Giving Service Members the Credit They Deserve: A Review of Sentencing Credit and Its Application

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Introduction

I know not whether Laws be right,
Or whether Laws be wrong;
All that we know who lie in gaol
Is that the wall is strong;
And that each day is like a year,
A year whose days are long.[1]

These words of a prisoner long ago capture the impact of a single day of confinement. With this quote in mind, military practitioners cannot treat sentence credit as a trivial presentencing matter.[2] Instead, they must recognize the types of sentence credit available and understand how the credit is applied.

The purpose of this article is to analyze available sentence credit and to propose a uniform approach to its application. The article is divided into three main parts. First, it will discuss sentence credit in detail, including the four available types of sentence credit.[3]

The second part of this article examines Article 13 credit in more depth. Today, nearly all sentence credit is applied against the sentence ultimately approved by the convening authority[4] (except for *Pierce* credit[5]) with one major exception: credit for illegal pretrial punishment in violation of Article 13, Uniform Code of Military Justice (UCMJ).

In this area, sentence credit can be applied against either the adjudged or the approved sentence.[6] For instance, consider the cases of two service members who both suffer Article 13 pretrial punishment. In one case, the military judge considers the violation to adjudge an appropriate sentence at trial.[7] In the other case, however, the judge orders an administrative credit, which is assessed against the approved sentence.[8] Although both applications are proper, their impacts on soldiers differ and can result in unequal treatment.[9] This anomaly stems from the current state of the law in military sentence credit–a mosaic of

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1. OSCAR WILDE, THE BALLAD OF GAOL, pt. 5, stanza 1 (1896), *quoted in* United States v. McCarthy, 47 M.J. 162, 168 (1997).

2. *See generally* U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK 58 (30 Sept. 1996) [hereinafter BENCHBOOK] (outlining presentencing session for courts-martial).

3. The four categories of sentence credit are: (1) *Allen* and *Mason* credit, (2) R.C.M. 305(k) credit, (3) Article 13, UCMJ credit, and (4) *Pierce* credit. *See* United States v. Allen, 17 M.J. 126 (C.M.A. 1984) (providing credit for time spent in pretrial confinement); United States v. Mason, 19 M.J. 274 (C.M.A. 1985) (providing credit for pretrial restraint equivalent to confinement); MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 305(k) (1998) [hereinafter MCM] (including *Suzuki* credit, United States v. Suzuki, 14 M.J. 491 (C.M.A. 1983)); UCMJ art. 13 (West 1998). Article 13 provides:

> No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline.

Id. See also United States v. Pierce, 27 M.J. 367 (C.M.A. 1989) (providing the service member with the choice between having credit for prior nonjudicial punishment considered by the judge at trial, or allowing the convening authority to administratively apply the credit against the approved sentence).

4. *See generally Allen*, 17 M.J. at 126; *Mason*, 19 M.J. at 274; MCM, *supra* note 3, R.C.M. 305(k).

5. *See generally Pierce*, 27 M.J. at 367. *Pierce* credit applies in the unusual case of a service member who is court-martialed for an offense that was already punished under Article 15, UCMJ; therefore, this article treats this area as a minor exception. *Id.* at 369.

6. *See* Coyle v. Commander, 21st Theater Army Area Command, 47 M.J. 626, 629 (Army Ct. Crim. App. 1997).

7. *See id*.

8. *See id*.

9. *See generally* United States v. Larner, 1 M.J. 371, 375 (C.M.A. 1976) (observing that the two possible methods to deal with illegal pretrial confinement are (1) applying sentence credit administratively against the approved sentence to confinement, or (2) having the judge consider the illegal confinement to adjudge a sentence at trial). Because of the way good time abatement credit is earned at the confinement facility, the latter method may result in a service member serving more time in confinement. The former method is a "fully adequate remedy." *Id.* at 372.

common law, executive order, and statute.[10] After critically reviewing *Coyle v. Commander*,[11] a recent case addressing the sentencing credit status quo, this article discusses the anomalous impact that the different methods of applying credit can have on service members.

The third part of this article is a proposal for uniformity. This article proposes that all Article 13 sentence credit be administratively applied against the approved sentence to confinement.[12] This approach would cause all illegal pretrial confinement and punishment to be treated the same for credit purposes.

In short, this article examines giving service members the credit they deserve by critically reviewing the status quo and recommending a system where a tangible credit would attach to every finding of sentence credit at trial.

Available Types of Sentence Credit

Sources of available sentence credit fall into four broad categories: (a) *Allen*[13] and *Mason*[14] credit; (b) Rule for Courts-Martial (R.C.M.) 305(k) credit,[15] which includes *Suzuki* credit;[16] (c) Article 13, UCMJ credit;[17] and (d) *Pierce*[18] credit. The military practitioner must ask three questions when analyzing each type of sentence credit. First, what triggers the credit? Second, how is the credit applied? Finally, what are the practical issues to consider? Using this analysis, this section examines the four categories of sentence credit. First, however, this section will briefly discuss the two methods of applying sentencing credit. Note that this section offers, for use by practitioners, a sentence credit guide that can be found at the Appendix to this article.[19]

The Two Methods of Applying Sentencing Credit and its Terminology

"In the military a substantial difference exists between an adjudged and an approved sentence. The former is the sentence imposed by the military judge or court-martial members. The latter is the sentence ultimately approved by the convening authority."[20] As simple as this distinction may seem, its precise meaning is easily lost in semantics;[21] therefore, a brief background discussion is necessary.

Judicial Credit—Credit that is applied against the adjudged sentence means that the sentencing authority reduces the sentence at trial.[22] In court-martial practice, the credit is considered as mitigation by the military judge or the panel in adjudging an appropriate sentence.[23] For example, what would

10. *See generally* UCMJ art. 13 (West 1998); MCM, *supra* note 3, R.C.M. 304, 305; United States v. Suzuki, 14 M.J. 491 (C.M.A. 1983); United States v. Allen, 17 M.J. 126 (C.M.A. 1984); United States v. Mason, 19 M.J. 274 (C.M.A. 1985); United States v. Pierce, 27 M.J. 367 (C.M.A. 1989).

11. *Coyle*, 47 M.J. at 629.

12. This approach would require military judges to order additional administrative credit against the approved sentence to confinement for all illegal pretrial punishment in violation of Article 13, UCMJ.

13. *Allen*, 17 M.J. at 126 (providing credit for time spent in pretrial confinement).

14. *Mason*, 19 M.J. at 274 (providing credit for pretrial restraint equivalent to confinement).

15. MCM, *supra* note 3, R.C.M. 305(k).

16. United States v. Suzuki, 14 M.J. 491 (C.M.A. 1983).

17. UCMJ art. 13 (West 1998).

18. United States v. Pierce, 27 M.J. 367 (C.M.A. 1989) (providing the service member with the choice between having credit for prior nonjudicial punishment considered by the judge at trial, or allowing the convening authority to administratively apply the credit against the approved sentence).

19. *See infra* Appendix. The concept for this guide is based on a sentencing credit matrix developed by Colonel Keith Hodges, Trial Judge, 2d Judicial Circuit, U.S. Army, Fort Benning, Georgia.

20. *See* United States v. Gregory, 21 M.J. 952, 957 (A.C.M.R. 1986).

21. *See, e.g.*, United States v. Allen, 17 M.J. 126, 129 (C.M.A. 1984) (referring to pretrial confinement credit applied on the "sentenced adjudged," but describing administrative credit that reduces sentence ultimately approved by the convening authority); *Gregory*, 21 M.J. at 956 (noting that the loose usage of the term "adjudged" by the drafters of R.C.M. 305(k) to describe an administrative scheme of credit blurs the distinction between sentence credit imposed at trial and credit applied against the approved sentence).

22. *See* Coyle v. Commander, 21st Theater Army Area Command, 47 M.J. 626, 628-630 (Army Ct. Crim. App. 1997).

23. *See* MCM, *supra* note 3, R.C.M. 1001 (b)(1) (requiring the "duration and nature of any pretrial restraint" be presented by the prosecution to the sentencing authority), R.C.M. 1001(c)(1)(B) (defining a "matter in mitigation" as evidence that is "introduced to lessen the punishment to be adjudged by the court-martial"); BENCHBOOK, *supra* note 2, at 91 (sentencing instructions include giving due consideration to "all matters of extenuation and mitigation").

have been a twenty-four month sentence at trial becomes a twenty-two month sentence due to the credit.[24] Accordingly, the term "judicial credit,"[25] which this article uses throughout, describes applying credit against the adjudged sentence at trial by factoring-in credit as mitigation.

Administrative Credit—Credit applied against the approved sentence to confinement is "administrative credit."[26] Instead of reducing the adjudged sentence at trial, the military judge orders an administrative credit,[27] which is annotated in the report of result of trial.[28] Next, using the administrative credit indicated in the report, confinement officials reduce the term of confinement in the appropriate amount.[29] Finally, when the convening authority approves the sentence,[30] at a minimum, the promulgating order must account for any administrative credit ordered by the military judge.[31] After the promulgating order is published, confinement officials make further adjustments to the sentence, if necessary.[32]

Credit for Pretrial Confinement or its Equivalent: Allen and Mason Credit

Military pretrial confinement or its equivalent triggers *Allen* credit,[33] for time spent in actual confinement;[34] or *Mason* credit,[35] for restriction "tantamount to confinement."[36] Both *Allen* and *Mason* credits are administrative credit, applied against the approved sentence to confinement.[37] Credit for time spent in civilian pretrial confinement is the practical issue to consider in this area.

What Triggers Allen and Mason Credit?—Before 1984, service members in pretrial confinement were not entitled to administrative credit.[38] After *United States v. Allen*,[39] however,

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24. *See Coyle*, 47 M.J. at 628.

25. *See* United States v. Larner, 1 M.J. 371, 375 n.13 (C.M.A. 1976) (drawing a distinction between "judicial reduction" of a sentence and "judicially ordering an administrative credit").

26. *See id*. at 375 n.13.

27. *See Coyle*, 47 M.J. at 628-630.

28. *See* U.S. Dep't of Army, Reg. 27-10, Legal Services: Military Justice, para. 5-28a. (24 June 1996) [hereinafter AR 27-10] (requiring that DA Form 4430-R, Report of Result of Trial, include all administrative credits). Specifically, a report must contain "all credits against confinement adjudged whether 'automatic' credit for pretrial confinement under [*Allen*], or judge-ordered additional administrative credit under R.C.M. 304, R.C.M. 305, [*Suzuki*], or for any other reason specified by the judge." *Id.*

29. *See* U.S. Dep't of Army, Reg. 633-30, Apprehension and Confinement: Military Sentences to Confinement, para. 4a. (6 Nov. 1964) (C1, 13 April 1984) [hereinafter AR 633-30]; U.S. Dep't of Army, Reg. 190-47, Military Police: The Army Corrections System, para. 3-5 (15 Sept. 1996) [hereinafter AR 190-47]; Telephone Interview with Mr. Terry Rush, Confinement Administrator, United States Disciplinary Barracks, Fort Leavenworth, Kansas (Jan. 26, 1999; Mar. 23, 1999) [hereinafter Rush Interview]; *see generally* UCMJ art. 57 (West 1998) (sentence to confinement begins on date adjudged unless deferred by convening authority). In the usual case, the accused will immediately begin serving a sentence to confinement adjudged at trial, awaiting subsequent approval of the sentence by the convening authority.

30. *See generally* MCM, *supra* note 3, R.C.M. 1107(a) (promulgating the convening authority's broad command discretion to act on findings and sentence).

31. *See id*., R.C.M. 1107(f)(4)(D) (requiring the convening authority to direct R.C.M. 305(k) credit in his action on the sentence when the military judge orders it at trial); AR 27-10, *supra* note 28, para. 5-28a. ("The convening authority will show in his or her initial action all credits against a sentence to confinement."); *see generally* United States v. Suzuki, 14 M.J. 491, 493 (C.M.A. 1983) ("A convening authority . . . has no power to ignore a ruling by the military judge and unilaterally act on his own.").

32. *See* AR 633-30, *supra* note 29, para. 6a. (5); Rush Interview, *supra* note 29 (explaining that because of the way good conduct abatement is calculated, a further sentence reduction by the convening authority or the appellate courts could ironically result in a later release date; in such situations, the earlier release date is selected for the prisoner affected).

33. United States v. Allen, 17 M.J. 126 (C.M.A. 1984).

34. *See id*. at 127-28.

35. United States v. Mason, 19 M.J. 274 (C.M.A. 1985).

36. *See Mason*, 19 M.J. at 274 (defining standard as "equivalent to confinement"); United States v. Smith, 20 M.J. 528, 529 (A.C.M.R. 1985).

37. *See Allen*, 17 M.J. at 128-29; *Mason*, 19 M.J. at 274; Coyle v. Commander, 21st Theater Army Area Command, 47 M.J. 626, 629-30 (Army Ct. Crim. App. 1997).

38. *See generally* United States v. Larner, 1 M.J. 371, 374 n.11 (C.M.A. 1976) ("The convicted accused in our system is not entitled by right to credit on his sentence for pretrial confinement."); United States v. Davidson, 14 M.J. 81, 84-88 (C.M.A. 1982) (documenting that before 1951, pretrial confinement in the military system was viewed differently than confinement imposed by a court-martial sentence). Before the UCMJ was enacted, prisoners could not be legally punished until convening authority action; however, when the 1951 *MCM* was promulgated, the President provided that pretrial confinement had to be brought to the attention of the court-martial in adjudging an appropriate sentence. *Id*. at 84-88.

the Court of Military Appeals (CMA)[40] began to award day-for-day credit for time spent in pretrial confinement.[41] *Allen* credit was not purely a function of common law. The CMA adopted a plain meaning interpretation of *Department of Defense Instruction (DODI) 1325.4*,[42] which "voluntarily incorporated the pretrial-sentence credit extended to other Justice Department convicts"[43] via 18 U.S.C. § 3568.[44] Today, even though *DODI 1325.4* and 18 U.S.C. § 3568 have been replaced,[45] the Court of Appeals for the Armed Forces (CAAF) has not revisited *Allen*.

Mason credit[46] is derived from *Allen*.[47] In cases of pretrial restraint that are "tantamount to confinement,"[48] day-for-day administrative credit is required "in light of *Allen*."[49] Whether pretrial restriction rises to the level of confinement is a question of fact based "on the totality of the conditions imposed."[50] Relevant factors include "the nature of the restraint (physical or moral), the area or scope of the restraint . . . , the types of duties, if any, performed during the restraint . . . , and the degree of privacy enjoyed within the area of restraint."[51]

How are Allen and Mason Credits Applied?—Both *Allen* and *Mason* credit are applied against the approved sentence to confinement.[52] Although not facially apparent,[53] the statutory requirement incorporated by *Allen*, and the distinction between "judicial" and "administrative" credit,[54] both support applying these credits against the approved sentence.[55]

First, the statutory requirement incorporated by *Allen* provided that "the Attorney General shall *give* . . . credit"[56] against a sentence to confinement when allowable.[57] As a practical

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39. 17 M.J. 126 (C.M.A. 1984).

40. *See* National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994) (renaming the United States Court of Military Appeals (CMA) to the United States Court of Appeals for the Armed Forces (CAAF)).

41. *Allen*, 17 M.J. at 128.

42. U.S. DEP'T OF DEFENSE, INSTR. 1325.4, TREATMENT OF MILITARY PRISONERS AND ADMINISTRATION OF MILITARY CORRECTION FACILITIES (7 Oct. 1968) [hereinafter DODI 1325.4], *superseded by* U.S. DEP'T OF DEFENSE, DIR. 1325.4, CONFINEMENT OF MILITARY PRISONERS AND ADMINISTRATION OF MILITARY CORRECTIONAL PROGRAMS AND FACILITIES (19 May 1988) [hereinafter DODD 1325.4].

43. *Allen*, 17 M.J. at 128.

44. Act of June 22, 1966, Pub. L. No. 89-465, § 4, 80 Stat. 217 (providing that credit shall be given for "any days spent in custody in connection with the offense or acts for which sentence was imposed"), *repealed by* Act of Oct. 12, 1984, Pub. L. 98-473, Title II, ch. II, § 212(a)(1), 98 Stat. 1987 (1984) (codified as 18 U.S.C. § 3585 (1994)).

45. *See* DODD 1325.4, *supra* note 42; 18 U.S.C. § 3585 (1994).

46. United States v. Mason, 19 M.J. 274 (C.M.A. 1985).

47. *Allen*, 17 M.J. at 126.

48. *See* United States v. Smith, 20 M.J. 528, 529 (A.C.M.R. 1985).

49. *See Mason*, 19 M.J. at 274.

50. *See Smith*, 20 M.J. at 529.

51. *See id*. at 531. *See also* Wiggins v. Greenwald, 20 M.J. 823 (A.C.M.R. 1985); Washington v. Greenwald, 20 M.J. 699 (A.C.M.R. 1985).

52. *See* Coyle v. Commander, 21st Theater Army Area Command, 47 M.J. 626, 629-630 (Army Ct. Crim. App. 1997).

53. *See, e.g.*, United States v. Allen, 17 M.J. 126, 129 (C.M.A. 1984) (referring to pretrial confinement credit applied on the "sentence adjudged"); United States v. McFarland, 17 M.J. 408 (C.M.A. 1984) (referring to administrative credit on the "adjudged sentence" for pretrial confinement); United States v. Mattingly, 17 M.J. 411 (C.M.A. 1984) (referring to administrative credit on the "adjudged sentence"); United States v. McClain, 22 M.J. 124 (C.M.A. 1986) (remanding for "purposes of receiving credit on a adjudged sentence"). *But see, e.g.*, United States v. Kossman, 38 M.J. 258 (C.M.A. 1993) ("All pretrial confinement served is now credited against any sentence ultimately adjudged.").

54. *See* discussion *supra* notes 22-32 and accompanying text.

55. *See generally* United States v. Davidson, 14 M.J. 81, 84-88 (C.M.A. 1982) (observing that paragraph 88b, 1969 *MCM*, provided for the consideration of pretrial confinement as a factor for a court-martial to consider in adjudging a sentence at trial). The judicial method of applying sentence credit was already being used for pretrial confinement sentence credit when *Allen* was decided. *Id*. at 84-88.

56. *See* 18 U.S.C. § 3568 (1966) (providing that credit shall be given for "any days spent in custody in connection with the offense or acts for which sentence was imposed"), *repealed by* Act of Oct. 12, 1984, Pub. L. 98-473, Title II, ch. II, § 212(a)(1), 98 Stat. 1987 (1984) (codified as 18 U.S.C. § 3585 (1994)) (expanding the reach of 18 U.S.C. § 3568). Further, section 3585 provides that "a defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences." *Id*.

matter, administrative credit is the only alternative that ensures statutory compliance. Otherwise, service members may not receive tangible credit for time spent in pretrial confinement.[58] Arguably, judicial credit also meets the statutory requirement; however, this expansive view must be rejected, because "simply reducing the adjudged sentence proportionately for time actually served is not a full remedy."[59]

Second, the distinction between judicial and administrative credit also supports applying these credits against the approved sentence. Simply stated, the statutory credit scheme incorporated by *Allen* was–and still is–based on administrative, not judicial credit.[60] Hence, both logically[61] and legally, *Allen* and *Mason* credit are administratively applied against the sentence ultimately approved by the convening authority.[62]

Practical Issue: Credit for Civilian Pretrial Confinement—What happens when civilian authorities confine a service member who is awaiting court-martial? Practitioners should note that 18 U.S.C. § 3568, upon which CMA originally relied on in *Allen*,[63] was replaced by 18 U.S.C. § 3585.[64] This change extends the reach of *Allen* credit in the civilian pretrial confinement context.[65] Moreover, a split exists among service courts in this area.[66] Although the CAAF has yet to readdress this issue, the trend is toward the *Murray* approach,[67] which extends *Allen* credit to civilian confinement. *Allen*'s statutory underpinnings have changed.[68] Computing federal confinement sentences is now governed by 18 U.S.C. § 3585 (b), which states:

> *Credit for prior custody.* A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences—
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> (1) as a result of the offense for which the sentence was imposed; or
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> (2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;

57. *See Allen*, 17 M.J. at 127-129.

58. *See id*. at 129 (Everett, C. J., concurring) (explaining that uncertainty of mitigation means that some sentencing authorities may not give any credit at all and the construction adopted by the majority provides certainty that was lacking under the practice of allowing the sentencing authority to merely consider pretrial confinement when adjudging a sentence).

59. *See* United States v. Larner, 1 M.J. 371, 374 (C.M.A. 1976) (comparing the credit application methods of judicial versus administrative credit in the illegal pretrial confinement context).

60. *See* 18 U.S.C. § 3568 (1966) (providing that credit shall be given by the Attorney General), *repealed by* Act of Oct. 12, 1984, Pub. L. 98-473, Title II, ch. II, § 212(a)(1), 98 Stat. 1987 (1984) (codified as 18 U.S.C. § 3585 (1994)) (dropping the "Attorney General" language). A plain reading analysis supports the conclusion that credit must be applied administratively against the approved sentence; the statute mandates credit which is implemented by executive agency, not judicially administered. Although the military judge orders the credit, the credit is administered by the confinement facility and convening authority. *See* DODD 1324.5, *supra* note 42; MCM, *supra* note 3, R.C.M. 1107; United States v. Wilson, 503 U.S. 329 (1992) (holding that former 18 U.S.C. § 3568 expressly required the Attorney General to award credit). When Congress recodified the statute as 18 U.S.C. § 3585, it did not intend to transfer computing sentence credit to the district courts. The statute still retains its executive administration character. Since federal defendants do not serve their sentences immediately, any calculation by the district courts would be speculative. *Id.* at 331-337.

61. *See generally Davidson*, 14 M.J. 81, 84-88. Since the judicial method of applying sentence credit was already being used for pretrial confinement sentence credit, logically, *Allen*'s only alternative was establishing an administrative credit remedy.

62. *See* 18 U.S.C. § 3585 (1994) (repealing 18 U.S.C. § 3568 (1966) by Act of Oct. 12, 1984, Pub. L. 98-473, Title II, ch. II, § 212(a)(1), 98 Stat. 1987 (1984)); *Davidson*, 14 M.J. at 84-88.

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

64. 18 U.S.C. § 3585 (1994) (part of Sentencing Reform Act of 1984, Pub. L. 98-473 § 212 (a) (2), 98 Stat. 2001 (1984), superseding 18 U.S.C. § 3568 (1966)).

65. *See id.*; DODD 1325.4, *supra* note 42. Practitioners must not confuse *Allen* credit with R.C.M. 305(k) credit. These are two distinct types of credit. Rule 305(k) credit is governed by United States v. Ballesteros, 29 M.J. 14 (C.M.A. 1989).

66. *See* United States v. Murray, 43 M.J. 507 (A.F. Ct. Crim. App. 1996) (extending *Allen* credit to civilian confinement based on incorporating of 18 U.S.C. § 3585 language into DODD 1325.4); *see also* United States v. Dave, 31 M.J. 940 (A.C.M.R. 1990) (extending *Allen* credit to civilian confinement only when civilian custody is in connection with acts solely for which military sentence is imposed); Major Amy M. Frisk, *Military Justice Symposium: New Developments in Pretrial Confinement*, ARMY LAW., Mar. 1996, at 31-32 (noting that service courts disagree on the issue of whether service members who spend time in civilian pretrial confinement before military pretrial confinement are entitled to *Allen* credit).

67. *See Murray*, 43 M.J. at 513-515; United States v. Martin, No. 9700900 (Army Ct. Crim. App. June 18, 1998) (signaling the Army Court of Criminal Appeals' (ACCA) shift towards the *Murray* approach by employing a 18 U.S.C. § 3858 analysis to deny appellant credit for time spent in civilian pretrial confinement).

68. *See Murray*, 43 M.J. at 514 (explaining that new DODD 1325.4, dated 19 May 1988, left language incorporating federal sentence computation standards virtually unchanged and that the standards now incorporated are governed by 18 U.S.C. § 3585, which replaced 18 U.S.C. § 3568, the statute initially incorporated by *Allen*).

that has not been credited against another sentence.[69]

According to the United States Supreme Court,[70] 18 U.S.C. § 3585(b) altered 18 U.S.C. § 3568 in three ways. "First, Congress replaced the term 'custody' with the term 'official detention.' Second, Congress made clear that a defendant could not receive a double credit for his detention time. Third, Congress enlarged the class of defendants eligible to receive credit." [71]

The impact of these changes on the extension of *Allen* credit is twofold. First, Congress expanded *Allen* credit to service members who initially find themselves confined by civilian authorities on a state charge, but who are ultimately tried for a UCMJ offense committed before the state charge.[72] Second, the changes can extend *Allen* credit to offenses that have no military connection.[73]

Despite these statutory changes, service courts are split on extending *Allen* credit to civilian pretrial confinement.[74] In *United States v. Murray*,[75] the Air Force Court of Criminal Appeals (AFCCA) adopted an approach based on the plain meaning of 18 U.S.C. § 3585 to award an airman credit for time spent in state custody.[76] The Army Court of Military Review (ACMR)[77] used a military-connection type analysis.[78] A service member earns *Allen* credit for time spent in civilian confinement at the behest of the military[79] or civilian custody "in connection with the offense or acts solely for which a sentence to confinement by a court-martial is ultimately imposed."[80] The Army's approach, however, appears to be headed in the direc-

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69. 18 U.S.C. § 3585 (1994) (part of Sentencing Reform Act of 1984, Pub. L. 98-473 § 212 (a) (2), 98 Stat. 2001 (1984), superseding 18 U.S.C. § 3568 (1966)).

70. *See* United States v. Wilson, 503 U.S. 329, 337 (1992).

71. *See id.* at 337. The prevention of double credit refers to the language of 18 U.S.C. § 3585 that provides: "has not been credited against another sentence." *Id*. at 334. Query, how would double credit be prevented if a soldier is court-martialed and later tried by the state? For instance, a soldier is apprehended on unrelated state charges and later transferred to the military on UCMJ charges. Although the soldier is not tried for the unrelated state charges, he receives credit, under the 18 U.S.C. § 3585 scheme, for the time spent in state custody before court-martial. After court-martial, the soldier is tried by the state for the state charges. The state court may also give credit for the state pretrial custody (this assumes state authorities will be unaware of the credit already given by the military at the first trial). In such a case, what happens at the confinement facility. Do they deduct one of the credits?

72. *See Murray*, 43 M.J. at 514-515. *Cf.* United States v. Richardson, 901 F.2d 867 (10th Cir. 1990) (holding that plain meaning of 18 U.S.C. § 3585 permits federal credit for state custody); United States v. Wilson, 916 F.2d 1115 (6th Cir. 1990), *rev'd on other grounds*, 503 U.S. 329 (1992) (leaving intact 6th Circuit's interpretation that 18 U.S.C. § 3585 requires credit for time spent in state pretrial custody not previously credited); United States v. Dowling, 962 F. 2d 390 n.3 (5th Cir. 1992) ("It is uncontroverted . . . that Dowling's 74-day stay in Orleans Parish [state] Prison constituted 'official detention' for purposes of 18 U.S.C. § 3585(b)."); Mitchell v. Story, 68 F.3d 483 (10th Cir. 1995) (indicating that U.S. Bureau of Prisons credits state pretrial custody when calculating credit under 18 U.S.C. § 3585).

73. *Cf. Richardson*, 901 F.2d at 867-869 (noting that a defendant was credited for custody on a state charge that was unrelated to the federal charge he was sentenced for). Because the defendant's federal crime pre-dated the unrelated state offense for which he was initially jailed, the plain meaning of 18 U.S.C. § 3585 required credit. *Id*. at 868. Hypothetically, an accused flees the scene of a larceny and is taken into state custody on a traffic violation. Three days later, the accused is charged for the larceny and continues to be held in confinement. Jurisdiction is later transferred to the military, and the accused is convicted of larceny, but the traffic offense is not tried. Under the old 18 U.S.C. § 3568 scheme, the accused would not be entitled to credit for the initial three days in confinement due to the lack of a connection to the offense for which sentence was imposed. Conversely, under 18 U.S.C. § 3585(b)(2), the three days would be creditable.

74. *See* Frisk, *supra* note 66, at 31-32 (noting that service courts disagree on the issue of whether service members who spend time in civilian pretrial confinement before military pretrial confinement are entitled to *Allen* credit).

75. 43 M.J. 507 (A.F. Ct. Crim. App. 1996).

76. *Id.*; United States v. Harris, ACM 32237 (A.F. Ct. Crim. App. Jan. 21, 1997) (holding that an accused was not entitled to credit on an offense for which he was charged but not sentenced, under an 18 U.S.C. § 3585 analysis); United States v. Gazurian, ACM 31372 (A.F. Ct. Crim. App. Feb. 20, 1997) (granting five days civilian pretrial confinement credit under the 18 U.S.C. § 3585 analysis); ; United States v. Taylor, (ACM 31574) 1996 CCA LEXIS 200 (A.F. Ct. Crim. App. June 20, 1996). *But see* United States v. Lassiter, 42 M.J. 538 (A.F. Ct. Crim. App. 1995) (denying credit for time spent in a civilian pretrial confinement using the rationale that the Air Force had to play an active role in the confinement to warrant *Allen* credit).

77. *See* National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994) (designating the Army Court of Military Review (ACMR) as the Army Court of Criminal Appeals (ACCA)).

78. See United States v. Dave, 31 M.J. 940 (A.C.M.R. 1990).

79. *See* United States v. Huselkamp, 21 M.J. 509 (A.C.M.R. 1985) (holding that an accused was entitled to *Allen* credit for civilian pretrial confinement that was directed by military authorities); United States v. Davis, 22 M.J. 557 (A.C.M.R. 1986) (holding that *Allen* credit was awarded for time spent in civilian pretrial confinement at the insistence of federal authorities in connection with the offense for which a sentence to confinement by court-martial was ultimately imposed).

80. *See Dave*, 31 M.J. at 942 (establishing the test that *Allen* credit for time in civilian pretrial confinement is awarded if the confinement is in connection with an offense *solely* for which sentence to confinement by court-martial is ultimately imposed). *See also* United States v. McCullough, 33 M.J. 595 (A.C.M.R. 1991) (citing *Dave*, no *Allen* credit is given where an accused who is held for state and military offenses was given time-served for state offense before the military took control). *Allen* credit only applies for civilian pretrial custody when in connection with the offense solely for which a sentence to confinement by court-martial is ultimately adjudged. *Id*. at 597.

tion of *Murray*.[81] Even though most cases would reach the same result under either service court's rationale,[82] the potential for inconsistency looms.

The *Murray* approach is superior for three reasons. First, it is the only approach consistent with *Allen*'s analysis.[83] *Department of Defense Directive 1325.4* still requires the armed forces to follow Department of Justice sentence credit rules.[84] These rules are now governed by 18 U.S.C. § 3585.[85] Second, the *Murray* approach comports with the broader scope of 18 U.S.C. § 3585.[86] Extending *Allen* credit to civilian pretrial confinement does not turn on a military connection;[87] the statute plainly credits any time "spent in *official* detention . . . as a result of the offense for which sentence was imposed."[88] Third, the *Murray* approach has sound legal backing. Federal courts have interpreted 18 U.S.C. § 3585 to require federal credit for state pretrial confinement.[89]

R.C.M. 305(k) Credit

The President gave another source of credit with R.C.M. 305(k),[90] which provides additional credit for the failure to comply with a host of pretrial confinement safeguards.[91] The credit is administratively applied against the approved sentence to confinement.[92] The 1998 *Manual for Courts-Martial* includes two additional grounds that trigger R.C.M. 305(k) credit. These changes comprise the practical issue in this area.

What Triggers R.C.M. 305(k) Credit?—The modern military pretrial confinement system[93] give service members placed into pretrial custody many substantive and procedural safeguards.[94] The failure to comply with four enumerated R.C.M. 305 safeguards results in a day-for-day sentence credit in addition to any *Allen* or *Mason* credit received.[95] These four include: (a) R.C.M. 305(f), the confinee's right to military counsel; (b) R.C.M. 305(h), the commander's review of pretrial confine-

81. *See* United States v. Martin, No. 9700900 (Army Ct. Crim. App. June 18, 1998) (holding that an accused was not entitled to credit under a 18 U.S.C. § 3585 analysis). This memorandum opinion indicates a shift in ACCA's approach and may signal the future adoption of the *Murray* approach. The appellant was absent without leave (AWOL) from his military unit when he was apprehended by civilian authorities on offenses totally unrelated to his subsequent court-martial. After three days in civilian custody, the military filed a detainer requesting that he be held to face UCMJ charges; four days later, the appellant was transferred to military custody. At trial, the appellant was denied credit for the initial three days of custody. On appeal, the appellant argued that he was entitled to credit for these days under section 3585 since the military offense predated the state offenses. The court found the legal argument "appealing" (no mention of *Dave*), but denied relief on factual grounds; nothing in the record indicated that the appellant had not already been credited by state authorities under section 3585. *Id*. at 2-3.

82. *See, e.g*., *Dave*, 31 M.J. at 940; *McCullough*, 33 M.J. at 595. Both cases, decided after 18 U.S.C. § 3585 took effect, would have reached the same credit result under either analysis.

83. United States v. Allen, 17 M.J. 126 (C.M.A. 1984).

84. *See* DODD 1325.4, *supra* note 42, para. H.5; *Murray*, 43 M.J. at 514.

85. 18 U.S.C. § 3585 (1994) (part of the Sentencing Reform Act of 1984, Pub. L. 98-473 § 212 (a)(2), 98 Stat. 2001 (1984), superseding 18 U.S.C. § 3568 (1966) and reestablishing term of imprisonment computation rules for Department of Justice prisoners); *Murray*, 43 M.J. at 514.

86. *See* United States v. Wilson, 503 U.S. 329, 337 (1992) (noting that Congress intended to expand the class of defendants who are eligible for credit, and replaced the term 'custody' with 'official detention'); *Murray*, 43 M.J. at 514 (citing United States v. Garcia-Gutierreez, 835 F.2d 585 (5th Cir. 1988); United States v. Blankenship, 733 F.2d 433 (6th Cir. 1984)). Under the former scheme of 18 U.S.C. § 3568, some federal courts limited credit to federal pretrial detention only. *Id*. at 514-15.

87. *See Dave*, 31 M.J. at 940 (using a military-connection type analysis to extend *Allen* credit for time spent in civilian pretrial confinement). To receive credit, pretrial confinement must be in connection with an offense solely for which sentence to confinement by court-martial is ultimately imposed. *Id*. at 942.

88. *See* 18 U.S.C. § 3585(b). Note that the new term, "official custody" is not limited to a particular sovereign.

89. *Accord* United States v. Richardson, 901 F.2d 867 (10th Cir. 1990); United States v. Wilson, 916 F.2d 1115 (6th Cir. 1990), *rev'd on other grounds*, 503 U.S. 329 (1992); United States v. Dowling, 962 F.2d 390 n.3 (5th Cir. 1992); United States v. Benefield, 942 F.2d 60 (1st Cir. 1991). *See also* Mitchell v. Story, 68 F.3d 483 (10th Cir. 1995) (showing that U.S. Bureau of Prisons credits state pretrial custody when calculating credit under 18 U.S.C. § 3585).

90. MCM, *supra* note 3, R.C.M. 305(k).

91. *See generally id*. R.C.M. 305(k).

92. *See generally* United States v. Gregory, 21 M.J. 952, 957 (A.C.M.R. 1986), *aff'd*, 23 M.J. 246 (C.M.A 1986).

93. *See* Exec. Order No. 12,473, 49 Fed. Reg. 17,152 (1984), *amended by* Exec. Order 12,484, 49 Fed. Reg. 28,825 (1984) (promulgating the 1984 *MCM* with the R.C.M.).

94. *See generally* MCM, *supra* note 3, R.C.M. 305.

95. *See id*. R.C.M. 305(k).

ment; (c) R.C.M. 305(i), military magistrate reviews;[96] and (d) R.C.M. 305 (j), the military judge's review, if any.[97]

In addition to these enumerated safeguards, R.C.M. 305(k) credit can be triggered by an R.C.M. 305(*l*) violation,[98] or a violation of the grounds added by the 1998 *Manual*,[99] which now includes *Suzuki* credit.[100] Rule 305(k) credit can also extend to service members awaiting court-martial in civilian custody, but only if "a military member is confined by civilian authorities for a military offense and with notice and approval of military authorities."[101]

How is R.C.M. 305(k) Credit Applied?—Rule 305(k) is an administrative credit applied against the approved sentence to confinement, but the language of R.C.M. 305(k) is misleading. It provides that "noncompliance with subsections (f), (h), (i), or (j) shall be an administrative credit against the sentence *adjudged*."[102] Counsel, however, must not narrowly construe its meaning, for a "cursory reading of the rule may result in the erroneous conclusion that R.C.M. 305(k) is to be applied only against an adjudged sentence."[103] Instead, practitioners must read the rule as a whole and focus on the distinction between "judicial" and "administrative" credit.[104]

First, the rule must be read as a whole. The ACMR tackled the R.C.M. 305(k) interpretation challenge in *United States v. Gregory.*[105] Despite the use of the word "adjudged" in the rule, credit is administratively applied; in fact, if it were judicially applied, service members may not receive "meaningful R.C.M. 305(k) credit at all."[106] Administrative credit not only avoids potential "absurdity,"[107] it "most 'accurately reflects the intention of' the President, 'is more consistent with the structure of the' rule, 'and more fully serves the purpose of' R.C.M. 305."[108]

Second, the distinction between administrative credit and judicial credit is critical. Rule 305(k) characterizes the credit as "administrative," not one adjudged at trial.[109] Moreover, R.C.M. 305(k) credit is based on *United States v. Larner*,[110] where CMA held that administrative credit was the only adequate and legal remedy for illegal pretrial confinement.[111]

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96. *See id*. R.C.M. 305(i) (including two military magistrate reviews, a 48-hour probable cause determination, and a seven-day pretrial confinement review); United States v. McCants, 39 M.J. 91 (C.M.A. 1994) (failing to timely deliver the magistrate review decision to the defense counsel, after request, results in R.C.M. 305(k) credit for violating R.C.M. 305 (i)).

97. *See* MCM, *supra* note 3, R.C.M. 305 (j) (requiring a motion for appropriate relief to initiate military judge's review of pretrial confinement once the charges are referred to trial).

98. *See* United States v. Williams, 47 M.J. 621, 623 (Army Ct. Crim. App. 1997) (awarding R.C.M. 305(k) credit for violating R.C.M. 305(*l*) when the military judge erred in returning the appellant to pretrial confinement without "new evidence" or "additional misconduct"). Violations of R.C.M. 305(*l*) fall within the "other situations" that the drafters of R.C.M. 305 envisioned as triggering additional R.C.M. 305(k) relief out of a policy to deter violations. *Id*. at 633.

99. *See* discussion *infra* notes 112-115 and accompanying text.

100. *See* United States v. Suzuki, 14 M.J. 491 (C.M.A. 1983).

101. *See* United States v. Lamb, 47 M.J. 384, 385 (1998) (citing *Ballesteros*, accused denied *Rexroat* credit by failing to show that he was confined solely for a military offense); *see also* United States v. Ballesteros, 29 M.J. 14 (C.M.A. 1989); United States v. Stuart, 36 M.J. 746 (A.C.M.R. 1993) (awarding R.C.M. 305(k) credit to AWOL accused held by civilian authorities at request of the military).

102. MCM, *supra* note 3, R.C.M. 305(k) (emphasis added).

103. *See* United States v. Gregory, 21 M.J. 952, 957 (A.C.M.R. 1986), *aff'd*, 23 M.J. 246 (C.M.A 1986).

104. *See* discussion *supra* notes 22-32 and accompanying text.

105. 21 M.J. 952, 957 (A.C.M.R. 1986), *aff'd*, 23 M.J. 246 (C.M.A 1986).

106. *See id*. at 957.

107. *See id*. at 957 n.13 (applying 31 days of R.C.M. 305(k) credit against the accused's five month adjudged sentence at trial would have the "absurd" result of allowing no meaningful credit in light of convening authority's approved sentence to confinement of three months).

108. *See id*., 21 M.J. at 957 (quoting United States v. Leonard, 21 M.J. 67, 69 (C.M.A. 1985)).

109. MCM, *supra* note 3, R.C.M. 305(k) ("The remedy . . . shall be an administrative credit.").

110. 1 M.J. 371 (C.M.A. 1976). *See* MCM, *supra* note 3, R.C.M. 305(k) analysis, app. 21, at A21-20 ("The requirement for an administrative credit for violations . . . is based on *United States v. Larner*.").

111. *See Larner*, 1 M.J. at 373-75 (noting two sources of credit for the illegal pretrial confinement suffered by the appellant). The *Larner* opinion lacks a factual account explaining why appellant's pretrial confinement was illegal. The court cites Article 13, UCMJ, and *United States v. Nixon*, 45 C.M.R. 254 (1970) (recognizing illegal pretrial confinement as a lack of probable cause, or for purposes other than to insure an accused's presence at trial, or to protect the person and property of others) when referring to appellant's illegal pretrial confinement. *Id.* at 372 n.1.

Practical Issue: 1998 Manual Changes—The 1998 *Manual for Courts-Martial* adds two additional grounds for awarding R.C.M. 305(k) credit.[112] The amended R.C.M. 305(k) provides that "the military judge may order additional credit for each day of pretrial confinement that involves an abuse of discretion or unusually harsh circumstances."[113] These new grounds also apply in addition to any *Allen* or *Mason* credit.[114] Unlike violations of R.C.M. 305 (f), (h), (i), and (j), however, the two new grounds are not limited to day-for-day credit as a remedy; the amount of credit is at the military judge's discretion.[115]

Credit for the Abuse of Discretion—Substantively, the "abuse of discretion" ground is not new; it appears in R.C.M. 305(j)(2) and has been there since the inception of R.C.M. 305.[116] Although redundant, the 1998 amendment included the "abuse of discretion" language in R.C.M. 305(k) for consistency and clarity.[117]

Rule 305(j)(2) was inconsistent with the 1995 version of R.C.M. 305(k). Rule 305(j)(2), not limited by a day-for-day remedy, directed the military judge to apply credit via R.C.M. 305(k).[118] The former R.C.M. 305(k), however, only specified day-for-day credit and did not include the "abuse of discretion" language.[119] This led to different interpretations of how to apply the credit.[120] The new language of amended R.C.M. 305(k) clarifies the amount of credit that can be awarded,[121] and it serves notice to convening authorities that egregious conduct can lead to more than day-for-day credit against an approved sentence.[122]

Credit for Unusually Harsh Circumstances: Suzuki Credit—The second ground, pretrial confinement that involves "unusually harsh circumstances,"[123] is also not a new substantive standard. This provision codifies *United States v. Suzuki*,[124] where the CMA awarded more than day-for-day administrative credit for pretrial confinement under "unusually harsh circumstances."[125] While including the "unusually harsh circumstances" language in R.C.M. 305(k) did not create a new basis for relief, [126] it resolved the issue of where to categorize *Suzuki* credit.[127]

Credit for Violations of Article 13, UCMJ

Article 13, UCMJ provides two bases of sentence credit for service members "held for trial":[128] (a) pretrial punishment, and (b) credit for "unduly rigorous circumstances."[129] Article 13 credit is applied two ways–either judicially or administratively–depending on the circumstances of the case.[130] In addition, this section discusses the practical issue of waiver–when

112. *See* MCM, *supra* note 3, Exec. Order No. 13086, 1998 Amendments to the *Manual for Courts-Martial*, app. 25, A25-36.

113. *Id*. R.C.M. 305(k).

114. *See id*.

115. *See id*.

116. *See generally* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 305 (1984) [hereinafter 1984 MANUAL].

117. *See* Memorandum, Joint Service Committee on Military Justice Working Group, Criminal Law Division, Office of The Judge Advocate General, 2200 Army Pentagon, DAJA-CL, to The Judge Advocate General, subject: 23 August Meeting of the Joint Service Committee (JSC) on Military Justice, para. II. F. (28 Aug. 1995) (on file with author) [hereinafter JSC Memo] (noting the reasons for the proposed changes to R.C.M. 305).

118. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 305(j)(2) (1995) [hereinafter 1995 MANUAL].

119. *See* 1984 MANUAL, *supra* note 116, R.C.M. 305(j)(2).

120. *See* JSC Memo, *supra* note 117, para. II. F.

121. *See id*.

122. *See id.* (according to the JSC Air Force representative, one reason the "abuse of discretion" language was included in R.C.M. 305(k) was motivated by United States v. Tilghman, 1995 CCA Lexis 171, ACM 30542 (A.F. Ct. Crim. App. Jun. 20, 1995, *aff'd*, 44 M.J. 493 (1996). In *Tilghman*, a post-trial military judge granted an additional 18 month sentence credit for the unlawful intervention of the government, who in defiance of the trial judge's ruling, ordered the accused into confinement after conviction , but before a sentence was adjudged. *Tilghman*, 44 M.J. at 494.

123. *See* MCM, *supra* note 3, R.C.M. 305(k).

124. 14 M.J. 491 (C.M.A. 1983); Telephone Interview with Lieutenant Colonel Frederic Borch, Standing Member, Joint Service Committee on Military Justice, 1994-1996, (Nov. 9, 1998) (stating intent of including language was to incorporate *Suzuki*) [hereinafter Borch Interview].

125. *See Suzuki*, 14 M.J. at 491-493. "On the first day of this segregation, appellant's clothes were taken from him and he remained in a cell approximately 6 X 8 feet in size, clothed only in his underwear. In his cell was a bed resting on a piece of plywood, an open toilet, a sink, and a single light." *Id*. at 491-92.

126. Borch Interview, *supra* note 124 (including additional language in R.C.M. 305(k) provided military judges with all illegal pretrial confinement options in one location). Note that R.C.M. 305(k) contains no provision for awarding credit for violations of Article 13, UCMJ.

does the accused's failure to timely complain waive an Article 13 remedy?

What Triggers Article 13, UCMJ Credit?

The McCarthy Test—In *United States v. McCarthy*,[131] the CAAF provided a two-pronged test for Article 13 violations.[132] This test established a framework for determining when Article 13 sentence credit is triggered. This section examines *McCarthy*'s two-pronged test and discusses the parameters of Article 13 credit with this framework in mind.

Article 13, UCMJ, prescribes that "[n]o person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement . . . nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances require to insure his presence."[133] In *McCarthy*, the CAAF explains that Article 13 prohibits two types of activities: (a) "punishment or penalty prior to trial"[134] (the punishment prong), and (b) "unduly rigorous circumstances during pretrial detention" (the rigorous circumstances prong).[135]

The punishment prong focuses on intent; it requires "a purpose or intent to punish an accused before guilt or innocence has been adjudicated."[136] There is "no single standard as to what constitutes punishment";[137] the intent inquiry is a "classic question of fact."[138] The rigorous circumstances prong, however, focuses on conditions; an inference of punishment may arise from "sufficiently egregious circumstances"[139] that may be "so excessive as to rise to the level of punishment."[140]

The Parameters of Article 13 Credit—Specific conduct that triggers Article 13 credit has shifted over time.[141] Therefore,

127. A nagging question in sentencing credit has been whether *Suzuki* credit is a substantive basis of credit apart from Article 13 credit. This question arises because the egregious facts in *Suzuki* seem a logical violation of Article 13, but the CMA did not mention Article 13 in its opinion. One view is that *Suzuki* is an Article 13 case. First, *Suzuki*'s facts fall squarely within the ambit of Article 13's prohibitions. *See* discussion *infra* notes 131-140 and accompanying text. Second, the CMA described the essential facts of the case by citing *United States v. Bruce*, 14 M.J. 254 (C.M.A. 1982), an Article 13 commingling case, as the basis for the trial judge's finding that the accused was subjected to illegal pretrial punishment. Third, the primary issue decided by *Suzuki* was grounded in Article 13. At issue was the remedial rule of *United States v. Larner*, 1 M.J. 372 n.1 (C.M.A. 1976), which initially established administrative credit as the appropriate remedy for illegal pretrial confinement (in violation of Article 13 and *United States v. Nixon*, 45 C.M.R. 254 (C.M.A. 1970)). Finally, it is doubtful that *Suzuki* was created from "whole cloth." Viewing *Suzuki* from a historical perspective, no basis other than Article 13 existed at the time of the decision to justify a remedy for the egregious conditions of pretrial confinement in the case. *See generally* UCMJ art. 9(d) (1964) (requiring probable cause); UCMJ art. 10 (1964) (requiring pretrial confinement if charged with an offense "as circumstances may require," but normally summary court-martial charges do not warrant pretrial confinement); MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. II, ¶ 20c. (1969) (preventing flight and the "seriousness of the offense charged" are grounds for pretrial confinement); United States v. Heard, 3 M.J. 14, (C.M.A. 1977) (pretrial confinement justified for foreseeable serious criminal misconduct, but rejected "seriousness of the offense charged" as an independent basis for pretrial confinement apart from the prevention of flight and preventing criminal misconduct).

128. *See* United States v. Combs, 47 M.J. 330, 333 (1997).

129. *See* United States v. McCarthy, 47 M.J. 162, 165 (1997).

130. *See generally* Coyle v. Commander, 21st Theater Army Area Command, 47 M.J. 626 (Army Ct. Crim. App. 1997).

131. *McCarthy*, 47 M.J. at 162.

132. *See id*. at 165.

133. UCMJ art. 13 (West 1998).

134. *See McCarthy*, 47 M.J. at 165.

135. *See id*.

136. *See id*. at 165 (citing *Bell v. Wolfish*, and the constitutional dimension raised by illegal pretrial punishment); Bell v. Wolfish, 441 U.S. 520, 537-538 (1979) (holding that the Due Process Clause provides pretrial detainees the right to be free from punishment). To determine whether particular conditions rise to the level of punishment, "a court must decide whether the disability is imposed for the purpose of punishment." *Id*. at 537.

137. *See* United States v. Huffman, 40 M.J. 225, 227 (1994).

138. *See McCarthy*, 47 M.J. at 166.

139. *See id*. at 165.

140. *See id*. (citing United States v. James, 28 M.J. 214, 217 (C.M.A. 1989)). This prong of *McCarthy* appears synonymous with *Suzuki*. However, *Suzuki* occurred in pretrial confinement, and the rigorous circumstances prong of *McCarthy* applies to "pretrial detention," an arguably broader standard. Conceptually, based on one's view of whether or not *Suzuki* is an Article 13 case, *Suzuki* can fall within either prong of the *McCarthy* analysis. Nevertheless, despite the logical appeal of placing *Suzuki* in the Article 13 category, *Suzuki* credit is now incorporated into R.C.M. 305(k) credit. *See* discussion *supra* notes 123–127 and accompanying text.

141. *See generally* United States v. Palmiter, 20 M.J. 90 (C.M.A. 1985) (providing an historical overview of what conduct was considered pretrial punishment, beginning with the legislative history of Article 13 to the court's adoption of an intent-based standard in this decision).

when presented with an Article 13 credit issue, practitioners should ask two questions to determine if one or both of the *McCarthy* prongs have been triggered: (a) what conduct per se violates Article 13? and, (b) how far does Article 13 extend?

What conduct per se violates Article 13? Practitioners should consider R.C.M. 304(f), the commingling of pretrial detainees with sentenced prisoners, regulations, and "harsh" confinement conditions. First, a violation of R.C.M. 304(f) can violate either *McCarthy* prong. The President amplifies Article 13 in R.C.M. 304(f) by providing that "prisoners being held for trial shall not be required to undergo punitive duty hours training, perform punitive labor, or wear special uniforms prescribed only for post-trial prisoners."[142] These prohibitions are grounded in the genesis of Article 13 and essentially equate to per se violations.[143]

The mere commingling of pretrial confinees with sentenced prisoners, however, does not per se violate either prong of Article 13.[144] Before 1985, pretrial confinees suffered illegal pretrial punishment by working with sentenced prisoners–regardless of "the type of work involved."[145] The CMA ended this "commingling" rationale in *United States v. Palmiter* and adopted an "intent" based approach.[146] Commingling is now just a factor to consider; the question to be resolved now is "whether any condition of . . . confinement was intended to be punishment."[147]

Likewise, a regulatory violation does not automatically trigger one of the Article 13 prongs. Under the *McCarthy* analysis, the issue is one of intent and the nature of conditions. The government's mere failure to follow regulations does not per se violate Article 13;[148] however, implementing a defective policy may constitute an Article 13 violation.[149]

Finally, beware of labels. A service member's complaint of "harsh" conditions does not alone trigger Article 13 sentence credit. In *McCarthy*, the appellant was denied credit even though he was placed into "maximum" pretrial custody.[150] The bottom line in this area: practitioners must focus on *McCarthy's* two-pronged analysis.

How far does Article 13 extend? On its face, Article 13 is not limited to pretrial confinees; it broadly applies to service members "held for trial."[151] This includes cases of public denunciation and military degradation,[152] as well as unlawfully reducing a service member's rank.[153] Furthermore, pretrial confinement does not have to be in a military facility; "pretrial confinement in a civilian facility is subject to the same scrutiny."[154] Lastly, service members in pretrial confinement cannot waive their Article 13 protections,[155] but they can voluntarily subject themselves to certain confinement conditions, "so long as those conditions do not rise to the level of pretrial 'punishment'."[156]

How is Article 13 Credit Applied?—Applying Article 13 credit is problematic.[157] A service member who suffers an Arti-

142. MCM, *supra* note 3, R.C.M. 304(f), analysis, app. 21, at A21-15 ("This section is based on Article 13.").

143. *See Hearings on H.R. 2498 Before a Subcomm. of the Comm. on Armed Services*, 81st Cong., 1st Sess. 916-917 (1949) (stating that the intent of Article 13 was to prohibit imposing hard labor as punishment on pretrial detainees until they were convicted and sentenced to perform such labor), *reprinted in* 1 INDEX AND LEGISLATIVE HISTORY, UNIFORM CODE OF MILITARY JUSTICE 384-385 (1949) [hereinafter *Hearings on H.R. 2498*]; United States v. Bayhand, 21 C.M.R. 84 (C.M.A. 1956) (noting that the drafters of 1951 *MCM* wrote, and the President promulgated, the present day R.C.M. 304(f) prohibitions to amplify Article 13).

144. *See Palmiter*, 20 M.J. at 95-96.

145. *Id.* at 94; *see* United States v. Nelson, 39 C.M.R. 177 (C.M.A. 1969); United States v. Pringle, 41 C.M.R. 324 (C.M.A. 1970).

146. *See Palmiter*, 20 M.J. at 95-96.

147. *See id*. at 95.

148. *See* United States v. Moore, 32 M.J. 56, 60 (C.M.A. 1991) ("We hold that a violation of applicable service regulations do not per se require additional credit."); United States v. Phillips, 42 M.J. 346 (1995) (erroneously denying religious materials to service member confined in civilian facility did not violate Article 13).

149. *See* United States v. Anderson, 49 M.J. 575 (N.M. Ct. Crim. App. 1998) (awarding 77 days of credit for arbitrary unwritten policy that violated Article 13). The Marine Corps Base at Camp Pendleton had an unwritten policy that all pretrial confinees were placed in a maximum-custody status based solely on whether the pretrial confinee faced more than five years of confinement. *Id.* at 576.

150. *See* United States v. McCarthy, 47 M.J. 162 (1997) (placing pretrial confinee in maximum confinement does not in and of itself violate Article 13).

151. *See* United States v. Combs, 47 M.J. 330, 333 (1997).

152. *See* United States v. Cruz, 25 M.J. 326 (C.M.A. 1987) (humiliating soldiers in public and military degradation by command in infamous "peyote platoon" case constituted Article 13 pretrial punishment); United States v. Villamil-Perez, 32 M.J. 341 (C.M.A. 1991) (posting on a unit bulletin board a serious incident report, which identified the accused, violated Article 13); *Combs*, 47 M.J. at 330 (1997) (forcing an airman to wear E-1 rank while he was awaiting rehearing violated Article 13).

153. *See Combs*, 47 M.J. at 333.

154. *See* United States v. James, 28 M.J. 214, 216 (C.M.A. 1989).

cle 13 violation while in pretrial confinement receives administrative credit.[158] Outside of pretrial confinement, however, a service member will generally receive judicial credit.[159] A recent Army Court of Criminal Appeals decision, *Coyle v. Commander*,[160] attempts to clarify this area.

At a minimum, the CAAF provided in *Suzuki* that "unusually harsh circumstances"[161] of pretrial confinement deserve administrative credit.[162] Whether *Suzuki* remedied an Article 13 violation is a subject of debate,[163] but it provides a starting point to determine how Article 13 credit is applied. The remedy for such violations is "not framed in concrete";[164] therefore, military judges are not limited to a day-for-day credit.

Applying Article 13 credit for violations in other circumstances, especially outside of pretrial confinement, however, is murky. No cogent credit scheme exists.[165] In pretrial punishment cases outside the confinement context, the CAAF has not provided any bright lines on how to apply Article 13 credit.[166] Exercising its broad power to reassess sentences on appeal,[167] the CAAF has fashioned varied remedies in these cases.[168] This includes the landmark "peyote platoon" case, *United States v. Cruz*,[169] where the CMA ordered a full sentence rehearing to bring the prior punishment to the attention of the court-martial.[170]

Given the lack of authority in the non-pretrial confinement context, the military judge must decide whether to order an administrative credit or consider illegal pretrial punishment as mitigation in adjudging a sentence.[171] In fact, military judges have taken both routes.[172] To provide some direction, the court in *Coyle v. Commander*[173] divided the current law of sentence credit into two categories: "confinement credit" and "punishment credit."[174] Confinement credit includes "*Allen* credit,

155. *See* United States v. Palmiter, 20 M.J. 90, 96 (C.M.A. 1985) ("It should be noted that a prisoner cannot 'waive' his Article 13 protections prior to trial because no one can consent to be treated in an illegal manner.").

156. *See* United States v. Huffman, 40 M.J. 225, 227-28 (1994) (referring to the "punishment" standard of *Bell v. Wolfish*, 441 U.S. 520 (1979), where the "significant factor in the judicial calculus is the intent of detention officials").

157. The last two sections of this article examine this proposition in more detail and propose the uniform application of all Article 13 violations administratively against the approved sentence to confinement.

158. *See* United States v. Larner, 1 M.J. 371 (C.M.A. 1976); United States v. Suzuki, 14 M.J. 491 (C.M.A 1983).

159. *See* Coyle v. Commander, 21st Theater Army Area Command, 47 M.J. 626 (Army Ct. Crim. App. 1997).

160. *Id.* (instructing that a categorical approach to Article 13 credit be followed). The categorical approach comports with the status quo vis a' vis precedent.

161. *See Suzuki*, 14 M.J. at 493.

162. *See id*. at 493 (expanding *Larner* beyond a day-for-day formula to remedy "unusually harsh conditions of pretrial confinement"); United States v. Larner, 1 M.J. 371, 372 n.1 (C.M.A. 1976) (administratively applying credit only remedy that legally and adequately provides relief for illegal pretrial confinement, citing Article 13 and United States v. Nixon, 45 C.M.R. 254 (C.M.A. 1970), as a bases for appellant's illegal pretrial confinement); *see also* United States v. Nelson, 39 C.M.R. 177 (C.M.A. 1969) (meaningful relief due for accused wearing same uniform as sentenced prisoners, governed by same rules and regulations, and being used indiscriminately with sentenced prisoners to perform labor); United States v. Pringle, 41 C.M.R. 324 (C.M.A. 1970) (meaningful sentence relief is the remedy for violating standards now contained in R.C.M. 304(f)).

163. *See supra* note 127.

164. *See Suzuki*, 14 M.J. at 493.

165. *See* UCMJ art. 13 (West 1998); MCM, *supra* note 3, R.C.M. 305(k); United States v. Suzuki, 14 M.J. 491 (C.M.A. 1983); United States v. McCarthy, 47 M.J. 162, 166 (1997); *Coyle*, 47 M.J. at 626.

166. *See generally Coyle*, 47 M.J. at 628-30.

167. *See generally* UCMJ art. 67; *Larner*, 1 M.J. at 373; United States v. Valead, 32 M.J. 122 (C.M.A. 1991).

168. *See* United States v. Villamil-Perez, 32 M.J. 341, 343-344 (C.M.A. 1991) (awarding no credit for the improper public posting of an incident report). Although it found the three-day posting of the report constituted pretrial punishment, the court held that the appellant suffered no substantial prejudice. The appellant had already received significant relief from the convening authority in the form of a 23-month sentence suspension, which considered the improper posting of the report, among other factors. *Id*. at 343-444; United States v. Combs, 47 M.J. 330 (1997) (awarding an illegally demoted airman a 20-month reduction against his approved sentence to confinement on a day-for-day basis).

169. 25 M.J. 326 (C.M.A. 1987) (holding that mass apprehension and public humiliation of soldiers violated Article 13). Soldiers suspected of drug offenses were called out of a brigade formation. The suspected soldiers were escorted to the brigade commander, saluted, and had their unit crests removed. The brigade commander did not return their salutes. The soldiers were then arrested and handcuffed by CID in front of the formation. Thereafter, the suspected soldiers were segregated from the unit and were allegedly marched in the unit area to the cadence of "peyote, peyote, peyote." *Id*. at 328-29.

170. *Cruz*, 25 M.J. at 331.

Mason credit, R.C.M. 305(k) credit, [and] *Suzuki* credit,"[175] which must be administratively assessed.[176] "[I]n 'punishment credit' cases not involving confinement,"[177] however, credit is usually assessed judicially,[178] although credit must be administratively assessed "under some circumstances."[179] In sum, *Coyle* shows that applying non-confinement related Article 13 credit is largely a function of military judge discretion.

Practical Issue: Waiver of Article 13 Claims—Does an accused waive his Article 13 claim if he fails to raise the conditions of his confinement before trial?[180] Does the "failure of an accused to raise the question at trial bar raising the issue on appeal"?[181] The direct answer to both questions is no, but the failure to timely complain in effect disables any claim of illegal pretrial punishment.[182]

Before trial, "if an accused fails to complain of the conditions of his pretrial confinement to the military magistrate or his chain of command, that is strong evidence that the accused is not being punished in violation of Article 13."[183] Likewise, an accused that raises the issue for the first time on appeal faces the same uphill battle. While the claim is not barred per se, the failure to raise it at the trial level is "strong evidence"[184] that no illegal punishment occurred.[185]

Moreover, the evidentiary weight raised by the timely failure to complain does not function "in reverse." In *McCarthy*, the appellant argued that his timely complaint of pretrial confinement conditions amounted to "strong evidence"[186] of illegal Article 13 punishment. Dismissing this rationale, the CAAF noted that "few people keep silent when they have cause to complain, many complain when they have no cause."[187] A timely complaint merely preserves the claim; it does not amount to a per se finding of impermissible punishment.[188]

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171. *See Coyle*, 47 M.J. at 626 (instructing that military judges must distinguish between punishment credit and confinement credit; punishment credit should be announced on the record, informing the accused that but for the adjudged credit, his sentence would have been increased by the amount of credit); *see also* MCM, *supra* note 3, R.C.M. 1001(c)(1)(B) (defining mitigation as any matter introduced that may lessen the punishment). *See also* BENCHBOOK, *supra* note 2 (containing no sentencing instruction for Article 13 violations).

172. *See* United States v. Moore, 32 M.J. 774 (A.C.M.R. 1991) (although military judge announced that he had considered pretrial punishment in hisits sentence deliberation, more credit was awarded on appeal in an abundance of caution); United States v. Latta, 34 M.J. 596 (A.C.M.R. 1992) (noting that the military judge considered pretrial punishment in the sentence adjudged); *Coyle*, 47 M.J. at 626 (noting that the trial judge applied the punishment remedy as mitigation on sentencing, and announced such on the record). *But see* United States v. Russel, 30 M.J. 977 (A.C.M.R. 1990) (noting that at sentencing the military judge awarded pretrial punishment credit in restriction case and ordered as an administrative credit); United States v. Stamper, 39 M.J. 1097 (A.C.M.R. 1994) (awarding administrative sentence credit at trial for restriction that was not tantamount to confinement, but constituted illegal pretrial punishment for routine disparaging remarks by commander).

173. 47 M.J. at 626; Telephone Interview with Colonel Wayne Johnston, Appellate Judge, Army Court of Criminal Appeals, author of *Coyle* opinion (Nov. 13, 1998) [hereinafter Johnston Interview].

174. *See Coyle*, 47 M.J. at 628-630 (establishing "confinement credit" and "punishment credit" categories).

175. *See id*. at 629.

176. *See id*. (holding that confinement credit "must be assessed against the approved sentence").

177. *See id*.

178. *See id*.; United States v. Stamper, 39 M.J. 1097, 1099 (A.C.M.R. 1994) ("It is usually sufficient if some allowance for prior punishment is made in assessing or reassessing the sentence.").

179. *See Coyle*, 47 M.J. at 630 (referring to *United States v. Suzuki*, 14 M.J. 491 (C.M.A. 1983) as "some circumstances"). This indicates a broad view of *Suzuki*. Clearly, *Suzuki* mandates administrative credit for "unusually harsh circumstances" in the pretrial confinement context. *Coyle*, however, apparently does not view *Suzuki* as authorizing credit solely in the pretrial confinement context, but envisions situations where "unusually harsh circumstances" imposed on a service member under pretrial restriction may warrant administrative credit.

180. *See* United States v. Huffman, 40 M.J. 225, 226-27 (C.M.A. 1994).

181. *See id*. at 227.

182. *See id*. at 227-28.

183. *See id*. at 227; *see also* United States v. Palmiter, 20 M.J. 90 (C.M.A. 1985); United States v. James, 28 M.J. 214 (C.M.A. 1989).

184. *See Palmiter*, 20 M.J. at 97; *Huffman*, 40 M.J. at 227. *But see* United States v. Combs, 47 M.J. 330 (1997) (describing case as unusual, failing to raise illegal rank reduction by accused at rehearing did not amount to waiver on appeal).

185. *See Huffman*, 40 M.J. at 228.

186. United States v. McCarthy, 47 M.J. 162, 166 (1997).

187. *See id*. at 166.

Credit for Prior Nonjudicial Punishment: Pierce Credit

Pierce credit[189] is triggered in the "rare case"[190] where a service member is court-martialed for the same offense he was previously punished for under Article 15, UCMJ.[191] Service members can elect to have this credit applied against either their adjudged sentence at trial or against the sentence approved by the convening authority.[192] Also, practitioners should be wary of the limited use of prior nonjudicial punishment at trial[193] and understand the credit impact of Article 58b, UCMJ.[194]

What Triggers Pierce Credit?—Pierce credit is triggered when a command tries a service member after he has received nonjudicial punishment for the same offense.[195] Even though military due process allows service members to be court-martialed after receiving nonjudicial punishment under Article 15,[196] a double penalty for the same conduct is prohibited.[197] Therefore, these cases require "complete credit for any and all nonjudicial punishment suffered: day-for-day, dollar-for-dollar, stripe-for-stripe."[198] Of course, the types of nonjudicial punishment may not match the types of judicial punishment.[199] In this case, counsel, courts, and convening authorities must fashion equivalent credit via sentence conversion.[200]

How is Pierce Credit Applied?—Unlike all other sentence credits, *Pierce* credit presents an option to the service member. The convening authority applies any credit due for previous nonjudicial punishment at initial action on the sentence,[201] unless the accused "reveal[s] the prior punishment to the court-martial for consideration on sentencing."[202] The military judge can determine and apply the credit at trial only if the accused specifically requests the judge to do so.[203]

Practical Issues: Using Records of Nonjudicial Punishment and Article 58b, UCMJ—Two practical issues in this area deserve attention: the use of prior nonjudicial punishment at trial and the automatic forfeiture provisions of Article 58b, UCMJ. Simply stated, trial counsel cannot introduce a prior record of nonjudicial punishment once *Pierce* is triggered.[204] Unless the accused consents, a prior record of nonjudicial punishment for the same offense cannot be used for "any purpose at trial";[205] it "simply has no legal relevance to the court-martial."[206]

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188. *See id*.

189. *See* United States v. Pierce, 27 M.J. 367 (C.M.A. 1989).

190. *See id.* at 369. *But see* United States v. Self, No. 9800614 (Army Ct. Crim. App. Feb. 26, 1999) (indicating frustration over the review of *Pierce* cases, which are becoming an "all too common occurrence").

191. *See generally* UCMJ art. 15(f) (West 1998).

192. *See Pierce*, 27 M.J. at 369; United States v. Edwards, 42 M.J. 381 (1995).

193. *See Pierce*, 27 M.J. at 369.

194. *See generally* UCMJ arts. 57(a), 58b. (requiring the automatic forfeiture of pay and allowances 14 days after the sentence is adjudged or the convening authority acts, whichever is earlier, for a sentence of confinement in excess of six months or a sentence of confinement for six months or less and a punitive discharge).

195. *See Pierce*, 27 M.J. at 369.

196. *See* UCMJ art. 15(f) (stating that a subsequent court-martial for a serious crime or offense is not barred).

197. *See Pierce*, 27 M.J. at 369.

198. *See id.*

199. *See generally* UCMJ art. 15(a); MCM, *supra* note 3, R.C.M. 1003(b).

200. *See Pierce*, 27 M.J. at 369 (using a "Table of Equivalent Punishments, similar to that provided in paragraph 127c(2) or 131d, *Manual for Courts-Martial*, United States, 1969, would be helpful."). *See generally* MCM, *supra* note 3, R.C.M. 1107 (discussing the action on sentence by convening authority).

201. *See* MCM, *supra* note 3, R.C.M. 1107(d).

202. *See Pierce*, 27 M.J. at 369; United States v. Edwards, 42 M.J. 381 (1995).

203. *See Edwards*, 42 M.J. at 382-83. *But see* United States v. Gibson, No. 9700619 (Army Ct. Crim. App. July 1, 1998) (noting that the accused's discretion to choose a remedy was preempted by the trial counsel's improper introduction of a prior Article 15–prompting the military judge to adjudge credit without a specific request).

204. *See Pierce*, 27 M.J. at 369.

205. *See id.*

Article 58b, UCMJ presents a potential post-trial pitfall in this area. When a case is forwarded to the convening authority for initial action,[207] justice managers and staff judge advocates must guide the convening authority through the automatic forfeiture minefield.[208] The convening authority must give meaningful credit; he cannot award *Pierce* credit and allow it to be preempted by Article 58b.[209] In such a case, the convening authority should select an alternative that accounts for the impact of Article 58b.[210]

Summary of Available Types of Sentence Credit

This section of the article pieced together the mosaic of case law, executive rule, and statute that make up available sentence credit.[211] A quick reference guide is found at the Appendix. To recap, there are four main categories of sentence credit: (a) *Allen* and *Mason* credit, which entitle service members to day-for-day administrative credit for time served in pretrial confinement or its equivalent;[212] (b) R.C.M. 305(k) credit, which provides administrative credit in addition to *Allen* and *Mason* for violating R.C.M. 305 safeguards, and "pretrial confinement that involves an abuse of discretion or unusually harsh circumstances";[213] (c) Article 13 credit,[214] which remedies illegal pretrial punishment and "unduly rigorous circumstances during pretrial detention;"[215] and (d) *Pierce* credit, which gives service members the option to receive credit judicially or administratively when court-martialed for an offense previously punished under Article 15, UCMJ.[216]

After surveying available sentence credit, the entire credit scheme comes into focus. Service members receive tangible administrative credit for the time they spend in pretrial confinement and for any violations of pretrial confinement safeguards,[217] with one caveat: Article 13 credit.[218] Why isn't Article 13 credit administratively applied in every case? This article discusses Article 13 credit in the next section, and explores a proposed solution.

The Article 13 Credit Anomaly

A service member who receives judicially-applied Article 13 credit under the current scheme may not receive any tangible sentence credit, and in some circumstances, may serve a longer sentence than a similarly situated service member who receives administrative credit. These unsettling propositions, however, reflect the reality of the Article 13 credit anomaly and deserve attention. This section examines this problem in-depth. First, this section reviews the status quo of sentencing credit application offered by *Coyle v. Commander*,[219] and identifies its deficiencies in the Article 13 context. Second, this section examines the anomalous impact of the status quo on service members by hypothetical, which calls into question sentence credit philosophy.

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206. *See id*.

207. *See* MCM, *supra* note 3, R.C.M. 1107.

208. *See* UCMJ arts. 57(a), 58b (West 1998) (requiring the automatic forfeiture of pay and allowances 14 days after a sentence is adjudged or the convening authority acts, whichever is earlier, for (i) a sentence to confinement in excess of six months, or (ii) a sentence to confinement for six months or less and a punitive discharge).

209. *See* United States v. Ridgeway, 48 M.J. 905 (Army Ct. Crim. App. 1998) (observing that implicit in *Pierce* is the "principle that the convening authority must, whenever possible, grant credit which gives meaningful relief").

210. *See Ridgeway*, 48 M.J. at 907 (listing alternative convening authority options). Options include deferment under Article 57(a)(2), waiver of pay forfeitures under Article 58b(b), or additional sentence credit through sentence conversion with one day of pay equal to one day of confinement. *Id*. at 907.

211. *See generally* UCMJ art. 13; MCM, *supra* note 3, R.C.M. 304, 305; United States v. Suzuki, 14 M.J. 491 (C.M.A. 1983); United States v. Allen, 17 M.J. 126 (C.M.A. 1984); United States v. Mason 19 M.J. 274 (C.M.A. 1985); United States v. Pierce, 27 M.J. 367 (C.M.A. 1989).

212. *See Allen*, 17 M.J. at 126; *Mason*, 19 M.J. at 274.

213. *See* MCM, *supra* note 3, R.C.M. 305(j), 305(k). *See also Suzuki*, 14 M.J. at 491; United States v. Williams, 47 M.J. 621, 623 (Army Ct. Crim. App. 1997).

214. UCMJ art. 13.

215. *See* United States v. McCarthy, 47 M.J. 162, 165 (1997).

216. *See* United States v. Pierce, 27 M.J. 367 (C.M.A. 1989).

217. *See* discussion *supra* notes 33-127 and accompanying text.

218. *See* discussion *supra* notes 157-179 and accompanying text.

219. Coyle v. Commander, 21st Theater Area Army Command, 47 M.J. 626 (Army Ct. Crim. App. 1997).

The Sentence Credit Application Status Quo and its Deficiencies

A Review of the Status Quo—Coyle v. Commander[220] exposes the deficiencies inherent in the current Article 13 credit scheme. In review, *Coyle* notes that sentencing credit law differentiates between "confinement credit" and "punishment credit."[221] "Confinement credit" consists of "*Allen* credit, *Mason* credit, R.C.M. 305(k) credit, [and] *Suzuki* credit";[222] while "punishment credit" involves illegal pretrial punishment that occurs outside of confinement.[223] Confinement credit is administratively applied; punishment credit is judicially determined.[224]

This categorical analysis splits the application of Article 13 credit apart. *Coyle* notes that at a minimum, Article 13 credit is judicially applied, but there are circumstances–like *Suzuki*–where the credit must be administratively applied.[225] In sum, Article 13 credit is largely a matter of sentencing authority discretion.[226]

Status Quo Deficiencies in Applying Article 13 Credit—The status quo suffers in three respects: (1) it lacks a solid legal foundation for applying Article 13 credit, (2) it makes inconsistent policy, and (3) it is uncertain and complex.

First, there is no firm legal foundation for treating Article 13 cases outside of confinement different than Article 13 cases in pretrial confinement. The language of Article 13 is silent here,[227] and its legislative history provides little remedial insight.[228] Therefore, the CAAF precedent remains the guiding light. But unfortunately, the light does not shine brightly in one specific direction.

Although *Larner* and *Suzuki* provide a foundation for an administrative remedy in the confinement context,[229] the CAAF decisions are unclear elsewhere.[230] These decisions must be viewed within their appellate context, where broad reassessment powers exist,[231] and the remedy is often a function of time and equity.[232] Service courts have relied on CAAF's denial of a "drastic remedy" in *United States v. Villamil-Perez*[233] to fashion their own appellate remedies,[234] but this does not dictate a particular method of credit at trial. In fact, trial judges have applied credit both ways to remedy Article 13 violations outside of confinement[235] and continue to do so in the field.[236]

Second, the current application of Article 13 credit creates inconsistent sentence credit policy. The remedy for violating any of the R.C.M. 305 safeguards is tangible administrative credit.[237] This credit, unlike confinement credit, is not grounded in equity;[238] instead, R.C.M. 305(k) credit is driven by a policy of deterrence.[239] The Article 13 status quo is incon-

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220. *Id.*

221. *Id.* at 628-29.

222. *See id*. at 629.

223. *See id*. at 628-29.

224. *See id*.

225. *See id*.

226. *See* discussion *supra* notes 157-179 and accompanying text.

227. *See* UCMJ art. 13 (West 1998).

228. *See Hearings on H.R. 2498*, *supra* note 143 (expressing concern for the performance of hard labor by pretrial detainees, but no remedial measures beyond prohibiting such conduct is discussed).

229. *See* United States v. Larner, 1 M.J. 371 (C.M.A. 1976); United States v. Suzuki, 14 M.J. 491 (C.M.A. 1983).

230. *See* United States v. Cruz, 25 M.J. 326 (C.M.A. 1987); United States v. Villamil-Perez, 32 M.J. 341 (C.M.A. 1991); United States v. Combs, 47 M.J. 330 (1997).

231. *See* UCMJ arts. 66, 67; s*ee also Larner*, 1 M.J. at 373; United States v. Valead, 32 M.J. 122 (C.M.A. 1991).

232. *See Larner*, 1 M.J. at 371 (noting that the appellate remedy cannot increase the severity of the sentence); *Villamil-Perez*, 32 M.J. at 343-44 (granting an additional appellate remedy would result in double credit since the appellant already benefited from the convening authority's action for the Article 13 violation). *See also* United States v. Latta, 34 M.J. 596 (A.C.M.R. 1992) (giving meaningful relief for illegal pretrial punishment by reassessing adjudged forfeitures since appellant had already completed confinement).

233. *See Villamil-Perez*, 32 M.J. at 344 (reversing the service court's finding that the appellant did not suffer Article 13 punishment for publicly posting a serious incident report, the CAAF refused to grant appellant "drastic remedy" of setting aside his punitive discharge).

234. *See* United States v. Hatchell, 33 M.J. 839 (A.C.M.R. 1991) (finding that mass apprehension at formation was violation of Article 13, no relief on appeal citing *Villamil-Perez* and noting that convening authority substantially reduced confinement per pretrial agreement); United States v. Foster, 35 M.J. 700 (N.M.C.M.R. 1992) (citing *Villamil-Perez*, additional Art. 13 credit was denied on appeal because the defense counsel made tactical decision to present the violation as mitigation).

sistent with this policy rationale since pretrial punishment credit is applied, in large part, judicially.[240] Why should pretrial punishment be treated differently? If the system deters violations of R.C.M. 305(k) safeguards with additional administrative credit, why should we allow illegal pretrial punishment–arguably more severe–to be left to the uncertainty of discretion and mitigation?

Finally, the status quo is uncertain and complex. In his concurring opinion in *Allen*, Chief Judge Everett addressed the uncertainty of applying sentence credit judicially rather than administratively.[241] Although *Allen* involved credit for pretrial confinement, Judge Everett's rationale also applies in this context, because "no one can foresee exactly what weight . . . various sentencing authorities and convening authorities" [242] will give to pretrial punishment cases.[243]

Uncertainty also extends to procedure. Military judges can account for Article 13 credit by announcing on the record how an adjudged sentence is reduced.[244] Member sentencing, however, is troublesome and raises a host of questions. How does a panel factor an accused's pretrial punishment into an adjudged sentence?[245] Does the military judge instruct the members, or is the prior pretrial punishment kept from them?

Moreover, the status quo is complex; in fact, in a case with both pretrial punishment[246] and unusually harsh circumstances,[247] applying Article 13 credit would be bifurcated. For instance, in a case like *United States v. Hoover*,[248] *Coyle* suggests that credit would be applied both administratively and judicially. In *Hoover*, the accused was forced to erect a pup tent on the unit lawn each night for three weeks, surround it with concertina wire, and remain there from 2200 until 0400.[249] In *Hoover*, ACMR held that the accused's "restraint was tantamount to confinement and that it was intended to be punishment."[250]

How would these violations of Article 13 receive credit today in light of the two-pronged *McCarthy* analysis?[251] *Coyle* suggests a bifurcated approach.[252] The punishment prong violation would be considered by the sentencing authority to arrive at an adjudged sentence.[253] The military judge, however, would order an administrative credit for the unusually harsh conditions tantamount to confinement.[254] While such a system could

235. *See* United States v. Russel, 30 M.J. 977 (A.C.M.R. 1990) (awarding administrative credit at trial for pretrial punishment in restriction case); United States v. Stamper, 39 M.J. 1097 (A.C.M.R. 1994) (awarding 40 days administrative credit at trial for routine disparaging comments by the unit commander). *But see* United States v. Moore, 32 M.J. 774 (A.C.M.R. 1991) (considering non-confinement related pretrial punishment as mitigation in arriving at a sentence); *Latta*, 34 M.J. at 596 (considering pretrial punishment in sentence adjudged); United States v. Rothhaas, ACM 32277 (A.F. Ct. Crim. App. Feb. 24, 1997) (degrading comments by commander considered as mitigation by military judge).

236. Electronic Interviews of U.S. Army Trial Judges, compiled by Colonel Gary Smith, Chief Trial Judge, U.S. Army, (Mar. 15, 1999) (on file with author) [hereinafter Army Trial Judge Poll] (requesting that positions on credit issues not be attributed to specific military judges).

237. *See* MCM, *supra* note 3, R.C.M. 305(k).

238. *See generally* United States v. Allen, 17 M.J. 126, 129 (C.M.A. 1984) (Everett, C. J., concurring) (stating benefits of administrative credit for legal pretrial confinement include placing military pretrial confinees in the same position as other federal detainees and eliminating the concern that the aggregate of pretrial and post-trial confinement can exceed the maximum sentence authorized by the *Manual*).

239. *See* MCM, *supra* note 3, R.C.M. 305(k) analysis, app. 21, at A 21-20 (credit under R.C.M. 305(k) "is intended as an additional credit to deter violations of the rule").

240. *See* Coyle v. Commander 21st Theater Army Area Command, 47 M.J. 626, 628-29 (Army Ct. Crim. App. 1997).

241. *See* United States v. Allen, 17 M.J. 126, 129 (C.M.A. 1984) (Everett, C. J., concurring).

242. *See id*.

243. *See id*. Chief Judge Everett's rationale applies via analogy to the pretrial punishment context.

244. *See, e.g.*, *Coyle*, 47 M.J. at 628-29 (encouraging the military judge to announce on the record how much the adjudged sentence is reduced for punishment credit); Army Trial Judge Poll, *supra* note 236 (indicating that at least three trial judges follow this approach for Article 13 credit).

245. *Cf. Allen*, 17 M.J. at 129 (Everett, C. J., concurring) ("It is impossible, even after the fact, to determine how an accused's pretrial confinement fits into [a sentencing authority's] determination of an appropriate sentence.").

246. United States v. Cruz, 25 M.J. 326 (C.M.A. 1987) (holding that intentional public humiliation and military degradation violated Article 13).

247. United States v. Suzuki, 14 M.J. 491 (C.M.A. 1983).

248. 24 M.J. 874 (A.C.M.R. 1987).

249. *See id*. at 876.

250. *See id*.

function, it is complex and increases the risk that a service member will receive either a windfall or no credit at all.

The Impact on Service Members

The most significant deficiency of the Article 13 credit status quo is the anomalous impact it can have on service members. Some service members who get judicial credit for pretrial punishment may not receive any tangible credit. Even worse, some may actually serve more time in confinement than a similarly sentenced service member who gets administrative credit.

Consider this hypothetical: two soldiers are facing court-martial. Soldier *A*, while in pretrial confinement, endures conditions that violate the rigorous circumstances prong of Article 13.[255] Soldier *B*, not in pretrial confinement, suffers routine public humiliation at formation from his commander that violates the punishment prong of Article 13.[256] Soldier *A* receives administrative credit, which will be subtracted from the approved sentence by the convening authority. Soldier *B* receives credit in the form of mitigation; the public humiliation is factored into his sentence at trial by the sentencing authority. Although, both soldiers suffered intentional punishment in violation of Article 13, they are credited differently.[257]

This disparity is pronounced in the common pretrial agreement scenario, where it can deprive soldier *B* of tangible credit. Assume both soldiers receive an adjudged sentence of thirty-six months, have pretrial agreements limiting confinement to eighteen months, and are given thirty days credit for their respective pretrial punishment. When the convening authority approves the eighteen month sentence, soldier *A*'s term of confinement is administratively reduced to seventeen months.[258] Soldier *B*, however, receives the full eighteen-month approved sentence. While the military judge reduces his adjudged sentence to thirty-five months, the convening authority still approves the pretrial agreement limitation of eighteen months. Whether or not one considers soldier *B*'s result as just,[259] soldier *A* received a bonafide credit, while soldier *B*'s credit was preempted by the pretrial agreement.[260] Soldier *B* received "no meaningful . . . credit at all."[261]

The potential impact of soldier *B* serving more time in confinement than soldier *A*, however, presents an even greater anomaly. Assume both soldiers receive a six month sentence to confinement without any pretrial agreement, and both soldiers earn all the good time credit allowable. Because of the way good time abatement credit is earned at the confinement facility, soldier *A* would serve a total of four months in confinement; but soldier *B*, who also received thirty days of credit for pretrial punishment, would serve four months and five days.[262] This occurs because the basis for earning good time credit is the adjudged sentence at trial adjusted for any pretrial agreement limitations.[263]

Here, soldier *A* earned thirty days good time credit based on his six month adjudged sentence (good time credit rate is five

251. *See* United States v. McCarthy, 47 M.J. 162, 165 (1997). The facts of *Hoover* seemingly trigger both of the *McCarthy* prongs. The intentional fatigue duty of erecting the tent violated the punishment prong, while the conditions were "unduly rigorous circumstances imposed during pretrial detention." *Id*. at 165.

252. *See* Coyle v. Commander 21st Theater Army Area Command, 47 M.J. 626, 628-29 (Army Ct. Crim. App. 1997).

253. *See id*.

254. *See id*. The "tantamount to confinement" scenario envisions the "other circumstances" or *Suzuki*-like situation were credit would be administratively applied. *Id.*

255. *See McCarthy*, 47 M.J. at 165.

256. *See id*. at 165.

257. *See generally Coyle*, 47 M.J. at 628-29. This is the result produced by the sentencing credit status quo.

258. *See* AR 633-30, *supra* note 29; AR 27-10, *supra* note 28, para. 5-28a. (requiring that DA Form 4430-R, Report of Result of Trial, include "all credits against confinement adjudged"); Rush Interview, *supra* note 29 (opining that maximum term of confinement would be adjusted forward for administrative credit and pretrial agreement term would equal the maximum term of confinement).

259. Some may view soldier *B*'s result as "just" since he received the benefit of his pretrial agreement.

260. *See also* United States v. Perry, No. 9500270 (Army Ct. Crim. App. Dec. 4, 1995) (leaving intact the judicial application of Article 13 credit despite pretrial agreement). The military judge reduced the adjudged sentence at trial by two years for pretrial punishment that occurred at the unit, which reduced the appellant's adjudged sentence to seven years. The pretrial agreement was for six years; no credit was deducted from the approved sentence. *Id.* at 2-3. Note that the same disparity would exist if soldier *A* was given credit under R.C.M. 305(k), *Allen*, or *Mason*.

261. *See* United States v. Gregory, 21 M.J. 952, 957 (characterizing the application of R.C.M. 305(k) credit against the appellant's adjudged sentence as "absurd" because no "meaningful" credit would result). The appellant received a five-month adjudged sentence, and convening authority approved three months of confinement. At issue was 31 days of R.C.M. 305(k) credit. *Id.* at 954-57. This rationale applies to the Article 13 context by analogy.

262. *See* AR 633-30, *supra* note 29; Rush Interview, *supra* note 29 (opining that good time credit of five days per month would be earned using the adjudged sentence as the basis).

263. Rush Interview, *supra* note 29.

days per month for confinement term of less than one year).[264] This good time credit combined with the thirty days of administrative Article 13 credit reduces the total term of confinement to four months. Soldier *B*, however, can only earn twenty-five days of good time credit. Because soldier *B* received judicial Article 13 credit, which reduced his adjudged sentence to five months, his basis for earning good time credit was only five months. Therefore, soldier *B* earned twenty five days of good time credit, which reduced his total term of confinement to four months and five days.

These hypotheticals call into question the underlying philosophy of sentence credit–that the remedy "be effective."[265] Do we want a system that allows such results?

Summary of the Article 13 Credit Anomaly

The status quo of applying Article 13 credit is unlike *Allen*, *Mason*, or R.C.M. 305(k) credit. *Coyle* submits that service members generally receive Article 13 credit judicially, but there may be instances where credit is received administratively.[266] This approach lacks a solid legal foundation, makes inconsistent policy, and is uncertain and complex. Yet, this is the approach generally permitted by CAAF precedent.[267] Moreover, service members can suffer anomalous results from the judicial application of sentencing credit. Together, these deficiencies call for a solution.

Adopting a Uniform Administrative Approach

The only approach that adequately corrects the status quo deficiencies and eliminates disparate impact is a uniform administrative approach, which credits all illegal pretrial punishment like *Allen*, *Mason*, and R.C.M. 305(k) credit.[268] This section identifies alternative methods of applying Article 13 credit, discusses how a uniform administrative approach corrects the deficiencies identified above, and recommends a method of implementation.

Alternative Methods of Applying Article 13 Credit

A poll of current trial judges indicates that they use two methods to apply Article 13 credit, judicial and administrative.[269] A *Pierce* [270] approach creates a third alternative. The trial judge in *Coyle* used the judicial method.[271] Essentially, the military judge grants and issues the credit by announcing on the record how the adjudged sentence is reduced.[272] Conversely, other military judges use an administrative method. In their view, applying Article 13 credit is better left to the convening authority; therefore, they order an administrative credit after announcing the adjudged sentence.[273]

A third alternative can be derived from *Pierce*.[274] If the military judge finds that a violation of Article 13 has occurred, the service member could be given the option of how to apply the credit. This method, however, does not appear widespread.[275] Despite the "let the accused decide" nature of this alternative, the administrative method is the only alternative that corrects the status quo deficiencies and eliminates the potential disparate impact on service members.

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264. *See* AR 633-30, *supra* note 29, para. 13.

265. *See* United States v. Suzuki, 14 M.J. 491, 493 (C.M.A. 1983) (indicating a philosophy that the remedy be effective to cure "unusually harsh conditions" in pretrial confinement); *cf. Gregory,* 21 M.J. 952, 956 (citing the *Suzuki* philosophy of providing an "effective remedy" to argue that R.C.M. 305(k) credit must be applied administratively); United States v. Stamper, 39 M.J. 1097, 1099 (A.C.M.R. 1994) (citing the *Suzuki* concern of an effective remedy to reassess credit for a violation of Article 13–public denunciation of appellant by commander at unit–on appeal). Query, is it time to extend this "effective remedy" rationale to include all forms of pretrial punishment?

266. *See* Coyle v. Commander 21st Theater Army Area Command, 47 M.J. 626, 628-29 (Army Ct. Crim. App. 1997).

267. *See* discussion *supra* notes 157-179 and accompanying text.

268. Procedurally, this envisions applying Article 13 credit as an additional administrative credit in a manner consistent with R.C.M. 305(k) credit.

269. *See* Army Trial Judges Poll, *supra* note 236 (indicating that two major approaches are being used by military judges in the field to apply Article 13 credit).

270. *See* United States v. Pierce, 27 M.J. 367 (C.M.A. 1989).

271. *See Coyle*, 47 M.J. at 628-629.

272. *See, e.g.*, *Coyle*, 47 M.J. at 627 ("But for the credit that I put into my sentence, the sentence to confinement would have been for a period of 24 months.").

273. Army Trial Judges Poll, *supra* note 236 (using the following instruction: "The accused will be credited with (__days of pretrial confinement credit) (and) (an additional ___days of administrative credit based on upon (Article 13) (RCM 305(k)) against the accused's term of confinement)"). *Id*.

274. *See Pierce*, 27 M.J. at 367.

275. Army Trial Judges Poll, *supra* note 236.

Correcting the Status Quo Deficiencies and Eliminating Anomalous Impact

The status quo deficiencies of Article 13 credit can be corrected by adopting a uniform administrative approach. This would eliminate anomalous impacts on service members as well as solidify the sentence credit philosophy. A legitimate concern to this proposal is the potential for double credit. This concern, however, can be addressed through sound implementation.

First, whether through common law or by rule, a uniform approach would establish a solid legal foundation. The CAAF could expand *Suzuki*'s horizons to include pretrial punishment cases outside of confinement.[276] Alternatively, the President could build upon the "unusually harsh circumstances" language recently added to R.C.M. 305(k),[277] by including a provision that applies to all Article 13 pretrial punishment.[278]

Second, a uniform administrative credit approach erases the policy inconsistencies of the sentence credit status quo. Tangible administrative credit would deter violations of all pretrial safeguards, whether it be the failure to conduct a timely magistrate review[279] or public humiliation at the unit.[280] Moreover, this approach bolsters the overall integrity of the system. Illegal pretrial punishment, which assaults fundamental due process rights,[281] would be treated the same for credit purposes as the pretrial safeguards of R.C.M. 305(k), which protect those same due process rights.[282]

Third, a uniform administrative approach yields certainty and simplicity. A bonafide administrative credit would remove uncertainty at the outset. Before key decisions are made or any pretrial agreements are reached, both the convening authority and the accused would know in advance that any illegal pretrial punishment must be "credited in full against any sentence to confinement."[283] Furthermore, pretrial punishment cases would no longer depend on the imprecision of discretion and mitigation, where one court-martial may reduce adjudged confinement with a formula, another may reduce without any formula, and yet another may give "no reduction."[284]

A uniform approach also means simplicity. The mechanical difficulty raised by hybrid Article 13 cases–those with both illegal pretrial punishment and unusually harsh circumstances–would cease.[285] Procedurally, the military judge would handle all pretrial punishment cases like other requests for additional sentence credit.[286] This envisions a procedure similar to R.C.M. 305(k) where "additional credit . . . deter[s] violations of the rule."[287] Upon request, the judge must find that an Article 13 violation occurred, and if so, determine the appropriate amount of administrative credit to award.[288]

Significantly, administrative Article 13 credit would eliminate the disparate impacts that some service members may suffer.[289] Like all other administrative credits, credit would *mean* credit in every situation,[290] and the longer confinement anomaly created by good time credit would be eliminated.[291] Moreover,

276. United States v. Suzuki, 14 M.J. 491 (C.M.A. 1983) (allowing more than day-for-day credit for "unusually harsh conditions" in pretrial confinement).

277. Borch Interview, *supra* note 124 (stating intent of including "unusually harsh circumstances language" was to incorporate *Suzuki* into available remedies of R.C.M. 305(k)).

278. One alternative is to amend the third sentence of R.C.M. 305(k) to read: "The military judge may order additional credit for violations of Article 13, UCMJ and for each day of pretrial confinement that involves an abuse of discretion or unusually harsh circumstances."

279. *See generally* MCM, *supra* note 3, R.C.M. 305(i).

280. *See, e.g.*, United States v. Cruz, 25 M.J. 326 (C.M.A. 1987); United States v. Villamil-Perez, 32 M.J. 341 (C.M.A. 1991); United States v. Stamper, 39 M.J. 1097 (A.C.M.R. 1994).

281. *See* Bell v. Wolfish, 441 U.S. 520 (1979) (holding that punishment of pretrial detainees violates the Due Process Clause of the Fifth Amendment); United States v. McCarthy, 47 M.J. 162 (1997) (citing *Bell* as the authority for the "punishment prong" of Article 13).

282. *See generally* MCM, *supra* note 3, analysis R.C.M. 305, app. 21, A21-16-20 (explaining the grounds for R.C.M. 305 protections); United States v. Gregory, 21 M.J. 952, 959 (A.C.M.R. 1986) (noting that the procedures of R.C.M. 305 (k) are "designed to protect both due process and military due process rights").

283. *See* United States v. Allen, 17 M.J. 126, 129-130 (C.M.A. 1984) (Everett, C. J., concurring) The rationale applies to pretrial punishment context by analogy.

284. *See id*. at 129 (Everett, C. J., concurring). The rationale applies to the pretrial punishment context by analogy.

285. *See* discussion *supra* notes 230-257 and accompanying text.

286. *See generally* MCM, *supra* note 3, R.C.M. 906 (discussing motions for appropriate relief).

287. *See id.* analysis R.C.M. 305(k), app. 21, A21-20.

288. *See generally id.* R.C.M. 100 (1)(B)(c) (supporting that if no violation of Article 13 is found, the condition complained of may be considered as mitigation by the sentencing authority as a matter that could "lessen punishment").

289. *See* discussion *supra* notes 255-265 and accompanying text.

the troubling question of sentence credit philosophy would be resolved.[292]

A legitimate concern raised by a uniform administrative approach is the potential for double credit. The accused could receive "two bites at the apple" if illegal pretrial punishment was considered as mitigation by the sentencing authority, and awarded as an administrative credit by the convening authority.[293] The solution to this problem is procedural–and is best left to the military judge, which will be discussed next.

Implementing a Uniform Approach at Trial

No proposal is complete without discussing how to implement it. Here, the panel forum presents the greatest challenge since military judges can keep their sentence deliberations separate from any award of administrative credit. The concern here is whether or not the panel should be informed of the additional credit, and if so, how? Trial judges in the field tackle this problem in many ways.[294] Ultimately, the ideal procedure should be simple to implement, reduce panel confusion, and prevent double credit.[295]

Procedurally, the problem of applying additional administrative credit for Article 13 parallels the award of R.C.M. 305 (k) credit in the panel forum. Although there is an instruction for *Allen* credit,[296] no specific procedure exists for the others.[297] In fact, military judges in the field employ a number of ways to implement additional credit, which distill down to two basic procedures.[298]

The most widely used procedure is to keep *Allen* credit separate from any additional credit.[299] For instance, if an accused is entitled to both *Allen* credit and additional credit, such as R.C.M. 305(k) or Article 13, the military judge instructs the panel on *Allen* credit,[300] but does not inform or instruct them on the additional credit.

The other basic procedure is a balanced approach. Generally, additional credit information does not go before the panel.[301] An instruction, however, is triggered once the information becomes relevant mitigation, either by accused request

290. *See, e.g.*, United States v. Perry, No. 9500270 (Army Ct. Crim. App. Dec. 4 1995) (leaving intact judicial application of Article 13 credit, although preempted by pretrial agreement thereby depriving accused of any tangible benefit from the credit).

291. *See generally* AR 633-30, *supra* note 29, sec. III. (providing rates for good time abatement).

292. *See generally* United States v. Gregory, 21 M.J. 952 (A.C.M.R. 1986) (indicating underlying sentence credit philosophy of *Suzuki* is that the remedy be effective).

293. *See generally* MCM, *supra* note 3, R.C.M. 1001(c). Herein lies the concern: "pretrial punishment" falls within the broad definition of matters that can be presented by the accused as mitigation at sentencing. Note that the same concern arises in R.C.M. 305(k) credit situations. R.C.M. 1001(c) does not address the issue of sentence credit. Query, is it time to modify R.C.M. 1001(c)?

294. Army Trial Judge Poll, *supra* note 236; Telephone Interview with Colonel Gary Smith, Chief Trial Judge, U.S. Army (Feb. 8, 1999) (largely viewed as a judge's issue in the field; generally, the military judge has no obligation to instruct the members on additional administrative credit that has been awarded); Telephone Interview with Colonel McShane, Chief Trial Judge, U.S. Air Force, (Feb. 9, 1999) (prevailing practice in the Air Force is to keep additional credit matters from the panel, informing the panel of these matters risks confusion and double credit); Telephone Interview with Captain MacLaughlin, Chief Trial Judge, U.S. Navy-Marine Corps, (Feb. 9, 1999) (opining that members are generally not informed in the Navy-Marine Corps, a separate issue handled by the military judge) [hereinafter Chief Trial Judge Interviews].

295. Note that the mere fact that the panel is aware of an accused's pretrial punishment does not mechanically result in double credit. After all, this is the approach used for *Allen* credit. United States v. Allen, 17 M.J. 126 (C.M.A. 1984). The members are instructed to consider any pretrial confinement in reaching an appropriate sentence at trial and that the accused will also receive administrative credit. Does the accused receive double credit in this scenario? No one really knows; deliberation is secret and mitigation is intangible. Presumably, the members make an informed decision knowing administrative credit will be awarded, thereby preventing double credit.

296. *See* BENCHBOOK, *supra* note 2, 94 (instruction entitled "Pretrial Confinement Credit, If Applicable").

297. Chief Trial Judge Interviews, *supra* note 294 (noting the opinion by the Army's Chief Judge that no set procedure currently exists for presenting R.C.M. 305(k) or *Suzuki* credit in a panel forum). *See generally* BENCHBOOK, *supra* note 2 (indicating that other than *Allen* credit, there is no specific sentencing instructions for sentence credit).

298. Army Trial Judge Poll, *supra* note 236 (noting that other procedures include: (a) treating Article 13 credit like *Allen* credit by instructing on it in every case, and (b) informing the members of the total amount of administrative credit an accused will receive, regardless of its source).

299. Army Trial Judge Poll, *supra* note 236; Chief Trial Judge Interviews, *supra* note 294.

300. *See* BENCHBOOK, *supra* note 2, at 94 (instruction entitled "Pretrial Confinement Credit, If Applicable").

301. *See generally* MCM, *supra* note 3, R.C.M. 1001(a); BENCHBOOK, *supra* note 2, at 94 (containing *Allen* credit instruction). During presentencing, the panel receives information about pretrial restraint when the personal data sheet of the accused is read. Therefore, the panel knows about time spent in pretrial confinement up front (but not any pretrial punishment or R.C.M. 305(k) violation). The *Allen* credit instruction informs the panel about the time already spent in confinement and that administrative credit will be given.

or counsel argument. In such a case, an instruction similar to the *Allen* credit instruction can be used.[302]

Which procedure is better? The former is a bit simpler, but the flexibility of the balanced approach meets all three of the criteria outlined above. Both procedures are relatively simple to implement, and both prevent confusion initially by keeping the additional credit from the panel.[303] Only the balanced approach, however, is equipped to deal with the potential double credit generated by the disclosure. For instance, if a savvy defense counsel, knowing that the accused will receive administrative credit for pretrial punishment, presents information about the prior punishment to the panel, the accused may receive double credit if the panel is not properly instructed.

Summary of the Uniform Administrative Approach

Adopting a uniform administrative sentence credit scheme that awards additional credit to service members for pretrial punishment holds many advantages. Administratively treating Article 13 similar to *Allen*, *Mason*, and R.C.M. 305(k) for credit purposes would lay a better legal foundation for applying Article 13 credit, create consistent sentence credit policy, and inject certainty and simplicity into the system.[304] Moreover, anomalous impacts on service members would disappear.[305] Procedurally, Article 13 credit should be implemented as an additional administrative credit in a manner similar to R.C.M. 305(k). In member trials, military judges should award Article 13 credit independent of the panel, unless the information is revealed. In that case, an appropriate instruction should be given.[306]

Conclusion

A good criminal justice system should readily expend its resources to "remedy even one day of unjust confinement."[307] Indeed, the military justice system has come a long way in recent decades to provide appropriate sentence credit to service members facing confinement.[308] As a result, military practitioners must familiarize themselves with the terrain of sentence credit and its application. Service members are entitled to administrative credit for each day they spend in pretrial confinement or its equivalent,[309] whether held by military or civilian authorities, so long as the time spent in detention results from an offense for which the sentence is received.[310]

Moreover, service members are entitled to additional administrative credit when pretrial confinement safeguards enumerated in R.C.M. 305(k) are violated.[311] They also receive full credit at court-martial for any previous nonjudicial punishment.[312]

Despite the progressive credits available today, service members still face inconsistent treatment for illegal pretrial punishment in violation of Article 13, UCMJ.[313] Although the current system deters violations of R.C.M. 305(k) through additional administrative credit, pretrial punishment does not receive equal treatment.[314] A uniform administrative system of sentence credit will ensure service members get the credit they deserve. The system would benefit from consistency, integrity, and simplicity, and the service member facing trial would receive some degree of certainty. Even if the end result is but a single day of administrative credit, it will be one less day that seems "like a year."[315]

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302. *See* BENCHBOOK, *supra* note 2, at 94 (instruction entitled "Pretrial Confinement Credit, If Applicable"); Army Trial Judge Poll, *supra* note 236 (noting that this instruction can be tailored to fit many factual circumstances by referring to the credit the convening authority is to award).

303. Chief Trial Judge Interviews, *supra* note 294 (observing that if members are not aware that a service member has suffered pretrial punishment, instructing the members on a credit might confuse them and require the military judge to present information not previously admitted).

304. *See* discussion *supra* notes 276-293 and accompanying text.

305. *See id.*

306. *See* discussion *supra* notes 294-303 and accompanying text.

307. *See* United States v. McCarthy, 47 M.J. 162, 168 (1997) (Sullivan, J., concurring).

308. *See generally* discussion *infra* Part II.B-C.

309. *See* United States v. Allen, 17 M.J. 126 (C.M.A. 1984); United States v. Mason, 19 M.J. 274 (C.M.A. 1985).

310. *See* 18 U.S.C. § 3585 (1994); discussion *infra* Part II.B.3.

311. *See* MCM, *supra* note 3, R.C.M. 305(k).

312. *See* United States v. Pierce, 27 M.J. 367 (C.M.A. 1989).

313. *See* discussion *infra* Part III.A-B.

314. *See* Coyle v. Commander 21st Theater Army Area Command, 47 M.J. 626, 628-29 (Army Ct. Crim. App. 1997); MCM, *supra* note 3, R.C.M. 305(k).

315. WILDE, *supra* note 1, pt. 5, stanza 1.

Appendix

Sentence Credit Guide

Type	Basis	Authority	Amount	How Applied	Issues (*see* Sentence Credit Issues below)
Allen	Pretrial Confinement	*Allen*, 17 M.J. 126 (C.M.A. 1984).	Day-for-day	Approved Sentence	A. Civilian pretrial confinement credit
Mason	Restriction tantamount to confinement	*Mason*, 19 M.J. 274 (C.M.A.1985)	Day-for-day	Approved Sentence	
R.C.M. 305(k)	Violation of: 1. 305(f) 2. 305(h) 3. 305(i) 4. 305(j) 5. 305(*l*) 6. R.C.M. 305(j)(2); (k) 7. Unusually harsh circumstances	1-4 R.C.M. 305(k) 5. *Williams*, 47 M.J. 621 6. R.C.M. 305(j)(2); (k) 7. R.C.M. 305(k); *Suzuki*, 14 M.J. 491 (C.M.A.)	1-4. Additional, Day-for-day 5-7. Additional, as appropriate	Approved Sentence. *See Gregory*, 21 M.J. 952 (A.C.M.R. 1986)	B. 1998 Amendments
Article 13, UCMJ	1. Pretrial or intential punishment 2. Unduly rigorous circumstance of detention	*McCarthy*, 47 M.J. 162 (1997); *Suzuki*, 14 M.J. 491 (C.M.A. 1983)	Additional, as appropriate	1. Adjudged or Approved *See Coyle*, 47 M.J. 626 (Army Ct. Crim. App. 1997). 2. Approved Sentence *See Coyle*.	C. Waiver
Pierce	Prior nonjudicial punishment	*Pierce*, 27 M.J. 367 (C.M.A. 1989)	Complete: Day-for-day, dollar-for-dollar, stripe-for-stripe	Adjudged or Approved per accused's election	D. Use of nonjudicial punishment at trial. E. Impact of Article 58b, UCMJ.

Sentence Credit Issues

A. Two approaches extending *Allen* credit to civilian pretrial confinement:

(1) ACCA: A service member earns *Allen* credit for time spent in civilian confinement at the request of the military[1] or civilian custody "in connection with the offense or acts solely for which a sentence to confinement by a court-martial is ultimately imposed."[2]

(2) *Murray*, 43 M.J. 507 (A.F. Ct. Crim. App. 1995): Credit determined by 18 U.S.C. § 3585 (b):

> **Credit for prior custody**. A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences–

1. *See* United States v. Huselkamp, 21 M.J. 509 (A.C.M.R. 1985); United States v. Davis, 22 M.J. 557 (A.C.M.R. 1986).

2. *See* United States v. Dave, 31 M.J. 940 (A.C.M.R. 1990); United States v. McCullough, 33 M.J. 595 (A.C.M.R. 1991).

(1) as a result of the offense for which the sentence was imposed; or

(2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;

that has not been credited against another sentence.

B. 1998 Amendments to R.C.M. 305(k):

(1) Abuse of discretion: "The military judge may order additional credit for each day of pretrial confinement that involves an abuse of discretion."

(2) Unusually harsh circumstances: "The military judge may order additional credit for each day of pretrial confinement that involves . . . unusually harsh circumstances."

C. Waiver of Article 13 claims:

(1) Failure to raise before trial. Failure to complain before trial "is strong evidence that the accused is not being punished in violation of Article 13."[3]

(2) Failure to raise at trial. The claim is not barred per se, but the failure to raise it at the trial level is "strong evidence" that no illegal punishment occurred.[4]

D. Use of prior nonjudicial punishment at trial: Unless the accused consents, a prior record of nonjudicial punishment for the same offense cannot be used for any purpose at trial; it "simply has no legal relevance to the court-martial."[5]

E. Impact of Article 58b, UCMJ: Where *Pierce* credit may be preempted by the automatic forfeiture provisions of Article 58b, the convening authority should select an alternative that accounts for the impact of Article 58b. These alternatives include deferment under Article 57(a)(2), waiver of pay forfeitures under Article 58b(b), or additional sentence credit through sentence conversion with one day of pay equal to one day of confinement.[6]

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3. *See* United States v. Huffman, 40 M.J. 225, 228 (1994); United States v. James, 28 M.J. 214 (C.M.A. 1989); United States v. Palmiter, 20 M.J. 90 (C.M.A. 1985).

4. *See Palmiter*, 20 M.J. at 97-98; *Huffman*, 40 M.J. at 228. *But see* United States v. Combs, 47 M.J. 330 (1997) (describing case as unusual, failing to raise illegal rank reduction by accused at rehearing did not amount to waiver on appeal).

5. *See* United States v. Pierce, 27 M.J. 367, 369 (CMA 1989).

6. *See* United States v. Ridgeway, 48 M.J. 905 (Army Ct. Crim. App. 1998) (listing alternative convening authority options).