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## LOCKING DOWN PRETRIAL CONFINEMENT REVIEW: AN ARGUMENT FOR REALIGNING RCM 305 WITH THE CONSTITUTION


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*Whatever procedure [may be adopted], it must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest.*[1]

### I. Introduction

It is 1700 on a Friday. After a rough week in the courtroom, Captain (CPT) Hack, a trial counsel at Fort Grillem, is getting ready to head home for a relaxing weekend when his office phone rings. On the other end is one of his company commanders.

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[1] Gerstein v. Pugh, 420 U.S. 103, 124–25 (1975) (footnotes omitted).

"Hey, buddy. I'm glad I caught you," barks the commander. "My favorite Soldier is at it again. Ever since I read him his summary court-martial charges for the marijuana use, he's been a real "pain in the neck."[2] He's always late to formation and just sits around while the rest of the Soldiers are working. The other day, the first sergeant caught him hanging out at the post exchange when he was supposed to be in the motor pool helping to pack up our equipment. And just this afternoon, his squad leader overheard him saying that he planned to get high this weekend, since he's getting court-martialed anyway. We're trying to get ready for a deployment, and I don't have time to deal with this nonsense! Can you just get this guy out of our hair?"

Sensing the exasperation in the commander's voice, CPT Hack quickly suggests that the commander put the Soldier in pretrial confinement to keep him from causing problems in his unit and from getting into any more trouble prior to his summary court-martial. After assuring the company commander that he will have his paralegal start on the paperwork immediately, CPT Hack slumps back into his chair and wonders whether he gave the right advice. Although one of his fellow trial counsel is constantly bragging about how his brigade puts Soldiers in jail as a general rule whenever they prefer court-martial charges, CPT Hack has never used pretrial confinement in his short time as a trial counsel and is not sure if it is appropriate in this case. He opens his *Manual for Courts-Martial* (*MCM*) to Rule for Courts-Martial (RCM) 305 to review the requirements for ordering a Soldier into pretrial confinement.

The standard specified in the *MCM* is probable cause, which is satisfied by a finding that there are reasonable grounds to believe that:

> (i) An offense triable by a court-martial has been committed;
> (ii) The prisoner committed it; and
> (iii) Confinement is necessary because it is foreseeable that:

[2] This language comes from *United States v. Heard*, which is commonly cited for the proposition that an accused may not be placed in pretrial confinement solely on the basis that he is a "pain in the neck." *See* 3 M.J. 14, 16, 22 (C.M.A. 1977); MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 305 analysis, at A21-18 (2008) [hereinafter MCM] (distinguishing the accused in *Heard* from the "'quitter' who disobeys orders and refuses to perform duties" and may be confined due to his detrimental effect on morale and discipline).

> (a) The prisoner will not appear at trial, pretrial hearing, or investigation, or
>
> (b) The prisoner will engage in serious criminal misconduct; and
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> (iv) Less severe forms of restraint are inadequate.[3]

The person ordering confinement should ensure that these grounds exist before making his decision.[4] In addition, within seventy-two hours, the commander must document the grounds for his determination in a written memorandum, along with the reasons for continued pretrial confinement.[5] Within forty-eight hours of the initiation of confinement, a "neutral and detached officer" must review the initial confinement decision in accordance with RCM 305(i)(1) to determine whether probable cause indeed exists.[6] Provided that the commander is neutral and detached and completes his 72-hour review within forty-eight hours, he may satisfy the 48-hour review required by RCM 305(i)(1) with his memorandum.[7] Moreover, the rules do not prohibit the 48-hour review and the 72-hour commander's review from occurring contemporaneously with ordering the accused into confinement.[8] Finally, RCM 305(i)(2) requires the review of "the probable cause determination and necessity for continued pretrial confinement" within seven days by a "neutral and detached officer appointed in accordance with regulations prescribed by the Secretary concerned."[9] For the Army, Army Regulation (AR) 27-10 requires that the 7-day review be conducted by a judge advocate appointed as a military magistrate.[10]

Having refreshed his understanding of the requirements for the imposition and review of pretrial confinement, CPT Hack decides that he will save time by drafting the 72-hour memorandum for the company commander's signature so that he does not need to explain the legal standards to the commander in detail. In analyzing the elements of the probable cause determination, CPT Hack again ponders whether

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[3] MCM, *supra* note 2, R.C.M. 305(h)(2)(B).
[4] *See id.* R.C.M. 305(d) & discussion.
[5] *Id.* R.C.M. 305(h)(2)(C).
[6] *Id.* R.C.M. 305(i)(1).
[7] *Id.* R.C.M. 305(h)(2)(A).
[8] *See id.*
[9] *Id.* R.C.M. 305(i)(2).
[10] U.S. DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE paras. 5-15, 9-5 (16 Nov. 2005) [hereinafter AR 27-10]. The Army is the only service branch that requires a judge advocate magistrate. The requirements of the other service regulations are addressed in Part II.B.4, *infra*.

confinement in this case meets the legal standard, but he believes that he can at least make a colorable argument. After all, CPT Hack reasons, the accused is already charged with an offense, his perpetual lateness to formation and absence from his place of duty make it foreseeable that he will not appear at trial, and the accused's statement that he plans to use marijuana again certainly shows that he intends to engage in serious criminal misconduct.[11] Upon completing the 72-hour memorandum, CPT Hack instructs his paralegal to take it, along with the confinement order and other required documents,[12] to the company commander for signature.

Realizing the utility of conducting the 48-hour "neutral and detached" review immediately, so as to avoid having to do it over the weekend, CPT Hack also prepares a succinct memorandum stating that there is probable cause that pretrial confinement should continue. He then considers who should serve as the "neutral and detached officer" for the 48-hour review. Although he remembers his chief of military justice telling him it is a good practice to arrange for a part-time military magistrate to conduct the 7-day review within forty-eight hours to satisfy the requirements of both RCM 305(i)(1) and RCM 305(i)(2),[13] CPT

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[11] Mere lateness to formation and a failure to go to his appointed place of duty generally would not make it foreseeable that the accused will not appear at trial. Moreover, mere drug use would not make it foreseeable that the accused will engage in serious criminal misconduct within the meaning of RCM 305(h)(2)(B) unless there is some nexus between the drug use and "the safety of the community or . . . the effectiveness, morale, discipline, readiness, or safety of the command." MCM, *supra* note 2, R.C.M. 305(h)(2)(B). *Compare* United States v. Williams, 54 M.J. 626, 631 (A.F. Ct. Crim. App. 2000) ("No *trained* commander or magistrate could reasonably believe this evidence [of cocaine possession and use] was sufficient to establish, by a preponderance of the evidence, that incarceration was appropriate."), *and* United States v. Sharrock, 32 M.J. 326, 331–32 (C.M.A. 1991) (failing to mention accused's drug use in upholding the lawfulness of his pretrial confinement), *with* United States v. Plummer, No. 200601319, 2007 CCA LEXIS 229, at *10 (N-M. Ct. Crim. App. 2007) (unpublished decision) (accused posed "serious threat to the community" because he distributed drugs to other Marines from his government quarters in addition to using drugs), *and* United States v. Fortune, No. 200300779, 2005 CCA LEXIS 119, at *6 (N-M. Ct. Crim. App. 2005) (unpublished decision) (pretrial confinement was warranted because "as a mechanic working on amphibious vehicles during an exercise, the appellant's drug use presented a safety hazard to the other Marines in the field").

[12] Army regulations require preparation of a Department of Army (DA) Form 5112, Checklist for Pretrial Confinement, in addition to the confinement order. *See* AR 27-10, *supra* note 10, paras. 5-15c, 9-5b(2).

[13] This has been recognized as good practice since the 1998 changes to the *MCM* incorporated the 48-hour review. *See* Major Michael J. Hargis, *Pretrial Restraint and Speedy Trial: Catch Up and Leap Ahead*, ARMY LAW., Apr. 1999, at 13, 13; *see also*

Hack is afraid that the magistrate will determine that the legal requirements for pretrial confinement have not been met in this case. He believes that the battalion commander might ordinarily be a logical choice to conduct the 48-hour review of a company commander's confinement decision. However, because the battalion commander has already referred charges against this Soldier to a summary court-martial and he therefore may not be sufficiently "neutral and detached," CPT Hack decides instead to seek out the battalion executive officer.

"What do we need to do with this guy, Judge?" asks the battalion executive officer after CPT Hack briefed him on the situation.

"He's a dirtbag, sir," replies CPT Hack. "The company commander is signing the confinement order as we speak. He just needs you to sign a memo saying you agree with his decision. There's a chance that the military magistrate will kick him out of jail, but that doesn't have to happen for seven days. At least he'll be out of the command's hair until then."

With that, the battalion executive officer signed the 48-hour review memorandum, and the accused's unit escorted him to a local confinement facility. The accused remained there for seven days until the military magistrate determined that pretrial confinement was not warranted and ordered his immediate release in accordance with RCM 305(i)(2)(C).[14]

The preceding scenario should be troubling, not only because of the many intentional and unintentional abuses of the pretrial confinement procedures,[15] but also because it is representative of tactics that are all

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Major Mackay, Note, *The COMA Addresses the Constitutional Requirements for Pretrial Confinement Determinations and Reviews in Light of* Gerstein v. Pugh *and* County of Riverside v. McLaughlin, ARMY LAW., Mar. 1994, at 46, 49 (calling a magistrate review at forty-eight hours "the more efficient solution" even prior to the 1998 changes to the *MCM*).

[14] "Upon completion of review, the reviewing officer shall approve continued confinement or order immediate release." MCM, *supra* note 2, R.C.M. 305(i)(2)(C).

[15] For example, pretrial confinement is generally not appropriate when the command is disposing of the offense with a summary court-martial. *See* UCMJ art. 10 (2008) ("when charged only with an offense normally tried by a summary court-martial, [an accused] shall not ordinarily be placed in confinement."); U.S. ARMY TRIAL JUDICIARY, STANDING OPERATING PROCEDURES FOR MILITARY MAGISTRATES 13 (2006) [hereinafter MILITARY MAGISTRATE SOP]. In this hypothetical scenario, it is doubtful that the circumstances even require pretrial confinement. *See supra* note 10. Finally, for a discussion of the

too common in today's military justice practice. This potential for abuse is important because pretrial confinement is the most drastic form of restraint that can be imposed on an accused prior to trial. Beyond depriving the accused of his liberty, it interferes with his performance of duty "and may greatly complicate [his] defense by making more difficult the attorney-client relationship."[16] Therefore, "unless confinement prior to trial is compelled by a legitimate and pressing social need sufficient to overwhelm the individual's right to freedom . . . restrictions unnecessary to meet that need are in the nature of intolerable, unlawful punishment."[17]

Certainly, the military's status as a "specialized society separate from civilian society"[18] necessitates considerations such as military discipline and national security[19] in addition to those factors customarily used in state and federal criminal procedure in determining whether pretrial confinement is appropriate.[20] But it is precisely because of the expansive bases on which a commander can justify placing an accused servicemember in pretrial confinement[21] as well as the absence of bail in

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typical prosecutor-driven, *ex parte* nature of the 48-hour and 72-hour reviews, see Part III.A.3, *infra*.

[16] 1 FRANCIS A. GILLIGAN & FREDERIC I. LEDERER, COURT-MARTIAL PROCEDURE § 4-10.00 (3d ed. 2006); *see also* Major Richard R. Boller, *Pretrial Restraint in the Military*, 50 MIL. L. REV. 71, 73, 74–75 (1970) (noting that pretrial confinement may hinder the preparation of the accused's defense and may have subtle effects on the outcome of the trial). At Fort Drum, New York, for example, pretrial confinees are sometimes jailed in civilian confinement facilities as far away as Syracuse, New York, a drive that takes over two hours round trip under normal conditions and can take several hours during inclement weather.

[17] United States v. Heard, 3 M.J. 14, 20 (C.M.A. 1977).

[18] Parker v. Levy, 417 U.S. 733, 743 (1974).

[19] Under RCM 305, the definition of "serious criminal misconduct" includes "intimidation of witnesses or other obstruction of justice, serious injury of others, or other offenses which pose a serious threat to the safety of the community or to the effectiveness, morale, discipline, readiness, or safety of the command, or to the national security of the United States." MCM, *supra* note 2, R.C.M. 305(h)(2)(B). At the extreme edge of this broad range of what is considered "serious criminal misconduct" justifying preventive detention is the concept of the "quitter," who may be confined based on the impacts of his behavior on good order and discipline. *See id.* R.C.M. 305 analysis, at A21-18.

[20] *See, e.g.*, 18 U.S.C. § 3142 (2006) (discussing the factors considered for pretrial detention in the federal system).

[21] Noted military law scholars Frances Gilligan and Frederic Lederer have opined that the preventative detention scheme in the *MCM* may be unconstitutional in light of the framework approved by the Supreme Court in *United States v. Salerno*, 481 U.S. 739 (1987), in which the Court reviewed the constitutionality of the Bail Reform Act of 1984. *See* GILLIGAN & LEDERER, *supra* note 16, § 4-32.00.

the military system[22] that it is so vital that the legal review of the pretrial confinement decision be meaningful, in terms of both its timeliness and its reliability. Indeed, promptness and reliability are central to the Supreme Court's concept of the constitutionally-required judicial review of pretrial confinement.[23]

As the Supreme Court has delineated the constitutional limits of pretrial confinement over the years, however, the military has imperfectly implemented the Court's mandates.[24] As a result, the current version of RCM 305 establishes a pretrial confinement framework that is prone to systematic abuse and does not provide a meaningful, reliable judicial review in a timely manner to protect the basic rights of servicemembers. In particular, because RCM 305 allows for the review of pretrial confinement by non-legally-trained officers who may neither understand the nature of the probable cause determination nor be truly neutral and detached, the current system is inherently unreliable and insufficiently judicial. In order for military pretrial confinement procedures to be in compliance with the Constitution, RCM 305 must be amended to require review of pretrial confinement by a neutral and detached judge advocate magistrate within forty-eight hours.

In building the case for realigning RCM 305 with the Constitution, Part II of this article first explains the Supreme Court's concept of the constitutionally-required judicial review of pretrial confinement, as well as the way in which the military courts have applied the Supreme Court precedent to the armed services. It then traces the historical development of the law pertaining to pretrial confinement in the military, demonstrating how the military has continually lagged behind the constitutional standard. Part II concludes by examining the development of RCM 305 and the various service regulations, which have failed to adequately implement the constitutionally-required pretrial confinement review procedures.

Part III explores the problems with the current system in terms of the illogical framework of pretrial confinement review in RCM 305 and the lack of uniformity across the services, which have resulted in a system that is prone to abuse. A proposed revision to RCM 305, laid out in the Appendix and explained in Part III.B, is designed to comply more

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[22] Courtney v. Williams, 1 M.J. 267, 271 (C.M.A. 1976).
[23] *See infra* Part II.A.
[24] *See infra* Part II & Part III.A.

squarely with the Constitution. This revision would eliminate the multiple layers of review, ensure consistency across the services, and reduce the opportunities for abuse.

Finally, in support of the proposed revisions, Part IV of this article argues that the military cases applying the Supreme Court's mandates concerning pretrial confinement review are flawed in their justifications for allowing non-lawyers to review pretrial confinement decisions. This article concludes by arguing that this proposal should be implemented because only judge advocates can consistently fulfill the Supreme Court's vision for neutral and detached magistrates and provide a meaningful review of pretrial confinement that complies with the Constitution.

## II. Background

### A. The Constitutional Standard for Pretrial Confinement Review

#### *1. Prompt Review by a Neutral and Detached Magistrate*

The Fourth Amendment guarantees the "right of the people to be secure in their persons . . . against unreasonable searches and seizures."[25] While the Supreme Court has long held that the Fourth Amendment standard for arrest and pretrial detention is probable cause,[26] the current jurisprudence regarding the appropriate standards for the review of pretrial confinement began in 1975 with *Gerstein v. Pugh*.[27] In that seminal case, the Supreme Court considered the issue of "whether a person arrested and held for trial . . . is constitutionally entitled to a judicial determination of probable cause for pretrial restraint of liberty."[28] The petitioner in *Gerstein* challenged a Florida criminal procedure whereby "a person arrested without a warrant and charged by information [could] be jailed . . . pending trial without any opportunity for a probable cause determination."[29] The Court held that the Fourth

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[25] U.S. CONST. amend. IV.

[26] *See Ex parte* Burford, 7 U.S. (3 Cranch) 448, 453 (1806) (finding a warrant of commitment illegal under the Fourth Amendment, "for want of stating some good cause certain, supported by oath").

[27] 420 U.S. 103 (1975).

[28] *Id.* at 105.

[29] *Id.* at 116. A criminal "information" is "[a] formal criminal charge made by a prosecutor without a grand-jury indictment." BLACK'S LAW DICTIONARY 795 (8th ed.

Amendment mandates "a *judicial* determination of probable cause as a prerequisite to extended restraint of liberty following arrest."[30]

Central to the Court's concept of this judicial review of pretrial confinement was the idea that a "neutral and detached *magistrate*" should decide the existence of probable cause "whenever possible."[31] In establishing this constitutional requirement, the Court carefully distinguished between the initial probable cause determination incident to arrests and the probable cause review needed for pretrial confinement. In the former instance, the Court acknowledged that the interests of law enforcement demand that a police officer's on-scene assessment of probable cause be sufficient to justify the arrest of a suspect, as well as "a brief period of detention to take the administrative steps incident to arrest."[32] Once these steps are complete, however, the need for unilateral action by the government disappears, and the "need for a neutral determination of probable cause increases significantly"[33] due to the profound effects that pretrial confinement can have on the suspect's life.[34] Because the impacts of pretrial confinement are so severe, "the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty."[35]

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2004). "The information is used to prosecute misdemeanors in most states, and about half the states allow its use in felony prosecutions as well." *Id.*

[30] *Gerstein*, 420 U.S. at 114 (emphasis added).

[31] *Id.* at 112 (emphasis added). The Court further explained:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by an officer engaged in the often competitive enterprise of ferreting out crime.

*Id.* at 112–13 (quoting Johnson v. United States, 333 U.S. 10, 13–14 (1948)).

[32] *Id.* at 113–14.

[33] *Id.* at 114.

[34] The Court noted the impacts on the suspect's employment, income, and family relationships, as well as his ability to assist in the preparation of his defense. *See id.* at 114, 123. *See generally* LEWIS R. KATZ ET AL., JUSTICE IS THE CRIME: PRETRIAL DELAY IN FELONY CASES 56–62 (1972) (decrying the psychological and physical effects of being confined before trial with those already convicted of serious crimes).

[35] *Gerstein*, 420 U.S. at 114.

Having established the constitutional requirement for review of pretrial confinement by a neutral and detached magistrate, the Court expounded as to who could fulfill this function. Reasoning that "a prosecutor's responsibility to law enforcement is inconsistent with the constitutional role of a neutral and detached magistrate,"[36] the Court held that a prosecutor's judgment as to probable cause, implicit in his decision to file a criminal information, does not satisfy the requirements of the Fourth Amendment.[37] Moreover, the Court emphasized that the magistrate must be completely independent from both the prosecution and law enforcement.[38] Such independence is critical to guard against both intentional and inadvertent disregard of liberties by those associated with enforcing the law.

Finally, the Court in *Gerstein* addressed the nature of the review itself. In cautioning that the Constitution does not require any particular procedure, the Court nonetheless warned that whatever procedure a jurisdiction chooses, "it must provide a fair and reliable determination of probable cause . . . by a judicial officer either before or promptly after arrest."[39] Because the sole issue determined by the magistrate is "whether there is probable cause for detaining the arrested person pending further proceedings,"[40] a reliable determination can be made without an adversarial hearing.[41] Likewise, due to "its limited function and its nonadversary character, the probable cause determination is not a 'critical stage' in the prosecution that would required appointed counsel."[42]

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[36] *Id.* at 117 (citing Coolidge v. New Hampshire, 403 U.S. 443, 449–53 (1971)).
[37] *Id*.
[38] *Id.* (citing Shadwick v. City of Tampa, 407 U.S. 345 (1972)). In Part IV.B.1, *infra*, I discuss the unique way in which the military justice system distributes the traditional prosecutorial functions among the trial counsel, the chain of command, the staff judge advocate, and the convening authority.
[39] *Id.* at 124–25.
[40] *Id.* at 120. In applying *Gerstein* to the military, the Court of Military Appeals (COMA) explained the probable cause determination as having two components: "if a person *could* be detained and if he *should* be detained." Courtney v. Williams, 1 M.J. 267, 271 (C.M.A. 1976) (emphasis added).
[41] *Gerstein*, 420 U.S. at 120–22.
[42] *Id.* at 122. The *MCM*, however, does allow for military counsel to be provided to pretrial confinees. MCM, *supra* note 2, R.C.M. 305(f). It also provides that counsel "shall be allowed to appear before the 7-day reviewing officer and make a statement, if practicable." *Id.* R.C.M. 305(i)(2)(A)(i).

*2. The 48-Hour Rule*

In the two decades following *Gerstein*, the courts wrestled with what constituted "prompt" judicial review of pretrial confinement. In *County of Riverside v. McLaughlin*,[43] the Supreme Court considered a California county's policy of combining the probable cause determination following warrantless arrests with the arrestee's arraignment proceedings, which were required to be conducted without unreasonable delay and within two days of arrest, excluding weekends and holidays.[44] Recognizing that *Gerstein* "struck a balance between competing interests,"[45] the Court in *McLaughlin* held that "judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*,"[46] and thus are presumptively reasonable under the Fourth Amendment.[47]

The Court acknowledged that although the Fourth Amendment "permits a reasonable postponement of a probable cause determination while the police cope with the everyday problems of processing suspects through an overly burdened criminal justice system,"[48] there is no legitimate state interest in detaining individuals without probable cause for extended periods.[49] Therefore, judicial determinations of probable cause made after forty-eight hours are presumptively unreasonable.[50] In such cases, "the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance."[51]

Under the *McLaughlin* rule, neither a state's desire to combine proceedings nor intervening weekends and holidays constitute extraordinary circumstances that justify delay beyond forty-eight hours.[52] In fact, the Court specifically noted that the exclusion of weekends and holidays from the county's computation of the two days within which the

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[43] 500 U.S. 44 (1991).
[44] *Id.* at 47.
[45] *Id.* at 54.
[46] *Id.* at 56.
[47] Colonel Francis A. Gilligan & Lieutenant Colonel Stephen D. Smith, *Criminal Law Division Notes: Supreme Court—1990 Term, Parts III and IV*, ARMY LAW., July 1991, at 50, 53.
[48] *McLaughlin*, 500 U.S. at 55.
[49] *Id.*
[50] Gilligan & Smith, *supra* note 47, at 53.
[51] *McLaughlin*, 500 U.S. at 57.
[52] *See id.* at 57–58.

combined proceedings had to occur—a policy that caused delays of up to seven days in some cases—meant that the county's standard procedures regularly exceeded the constitutionally-permissible 48-hour period.[53] Moreover, the Court opined that the typical practice of the combined proceedings taking place on the last possible day might constitute "delay for delay's sake,"[54] which would make the probable cause review unreasonable even if the hearing was held within forty-eight hours.[55]

## B. Pretrial Confinement Review in the Military

### *1. Application of the Constitutional Standard to the Military*

With what appeared to be a clear mandate from the Supreme Court for a judicial review of pretrial confinement by a neutral and detached magistrate within forty-eight hours, the issue of who is authorized to conduct this review in the military came before the military courts. At the time the Army Court of Military Review (ACMR) considered this issue in *United States v. Rexroat*[56] in 1992, it had already been established that the *Gerstein* rule applied to the military,[57] but it was not yet clear whether the 48-hour rule of *McLaughlin*, decided the year prior, would also apply.[58]

In *Rexroat*, the accused's pretrial confinement had been reviewed within forty-eight hours by "LTC R," a convening authority not in the accused's chain of command, but the review by a military magistrate did not occur until his seventh day of confinement.[59] The accused sought confinement credit on the grounds that LTC R was not a neutral and detached magistrate as defined by AR 27-10 and as required by *Gerstein*, and that the subsequent magistrate review was not conducted within

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[53] *See id.* at 58–59.
[54] *Id.* at 59.
[55] *See id.* at 56.
[56] 36 M.J. 708 (A.C.M.R. 1992) (en banc), *rev'd in part by* 38 M.J. 292 (C.M.A. 1993).
[57] *See* Courtney v. Williams, 1 M.J. 267 (C.M.A. 1976) (holding that the requirement for a prompt probable cause determination for pretrial confinement by a neutral and detached magistrate was applicable to the military).
[58] *See generally* Gilligan & Smith, *supra* note 47, at 54 (speculating as to the impacts of *McLaughlin* on military procedure).
[59] *Rexroat*, 36 M.J. at 710. Whereas the ACMR referred to the reviewing officer as "LTC R," the COMA would later use his actual name. To avoid confusion in this article, "LTC R" is used when discussing both cases.

forty-eight hours as mandated by *McLaughlin*.[60] Additionally, the accused argued that LTC R "was inherently disqualified to act as a neutral and detached magistrate since, as a commander, he performed prosecutorial or law enforcement duties."[61]

The ACMR first held that the 7-day review for probable cause under RCM 305(i) was not constitutional in light of the 48-hour requirement specified in *McLaughlin*, and that the decision to place a Soldier in pretrial confinement must be reviewed by a neutral and detached magistrate within forty-eight hours.[62] The court found that LTC R was not authorized under RCM 305(i) and AR 27-10 to act as a magistrate for review of pretrial confinement.[63] Therefore, his probable cause review was invalid.

On appeal, the Court of Military Appeals (COMA) affirmed the holding that the 48-hour time limit of *McLaughlin* applied to the military.[64] In next considering who is constitutionally qualified to conduct the review, however, the court reversed the decision of the ACMR and held that the 48-hour probable cause determination may be conducted by a "neutral and detached *official*."[65] In departing from the "magistrate" language used by the Supreme Court in *Gerstein*, the court in *Rexroat* relied on *Shadwick v. City of Tampa*[66] as Supreme Court precedent that a non-lawyer may be constitutionally qualified to

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[60] *Id.*
[61] *Id.* at 711.
[62] *Id.* at 712.
[63] *Id.* at 711. The court reasoned that since *McLaughlin* only dealt with what constituted a "prompt" review under *Gerstein*, "its only effect on military procedure was to replace the seven-day rule . . . with a forty-eight hour rule." *Id.* at 713. Therefore, in the court's opinion, guidance from the Office of the Judge Advocate General that a neutral and detached commander or other officer could conduct the new *McLaughlin* review erroneously changed *who* was authorized to conduct the probable cause review. *Id.*
[64] United States v. Rexroat, 38 M.J. 292, 295 (C.M.A. 1993), *cert. denied*, 510 U.S. 1192 (1994). The Army Court of Criminal Appeals has enforced the 48-hour rule very stringently. *See* United States v. Dingwall, 54 M.J. 949 (A. Ct. Crim. App. 2001) (finding that conducting the 48-hour probable cause determination fifty-four hours after appellant was arrested by civilian authorities was unreasonable despite the fact that the accused had to be transported from California to Fort Bragg, North Carolina).
[65] *Rexroat*, 38 M.J. at 298 (emphasis added).
[66] 407 U.S. 345 (1972). In *Shadwick*, the appellant was arrested for driving while impaired, a violation of a municipal ordinance, under a warrant issued by the non-lawyer clerk of the municipal court. *Id.* at 346. Part IV.A.1 of this article argues that the COMA in *Rexroat* improperly applied *Shadwick*.

determine whether there is probable cause to detain a person.[67] The court also pointed to its "undeviating line of cases"[68] holding that a commander can be neutral and detached for the purposes of authorizing a search, and concluded there was no reason to treat the determination of probable cause for pretrial confinement differently.[69]

Applying its newly-crafted rule, the COMA found that even though LTC R could neither conduct the RCM 305(h) review (because he was not the accused's commander), nor conduct the RCM 305(i) review (because he was not a magistrate appointed in accordance with AR 27-10), his review within forty-eight hours would nonetheless satisfy *Gerstein* and *McLaughlin* as long as he was neutral and detached.[70] The court found LTC R to be neutral and detached despite being a convening authority because he was outside of the accused's chain of command and played no prosecutorial or law enforcement role in the accused's case.[71]

*2. History of the Statutory Basis for Military Pretrial Confinement*

The *Rexroat* decision was the last major step in the case law governing pretrial confinement review in the military, and arguably a step backward at that, effectively reducing the judicial character of the review. A look at the history of pretrial confinement in the military similarly demonstrates that the rules have evolved over time both in response to constitutional jurisprudence and in response to perceived abuses of the system, but that the military has always lagged behind the constitutional standard.

Prior to the adoption of the U.S. Constitution, and continuing through World War I, pretrial confinement was the norm for enlisted members.[72] The Articles of War of 1775 specified that a

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[67] *Rexroat*, 38 M.J. at 297.
[68] *Id.* at 296 (quoting United States v. Ezell, 6 M.J. 307, 330 (C.M.A. 1979) (Cook, J., dissenting in part)).
[69] *Id.* at 298.
[70] *Id.* In making this determination, the COMA posited that RCM 305 did not prohibit additional procedures for reviewing pretrial confinement. *Id.*
[71] *Id.*
[72] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 123 (2d. ed. 1896, reprint 1920) ("[I]n all cases, the trial . . . is to be preceded by arrest in the form of *confinement*."); *see* GILLIGAN & LEDERER, *supra* note 16, § 4-31.10 (noting that the provision mandating pretrial confinement for enlisted members "remained substantially unchanged" from 1775 to 1920); Boller, *supra* note 16, at 93 & n.117 ("[C]onfinement was, for the enlisted

noncommissioned officer or Soldier who committed a crime "shall . . . be imprisoned till he shall be either tried by a court-martial, or shall be lawfully discharged by proper authority."[73] Thus, the only threshold requirement for pretrial confinement was that a Soldier be charged with a crime. Such confinement was to last "no more than eight days, or till such time as a court-martial [could] be *conveniently* assembled."[74] Although the Articles of War contained no procedures specifying a formal review of the necessity for pretrial confinement, Article XLV required that the names and crimes of pretrial confinees be reported in writing within twenty-four hours to the colonel of the regiment (where the prisoner was confined within his own regiment based on offenses relating only to dereliction of duty within his own corps) or to the commander-in-chief of the Continental Army.[75] Only the confining officer and higher level commanders had the authority to release such prisoners.[76]

After the Declaration of Independence, the Articles of War of 1776 renumbered the provisions but retained an identical pretrial confinement scheme for offenses committed within the military.[77] A new provision, however, mandated the deliverance to the "civil magistrate" of both officers and enlisted members accused of crimes against the civilian populace.[78] While an amendment to the Articles in 1786 maintained

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man, the traditional mode of pretrial restraint."). Colonel William Winthrop pointed out in 1896 that because the military did not yet have a system of nonjudicial punishment, the effect of the Articles of War was to require pretrial confinement anytime an enlisted member was charged with a crime. WINTHROP, *supra* note 72, at 123.

[73] Articles of War of 1775, art. XLI, *reprinted in* WINTHROP, *supra* note 72, at 956. Officers, on the other hand, were to be put in "arrest." *Id.* When the treatment of officers and enlisted members was later bifurcated into separate articles, "arrest" of an officer was defined as being confined to quarters. WINTHROP, *supra* note 72, at 111–12. By regulation and practice, the limits of arrest could be extended in the discretion of the imposing commander, though the officer remained suspended from the functions of his office. *Id.* at 112–13, 116. Thus, it resembles the modern-day concept of arrest under RCM 304. *See* MCM, *supra* note 2, R.C.M. 304(a)(3). The rationale for the disparate treatment of officers and enlisted men was the fact that officers would be in danger of forfeiting their commissions if they violated the terms of their arrest or failed to appear for trial. WINTHROP, *supra* note 72, at 114, 124.

[74] Articles of War of 1775, art. XLII, *reprinted in* WINTHROP, *supra* note 72, at 956 (emphasis added).

[75] Articles of War of 1775, art. XLV, *reprinted in* WINTHROP, *supra* note 72, at 957.

[76] WINTHROP, *supra* note 72, at 125, 129.

[77] *See* Articles of War of 1776, sec. XIV, arts. 15–20, *reprinted in* WINTHROP, *supra* note 72, at 969.

[78] Articles of War of 1776, sec. X, art. 1, *reprinted in* WINTHROP, *supra* note 72, at 964. This article, along with another new article prohibiting officers from protecting their

essentially the same provisions for military pretrial confinement (including the mandatory imprisonment for enlisted members charged with crimes),[79] it attempted to preclude prolonged arrest or confinement without trial by omitting the word "conveniently" from the language concerning the time in which a court-martial should be assembled.[80] At the same time, however, it essentially reduced the level of likely review by requiring that the confinement be reported to "the commander in chief *or* commanding officer."[81] The Articles of War of 1806 further reduced the reporting requirement to simply "the commanding officer,"[82] which language was retained by the Articles of War of 1874.[83]

Undoubtedly, this reporting requirement allowed for some measure of rudimentary review of pretrial confinement, at least in extreme cases. Colonel (COL) William Winthrop, who served as Assistant Judge Advocate General and whose treatise on military law was widely recognized as the definitive work of its kind,[84] wrote with respect to the reporting requirement of Article 69 of the 1874 Articles:

> The chief intent of this statute evidently is to preclude the unreasonable detention without trials of the prisoners committed daily to the guard-house at posts, . . . and to secure them a prompt trial by bringing the cases, every twenty-four hours, . . . to the attention of the commanding officer, who, upon examination of the facts

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Soldiers from creditors, appears to have been intended to bolster the presumably under-enforced existing provision requiring commanders to redress acts of public disorder committed by members of their commands. *See id.* sec. IX, art. 1, *reprinted in* WINTHROP, *supra* note 72.

[79] *See* Articles of War of 1786, art. 16, *reprinted in* WINTHROP, *supra* note 72, at 973. The 1786 Articles repealed Section XIV of the Articles of War of 1776 and replaced it with twenty-seven articles entitled "Administration of Justice." WINTHROP, *supra* note 72, at 22–23.

[80] Boller, *supra* note 16, at 92 (stating that the omission of the word "conveniently" was intended to "preclude protracted arrests and confinements and to secure prompt trials"); *see also* WINTHROP, *supra* note 72, at 118, 126 (interpreting the omission to mean that the court-martial must be assembled with "reasonable diligence" and "as soon as the exigencies of the service may permit").

[81] Articles of War of 1786, art. 19, *reprinted in* WINTHROP, *supra* note 72, at 974 (emphasis added).

[82] Articles of War of 1806, art. 82, *reprinted in* WINTHROP, *supra* note 72, at 983.

[83] *See* Articles of War of 1874, art. 68, *reprinted in* WINTHROP, *supra* note 72, at 992.

[84] *Col. William Winthrop's Retirement*, N.Y. TIMES, July 30, 1895, at 9.

> reported, may determine then and there, . . . whether the parties shall be tried or released.[85]

Nonetheless, this system of oversight/review appears to have been prone to abuse for three reasons: first, because the "commanding officer" referred to in Article 69 could vary depending on the level of command to which the prisoner was delivered[86] (and could presumably be the same commander who ordered confinement); second, because Article 69 did not actually *require* any formal review; and third, because the only determining factor for the appropriateness of pretrial confinement was whether the Soldier was charged with a crime, however minor, since there was not yet a system of nonjudicial punishment to deal with minor offenses.[87] Indeed, COL Winthrop conceded that under this framework, enlisted men were frequently "detained in arrest and confinement for long and apparently unreasonable periods before trial."[88]

In response to the extensive and often unnecessary pretrial confinement of enlisted personnel,[89] the military's pretrial confinement framework finally received an overhaul in 1920.[90] Article 69 of the

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[85] WINTHROP, *supra* note 72, at 128.
[86] *See id.* ("officer commanding the regiment, detachment, garrison, post, [etc.]").
[87] *Id.* at 123.
[88] *Id.* at126.
[89] *See* A MANUAL FOR COURTS-MARTIAL ch. V, ¶ 52 note (1921) [hereinafter 1921 MCM]. The 1921 *MCM* explained:

> The chief object of Congress in changing, by the Code of 1920, the provisions of [Article of War] 69 relating to arrest and confinement was to lessen resort to confinement, particularly of enlisted men, in cases where restraint is not a necessity, either to prevent the escape of the accused or to restrain him from further violence or for other like reasons.

*Id.*
[90] *See* GILLIGAN & LEDERER, *supra* note 16, § 4-31.10 (noting that pretrial confinement "remained substantially unchanged until the 1920 enactment of Article of War 69"). Whereas the provisions for confinement remained substantially similar from 1775 to 1920, there were some changes beginning in the late nineteenth century with respect to pretrial *arrest*. The Articles of War of 1874 added a provision under which trial for officers placed in arrest was to commence within ten days under normal circumstances, or after an additional thirty days if military necessity prevented an earlier trial; if the trial did not commence in a timely manner, the arrest was to end. Articles of War of 1874, art. 71, *reprinted in* WINTHROP, *supra* note 72, at 992. This was the first time that the military law included a mechanism for automatic release. The Articles of War of 1917

Articles of War of 1920 provided that "[a]ny person subject to military law charged with crime or with a serious offense . . . shall be placed in confinement or arrest as circumstances may require; but when charged with a minor offense only such person shall not ordinarily be placed in confinement."[91] Not only did the new law treat officers and enlisted personnel the same, but also it greatly curtailed the default use of pretrial confinement for enlisted Soldiers. Moreover, by including the clause "as the circumstances may require," the law contemplated instances in which no pretrial restraint would be necessary.[92]

Despite narrowing the circumstances warranting pretrial confinement, however, the Articles of War still provided no mandatory procedures for reviewing its necessity, containing only a requirement to take "immediate steps" to try the accused or release him.[93] The 1921 *MCM*, on the other hand, contained an early form of pretrial confinement review by someone outside of the chain of command, albeit without providing independent authority to effect a release. Paragraph 47(c) of the *MCM* allowed the court or counsel to make recommendations to the appointing authority, while reserving to the chain of command the actual authority to release a pretrial confinee or to modify the nature of the restraint.[94]

With the enactment of the Uniform Code of Military Justice (UCMJ) in 1950, Article 10 contained similar language to Article of War 69, authorizing "arrest or confinement, as circumstances may require" for those charged with an offense, and cautioning that a person "charged only with an offense normally tried by a summary court-martial" should "not ordinarily be placed in confinement."[95] Article 9 added that "[n]o person shall be ordered into arrest or confinement without probable

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also revised the provisions relating to arrest. *See* Articles of War of 1917, arts. 69–74, Pub. L. No. 64-242, § 3, 39 Stat. 619, 661–62 (1916); Boller, *supra* note 16, at 92–93.

[91] Articles of War of 1920, art. 69, Pub. L. No. 66-242, ch. 2, 41 Stat. 759, 802; 1921 MCM, *supra* note 89, ch. V, ¶ 46(a) & note.

[92] This interpretation would become explicit in subsequent editions of the *MCM*. *See* A MANUAL FOR COURTS-MARTIAL, U.S. ARMY ch. V, ¶ 19 (1928) (stating that pretrial arrest or confinement was not mandatory); MANUAL FOR COURTS-MARTIAL, U.S. ARMY ch. V, ¶ 19 (1949) (emphasizing pretrial confinement is within the discretion of the officer empowered to impose it and that restraint should be the "minimum necessary under the circumstances," including no restraint).

[93] Articles of War of 1920, art. 70, Pub. L. No. 66-242, ch. 2, 41 Stat. 759, 802.

[94] 1921 MCM, *supra* note 89, ch. V, ¶ 47(c).

[95] UCMJ art. 10 (1951).

cause."[96] With respect to the conditions of confinement, Article 13 prohibited it from being "any more rigorous than the circumstances require" to ensure the accused's presence at trial.[97]

Although the 1951 *MCM*, in implementing the UCMJ, failed to indicate the exact nature of the probable cause to be established, it further limited the circumstances under which pretrial confinement could be imposed to those "deemed necessary to insure [sic] the presence of the accused at the trial or because of the seriousness of the offense charged."[98] This provision remained unchanged through the 1969 *MCM*,[99] which, in turn, stayed in effect until 1984. Despite the seeming progress in delineating the bases for pretrial confinement, confusion abounded in the courts as to what constituted lawful pretrial confinement.[100]

Furthermore, at the time of *Gerstein*, there were still no uniform procedures prescribed for the military services to review pretrial confinement. Without a review mechanism, servicemembers were still subject to confinement for the convenience of their commands, sometimes on multiple occasions.[101] Moreover, the only statutory remedy for illegal pretrial confinement, other than the hope that a higher commander would intervene and order release, was the potential punishment under Article 97, UCMJ, of the person ordering the illegal confinement.[102] The accused could not even count on receiving

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[96] *Id.* art. 9(d). The current version uses "may" in place of "shall." *See* UCMJ art. 9(d) (2008).
[97] UCMJ art. 13 (1951).
[98] MANUAL FOR COURTS-MARTIAL, UNITED STATES ch. V, ¶ 20c (1951). Although the reference to the seriousness of the offense appeared to permit preventive detention, the COMA interpreted this language such that the seriousness of the charges were relevant only to establishing the likelihood that the accused would flee to avoid trial. *See* DeChamplain v. Lovelace, 48 C.M.R. 506, 508 (C.M.A. 1974).
[99] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES ch. V, ¶ 20c (1969) [hereinafter 1969 MCM].
[100] United States v. Heard, 3 M.J. 14, 16 (C.M.A. 1977) (discussing the problems in interpreting the UCMJ in conjunction with the *MCM*).
[101] The quintessential example of such abuses is *United States v. Heard*, in which the accused was put in pretrial confinement on three separate occasions over a five-month period for relatively minor offenses that did not justify pretrial confinement. *Id.*
[102] *See* 1969 MCM, *supra* note 99, ch. V, ¶ 20e.

confinement credit toward an adjudged sentence,[103] as the case law awarding such credit had not yet developed.[104]

*3. Development of RCM 305*

While the statutory authority for pretrial confinement has not changed since the advent of the UCMJ, the *MCM* and service regulations implementing this authority and providing the standards for review, as well as the judicial interpretations thereof, have evolved with the development of the corresponding constitutional jurisprudence. At the time that the COMA applied *Gerstein*'s requirement for a prompt review of pretrial confinement by a neutral and detached magistrate to the military in *Courtney v. Williams*,[105] neither the UCMJ nor the *MCM* provided a procedure for reviewing probable cause. The contemporaneous Department of Defense Directive (DoDD) 1325.4, however, required the review of pretrial confinement every thirty days,[106] and the Army had begun to implement a magistrate program.[107]

In response to the requirements of *Gerstein* and *Courtney*, the military services independently implemented magistrate programs for the review of pretrial confinement through their respective service

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[103] Major Patrick Finnegan, *Pretrial Restraint and Pretrial Confinement*, ARMY LAW., Mar. 1985, at 15, 24, 25.

[104] *See, e.g.*, United States v. Allen, 17 M.J. 126 (C.M.A. 1984) (day-for-day credit for time spent in legal pretrial confinement); United States v. Suzuki, 14 M.J. 491 (C.M.A. 1983) (credit for illegal pretrial confinement amounting to punishment).

[105] 1 M.J. 267, 270 (C.M.A. 1976). In *Courtney*, the accused, a fireman apprentice in the Navy who was pending a special court-martial for two specifications of unauthorized absence, was placed in pretrial confinement after committing an assault. *Id.* at 269. The accused never had the opportunity to respond to the basis for confinement. *Id.* Only upon the thirty-day review mandated by Department of Defense Directive 1325.4 did the convening authority order the release of the accused from pretrial confinement, on the rationale that the victim of the assault had departed the area and would no longer be in danger should the accused be released. *Id.* at 269 & n.5.

[106] U.S. DEP'T OF DEF., DIR. 1325.4, para. III.A.2.b (7 Oct. 1968) [hereinafter DoDD 1325.4].

[107] *Courtney*, 1 M.J. at 270 & n.10 (citing DoDD 1325.4, *supra* note 106, para. III.A.2.b); *id.* at 271 n.14 (noting that the Army was implementing a magistrate program through a change to AR 27-10, ch. 16); *see also* Captain Jack E. Owen, Jr., *A Hard Look at the Military Magistrate Pretrial Confinement Hearing:* Gerstein *and* Courtney *Revisited*, 88 MIL. L. REV. 3, 4 (1980) (stating that, prior to 1976, pretrial confinement was within "the virtually uncontrolled discretion of the commanding officer").

regulations.[108] The result was a lack of uniformity. According to a contemporary military scholar, there were "at least four major, inexplicable procedural differences between" the respective magistrate procedures of the Army, Air Force, Navy/Marine Corps, and Coast Guard.[109] Among these differences were the varying interpretations of *Gerstein*'s promptness requirement for the magistrate review, ranging from seventy-two hours for the Air Force, Navy/Marine Corps, and Coast Guard, to seven days for the Army.[110] Another significant difference was whether or not the magistrate had to be a judge advocate. While both the Army and the Navy required that the magistrate be a judge advocate, the Marine Corps and Coast Guard did not; the Air Force took a middle position, specifying that the magistrate must either be the special court-martial convening authority, or a judge advocate appointed by him.[111]

Finally implementing uniform procedures that would comply with *Gerstein*, *Courtney*, and their progeny, the President promulgated the RCM, including RCM 305, for the first time in the 1984 edition of the *MCM*.[112] That version of the rule first defined what probable cause entailed for pretrial confinement and set forth the current elements that must be established under RCM 305(h)(2)(B).[113] In addition to the traditional authorization for confinement to ensure the accused's presence at trial,[114] the rule's inclusion of foreseeable "serious criminal misconduct" as a basis for pretrial confinement expressly authorized the

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[108] *See* GILLIGAN & LEDERER, *supra* note 16, § 4-10.00 n.7; Owen, *supra* note 107, at 40–47. *See generally* U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE ch. 16 (26 Nov. 1968) (C17, 15 Aug. 1977) (Army); U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR. 1640.10, DEP'T OF THE NAVY MILITARY MAGISTRATE PROGRAM (16 Aug. 1978) (Navy/Marine Corps); U.S. DEP'T OF AIR FORCE, MANUAL 111-1, MILITARY JUSTICE GUIDE para. 3-25 (C2 8 Oct. 1976) (Air Force); U.S. COAST GUARD, MANUAL 488, MILITARY JUSTICE MANUAL pt. 202 (1977) (Coast Guard).

[109] Owen, *supra* note 107, at 42.

[110] *Id.* at 44.

[111] *Id.*

[112] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 305 & analysis, at A21-14 (1984) [hereinafter 1984 MCM]; *see* United States v. Rexroat, 38 M.J. 292, 295 (C.M.A. 1993); *see also* GILLIGAN & LEDERER, *supra* note 16, § 4-31.20 (discussing the codification of the bases for pretrial confinement).

[113] 1984 MCM, *supra* note 112, R.C.M. 305(h)(2)(B). For a listing of the elements, see *supra* note 3 & accompanying text.

[114] Although this justification for pretrial confinement was not explicitly referenced until the 1951 *MCM*, it was commonly understood that it was the underlying basis. *See generally* WINTHROP, *supra* note 72, at 114, 124 (discussing arrest and confinement in terms of preventing escape of the accused prior to trial).

type of preventive detention about which the military courts had theretofore speculated.[115]

Most significantly, the new RCM 305 established uniform procedures and timetables for review of pretrial confinement, as well as more meaningful remedies for noncompliance with these procedures. It called for both the 72-hour review by the commander and the 7-day review by a neutral and detached officer designated by the respective service regulations.[116] The new RCM 305(j) also empowered the military judge, for the first time, to review pretrial confinement after referral of charges and to order release when insufficient grounds existed.[117] Furthermore, RCM 305(k) provided a remedy for illegal pretrial confinement beyond the punishment of the confining officer. In addition to the day-for-day credit that an accused could now receive on his sentence for time spent in legal pretrial confinement under *United States v. Allen*,[118] RCM 305(k) allowed day-for-day credit for confinement served as the result of noncompliance with the review procedures.[119] These provisions remain substantially the same today, changed mainly to incorporate references to the 48-hour review, as well as to clarify when the clock starts in situations where an accused is "apprehended by civilian authorities and remains in civilian custody at the request of military authorities."[120]

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[115] *See, e.g.*, United States v. Heard, 3 M.J. 14, 20–21 (C.M.A. 1977) (discussing the questionable constitutionality of preventative detention); DeChamplain v. Lovelace, 48 C.M.R. 506, 508 (C.M.A. 1974) (seriousness of offense alone does not justify pretrial confinement, but may be used as a "strong indication" that the accused is a flight risk). The drafters of the 1984 *MCM* "slightly expand[ed] on the legitimate bases for confinement found by the Court of Military Appeals in *United States v. Heard*." Finnegan, *supra* note 103, at 20 & n.42.

[116] *See* 1984 MCM, *supra* note 112, R.C.M. 305(h)(2)(A) & (i); *Rexroat*, 38 M.J. at 295.

[117] *See* 1984 MCM, *supra* note 112, R.C.M. 305(j). *But cf.* 1969 MCM, *supra* note 99, ch. V, ¶ 21c (no authority of the court over pretrial restraint of the accused).

[118] 17 M.J. 126 (C.M.A. 1984) (now commonly referred to as "*Allen* credit"); *see also* 1984 MCM, *supra* note 112, R.C.M. 305(k) analysis, at A21-18 (indicating that credit awarded under RCM 305(k) was in addition to *Allen* credit).

[119] 1984 MCM, *supra* note 112, R.C.M. 305(k). In 1998, RCM 305(k) was amended to incorporate case law "allowing the military judge to grant additional discretionary pretrial confinement credit for pretrial confinement under 'unusually harsh circumstances.'" Hargis, *supra* note 13, at 13; *see* United States v. Suzuki, 14 M.J. 491 (C.M.A. 1983).

[120] 1984 MCM, *supra* note 112, R.C.M. 305(i)(1) (C6, 21 Jan. 1994); *see* Lieutenant Colonel Eugene R. Milhizer & Lieutenant Colonel Thomas W. McShane, *Analysis of Change 6 to the 1984* Manual for Courts-Martial, ARMY LAW., May 1994, at 40, 43. With respect to this amendment, the ACCA has stated that "the constitutional standard is not always met by compliance with R.C.M. 305(i)(1)" since "[t]he 48-hour requirement of R.C.M. 305(i)(1) is triggered when the servicemember is brought under military

Although *Rexroat* imposed the *McLaughlin* requirement for a review within forty-eight hours on the military in 1993, it was not until May 1998 that Executive Order 13,086 amended RCM 305 to reflect this requirement in what is now RCM 305(i)(1).[121] This provision first appeared in the 1998 *MCM*.[122] The new 48-hour review, however, did not *replace* any of the existing review procedures, but rather was *in addition* to them. This resulted in the multiple levels of review that remain in force in the 2008 *MCM*.

Thus, with respect to the review of pretrial confinement, the current version of RCM 305 provides for the following: an initial consideration by the officer ordering confinement as to whether probable cause exists;[123] a review of "the adequacy of probable cause" by a "neutral and detached officer" within forty-eight hours;[124] a review by the commander within seventy-two hours;[125] a review within seven days by "a neutral and detached officer appointed in accordance with regulations prescribed by the Secretary concerned" of both "the probable cause determination and necessity for continued pretrial confinement;"[126] and, upon motion for appropriate relief after the referral of charges, a review by the military judge.[127] Even though this framework appears at first glance to provide more than adequate safeguards of the accused's liberty interests,

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control," whereas "the constitutional standard is triggered by warrantless arrest." United States v. Dingwall, 54 M.J. 949 (A. Ct. Crim. App. 2001). The CAAF has yet to address this potential unconstitutionality of RCM 305(i)(1).

[121] DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE § 5-9(C) & n.28 (6th ed. 2004); *see* Hargis, *supra* note 13, at 13.

[122] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 305(i)(1) (1998).

[123] MCM, *supra* note 2, R.C.M. 305(d) & discussion.

[124] *Id.* R.C.M. 305(i)(1).

[125] *Id.* R.C.M. 305(h)(2)(A).

[126] *Id.* R.C.M. 305(i)(2).

[127] *Id.* R.C.M. 305(j). Absent an abuse of discretion or new evidence establishing the accused should be released, the military judge may not overturn a 7-day reviewing officer's decision that pretrial confinement should continue. *See id.* Conversely, absent new evidence or misconduct, the military judge also cannot order the accused back into pretrial confinement after the 7-day reviewing officer has ordered release. Keaton v. Marsh, No. 9502052, 1996 CCA LEXIS 345 (A. Ct. Crim. App. Jan. 11, 1996); Major Amy M. Frisk, *New Developments in Pretrial Confinement*, ARMY LAW. Mar. 1996, at 25, 25–26 (discussing *Keaton*). In addition, the standard of review of pretrial confinement under RCM 305(j) depends whether the military judge is reviewing the "'legality of confinement previously served'" (abuse of discretion) or "deciding whether the accused should be released" (*de novo*). Major Amy Frisk, *Walking the Fine Line Between Promptness and Haste: Recent Developments in Speedy Trial and Pretrial Restraint Jurisprudence*, ARMY LAW., Apr. 1997, at 19–20 (discussing United States v. Gaither, 45 M.J. 349 (C.A.A.F. 1996)).

Parts III and IV of this article argue that this system does not comply with constitutional requirements. Furthermore, these supposed safeguards do not provide for timely, meaningful review of pretrial confinement because of the illogical framework of RCM 305 and the inconsistencies across the service regulations which implement the review procedures.

*4. Service Regulations*

The military services have implemented RCM 305 through their respective service regulations, the chief function of which is to designate who may perform the review of pretrial confinement under RCM 305(i).[128] The differing approaches used by these regulations have resulted in substantial inconsistencies across the services, which are discussed below.

*a. Army*

The Army establishes its Military Magistrate Program through Chapter 9 of AR 27-10, in part for the purpose of reviewing pretrial confinement under RCM 305(i).[129] This regulation defines a military magistrate as a judge advocate.[130] Although military judges fall under the definition of an "assigned military magistrate,"[131] typically pretrial confinement reviews are performed by a "part-time military magistrate," which is a judge advocate appointed by The Judge Advocate General (TJAG) or his designee to perform magistrate duties with training by and under the supervision of a military judge.[132] Judge advocates nominated to serve as part-time military magistrates must "possess the requisite training, experience, and maturity to perform the duties of a

[128] *See* MCM, *supra* note 2, R.C.M. 305(i)(2) ("[A] neutral and detached officer appointed in accordance with regulations prescribed by the Secretary concerned shall review the probable cause determination.").
[129] AR 27-10, *supra* note 10, para. 9-1a. The regulation does not specifically state that the military magistrate conducts the 7-day review under RCM 305(i)(2) versus the 48-hour review under RCM 305(i)(2); however, this is understood when the regulation is read in conjunction with RCM 305(i), though of course nothing precludes the magistrate's review from also satisfying the requirement of RCM 305(i)(2). Perhaps this is a vestige of the pre-1998 versions of RCM 305(i) which included only the 7-day review.
[130] *Id.* para. 9-1d.
[131] *Id.* para. 9-1e.
[132] *Id.* para. 9-1f–g; MILITARY MAGISTRATE SOP, *supra* note 15, at 3.

magistrate,"[133] and though they may not be performing prosecutorial functions at the time of their nomination, military justice experience is preferable.[134]

*b. Air Force*

Pretrial confinement review in the Air Force is governed by Air Force Instruction (AFI) 51-201.[135] This instruction distinguishes "military magistrates," which are officers appointed under Military Rule of Evidence (MRE) 315(d)(2) to issue search, seizure, and apprehension authorizations[136] from "pretrial confinement review officers" (PCROs) appointed under RCM 305(i)(2) to conduct the 7-day review.[137] Special court-martial convening authorities (SPCMCAs) in the Air Force may appoint "a reasonable number of mature officers to serve as PCROs."[138] Although there are no further rank requirements, the instruction specifically *prohibits* the appointment of chaplains, Air Force Office of Special Investigations and Air Force Security Forces personnel, court-martial convening authorities, and "SJA office personnel" as PCROs.[139] Presumably, the latter prohibition would disqualify all judge advocates who might otherwise be able to serve in this capacity. In fact, the only explicit role for Air Force judge advocates in pretrial confinement review, aside from trial and defense counsel, is to brief PRCOs on their duties.[140]

Unlike the Army's regulation, AFI 51-201 also addresses the qualifications of the officer who conducts the 48-hour review. In addition to restating the requirements of RCM 305(i)(1) that this officer be neutral and detached, the instruction lists several factors to consider in

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[133] AR 27-10, *supra* note 10, para. 9-2b.
[134] *Id.*; MILITARY MAGISTRATE SOP, *supra* note 15, at 1.
[135] U.S. DEP'T OF AIR FORCE, INSTR. 51-201, LAW: ADMINISTRATION OF MILITARY JUSTICE (21 Dec. 2007) [hereinafter AFI 51-201].
[136] *Id.* sec. 3A. These officers should generally be serving in the rank of lieutenant colonel or above, but may be appointed by or with the concurrence of the General Court-Martial Convening Authority (GCMCA) if in the rank of major or below. *Id.* para. 3.1.2.
[137] *Id.* para. 3.2.4. Those appointed as "military magistrates" under paragraph 3.1.1 to issue search and seizure authorizations may also be appointed as PCROs under paragraph 3.2.4.1, but generally may not act as the PCRO in a particular case if he otherwise acted upon the same case as a magistrate. *Id.* para. 3.2.4.1.
[138] *Id.* para. 3.2.4.
[139] *Id.*
[140] *See id.* para. 3.2.8.

determining whether any given reviewing officer is qualified. The factors include "whether the officer is the formal accuser on the charge sheet, is the officer who ordered the accused into confinement, or is directly or particularly involved in the command's law enforcement functions."[141] Curiously, AFI 51-201 appears to allow some of the very same "SJA office personnel" to conduct the 48-hour review who are specifically disqualified from conducting the 7-day review, so long as they are not directly involved in law enforcement.

*c. Navy/Marine Corps*

The regulation specifying who may conduct pretrial confinement reviews for the Navy and Marine Corps is the Manual of the Judge Advocate General (JAGMAN).[142] Like AFI 51-201, the JAGMAN provides guidance as to the 48-hour review in addition to specifying who must conduct the 7-day review.

With respect to the 48-hour review, which it calls the preliminary review, the JAGMAN states that the neutral and detached officer "may be the confinee's commanding officer, but this is not required."[143] Moreover, the JAGMAN specifically contemplates that the commander is still neutral and detached and may conduct the 48-hour review even when he is the person who ordered the accused into pretrial confinement.[144] In fact, as a rule, no separate 48-hour review is necessary when the commander "personally orders the accused into confinement" after determining probable cause under RCM 305(d) or when the commander signs the 72-hour memorandum within forty-eight hours.[145]

With respect to who may conduct the 7-day review under RCM 305(i)(2), which it calls the initial review, the JAGMAN provides that the General Court-Martial Convening Authority (GCMCA) "shall designate one or more officers of the grade of O-4 or higher . . . to act as

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[141] *Id.* para. 3.2.2.2 (citing United States v. Rexroat, 38 M.J. 292 (C.M.A. 1993); United States v. Lynch, 13 M.J. 394 (C.M.A. 1982)).
[142] U.S. DEP'T OF NAVY, JUDGE ADVOCATE GEN. INSTR. 5800.7D, MANUAL OF THE JUDGE ADVOCATE GENERAL (JAGMAN) (15 Mar. 2004) [hereinafter JAGMAN].
[143] *Id.* sec. 0127c.(3).
[144] *Id.*
[145] *Id.* sec. 0127c.(4)(a)–(b).

the initial review officer."[146] It further specifies that "officers designated as initial review officers should be neutral and detached, should be selected for their maturity and experience, and, if practicable, should have command experience."[147] There is no requirement, nor any suggestion, that the initial review officer for the Navy or Marine Corps be a judge advocate.

*d. Coast Guard*

Finally, for the Coast Guard, Commandant Instruction M5810.1D governs the review of pretrial confinement.[148] The Coast Guard manual terms the officer conducting the 7-day review the "Initial Review Officer" (IRO) and is unique amongst the services in that it empowers the reviewing officer to review "the conditions of confinement" for potential violations of Article 13, UCMJ, in addition to the probable cause determination and the necessity for continued pretrial confinement.[149] The GCMCA must "designate one or more officers in the grade of O-4 or higher to act as the IRO for purposes of RCM 305(i)(2)."[150] Similar to the Navy and Marine Corps, such officers "should be neutral and detached, should be selected for their maturity and experience, and, if practicable, should have command experience."[151] Since the Coast Guard does not maintain its own confinement facilities,[152] the GCMCA may also accept the pretrial confinement review of a duly appointed reviewing officer who is assigned to the

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[146] *Id.* sec. 0127d.

[147] *Id.* The preference for command experience could result in the appointment of initial review officers who have a bias toward the interests of the command and hence would not be truly neutral.

[148] U.S. COAST GUARD, COMMANDANT INSTR. M5810.1D, MILITARY JUSTICE MANUAL (17 Aug. 2000) [hereinafter COMDTINST M5810.1D]. The Coast Guard's Personnel Manual also discusses pretrial confinement, but this section appears to reference an older version on COMDINST M5810.1D. *See* U.S. COAST GUARD, COMMANDANT INSTR. M1000.6A, PERSONNEL MANUAL art. 8.F.3 (C41, 18 June 2007) [hereinafter COMDTINST M1000.6A].

[149] COMDTINST M5810.1D, *supra* note 148, paras. 3.C.4.a, 3.C.4.d(7). This is likely due to the fact that, as an agency of the Department of Homeland Security, the Coast Guard does not maintain its own confinement facilities and typically uses Navy brigs. *See* COMDTINST M1000.6A, *supra* note 148, art. 8.F.1.b.

[150] COMDTINST M5810.1D, *supra* note 148, para. 3.C.4.b. Note that the GCMCA is referred to as the Officer Exercising General Courts-Martial Jurisdiction (OEGCMJ) in the Coast Guard.

[151] *Id.* para. 3.C.4.b.

[152] COMDTINST M1000.6A, *supra* note 148, art. 8.F.1.b.

confinement facility into which the Coast Guard pretrial confinee is placed.[153]

## III. The Problem and Solution

As the development of the law governing military pretrial confinement from 1775 to the present has shown, the military has historically lagged behind the rest of society in the protection of the liberty interest of its servicemembers, even considering the difference between the military and civilian sectors. This Part will examine how the military has imperfectly implemented the constitutional requirements for pretrial confinement review through RCM 305 and the service regulations, resulting in a system that is inconsistent across the services and prone to abuses.

### A. The Problems with the Current System

#### *1. An Illogical Framework*

When the drafters incorporated the 48-hour rule of *McLaughlin*, as interpreted by *Rexroat*, into the 1998 *MCM*, they did so in a patchwork manner that has created an illogical framework for pretrial confinement review. Rather than simply requiring that the existing 7-day review take place within forty-eight hours, the amendment added a new, redundant, level of review.[154] The Analysis to RCM 305 contains no explanation for this choice. The result is often a meaningless 48-hour review that fails to satisfy the constitutional requirement for four major reasons.

First, the current framework retains the details of the 7-day hearing, but provides no guidance as to what the 48-hour reviewing officer must consider. Although the Court in *Gerstein* stated that the Constitution does not require any particular procedure,[155] RCM 305 allows the 48-hour review of the initial confinement decision to be made before the commander is even required to specify in writing his reasons for ordering

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[153] COMDTINST M5810.1D, *supra* note 148, para. 3.C.4.c.
[154] *See* Mackay, *supra* note 13, at 49 (having the military magistrate conduct the 48-hour review "meets both constitutional standards and R.C.M. 305 requirements and avoids encumbering the pretrial confinement procedure with an additional layer of review").
[155] Gerstein v. Pugh, 420 U.S. 103, 123 (1975).

pretrial confinement. Even if the 72-hour memorandum is complete at the time of the 48-hour review, there is no requirement that the neutral and detached officer consider it, as the rule only specifies that the commander shall forward the memorandum to the 7-day reviewing officer.[156] Since the purpose of the commander's memorandum is "to ensure that the officer reviewing the confinement has sufficient information to determine its propriety under the law,"[157] it is possible that the officer conducting the 48-hour review will not have a complete record before him to make a sound decision.

Second, the protections that accompanied the 7-day review under RCM 305(i), which the drafters presumably deemed necessary to satisfy *Gerstein* and *Courtney*, were not transplanted to the new 48-hour review. These protections include the right to consult with counsel[158] and the right to appear before the reviewing officer and make a statement.[159] This makes the 48-hour review inherently less reliable because, in most cases, the reviewing officer will only hear the command's side of the story.

Third, in addition to failing to specify the procedures and rights of the accused during the 48-hour review, RCM 305 contains a further glitch. Even after the inclusion of the 48-hour review, the authority to direct release from confinement under RCM 305(g) remained with "[a]ny commander of a prisoner, an officer appointed under regulations of the Secretary concerned to conduct the review under subsection (i)," and, after referral, the military judge.[160] Noticeably absent from this list is the 48-hour reviewing officer, unless that officer also happens to fit into one of the other categories. Moreover, whereas RCM 305(i)(2)(C) states that after completing the review, the 7-day reviewing officer

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[156] MCM, *supra* note 2, R.C.M. 305(h)(2)(C).
[157] GILLIGAN & LEDERER, *supra* note 16, § 4-64.00.
[158] *See* MCM, *supra* note 2, R.C.M. 305(f). It should be noted that the Court in *Gerstein* did not consider the review of pretrial confinement to be "a 'critical stage' in the prosecution that would require appointed counsel." *Gerstein*, 420 U.S. at 122 (distinguishing Coleman v. Alabama, 399 U.S. 1 (1970)). *But see* United States v. Jackson, 5 M.J. 223, 227 (C.M.A. 1978) ("[F]undamental fairness calls for such representation of all prisoners confined for more than a brief period of time."). Nonetheless, the right to counsel upon request exists under RCM 305, and failure to provide requested counsel renders the confinement illegal and results in administrative credit. Finnegan, *supra* note 103, at 21.
[159] MCM, *supra* note 2, R.C.M. 305(i)(2)(A)(i).
[160] *Id.* R.C.M. 305(g).

"shall approve continued confinement or order immediate release,"[161] there is no corresponding provision applicable to the 48-hour review. Does this mean that the 48-hour reviewing officer has no independent authority to order release?

Finally, the nature of the 48-hour and 7-day reviews appears to be different. Whereas the 48-hour reviewing officer is charged with reviewing only "the adequacy of probable cause to continue pretrial confinement,"[162] the 7-day reviewing officer is tasked to review "the probable cause determination *and* necessity for continued pretrial confinement."[163] This difference in language harkens back to Justice Fletcher's formulation of the reviewing officer's duties when the COMA first applied *Gerstein* to the military: "We believe, then, that a neutral and detached magistrate must decide more than the probable cause question. A magistrate must decide if a person *could* be detained and if he *should* be detained."[164] This expansion of the *Gerstein* concept of the probable cause review resulted from the absence of a bail system in the military, which in turn makes the question of whether an accused *should* be confined all the more critical at the pretrial confinement review stage.[165] Interpreting RCM 305 through this lens, it seems that the 48-hour review answers only the "could" question, while the 7-day review answers both the "could" and "should" questions.

These differences are puzzling, since the Supreme Court intended the *McLaughlin* rule to be merely a clarification of the *Gerstein* rule by defining "prompt" as being within forty-eight hours under most circumstances.[166] In fact, military justice scholars have opined that because *McLaughlin* made the 7-day period under RCM 305 presumptively unreasonable, "no readily apparent circumstances justify keeping a seven-day rule."[167] It stands to reason, then, that after *McLaughlin* and *Rexroat*, the 7-day review by an officer appointed in accordance with the respective service regulations should be conducted within forty-eight hours. It makes no sense to create an additional review with a lesser scope and fewer procedural protections. The current

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[161] *Id.* R.C.M. 305(i)(2)(C).
[162] *Id.* R.C.M. 305(i)(1).
[163] *Id.* R.C.M. 305(i)(2) (emphasis added).
[164] Courtney v. Williams, 1 M.J. 267, 271 (C.M.A. 1976) (emphasis added).
[165] *See id.*
[166] County of Riverside v. McLaughlin, 500 U.S. 44, 47 (1991) ("This case requires us to define what is 'prompt' under *Gerstein*.").
[167] Gilligan & Smith, *supra* note 47, at 54.

pretrial confinement framework provides for a 48-hour review that in many cases satisfies the constitutional requirement in name only.

*2. Lack of Uniformity*

The illogical framework in RCM 305 is compounded by the inconsistencies among the service regulations. The most significant and glaring of these differences is that the Army is the only service that requires the 7-day review to be conducted by a lawyer. In fact, none of the service regulations besides AR 27-10 even refers to the reviewing officers as "magistrates," which reduces their status as "judicial" officers both in name and qualifications. Prominent military law scholars have described the failure of the other services to use judge advocate magistrates "as a grudging compliance with *Gerstein*."[168]

This sentiment certainly rings true when one reflects on the history of the services' magistrate programs. Originally, both the Army and the Navy required their magistrates to be judge advocates when they established their programs in response to *Gerstein* and *Courtney*; the Marine Corps allowed but did not require its magistrates to be judge advocates; and the Air Force allowed *only* judge advocates to be appointed if the SPCMCA elected not to conduct pretrial confinement reviews personally.[169] After the 1984 *MCM* went into effect, however, the Navy and Marine Corps inexplicably regressed to using only line officers,[170] and the Air Force specifically *excluded* judge advocates from this function.[171] The latter change was likely the result of overcompensation by the Air Force in response to *United States v. Lynch*.[172] In *Lynch*, the COMA held that both a SPCMCA and a staff judge advocate (both explicitly authorized by the Air Force regulation to review pretrial confinements) were *per se* disqualified from reviewing pretrial confinement based on their inherent authority and responsibilities regarding the court-martial referral process.[173] The Air Force responded by banning all SJA office judge advocates from this task.

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[168] GILLIGAN & LEDERER, *supra* note 16, § 4-73.00.
[169] *See* Owen, *supra* note 107, at 44.
[170] Finnegan, *supra* note 103, at 22 n.60.
[171] *See* AFI 51-201, *supra* note 135, para. 3.2.4.
[172] 13 M.J. 394 (C.M.A. 1982).
[173] *See id.* at 396–97.

Another inconsistency among the service regulations is their guidance concerning the 48-hour review by a neutral and detached officer. While the Army makes no mention of this review in AR 27-10, and the Coast Guard simply paraphrases RCM 305, the Air Force and Navy/Marine Corps provide the best and worst procedures, respectively. The Air Force requires that the 48-hour review be in writing and included in the record of trial.[174] Moreover, AFI 51-201 incorporates case law to provide guidance in selecting a neutral and detached officer, including "whether the officer is the formal accuser on the charge sheet, is the officer who ordered the accused into confinement, or is directly or particularly involved in the command's law enforcement functions."[175] In sharp contrast, the very factors that appear to counsel *against* an Air Force commander who imposes pretrial confinement being considered "neutral and detached" for the purposes of the 48-hour review are used by the Navy JAGMAN to illustrate a common form of compliance with the rules. If a Navy or Marine Corps commanding officer complies with RCM 305(d) (by making an initial assessment of probable cause) and "personally orders the accused into confinement," no separate 48-hour review is needed.[176] The way the JAGMAN is written thus causes the commander to be the default 48-hour reviewing official, which is a meaningless "review" of what is typically his own decision. Although RCM 305(h)(2)(A) does contemplate situations in which a neutral and detached commander's compliance with the 72-hour review requirement may also satisfy RCM 305(i)(1) if done within forty-eight hours, a far more sensible interpretation of that rule is that it should apply only to circumstances in which someone other than the commander was the one who initially ordered the confinement.

While slight variations in the procedures specified by the respective services are tolerable, the fundamental differences between how the pretrial confinements of Soldiers, Airmen, Sailors, Marines, and Coastguardsmen are reviewed are inexcusable, particularly because these differences are not justified by the legitimate needs of the respective services. This is especially troublesome in today's joint operating environments, where servicemembers may find themselves under the command of other services. The need for uniformity in such

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[174] AFI 51-201, *supra* note 135, para. 3.2.2.

[175] *Id.* para. 3.2.2.2 (citing United States v. Rexroat, 38 M.J. 292 (C.M.A. 1993); United States v. Lynch, 13 M.J. 394 (C.M.A. 1982)).

[176] JAGMAN, *supra* note 142, para. 0127c(4). Moreover, the 48-hour review in the Navy and Marine Corps need not be in writing, though it is recommended. *Id.* para. 0127c(2).

environments is paramount to ensure the rights of the accused are protected. With regard to the needs of the particular services, the rule already contains exceptions for operational necessity and for situations in which the accused is confined while at sea.[177] Moreover, the Analysis to RCM 305 makes it clear that the rules are flexible enough to allow a telephonic hearing and review of an electronically-transmitted pretrial confinement packet.[178] The same logic applies to situations in which either a military defense counsel or a judge advocate magistrate is not co-located with the command seeking the pretrial confinement review.

*3. A System Prone to Abuse*

The *MCM*'s patchwork implementation of the constitutional requirements, coupled with service regulations that provide inadequate or faulty guidance, has created a system of pretrial confinement that is prone to both intentional and unintentional abuse. For example, in the Army, commanders typically make the initial decision for pretrial confinement after consulting with their assigned trial counsel, who is the prosecutor. The trial counsel or his paralegals often prepare the pretrial confinement documentation, including the commander's 72-hour memorandum required by RCM 305(h)(2)(C) and the memorandum (if any) signed by the "neutral and detached officer" documenting the 48-hour probable cause determination under RCM 305(i)(1). The danger of this routine practice is that the commander or the 48-hour reviewing officer is not making an independent assessment that the requirements for pretrial confinement are present, and, in many cases, will simply sign off on the paperwork to make the confinement "legal." This process does not provide a meaningful review because it is driven by the *ex parte* influence of the trial counsel, is conducted by individuals who generally have a desire to support the command's actions, and is often subsumed into the initial confinement decision.

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[177] *See* MCM, *supra* note 2, R.C.M. 305(m). This subparagraph allows the Secretary of Defense to suspend the provisions concerning advice of the accused's rights, military counsel, the 72-hour review by the commander, and the reviews under RCM 305(i) for operational necessity, and provides that the same provisions do not apply at sea but should resume their application upon transfer of the accused to a confinement facility ashore. *Id.*

[178] *See* MCM, *supra* note 2, R.C.M. 305(i) analysis, at A21-19 ("[T]he review may be conducted entirely with written documents, without the prisoner's presence when circumstances so dictate.").

Furthermore, because RCM 305 does not require notification of,[179] or any action by, the 7-day reviewing officer until the seventh day, trial counsel often seek out a member of the command to conduct the 48-hour review, either as an expedient means of "checking the block" or to buy the command some time when they believe it is likely that the reviewing magistrate will release the accused. Yet, such practices subvert the intent of the constitutional requirement and may constitute "a delay motivated by ill will against the arrested individual, or delay for delay's sake," which the Supreme Court in *McLaughlin* specifically condemned as unreasonable.[180]

Finally, although pretrial confinement is generally not warranted when the accused is "charged only with an offense normally tried by a summary court-martial"[181] and is "not authorized for individuals pending administrative discharge where no charges are awaiting disposition,"[182] some commands may nevertheless place individuals in pretrial confinement even when they anticipate dispositions other than trial by special or general court-martial.[183] In such cases, the accused may

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[179] Although AR 27-10 requires that "the SJA concerned . . . will be notified prior to the accused's entry into confinement or as soon as practicable afterwards" and that the GCMCA "will immediately cause the responsible magistrate to be notified of the case," in Army practice the magistrate commonly does not receive notice until several days after the confinement begins, and in some cases is not notified until the seventh day. AR 27-10, *supra* note 10, paras. 5-15a, 9-5a(2); Professional Experiences of the author as Part-Time Military Magistrate at Fort Drum, New York from 1 May 2004 to 1 December 2004, and at Fort Polk, Louisiana from 5 June 2007 to 15 July 2008 [hereinafter Professional Experience]. The Coast Guard has made an admirable effort to speed up the review process by requiring that the commander's 72-hour memorandum "be forwarded, by the most expeditious means, to the appropriate servicing legal office," which in turn "shall promptly pass the . . . memorandum to the [Initial Review Officer] appointed to review the confinement decision." COMDTINST M5810.1D, *supra* note 148, para. 3.C.4.d.

[180] County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991).

[181] UCMJ, art. 10 (2008).

[182] Finnegan, *supra* note 103, at 19 & n.37.

[183] At Fort Drum, New York, for example, Colonel David L. Conn, while serving as Military Judge, found that commanders were routinely abusing their authority by placing Soldiers in pretrial confinement as a "disciplinary expedient" and then disposing of the cases with summary courts-martial and administrative separations. E-mail from Colonel David L. Conn, Judge, U.S. Army Court of Criminal Appeals, to author (Jan. 22, 2009 16:15) (on file with author). Current procedures in the Army require the reviewing magistrate to ask the trial counsel or commander the anticipated level of disposition of the case, but there is no requirement that the magistrate be notified if the command later elects a disposition which would negate the continued legality of pretrial confinement. MILITARY MAGISTRATE SOP, *supra* note 15, at 13.

receive an inadequate remedy if he serves more time in pretrial confinement than he could receive as a sentence at a summary court-martial, or no remedy at all if his case never goes to trial. Without a review by a neutral and detached magistrate who is familiar with the legal limitations on pretrial confinement, the likelihood that an accused will be deprived of his liberty without an appropriate remedy increases dramatically.

The drafters of the original version of RCM 305 "proceeded from the premise that no person should be confined unnecessarily."[184] In the quarter century during which the Rules for Courts-Martial have existed, it has become apparent that the system is prone to abuse. It is therefore time to amend RCM 305 to ensure that the constitutionally-required, and most meaningful, review occurs as early as possible in the process.

B. Proposed Amendments to RCM 305

Amendment of RCM 305 is the best way to ensure compliance with the constitutional requirements for the prompt, meaningful judicial review of pretrial confinement by neutral and detached magistrates. The Appendix to this article contains proposed revisions to the rule, the primary goals of which are eliminating the multiple layers of review, ensuring consistency across the services, and bringing the procedures into clear compliance with the Constitution by mandating a review by a neutral and detached, legally-trained magistrate within forty-eight hours.

The most fundamental proposed change to RCM 305 involves replacing the multiple reviews in RCM 305(i) with a single 48-hour review conducted by a neutral and detached magistrate defined as a judge advocate who has been appointed under the respective service regulations for duty as a military magistrate, with judicial supervision. This proposal is designed to correctly implement the constitutional requirements of *Gerstein*, *McLaughlin*, and *Courtney* while eliminating the patchwork system of multiple reviews that currently exists under the rule. This change would also ensure consistency across the services in that all pretrial confinement cases would receive a truly neutral and detached review by a legally-trained officer. A judge advocate, as opposed to a line officer, is better able to correctly and consistently apply the required elements for pretrial confinement, and the judicial

[184] 1984 MCM, *supra* note 112, R.C.M. 305 analysis, at A21-14.

interpretations thereof, to the facts at hand and to recognize situations in which pretrial confinement is not appropriate. Furthermore, as attorneys, judge advocates have an independent duty to uphold the law under their applicable rules for professional conduct.[185]

The requirement that the magistrate be a judge advocate should not be overly burdensome for the services. One of the considerations that influenced the drafters in developing the original RCM 305 in 1984 was that the procedures for reviewing pretrial confinement must "be compatible with existing resources."[186] Given that most military installations now have judge advocates who are not engaged in prosecutorial functions, there should be little problem with appointing at least one magistrate per installation. The Army currently follows this practice with great success. Where that is not possible due to the shortage of judge advocates at a particular installation, pretrial confinement reviews could be conducted by judge advocate magistrates from other installations using telephonic hearings and electronically-transmitted documents.

The consolidation of the multiple "neutral and detached" reviews into one 48-hour magistrate review would necessitate an amendment to the requirement for the commander's 72-hour decision and memorandum under RCM 305(h)(2). The proposed amendment requires the commander to take these actions within twenty-four hours. Because the commander's reasons for placing an accused in pretrial confinement seldom change after the initial confinement decision, and commanders rarely, if ever, reverse themselves in what is essentially a meaningless self-review, there should be little impact from changing the rule in this manner. Furthermore, in the rare instances in which someone besides the commander orders the initial confinement, the rules currently require a report to the commander within twenty-four hours.[187] Under this proposal, the commander still has up to twenty-four more hours to ratify the confinement decision or to release the accused before the 48-hour magistrate review occurs.

The proposed change to RCM 305(h)(1) is designed to ensure that the command notifies the magistrate in a timely manner, either prior to

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[185] *See, e.g.*, U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS para. 6d. (1 May 1992) (discussing a lawyer's "duty to uphold legal process").
[186] 1984 MCM, *supra* note 112, R.C.M. 305 analysis, at A21-14.
[187] MCM, *supra* note 2, R.C.M. 305(h)(1).

the initiation of confinement or as soon as practicable thereafter. In all cases the magistrate may either conduct his review or grant an appropriate extension within forty-eight hours. This change is meant to encourage the constitutionally-required probable cause review to occur at the earliest possible time, which can be sooner than forty-eight hours in many cases, and thus avoid unnecessary delay. This procedure would also minimize the time that an accused is deprived of liberty in circumstances under which pretrial confinement is not warranted. Moreover, if the review is accomplished prior to initiation of confinement, it may save the command the logistical hassle of arranging for confinement, as well as the potential embarrassment of having the magistrate overturn the command's decision.

The last proposed substantive change regarding the timing of the review involves the extension provision of RCM 305(i)(2)(B). Authorizing the magistrate to grant an extension to the normal forty-eight hour timeline upon a showing by the Government of "the existence of a bona fide emergency or other extraordinary circumstance"[188] more accurately implements the *McLaughlin* concept of what constitutes a reasonable delay beyond forty-eight hours than does the current language ("for good cause").[189] This change will prompt the Government to specify, and the record to reflect, a particular reason for delay, which a court can later examine in determining appropriate confinement credit.

Finally, though *Gerstein* did not require the appointment of counsel for the probable cause review of pretrial confinement, this proposal would amend RCM 305(f) to require the appointment of military counsel prior to the magistrate review, since conducting the magistrate review within forty-eight hours would largely render moot the current standard of providing counsel within seventy-two hours. The rationale for the requirement for counsel is to add another layer of protection to the accused by assisting the accused in making his best case against pretrial confinement at the most meaningful opportunity for review. Furthermore, given that the military does not have a bail system, pretrial confinement review in the military functions as both the probable cause review (answering the question of whether the accused *could* be confined) and as a quasi-bail review (answering the question of whether the accused *should* be confined).[190] The Supreme Court has recognized

[188] County of Riverside v. McLaughlin, 500 U.S. 44, 57 (1991).
[189] MCM, *supra* note 2, R.C.M. 305(i)(2)(B).
[190] *See* Courtney v. Williams, 1 M.J. 267, 270–71 (C.M.A. 1976).

the right to counsel as an important component of a bail hearing where preventive detention is being considered.[191]

## IV. Argument

This proposal for amending RCM 305 serves the interests of both the accused and military society in placing the most meaningful review of pretrial confinement (that is, the review that is most likely to result in the release of an accused who is illegally confined) at the earliest possible stage of the process. But it is also compelled by the Constitution. This Part argues that *Rexroat* was wrongly decided, and the pretrial confinement framework under RCM 305 is unconstitutional. This part further argues that under the Supreme Court's concept of a neutral and detached magistrate, only judge advocates can adequately provide the constitutionally-required level of review of pretrial confinement on a consistent basis.

### A. *Rexroat* was Wrongly Decided

#### *1. Improper Interpretation of* Shadwick v. City of Tampa[192]

The COMA in *Rexroat* relied in part on *Shadwick v. City of Tampa* as Supreme Court precedent that "a non-lawyer may be constitutionally qualified to determine whether there is probable cause to detain a person."[193] The holding in *Shadwick*, however, should have been limited to its particular facts and should not have been used by the court in *Rexroat* to justify to the use of non-lawyers to review pretrial confinement in the military. First, the procedures at issue in *Shadwick* empowered non-lawyer clerks of court to issue arrest warrants *only* for violations of municipal ordinances; these clerks did not have the authority to issue search or arrest warrants for misdemeanors or felonies.[194] Second, even in the limited realm in which they could issue arrest warrants, the clerks' action was ministerial and nondiscretionary in nature, for the statute specified that the clerk "'*shall* issue a warrant'"

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[191] *See generally* United States v. Salerno, 481 U.S. 739, 750–52 (1987) (sustaining the constitutionality of the Bail Reform Act of 1984 and discussing its procedural protections).
[192] Shadwick v. City of Tampa, 407 U.S. 345 (1972).
[193] United States v. Rexroat, 38 M.J. 292, 297 (C.M.A. 1993).
[194] *Shadwick*, 407 U.S. at 347, 351.

upon an affidavit by a police officer that a person violated a city ordinance.[195] Third, the warrants issued by the non-lawyer clerks merely authorized arrest (and its inherent temporary detention), not the extended pretrial confinement that was at issue in *Gerstein* and *Rexroat*. At best, the clerks were only determining probable cause that the person committed a municipal violation,[196] whereas the commission of an offense is but one element of the inquiry for pretrial confinement in the military.[197]

Finally, even though the clerks in *Shadwick* were non-lawyers, they were nonetheless judicial officers,[198] unlike the commanders in *Rexroat* who were completely outside of the judicial branch. The Court in *Shadwick* was careful to limit its holding to the types of warrants in question, stating that had it instead been examining the question of "whether a State may lodge warrant authority in someone entirely outside the sphere of the judicial branch . . . [the] case would have presented different considerations."[199] In so doing, the Court noted that "[m]any persons may not qualify as the kind of 'public civil officers' we have come to associate with the term 'magistrate.'"[200]

This conclusion as to the limited application of the holding in *Shadwick* is bolstered by the fact that three years later when *Gerstein* dealt squarely with the issue of the review of probable cause for extended pretrial confinement beyond the initial arrest, the Supreme Court consistently spoke in terms of a "judicial determination"[201] by a "neutral and detached magistrate."[202] The opinion never once suggested that this magistrate could be a non-lawyer "[w]hen the stakes are this high" in depriving a person of liberty.[203] In fact, the *Gerstein* Court cited *Shadwick* only for the proposition that "a prosecutor's responsibility to

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[195] *Id.* at 346 (quoting the Charter of the City of Tampa, Section 495) (emphasis added).
[196] *Id.* at 351.
[197] *See* MCM, *supra* note 2, R.C.M. 305(h)(2)(B) (requiring a finding that pretrial confinement is necessary and that lesser forms of restraint are inadequate).
[198] *Shadwick*, 407 U.S. at 352.
[199] *Id.*
[200] *Id.* Furthermore, the reasons the Court noted for communities to delegate responsibility for issuing certain warrants to non-lawyers, such as a shortage of lawyers in small or rural communities, generally do not exist in the military, especially given the advances in technology that make possible the exercise of magistrate functions over a considerable distance. *See id.* at 352–53 & 352 n.10.
[201] Gerstein v. Pugh, 420 U.S. 103, 114 (1975).
[202] *Id.* at 112.
[203] *Id.* at 114.

law enforcement is inconsistent with the constitutional role of a neutral and detached magistrate."[204] Moreover, in the military cases prior to *Rexroat*, the COMA specifically envisioned a judicial review by a legally-trained magistrate or judge.[205] Had it correctly interpreted *Shadwick*, the court in *Rexroat* would not have held that a non-lawyer completely outside the judicial branch could constitutionally review pretrial confinement.

*2. Erroneous Comparison with Issuance of Search Authorizations*

In addition to its faulty interpretation of *Shadwick*, the COMA in *Rexroat* further relied on its own precedent holding that non-lawyer commanders "may be constitutionally required to determine whether there is probable cause to search," and saw "no reason to treat the determination of probable cause for pretrial confinement differently."[206] The application of the law for search authorizations to pretrial confinement review, however, was flawed for two reasons. First, the court conceded that the case law on which it was relying, while upholding the authority of a commander to issue search authorizations, itself expressed reservations about equating commanders with magistrates.[207] Most notably, Chief Judge Fletcher, who wrote the opinion in *Courtney v. Williams* requiring a magistrate review of pretrial confinement in the military,[208] called the treatment of a commander as a magistrate for purposes of issuing search authorizations a "legal fiction" in his concurring opinion in *United States v. Ezell*.[209] Similarly, Chief Judge Everett wrote for the court in *United States v. Stuckey* that "a military commander—no matter how neutral and impartial he strives to be—cannot pass muster constitutionally as a 'magistrate' in the strict sense."[210]

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[204] *Id.* at 117–18.
[205] *See, e.g.*, United States v. Lynch, 13 M.J. 394, 397 (C.M.A. 1982) (stating the only persons constitutionally authorized to review pretrial confinement are military judges, military magistrates, and persons authorized by the UCMJ to confine who are not involved in the command's law enforcement function); United States v. Malia, 6 M.J. 65, 66 (C.M.A. 1978) (likening a magistrate to a judge); Courtney v. Williams, 1 M.J. 267, 270–71 (C.M.A. 1976) (using only the term "magistrate" and referencing the Army procedures, which called for a judge advocate to be magistrate).
[206] United States v. Rexroat, 38 M.J. 292, 298 (C.M.A. 1993).
[207] *See id.* at 296.
[208] *See* 1 M.J. 267 (C.M.A. 1976).
[209] 6 M.J. 307, 328 (C.M.A. 1979) (Fletcher, C.J., concurring).
[210] 10 M.J. 347, 361 (C.M.A. 1981).

Second, and more significantly, the COMA in *Rexroat* erroneously equated pretrial confinement review with the issuance of search authorizations by commanders.[211] In making such analogies, however, the issuance of a search authorization is more fittingly compared to the commander's initial probable cause determination to order a Soldier into confinement rather than to the legal review of a pretrial confinement decision already made by the command. A commander, in addition to playing a role in law enforcement, is charged with ensuring the health and welfare, as well as the good order and discipline, of his unit. Based on these responsibilities, there may exist a military necessity for a commander to be able to authorize searches and to order confinement, but there is no corresponding military justification to allow a non-magistrate to determine whether pretrial confinement should continue. Similarly, while there may be exigencies that require a commander to act swiftly on a search authorization, as well as constitutional rules that allow warrantless searches in exigent circumstances, there is no exigent circumstances exception justifying prolonged pretrial confinement without judicial review.

Moreover, the consequences of pretrial confinement, in terms of the deprivation of liberty, are more severe than the consequences of an unlawful search. The exclusionary rule[212] at trial, in effect, provides the outside review of the commander's decision to issue a search and seizure authorization based on his determination of probable cause. Whereas excluding improperly obtained evidence is generally an adequate remedy at trial and can even preclude a successful prosecution, an accused who suffers through illegal pretrial confinement only receives an appropriate remedy if he is ultimately convicted and sentenced to more confinement than he has already served. Those pretrial confinees whose sentence is less than the confinement already served receive an inadequate remedy, while those whose cases that do not go to trial receive no remedy at all. Thus, while military necessity may justify non-lawyer commanders to play the role of magistrates in the context of issuing search authorizations, there is no military necessity justifying a non-judicial review of pretrial confinement. Therefore, the *Rexroat* Court's comparison of pretrial confinement review to the issuance of search authorizations in holding that non-lawyers could constitutionally act in both instances was erroneous.

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[211] *See Rexroat*, 38 M.J. at 297–98.
[212] *See* MCM, *supra* note 2, MIL. R. EVID. 311.

*3.* Rexroat *Allows the Person Ordering Confinement to Review Himself*

Even if one accepts as correct the COMA's decision in *Rexroat* to allow non-lawyer magistrates to satisfy the *Gerstein* review, *Rexroat* undermined its result with its own faulty logic. It created an unacceptable and irrational result in specifically holding that "either the commander's probable-cause determinations required by RCM 305(d) or (h) can satisfy *Gerstein* if the commander is neutral and detached, and can satisfy *McLaughlin* if conducted within 48 hours."[213] By its nature, the RCM 305(d) probable cause determination is made by the person initially ordering the accused into pretrial confinement, and need not be a "detailed analysis of the necessity for confinement."[214] Similarly, the 72-hour review of RCM 305(h) is required by the commander even in the typical situation in which the commander is also the person ordering confinement.[215] These situations are clearly more akin to the initial probable cause determination by a police officer to arrest a suspect, which the Supreme Court in *Gerstein* distinguished from the independent magistrate review.[216] Yet the *Rexroat* court explicitly allows the officer ordering confinement to review his own decision as long as he is neutral and detached.[217] This reasoning is completely illogical, since the person ordering confinement is inherently *not* neutral *or* detached. Such a result could not be further from the constitutional standard for pretrial confinement review.

B. Only Judge Advocates Meet the Constitutional Standard for Magistrates

Not only is the proposed amendment to RCM 305 compelled by the erroneous application of the constitutional standard for pretrial confinement review by the court in *Rexroat*, it is also compelled by the

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[213] United States v. Rexroat, 38 M.J. 292, 298 (C.M.A. 1993), *cert. denied*, 510 U.S. 1192 (1994).
[214] MCM, *supra* note 2, R.C.M. 305(d) discussion.
[215] *Id.* R.C.M. 305(h).
[216] *See generally* Gerstein v. Pugh, 420 U.S. 103, 112–14 (1975) (distinguishing a police officer's on-scene assessment of probable cause from a magistrate's neutral and detached review).
[217] *See Rexroat*, 38 M.J. at 298. *But cf.* Gilligan & Smith, *supra* note 47, at 54 ("[T]he practical workings of imposing pretrial confinement may jeopardize the imposing commander's neutrality.").

constitutionally-required qualifications of a reviewing magistrate. In *Shadwick*, the Supreme Court declared that the "magistrate must meet two tests. He must be neutral and detached, and he must be capable of determining whether probable cause exists for the requested arrest or search."[218] Due to the realities of the military command structure and the nature of the probable cause determination for pretrial confinement, only judge advocates who have been officially designated as military magistrates can consistently meet the constitutional standard in the military.

*1. The Meaning of "Neutral and Detached"*

The first requirement is that the magistrate be a neutral and detached judicial officer, which the Supreme Court has held to mean "someone independent of police and prosecution."[219] "Whatever else neutrality and detachment might entail," the Court explained in *Shadwick*, "it is clear that they require severance and disengagement *from activities of law enforcement*."[220] It is important to realize that this detachment means disengagement from all law enforcement activities, not merely that the individual has refrained from engaging in law enforcement in the particular case at hand. Thus, the exclusive use as magistrates of judge advocates who are not involved in prosecutorial functions would ensure that the officer reviewing pretrial confinement is sufficiently neutral and detached. It would also avoid the legal fiction of detachment that the military case law has commonly employed.

The military case law often gives short shrift to the issue of whether a reviewing officer is neutral and detached, simply stating the conclusion with no analysis.[221] Even when the courts delve into the facts, their conclusions are frequently untenable and unsatisfactory. For example, in *United States v. Lipscomb*, the Coast Guard Court of Military Review found that the commanding officer who initially ordered the accused into confinement was sufficiently neutral and detached to satisfy the 48-hour

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[218] Shadwick v. City of Tampa, 407 U.S. 345, 350 (1972).
[219] *Gerstein*, 420 U.S. at 118.
[220] *Shadwick*, 407 U.S. at 350 (emphasis added).
[221] *See, e.g.*, United States v. McLeod, 39 M.J. 278, 278 (C.M.A. 1994) (per curiam) (summarily concluding that the accused's brigade commander and the staff judge advocate were neutral and detached); United States v. Bell, 44 M.J. 677, 680 (N-M. Ct. Crim. App. 1996) (summarily concluding that the ship's duty officer and the accused's commander were "both neutral and detached").

review requirement of *McLaughlin*.[222] Even though this commander did not complete his 72-hour memorandum within forty-eight hours, the court, relying on *Rexroat*'s holding that the initial probable cause determination can satisfy *Gerstein* and *McLaughlin*, assumed that the commander considered the same reasons at the time he ordered confinement which he later reflected in the memorandum. Thus, he could constitutionally review himself simultaneously with the initial order![223] Moreover, the court was unfazed by the fact that this commander was also the convening authority who referred the accused's case to trial three days after ordering him into confinement, as well as by the fact that the trial counsel who subsequently prosecuted the accused assisted in preparing the 72-hour memorandum.[224] The court's finding that this commander was neutral and detached under these circumstances illustrates the flawed interpretation that military courts give to those words, erroneously believing them satisfied if the officer has no "personal interest that would have disqualified him under the accuser concept" and does not personally "participat[e] in any prosecutorial capacity."[225]

In *Rexroat* itself, the COMA reached constitutionally questionable conclusions with regard to the neutrality and detachment of the individuals it held could conduct the *Gerstein* review. Although the court ultimately found that it had insufficient facts to determine conclusively whether the accused's immediate commander was neutral and detached, the court seemed prepared to find him so since he was "not the formal accuser."[226] Furthermore, the court reasoned that because the commander formally ordered the accused into confinement under RCM 305(d) after the accused had already been taken into custody by security personnel for shoplifting at the local base exchange, he would not be reviewing his own decision.[227] With respect to the battalion commander

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[222] 38 M.J. 608, 609–10 (C.G.C.M.R. 1993).
[223] *See id.* at 610.
[224] *Id. But cf.* Gerstein v. Pugh, 420 U.S. 103, 117 (1975) (holding that a prosecutor's assessment of probable cause does not meet the requirements of the Fourth Amendment and is therefore insufficient to justify pretrial confinement).
[225] *Lipscomb*, 38 M.J. at 610.
[226] United States v. Rexroat, 38 M.J. 292, 298 (C.M.A. 1993).
[227] *Id.* at 294, 298. The court's faulty reasoning represents a fundamental misunderstanding of pretrial confinement review. When security personnel first took the accused into custody, this was an "apprehension" under RCM 302. *See* MCM, *supra* note 2, R.C.M. 302(a)(1) & discussion. The review requirements of RCM 305 were not triggered until the accused's commander ordered him into "pretrial confinement," which is legally distinct from the custody the accused was in as a result of the apprehension.

that reviewed the accused's confinement, the court found that he was neutral and detached even though he himself was a convening authority, because he was not in the *accused's* chain of command and "had no prosecutorial or law enforcement role in *this* case."[228] Applying this logic, a prosecutor who is not assigned to a particular criminal defendant's case could constitutionally act as a neutral and detached magistrate to approve that defendant's pretrial confinement, a result that few could plausibly contend is consistent with *Gerstein*.

The conclusions as to neutrality and detachment reached by the military courts in cases like *Rexroat* and *Lipscomb* represent a disregard of the nature and workings of the military justice system. In the military, the traditional prosecutorial functions are shared by the trial counsel, the chain of command, the staff judge advocate, and the convening authority. The trial counsel determines the sufficiency of the evidence, advises the command on the propriety of pretrial confinement, and drafts charges. Commanders at all levels make recommendations as to the disposition of charges, and in many cases also have the authority to convene courts-martial and refer charges to trial. Before a case may be referred to a general court-martial, the staff judge advocate must give his pretrial advice to the convening authority.[229] In fact, the COMA explicitly recognized in *United States v. Lynch* that "the pretrial obligations of the staff judge advocate place him in the posture of a prosecutor" in holding that "a magistrate's decision based upon the advice of such a person cannot realistically be considered neutral and detached."[230] The court further stated that "[a] commanding officer who refers cases to courts-martial must be considered similarly disqualified [from acting as a magistrate] as a matter of law."[231]

It follows that the ability of staff officers and other members of the command to qualify as truly "neutral and detached" is inherently suspect due to the obvious reality that they are often rated by the commanders

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Therefore, the commander's confinement decision under RCM 305(d), though prompted by the apprehension, was not a review of the apprehension, but rather was the very decision that itself needed to be reviewed under RCM 305(i).

[228] *Rexroat*, 38 M.J. at 298 (emphasis added).

[229] MCM, *supra* note 2, R.C.M. 406.

[230] 13 M.J. 394, 396 (C.M.A. 1982) (citing United States v. Hardin, 7 M.J. 399 (C.M.A. 1979)). The court further stated that the "institutional position" of staff judge advocate "is inextricably linked to the command function of policing and law enforcement in the military community." *Id.*

[231] *Id.* at 396–97.

and, in any event, have incentive to support the desires of the chain of command. This may be particularly true in a deployed environment, where the perceived exigencies of the situation may cause a reviewing officer to risk a stigma in recommending release against the wishes of the commander. As such, they are akin to agents of law enforcement who have as much interest in good order and discipline as their commanders and are predisposed to view the facts from the command's perspective. Such persons cannot be viewed as independent of police and prosecution and therefore cannot be constitutionally relied upon as a class to provide a meaningful review of pretrial confinement. Similarly, commanders in other chains, by virtue of being in the business of enforcing discipline themselves, have an incentive to support their fellow commanders and are predisposed to view cases from the command's perspective.

While the above reasoning does not necessarily exclude every member of a command from being neutral and detached, it nonetheless applies to such a significant portion of that population who may potentially be called upon under RCM 305 to conduct the 48-hour review that, taken as a whole, they cannot be said to provide fair and reliable reviews. It is therefore imperative that the rule be amended to entrust pretrial confinement review to judge advocates who fall outside of the command's law enforcement functions.

*2. The Nature of the Probable Cause Determination*

The second requirement for a magistrate under the constitutional standard is that they be capable of making the probable cause determination.[232] In other words, they must possess sufficient legal training and mental capacity to render reasoned decisions based upon the information presented to them. While some may argue that lay persons are routinely called upon to make legal conclusions as court members or investigating officers, in those instances such persons enjoy the benefit of a judge's instructions or the advice of a dedicated legal advisor to assist them in analyzing the law. For the second part of the constitutional test to be meaningful, it must require something more, such that not everyone would qualify.

Within the context of pretrial confinement review, a finding that the accused committed an offense under the UCMJ is but one element of the

[232] Shadwick v. City of Tampa, 407 U.S. 345, 350 (1972).

probable cause determination under RCM 305(h)(2)(B); the reviewing officer must also determine the foreseeability that the accused is a flight risk or that the accused will continue to engage in serious criminal misconduct.[233] The determination of whether the accused is a flight risk can be enhanced when an officially designated military magistrate under judicial supervision has the benefit of perspective from seeing many cases for review, compared with the single case that most non-lawyer reviewing officers would see. Furthermore, "serious criminal misconduct" has a particular meaning under the analysis in the *MCM* and case law. Offenses that a line officer would typically view as serious, such as drug use, may not actually justify pretrial confinement.[234] Moreover, the ability to distinguish legal nuances, such as the distinction of a "quitter" from a mere "pain in the neck,"[235] warrants review by a legally-trained magistrate earlier in the process. Finally, the determination as to whether lesser forms of restraint would be inadequate is better made by a judge advocate, who understands the full range of pretrial restraint under RCM 304.

The reality that judge advocates serving as military magistrates overturn the judgment of commanders and non-lawyer reviewing officers in a significant number of cases underscores the inherent unreliability of the current system. In 2008, for example, military magistrates released over 22% of Soldiers ordered into pretrial confinement Army-wide.[236] This translates into ninety-one Soldiers who were illegally confined prior to trial.[237] In the author's own experience as a part-time military magistrate, the percentage of releases was substantially higher, at 54% (seven of thirteen cases reviewed).[238] With such a significant number of non-lawyers incorrectly ordering or ratifying pre-trial confinement, it is

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[233] MCM, *supra* note 2, R.C.M. 305(h)(2)(B).
[234] *See supra* note 11.
[235] MCM, *supra* note 2, R.C.M. 305(h)(2)(B) analysis, at A21-18.
[236] U.S. ARMY TRIAL JUDICIARY, 2008 PART-TIME MILITARY MAGISTRATE ROLLUP REPORT (2008) [hereinafter 2008 PART-TIME MILITARY MAGISTRATE ROLLUP REPORT] (on file with author). In the past three years for which the U.S. Army Trial Judiciary has maintained statistics, the percentage of releases has increased each year. In 2008, 22.5% (91 out of 405) confinees were released by part-time military magistrates. *Id.* In 2007, 14.3% (79 out of 551) confinees were released by part-time military magistrates. U.S. ARMY TRIAL JUDICIARY, 2007 PART-TIME MILITARY MAGISTRATES ROLLUP REPORT (2007) (on file with author). In 2006, 13% (67 out of 516) confinees were released by part-time military magistrates. U.S. ARMY TRIAL JUDICIARY, PART-TIME MILITARY MAGISTRATES REPORT–2006 (2006) (on file with author).
[237] *See* 2008 PART-TIME MILITARY MAGISTRATE ROLLUP REPORT, *supra* note 236.
[238] Professional Experience, *supra* note 179.

crucial that the system change to put the most meaningful review—the one where an accused who is illegally confined stands the best chance of release—as early in the process as possible.

## V. Conclusion

The essence of the constitutional requirement for pretrial confinement is that it be a prompt, fair, and reliable judicial review by a neutral and detached magistrate.[239] Throughout history, the military has lagged behind its civilian counterparts in protecting the liberty interests of those who are confined prior to trial. Even when the military services grudgingly accepted the application of the constitutional standards pertaining to pretrial confinement, they have imperfectly implemented those standards. As this article has demonstrated, the result has been a system of pretrial confinement review that is illogical, inconsistent, and prone to abuse. The time has come to "lock down" pretrial confinement and bring it more perfectly in line with the Constitution by amending RCM 305 to require a judicial review by a neutral and detached judge advocate magistrate within forty-eight hours of the initiation of confinement. Such a change will ensure that servicemembers are not deprived of their liberty without a trial except in the most necessary of circumstances.

[239] *See* Gerstein v. Pugh, 420 U.S. 103, 124–25 (1975).

## Appendix

## Proposed Changes to RCM 305

This Appendix contains proposed changes to RCM 305. Absence of changes to a particular subsection is indicated by the title of the subsection and the bracketed words "[no change]." Proposed new language is shown in ***bold italics***, while proposed deletions are indicated in ~~strikethrough~~ type.

### Rule 305. Pretrial Confinement

(a) *In general*. [no change]

(b) *Who may be confined*. [no change]

(c) *Who may order confinement*. [no change]

(d) *When a person may be confined*. [no change]

(e) *Advice to the accused upon confinement*. [no change]

(f) *Military counsel*. ~~If requested by the prisoner and such request is made known to military authorities, M~~***M***~~m~~ilitary counsel shall be provided to the prisoner before the ~~initial~~ ***magistrate*** review under subsection (i) of this rule ~~or within 72 hours of such request being first communicated to military authorities, whichever occurs first~~. Counsel may be assigned for the limited purpose of representing the accused only during the pretrial confinement proceedings before charges are referred. If assignment is made for this limited purpose, the prisoner shall be so informed. Unless otherwise provided by the regulations of the Secretary concerned, a prisoner does not have a right under this rule to have military counsel of the prisoner's own selection.

(g) *Who may direct release from confinement.* [no change]

(h) *Notification and action by commander*.

(1) *Report*. Unless the commander of the prisoner ordered the pretrial confinement, the commissioned, warrant, noncommissioned, or petty officer into whose charge the prisoner was committed shall, within 24 hours after that commitment, cause a report to be made to the

commander that shall contain the name of the prisoner, the offenses charged against the prisoner, and the name of the person who ordered or authorized confinement. ***In all cases, the commander or other person who ordered the confinement shall also report this information to the reviewing magistrate under subsection (i)(2) of this rule either prior to confinement or as soon as practicable thereafter, such that the reviewing magistrate may either review the confinement or grant an extension within 48 hours***.

(2) *Action by commander*.

(A) *Decision*. Not later than ~~72~~ ***24*** hours after the commander's ordering of a prisoner into pretrial confinement or, after receipt of a report that a member of the commander's unit or organization has been confined, whichever situation is applicable, the commander shall decide whether pretrial confinement will continue. ~~A commander's compliance with this subsection may also satisfy the 48-hour probable cause determination of subsection R.C.M. 305(i)(1) below, provided the commander is a neutral and detached officer and acts within 48 hours of the imposition of confinement under military control. Nothing in subsections R.C.M. 305(d), R.C.M. 305(i)(1), or this subsection prevents a neutral and detached commander from completing the 48-hour probable cause determination and the 72-hour commander's decision immediately after an accused is ordered into pretrial confinement.~~

(B) *Requirements for confinement*. [no change]

(C) ~~*72*~~ ***24****-hour memorandum*. If continued pretrial confinement is approved, the commander shall prepare a written memorandum that states the reasons for the conclusion that the requirements for confinement in subsection h(2)(B) of this rule have been met. This memorandum may include hearsay and incorporate by reference other documents, such as witness statements, investigative reports, or official records. This memorandum shall be forwarded to the ~~7-day reviewing officer~~ ***magistrate*** under subsection (i)(2) of this rule. If such a memorandum was prepared by the commander before ordering confinement, a second memorandum need not be prepared; however, additional information may be added to the memorandum at any time ***prior to review by the magistrate***.

(i) *Procedures for review of pretrial confinement*.

(1) ~~*48-hour probable cause determination*~~ ***Timing***. Review ***under this subsection*** ~~of the adequacy of probable cause to continue pretrial confinement~~ shall be made ~~by a neutral and detached officer~~ within 48 hours of imposition of confinement under military control. If the

prisoner is apprehended by civilian authorities and remains in civilian custody at the request of military authorities, reasonable efforts will be made to bring the prisoner under military control in a timely fashion.

(2) ~~*7-day review of pretrial confinement*~~ ***By whom made***. ~~Within 7 days of the imposition of confinement, a neutral and detached officer appointed in accordance with regulations prescribed by the Secretary concerned shall review the probable cause determination and necessity for continued pretrial confinement. In calculating the number of days for purposes of this rule, the initial date of confinement under military control shall count as one day and the date of the review shall also count as one day.~~ ***The review under this subsection shall be made by a neutral and detached magistrate, defined as a judge advocate officer who is qualified and certified under Article 27(b), UCMJ and is appointed in accordance with the regulations prescribed by the Secretary concerned to perform the duties of a magistrate under the supervision of a military judge.***

(A) *Nature of the* ~~*7-day*~~ ***magistrate*** *review*.

(i) *Matters considered*. The review under this subsection shall include a review of the memorandum submitted by the prisoner's commander under subsection (h)(2)(C) of this rule. Additional written matters may be considered, including any submitted by the accused. The prisoner and the prisoner's counsel, if any, shall be allowed to appear before the ~~7-day reviewing officer~~ ***magistrate*** and make a statement, if practicable. A representative of the command may also appear before the ~~reviewing officer~~ ***magistrate*** to make a statement.

(ii) *Rules of evidence*. [no change]

(iii) *Standard of proof*. [no change]

(B) *Extension of time limit*. ***Upon the demonstration by the Government of the existence of a bona fide emergency or other extraordinary circumstance,*** ~~The 7-day reviewing officer~~ ***the magistrate*** may~~, for good cause,~~ extend the time limit for completion of the review ***as long as is reasonably necessary to accommodate such circumstances*** ~~to 10 days after the imposition of pretrial confinement~~. ***The magistrate shall document such extensions in the memorandum completed under subsection (i)(2)(D) of this rule.***

(C) *Action by* ~~*7-day reviewing officer*~~***magistrate***. Upon completion of review, the ~~reviewing officer~~ ***magistrate*** shall approve continued confinement or order immediate release.

(D) *Memorandum*. The ~~7-day reviewing officer's~~ ***magistrate's*** conclusions, including the factual findings on which they are based, shall be set forth in a written memorandum. A copy of the memorandum and of all documents considered by the ~~7-day reviewing officer~~ ***magistrate***

shall be maintained in accordance with regulations prescribed by the Secretary concerned and provided to the accused or the Government on request.

(E) *Reconsideration of approval of continued confinement.* The ~~7-day reviewing officer~~ ***magistrate*** shall upon request, after notice to the parties, reconsider the decision to confine the prisoner based upon any significant information not previously considered.

(j) *Review by military judge*. [no change]

(1) *Release*. The military judge shall order release from pretrial confinement only if:

(A) The ~~7-day reviewing officer's~~ ***magistrate's*** decision was an abuse of discretion, and there is not sufficient information presented to the military judge justifying continuation of pretrial confinement under subsection (h)(2)(B) of this rule;

(B) Information not presented to the ~~7-day reviewing officer~~ ***magistrate*** establishes that the prisoner should be released under subsection (h)(2)(B) of this rule; or

(C) The provisions of subsection (i)(1) or (i)(2) of this rule have not been complied with and information presented to the military judge does not establish sufficient grounds for continued confinement under subsection (h)(2)(B) of this rule.

(2) *Credit.* [no change]

(k) *Remedy*. [no change]

(l) *Confinement after release*. [no change]

(m) *Exceptions*. [no change]

(1) *Operational necessity*. [no change]

(2) *At sea*. [no change]