SERIOUS OFFENSE: CONSIDERING THE SEVERITY OF THE CHARGED OFFENSE WHEN APPLYING THE MILITARY'S PRE-TRIAL CONFINEMENT RULES

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I. Introduction—An Empty Chair

Where is he? The courtroom clock chews through the minutes, and when the start time for the court-martial arrives, the Accused's chair is empty. The government counsel look at the Accused's chair, glance at the Accused's commander, share a knowing look with defense counsel, and look back at the empty chair. On the second day of the trial of Sergeant (SGT) Kirk Evenson, it becomes apparent to all parties in the courtroom that the Accused will not be present to face charges of raping and sexually assaulting a minor child. After a brief hearing outside the presence of the panel, the military judge allows the government to proceed with its case against SGT Evenson *in absentia*. Following the close of evidence, an enlisted panel convicts SGT Evenson of raping, sodomizing, and sexually assaulting a minor child, and subsequently sentences him to confinement for life without the possibility of parole.[1]

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[1] This assertion is based on the author's recent professional experiences as the Brigade Judge Advocate, 4th Infantry Brigade Combat Team, 1st Infantry Division, Fort Riley Kansas from June 6, 2010 to July 10, 2012 [hereinafter Professional Experiences]. As the co-counsel for the Government in *United States v. SGT Kirk Evenson*, I was involved in and present during all facets of the case. I personally participated in the presentation of evidence against Sergeant (SGT) Evenson and was in the courtroom, at the counsel's table, when SGT Evenson failed to report to the second day of his trial and when the panel delivered its findings and sentencing in this case.

The day after SGT Evenson was convicted of these heinous crimes, he was discovered hiding-out in a nearby hotel. In short order, countless local and federal law enforcement officers descended upon the hotel. In a scene befitting an action movie, police cars and emergency vehicles littered the hotel parking lot, snipers leveled their rifle scopes on the hotel windows, a special weapons and tactics (SWAT) team clad in body armor hustled into their positions, and the heads of several agencies huddled in a makeshift command center in the hotel lobby to prepare for the ensuing confrontation.[2] After a protracted stand-off, law enforcement officers cut a hole in the hotel door and forced their way into SGT Evenson's room.[3] The officers, armed with MP5s and side-arms, tactically cleared the room and demanded SGT Evenson peacefully submit himself to arrest.[4] But SGT Evenson resisted, and he was shot twenty-one times, dying as a result.[5] The book abruptly closed on SGT Evenson's life, and the questions began to mount. How could this happen? Was this result avoidable? Why was SGT Evenson not placed in pre-trial confinement when facing such serious charges?[6]

The purpose of this article is to examine the current Rules for Courts-Martial (RCM) as those rules pertain to pre-trial confinement in cases like SGT Evenson's. The circumstances surrounding SGT Evenson's trial and his ultimate fate serve as a vehicle for a broader discussion of how the military pre-trial confinement system, when

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[2] *Id*. While traveling to Denver, Colorado, during time off from work for Labor Day Weekend, the lead Criminal Investigative Division (CID) agent contacted the author and informed me that they located SGT Evenson at the Holiday Inn Express in Abilene, Kansas. As Abilene was along the route to Denver, I requested access to the scene in order to provide local and federal law enforcement agents with any background information they might need in their efforts to defuse the stand-off. I was allowed to enter the hotel lobby and received a briefing from the tactical commander.

[3] *See* Captain James E. Jones, Army Regulation 15-6 Report of Investigation on the Circumstances Surrounding the Death of Sergeant Kirk Evenson exhibit L (19 June 2012) [hereinafter CPT Jones, AR 15-6 Investigation] (on file with the Admin. Law Div., Office of the Staff Judge Advocate, 1st Infantry Div., Fort Riley, Kan.).

[4] *Id*.

[5] *See id*.; *see also* Associated Press, *AWOL Riley Sergeant Killed During Standoff*, ARMY TIMES (Sep. 2, 2011, 7:27 PM), http://www.armytimes.com/news/2011/09/ap-awol-riley-sergeant-killed-during-standoff-090211/; *Ft. Riley Soldier on Trial for Child Rape Killed in Standoff*, WIBW **(**Sep. 1, 2011, 7:57 PM), http://www.saljournal.com/news/story/soldier-killed-9-1-11; *AWOL Fort Riley Soldier Dies After Police Standoff in Abilene*, SALINA POST (Sep. 2, 2011), http://salinapost.com/2011/09/02/awol-fort-riley-soldier-dies-after-police-standoff/.

[6] *See Soldier Killed in Standoff Hadn't Been Confined*, SALINA J. (Sep. 2, 2011, 3:03 AM), http://www.saljournal.com/news/story/soldier-killed-9-1-11.

compared to the civilian federal system, is not properly structured to deal with cases in which an accused is facing serious criminal charges that carry with them the potential for severe punishment. To fully explore this question, this article will: (1) identify the precise issue, and commander's dilemma, when an accused is facing serious criminal charges; (2) look at the history of the military's system of pre-trial confinement; (3) examine that system's constitutional boundaries; (4) compare the military system to the federal bail system; (5) address the arguments against changing the military system to mirror the current federal bail system; and consequently, (6) propose changes to the military pre-trial confinement rules.

Based upon the analysis described above, this article shows why it is necessary for Congress and the President to amend the Uniform Code of Military Justice (UCMJ) and the RCMs pertaining to pre-trial confinement in a manner that reflects current federal pre-trial restraint law, particularly when dealing with cases like SGT Evenson's. The current military pre-trial confinement rules fail to recognize or appreciate the risk that service members who are charged with serious crimes and facing significant punishment are more likely to flee when compared to a service member charged with a lesser crime. To that end, the military-justice system should presume, for certain serious offenses, that absent pre-trial confinement an accused will either flee or harm members of the surrounding community. Such a presumption would assist commanders in preventing an unfortunate calamity, like that which occurred in SGT Evenson's case.

II. Why Was SGT Evenson Not Confined?

As a preliminary matter, it is instructive to consider how SGT Evenson's absence at trial, and the command's decision to not place him in pre-trial confinement, developed. This initial discussion is necessary to fully understand a commander's dilemma and the issues at stake when considering pre-trial confinement for a service member who is accused of serious criminal misconduct.

On April 27, 2011, the government preferred three charges containing a total of twenty separate specifications against SGT Evenson,

including, most notably, rape and sodomy of a minor child.[7] At the time of preferral and at several other junctures throughout the process, government counsel and commanders discussed whether to place SGT Evenson in pre-trial confinement.[8] Sergeant Evenson's commanders expressed an interest in pre-trial confinement, but the only fact supporting such confinement was the serious nature of the charges SGT Evenson was facing, as reflected in the potential punishment that could result from a conviction.[9]

Under current law, a commander's authority to confine a service member before trial is described in RCM 305.[10] In relevant part, RCM 305 states that a commander may confine a service member before trial when, "confinement is necessary because it is foreseeable that: (*a*) the prisoner will not appear at a trial, pretrial hearing, or investigation, or (*b*) the prisoner will engage in serious criminal misconduct; and (*iv*) less severe forms of restraint are inadequate."[11]

While it is true that Rule 305's discussion includes, as a consideration, the nature and the circumstances of the charged offense, *United States v. Heard*, discussed below, prohibits commanders from placing a service member in pre-trial confinement on the basis of the charged offense alone.[12] Rather a commander's authority to place an accused in confinement depends on a finding that the accused will either flee or commit additional serious misconduct.[13] And the indirect reference to an offense's seriousness in the (non-binding) RCM discussion does not go far enough in linking the nature of the charged offenses and its potential punishment to the likelihood that an accused will absent himself from trial.

In SGT Evenson's case, there was no evidence, beyond the nature of the charged offenses, to suggest that he would flee during the trial

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[7] *See* CPT Jones, AR 15-6 Investigation, *supra* note 3, exhibit I; *see also* Professional Experiences, *supra* note 1.
[8] *See* CPT Jones, AR 15-6 Investigation, *supra* note 3, exhibit H1; *see also* Professional Experiences, *supra* note 1.
[9] *See* CPT Jones, AR 15-6 Investigation, *supra* note 3, exhibit H1; *see also* Professional Experiences, *supra* note 1.
[10] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 305 (h)(2) (2012) [hereinafter MCM].
[11] *Id*.
[12] *See* 3 M.J. 14 (C.M.A. 1977); *see also* MCM, *supra* note 10, R.C.M. 305 (h)(2) discussion.
[13] *Heard*, 3 M.J. at 14; *see also* MCM, *supra* note 10, R.C.M. 305 (h)(2) discussion.

process or commit additional serious misconduct. More specifically: (1) SGT Evenson's family lived within the local area; (2) SGT Evenson remained in his unit and did not absent himself once he became aware of the potential charges against him; (3) SGT Evenson observed the terms of a military restraining order put in place by his commander; and (4) SGT Evenson was present through all phases of the pre-trial process, including two Article 32 investigative hearings at which the government presented compelling evidence of his guilt.[14] In light of these facts, commanders at various levels felt they did not possess the authority to place SGT Evenson in pre-trial confinement because they could proffer no evidence that SGT Evenson would flee or commit additional offenses, aside from the common sense understanding that someone facing a potential life sentence has a greater incentive to flee than someone facing a shorter period of confinement.[15] But SGT Evenson's commanders' worst fears were realized on day two of his trial when they saw an empty chair at the defense table.

The factual circumstances that those commanders faced illustrate the current gap existing within the pre-trial confinement rules. Under the current system, a commander is left with little choice but to accept the risk foisted upon that commander by a pre-trial confinement system that fails to acknowledge the obvious: a person facing life is more likely to flee than a person who is not.[16]

III. History of Pre-Trial Confinement in the Military

The military legal system, not unlike the federal civilian system, guards against unnecessary detention of an accused before trial and favors release from pre-trial restraint while pending trial.[17] An

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[14] CPT Jones, AR 15-6 Investigation, *supra* note 3, exhibit H1; *see also* Professional Experiences, *supra* note 1. Sergeant Evenson faced two Article 32 investigations because CID discovered evidence of additional offenses after the conclusion of the initial hearing. In order to limit confusion at trial, the government decided to dismiss all charges without prejudice and prefer both the original charges and the new charges all on one charge sheet.

[15] *Id*.

[16] Commanders must also be cautious not to aggressively seek pre-trial confinement for service members charged with serious criminal offenses. If a magistrate releases a service member from pre-trial confinement at the seven-day review, a commander may not revisit that decision again without evidence of new misconduct. *See* MCM, *supra* note 10, R.C.M. 305(i)(2)(E).

[17] *See* UCMJ art. 10 (2012); *see also* Courtney v. Williams, 1 M.J. 267 (C.M.A. 1976).

examination of the development of the military pre-trial confinement rules provides a better understanding of the foundational principles of pre-trial confinement in order to determine: (1) if the rules, as they exist, provide sufficient means for a commander to deal with a case like SGT Evenson's; and (2) what are the limitations on any proposed change to those rules.

A. Pre-trial Confinement Prior to the Uniform Code of Military Justice (UCMJ)

The limitations on conditions permitting the government to place an individual in confinement pending trial trace back to the first American Articles of War, which were adopted in 1775.[18] The Articles of War contain three major principles relating to pre-trial restraint in the military: (1) deference to the commander regarding decisions of pre-trial confinement;[19] (2) abhorrence for an unreasonably long period of confinement before trial;[20] and (3) the primacy of the risk of flight as the reason justifying restraint.[21] These three themes play an important part in the later formation of pre-trial confinement rules under the UCMJ. Furthermore, these early principles are the foundation for the later discussion herein of how our current system should be re-structured to

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[18] *See generally* COLONEL WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 110 (2d ed. 1920), *reprinted in* American Articles of War of 1775, arts. XLI, XLII [hereinafter 1775 Articles of War]; *see also* Major Richard R. Boller, *Pretrial Restraint in the Military*, 50 MIL. L. REV. 71, 91–92 (1970) (providing a more in-depth look at the history of pre-trial restraint generally as well as a detailed examination of the history of military pre-trial confinement).

[19] *See* WINTHROP, *supra* note 18, at 113–25. Winthrop discusses how in the case of officers, commanders had vast discretion to determine whether to arrest the officer pending trial, the limits of an officer's arrest, whether to request the accused officer turn in his sword, and whether to discontinue arrest. *Id*. In the case of an enlisted service member, the commander enjoyed a fair degree of discretion when deciding whether to terminate confinement based upon the commander's assessment that the facts merit a trial by court-martial, or when a court-martial cannot be assembled within a reasonable period of time. *Id*.

[20] *See* 1775 Articles of War, *supra* note 18, at 953 (stating "[n]o officer or soldier who shall be put in arrest or imprisonment, shall continue in his confinement more than eight days, or till such time as a court-martial can be conveniently assembled.").

[21] *See* WINTHROP, *supra* note 18, at 113–14, 125. Winthrop discusses the theory that an officer's commission served as a form of bail, thereby preventing an officer from being required to be placed under arrest. *Id*. By contrast, Winthrop articulates that the early Articles of War viewed the only way to guarantee the presence at trial of an enlisted service member, not possessing a commission or any such value to offer, was to place the enlisted service member in confinement pending trial. *Id.* at 123.

deal with cases involving service members facing serious criminal charges.

B. Pre-trial Confinement Codified in Military Law

In 1950, Congress adopted the UCMJ, which has endured as the single consolidated source of military law.[22] The UCMJ's somewhat ill-defined articulations regarding pre-trial are refined by the RCMs established within the *Manual for Courts-Martial* (*MCM*).[23] In 1921, the *MCM* created two separate factors that a commander could consider when determining whether to confine a service member before trial: (1) seriousness of the offense; and (2) the necessity of preventing the accused's escape.[24] Subsequent editions of the *MCM* maintained these same conditions until 1984, when, based upon the Court of Military Appeals (CMA) decision in *United States v. Heard* (discussed in more detail below), the President made dramatic changes to the *MCM*'s rules and procedures governing pre-trial confinement.[25] The *MCM* no longer authorized a commander to confine a service member before trial based upon the serious nature of the charges alone.[26] Under RCM 305 of the *1984 MCM*, commanders were only authorized to confine a service member when, "(*a*) the prisoner will not appear at a trial, pretrial hearing, or investigation, or (*b*) the prisoner will engage in serious criminal misconduct; and (*iv*) less severe forms of restraint are inadequate."[27] The serious nature of the charged offense, no longer a stand-alone condition for confinement, instead must be combined with some other evidence indicating the accused will either flee or commit additional serious misconduct prior to trial.[28]

The rules for confining a service member prior to trial present in the *1984 MCM* were the same rules in place in 2011 when SGT Evenson's

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[22] *See generally* 10 U.S.C. §§ 801–846 (2012).

[23] *See* MCM, *supra* note 10, R.C.M. 305 (reviewing the current rules pertaining to pre-trial confinement in the military).

[24] MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. V, ¶ 46 (1921); *see also Boller*, *supra* note 18, at 96 ("Such confinement may not be imposed unless actual restraint is deemed necessary to insure the presence of the accused at the court-martial or the offense allegedly committed was a serious felony.").

[25] MANUAL FOR COURTS-MARTIAL, UNITED STATES (1984); *see also* United States v. Heard, 3 M.J. 14 (C.M.A. 1977).

[26] MCM, *supra* note 24, R.C.M. 305(h)(2)(B); *see also Heard*, 3 M.J. at 14.

[27] MCM, *supra* note 24, R.C.M. 305(h)(2)(B).

[28] *Id.* R.C.M. 305(h)(2)(B) discussion.

commanders had to decide the appropriate course of action, and they are the same rules that exist in the current version of the *MCM*.[29] In limiting the circumstances in which a Commander may seek to confine a service member, the *MCM* drafters have shifted the pre-trial confinement balance away from commanders' discretion and toward the release of the accused prior to trial.

Considering the increased focus and interest in prosecuting sexual-assault crimes within the military, cases where service members face serious charges and potentially severe punishments are likely to increase.[30] Thus, it is worth examining whether it is feasible and desirable to shift the pretrial confinement balance back to a position somewhere between the vast discretion available to commanders under the Articles of War and narrow discretion allowed to commanders in the present version of the pre-trial confinement rules.

IV. Constitutional Limitations on Pre-Trial Confinement in the Military

As noted above, the CMA imposed constraints on a commander's authority to place service members in confinement. By examining the boundaries these constraints create, it becomes possible to ensure that any proposed change does not violate the constitutional rights afforded an accused. Specifically, the military pre-trial confinement system developed clear constitutional limitations in the late 1970s and early 1980's when the Supreme Court and military courts struggled with the question of what rights must be afforded an accused when considering detention prior to trial.

A. *Gerstein v. Pugh*—Probable Cause and Magistrate Review Requirements for Pre-Trial Confinement

In 1975, the Supreme Court decided the case of *Gerstein v. Pugh* and the issue of whether the Constitution requires a probable-cause

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[29] *Compare* MCM, *supra* note 25, R.C.M. 305(h)(2)(B), *with* MCM, *supra* note 10, R.C.M. 305(h)(2)(B).

[30] *See* Nancy Gibbs, *Sexual Assaults on Female Soldiers: Don't Ask, Don't Tell*, TIME (Mar. 8, 2010), http://www.time.com/time/magazine/article/0,9171,1968110,00.html; *see also* Leslie Bentz, *Congresswomen Push for Tougher Measures Against Sexual Abuse in the Military*, CNN (Oct. 5, 2012), http://www.cnn.com/2012/10/04/politics/military-assaults-congresswomen/index.html.

determination before a person may be confined before trial based solely on criminal information filed by the prosecutor.[31] At the time, the Court decided *Gerstein*, defendants in Florida were not authorized a preliminary hearing on detention after the prosecutor filed the criminal information.[32] But the Court rejected this construction.[33]

Pursuant to *Gerstein*, police officers are permitted to make a probable-cause determination for the initial arrest and the brief detention required to comply with the administrative requirements of that arrest.[34] Once an individual is in custody, however, the Court recognized that there are no longer concerns that the defendant will flee or commit additional crimes, and the Fourth Amendment requires an increased burden on the government to continue post-arrest detention.[35] The *Gerstein* Court identified the magistrate's review as sufficient to meet this increased post-arrest burden.[36] Therefore, based on the Supreme Court's interpretation of the Fourth Amendment, as applied to pre-trial detention cases, the basic constitutional requirements afforded an accused confined before trial are: (1) a determination that there is probable cause to conclude the person committed the charged offense; and (2) a review of this determination by a neutral magistrate.

B. *Courtney v. Williams—Gerstein* Applied to the Military Pre-Trial Confinement System

In 1976, the CMA heard the case of *Courtney v. Williams* and had occasion to apply the Supreme Court's then-recent ruling in *Gerstein* to military cases.[37] In *Courtney*, the accused challenged the legality of his pre-trial confinement, claiming that the detention violated his rights under the Fifth Amendment's Due Process Clause.[38] The *Courtney* court

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[31] 420 U.S. 103, 105 (1975).
[32] *Id.*
[33] *Id.* at 111 (citing Cupp v. Murphy, 412, U.S. 291 (1973)).
[34] *Id.* at 113.
[35] *Id.*
[36] *Id.*
[37] 1 M.J. 267 (C.M.A. 1976).
[38] *Id.* at 268–70. The accused in *Courtney* was pending trial based upon a charge of unauthorized absence. While awaiting trial, the accused allegedly committed an assault and his command subsequently placed him in pre-trial confinement and did not afford him a meaningful opportunity to respond to the detention decision. A few days after the accused's command confined him, the convening authority determined that there was no "objective basis" for continuing detention and released the accused from confinement.

determined that *Gerstein*'s requirements for a probable-cause determination by a neutral and detached magistrate was equally applicable to the military systems, identifying a two-part test for determining if an accused's pre-trial detention of an accused complied with the Fourth Amendment.[39] The *Courtney* court concluded that a neutral and detached magistrate is required to decide: (1) whether probable cause exists to detain a service member; and (2) whether an accused should be detained.[40] Notwithstanding the *Courtney* court's articulation of the principle that pretrial confinement is only appropriate in cases where an accused service member *should* be detained, it fell short of describing the threshold the government must meet at a magistrate's hearing to reach that standard.[41]

C. *United States v. Heard*—When Should an Accused Be Detained Prior to Trial

In 1977, the CMA offered an answer to the question left unanswered by the *Courtney* court.[42] In *United States v. Heard*, the accused was pending court-martial for thirteen specifications of forgery, four specifications of making false statements, and one specification of wrongful appropriation.[43] Heard's commander placed him in pretrial confinement on four separate occasions and admitted doing so on two of those occasions because Heard was a "pain in the neck."[44] The *Heard* court reaffirmed its prior ruling in *Courtney*, which indicated that the government *can* place an accused in pre-trial confinement when there is probable cause to believe: (1) an offense has been committed; and (2) the accused committed it.[45] The court then went on to analyze the issue of when the government *should* place an accused in pre-trial confinement.[46]

The court began its analysis by looking to pre-trial confinement rules contained in the *1968 MCM*, which stated, "[c]onfinement will not be

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[39] *Id*. at 270; *see also* UCMJ art. 9d (2012) (stating "no person may be ordered into arrest or confinement except for probable cause").
[40] *Courtney*, 1 M.J. at 270.
[41] *Id*.
[42] United States v. Heard, 3 M.J. 14 (C.M.A. 1977).
[43] *Id*.
[44] *Id*. at 16.
[45] *Id*. at 18.
[46] *Id*.

imposed pending trial unless deemed necessary to ensure the presence of the accused at the trial or because of the seriousness of the offense charged."[47] The government sought a literal reading of the *MCM* so as to allow commanders to confine service members based upon the seriousness of the charged offense alone.[48] The court, however, refused to apply such an interpretation citing the presumption of innocence and stating, "unless confinement prior to trial is compelled by a legitimate and pressing social need sufficient to overwhelm the individual's right to freedom given the fact probable cause exists to believe he has committed a crime, restrictions unnecessary to meet that need are in the nature of intolerable, unlawful punishment."[49] Citing several cases and secondary sources, the court recognized two reasons that rise to the level of overwhelming an accused's right to freedom prior to trial: (1) ensuring the accused's presence at trial; and (2) the accused's commission of serious criminal misconduct.[50]

The President changed the pre-trial confinement rules in the *1984 MCM* to reflect the CMA's decisions in *Courtney* and *Heard*.[51] As noted above, this change prevented commanders from considering the serious nature of the charged offense as a stand-alone justification for confining a service member before trial. Under the new rules, commanders must now be able to articulate a belief that a service member facing serious charges will either flee from his court-martial proceeding or will commit additional serious criminal misconduct.[52] In many cases, especially those offenses hinging on the credibility of victim witness testimony, a service member who commits a serious offense will not exhibit any other signs of becoming a flight risk at the early stages of the lengthy trial process. Because the victim may be unable to endure the stress of the process and testify against the accused at trial, an accused, like SGT Evenson, may delay his decision to flee until after the point when the government demonstrates the ability to succeed at trial. Unfortunately for the accused service member's commander in these types of cases, it is too late to entertain the idea of pre-trial confinement at the moment the accused finally manifests his intent to flee.

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[47] MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. V, ¶ 20c (1968).
[48] *Heard*, 3 M.J. at 20.
[49] *Id.*
[50] *Id.*
[51] MCM, *supra* note 10, R.C.M. 305 analysis.
[52] *Id.* R.C.M. 305(h).

D. *United States v. Salerno*—Future Serious Criminal Activity as a Basis for Confinement and Required Procedural Protections

In 1987, the Supreme Court examined a due-process challenge to the federal pre-trial confinement system in *United States v. Salerno*.[53] In *Salerno*, two federal defendants challenged the constitutionality of the Bail Reform Act of 1984 (BA) on the ground that the BA violated the constitutional guarantee of due process by imposing impermissible punishment before trial.[54] In particular, the defendants claimed that the government's interest in preventing future crime under the BA was insufficient to support the infringement on liberty associated with confinement prior to trial.[55] The Court, however, upheld the BA as constitutional because of the government's compelling regulatory interest in community safety and the narrow application of the BA based upon the procedural protections available to defendants facing pre-trial detention.[56]

The defendants in *Salerno* did not dispute the authority of the government to place an individual in confinement who exhibit a risk of flight before trial; instead they focused on the government's ability under the BA to confine an individual to prevent potential future criminal activity.[57] The Court, in its decision, recognized the legitimacy and compelling nature of the government's interest in protecting the community from potential criminal activity, which is furthered by the BA.[58]

Notwithstanding the government interest in preventing future misconduct, the Court noted the importance of the procedural protections present in the BA that ensure individuals who are denied bail are actually those who present a risk of flight or future criminal misconduct.[59] The Court outlined specifically how defendants facing confinement under the BA may avail themselves of the following procedural protections: (1) an

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[53] 481 U.S. 739 (1987).
[54] *Id*. at 746. The Court also examined and rejected the defendant's argument that the BA violated the Eighth Amendment's ban on excessive bail. *Id*. at 752. Whether the military's pre-trial confinement system implicates Eighth Amendment protections is a question outside the scope of this article.
[55] *Id*. at 748–49.
[56] *Id*. at 748.
[57] *Id*.
[58] *Id.* at 750.
[59] *Id.*

adversarial hearing; (2) a clear and convincing evidentiary burden, which ultimately must be borne by the government; and (3) and appellate review of the decision to detain.[60]

The Court's decision in *Salerno* provides two important conclusions relevant to the military's pre-trial confinement regime: (1) a rebuttal presumption of the accused's flight risk or likelihood that the accused will commit further serious future misconduct is capable of withstanding constitutional scrutiny; and (2) prior to adopting such a presumption, the military must ensure sufficient procedural protections are also adopted to protect the rights of all accused.

V. Applying Current Federal Bail System Principles to Military Pre-Trial Confinement Rules

With the constitutional limitations of pre-trial confinement identified, the question becomes how to change the RCM to handle cases where an accused is facing serious charges and severe punishment. These cases, by their nature, carry different risks than a standard court-martial and, as such, should be afforded special consideration when determining the issue of pre-trial confinement. By way of analogy, we can look to the federal bail system, which specifically addresses the issue of how to handle pre-trial detention of a federal defendant facing serious charges and severe punishment.[61] After examining the federal system, it is important to consider arguments against this proposed change before examining its practical application to the military.

A. The Bail Reform Act—Rebuttable Presumption Detention is Appropriate for Serious Crimes

The BA is the federal statute that provides the procedure for determining what level of pre-trial restraint is appropriate for federal

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[60] *Id*. at 750–52

[61] In *Courtney*, the Court of Military Appeals refers to the federal bail system by analogy when discussing the question of whether a commander can meet the burden of showing an accused service member should be confined prior to trial. The court specifically stated, "[b]asically, a determination that probable cause exists only confirms that a person could be detained, not that he should be detained. Assuming that he could be detained, the bail procedures in the civilian community would then be applicable." Courtney v. Williams, 1 M.J. 267, 270–71 (C.M.A. 1976).

criminal defendants.[62] Notwithstanding the limitations placed on pre-trial restraint for federal defendants, the federal criminal system recognizes the need to create a special category for defendants facing certain types of serious crimes and certain levels of punishment.[63] The BA accounts for the nexus between a defendant who is accused of committing a serious crime and the increased risk that defendant will flee or commit additional serious crimes. In recognition of this risk, the BA creates a rebuttable presumption that there is no set of conditions that will assure the presence of a defendant at trial and protect the safety of the community in the case of a defendant accused of certain crimes (e.g., certain drug offenses, terrorism, human trafficking, and crimes involving a minor victim).[64]

The practical effect of this rebuttable presumption is to deny bail to a defendant accused of a serious crime unless the defendant rebuts the presumption of flight or additional serious misconduct. The BA's rebuttable presumption is consistent with the constitutional limitations on pre-trial restraint: (1) the BA does not permit the government to place an individual in pre-trial detention based upon a presumption of guilt but rather identifies the practical and realistic circumstance that defendants properly charged with certain offenses are far more likely to flee from the judicial process or commit additional misconduct than would be the case for a defendant accused of committing a minor crime; (2) the BA provides the defendant with an opportunity to present evidence that counters the presumption that he presents either a flight risk, or threat of additional serious misconduct; and (3) the rebuttable presumption does not guarantee confinement because the government still bears the

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[62] Bail Reform Act, 18 U.S.C. §§ 3141–3150 (2012). This act contains the same basic foundational elements as RCM 305: (1) a preference for releasing a defendant from detention prior to trial; (2) a magistrate's review; (3) the requirement that the government show that detention is required either to assure the appearance of the defendant or protect the safety of individuals in the community; and (4) a graduated approach to detention where conditions placed upon an individual's release from detention are considered prior to detaining a defendant prior to trial. *See id.* § 3142(b)–(c).

[63] *See* S. REP. 98-225, at 6–7 (1983). In this report, the U.S. Senate identifies the risk associated with releasing certain defendants accused of serious offenses based upon the likelihood of flight or recidivism and includes specific statistics. As an example, the Senate report indicated that, "[a]mong defendants released on surety bond, which under the District of Columbia Code, like the Bail Reform Act, is the form of release reserved for those defendants who are the most serious bail risks, pretrial re-arrest occurred at the alarming rate of twenty-five percent." *Id.* at 6.

[64] 18 U.S.C. § 3142(e)(3).

ultimate burden of proving to a magistrate that confinement is appropriate for each individual defendant.[65]

B. Counterarguments to Implementing the Bail Reform Act's Rebuttable Presumption to the Military System.

Applying a similar rebuttable presumption to the military pretrial confinement system would be a method of reducing the inherent risk associated with service members facing serious charges. But there are two major arguments against changing the current system in favor of the rebuttable presumption: (1) it would infringe upon the rights of service members who would be confined in a manner that outweighs the benefit in decreased flight risk and community harm; and (2) including a rebuttable presumption in the military pre-trial confinement rule provides commanders with the authority to summarily confine service members accused of such an offense without a proper check on that authority. While both of these are valid concerns, a deeper analysis of the issue of pre-trial confinement in the military suggests that these arguments are overwhelmed by the greater need to prevent the consequences of SGT Evenson's case.

1. The Current Pre-Trial Confinement Does Not Adequately Protect the Full Rights of the Accused and Other Individuals

The basic, and perhaps, the most compelling argument against changing the military pre-trial confinement system is that including a rebuttable presumption is too great an encroachment upon the rights of an accused service member. Such an argument, however, fails to fully recognize the panoply of consequences resulting from an accused service

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[65] *See* United States v. Portes, 786 F.2d 758 (7th Cir. 1985). The *Portes* court discusses the process of burden shifting that occurs when the government asserts the BA's rebuttable presumption. In maintaining the presumption of a defendant's innocence, the BA's rebuttable presumption operates as a burden of production, whereby the defendant produces evidence that he will not flee or pose a threat to the community. *Id*. at 764. Once the defendant meets that burden of production, the rebuttable presumption still exists as a factor for the magistrate to consider when deciding whether the government has met the burden of proving by clear and convincing evidence that a no condition or set of conditions exists to ensure the presence of the defendant and safety of the community. *Id*.

member's decision to either flee before trial or commit additional serious misconduct.

On one side of the balancing sheet, there are two possible scenarios for an accused who is confined prior to trial under a rebuttable-presumption model. In the least concerning case the accused will be found guilty at trial and sentenced to confinement, and will, consequently, receive credit towards his sentence for the time spent in pre-trial confinement.[66] In its worst case, a service member accused of a serious crime will be confined prior to trial but will be released upon an acquittal. One must concede that any infringement upon the rights of an individual should be avoided whenever possible; however, such an argument fails to fully examine the other side of the balance sheet. The *Salerno* Court validated the government's interest in using pre-trial confinement to protect the community from harm. Sergeant Evenson's case serves as a stark example of the risks to the community, which includes the accused, when commanders are unable to use the same tools available to the government under the BA.

Under this full calculus, it becomes apparent why the military pre-trial confinement system must recognize, appreciate, and mitigate the true risk existing in cases where an accused is charged with a serious offense. By changing the military pre-trial confinement system to better reflect the current federal system, a service member's rights will be guaranteed the same level of protections as currently exist within the civilian federal system. Further in a culture prepared to sacrifice many rights and freedoms in service to our nation, any rights that service members will sacrifice under this proposed system are outweighed by the government's interest in protecting the rights of service members, families, and victims that were lost in the outcome of SGT Evenson's case.

2. United States v. Freitas*—Bail Reform Act's Rebuttable Presumption Does Not Provide the Government with Excessive Authority*

It is difficult to examine this issue in the context of military justice, as no such presumption has ever existed within our system; however, there are cases within the federal system that have examined the rebuttable presumption of the BA. In *United States v. Freitas*, the

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[66] *See* United States v. Allen, 17 M.J. 126, 126 (C.M.A. 1984).

defendant was placed in pre-trial detention based, in part, upon probable cause that the defendant committed a crime, which triggered the BA's rebuttable presumption, but the defendant argued that the BA's rebuttable presumption effectively denied him an opportunity for an individualized analysis of his bail eligibility and that the presumption, therefore, effectively denied bail to an entire class of persons.[67]

The court ultimately rejected the defendant's argument. In particular, the court noted that the defendant is still entitled to a hearing where the government is required to persuade a magistrate that detention is necessary.[68] Furthermore, the BA allows the defendant to rebut the presumption that he will flee or commit additional misconduct. The court stated that it was,

> not persuaded that the rebuttable presumption in the Bail Act so handicaps a criminal defendant as to create a category of cases for which bail will not be permitted. Since the subject of the inquiry is the defendant himself, much of the information that would be helpful to the court in settling release conditions is likely to be within the defendant's possession.[69]

The same line of reasoning in *Freitas* applies to the military context, in that a commander does not have the last say in whether an accused service member remains in confinement. Even though a commander would be able to order a service member into confinement based upon a rebuttable presumption, the accused would still be entitled to a magistrate's review within seven days of that order.[70] At this review, the accused would have an opportunity to present evidence to a neutral and detached officer to rebut the presumption, and the government would maintain the burden of persuading a magistrate that confinement is necessary.

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[67] United States v. Freitas, 602 F. Supp. 1283, 1288 (N.D. Cal 1985). The defendant's argument in *Freitas* is a close analogy to the argument that commanders in the military system will have unbridled authority to make arbitrary and capricious decisions to confine service members prior to trial, thereby denying the service member the presumption of innocence and the right to be free from unnecessary governmental intrusion.

[68] *Id*. at 1288–89.

[69] *Id*. at 1289.

[70] *See* MCM, *supra* note 10, R.C.M. 305(i)(2).

Moreover, a commander would face a difficult decision when deciding whether to invoke the rebuttable presumption and confine a service member accused of a serious offense before trial. On one hand, if confined the accused has the right to be tried no later than 120 days after the date of confinement, and the government must diligently move a confined service member's case to trial.[71] Consequently, the government's decision to confine a service member may accelerate its trial timeline. On the other hand, the longer a commander waits to make this decision, the more he undercuts his argument that pre-trial confinement is necessary. Therefore, the government cannot take lightly the decision to confine a service member before trial even in the case of a service member accused of a serious offense.

C. Applying the Bail Reform Act to the Military Pre-Trial Confinement System

Once it becomes clear that the current pre-trial confinement system requires the same type of rebuttable presumption within the BA, the question remains as to how to implement such a change. This analysis requires: (1) an examination of whether the BA, as applied to the military system, complies with constitutional limitations as described in case law; and (2) a practical consideration of how the BA's rebuttable presumption would work in the military system.

1. The BA's Rebuttable Presumption Contained Complies with Constitutional Limitations of Pre-Trial Confinement in the Military

Based on the factual scenario presented in SGT Evenson's case, it is reasonable to presume that the command would have sought pre-trial confinement if the RCMs contained a provision similar to the one that exists in the BA. Such a provision would have created a presumption that SGT Evenson would have fled at some point during the trial process, allowing for his confinement prior to trial. The question is whether any such rebuttable presumption meets statutory and constitutional scrutiny. The *Heard* case, discussed above, cautions the government from confining a Soldier based solely upon the seriousness of an offense. When responding to the government's contention that the seriousness of the accused's offense in *Heard* alone justified detention, the court stated,

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[71] *See id.* R.C.M. 707; *see also* UCMJ art. 10 (2012).

"[a]n accused is presumed innocent until proved guilty, and, therefore, punishment for an alleged offense is prohibited before trial. Any rule to the contrary would be to deny an accused due process of the law."[72] The court goes on to describe that the proper basis for pre-trial detention is: (1) to ensure the accused's presence at trial or (2) to protect the safety of the community, but only when (3) that all lesser forms of restraint are inadequate.[73]

The rebuttable presumption contained in the BA is congruent with the pre-trial confinement requirements listed by the *Heard* court. First, the presumption in the BA does not permit the government to confine a defendant based upon the seriousness of an offense alone, instead it identifies certain offenses where, by the nature of the offense, there is an inherent risk that a defendant with either flee or will do further harm in the surrounding community–the precise conditions that the *Heard* court identified as permissible for pre-trial confinement.[74] Further the BA protects an accused's right to the presumption of innocence because the government maintains the burden or persuasion throughout the entire pre-trial confinement process.[75] Consequently, the rebuttable presumption, if adopted for the military system, would appropriately provide a different level of pre-trial confinement analysis for cases where an accused is charged with serious crimes and facing severe punishment while at the same time meeting the constitutional requirements for pre-trial confinement as described by the court in *Heard*.

It remains unsettled whether current procedural protections under RCM 305 are sufficient to withstand the constitutional scrutiny applied in *Salerno*.[76] In contrast to the significant procedural protections available to a federal defendant under the BA, a military accused receives only a non-adversarial magistrate's review, which is founded upon the probable-cause standard of proof and for which there is limited post-decision review.[77] Thus, any discussion of adding a rebuttable presumption of flight risk or danger to the community to the military pre-trial confinement system must include consideration of altering the military pre-trial confinement procedural protections to better reflect

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[72] United States v. Heard, 3 M.J. 14, 20 (C.M.A. 1977).
[73] *Id*. at 20–21.
[74] *See* 18 U.S.C. § 3142(e)(3) (2012).
[75] *Id.* § 3142(f)(2)B.
[76] 481 U.S. 750 (1987).
[77] *See* MCM, *supra* note 10, R.C.M. 305.

those Congress provided to federal defendants in the BA.[78] But as a matter of fairness, any effort to incorporate the BA's rebuttable presumption should include, as a matter of policy, if not constitutional prerequisite, the procedural protections inherent in the BA.

2. How Would the Bail Reform Act's Rebuttable Presumption Work, If Applied to the Military System?

If the Congress adopted a rebuttable presumption, similar to that which exists in the BA, within the military-justice system, it is important to consider the practical effect to ensure that a theoretical rule is capable of realistic application. The first consideration is how extensively to apply the rebuttable presumption, or which charged crimes would carry the presumption that an accused would flee or commit additional serious criminal misconduct. Like the federal system, the military should judiciously apply this presumption to the few crimes in which there is an actual risk of flight or additional criminal activity. In order to determine which crimes should qualify for a presumption of fight or serious misconduct, the Department of Defense could conduct a study and review of cases over a specified period of time to determine which offenses result in said increased risk.

The next practical consideration is to determine how a rebuttable presumption would apply within the current pre-trial confinement system. Under the current RCM pertaining to pre-trial confinement, there are generally two major decision points: (1) when an officer initially orders a service member into confinement;[79] and (2) when the decision to confine that service member is reviewed by a neutral and detached officer within seven days of the confinement order.[80] The rebuttable presumption would come into play during both of those major decision points.

First, the RCM could include a specific caveat that serves as a limitation on a commander's authority to invoke the rebuttable

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[78] A question remains as to whether the military pre-trial confinement as it exists today requires the procedural protections listed by the *Salerno* Court, even in the absence of an update that would include a rebuttable presumption similar to the BA. The analysis of that topic, as well as the specific form of the protections required to meet the due process requirements of the *Salerno* Court is outside the scope of this article.

[79] *See* MCM, *supra* note 10, R.C.M. 305(d).

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

presumption. This caveat would require commanders to consult with a judge advocate to make sure the accused's misconduct either fits within the traditional pre-trial confinement pre-requisites or that the commander could reasonably charge the accused with an offense that fits within the categories where the rebuttable presumption is applicable.[81]

The second time the rebuttable presumption would come into play is at the seven day magistrate's review. A neutral and detached magistrate could initially review the government's claim there is probable cause to believe an accused committed the type of offense that involves a rebuttable presumption the accused will either flee or commit additional misconduct. Then the magistrate could receive any evidence from the accused which rebuts the initial presumption and could analyze whether the government has met the overall burden to persuade the magistrate it has met the foundational elements of the pre-trial confinement rules.[82]

Applying the BA's rebuttable presumption to the pre-trial confinement system in the military is a feasible solution to prevent the issue that presented itself in SGT Evenson's case—the failure to timely address the flight risk associated with the serious nature of the charged crimes and a potential life sentence facing an accused. The rebuttable presumption meets constitutional muster and can practically be applied to the military system. Therefore, it is worth consideration as a means of mitigating the pre-trial risk of flight or additional misconduct inherent in cases like SGT Evenson's.

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[81] This slight alteration to the existing pre-trial confinement rules in the *MCM* would serve as a check on a commander's authority to utilize any rebuttable presumption and bring judge advocates in to the process early enough to advise commanders whether they have sufficient evidence to support a charge which carries the risk an accused would either flee or commit additional serious criminal misconduct prior to trial.

[82] *See generally* U.S. ARMY TRIAL JUDICIARY, STANDARD OPERATING PROCEDURE FOR MILITARY MAGISTRATES (10 Sept. 2013). Under the current framework described in the Magistrate's standard-operating procedures, the magistrate already reviews a commander's decisions that an offense was committed by the accused and whether continued confinement is necessary because it is foreseeable that an accused will flee, or engage in serious criminal misconduct, and that lesser forms of restraint are inadequate. It would not be difficult to add one more layer of analysis that requires a magistrate to verify there is sufficient evidence to support a finding that an accused committed an offense where there is a statutorily created rebuttable presumption that an accused will flee or commit additional serious criminal misconduct and that lesser forms of restraint are insufficient.

VI. Conclusion

Notwithstanding SGT Evenson's heinous crimes, the circumstances surrounding SGT Evenson's ultimate demise were nothing less than a tragedy. While in hindsight it is always easy to second guess decisions, one finds it difficult not to come to the conclusion that the end result in SGT Evenson's case was completely and utterly avoidable. Sergeant Evenson's commanders, who knew him best, wanted to place him in confinement but could not find the authority to do so under the existing pre-trial confinement in the military. Sergeant Evenson's commanders and government counsel could only cite their concern for the high degree of risk of flight associated with being charged with the rape of a minor child and a potential sentence of life in prison–which was not sufficient justification under the current rules for courts-martial. The BA provides the proper solution to the problem SGT Evenson's commanders faced. By adopting a rebuttable presumption that service members charged with certain serious crimes and facing potentially severe punishment will flee or commit additional serious criminal misconduct, the military can address the issue presented in the Evenson case. The rebuttable presumption is consistent with the historical principles, congruent with constitutional limitations, and capable of practical implication within the military pre-trial confinement system. Based upon the potential severe consequences as exhibited in SGT Evenson's case and the relative ease with which these consequences can be avoided, the President should amend the RCM pertaining to pre-trial confinement. The RCM should contain a rebuttable presumption for certain cases based upon the serious nature of the charged offenses and the potential for exposure to a grave level of punishment that an accused will not be present for all phases of a trial and that lesser forms of restraint are inadequate.