958). However, this regulation undoubtedly relies on implied statutory authorization, ch. 1024, tit. I. § 21, 64 Stat. 1005 (1950), 50 U.S.C. § 797 (a) (1958), rather than upon the trend of case law.

B. PREVENTION OF A CRIMINAL OFFENSE

A second major area of substantive law important to the use of force for the protection of government property is that relating to the prevention of criminal offenses. It is generally recognized that every person is privileged to use some force to prevent the commission of some crimes, but the degree of force which may be used and the kind of offenses which it may be employed to prevent vary considerably from one jurisdiction to another.

1. The Basic Rule - Nondeadly Force.

At common law the right to use force for the prevention of criminal offenses was generally coextensive with the right to make a citizen's arrest for such offenses.[106] Under this rule force could be used to prevent any felony or a misdemeanor which constituted a breach of the peace.[107]

Several states have enacted statutes which restrict the

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106 See Restatement, Torts § 140, comment a (1934).

107 The circumstances justifying arrest by a private citizen are discussed in more detail in the following subchapter.

right to use force for the prevention of criminal offenses against property to cases in which the offense is forcible in nature.[108] Since a forcible offense would probably constitute a breach of the peace in most cases, these statutes do not appear to expand on the common law by allowing the use of force to prevent misdemeanors other than breaches of the peace. Rather they seem to narrow the rule by eliminating the common law right to use force to prevent non-forcible felonies against property.

Other states have enlarged on the common law and allow the use of force to prevent any trespass or interference with property[109] or to prevent offenses generally, without regard to the nature of the offense.[110]

The Model Penal Code would allow the use of nondeadly force to prevent any crime involving or threatening damage to or loss of property or a breach of the peace.[111] This would

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108 See, e.g., Cal. Pen. Code § 693; La. Rev. Stat. Ann. § 14.19 (1951); Ore. Rev. Stat. § 145.110 (1959).

109 See, e.g., N.Y. Pen. Law. § 246 (3).

110 See, e.g., Ariz. Rev. Stat. Ann. § 13-246 (A) (3) (1956); Tex. Pen. Code art. 1142 (3) (1961).

111 See Model Penal Code § 3.07 (5) (a) (Prop. Off. Draft 1962).

also be considerable expansion on the common law with regard to offenses against property since every such offense, either felony or misdemeanor, would be included in the rule.

The Court of Military Appeals in the Hamilton case[112] appears to have adopted a rule considerably more restrictive than the common law. Hamilton, an off duty air policeman, held his knife to the throat of another airman to put an end to the latter's disorderly and abusive conduct after lesser measures had failed to deter him. A very minor cut was inflicted. Hamilton was convicted of aggravated assault. In passing on the defense argument that the use of force was justifiable because it was necessary to prevent the commission of criminal offenses,[113] the court unanimously upheld the conviction, saying that a private person may use force to prevent an offense only when it constitutes a felony. The same result could have been reached under the common law rule by considering the use of

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112 United States v. Hamilton, 10 USCMA 130, 27 CMR 204 (1959).

113 Drunk and disorderly conduct, abusive language in the presence of a female, and assault, id. at 133, 27 CMR at 207.

the knife under the circumstances to have been deadly force. However, the Court made no distinction as to the degree of force but indicated that no force could be used to prevent anything less than a felony.

Although the right to use force in the prevention of relatively minor offenses may seem unimportant, it is probably the situation which will most often confront the serviceman protecting government property. As will be seen later, many offenses against government property are misdemeanors. Since such offenses generally do not constitute a breach of the peace, in most jurisdictions the serviceman is without authority, under this theory of law, to use force to prevent them.

2. The Use of Deadly Force.

No American jurisdiction goes so far as to hold that prevention of a criminal offense is never justification for the use of deadly force. Like the law relating to defense of property, however, there is considerable difference of opinion as to when such drastic measures are permissible.

a. Defense of the Person. The statute most restrictive of the use of deadly force for the prevention of offenses provides that such force is justified if used to prevent a violent or

forcible felony involving danger to life or of great bodily harm.[114] This in itself is a substantial limitation, but the statute provides further that the circumstances must be sufficient to excite the fear of a reasonable person that there would be serious danger to his own life or person if he attempted to prevent the felony without killing the culprit.[115] This latter limitation is an innovation not generally recognized, although it is implied to some extent in the principle that killing a felon is justified only when reasonably believed to be absolutely necessary.

The Model Penal Code would adopt a position not quite so restrictive. The use of deadly force would be justified in preventing any crime which the actor reasonably believes will cause death or serious bodily harm.[116]

Both of these approaches substantially eliminate prevention of a criminal offense as a separate ground for justification

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114 See La. Rev. Stat. Ann. § 14.20 (2) (1951).

115 See ibid.

116 See Model Penal Code § 3.07 (5) (a) (ii) (1) (Prop. Off. Draft 1962).

of deadly force since defense of the person is made an essential element.

b. Dangerous Felonies. As already mentioned in connection with defense of property, the early common law rule held homicide justifiable when necessarily committed in the prevention of any forcible or atrocious felony.[117] This is still the most generally accepted rule as to when deadly force may be used to prevent criminal offenses.[118]

The fact that a state statute appears to modify the common law rule is not always controlling, either. For example, the Oregon statute provides that homicide is justifiable when committed to prevent a felony upon the slayer or members of his household[119] or upon property in his possession.[120] This could

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117 See 4 Blackstone, Commentaries *180.

118 See State v. Robinson, 328 S. W. 2d 667 (Mo. 1959); Commonwealth v. Emmons, 157 Pa. Super. 495, 43 A. 2d 568 (1945); Ark. Stat. Ann. § 41-2232 (1947).

119 See Ore. Rev. Stat. § 163.100a (1957).

120 See Ore. Rev. Stat. § 163.100b (1957).

be interpreted as enlarging the common law rule since no mention is made of any requirement that the felony being prevented be a dangerous or forcible one. Yet the Supreme Court of Oregon, after an extensive review of authorities, said:

> Any civilized system of law recognizes the supreme value of life, and excuses or justifies its taking only in cases of absolute necessity. It is for that reason that the right to kill to prevent the commission of a felony does not extend to secret felonies not committed by force or to remote and problematic dangers.[121]

Similarly a Washington statute[122] providing that homicide is justifiable when committed in resisting the commission of a felony, without any express limitation as to the type of felony, was held to be "but a statutory declaration of the common law",[123] and not to justify homicide except in the case of violent felonies endangering human life.

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121 State v. Nodine, 198 Ore. 679, 714, 259 P. 2d 1056, 1071 (1953).

122 Rev. Code Wash. Ann. § 9.48.170 (1961).

123 State v. Nyland, 47 Wash. 2d 240, 242, 287 P. 2d 345, 347 (1955).

The Court of Military Appeals in the Lee case, previously discussed, apparently accepted this majority rule.[124] The Manual also adopts this position.[125]

According to Blackstone, the rule allowing the use of deadly force in preventing the commission of dangerous felonies was based on the fact that these felonies were punishable by death.

> For the one uniform principle that runs through our own, and all other laws, seems to be this, that where a crime, in itself capital, is endeavored to be committed by force, it is lawful to repel that force by the death of the party attempting.[126]

This reasoning would certainly not be applicable today when capital punishment is so much more restricted than it was in Blackstone's day.

The true basis for allowing the use of deadly force in preventing forcible felonies appears to be that such offenses are at least a potential threat to human safety.[127] Thus, this rule is

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124 See United States v. Lee, 3 USCMA 501, 13 CMR 57 (1953).

125 See MCM, 1951, para. 197b.

126 4 Blackstone, Commentaries *181.

127 See United States v. Gilliam, 25 Fed. Cas. 1319 (no. 15,205a) (C.C.D.C. 1882).

very similar to, but slightly more liberal than, the rule expressly limiting the use of deadly force to those cases where defense of the person is involved.

c. Any Felony. Many jurisdictions appear to have adopted rules which go beyond the theory that the felony prevented must involve at least a potential threat to human life before the use of deadly force is justifiable in preventing it. These states have adopted statutes declaring homicide justifiable if committed in the prevention of a felony, without specifying any particular kind of felony.[128] As already mentioned, however, it is not entirely reliable to accept such statutes at face value since some courts have held that they do not change the common law requirement that the felony prevented must be a dangerous one.[129]

Some jurisdictions, though, have clearly abandoned any requirement that the felony prevented must be dangerous.

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128 See, e.g., Ariz. Rev. Stat. Ann. § 13-462 (1956); Idaho Code Ann. § 18-4009 (1947); N. Y. Pen. Law § 1055.

129 See State v. Nyland, 47 Wash. 2d 240, 287 P. 2d 345 (1955); State v. Nodine, 198 Ore. 679, 259 P. 2d 1056 (1953).

In People v. Silver,[130] for example, three young brothers drove their car up to a private gasoline pump at a mine at night and began to fill the tank with gasoline. A watchman opened fire with a rifle, killing one of the boys and wounding another. Because the boys were committing a felony, under a greatly expanded statutory definition of burglary, the watchman's conviction for manslaughter was reversed. The California statute, therefore, appears to allow the use of deadly force to prevent a felony without requiring even a potential danger to human safety.[131]

Since a large number of states have justifiable homicide statutes similar or identical to California's with regard to the prevention of felonies, if the bulk of them interpret these statutes in the same way this could conceivably rival the majority rule. However, most of these statutes have not been interpreted by the courts on this particular point.

d. Offenses Other Than Felonies. In a few very limited

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6 Cal. 2d 714, 108 P. 2d 4 (1940).

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See Note, 13 Stan. L. Rev. 566, 578 (1961).

instances the use of deadly force is permissible in preventing an offense not amounting to a felony. For example, the right to use deadly force in surpressing a riot is generally recognized even though participation in a riot may not constitute a felony.[132] Texas allows the use of deadly force to prevent any theft at night, even though not a felony.[133]

3. Mistake.

Although force may be used only when a criminal offense cannot otherwise by prevented, the prevailing view, as in the case of defense of property, is that this necessity is determined by the reasonable belief of the actor rather than by the actual facts.[134] This affords the serviceman some protection if he is mistaken as to whether an offense is actually being committed or as to the nature of the offense. This is obviously an

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132 See, e.g., Cal. Pen. Code § 197 (4); N.Y. Pen. Law § 1055; Restatement, Torts § 142 (1934).

133 See Tex. Pen. Code art. 1222 (1961).

134 See Williams v. State, 70 Ga. 10, 27 S.E. 2d 109 (1943); Restatement, Torts § 143 (1948 Supp.).

important protection.

Most of the statutes dealing with the use of force in preventing offenses are silent as to whether the actor is justified in relying on a reasonable belief that an offense is being committed.[135] The silence of some of these would seem to cast doubt on the general rule since they expressly apply the reasonable belief principle in the case of force used in defense of persons or property, but fail to say that it also extends to prevention of offenses.[136] Such a statute has not prevented a holding that the actor's reasonable belief is sufficient, however.[137]

The justifiable homicide statutes of a few jurisdictions include the word "actual" in the section referring to resisting

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135 See, e.g., Cal. Pen. Code § 692-694; Ore. Rev. Stat. §§ 145.110, 163.100 (1957).

136 See, e.g., Ariz. Rev. Stat. §§ 13-462 (1) - (2) (1956); Idaho Code Ann. §§ 18-4009-4010 (1947). See generally Comment, 59 Colum. L. Rev. 1212, 1219-20 n. 40 (1959).

137 See Viliborghi v. State, 45 Ariz. 275, 43 P. 2d 210 (1935). But see State v. Law, 106 Utah 196, 147 P. 2d 324 (1944).

certain felonies.[138] This more clearly seems to put the actor outside the protection of the statute if he kills a person he mistakenly believes to be committing such a felony.

4. Subsequent Actions.

In the prevention of criminal offenses, by definition, there is no justification for the use of force unless an offense either is being or is about to be committed. If the supposed culprit abandons his attempt to commit the offense, or attempts to flee, there is no longer any necessity to use force to prevent the offense.[139] So too, if the offense has already been completed, forcible action against the offender is not justifiable under this theory of law.[140] In either case, however, the further use of force might be justifiable in an attempt to arrest the culprit.

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138 See, e.g., N.Y. Pen. Law § 1055.

139 See State v. Beal, 55 N.M. 382, 234 P. 2d 331 (1951).

140 See Haworth v. Elliott, 67 Cal. App. 2d 77, 153 P. 2d 804 (Dist. Ct. App. 1944).

C. ARREST

The right of a private person to make an arrest without a warrant, popularly referred to as a citizen's arrest, is a survival from the early common law when law enforcement was largely in the hands of private citizens rather than peace officers. Although less common today, the right is still generally recognized in the United States.

Some question might be raised as to the right of a private person to arrest for a federal offense since the federal statutes specifying who may arrest for offenses against the United States do not mention private citizens,[141] and there is no federal common law.[142] However, the applicability of the citizen's arrest to federal offenses is apparently an accepted principle.[143]

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141 See 18 U.S.C. ch. 203 (1958).

142 See Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

143 See Ward v. United States, 316 F. 2d 113 (9th Cir. 1963) (citizen's arrest by postal inspector for theft of mail); United States v. Burgos, 269 F. 2d 763 (2d Cir. 1959) (citizen's arrest by customs official for illegal entry into United States).

The serviceman, like any private citizen, may arrest[144] certain offenders even though they are not subject to military law.[145] There is one important qualification, however. That is the Posse Comitatus Act[146] which, in effect, prohibits the use of any part of the Army or Air Force[147] to execute the laws. An order directing servicemen as part of their official duties to arrest civilian lawbreakers would undoubtedly run afoul of the Act.[148]

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144 The term "apprehension" is generally used in the military. For the purpose of this discussion "arrest" and "apprehension" will be used interchangeably.

145 See AR 633-1, para. 8a (Sept. 13, 1962). Somewhat different provisions apply to the apprehension of military personnel, Uniform Code of Military Justice, Art. 7; MCM, 1951, para. 19; AR 633-1, para. 4a (Sept. 13, 1962).

146 18 U.S.C. § 1385 (1958).

147 The Posse Comitatus Act makes no reference to other branches of the armed forces.

148 This limitation would not apply to the serviceman's apprehension of any person who enters a restricted area without authority, ch. 1024, tit. I, § 21, 64 Stat. 1005 (1950), 50 U.S.C. § 797 (1958); Dep't of Defense Directive No. 5200.8 (Aug. 20, 1954); AR 380-20, para. 6a (Feb. 6, 1958).

However, in cases where it can reasonably be done, the serviceman will often act spontaneously to apprehend a person who has committed an offense against property under the serviceman's protection. "When the serviceman acts on his own initiative, as an individual, in an unofficial capacity, . . . he is beyond the restrictions of the Act."[149]

1. The Basic Rule - Nondeadly Force.

The use of force in connection with an arrest actually involves two distinct problems, the circumstances under which an arrest may be made and the amount of force which may be used in making it. At common law either a peace officer or a private person could arrest for a misdemeanor amounting to a breach of the peace, if committed in his presence,[150] or for a felony, whether or not committed in his presence.[151] The right to arrest carried with it the right to use whatever force reasonably appeared to be necessary to overcome the offender's

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149 Furman, Restrictions Upon the Use of the Army Imposed by the Posse Comitatus Act, 7 Mil. L. Rev. 85, 127 (1960).

150 See Perkins, The Law of Arrest, 25 Iowa L. Rev. 201, 230 (1940).

151 See id. at 233.

resistance and prevent his flight,[152] with certain limitations on the use of deadly force which will be discussed below. Although the majority of American jurisdictions still follow these common law principles as to arrests by private citizens,[153] in many states there have been statutory modifications.

Some jurisdictions have expanded somewhat on the common law and allow a private person to arrest for any misdemeanor committed in his presence as well as for any felony.[154] One state also allows the arrest of any person reasonably believed to be in possession of stolen property.[155] Others have

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152 See Waite, The Law of Arrest, 24 Tex. L. Rev. 279, 301 (1945).

153 There has been a much greater enlargement of the common law, both as to when an arrest may be made and what force may be used in making it, in the case of peace officers. However, since this discussion is concerned primarily with arrests by servicemen, no discussion of statutes applicable to state peace officers is included here.

154 See, e.g., N.Y. Pen. Code § 183; 22 Okla. Stat. Ann. § 202 (1937).

155 See Lasker v. State, 290 S.W. 2d 901 (Tex. Crim. App. 1956). interpreting Tex. Code Crim. Proc. art. 325 (1954).

restricted a private citizen's right to arrest for felonies to those committed in his presence, while not modifying his common law right to arrest for breaches of the peace.[156] Still others allow a private person to arrest for any offense committed in his presence,[157] thereby expanding the common law rule with respect to misdemeanors and restricting it with respect to felonies. In some jurisdictions a private person may arrest only for a felony.[158]

Where the statutes are silent, it may be presumed that nondeadly force may still be used whenever it reasonably appears necessary to effect an arrest by a private person. Some jurisdictions, in fact, have statutes specifically providing that force used in making a lawful arrest is privileged or that it

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156 See Gen. Stat. N.C. §§ 15-39 to -40 (1953).

157 See Tex. Code Pen. Proc. art. 212 (1954).

158 See La. Rev. Stat. Ann. § 15-61 (1951).

does not constitute assault and battery.[159]

Several jurisdictions, however, appear to limit the right of a private person to use force in making an arrest. These states have statutes which provide that the use of force is not unlawful in certain in cases.[160] One of the enumerations is: "When necessarily committed by any person in arresting one who has committed any felony and delivering him to a public officer competent to receive him in custody".[161] No mention is made of the use of force to arrest for a misdemeanor even though some of these states[162] allow a private person to arrest for any misdemeanor committed in his presence. Under the principle expressio unius est exclusio alterius, it appears that

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159 See, e.g., Ariz. Rev. Stat. Ann. § 13-246 (5) (1956); La. Rev. Stat. Ann. § 14-18 (2) (1951); Wis. Stat. Ann. § 939.45 (4) (1958).

160 See, e.g., N.Y. Pen. Law § 246 (2); Rev. Code Wash. Ann. § 9.11.040 (2) (1961).

161 21 Okla. Stat. Ann. § 643 (2) (1961).

162 E.g., New York, Oklahoma.

in jurisdictions with such statutes no force at all may be used by a private person to effect an arrest except for a felony.

No American jurisdiction has gone so far as to say that no force may be used by a private person in lawfully arresting for a felony.

2. The Use of Deadly Force.

A private person is not privileged to use deadly force to effect an arrest for a misdemeanor even in jurisdictions where such arrests are permitted.[163]

Under the early common law a private person was privileged to use deadly force in attempting to arrest for any felony if the felon could not otherwise be taken.[164] It appears that this is still the rule of a majority of American jurisdictions,[165]

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163 See Waite, The Law of Arrest, 24 Tex. L. Rev. 279, 301 (1945).

164 See id. at 303; People v. Lillard, 18 Cal. App. 343, 123 Pac. 221 (Dist. Ct. App. 1912).

165 For a compilation of statutes adopting this rule, see Comment, 59 Colum. L. Rev. 1212, 1219 n. 37 (1959). There are very few cases involving the use of deadly force by a private person in making an arrest; however, see Brown v. Cain, 56 F. Supp. 56 (E.D. Penn. 1944); People v. Lillard, supra note 164.

without any distinction as to the nature of the felony. Some states, however, allow a private person to use deadly force only when aiding a peace officer.[166]

The American Law Institute originally took the position that the privilege to kill in arresting for a felony should be limited, as it generally is in the prevention of offenses, to felonies which at least potentially endanger human life.[167] This is a very logical position, of course, since it seems ridiculous to prohibit a person from killing to prevent a non-dangerous felony but to allow him to kill the same felon an instant later on the theory of arresting him. However, after a number of years with little, if any, support for its position, the Institute reluctantly accepted the common law rule.[168]

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166 See Minn. Stat. Ann. §§ 619.28-.29 (1947); N.Y. Pen. Code § 1055. Washington allows a private citizen to use deadly force, but not with the intent to kill unless aiding a peace officer, State. v. Clarke, 61 Wash. 2d 138, 377 P. 2d 449 (1962).

167 See Restatement, Torts § 131 (1934).

168 See Restatement, Torts § 131 (1948 Supp.).

Since then, one jurisdiction has adopted a statute, similar to the Institute's original position, providing that a private person may use deadly force in making an arrest only when he reasonably believes that such force is necessary to prevent death or great bodily harm to himself or another.[169] The Model Penal Code would not allow private persons to use deadly force at all in making an arrest.[170]

Probably the most famous case involving the use of deadly force by a serviceman in attempting to arrest a civilian is that of United States ex. rel. Drury v. Lewis.[171] Lieutenant Drury was commander of a detachment of men stationed at Allegheny Arsenal in Pittsburgh. Because of the periodic theft of copper down spouts and eave troughs from arsenal buildings, Lieutenant Drury was directed to establish patrols of the grounds and arrest anyone committing depradations on the

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169 See Ill. Crim. Code § 7-6 (a) (1961).

170 See Model Penal Code § 3.07 (2) (b) (Prop. Off. Draft 1962).

171 200 U.S. 1 (1906).

arsenal property.[172] Sometime later, one of Lieutenant Drury's men, in his presence and apparently acting under his orders, shot and killed a nineteen year old youth who had fled when an attempt was made to arrest him. The youth had been stealing arsenal property, then a felony.

The Supreme Court refused to order Lieutenant Drury's release from the custody of state authorities because there was evidence that he had ordered the soldier to fire after the youth had stopped running and was returning to surrender. By implication, however, the court indicated that, if the evidence had clearly established that shooting the youth had been the only way in which he could be apprehended, a writ of habeas corpus would have been appropriate.

From the foregoing discussion it is apparent that the law

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172 Although the Posse Comitatus Act had been adopted twenty-five years before this incident, § 15, Army Appropriation Act of June 18, 1878, 20 Stat. 152, no one seemed to be bothered by the fact that Lieutenant Drury was ordered to arrest civilian lawbreakers as part of his official duties. The Act was not even mentioned in the decision.

is considerably more liberal in allowing the use of deadly force in making an arrest than in defending property or preventing a criminal offense.

3. Mistake.

An important concern of a private person making an arrest is whether he is liable if the person arrested is in fact innocent.[173] The general rule at common law was that the person making an arrest acted at his peril. There was one exception: if a felony had actually been committed and the person making the arrest reasonably believed that the person being arrested had committed it, an arrest without the use of deadly force was privileged even though the person arrested was in fact innocent.[174] However, the person making the arrest was liable for the use of deadly force against an innocent person even though the arrest was otherwise lawful.[175] In most jurisdictions this latter restriction has been eliminated,

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173 See generally Annot., 133 A.L.R. 608 (1941).

174 See Waite, The Law of Arrest, 24 Tex. L. Rev. 279, 289 (1945).

175 See Baker v. Commonwealth, 212 Ky. 50, 278 S.W. 163 (1925).

so that the use of deadly force is privileged whenever the private person is lawfully arresting for a felony, whether or not the person arrested is guilty.[176]

A few jurisdictions have narrowed the common law rule by restricting the privilege of a private person to arrest, even for a felony, only to cases where the person arrested is actually guilty.[177] One state has enlarged the privilege by allowing a private person to arrest for any offense, other than an ordinance violation, on reasonable grounds even though no offense was actually committed.[178] Others allow a private person to arrest for a felony whenever there are reasonable grounds, even though no felony was in fact committed.[179] Most jurisdictions, however, have retained the rule that an arrest

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176 See, e.g., Cal. Pen. Code § 197 (4); Utah. Code Ann. § 76-30-10 (5) (1953). See also Restatement, Torts § 131 (1948 Supp.).

177 See, e.g., N.Y. Pen. Code § 183.

178 See Ill. Code Crim. Proc. § 107-3 (1963).

179 See Miss. Code Ann. § 2470 (1942); Ohio Rev. Code Ann. § 2935.04 (1954).

by a private person is privileged only if the person arrested is actually guilty or if a felony has actually been committed and there are reasonable grounds to believe that the person arrested is guilty.[180]

Thus, in the majority of jurisdictions, a private person is liable whenever he mistakenly arrests an innocent person for a misdemeanor; and he is liable whenever he mistakenly arrests an innocent person for a felony which has not actually been committed by someone.

4. Subsequent Actions.[181]

In any case where force is authorized in making an arrest, the fact that the culprit is fleeing gives rise to no restriction on its use. In many cases, however, the only way to stop a person in flight will be with a bullet, so the choice is between using deadly force and letting the person escape. Although

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180 See, e.g., Cal Pen. Code § 837; Ky. Rev. Stat. § 431.05 (2) (1963); Gen. Stat. N.C. §§ 15-39 to -40 (1953).

181 Although it is not entirely accurate to refer to efforts to arrest a fleeing offender as subsequent actions, that term is used here for the sake of comparison with defense of property and prevention of criminal offenses.

there is some authority to the contrary,[182] most jurisdictions which allow a private person to use deadly force to effect an arrest for a felony impose no limitation on such force merely because the culprit is fleeing. The test is whether deadly force is necessary to effect the arrest, not whether it is necessary to prevent any further harm to persons or property.[183] Thus, if there is no other way to effect the arrest, an unarmed, fleeing felon may be shot down.[184] This rule may have been satisfactory when there were relatively few felonies, all punishable by death, but it is subject to severe criticism at a time when there are so many statutory felonies, few of which are capital.[185]

Another subsequent action which is sometimes desirable is that of search. The right to conduct a search of a person

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182 See Roe v. State, 55 Tex. Crim. 128, 115 S.W. 593 (1909); Warren, Homicide § 145 at 629 (perm. ed. 1938).

183 See Restatement, Torts § 131 (c) (1948 Supp.).

184 See People v. Lillard, 18 Cal. App. 343, 123 Pac. 221 (1912).

185 See Note, 15 Va. L. Rev. 582, 583 (1929).

incident to his lawful arrest is well recognized and extends also to property in his immediate possession and control.[186] The fact that the arrest is by a private citizen rather than by a peace officer does not diminish this right.[187]

D. THE IMPORTANCE OF DISTINGUISHING BETWEEN THE THREE THEORIES

In introducing this chapter, mention was made of the tendency to confuse the areas of substantive law dealing with defense of property, prevention of a criminal offense against the property, and arrest for such an offense. Now that each of these areas of law has been examined, a brief comparison will demonstrate the importance of recognizing that they are, or at least should be, distinct. For simplicity, only the majority views as to each area of law will be compared.

First of all, there is a substantial difference as to when and how much force is privileged. Force may be used in defending property from any interference, whether or not that

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186 See United States v. Rabinowitz, 339 U.S. 56 (1950); Perkins, The Law of Arrest, 25 Iowa L. Rev. 201, 261 (1940).

187 See Ward v. United States, 316 F. 2d 113 (9th Cir. 1963).

interference constitutes a criminal offense. Both prevention of offenses and arrest are limited by most jurisdictions to felonies and breaches of the peace. Deadly force may be used to arrest for any felony, whereas such force is privileged in defense of property and prevention of offenses only in the case of a dangerous felony.

The actor is justified in acting on his reasonable belief in defense of property or prevention of offenses, even though it should prove that he was mistaken. In effecting an arrest, however, the actor is not protected, in the case of a misdemeanor, unless the person arrested is in fact guilty or, in the case of a felony, unless the felony has actually been committed, regardless of his reasonable belief.

With regard to the time during which force may be used, there is also a considerable variation. There is no specific time limit on an arrest for a felony. A person who commits a felony against government property can be pursued and arrested by the serviceman, even a week or a month later if he is recognized as the culprit. The right to use force to prevent an offense, however, terminates when the offense has been completed or when the culprit abandons the attempt and flees.

There is no right to pursue him. In defense of property, the culprit may be pursued but, under the prevailing rule, only for the purpose of recovering property.

In making an arrest, it is permissible to search the person arrested or property in his immediate possession and control. This right is not generally recognized in connection with defense of property or prevention of criminal offenses. Furthermore, it is only in connection with an arrest that the right to detain the culprit is established.

Finally, the serviceman can be required as part of his official duties to defend property or prevent criminal offenses against it, but he may not be ordered to effect a citizen's arrest.

These differences between the law of defense of property, prevention of offenses, and arrest are certainly too significant to be ignored. Although in some cases the courts can confuse two or all three of these theories without affecting the outcome, in many others the result will depend on which theory is applied. In addition, confusion of the rules, even when it does not affect the outcome of the particular case, results in a misleading precedent.

CHAPTER IV

FEDERAL OFFENSES AGAINST PROPERTY

In examining the various theories of law under which the use of force may be justified, it is readily seen that it makes a considerable difference whether a felony or a misdemeanor is being committed. In most jurisdictions, for example, the rules of law relating to prevention of offenses and to arrest do not allow the use of any force in the case of ordinary misdemeanors. In other cases, deadly force may be used in the case of felonies, or at least certain felonies, but not in the case of misdemeanors.

In determining whether an interference with government property constitutes a misdemeanor or a felony, reference must be had to the ordinary criminal laws of the state in which the incident occurs.[188] In addition, there are certain federal criminal laws specifically applicable to property in which the

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188 In case of a federal prosecution under the Assimilative Crimes Act, 18 U.S.C. § 13 (1958), for an offense committed in a place subject to the exclusive or concurrent jurisdiction of the United States, the penalty for the offense is determined by reference to state law, but whether the offense is a felony or a misdemeanor is controlled by 18 U.S.C. § 1 (1958).

United States has a particular interest.

Examination of some of the federal offenses of particular concern to military personnel in connection with protecting government property will be helpful not only in visualizing the application of the general rules just discussed to particular offenses but also in understanding the scope of the authority which would be created by the recommendations in the following chapter.

In areas subject to the exclusive or concurrent jurisdiction of the United States,[189] it is a felony to willfully and maliciously destroy or injure any building, structure, machinery, supplies, military or naval stores, or munitions, or to attempt to do so.[190] An almost identical provision applies to arson of such property.[191] There is no requirement

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189 The statutes use the term "special maritime and territorial jurisdiction of the United States." This term is defined in 18 U.S.C. § 7 (1958).

190 See 18 U.S.C. § 1363 (1958).

191 See 18 U.S.C. § 81 (1958).

that the destruction or injury exceed any specific amount to constitute a felony.

Certain offenses relate to property owned or used by the United States without regard to the nature of federal jurisdiction over the situs. For example, the theft of government property is a crime against the laws of the United States without regard to where the offense takes place. If the amount of the theft exceeds one hundred dollars, it is a felony; otherwise it is a misdemeanor.[192]

A similar distinction with regard to value is made in the case of willful injury to or depradations against any government property. If the damage exceeds one hundred dollars, the offense is a felony; otherwise it is a misdemeanor.[193] This provision also applies to property being manufactured or constructed for the United States, even though title has not yet passed. If the property damaged or destroyed is connected with any means of communication operated or controlled by

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192 See 18 U.S.C. § 641 (1958).

193 See 18 U.S.C. § 1361 (1958).

the United States, the offense is a felony regardless of the value involved.[194]

It is also a felony to injure, destroy, contaminate, or infect any national-defense material, premises, or utilities with intent to impede the national defense.[195] National-defense material, premises, and utilities are defined so broadly as to include almost everything.[196]

A relatively obscure provision makes it a felony to willfully trespass upon, injure, or destroy any property or material of a fortification.[197] This is the only case in which trespass is made a felony merely because it is willful, without the requirement of some greater criminal intent. There are other offenses which seem more serious, yet are only misdemeanors.

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194 See 18 U.S.C. § 1362 (1958).

195 See 18 U.S.C. § 2155 (1958).

196 See 18 U.S.C. § 2151 (1958).

197 See 18 U.S.C. § 2152 (1958). The wording of this statute indicates that it may have been intended to apply primarily to harbor defense fortifications.

For example, pursuant to section 21 of the Internal Security Act of 1950,[198] the Armed Forces have made extensive use of restricted areas to safeguard their most sensitive materials and activities. These areas are generally well fenced, posted with warning signs, and guarded by armed sentries. Access is strictly controlled. Surprisingly enough, willful violation of the regulations for the protection of these areas is only a misdemeanor.[199] It seems somewhat incongruous that a person who deliberately ignores the warning signs, climbs the fence, and enters a restricted area only commits a misdemeanor, even if the entry is for an unlawful purpose,[200] while one who willfully trespasses upon the property of fortification is guilty of a felony.

However, if the purpose of entering the restricted area, or almost any other place connected with the national defense,

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198 Ch. 1024, tit. I, § 21, 64 Stat. 1005 (1950), 50 U.S.C. § 797 (1958).

199 Ibid.

200 See 18 U.S.C. § 1382 (1958).

is to obtain information respecting the national defense with intent or reason to believe that it will be used to the injury of the United States, a felony is committed.[201] In many circumstances the mere fact that a person either forcibly or furtively enters a sensitive area could be sufficient basis for a reasonable belief that he entertained such an intention and was therefore committing a felony.

CHAPTER V

SUMMARY, RECOMMENDATIONS, AND CONCLUSION

A. SUMMARY

Now that each of these areas of law has been examined separately, it is interesting to see what a serviceman may legally do in protecting government property when his privilege to act in defense of property, in preventing a crime, and in effecting an arrest are combined. Using the majority rule as to each point, he may proceed as follows.

Ordinarily he must tell the person intruding on or interfering with the property to desist. If that fails, he may use

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201 See 18 U.S.C. § 793 (a) (1958).

whatever nondeadly force he reasonably believes is necessary to terminate or prevent the intrusion. He may resort to deadly force if he reasonably believes it is necessary to stop the intruder from committing a dangerous felony or, when a felony has actually been committed and he reasonably believes the intruder has committed it, to arrest him. In the latter case, as well as when the intruder has actually committed a breach of the peace in the serviceman's presence, the serviceman may also take him into custody and search him. Otherwise the intruder may not be detained. However, the serviceman may pursue any intruder who has actually taken government property and, using nondeadly force if necessary, recover the property.

Clearly this is a considerable amount of authority. Yet There are some very significant deficiencies in it which bear closer examination.

1. No Duty to Arrest.

First of all, the foregoing summary of what the serviceman may do in protecting government property includes many actions which may be taken only pursuant to making an arrest. Without these his authority is substantially less. But because

of the Posse Comitatus Act,[202] members of the Army and Air Force may not be ordered to arrest lawbreakers as part of their official duties. Therefore any arrest by such personnel must be entirely of their own volition. Instructing servicemen as to their right to arrest as private citizens and encouraging them to do so[203] would not violate the letter of the Act and would probably be effective to some extent, but it is unsatisfactory to have to rely on purely voluntary actions, simply because of the lack of consistent and dependable results.

2. The Risk of Personal Liability.

The problem of the individual serviceman's personal liability is also greatly aggravated by the Posse Comitatus Act. As previously mentioned, the serviceman has some degree of protection from personal liability, both civil and criminal, for acts done in the performance of duty or pursuant to apparently legal orders. However, since the soldier or airman

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202 18 U.S.C. § 1385 (1958).

203 This is done to some extent. See, e.g., FM 19-5, The Military Policeman para. 28 (1959).

cannot legally be given the duty of enforcing the law,[204] if he mistakenly makes an unlawful citizen's arrest or uses excessive force in making a lawful one, he cannot claim this protection. Thus, he is fully subject to both civil and criminal liability when making an arrest.

The risk of such liability is great since a citizen's arrest is lawful in most states only if the person arrested has actually committed a breach of the peace in the serviceman's presence or if a felony has actually been committed and there are reasonable grounds to believe that the person arrested committed it. In other cases the serviceman's reasonable belief is no protection.

Thus, although there is always some risk that the serviceman will be personally liable for the use of force, the risk is extremely great when he is effecting a citizen's arrest.

3. Insufficient Authority to Detain.

A third significant deficiency in the serviceman's authority to protect government property is also somewhat related to his right to arrest. In most jurisdictions the serviceman may

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[204] See Wrynn v. United States, 200 F. Supp. 457 (E.D.N.Y. 1961) (Air Force pilots held to have been outside scope of employment in aiding police search for escaped convict.

not detain an intruder except in connection with a lawful arrest.[205] As has already been mentioned, the right to make a citizen's arrest is fraught with the risk of personal liability and is limited for the most part to situations where a felony has actually been committed.[206] As seen in the preceeding chapter, many offenses against government property are misdemeanors. In most jurisdictions the serviceman has no legal right to detain a misdemeanant even though he witnesses the offense and could easily apprehend the culprit on the spot.

In some cases it would undoubtedly be desirable for the serviceman to be able to detain a person without the requirement that a felony has been committed.

4. Lack of Uniformity.

Another important deficiency in the serviceman's authority.

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205 However, one who unlawfully enters a restricted area may be apprehended, searched, and questioned, AR 380-20, para. 6a (Feb. 6, 1958), based on Internal Security Act of 1950, ch. 1024, tit. I, § 21, 62 Stat. 1005, 50 U.S.C. § 797 (1958).

206 Although a private person may usually arrest for a breach of the peace committed in his presence, relatively few misdemeanors against government property will constitute breaches of the peace.

to protect government property is the lack of a uniform rule as to what he may legally do. His actions must comply with the law of the situs. This is the most serious obstacle to any practical service-wide guidance as to the use of force to protect government property.[207] This means that, if there is to be any guidance at all, it must be provided locally.[208] If the serviceman should manage to acquire adequate local training as to the use of force to protect government property, its value is largely lost with his next change of station.

The rules of some jurisdictions as to the use of force are much more liberal than the majority rules summarized above. This, of course, is to the serviceman's advantage. On the

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207 Current Army publications dealing with this subject are necessarily unspecific, e.g., FM 19-30, Physical Security para. 99 (1959), or limited to general common law principles, e.g., FM 19-5, The Military Policeman para. 28.(1959). The latter is particularly undesirable since several states are now more restrictive than the common law rules.

208 Even a state by state guide would not be entirely reliable because, as seen in Chapter II, the nature of federal jurisdiction over any particular parcel of land affects the applicability of the current state law as to civil liability.

other hand, some states impose much greater limitations on the use of force. An examination of the combined effect of the most restrictive rules illustrates how little force the serviceman may be allowed to use.

Under these rules, the serviceman must ordinarily tell the intruder to desist. If that fails, he may use whatever nondeadly force he reasonably believes is necessary to terminate or prevent the intrusion. The serviceman also may pursue an intruder who has actually taken property and recover it by nondeadly force if necessary. However, he may not take the intruder into custody, search him, or otherwise detain him unless the intruder has actually committed a felony in the serviceman's presence. In no event may the serviceman use deadly force except in defense of the person. Thus, if the intruder does not endanger human life and the serviceman is unable to stop him with nondeadly force, the serviceman cannot legally stop him at all, no matter what the offense.

To a limited extent this latter restriction exists even under the majority view. Whenever nondeadly force is not sufficient to stop the intruder from committing an offense or from escaping, but the use of deadly force is not privileged, the serviceman

cannot legally stop him. This can hardly be classified as a deficiency in the serviceman's authority, however, but rather reflects the fundamental belief of our legal system in the value of human life. This belief must be balanced against the prevention of crime and protection of property rights. No one would seriously advocate giving a guard the right to kill to prevent the theft of a few gallons of gasoline even though the lack of such authority meant the thief must be allowed to escape with the property. On the other hand, the law of the more restrictive jurisdictions would apply the same rule if the thief were stealing a portable nuclear bomb.[209] In the latter case, the potential threat to human life in allowing the theft to succeed appears to outweigh the sanctity of the life of the thief by a considerable margin.

B. RECOMMENDATIONS

The foregoing discussion points out some of the deficiencies in the right to use force in the protection of government

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[209] Theft of a nuclear weapon is a felony, ch. 1073, § 1, 68 Stat. 936 (1954), as amended, 42 U.S.C. § 2122 (1958), but since the guard would not be acting in defense of the person, under the most restrictive rule he would not be justified in killing the thief to prevent his escape with the weapon.

property under the current state of the law. Increasing the authority of the serviceman in this regard is the obvious solution. Unfortunately, however, the problem is not that simple.

Actually there are three separate interests which must be reconciled by any satisfactory solution. First, there is the interest of the United States in the security of its property. Second, there is the interest of the individual serviceman in avoiding personal liability. These two interests do not conflict and both could be satisfied by a substantial increase in the serviceman's authority to use force. The third interest, however, is diametrically opposed to such a solution. That is the interest of the ordinary citizen to be secure from the unprivileged or excessive use of force.

Because of the serviceman's relative immunity from both civil and criminal liability for acts done in the performance of duty, any increase in his right to use force subjects other persons to a greater risk of injury without a means of redress.[210] Even under the current law, the serviceman is

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210 Redress may be had through private relief legislation, of course.

privileged in some instances to use force on the basis of his reasonable belief although he is in fact mistaken. Thus, completely innocent persons may suffer injuries for which they have no legal right to be compensated. To increase the serviceman's authority to use force would also increase the likelihood of such injuries.

The following recommendations are made with these conflicting interests in mind.

1. Authority to Arrest.

It is recommended that officers, enlisted persons, and employees of the armed forces be given statutory authority to arrest for violation of laws of the United States when such violations relate to government property which the person making the arrest is responsible to protect (Appendix A). This authority to arrest should extend to any offense committed or attempted in the presence of the officer, enlisted person, or employee and to any felony which he has reasonable grounds to believe the person to be arrested has committed or is committing.[211]

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[211] This would be consistent with other federal statutes dealing with arrest, 18 U.S.C. § 2236 (b), 3053 (1958).

The statute should specifically provide for the same authority to use force in making an arrest as peace officers of the particular state have. Any attempt to give military personnel a greater right to use force would be most unlikely to be adopted.

Although such a reference to the authority of local peace officers would leave some lack of uniformity as to the degree of force which could be utilized in making an arrest, uniformity would be attained as to the circumstances under which an arrest could be made. This alone would greatly reduce the importance of local variations in the law and, with the universally recognized right to use nondeadly force in defense of property, would provide a broad base of authority applicable throughout the United States.

The proposed statute would significantly increase the right of the serviceman to use force in protecting government property in the many jurisdictions in which a peace officer is given more authority to use force in making an arrest than a private citizen may use.

In addition, such a statute, by allowing a serviceman to arrest as part of his official duty, would reduce his risk of

personal liability. It would also give the serviceman authority to detain offenders who at present cannot legally be detained. Thus, all of the deficiencies pointed out above would be either eliminated or substantially reduced by the proposed statute.

A federal statute is obviously the only practical way of accomplishing the desired result since it is inconceivable that all fifty states could be persuaded to act favorably on this matter.

Actually it is somewhat surprising that servicemen protecting government property do not already have authority to arrest in connection with that duty. Many other federal employees have such authority even when protection of federal property is only an incidental part of their duties and the property is less critical than that protected by servicemen in many cases.[212]

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212 See, e.g., 33 Stat. 873 (1905), 16 U.S.C. §§ 10, 559 (1958), providing that all employees of the National Park Service and Forest Service may arrest for violation of any law or regulation relating to national parks or forests.

2. Payment of Damages by the United States.

It is recommended that the Federal Tort Claims Act[213] be amended to allow recovery from the United States for an assault or battery resulting from the mistaken or excessive use of force by an employee of the government in performing his duty to protect government property (Appendix B). It is further recommended that recovery from the United States be made the exclusive remedy in such cases (Appendix C).

The first of these recommendations would not only offset any increased risk of uncompensated injury resulting from the previously recommended arrest statute, but would also provide a means of recovery for those innocent persons, injured through a reasonable mistake, who at present have no remedy other than private relief legislation. The second recommendation would provide the individual serviceman with additional protection from civil liability.

It may be argued that additional protection from civil

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213 Ch. 753, 60 Stat. 842 (1946), as amended by 75 Stat. 539 (1961) (codified in scattered sections of 28 U.S.C.). Specifically the recommendation would require amendments to 28 U.S.C. §§ 2679, 2680.

liability would increase the likelihood of the irresponsible use of force by servicemen. This is considered extremely doubtful, however. It is questionable whether the majority of low ranking servicemen are particularly concerned about their civil liability. Indeed, such a thought probably never enters the mind of a guard confronted with an actual problem in protecting government property. In considering the consequences to himself, he is most likely to think of the possibility of disciplinary action for failure to take adequate measures,[214] rather than of the consequences of using excessive force. If he should consider the latter, in all probability he will do so in terms of possible disciplinary action which may be taken against him for the use of excessive force.

The recommendation that the United States pay all claims in this area does not reduce the serviceman's criminal responsibility to the United States for his unprivileged or excessive

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214 A sentry who fails to take adequate measures to protect government property under his care may be guilty of an offense under UCMJ, Art. 108(3)(suffering military property to be lost, damaged, destroyed, etc.) or Art. 92(3)(dereliction in the performance of duty).

use of force. The military disciplinary system, with its varying levels of punishment to fit different degrees of guilt, is best equipped to deal with the wrongful conduct of military personnel and undoubtedly is the strongest deterrent to such conduct. Therefore, the risk of any increase in the irresponsible use of force by providing additional protection from civil liability is considered insignificant.

C. CONCLUSION

There is no doubt that servicemen need increased authority to adequately protect government property. At present the serviceman's authority in this regard is seriously out of proportion to his responsibility. Under the foregoing recommendations the serviceman would have the authority to perform his duties more effectively and have greater assurance against personal liability as well. Yet the public would also be provided with greater protection from uncompensated injuries.

Although the recommended authority to arrest would constitute an exception to the Posse Comitatus Act, that Act was never intended to hinder the Army in protecting government

property.[215] The serviceman's authority to arrest under the proposed statute would certainly not be disproportionate to that of other employees of the government with corresponding responsibilities.

Although these recommendations do not purport to give the serviceman all that might ever be desirable in the way of authority to use force in protecting government property, they do represent an attempt to reconcile the conflicting interests involved.

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215 For a brief history of the Posse Comitatus Act, including its original purpose, see Furman, Restrictions Upon the Use of the Army Imposed by the Posse Comitatus Act, 7 Mil. L. Rev. 85-86 (1960).

APPENDIX A

(Proposed Addition to Chapter 203, 18 U.S.C.)

§ . Military personnel protecting Government property.

Officers, enlisted persons, and employees of the armed forces of the United States who, as part of their official duties, are responsible for the protection of Government property may make arrests without warrant for any offense against the United States committed or attempted in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony; provided that such offense or such felony is related to Government property under the protection of the officer, enlisted man, or employee making the arrest. Such persons shall have the same authority to use force in making arrests as have peace officers in the state in which the arrest occurs. Any person arrested under this provision shall be taken before the nearest United States commissioner, within whose jurisdiction the arrest is made, for trial.

APPENDIX B

(Proposed Amendment* to 28 U.S.C. § 2680)

§ 2680. Exceptions.

The provisions of this chapter and section 1346 (b) of this title shall not apply to —

* * *

(h) Any claim arising out of an assault or battery (except when resulting from the mistaken or excessive use of force by an employee of the Government in performing his duty to protect Government property), or false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or with contract rights.

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*Underlined material indicates proposed additions to existing statute.

APPENDIX C

(Proposed Amendment* to 28 U.S.C. § 2679, as Amended)

§ 2679. Exclusiveness of remedy.

* * *

(b) The remedy by suit against the United States as provided by section 1346 (b) of this title for damage to property or for personal injury, including death, resulting <u>from the actions of any employee of the Government in performing his duty to protect Government property or</u> from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

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*Underlined material indicates proposed additions to existing statute.

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