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Searching for the Fourth Amendment: In a Post-September 11th World, Does the Rationale of the Fourth Circuit in United States v. Jenkins Reduce the Fourth Amendment Protections of Individuals on Military Installations?

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Searching for the Fourth Amendment: In a Post-September 11th World, Does the Rationale of the Fourth Circuit in *United States v. Jenkins* \(^1\) Reduce the Fourth Amendment Protections of Individuals on Military Installations?* 

**INTRODUCTION**

Envision driving on a military base with your family tucked away in the minivan. Your children are joyfully singing along to the patriotic songs on the radio, and you can feel the anticipation as you take your family to its first Fourth of July fireworks display. As you navigate the unfamiliar streets of the base, you notice the unwelcoming blue and white lights flashing in your rearview mirror. A military police officer with a hardened scowl approaches your car, ducks her head into your window, and without asking you any questions, briskly orders you and your family to step outside the van. The police officer then proceeds to search the interior of your vehicle and personal belongings. In the past, the Fourth Amendment requirements would make a scene such as this incomprehensible. However, in the post-September 11th world, the changing nature of the military’s response to terrorist threats and the closing of all military installations to the public could drastically impact an individual’s constitutionally protected privacy while on a military installation.

This comment will begin by discussing how the Fourth Circuit’s rationale in *United States v. Jenkins* could be interpreted as an exception to the Fourth Amendment’s warrant and probable cause requirements on closed military installations.\(^2\) Next, this comment will establish the legal definition of a closed military base to determine the potential impact of any interpretation of the Fourth Circuit’s decision in *Jenkins*. Then, this comment will analyze how *Jenkins* could be interpreted in both broad and narrow ways and why the narrower reading of the *Jenkins* opinion should be followed. This comment will then consider how other circuits have evaluated searches conducted on closed military installations. Finally, this comment will analyze the potential future impacts that, if read in its broadest sense, the rationale

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1. 986 F.2d 76 (4th Cir. 1993).
2. See *Jenkins*, 986 F.2d 76.
in *United States v. Jenkins* will have on the Fourth Amendment and individual rights in general.

**United States v. Jenkins**

Katrina Jenkins enlisted in the United States Air Force and was stationed at Andrews Air Force Base, Maryland. While Ms. Jenkins was stationed at Andrews Air Force Base, it was closed to the public. Thus, in order to enter Andrews, one had to stop at the security checkpoint, and the guards would grant access to individuals authorized to be on base. On June 18, 1992, Ms. Jenkins' estranged husband, Norman Jenkins, telephoned her at work, indicated he was on the base and intended to kill her. At the time Mr. Jenkins placed the call, he was sitting in the parking lot of the base hospital where Ms. Jenkins worked. When Ms. Jenkins left work for the evening, a security officer escorted her out of the hospital and to her car at her request. Mr. Jenkins noticed the security officer escorting his wife and left the hospital parking lot in an attempt to exit Andrews. Knowing of the threats made against Ms. Jenkins by her husband, the security officer phoned ahead to the security gate checkpoint, informed the guards on duty that Mr. Jenkins was about to exit the base, and apprised them of the threats Mr. Jenkins made against Ms. Jenkins. Officials at the base's access control gate arrested Mr. Jenkins based upon the information given to them by the security guard. Upon his arrest, officials searched Mr. Jenkins' person and his vehicle and found a .357 Magnum, twenty-five cartridges, and letters indicating Mr. Jenkins intended to kill his wife and then commit suicide.

Mr. Jenkins was indicted for attempted murder on federal property. Prior to trial, Mr. Jenkins attempted to suppress the evidence found in his vehicle based on the theory that the federal officials did not have probable cause to suspect him of attempted murder at the time of his arrest. Despite the evidence of Mr. Jenkins' threatening
phone call to his wife, the district court found for Mr. Jenkins and suppressed the evidence discovered in the search of his person and vehicle.\textsuperscript{15} The federal government moved for reconsideration of the district court's finding, arguing, "probable cause was not necessary for a search on a closed military base."\textsuperscript{16} In the alternative, the government argued the police had probable cause to conduct the search based upon the threats Mr. Jenkins made to his wife.\textsuperscript{17} On appeal, the United States Court of Appeals for the Fourth Circuit reversed the district court's suppression of the evidence.\textsuperscript{18} Instead of basing its decision upon established exceptions to the Fourth Amendment's probable cause requirement (i.e. \textit{Terry}\textsuperscript{19} search of a vehicle or search incident to arrest), the Fourth Circuit held that the nature of a closed military installation changes the general analysis for what constitutes a reasonable search.\textsuperscript{20} Most notably, the court stated, "The case law makes clear that searches \textit{on closed military bases have long been exempt from the usual Fourth Amendment requirement of probable cause}."\textsuperscript{21}

A complete look at the language of the \textit{Jenkins} opinion results in three possible conclusions: (1) an individual has no reasonable expectation of privacy on a closed military installation, and thus any government search on such an installation is not a search protected by the Fourth Amendment; (2) an individual impliedly consents to be searched at any time while on a closed military installation; or (3) an individual consents to be searched while on a closed military installation; however, the consent to be searched exists only near the exterior of the base at the entry and exit points.\textsuperscript{22}

\textbf{What is a Closed Military Base?}

In order to analyze the implications of the Fourth Circuit's rationale in \textit{Jenkins} and other similar cases, one must first define the differ-
ence between closed and open military installations. The district court in United States v. Ellis established the current definition for a closed military installation. Specifically, the court in Ellis stated, "[t]he case law has evolved to differentiate between a closed and an open military base. At a closed base, all individuals and vehicles are stopped at a gate and either granted or denied permission to enter." At an open base, individuals may freely enter or exit the installation without restriction.

In 1992, when the Fourth Circuit decided Jenkins, there were very few installations that fell within the judicial definition for a closed military base. However, after the terrorist attacks on September 11, 2001, the United States Department of Defense drastically altered its policies regarding military installation security. Today, entrance to any military base requires passing through a security checkpoint and, at a minimum, a showing of identification. Under an analysis that defines closed military installations as those where security personnel grant or deny access to individuals who desire to enter, every United States military base is considered a closed military installation. Therefore, if the rationale in Jenkins is read in its broadest sense, there is the potential for many citizens who live and work on military bases around the country to have their privacy interests greatly infringed upon. The logical question thus becomes, does the holding in Jenkins, juxtaposed with the post-September 11th security measures on military installations, give military police the authority to conduct warrantless searches without probable cause simply because an individual is present on a military base?

24. Id. at 1029.
25. See id.
26. See, e.g., U.S. Dep't Army, Reg. 190-13, para. 1-23, para. 2-5d, The Army Physical Security Program (Sept. 30, 1993); U.S. Dep't Army, Reg. 190-5, para. 3-1, Motor Vehicle Traffic Supervision (August 7, 1988); U.S. Dep't Army, Reg. 525-13, para. 4-6b (2), Antiterrorism (Jan. 4, 2002). See also U.S. Dep't Army, Reg. 190-51, Security of Unclassified Army Property (Sensitive and Nonsensitive) (September 30, 1993). Based my personal experience as a military intelligence officer in the U.S. Army, the Army's security posture is based upon the compilation of the previously listed regulations combined with the nation's current threat condition; each military service branch has similar regulations that, when combined with the nation's threat level, dictate that military installations be closed to the general public. Prior to September 11th, the nation's threat level did not require most military installations to be closed.
27. See sources cited supra note 26. After September 11th, the nation's increased threat level, dictated that military installations be closed to the general public. Id.
A proper examination of the language in *Jenkins* necessarily begins with an analysis of the Fourth Amendment. The drafters of the United States Constitution and the Bill of Rights included the Fourth Amendment as a protection from arbitrary and capricious intrusions into the personal privacy of individuals by the state.\(^{29}\) The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.\(^{30}\)

The Fourth Amendment is a balance between two weighty issues: an individual's interest in being free from unnecessary intrusions by law enforcement, and the state's interest in preventing crime and protecting its citizens.\(^{31}\) In its most simplistic sense, the Fourth Amendment requires that law enforcement officials conduct only reasonable searches, which are searches executed pursuant to a warrant and based upon probable cause.\(^{32}\) The main objective of the Fourth Amendment is sometimes misconstrued as the prevention of law enforcement officials from utilizing their intuition to prevent crime and protect citizens;\(^{33}\) however, "[the Fourth Amendment's] protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."\(^{34}\) When an impartial magistrate affirms that probable cause to search exists, she issues a warrant that specifically identifies the places to be searched and the items to be seized.\(^{35}\)

Not all searches initiated by the state require a warrant issued upon probable cause. "[The] Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those that


\(^{30}\) U.S. Const. amend. IV.


\(^{33}\) Johnson, 333 U.S. at 14.

\(^{34}\) Id.

\(^{35}\) United States v. Martinez, 78 F.3d 399, 401 (8th Cir. 1996).
are unreasonable." If an individual was subjected to an unreasonable search or seizure, she may move to suppress all evidence obtained during the unlawful search at any subsequent criminal trial.

**Expectation of Privacy and the Jenkins Decision**

Prior to the Supreme Court's decision in *Katz v. United States*, state searches were only subject to judicial scrutiny if the search resulted in some form of physical intrusion. However, advances in technology and the Court's expansion of the concept of privacy resulted in a change to the Fourth Amendment analysis. Now, courts look well beyond whether the state intruded an individual's physical space.

The Federal Bureau of Investigation suspected Charles Katz of using a particular phone booth in Los Angeles, California, to place illegal bets. The federal agents attached a listening device to the phone booth used by Mr. Katz to collect evidence of his activities and conversations. Based largely upon evidence collected from the recording device in the phone booth, Mr. Katz was convicted of violating a statute that proscribed placing bets and wagers across wire communications. The United States Supreme Court overturned Mr. Katz's conviction concluding the federal agents' actions constituted an unlawful search in violation of the Fourth Amendment. The Court recognized the Fourth Amendment protection as an individual protection of privacy, which the court reasoned Mr. Katz had in the phone booth. The Court specifically stated:

[T]he Fourth Amendment protects people not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

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41. Id.
42. Id.
43. Id.
44. Id. at 351.
45. Id. (citations omitted).
The Court’s shift away from the physical intrusion of the search to the expectation of privacy test changed the Fourth Amendment analysis.\(^{46}\) Now, when determining whether a search conducted by government officials violates the Fourth Amendment, one must ask whether the individual “[first] exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”\(^ {47}\) In other words, if the government activity does not offend an individual’s privacy that is subjectively held and objectively reasonable, that activity does not constitute a search and does not implicate the Fourth Amendment.\(^ {48}\)

The *Katz* expectation of privacy analysis provides the foundation for the first and broadest potential interpretation of the *Jenkins* opinion. The Fourth Circuit in *Jenkins* stated:

[Mr.] Jenkins had no right of unrestricted access to Andrews Air Force Base; he thus had no right to be free from searches while on the base. . . . The barbed-wire fence, the security guards at the gate, the sign warning of the possibility of search, and a civilian’s common sense awareness of the nature of a military base—all these circumstances combine to puncture any reasonable expectations of privacy for a civilian who enters a closed military base.\(^ {49}\)

Based on the plain meaning of the language used by the Fourth Circuit, it appears that any individual who sets foot on a closed military installation has no reasonable expectation of privacy. Therefore, any search of Mr. Jenkins or his automobile would not be subject to judicial scrutiny under the Fourth Amendment.\(^ {50}\) If the Fourth Circuit’s opinion in *Jenkins* stands for the broad proposition that government searches on a closed military installation are not searches under the Fourth Amendment, then law enforcement officials on closed military installations are not required to obtain a warrant or have probable cause prior to searching individuals. Under this analysis, the government’s ability to conduct a warrantless search without probable cause would not be limited to searches at the gates of closed military installations. Particularly, government officials could search an individual at any place and at any time without a warrant. Due to the fact that all military installations are now closed, this broad interpretation would

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\(^{46}\) Id.; see also *Olmstead*, 277 U.S. 438 (holding that Fourth Amendment analysis centers on physical intrusions).

\(^{47}\) *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

\(^{48}\) Id.

\(^{49}\) *Jenkins*, 986 F.2d at 79.

\(^{50}\) See *Katz*, 389 U.S. 347.
essentially result in an individual possessing no Fourth Amendment protections while present on a closed military base.

**Implied Consent and the Jenkins Decision**

One of the well-delineated and specifically established exceptions to the probable cause and the warrant requirements of the Fourth Amendment is a search conducted pursuant to express or implied consent.\(^5\) The implied consent exception provides the basis of the next interpretation of the Jenkins decision. Unlike the reasonable expectation analysis in determining whether a search was constitutional, the consent doctrine presumes the government performed a search governed by the Fourth Amendment, and an individual, though possessing the right to compel the government to produce a warrant, consents to a government search without requiring a warrant.\(^5\) In order for consent to be valid under the Fourth Amendment framework, it must be voluntarily given and cannot be the product of coercion.\(^5\) In Schneckloth v. Bustamonte, the United States Supreme Court held, "[T]he question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances."\(^5\) Consequently, whether an individual has given valid consent to search is a purely factual determination based on all of the circumstances surrounding a case.\(^5\)

In Jenkins, there existed no factual evidence that Mr. Jenkins gave his express consent to search his person or vehicle.\(^5\) However, at the entrance to Andrews Air Force Base, there was a sign posted that stated, "While on this Installation, all personnel and the property under their control are subject to search."\(^5\) Thus, the question becomes, whether Mr. Jenkins, by entering onto the military installation, impliedly consented to a search at any time during his presence on the base.

In McGann v. N.E. Ill. Reg'l Commuter R.R. Corp., the Seventh Circuit answered a similar question.\(^5\) The defendant in McGann posted a

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52. Id.
53. Id. at 227.
54. Id.; see also United States v. Smith, 395 F.3d 516 (4th Cir. 2005).
55. Schneckloth, 412 U.S. at 227.
56. Jenkins, 986 F.2d 76.
57. Id. at 77.
58. 8 F.3d 1174 (7th Cir. 1993); see also United States v. Burrow, 396 F. Supp. 890 (D. Md. 1975).
sign at each of its parking lot gates stating: "Vehicles Entering or Exiting Metra Property are Subject to Search by Metra Police." The plaintiffs admitted that they had all read the signs and were aware of them; however, the court in McGann noted, "consent is a waiver of the right to demand that government agents obtain the authorization of a warrant to justify their search; and the need for a warrant is waived only to the extent granted by the defendant in his consent." The Seventh Circuit held that the plaintiffs' reading and awareness of the posted sign did not equal a grant of implied consent to search. Specifically, "[a] sign's blanket statement that a person is 'subject to search,' however, does not readily inform the person of the grounds for the search, the extent of the search or the frequency or regularity of the searches." Thus, in order to establish implied consent, the state in McGann would have to establish specific actions by the plaintiffs showing consent to the particular search in question.

In Jenkins, the sign at Andrews Air Force Base alone was insufficient to authorize a warrantless search based on implied consent under McGann; however, the government in Jenkins argued on appeal that other circumstances taken in conjunction with the sign may have been sufficient to constitute implied consent. Specifically, "[t]he gravamen of the government's appeal is that the district court erred by not recognizing an 'implied consent' exception to the requirement of probable cause for closed military bases. By entering onto the closed base, the government argues, Jenkins gave his consent to be searched at any time." The Fourth Circuit, based upon the plain language of the Jenkins opinion, agreed with the government's contention. First, the court cited the totality of the circumstances test established by Schneckloth for determining whether consent was given. The court also cited several previous cases using implied consent as the rationale for authorizing searches conducted without probable cause on closed military installations. Then, the court identified the special security con-

59. McGann, 8 F.3d at 1176.
60. Id. at 1180.
61. Id.
62. Id.
63. Id. at 1181.
64. See United States v. Jenkins, 986 F.2d 76, 78 (4th Cir. 1993).
65. Id. at 79 (emphasis added).
66. Id. (citing Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973)).
67. Jenkins, 986 F.2d at 79 (citing United States v. Ellis, 547 F.2d 863, 866-67 (5th Cir. 1977); United States v. Rogers, 549 F.2d 490, 493-94 (8th Cir. 1976); United States v. Vaughan, 475 F.2d 1262, 1264 (10th Cir. 1973); United States v. Grisby, 335
cerns existing on Andrews Air Force Base due to the President's frequent travel in and out of that particular installation. The court also noted that aside from the sign, informing individuals they were consenting to search upon entry, there were visible indications of a closed installation that any casual observer would recognize (signs, gates, security guards, and restricted access). Thus, by choosing to enter, in the face of all these circumstances, Mr. Jenkins impliedly consented to a search at any time during his stay on Andrews Air Force Base.

An interpretation of Jenkins based upon implied consent seems more realistic than the expectation theory described above, due to the authority cited by the Fourth Circuit in Jenkins; however, the end result, using either of these two theories, would be the same. In other words, if a court determines that an individual has no reasonable expectation of privacy on a closed military installation or if a court instead determines that an individual impliedly consents to be searched at any time while present on a closed installation, the same conclusion follows: law enforcement officials on closed installations would have the authority to conduct a search at any time without probable cause or a warrant. Since all military installations are now closed, in a post-September 11th society, a broad interpretation of Jenkins would essentially remove an individual's Fourth Amendment rights while present on any military installation.

INTERPRETING JENKINS NARROWLY

Both the expectation analysis and the implied consent analysis discussed above are plausible and defensible interpretations of Jenkins, based upon the strict language of the court's opinion. Despite the fact the language in Jenkins allows for a broad reading, the Fourth Circuit's decision should be read narrowly to mean that an individual consents to a search on a closed military installation only when she expressly consents, when questioned by a government actor, or when she impliedly consents at the exterior of a closed base by attempting to enter or exit the installation because: 1) reading Jenkins to create a closed military installation exception to the Fourth Amendment is


68. Id.
69. Id.
70. Id.
71. See id.
unnecessarily broad, based upon other exceptions to the Fourth Amendment that apply to the facts in Jenkins; 2) a broad reading of Jenkins would be inconsistent with the current policies regarding searches on military installations; and 3) a limited reading of Jenkins is consistent with the Supreme Court’s recent decisions in analogous border checkpoint scenarios.

Other Applicable Fourth Amendment Exceptions

"A [search or] seizure conducted without a warrant is 'per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions.' As previously stated, Jenkins, if read broadly, could unnecessarily expand the scope of searches on all military installations by creating a new exception to the requirements of the Fourth Amendment for searches conducted on closed military bases. There are three existing Fourth Amendment exceptions that would allow a warrantless search under the facts in Jenkins without resulting in an unnecessary expansion of the state’s power to search on a closed military installation: a Terry search of a vehicle, the automobile exception, and warrantless searches incident to arrest. Due to the existence of these other established exceptions, the Fourth Circuit, in Jenkins, used unnecessarily broad language to justify the search of Mr. Jenkins. Future courts should limit their analysis of searches to firmly rooted exceptions to the Fourth Amendment.

Terry Search of a Vehicle Exception to the Warrant and Probable Cause Requirement of the Fourth Amendment

In Terry v. Ohio, the Supreme Court allowed a warrantless search of an individual without probable cause when a law enforcement official had a reasonable suspicion that the individual being searched was armed and dangerous. In Michigan v. Long, the Court extended a Terry search of an individual’s person to automobiles. In Long, police officers observed the defendant speeding, driving erratically, and eventually driving off of the road into a ditch. The police officers approached the defendant, who was standing at the rear of his

74. Id.
75. Id.
77. Id. at 1035.
car, and began to question him. The defendant began to move back towards the vehicle, and the police noticed a hunting knife on the floorboard of the driver's side of the car. The police then conducted a *Terry* search of the defendant's person and looked into the passenger compartment of the vehicle searching for other weapons. While looking in the vehicle to search for weapons, the police discovered marijuana. The Supreme Court determined that the interest of protecting police officers, which was the justification for the original *Terry* search, is sufficient to allow searches of vehicles when the police have reasonable suspicion that an individual near a vehicle is armed and dangerous. The Court specifically stated:

> [T]he search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on "specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant" the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons.

In *Jenkins*, the security officers could have formed a reasonable suspicion that Mr. Jenkins was armed and dangerous based upon the threat he made to his wife. Under the Supreme Court's analysis in *Long*, a warrantless search of Mr. Jenkins' vehicle without probable cause would not have violated the Fourth Amendment. The Fourth Circuit's use of broad language to justify the security officer's search in *Jenkins* is unnecessary. The court, instead of broadening the government's power to search individuals, could have applied the well-established *Terry* search exception to the facts in *Jenkins*.

**Automobile Exception to the Warrant Requirement of the Fourth Amendment**

Another well-defined exception to the warrant requirement of the Fourth Amendment the Fourth Circuit could have applied to the facts of *Jenkins* is the automobile exception. Under the automobile excep-

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78. Id. at 1036.
79. Id.
82. Id.
83. Id.
84. Id. at 1049 (quoting *Terry*, 392 U.S. at 21).
tion, law enforcement officials may conduct the search of a vehicle when they have probable cause to believe it contains contraband or evidence of a crime. This immediate search is justified by the movable character of an automobile, as well as a reduced expectation of privacy due to the highly regulated nature of automobiles.

In United States v. Vassiliou, a case similar to Jenkins, the defendant was in a heated argument with another individual and allegedly threatened that individual with a gun. The defendant subsequently attempted to hide the gun in his car. Upon being informed of the threat, the police searched the defendant's car and found the weapon. The court determined that the police had probable cause to conduct the search because they had a reasonable belief that contraband or evidence of a crime existed and thus permitted the admittance of the gun into evidence.

In Jenkins, the court did not reach the government's argument that it had probable cause to search the car. Instead, the Fourth Circuit used language that permits either implied consent searches anywhere on the installation or searches that raise no Fourth Amendment implications because they occur on closed military installations instead of analyzing the case under the well-established automobile exception. However, the facts of Jenkins, particularly the threat to kill Ms. Jenkins, suggest that probable cause to search Mr. Jenkins' automobile existed. Thus, a blanket exception to the Fourth Amendment on closed military installations should not be justified in a situation where probable cause to search does not exist, and the Fourth Circuit in Jenkins should have used the automobile exception to prevent future courts from reading its decision too broadly.

Searches Incident to Arrest Exception to the Warrant Requirement of the Fourth Amendment

The exception to the Fourth Amendment that fits the facts of Jenkins most closely is a warrantless search of an automobile incident to the arrest of an individual. The Supreme Court delineated this exception in Thornton v. United States when it held, "when a police officer has made a lawful custodial arrest of an occupant of an automobile,

89. Id. at 151.
90. 820 F.2d 28, 29 (2d Cir. 1987).
91. Id.
92. Id.
93. Id.
the Fourth Amendment allows the officer to search the passenger compartment of that vehicle as a contemporaneous incident of arrest. 95 In order to conduct an arrest, the police must have probable cause or "a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." 96

In Jenkins, the defendant communicated a threat to kill his wife. 97 The security officials, aware of the threat, could have easily formed a 'reasonable suspicion' that Mr. Jenkins was engaged in criminal activity. 98 The threat made by Mr. Jenkins provided the officials with the probable cause necessary to arrest or detain him. 99 Once the security guards lawfully arrested Mr. Jenkins, they would then be authorized under Thornton to conduct a warrantless search of his vehicle with no additional probable cause required. 100

The Fourth Circuit used broad language when it stated that searches on closed military bases are "exempt from the Fourth Amendment requirement of probable cause." 101 The language used by the court was unnecessary considering the facts of the case and the other narrower exceptions to the Fourth Amendment that apply. Consequently, future courts should limit their use of the Fourth Circuit's analysis in Jenkins. Jenkins should be read as allowing warrantless searches on military installations only when a firmly rooted exception to the Fourth Amendment applies in a case by case analysis.

Current Military Rules Regarding Searches Preclude a Broad Interpretation of Jenkins

A broad interpretation of Jenkins would result in a significant erosion of Fourth Amendment protections for individuals present on closed military installations. 102 The current rules and laws pertaining to searches within the military, however, are entirely inconsistent with such an interpretation and thus require a narrower reading of the Jenkins opinion. In United States v. Roberts, the United States Court of Military Appeals examined the issue of whether a service member has an

97. Jenkins, 986 F.2d at 77.
98. Id.
99. Id.
100. Thornton, 541 U.S. at 617.
101. Jenkins, 986 F.2d at 78.
102. See id.
expectation of privacy in his barracks room and thus whether a search of such a room would be governed by the Fourth Amendment. In Roberts, the defendant’s barracks room was searched during a commander’s inspection of the barracks with a drug dog. The commander’s sole purpose for conducting the search was to locate any drugs that were being hidden within the barracks. The drug dog detected the presence of drugs, and the commander located marijuana in the defendant’s room. The government in Roberts argued that members of the Armed Forces have no expectation of privacy in their barracks rooms, because a commander may conduct announced and unannounced inspections of a barracks room at any time. Further, commanders should be allowed to conduct “shakedown inspections” to search for drugs. Though the court recognized that service members give up a certain level of privacy when they enter the military, it did not adopt the broad rule suggested by the government that would essentially abolish a service member’s Fourth Amendment guarantees while living in the barracks. The court recognized that a, “soldier cannot reasonably expect the Army barracks to be a sanctuary like his civilian home,” but military quarters have some aspects of a dwelling or a home and in those respects the military member may reasonably expect privacy protected by the Fourth Amendment. The court also stated:

While the traditional military inspection which looks at the overall fitness of a unit to perform its military mission is a permissible deviation from what may be tolerated in civilian society generally - recognizing that such procedure is a reasonable intrusion which a serviceperson must expect in a military society - the “shakedown inspection” as earlier defined in search specifically of criminal goods or evidence is not such a permissible intrusion into a person’s reasonable expectation of privacy, even in the military setting.

The court held that the warrantless search was in violation of the defendant’s Fourth Amendment rights.
The rule established by the United States Court of Military Appeals that service members have a reasonable expectation of privacy and Fourth Amendment protections, even in their highly regulated barracks rooms, is inconsistent with a broad reading of *Jenkins* that creates an exception to the Fourth Amendment on military installations. It would defy logic to argue that civilians who are not members of the military, therefore not subject to military rules and regulations, have less privacy on a military installation than do members of the armed forces on the same installation. Further, a broad reading of *Jenkins* would remove the rule established in *Roberts* because all military bases are now closed, and thus, every person on a base would have no expectation of privacy at any time and could be searched at any time. Consequently, *Jenkins* should be read narrowly in a manner consistent with the current military rules and regulations as established in cases like *Roberts*.

*The Supreme Court's Analysis of U.S. Border Searches Precludes a Broad Interpretation of Jenkins*

To date the Supreme Court has not yet ruled on a case regarding the constitutionality of warrantless searches founded solely on a military base’s closed nature. The Court’s analysis regarding searches conducted at the United States border, a similar Fourth Amendment scenario, however, may provide some indication of its potential decision concerning warrantless searches on military installations.

In *United States v. Flores-Montano*, the Court considered the authority customs officials have to search vehicles at the United States border. Mr. Manuel Flores-Montano attempted to enter the U.S. through a border checkpoint in Southern California. A customs inspector asked Mr. Manuel Flores-Montano to vacate his vehicle and then made a preliminary inspection of the gas tank by tapping on it. The customs agent noticed the gas tank had a dense sound when tapped, at which point, the agent requested a mechanic to disassemble the gas tank for further inspection. The customs agent found more than eighty-one pounds of marijuana hidden in the gas tank. Mr. Manuel Flores-Montano argued the marijuana was obtained through an unlawful search in violation of the Fourth Amendment, and the dis-

114. Id. at 150.
115. Id. at 151.
116. Id.
117. Id.
district court approved his motion to suppress the evidence from trial. 118
Upon appeal, the Ninth Circuit affirmed the district court's decision based on the Supreme Court precedent of border searches in United States v. Montoya de Hernandez. 119 The Court in Montoya de Hernandez previously held that border searches are subject to the probable cause and warrant requirements unless they are considered 'routine' searches. 120 In Flores-Montano, the Ninth Circuit held that the search of the gas tank was not routine and thus required probable cause and a warrant. 121 The Supreme Court disagreed with the Ninth Circuit in Flores-Montano, however, and clarified its previous precedent when it stated, "[the] expectation of privacy is less at the border than it is in the interior." 122 In other words, the government may search individuals at the border without probable cause or a warrant but must follow Fourth Amendment requirements once individuals move beyond the border to the interior of the country. Consequently, the Court rejected the Ninth Circuit's holding, and the marijuana obtained from the customs agent's search in Flores-Montano was admissible against Mr. Manuel Flores-Montano. 123

Some courts have already begun to apply the Supreme Court's analysis in Flores-Montano to military installations by recognizing the notion of decreased expectation of privacy on a closed military base but limiting the area where an individual may be searched without a warrant to the exterior of a closed military base. The district court in United States v. Mohrmann analyzed a case involving an individual searched at the gates of a military installation. 124 Shawn Mohrmann attempted to enter Fort Leavenworth, Kansas on two separate occasions. 125 On both occasions, security officials at the gate searched Mr. Mohrmann's vehicle and discovered marijuana. 126 In ruling on the defendant's motion to suppress the evidence, the court balanced Mr. Mohrmann's expectation of privacy while in his vehicle with the government's interest in security on Fort Leavenworth. 127 The court found as a matter of law an individual has very little expectation of privacy at the gates of a military installation.
privacy when attempting to enter a military base, because an individual desiring entrance to a military installation is aware of the change in security posture present on the exterior of the base since September 11, 2001.\textsuperscript{128} The court cited \textit{Flores-Montano} for the propositions that at the exterior of a military installation an individual has a reduced expectation of privacy and that the government's interests in security are heightened.\textsuperscript{129} Thus, the court in \textit{Mohrmann} ultimately held that the warrantless search was lawful, and the defendant's motion to suppress the evidence was denied.\textsuperscript{130} The \textit{Mohrmann} court limited its analysis to the security checkpoint at the exterior of the military installation and did not use broad language or suggest that warrantless searches are authorized during the entire time an individual is present on a closed military installation.\textsuperscript{131}

The Court's decision in \textit{Flores-Montano} to distinguish between an individual's decreased expectation of privacy at the borders of the United States from her expectations of privacy in the interior of the country would be analogous to the situation in \textit{Jenkins}. Specifically, the Court's reasoning in \textit{Flores-Montano} could apply to \textit{Jenkins} by establishing that an individual has a reduced expectation of privacy at the exterior of a closed military installation, and the individual's expectation of privacy would increase as she moved towards the interior of that installation. The Fourth Circuit in \textit{Jenkins} made specific mention of an individual's reduced expectation of privacy at the exterior of a military installation when it stated:

\begin{quote}
The barbed-wire fence, the security guards at the gate, the sign warning of the possibility of search, and a civilian's common sense awareness of the nature of a military base—all these circumstances combine to puncture any reasonable expectation of privacy for a civilian who enters a closed military base.\textsuperscript{132}
\end{quote}

Thus, instead of reading \textit{Jenkins} broadly to mean that law enforcement could conduct warrantless searches of individuals any time they are present on a closed military base, under the Supreme Court's analysis in \textit{Flores-Montano}, warrantless searches would only be permissible at the gates of closed installations where individuals enter and exit the base.

As noted below, the impacts of a broad reading of the \textit{Jenkins} opinion is well beyond the scope of what the Fourth Circuit was consider-

\begin{footnotes}
\item[128.] Id.
\item[129.] Id. at *22-*23 (citing \textit{Flores-Montano}, 541 U.S. at 152).
\item[130.] Id. at *29.
\item[131.] See id.
\item[132.] United States v. Jenkins, 986 F.2d 76, 79 (4th Cir. 1993).
\end{footnotes}
ing at the time Jenkins was decided. Consequently, Jenkins should be read narrowly as allowing warrantless searches only at the exterior of closed military installations or where another firmly rooted exception to the Fourth Amendment applies.

TREATMENT OF THE FOURTH CIRCUIT’S RATIONALE IN JENKINS IN OTHER CIRCUITS

The various other circuit courts that have analyzed the issue of closed military installation searches have refrained from creating a broad exception to the Fourth Amendment based solely on the nature of a closed military base. If Jenkins were read to create such an exception, the Fourth Circuit would be an outlier among the other circuits that have dealt with this issue.

In Morgan v. United States, Greg Morgan was a civilian air traffic controller employed by the Federal Aviation Administration at Edwards Air Force Base, California. Edwards was a closed military installation during Mr. Morgan’s employment. One day, during Mr. Morgan’s regular commute to work, he was stopped at the gate prior to entering the base and was asked if he would consent to a search of his vehicle. Mr. Morgan refused, indicating that any search would cause him to be late for work. The officers at the gate did not allow Mr. Morgan to enter or leave the base, and upon searching his vehicle, they found a nine-millimeter pistol. Mr. Morgan later sought civil damages by bringing a claim against the security officers, arguing the officers violated his constitutional privacy rights. The district court granted the security officers’ motion to dismiss Mr. Morgan’s claim suggesting it was not necessary for the security officers to obtain a warrant or have probable cause prior to conducting a search on a closed military base. The Ninth Circuit did not adopt the district court’s determination that closed military installations are exempt from Fourth Amendment requirements. Specifically it stated, “[t]he district court’s reasoning goes too far in allowing a categorical exception to the probable cause rule for all searches on military bases.”

133. 323 F.3d 776, 778-79 (9th Cir. 2003).
134. Id. at 779.
135. Id.
136. Id.
137. Id.
138. Id.
139. Id.
140. Id. at 782.
141. Id.
The Ninth Circuit remanded the case back to the district court and instructed the district court to determine if the search could be upheld under the consent exception to the Fourth Amendment warrant requirement.\textsuperscript{142}

The Fifth Circuit also examined the issue of warrantless searches on military installations in \textit{United States v. Ellis}.\textsuperscript{143} David Ellis, a member of the United States Navy, was stationed at the naval air station in Pensacola, Florida.\textsuperscript{144} A military investigator observed a suspicious civilian, William Gaskamp, on the base and followed him to Ellis' room in the barracks.\textsuperscript{145} The investigator questioned Ellis and Gaskamp and asked Gaskamp for permission to search his vehicle.\textsuperscript{146} When Gaskamp refused to grant the investigator permission to search, the investigator asked if Gaskamp had read the visitor's pass he was given upon entering the base.\textsuperscript{147} The visitor's pass stated, "Display in windshield while on station [sic] destroy after leaving station; Visitor; Acceptance of this pass gives your consent to search this vehicle while entering, aboard, or leaving this station."\textsuperscript{148} The investigator asserted his right to search Gaskamp's vehicle as stated in the visitor's pass, and upon his search, discovered twenty plastic bags of marijuana.\textsuperscript{149}

In its decision, the Fifth Circuit noted that although probable cause was likely present in this case, Gaskamp's implied consent, given through his acceptance of the visitor's pass, was a valid basis for a warrantless search.\textsuperscript{150} The court's rationale in \textit{Ellis} was based solely upon a determination that the defendant had impliedly consented to the search of his vehicle and did not address whether a warrantless search is generally authorized on a closed military installation.\textsuperscript{151} The consent exception that was cited by the Fifth Circuit in this case is limited to the facts. Specifically, Ellis was in possession of a pass that granted him limited access to the military base, and the possession of that pass constituted consent to be searched.\textsuperscript{152} The Fifth Circuit did not use any broad language suggesting that all individuals present on a closed military installation impliedly consent to a search at any time,
and it limited its holding to situations where individuals possess a pass that specifically identifies the scope of their consent to be searched.\textsuperscript{153}

In \textit{United States v. Vaughan}, Marshall Vaughan, a civilian, sought entrance to Tinker Air Force Base in Oklahoma in 1973.\textsuperscript{154} Due to the high probability for anti-Vietnam War demonstrations, the commander of the base closed the installation to all visitors.\textsuperscript{155} When Vaughan attempted to enter the base, instead of denying him access and telling him to leave, the security guards at the base's entry point directed him to park on the side of the road and proceeded to search his vehicle without his consent.\textsuperscript{156} During their search, the security guards discovered marijuana in Vaughan's vehicle.\textsuperscript{157} The Tenth Circuit found the warrantless search without probable cause to be in violation of Vaughan's Fourth Amendment rights.\textsuperscript{158} Though it recognized the authority of the military to conduct searches at the security checkpoint of the installation, the court stated, "once a determination has been made not to allow defendant entry to the base, any search conducted thereafter must meet Fourth Amendment standards."\textsuperscript{159} Consequently, the court did not allow the admission of marijuana discovered in the unlawful search to be admitted into evidence against Vaughan.\textsuperscript{160}

To read \textit{Jenkins} broadly as creating an exception for warrantless searches on closed military installations at any time would be wholly inconsistent with the analysis of the other circuits that have analyzed this issue and would result in a radical decrease in constitutional protections for individuals within the Fourth Circuit. Thus, a narrower read of \textit{Jenkins} is logical, reasonable, and would be consistent with the analysis of the other circuit courts that have dealt with this issue.

\textbf{What is the Effect of a Broad Interpretation of the \textit{Jenkins} Decision?}

The result of interpreting the \textit{Jenkins} case as allowing law enforcement officials to conduct a search without probable cause or a warrant simply because an individual is present on a closed military installa-

\begin{itemize}
  \item \textsuperscript{153} Id.
  \item \textsuperscript{154} 475 F.2d 1262, 1263 (10th Cir. 1973).
  \item \textsuperscript{155} Id. at 1263.
  \item \textsuperscript{156} Id.
  \item \textsuperscript{157} Id.
  \item \textsuperscript{158} Id. at 1264.
  \item \textsuperscript{159} Id.
  \item \textsuperscript{160} Id. at 1265.
\end{itemize}
tion would be a severe limiting of individual liberties. Since September 11, 2001, all military installations are considered closed according to the judicial definition. Though these installations are closed within the meaning given by the courts, they still allow members of the general public to enter the installation on any given day for a variety of reasons (i.e. to visit the historical sites on bases, to work and to provide services to the members of the armed forces, etc.). Consequently, individuals living on or near military installations can expect their Fourth Amendment protections to diminish if Jenkins is interpreted at its broadest.

There are also numerous and far-reaching future implications if all searches on military bases are “exempt from the usual Fourth Amendment requirement of probable cause.” Ultimately, there is the potential for military commanders to attempt to assert their general authority to protect the installation from drugs and other harmful contraband by conducting searches and inspections of individuals in the absence of probable cause. Even though it seems to defy previous Fourth Amendment analysis, there is also the potential for military investigators to interpret Jenkins as authority to search individuals’ homes on bases without regard to probable cause.

A broad interpretation of the decision in Jenkins applied in a post-September 11th world could have implications well beyond the gates of military bases. Using the general interest of national security, state and federal agencies would likely be allowed to increase their authority to conduct warrantless searches of individuals in and around federal buildings. Also, due to the recent terrorist activities in Europe that resulted in attacks on mass transit systems, state entities could assert their authority to conduct warrantless searches in and around mass transit systems in the United States. For example, in response to the London subway bombings, officials in New York City initiated a program in July 2005 to randomly search the bags of passengers commuting on the subway. Though the courts have not been called upon to determine the constitutionality of the New York searches, there is a concern that officials may have overstepped their authority by initiating this program. The Jenkins decision, in its broadest sense, taken to its logical extension, could swallow up the Fourth Amendment guar-

161. See United States v. Jenkins, 986 F.2d 76 (4th Cir. 1993).
163. Jenkins, 986 F.2d at 78.
165. Id.
Search for the Fourth Amendment: In a Post-September 11th World

There is a possibility that if the Supreme Court analyzed the issue in *Jenkins* it would uphold a broad interpretation and permit military investigators to conduct searches both at the exterior and the interior of military installations even in the absence of probable cause on the basis of military deference. In the past, when the Court has weighed various constitutional protections of an individual against a military commander's duties to maintain good order and discipline of their unit and prepare their unit for combat, the Court has given great deference to military commanders. However, the Court's previous allocations of deference to the military did not have as broad an impact on individual rights as the decision in *Jenkins* would allow if adopted and applied by all courts.

In *Greer v. Spock*, the Supreme Court weighed the issues of an individual's First Amendment right of expression through speech with the military commander's right and duty to protect Fort Dix, New Jersey from outside threats. In 1972, Benjamin Spock was the candidate of the People's Party for the office of President of the United States. Spock and others wrote the commanding officer at Fort Dix requesting permission to campaign on the installation; the commander denied their request. Spock then filed suit claiming the Fort Dix regulations were in violation of the First and Fifth Amendments. The Supreme Court, in overturning the district court's injunction preventing the commander at Fort Dix from interfering with political rallies, found the military and its commanders have a constitutional duty to train soldiers and prepare for war and should not have to provide a public forum for speeches. Though the Supreme Court recognized a military commander's authority to exclude civilians from the area of his command, it did not grant the commander the plenary...
power to exclude the distribution of every publication that was political in nature. 172 The Court specifically stated:

The only publications that a military commander may disapprove are those that he finds constitute a clear danger to military loyalty, discipline, or morale, and he may not prevent distribution of a publication simply because he does not like its contents, or because it is critical, even unfairly critical, of government policies or officials. 173

Spock was ultimately unable to campaign at Fort Dix without the commander’s express authorization. 174

In Goldman v. Weinberger, the Court weighed the issues of an individual’s First Amendment right to freely practice his religion with the military’s need to have uniformity among service members while in uniform. 175 Simcha Goldman, an Orthodox Jew, was a member of the United States Air Force. 176 Goldman brought suit against the Secretary of Defense claiming Air Force regulations that prevented him from wearing his yarmulke violated his constitutional right to practice religion. 177 The Court found that the military’s need to maintain good order and discipline of its members outweighed the individual interest to express religion through wearing a religious symbol. 178 In particular, the Court noted, “when evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.” 179 Thus, the Air Force regulation prohibiting members from wearing a yarmulke in uniform was upheld. 180

Although the government often cites the need for military deference, the Court’s deference in Greer and Goldman is distinguishable from the Fourth Circuit’s broad grant of authority in Jenkins. In Greer, the Court’s decision supported the existing constitutional separation of the military from the political process. 181 Further, the Court in Greer did not grant authority to exclude all distributions of political

172. Id. at 840.
173. Id.
174. Id.
175. 475 U.S. 503 (1986).
176. Id. at 504-05.
177. Id. at 506.
178. Id. at 507.
181. See U.S. Const. art. II, § 2 (allocating the position of commander-in-chief to the President thus protecting the citizenry from the vast power of the military and at the same time placing political responsibilities on political leaders not military leaders).
material.\textsuperscript{182} The Court’s decision merely recognized a commander’s authority to exclude those materials that would constitute a danger to the loyalty of his subordinates.\textsuperscript{183} In \textit{Goldman}, the Court’s decision recognized the importance of cohesiveness within the military and prevented an individual’s expressions from hindering that cohesion.\textsuperscript{184} However, the Court’s decision in \textit{Goldman} does not prevent an individual from expressing a religious preference while not in uniform.\textsuperscript{185} Most importantly, the decision in \textit{Goldman} did not impact individuals not serving in the military. Furthermore, those who join the military voluntarily do so understanding and expecting to forgo certain freedoms and liberties they may have enjoyed in civilian life. For example, a soldier’s entire appearance from the length of his hair to where and what kind of tattoos he may have on his body are governed by Army regulation.\textsuperscript{186}

If one accepts \textit{Jenkins} as authorizing a closed installation exception to the Fourth Amendment, the Fourth Circuit’s rationale would grant broad levels of authority to military investigators and commanders to search citizens without probable cause or a warrant.\textsuperscript{187} In its previous decisions, when the Supreme Court gave the military the authority to suspend the freedom of expression while in uniform, it did not completely remove that individual’s right to practice her constitutionally guaranteed right on her own time.\textsuperscript{188} By allowing the military to conduct warrantless searches without probable cause, the court in \textit{Jenkins} would not only suspend a constitutional guarantee, it would remove that guarantee completely while on a closed military installation. Consequently, a broad interpretation of \textit{Jenkins} extends well beyond the Supreme Court’s general deference to the military in deciding constitutional questions.

\textbf{Conclusion}

Now think back to the scenario discussed in the beginning of this comment, where you and your family are traveling on a closed military installation. A broad reading of the Fourth Circuit’s analysis in \textit{Jenkins} would allow the military police officer to search you, your family, and your minivan without a warrant and without probable cause. Under a

\begin{itemize}
\item \textsuperscript{182} Greer v. Spock, 424 U.S. 828, 840 (1976).
\item \textsuperscript{183} Id.
\item \textsuperscript{184} \textit{Goldman}, 475 U.S. at 507.
\item \textsuperscript{185} Id.
\item \textsuperscript{186} U.S. Dep’t Army, Reg. 670-1, para. 1-8.
\item \textsuperscript{187} United States v. Jenkins, 986 F.2d 76, 78 (4th Cir. 1993).
\item \textsuperscript{188} See \textit{Goldman}, 475 U.S. 503.
\end{itemize}
narrower reading, however, this potentially frightening situation would never develop, because the military police officer would be unable to subject your family to an unjustified search unless you were entering or exiting the installation. You and your family could enjoy the celebration of our nation's independence without an unwarranted intrusion by the government.

There is no doubt the language used by the Fourth Circuit in Jenkins is broad and could be interpreted as allowing law enforcement officials to search individuals at any time on a closed military installation without a warrant or probable cause. Additionally, the Supreme Court has a general recognition for deference to military commanders in questions that affect loyalty, good order, discipline, and the safety of their units. However, the Court has never allowed the complete eradication of a constitutional guarantee on a military installation, even when faced with the special needs of the military. Further, the facts of Jenkins, the current military rules concerning searches of service members, and the Supreme Court's analysis regarding border searches all suggest a narrow interpretation of Jenkins. Future courts should only read Jenkins as either allowing warrantless searches without probable cause at the exterior of a military installation when an individual seeks to enter or exit the base or as allowing warrantless searches on closed military installations when a firmly rooted exception to the Forth Amendment applies to the given facts of a case. Any broader interpretation of Jenkins could have unnecessary and drastic impacts on the privacy of individuals in and around the many closed military installations across the United States.

Ryan Leary

190. See Goldman 475 U.S. 503; see also Greer, 424 U.S. 828.