Walking the Fine Line Between Promptness and Haste:[1] Recent Developments in Speedy Trial and Pretrial Restraint Jurisprudence

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Introduction

There are six sources of the right to a speedy trial in the military: (1) statute of limitations;[2] (2) the Due Process Clause of the Fifth Amendment;[3] (3) the Sixth Amendment;[4] (4) Articles 10 and 33 of the UCMJ;[5] (5) Rule for Courts-Martial (R.C.M.) 707;[6] and (6) case law.[7] The 1991 amendments to R.C.M. 707[8] significantly changed the 120-day speedy trial rule,[9] particularly in the area of excludable delays.[10] In last year's most significant speedy trial case, *United States v. Dies*,[11] the Court of Appeals for the Armed Forces (CAAF) returned in part to the "catalog-of-excluded-periods approach," by determining that the period of time that an accused absents himself without leave (AWOL) is automatically excludable from government accountability. In *United States v. Hatfield*,[12] the CAAF also shed new light on the "reasonable diligence"[13] standard for governmental compliance with Article 10[14] speedy trial rights.

The CAAF also issued three opinions dealing with the related topic of pretrial restraint.[15] In *United States v. Gaither*,[16]

1. *See* Powell v. Alabama, 287 U.S. 45, 59 (1932):

> The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice but to go forward with the haste of a mob.

See also Henderson v. Bannan, 256 F.2d 363, 390 (6th Cir. 1958) (Stewart, J., dissenting): "The prompt and vigorous administration of the criminal law is to be commended and encouraged. But swift justice demands more than just swiftness . . ."

2. UCMJ art. 43 (1988).

3. U.S. CONST. amend V.

4. *Id.* amend VI.

5. UCMJ arts. 10, 33 (1988).

6. MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 707 (1995 ed.) [hereinafter MCM].

7. United States v. Reed, 41 M.J. 449 (1995).

8. MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 707 (1984) (C5, 6 Jul 91).

9. For example, the amendment changed one event that triggers the clock from notice of preferral of charges to preferral; it changed the sole remedy from dismissal with prejudice to dismissal with or without prejudice and it eliminated the separate ninety day clock for pretrial confinement and arrest cases. *Id.*

10. Prior to Change 5 to R.C.M. 707, the government was not accountable for either periods of time covered by defense delays or for periods enumerated in the rule as excludable periods. MCM, *supra* note 8, R.C.M. 707 (1984). The drafters abandoned this "catalog-of-excluded-periods approach" in favor of a "contemporaneous-ruling approach." United States v. Dies, 45 M.J. 376 (1996).

11. 45 M.J. 376 (1996).

12. 44 M.J. 22 (1996).

13. *See* United States v. Kossman, 38 M.J. 258 (C.M.A. 1993) (holding that reasonable diligence is the standard for measuring government compliance with Article 10).

14. UCMJ art. 10 (1988).

15. Pretrial restraint law is closely related to speedy trial law because several forms of pretrial restraint enumerated in R.C.M. 304 trigger the R.C.M. 707 speedy trial clock. MCM, *supra* note 6, R.C.M. 304(a)(2)-(4), 707(a)(2). Arrest, R.C.M. 304(a)(3), and pretrial confinement, R.C.M. 304(a)(4), trigger Article 10 speedy trial rights. UCMJ art. 10 (1988).

16. United States v. Gaither, 45 M.J. 349 (1996).

the CAAF resolved the disagreement among the service courts on the proper standard of review a military judge should apply in conducting pretrial confinement reviews. The CAAF also addressed the issue of *Rexroat*[17] sentence credit for restraint tantamount to pretrial confinement in *United States v. Perez*.[18] Finally, in *United States v. Tilghman*,[19] the court refused to grant additional sentence credit for illegal pretrial confinement imposed during the recess of the case.

Speedy Trial

The CAAF Creates an Automatic Delay Under R.C.M. 707(c)

Prior to the R.C.M. 707 amendment in 1991, speedy trial motions[20] often degraded into "[p]athetic side-shows of claims and counter-claims, accusations and counter-accusations, proposed chronologies and counter-proposed chronologies, and always the endless succession of witnesses offering hindsight as to who was responsible for this minute of delay and who for that over the preceding months."[21] The 1991 amendments eliminated the list of automatic excludable delay periods and adopted the contemporaneous-ruling approach to handling delays. The drafters of the amended rule intended to eliminate such "[a]fter-the-fact determinations as to whether certain periods of delay are excludable."[22]

According to the amended rule, a party should request a delay from competent authority,[23] providing notice to the opposing party,[24] at the time of the desired delay. There are times, however, when the government may not have secured a proper, contemporaneous delay in advance, yet asks to be relieved from accountability for the time. The most compelling situation in favor of the government's position occurs when the accused goes AWOL during the preparation of the case.[25] According to *Dies*, the government is not accountable for periods when the accused is AWOL, even if it has not secured a delay from competent authority covering the period.[26]

In *Dies*, the accused was AWOL for twenty-three days after unrelated charges were preferred against him.[27] Preferral of charges triggered the R.C.M. 707(a) speedy trial clock.[28] Although the speedy trial clock had begun, the government neglected to secure a delay for the accused's twenty-three-day AWOL. The accused was arraigned 146 days after preferral, and the defense moved to dismiss the charges for violation of the R.C.M. 707(a) 120-day rule. The military judge, relying on the Court of Military Appeals (CMA)[29] decision in *United*

17. United States v. Rexroat, 38 M.J. 292 (C.M.A. 1993), *cert. denied*, 114 S. Ct. 1296 (1994) (holding that the forty-eight hour time limit for judicial reviews of continued confinement after warrantless arrests applies to the military.)

18. 45 M.J. 323 (1996).

19. 44 M.J. 493 (1996).

20. Speedy trial issues are usually raised as motions to dismiss under R.C.M. 907. MCM, *supra* note 6, R.C.M. 907(b)(2)(A).

21. United States v. Dies, 45 M.J. 376, 377-78 (1996).

22. MCM, *supra* note 6, R.C.M. 707 analysis, app. 21, at 21-40.

23. Prior to referral, the convening authority is the only competent authority to grant delays. After referral, the military judge resolves delay requests. MCM, *supra* note 6, R.C.M. 707(c)(1).

24. *See* United States v. Duncan, 38 M.J. 476, 479-80 (C.M.A. 1993) (holding that, absent extraordinary circumstances, government should inform accused of all government-requested pretrial delays in advance and give accused an opportunity to respond).

25. *See* United States v. Powell, 38 M.J. 153 (C.M.A. 1993) (government not accountable for period that accused is AWOL when preferral occurred prior to 1991 R.C.M. 707 amendment and arraignment occurred after change in rule). *Powell* presented unique facts. Preferral occurred under the old rule, where preferral was an irrelevant event for speedy trial purposes. The accused went AWOL before he could be notified of the charges, which was the relevant event under the old rule. The accused was caught and later arraigned with the new rule in effect. The court sorted through the confusion and avoided an "absurd" result by concluding that the government was not obliged to secure a delay for the AWOL period when, under the old rule, the clock had not even been triggered. *Id.* at 154-55. Clearly, none of the compelling facts and blameless complacency that occurred in *Powell* are present in *Dies*.

26. *Dies*, 45 M.J. at 377.

27. *Id.*

28. MCM, *supra* note 6, R.C.M. 707(a)(1), states the following:

> (a) *In general.* The accused shall be brought to trial within 120 days after the earlier of:
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> (1) Preferral of charges;
>
> (2) The imposition of restraint under R.C.M. 304(a)(2)-(4); or
>
> (3) Entry on active duty under R.C.M. 204.

States v. Powell,[30] found that the government was not accountable for the period of time that the accused was AWOL.[31]

The Navy-Marine Corps Court of Criminal Appeals (NMCCA) disagreed with the trial judge's interpretation of *United States v. Powell*. The NMCCA opined that the holding in *Powell* was limited to the unique case in which the charges were preferred prior to the amendment of R.C.M. 707.[32] No such situation arose in *Dies*, because both the preferral and arraignment of the accused occurred under the amended rule. The NMCCA found *Powell* inapplicable and held that the military judge could not relieve the government of accountability for the AWOL period by granting an after-the-fact delay.[33]

The CAAF set aside the NMCCA decision and clarified its position on speedy trial accountability for periods of AWOL.[34] It held that "[a]n accused who is an unauthorized absentee is estopped from asserting a denial of speedy trial during the period of his absence, at a minimum."[35] While an accused is AWOL, the court refused to force the government to make efforts to proceed to trial, which the court described as "futile."[36]

The opinion did not stop with equities, though. The court also explained how its holding was consistent with the language of R.C.M. 707(c).[37] The court opined that R.C.M. 707(c) merely lists *one* category of period excluded from the speedy trial count; "the rule does not say that those, and only those, stays and delays are excludable."[38] It rejected the notion that R.C.M. 707(c) is intended to be an exhaustive list of periods that are excludable from government accountability.[39] The court also justified its holding by claiming that it was "consistent" with both the Federal Speedy Trial Act (FSTA) [40] and the American Bar Association (ABA) Standards for Criminal Justice, Speedy Trials.[41]

Dies is significant because it displays, at least with respect to the current R.C.M. 707, the CAAF's lack of deference to the President's rule-making authority under Article 36.[42] In promulgating the current version of R.C.M. 707(c), the President specifically eliminated the list of periods of time that presumptively qualified as excludable delay under the prior rule.[43] In doing so, it put practitioners on clear notice that the government was accountable for all periods of time--regardless of the equities[44]--unless an "excludable delay" had been granted by competent authority.[45] It enabled the government, though, to secure delays by setting out a detailed procedure for the parties to fol-

29. On 5 October 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994) changed the name of the United States Court of Military Appeals to the United States Court of Appeals for the Armed Forces (codified at 10 U.S.C. § 941 (1995)).

30. 38 M.J. 153 (C.M.A. 1993).

31. United States v. Dies, 42 M.J. 847, 850 (N.M.Ct.Crim.App. 1995).

32. *Id.* at 851.

33. *Id*. The court left open the possibility that in extraordinary circumstances, such as unforeseeable military exigencies, military judges may grant an after-the-fact delay. *Id*. at 850 n.2.

34. United States v. Dies, 45 M.J. 376, 378 (1996).

35. *Id.*

36. *Id.*

37. R.C.M. 707(c), excludable delay, states, "all periods of time covered by stays issued by appellate courts and all other pretrial delays approved by a military judge shall be excluded when determining whether the period in subsection (a) of this rule has run." MCM, *supra* note 6, R.C.M. 707(c).

38. *Dies*, 45 M.J. at 378.

39. *Id.*

40. 18 U.S.C. § 3161 (1988). The Federal Speedy Trial Act (FSTA) contains a specific exemption for any time that the accused is absent. *Id.* § 3161(h)(3)(A). In order to be considered absent, the prosecution must show that accused's whereabouts are unknown and that the accused is attempting to avoid apprehension or prosecution, or that his whereabouts cannot be determined by due diligence. *Id.*

41. American Bar Association, Standards for Criminal Justice, Speedy Trials, standard 12-2.3(e) (1986) [hereinafter ABA Standards]. This ABA standard provides that periods of delay resulting from absence or unavailability of the defendant are excluded in computing the time for trial.

42. UCMJ art. 36 (1988). In Article 36, the Congress delegated to the President the power to prescribe pre-trial, trial and post-trial procedures.

43. Prior to Change 5 to R.C.M. 707, R.C.M. 707(c) contained nine periods that were automatically excluded when determining whether the 120 days had run. Many of those reasons are now enumerated in the discussion to R.C.M. 707(c). The CAAF's efforts, therefore, to interpret this rule consistently with the FSTA, section 3161(h)(3)(A), and ABA Standard 12-2.3 are strained. *See supra* notes 40 and 41 and accompanying text. Both the FSTA and the ABA Standards contain lists of automatic excludable periods, just like the *old* R.C.M. 707. It is illogical to suggest that if the President explicitly rejected this scheme, he nevertheless intended the new rule to be interpreted consistently with the previous one.

low.[46] Finally, it created a new remedy--dismissal without prejudice--for the military judge to apply when the equities weighed in favor of the government.[47] In short, the new rule eliminated the uncertainty and protracted litigation about which the CAAF was so critical.

The CAAF, however, has rejected the President's regulatory scheme and created an automatic exclusion for the government. The question for practitioners is whether, based on *Dies*, there are other periods of time that are also automatically excluded from government accountability. Although the court characterized its holding in *Dies* as "limited," it clearly opened the door to the creation of additional categories of "excludable delays" where the same equitable arguments apply on behalf of the government.[48] Notwithstanding *Dies*, the most prudent course of action for government counsel is to secure a contemporaneous ruling from competent authority for any periods of delay.

Speedy Trial Under Article 10

Article 10 mandates that, after confinement or arrest, the government must take immediate steps to try a prisoner or to release him.[49] In *United States v. Kossman*, the CMA held that the standard for measuring government compliance with Article 10 is "reasonable diligence."[50] Since *Kossman*, practitioners and the courts have wrestled with the question of what actions reflect "reasonable diligence" on the part of the government.[51] The overwhelming majority of recent cases addressing this issue have found that the government proceeded with reasonable diligence.[52] In *United States v. Hatfield*,[53] the CAAF, for the first time, has reversed a service court's finding of reasonable diligence.

The central issue in *Hatfield* was whether the military judge abused his discretion[54] when characterizing five periods of delay, totaling forty-eight days. The military judge characterized the entire period as "inordinate delay" and dismissed the charges.[55] The government appealed the ruling and the NMCCA reversed.[56] The NMCCA examined the reasonable diligence standard in depth and concluded that the military judge abused his discretion in dismissing the charges under Article 10.[57]

44. The analysis clearly states that the excludable delay subsection follows the principle that the government is accountable for all time prior to trial unless a competent authority grants a delay. R.C.M. 707(c), Analysis, app. 21, at 21-40, *supra* note 6. The CAAF interpreted the rule differently, concluding that there is "[n]othing even in the current version of R.C.M. 707 that assesses the Government for an accused's unauthorized absence." *Dies*, 45 M.J. at 378.

45. Prior to referral, the convening authority normally rules on requests for pretrial delay. After referral, the military judge rules on such requests. MCM, *supra* note 6, R.C.M. 707(c)(1). The discussion to this subsection states that prior to referral, the convening authority may delegate the authority to grant continuances to an Article 32 investigating officer. Absent express delegation, though, the Article 32 investigating officer does not have independent, inherent authority to grant delays which will be considered "excludable delays" under R.C.M. 707(c). *See* United States v. Thompson, 44 M.J. 598, 602 (N.M.Ct.Crim.App. 1996).

46. Rule 305(c)(1), when read in conjunction with the discussion, sets out a detailed procedure which prescribes the timing and form of requests for delays, the content of requests, the appropriate approval authorities, and reasons to grant delays. MCM, *supra* note 6, R.C.M. 707(c)(1) and discussion. The CAAF, though, chided the drafters of the new rule for sending to the President a rule "sans substantive guidelines." *Dies*, 45 M.J. at 378.

47. MCM, *supra* note 6, R.C.M. 707(d). The government could make a compelling argument for dismissal without prejudice if the government violated the 120-day rule solely because it was held accountable for the accused's AWOL period.

48. The government may consider the accused "beyond the control" of the government where the crime occurs overseas and the host country asserts jurisdiction. A significant period of time may elapse while the host country and the United States military determine who will prosecute the case. In *United States v. Youngberg*, 38 M.J. 635 (A.C.M.R. 1993), *aff'd on different grounds*, 43 M.J. 379 (C.M.A. 1995), the Army Court of Military Review (ACMR) held that the government is not accountable for such periods, even though it neglected to secure a delay to cover the time.

49. UCMJ art. 10 (1988).

50. United States v. Kossman, 38 M.J. 258 (C.M.A. 1993).

51. In *Kossman*, the CMA described reasonable diligence as something other than constant motion by the prosecution. Brief periods of inactivity were found to be permissible so long as they were not unreasonable or oppressive. *Id*. at 262. The court observed that an Article 10 issue would be raised where government could have gone to trial but negligently or spitefully chose not to. *Id*. at 261.

52. *See, e.g.*, United States v. Strouse, 1996 WL 255855 (A.F. Ct. Crim. App. May 8, 1996) (government proceeded with reasonable diligence when it brought accused to trial 116 days after imposition of pretrial confinement); United States v. Butler, 1996 WL 84607 (A.F. Ct. Crim. App. Feb. 23, 1996).

53. United States v. Hatfield, 44 M.J. 22 (1996).

54. Appellate courts apply an abuse of discretion standard in reviewing Article 10 rulings by the military judge. *See Kossman*, 38 M.J. at 262.

55. *Hatfield*, 44 M.J. at 23.

56. United States v. Hatfield, 43 M.J. 662, 663 (N.M.Ct.Crim.App. 1995).

57. *Id.*

The NMCCA first examined the sufficiency of the military judge's factual findings. It determined that the evidence did not support the judge's computation of forty-eight days of government inactivity because the government took specific steps toward trial on many of the days.[58] The court then examined the military judge's characterization of the "delay" as "inordinate." It concluded that because many steps needed for court-martial were accomplished on the disputed days, the military judge erred in concluding that the government lacked reasonable diligence.[59] Finally, the court also determined that the military judge misapplied the law, reiterating that the test for reasonable diligence is *not* whether the government could have gone to trial sooner, because absent evidence of negligence or spite, mere delay does not establish that the government violated Article 10.[60]

The CAAF, however, disagreed with the NMCCA finding that the military judge had not abused his discretion.[61] First, the court highlighted some of the conditions it expects military judges to consider in evaluating the chronologies of military cases. These include: case complexity; logistical challenges inherent in a mobile, world-wide system; operational necessities; ordinary judicial impediments, such as crowded dockets; and judge and attorney availability.[62] Practitioners should be mindful of this list of relevant events in preparing their chronologies.

The CAAF validated what it considered the two primary concerns that the military judge had in the case: the overall lack of forward motion in the case,[63] and the specific delays associated with appointing a military defense counsel. In particular, the Navy Legal Service Office responsible for appointing the defense counsel refused to accept the case file because some documents were missing.[64] Instead of taking immediate steps to secure the documents, the file sat untouched for several days.[65] The CAAF was also extremely critical of the lackadaisical government effort to secure a defense counsel for the accused.

In evaluating the significance of this case, counsel may conclude that it has little value because the facts were a true aberration--a worst case scenario of delay due to an unusual sequence of events and circumstances. Certainly, the military judge and the CAAF focused on this fact.[66] Practitioners, though, can learn more.

First, the CAAF printed the detailed findings of fact entered by the military judge.[67] It appears from the findings that the parties kept adequate records and were able to marshal the evidence at the hearing. When litigating Article 10 motions, counsel should not limit their efforts to filing a brief and presenting evidence. Counsel should look at the findings of fact as another opportunity for advocacy and, in every case, should submit to the military judge proposed findings of fact on the disputed facts.[68] While it may require additional work on the part of counsel, this practice ensures that the military judge does not overlook any evidence, and it provides a beneficial rendition of the facts that the military judge may draw from in entering the findings.

It also may be helpful to practitioners to contemplate the fundamental difference in how the NMCCA and the military judge viewed the delays. The military judge added the individual delay periods together and then evaluated the 48-day period. He found that, as a whole, the total period demonstrated inordinate delay because the government had neglected to move the case toward trial during this period.[69] The military

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58. *Id.* at 666.

59. *Id.*

60. *Id.* at 667.

61. *Hatfield*, 44 M.J. at 24-25.

62. *Id.* at 23 (quoting United States v. Kossman, 38 M.J. 258, 261-62 (C.M.A. 1993)).

63. For example, there were delays associated with all of the following events: re-preferring the original charges; compiling the paperwork for delivery to the appropriate Naval Legal Service Office; preparing the appointment letter for the Article 32 investigating officer; securing the availability of counsel for the Article 32 hearing; and preparation of the SJA's recommendation for forwarding of the charges to the general court-martial convening authority. *Id.* at 25.

64. *Id.*

65. A clerk went on leave for a few days, and no one else worked on the file. *Id.* at 25-26.

66. *Id.* at 24.

67. *Id.* at 25-16.

68. The parties should consider entering a stipulation of fact for the undisputed portions of the case chronologies. *See* United States v. Laminman, 41 M.J. 518, 522 n.2 (C.G.Ct.Crim.App. 1994) (en banc).

69. *Hatfield*, 44 M.J. at 23.

judge stated a concern even for brief periods of inactivity, which often can add up to lengthy periods of confinement.[70]

In contrast, the NMCCA analyzed each period of delay independently and found that none of them amounted to more than a "[p]eriod of inactivity . . . [that] can fairly be described as brief in length."[71] Comparing the facts to pre-*Burton*[72] cases, the NMCCA concluded that the longest single delay period (21 days) was far shorter than the typical length of delay where pre-*Burton* courts dismissed the charges for violations of Article 10.[73] It is noteworthy that the CAAF did not adopt this methodology in its review.

Pretrial Restraint

Standards of Military Judge Reviews of Pretrial Confinement

Military judges review pretrial confinement under essentially three circumstances: (1) when ruling on whether the accused is entitled to administrative credit for a violation of various subsections of R.C.M. 305;[74] (2) when ruling on whether the accused is entitled to administrative credit because the pretrial confinement was served as the result of an abuse of discretion;[75] and (3) when determining whether the accused should be released from pretrial confinement.[76] These issues are normally raised in a motion for appropriate relief.[77] In the first two circumstances, the question is whether the confinement already served was proper; in the third, it is whether the accused should be released.[78]

In *United States v. Gaither*,[79] the CAAF resolved the disagreement between the service courts[80] on the different standards of review for military judges reviewing pretrial confinement, particularly under R.C.M. 305(j).[81] The court clarified that the appropriate standard of review depends on whether the military judge is conducting a review under R.C.M. 305(j)(1)(A) or R.C.M. 305(j)(1)(B).[82]

In *Gaither*, the accused requested additional sentence credit[83] for illegal pretrial confinement.[84] He alleged that the R.C.M. 305(i) reviewing officer[85] erred in deciding to continue the pretrial confinement on the basis that the accused was a flight risk.[86] The military judge held a *de novo* hearing on the issue, allowing the government to present the same evidence

70. *Id.*

71. *Hatfield*, 43 M.J. at 667 (N.M.Ct.Crim.App. 1994).

72. United States v. Burton, 44 C.M.R. 166 (1971). In *Burton*, the CMA created a presumption that Article 10 is violated whenever an accused is held in confinement or arrest for longer than 90 days. The CMA overruled *Burton* in *United States v. Kossman*, 38 M.J. 258 (C.M.A. 1993). The court articulated the new standard for compliance with Article 10 in terms of pre-*Burton* law; therefore, the courts and practitioners continue to consider pre-*Burton* law as guidance in sorting out the "reasonable diligence" standard of Article 10.

73. *Hatfield*, 43 M.J. at 667.

74. An accused is entitled to administrative credit for failure to comply with R.C.M. 305(f) (right to military counsel); R.C.M. 305(h) (notification and action by commander); or R.C.M. 305(i) (review by neutral and detached official). MCM, *supra* note 6, R.C.M. 305(l)(2). The remedy for noncompliance with these subsections is one day of administrative credit, credited against the sentence adjudged, for each day of confinement served as a result of such noncompliance. *Id.* at 305(k).

75. An accused is entitled to administrative credit for pretrial confinement served as a result of an abuse of discretion. *Id.* at 305(j)(2). Depending on the timing of the motion, the defense may request that the accused be released from pretrial confinement in addition to the sentence credit. *See* id. at 305(j)(1)(A).

76. First, if the reviewing officer's decision was an abuse of discretion *and* the government fails to present sufficient evidence to justify continued confinement, then the military judge will release the accused. *Id.* at 305(j)(1)(A). The accused is also entitled to administrative sentence credit. Second, the military judge must release the accused if there was no abuse of discretion, but information not presented to the reviewing officer establishes that the prisoner should be released. *Id.* at 305(j)(1)(B). The last situation where the military judge will examine this issue is where no reviewing officer has reviewed the pretrial confinement. In that case, the military judge will conduct a review and release the accused if the government fails to present information to establish sufficient grounds for continued confinement. *Id.* at 305(j)(1)(C).

77. *Id.* at 906(b)(8).

78. United States v. Gaither, 45 M.J. 349, 351 (1996).

79. *Id.*

80. *Compare* United States v. Hitchman, 29 M.J. 951 (A.C.M.R. 1990) (de novo review proper in conducting R.C.M. 305(j) reviews of pretrial confinement), *with* United States v. Gaither, 41 M.J. 774 (A.F. Ct. Crim. App. 1995) (appropriate standard of review depends on the type of R.C.M. 305(j) review).

81. MCM, *supra* note 6, R.C.M. 305(j).

82. *Gaither*, 45 M.J. at 351-52.

83. Apparently Gaither was not asking to be released, so his situation fits into the second category of inquiry. *See supra* note 75 and accompanying text.

84. United States v. Gaither, 41 M.J 774, 776 (A.F. Ct. Crim. App. 1995).

that the reviewing officer had considered at the R.C.M. 305(i) hearing. Additionally, the military judge considered evidence that was not available to the reviewing officer during the R.C.M. 305(i) hearing.[87]

The military judge concluded that, based solely on the evidence presented at the R.C.M. 305(i) hearing, the reviewing officer abused his discretion in determining that the accused was a flight risk.[88] Relying on the additional information gleaned from the providence inquiry, though, the military judge concluded that pretrial confinement was necessary to prevent the accused from committing additional offenses.[89] The military judge denied the request for sentence credit due to illegal pretrial confinement.[90]

The Air Force Court of Criminal Appeals (AFCCA) determined that the military judge erred by conducting a *de novo* review instead of applying an abuse of discretion standard.[91] The CAAF agreed and settled the confusion over how military judges should review pretrial confinement issues. It held that when a military judge reviews "[t]he legality of confinement previously served . . .," he "[s]hould limit his review to the information before the magistrate at the time of the decision to continue confinement,"[92] an abuse of discretion review. In contrast, when the military judge is deciding whether the accused should be released, the military judge should hold a *de novo* hearing.[93]

The standards are logical and simple to apply except in those potentially confusing situations when the military judge must decide *both* questions. Specifically, whenever the defense requests release under R.C.M. (j)(1)(A),[94] counsel should be prepared to advise the military judge on the application of both standards. The military judge must first decide whether there was an abuse of discretion and, second, whether a *de novo* review of additional information justifies continued confinement.

Gaither also emphasizes how important it is for both trial and defense counsel to ensure all matters presented to the reviewing officer are made part of the record of the R.C.M. 305(i) hearing.[95] A complete record will facilitate counsel's arguments regarding the reviewing officer's exercise of discretion in continuing pretrial confinement.[96]

Applicability of Rexroat *to Pretrial Restriction?*

In another pretrial restraint case, *United States v. Perez*,[97] the CAAF struggled with an appellant who arguably received a windfall at trial and was seeking additional relief on appeal. The defense moved for sentence credit, claiming that the accused had been subjected to restriction tantamount to confinement when he was ordered not to leave the installation without permission.[98] The trial counsel presented no evidence on the matter. He merely pointed out that the restriction to the installation is normally regarded as restriction in lieu of arrest[99] under R.C.M. 304(a)(2) and not tantamount to pretrial confinement under R.C.M. 305.[100] The military judge granted the motion, criticizing the government for declining to present any evidence on the motion. The military judge, however, never awarded a specific amount of credit against the accused's sentence.[101]

On appeal, the AFCCA agreed with the appellant that he was entitled to day-for-day credit for each day spent on restriction,[102] but that he had not received the credit from the military judge. The appellant also contended that he was entitled to additional day-for-day credit because a neutral and detached official had not conducted a probable cause review of his "confinement"within forty-eight hours.[103] The AFCCA refused to award *Rexroat* credit, though, because the defense counsel's motion for appropriate relief did not raise the issue.[104] The CAAF granted review to consider whether the AFCCA had erred in deciding the defense had not preserved the *Rexroat* issue.

85. R.C.M. 305(i) requires that a neutral and detached official review the necessity for continued pretrial confinement within 7 days of the imposition of confinement under military control. MCM, *supra* note 6, R.C.M. 305(i)(1).

86. *Gaither*, 45 M.J. at 350. The requirements for pretrial confinement include either that the accused will not appear at trial and pretrial proceedings, or that the prisoner will engage in serious criminal misconduct. MCM, *supra* note 6, R.C.M. 305(h)(2)(B)(iii)(a), (b).

87. Specifically, the military judge considered responses that the accused made during the providency inquiry. *Gaither*, 45 M.J. at 351.

88. *Id.*

89. *Id.*

90. *Id.*

91. United States v. Gaither, 41 M.J 774, 778 (A.F. Ct. Crim. App. 1995).

92. *Gaither*, 45 M.J. at 351.

93. *Id.*

94. MCM, *supra* note 6, R.C.M. 305(j)(1)(A).

The CAAF left the issue unresolved because it decided that the government did not need to conduct a *Rexroat* review at all in this case, stating, "[w]e have never extended the requirement for a probable-cause hearing to pretrial restriction."[105] The court then proceeded to find that the facts in this case did not impose a duty on the government to make a *Rexroat* determination.[106] The court distinguished between restrictions that were as onerous as actual pretrial confinement and those, like the one in the case, that were not.[107] It commented that the requirements of *Rexroat* were "[f]ounded upon constitutional notions of due process to address the evil of police confining citizens in a common jail without the benefit of a judicial officer considering the facts and evidence to determine if probable cause exits,"[108] a circumstance not present here.

The *Perez* opinion does not provide clear guidance for practitioners. It appears to hold that an accused who is subjected to pretrial restraint tantamount to confinement[109] is not necessarily entitled to a *Rexroat* review or to sentence credit in the absence of a review. Unfortunately, the court did not clearly state this conclusion in its decision. Instead, it focused on not extending "[t]he requirement for a probable cause hearing to pretrial restriction." It discussed the many examples of when restriction does not equal confinement. The problem with this discussion is that, at the point the CAAF reviewed the case, the issue was no longer restriction, but restriction tantamount to confinement.

95. Neither MCM, *supra* note 6, R.C.M. 305(i), nor DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE (24 June 96) [hereinafter AR 27-10], dictate a form for the reviewing officer's written decision and for the recording of evidence.

96. The military judge will only review the reviewing officer's decision to *continue* pretrial confinement; the reviewing officer's decision to release a soldier from pretrial confinement is not reviewable by the military judge. Keaton v. Marsh, 43 M.J. 757 (Army Ct. Crim. App. 1996).

97. 45 M.J. 323 (1996).

98. The accused could leave the installation with permission. The defense counsel requested the relief after the accused's unsworn statement and before the sentencing argument. The defense counsel said he had just learned that his client had been restricted to the installation. United States v. Perez, 1995 WL 126663 (A.F. Ct. Crim. App. Mar. 10, 1995).

99. The trial counsel was on firm legal ground in his argument. *See* United States v. Powell, 2 M.J. 6 (C.M.A. 1976) (denial of pass privileges and requirement to get permission to leave post was not restraint tantamount to confinement); United States v. Calderon, 34 M.J. 501 (A.F.C.M.R. 1991) (restriction to installation and requirement to check in by phone was not restriction tantamount to confinement); United States v. Callinan, 32 M.J. 701 (A.F.C.M.R. 1991) (terms of restraint included restriction to base, removal from duties, and order not to contact victim; court agreed proper characterization of restraint was restriction); United States v. Wilkinson, 27 M.J. 645 (A.C.M.R. 1988), *petition denied* 28 M.J. 230 (C.M.A. 1989) (limitation of movement to the general confines of the installation was condition on liberty as defined under R.C.M. 304(a)(1)); United States v. Wagner, 39 M.J. 832 (A.C.M.R. 1994) (pulling pass privileges is normally a condition on liberty unless the restraint significantly disrupts the soldier's ability to carry out spousal and parental responsibilities).

100. United States v. Perez, 1995 WL 126663 (A.F. Ct. Crim. App. Mar. 10, 1995). The common thread that exists in cases where credit is due for pretrial restraint tantamount to confinement is a "[s]ubstantial impairment of the basic rights and privileges enjoyed by service members." *See* United States v. Smith, 20 M.J. 528, 530-31 (A.C.M.R. 1985), *petition denied*, 21 M.J. 169 (C.M.A. 1985).

101. *Perez*, 1995 WL 126663.

102. The court assumed that the military judge found the restriction to be tantamount to confinement. *Id*.

103. In *United States v. Rexroat*, 38 M.J. 292 (C.M.A. 1993), the C.M.A. held that the requirement for a probable cause review of pretrial confinement within forty-eight hours announced by the Supreme Court in *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), applies in the military. *Rexroat*, 38 M.J. at 298. The probable cause review may be completed by any neutral and detached official. *Id*. The remedy for noncompliance by the government is day-for-day credit under R.C.M. 305(k). *See* United States v. Taylor, 36 M.J. 1166, 1167 (A.C.M.R. 1993); MCM, *supra* note , R.C.M. 305(k). The provisions of R.C.M. 305 apply to pretrial confinement. United States v. Gregory, 21 M.J. 952, 956 (A.C.M.R.), *aff'd*, 23 M.J. 246 (C.M.A. 1986) (summary disposition). The Army Court of Military Review has held that the requirements of *Rexroat* likewise apply to restraint tantamount to confinement. *Taylor*, 36 M.J. at 1167. This article will refer to the credit associated with noncompliance with *Rexroat* as "*Rexroat* credit."

104. *Id*. Failure to specifically request *Rexroat* credit results in waiver of the issue. *See* United States v. McCants, 39 M.J. 91 (C.M.A. 1994) (request for sentence credit for failure to complete R.C.M. 305(i) review in timely fashion did not preserve *Rexroat* issue).

105. United States v. Perez, 45 M.J. 323, 324 (1996).

106. *Id.*

107. *Id*.

108. *Id.*

109. The accused in this case was probably not subjected to pretrial restraint tantamount to confinement, either. The military judge appeared to be either overly cautious or irritated with the government when awarding sentence credit. According to the AFCCA decision, the military judge did not even articulate that he was awarding credit based on restriction tantamount to confinement. *Perez*, 1995 WL 126663. The court assumed, though, that the military judge found the restriction to be tantamount to confinement. *Id*.

Did the court simply refuse to characterize the restraint as tantamount to confinement? If that is the basis for the decision, then the case does not change the law. An accused is not entitled to sentence credit under *Allen*[110] or R.C.M. 305 credit for restriction. It has been long established in the Army, though, that an accused is entitled to both *Allen* credit and R.C.M. 305 credit for restraint tantamount to confinement.[111]

Perez contains other lessons for counsel and the military judge. First, defense counsel should always ask their clients whether any restraint has been imposed and instruct their clients to immediately notify them of any changes in the terms of the restraint. Second, defense counsel must be certain to request every applicable type of sentence credit on behalf of a client or risk waiver.[112] The defense counsel's motion for appropriate relief in this case can best be characterized as inarticulate and confusing[113] and, as a result, did not preserve the *Rexroat* issue. The military judge was equally imprecise in his ruling. He did not clearly articulate the basis of his ruling, nor did he return to the issue to indicate how he assessed the credit.

Trial counsel, however, have the most to learn from the case. Trial counsel should always know whether any form of pretrial restraint has been imposed in a case and monitor the status of that restraint throughout the pretrial period. Trial counsel should counsel commanders to put the terms of restraint in writing and to supply the trial counsel with a copy of the memorandum.[114] At a minimum, trial counsel should have the commander and first sergeant on-call and prepared to testify about the exact terms of the restraint. Trial counsel should insist that the defense clarify the exact grounds for any motion for appropriate relief. This practice will ensure that any defense waiver of sentence credit for pretrial restraint will be clear from the record. Finally, trial counsel should always remind military judges to effectuate their rulings. In *Perez*, the trial counsel should have reminded the military judge to award the sentence credit; silence in such cases will seldom serve the government's goal of seeking justice.

Illegal Pretrial Confinement During a Recess of the Trial

In *United States v. Tilghman*,[115] the government paid a stiff price for imposing illegal pretrial confinement in direct contravention to the military judge's disapproval of a confinement request. After the findings and before sentencing, the trial counsel informed the military judge that the accused's commander issued an order confining the accused for the evening. The military judge, acting as a reviewing officer,[116] examined the basis for the pretrial confinement. He determined that the accused was not a flight risk, nor was he likely to commit future serious criminal misconduct.[117] Since the requirements for pretrial confinement were not met, the military judge disapproved the confinement order. Despite the military judge's order, the commander placed the accused in pretrial confinement.[118] Eventually, the accused was credited to eighteen months and twenty days against his sentence for the government's actions in the case.[119]

One issue addressed by the CAAF was whether the commander's order placed the accused in "pretrial confinement" under R.C.M. 304(a)(4).[120] The court decided that it had done so, holding that pretrial confinement includes any period prior to completion of the trial.[121] This determination is significant because, once placed in pretrial confinement, the accused is entitled to all of the rights and reviews set out in R.C.M. 305.[122] The trial counsel, therefore, properly requested that the military judge review the pretrial confinement pursuant to R.C.M. 305(i).[123]

What the trial counsel did not anticipate, and perhaps the best practice tip to learn from the case, is that a military judge may be a tough reviewing officer.[124] During the R.C.M. 305(i) hearing, the trial counsel indicated that the confinement order was based upon the finding of guilty, the accused's mental health, and upon the risk that the accused may flee. The trial counsel, though, declined the opportunity to present additional evidence[125] to the military judge. When confronted with the accused's freedom preceding and during the trial, the accused's

110. United States v. Allen, 17 M.J 126 (C.M.A. 1984) (holding accused is entitled to day-for-day sentence credit for any pretrial confinement).

111. United States v. Smith, 20 M.J. 274 (A.C.M.R. 1985), *petition denied*, 21 M.J. 169 (C.M.A. 1985) (holding day-for-day credit is due for every day spent in restriction tantamount to confinement based on the totality of circumstances).

112. *See* United States v. McCants, 39 M.J. 91 (C.M.A. 1994); MCM, *supra* note 6, R.C.M. 905(e).

113. *Perez*, 1995 WL 126663.

114. The best practice is for trial counsel to assist commanders in designating the terms of pretrial restraint and in drafting the memorandum.

115. 44 M.J. 493 (1996).

116. The military judge reviewed the adequacy of probable cause to believe the prisoner had committed an offense and the necessity for pretrial confinement. *See* MCM, *supra* note 6, R.C.M. 305(i).

117. *Id.* at 305(h)(2)(B)(iii)(a) & (b).

118. After a prisoner has been released by the R.C.M. 305(i) reviewing officer, reconfinement is allowed before the completion of trial only upon the discovery of evidence or misconduct which, either alone or together with other evidence, justifies confinement. *See id.* at 305(l). There is no indication that the commander discovered any such evidence or misconduct that would justify his confinement of the accused later in the day. *Tilghman*, 44 M.J. at 494.

assurances that he would not flee, and the government's inability to present any evidence that the accused was a flight risk, the military judge disapproved the request for confinement.[126]

Trial counsel can anticipate this situation ahead of time by raising the issue with the commander and discussing whether pretrial confinement would become necessary in cases in which sentencing is delayed until some period after findings have been entered. If so, and assuming the issue comes before the military judge, counsel must be prepared to present evidence of the change in circumstances that justifies pretrial confinement at the late date. Trial counsel should try not to rely solely on the finding of guilty as a basis for a claim that the accused now poses a flight risk. Trial counsel should be prepared to present evidence, such as the statements of the accused that he "won't go to prison" for the crime, or any other indications that the accused will flee. Of course, defense counsel should always consider whether to request that the military judge conduct the R.C.M. 305(i) hearing if confinement is imposed after a finding of guilt. Defense counsel should also refer military judges to the *Tilghman* case because the CAAF found no abuse of discretion in the military judge's disapproval of the confinement order.

119. *Tilghman*, 44 M.J. at 494. The CAAF refused to award additional relief. *Id.* at 495.

120. MCM, *supra* note 6, R.C.M. 304(a)(4).

121. *Tilghman*, 44 M.J. at 495.

122. *See* MCM, *supra* note 6, R.C.M. 304(a)(4).

123. *See supra* note 76 and accompanying text.

124. One school of thought is that the government should not approach the military judge at all in such cases. The commander has the authority to confine the accused pursuant to R.C.M. 304(b). MCM, *supra* note 6, R.C.M. 304(b). There would be no requirement that the R.C.M. 305(i) hearing occur the same night because the first review required in the military system is a review of the pretrial confinement by a neutral and detached official within 48 hours. United States v. Rexroat, 38 M.J. 292 (C.M.A. 1993). Still, in some locales, it is customary to bring all matters concerning the case to the military judge after referral.

125. The military judge did consider the evidence presented during the findings portion of the trial, and he questioned the accused. *Tilghman*, 44 M.J. at 494.

126. *Id.*

Conclusion

One clear message continues to emerge from recent speedy trial cases: practitioners must maintain detailed, comprehensive case-processing chronologies. With R.C.M. 707, it is still preferable that the government' s chronology reflect contemporaneous delays, approved by competent authority, for all periods of delay. In the absence of a contemporaneous delay, though, the CAAF has announced at least one period of time--an AWOL period--for which the government is not accountable. The comprehensive chronology is also an indispensable tool for proving government compliance or noncompliance with the "reasonable diligence" standard of Article 10.

The recent CAAF pretrial restraint cases also emphasize attention to detail, particularly on the part of the government. When the command has imposed some form of pretrial restraint, the trial counsel should be prepared to present detailed evidence describing the exact terms of the restraint and the justification for it.