How Far Is Too Far? Helping the Commander to Keep Control Without Going over the Line; the Trial Practitioner's Guide to Conditions on Liberty and Article 13 Credit

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The name given to the type of restraint imposed is not suasive, because nomina mutabilia sunt, res autem immobiles.[1]

I. Introduction

The trial counsel diligently works at his desk. The phone rings. The company commander, Captain Smith, has just found out that Private Snuffy has returned from his six-month absence without leave (AWOL). Captain Smith asks, "What can we do with this guy? Can I put him in jail? Can I lock him in the day room? Can I put him on restriction? What can I do so this guy doesn't flee again?" He wants an answer quickly.

A quick answer may be helpful, but quality advice will protect everyone's interests. The trial counsel's first priority should be to advise the command of the proper action to take. If the defense counsel files a motion claiming that illegal pretrial punishment or unduly harsh circumstances of confinement have occurred, the actions taken are what will later be judged to determine if the accused will be entitled to credit. Good intentions, although a factor, will not always suffice before the judge. The commander's actions will carry the day when arguing a motion in the area of pretrial restraint. However, one should also advise commanders on maintaining the proper terminology under the Rules of Court Martial (RCM), such as "conditions on liberty" and "pretrial restraint."

This primer discusses the proper actions for pretrial restraint and conditions on liberty. This article will assist the practicing trial counsel in making the right decisions in advising the commander on appropriate pretrial restraints and conditions on liberty. Furthermore, this primer will assist defense counsel in recognizing when the command has gone too far on appropriate pretrial restraint and conditions on liberty. When the command does go too far, this primer will assist the defense counsel in filing an appropriate Article 13 motion.[2]

II. The Basics

A. Pretrial Restraint (RCM 304) or Pretrial Confinement (RCM 305)

Rule for Courts-Martial 304 provides that "pretrial restraint is moral or physical restraint on a person's liberty which is imposed before and during disposition of offenses. Pretrial restraint may consist of conditions on liberty,[3] restriction in lieu of arrest,[4] arrest,[5] or confinement."[6]

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[1] United States v. Gregory, 21 M.J. 952, 959 (A.C.M.R. 1986) (quoting the court on the effect of pretrial restraint and not what label is put on the restraint). "Loosely translated, this phrase means: 'A name may be true or false, or may change, but the thing itself always maintains an identity.'" (citing BLACK'S LAW DICTIONARY 946 (5th ed. 1979)). *Id.* at n.1.

[2] UCMJ art. 13 (2005).

[3] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 304(a)(1) (2005) [hereinafter MCM] ("Conditions on liberty are imposed by orders directing a person to do or refrain from doing specified acts. Such conditions may be imposed in conjunction with other forms of restraint or separately.").

[4] *Id.* R.C.M. 304(a)(2) ("Restriction in lieu of arrest is the restraint of a person by oral or written orders directing the person to remain within specified limits; a restricted person shall, unless otherwise directed, perform full military duties while restricted.").

The trial counsel and defense counsel must understand the proper use of conditions on liberty. "Conditions on liberty include orders to report periodically to a specified official, orders not to go to a certain place (such as the scene of an alleged offense), and orders not to associate with specified persons (such as the alleged victim or potential witnesses)."[7] These types of conditions on liberty often include limits to the company area, place of duty, the dining facility, and place of religious worship. For example, conditions that limit off post access or limit on-post access to certain places have been deemed proper conditions on liberty.[8]

"Conditions on liberty must not hinder pretrial preparation, however. Thus, when such conditions are imposed, they must [be] sufficiently flexible to permit pretrial preparation."[9] Commanders should ensure that the accused Soldier has adequate access to his defense counsel. Adequate access to defense counsel requires commanders to allow for adequate time during the duty day, if necessary, and for adequate consultation and preparation with defense counsel.

A proper condition on liberty will not equate to any credit for pretrial confinement or restraint. Proper conditions on liberty will also not start the 120-day speedy trial clock.[10]

Although not always dispositive for judges ruling on actions by the command, trial counsel should reinforce proper terminology to commanders. Proper terminology will assist trial counsel in teaching commanders the reasons behind conditions on liberty. A condition on liberty is not a term used to carry out punishment. On the other hand, the term "restriction" connotes punishment. For example, commanders often want to restrict the Soldier to post or to the barracks. Restriction is generally a term for post-Article 15 punishment.[11] Use of proper terminology is a tool for counsel to ensure that conditions put on the Soldiers are for control purposes rather than a means for punishment. Commanders should continuously be trained on the underlying reasoning behind their actions. The commander's reasons and actions must include a focus on control, not punishment. Despite terminology, however, when conditions on liberty become punishment or become too onerous, credit may be granted. In general, the courts have determined that credit shall be granted under RCM 305[12] in situations where conditions on liberty or pretrial restraint are so onerous that it equates to "restriction tantamount to confinement."[13]

B. Pretrial Restraint, Restriction Tantamount to Confinement or Physical Restraint

One critical reason why the trial counsel must give good advice on pretrial restraint or conditions on liberty is judicially-based credit. If the command sets conditions that are too harsh or too restrictive, these conditions may later be judged as

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[5] *Id.* R.C.M. 304(a)(3). Rule for Courts-Martial 304(a)(3) states:

> Arrest is the restraint of a person by oral or written order not imposed as punishment, directing the person to remain within specified limits; a person in the status of arrest may not be required to perform full military duties such as commanding or supervising personnel, serving as guard, or bearing arms. The status of arrest automatically ends when the person is placed, by the authority who ordered the arrest or a superior authority, on duty inconsistent with the status of arrest, but this shall not prevent requiring the person arrested to do ordinary cleaning or policing, or to take part in routine training and duties.

Id.

[6] *Id.* R.C.M. 304(a)(4) ("Pretrial confinement is physical restraint, imposed by order of competent authority, depriving a person of freedom pending disposition of offenses. *See* R.C.M. 305.").

[7] *Id.* R.C.M. 304(a) discussion.

[8] *See generally* United States v. Rendon, 58 M.J. 221 (2003).

[9] *See* MCM, *supra* note 3, R.C.M. 304(a) discussion.

[10] *See id.* R.C.M. 707(a).

[11] UCMJ art. 15 (2005).

[12] *See id.* R.C.M. 305(a) ("Pretrial confinement is physical restraint, imposed by order of competent authority, depriving a person of freedom pending disposition of charges.").

[13] *See* United States v. Gregory, 21 M.J. 952 (A.C.M.R. 1986). *See also* United States v. Smith, 20 M.J. 528 (A.C.M.R. 1985); Wiggins v. Greenwald, 20 M.J. 823 (A.C.M.R 1985); Washington v. Greenwald, 20 M.J. 699 (A.C.M.R. 1985) (determining whether the restraint imposed was lawful and so onerous as to find that it was tantamount to confinement).

"tantamount to confinement" that rises to physical restraint.[14] The defense counsel will want to evaluate all conditions on liberty to determine if a motion for credit is appropriate. Defense counsel need to assess all orders that are close to or appear to be actual "physical restraint."

The military court-martial may provide credit for pretrial confinement or pretrial punishment. "The issue of credit for pretrial confinement and/or punishment has a long history in military law."[15] Generally, Article 13 of the Uniform Code of Military Justice (UCMJ) forbids "pretrial punishment as well as arrest or confinement more rigorous than necessary to assure the accused's presence at trial."[16] Rule for Courts-Martial 304(f) expressly forbids pretrial restraint as punishment and any use of pretrial restraint as punishment.[17] When pretrial punishment or conditions more rigorous than required to insure the accused's presence at trial is ordered, an accused may be entitled to relief under Article 13 of the UCMJ.[18]

A court must decide "whether . . . pretrial confinement conditions constitute illegal pretrial punishment or constitute legally permissible restraint."[19] The court will determine whether the conditions are "for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose."[20] The Supreme Court has stated that "[t]he fact that harm is inflicted by governmental authority does not make punishment. Figuratively speaking all discomforting action may be deemed punishment because it deprives of what otherwise would be enjoyed. But there may be reasons other than punitive for such deprivation."[21]

There are three distinct categories of credit that can be granted to an accused. First, legal pretrial confinement is credited day for day. For example, an accused allegedly commits murder and after a pretrial confinement review, a magistrate upholds the commander's decision for pretrial confinement. Second, the courts allow day for day credit for conditions on liberty that rise to the level of pretrial confinement or physical restraint. A common example is the command that locks an accused Soldier in his barracks room, feeds him his meals in the room and keeps a guard at the door for the weekend until trial counsel can be notified. Finally, the military judge may grant more than day for day credit for illegal pretrial confinement that equates to pretrial punishment.

These examples are varied and can be achieved after legal pretrial confinement or circumstances amount to harsh or restrictive conditions on liberty. Other examples include the following: placing a Soldier in solitary confinement for no legitimate purpose or parading a shackled Soldier in front of the unit to make an example of drug users to illustrate what happens to such criminals in the unit. The types of credit available are formally outlined in the next section.

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[14] *See generally* United States v. Rendon, 58 M.J. 221 (2003) (discussing that RCM 305 applies to restriction tantamount to confinement only when that restriction rises to the level of "physical restraint").

[15] United States v. Rock, 52 M.J. 154, 156 (1999).

[16] *Id. See also* UCMJ art. 13. Article 13 states:

> 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.

[17] *See* MCM, *supra* note 3, R.C.M. 304(f). Rule for Courts-Martial 304(f) states:

> *Punishment prohibited.* Pretrial restraint is not punishment and shall not be used as such. No person who is restrained pending trial may be subjected to punishment or penalty for the offense which is the basis for that restraint. Prisoners being held for trial shall not be required to undergo punitive duty hours or training, perform punitive labor, or wear special uniforms prescribed only for post-trial prisoners. This rule does not prohibit minor punishment during pretrial confinement for infractions of the rules of the place of confinement. Prisoners shall be afforded facilities and treatment under regulations of the Secretary concerned.

Id.

[18] *See* UCMJ art. 13.

[19] United States v. Gilchrist, 61 M.J. 785, 796 (Army Ct. Crim. App. 2005).

[20] Bell v. Wolfish, 441 U.S. 520, 538 (1979).

[21] United States v. Lovett, 328 U.S. 303, 324 (1946).

C. Types of Credit

In 1984, the Court of Military Appeals allowed *Allen* credit for legal pretrial confinement although such confinement was not considered punishment.[22] *Allen* credit is computed as day for day credit when the accused was legally placed in pretrial confinement.[23] The court in *Allen* took guidance from a Department of Defense Instruction (DODI) in order to maintain consistency with current federal law that allows day for day credit for legal pretrial confinement.[24]

In addition to *Allen* credit, two additional pretrial credits exist: *Mason* and *Suzuki* credits. *Mason* credit, which is mutually exclusive from *Allen* credit, is day for day credit allowed for pretrial restriction that is equivalent to confinement.[25] *Suzuki* credit allows for more than day for day credit for illegal pretrial confinement amounting to punishment.[26] Unlike *Allen* and *Mason* credit which come from case law, RCM 305(k) explicitly recognizes *Suzuki* credit.[27]

As an aside, for completeness, *Pierce* credit (also from case law)—an issue outside the scope of this primer—is given when an accused already received punishment from non-judicial punishment, but is court-martialed for the same charges.[28] Based on *Pierce* credit, when an accused is court-martialed for the same charges as a previous Article 15, the accused is entitled to complete credit for any and all non-judicial punishment adjudged. *Pierce* allows the accused credit day for day, dollar for dollar and stripe for stripe.[29]

D. Case Law—Pretrial Restraint Tantamount to Confinement

The court in *United States v. Smith* looked at the totality of the conditions to determine if the pretrial restraint was in fact "tantamount to confinement."[30] The court considered some relevant factors in its determination:

> The nature of the restraint (physical or moral), the area or scope of the restraint (confined to post, barracks, room, etc.), the types of duties, if any performed during the restraint (routine military duties, fatigue duties, etc.), and the degree of privacy enjoyed within the area of restraint.[31]

The court also considered additional conditions which could significantly affect the four factors above. These conditions were:

> [W]hether the accused was required to sign in periodically with some supervising authority; whether a charge of quarters or other authority periodically checked to ensure the accused's presence; whether the accused was required to be under armed or unarmed escort; whether and to what degree accused was allowed visitation and telephone privileges; what religious, medical, recreational, educational, or other support facilities were available for the accused's use; the location of the accused's sleeping

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

[23] *See* United States v. Rock, 52 M.J. 154, 156 (1999).

[24] *See id.* (referencing DODI 1325.4). Department of Defense Instruction 1325.4 has been replaced by DODI 1325.7 which provides "[p]risoners shall be given credit for time served toward a sentence to confinement until the term of the confinement is served . . . . No credit for time served shall be given during periods in which the term of confinement is interrupted by unauthorized absence." U.S. DEP'T OF DEFENSE DIRECTIVE, ADMINISTRATION OF MILITARY CORRECTIONAL FACILITIES AND CLEMENCY AND PAROLE AUTHORITY para. 6.3.1.2 (17 July 2001).

[25] *See* United States v. Mason, 19 M.J. 274 (C.M.A. 1985).

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

[27] *See Rock*, 52 M.J. at 156.

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

[29] *See id.*

[30] 20 M.J. 528 (A.C.M.R. 1985).

[31] *Id.* at 531.

accommodations; and whether the accused was allowed to retain and use his personal property (including his civilian clothing).[32]

Despite previous courts defining restriction tantamount to confinement as the trigger for applying credit under RCM 305, the U.S. Court of Appeals for the Armed Forces (CAAF) further clarified that restriction tantamount to confinement "does not, per se, trigger, justify or require application of R.C.M. 305."[33] There has often been confusion about how commanders and advising Judge Advocates can know what pretrial restraints are acceptable. The court in *Gregory* concluded that "most severe forms of pretrial restraint will not be tantamount to confinement and thus, RCM 305 will not be applicable."[34] The *Gregory* court went on to advise: "Judge Advocates should become familiar with the distinction between *Smith* and the *Wiggins/Washington* cases and advise commanders accordingly."[35]

E. Case Law—Physical Restraint

The court in *Rendon* attempted to clarify that "the conditions or terms of the restriction must constitute physical restraint depriving an accused of his or her freedom. Anything less is outside the scope of R.C. M. 305."[36]

The *Rendon* court provided the following analysis:

> On its face, R.C.M. 305 applies to "pretrial confinement." R.C.M. 305(b) directs that an accused may only be "confined if the requirements of this rule are met." Conspicuously absent from R.C.M. 305(b), or anywhere else in R.C.M. 305 is any reference to applying the procedural or credit provisions of the rule to any other form of pretrial restraint. R.C.M. 305(k), the credit provision upon which appellee relies, is limited by unambiguous language to "confinement served" after noncompliance with R.C.M. 305(f), (h), (i), or (j). There is no support in R.C.M. 305 for applying R.C.M. 305(k) to any lesser form of restraint.
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> Further, the nature of pretrial confinement or "confinement served" encompassed by the R.C.M. 305 is clear: "pretrial confinement is physical restraint . . . depriving a person of freedom pending disposition of offenses." . . . We find no evidence that the President intended the procedural protections or credit provided in R.C.M. 305 to apply to anything other than the physical restraint attendant to pretrial confinement.[37]

In *United States v. Rendon*, the appellee sought administrative credit for pretrial constraint that consisted of a written order of restriction.[38] The conditions rising to the level of restriction tantamount to confinement were:

1. Appellee was restricted to Training Center Yorktown.
2. Appellee was permitted to eat at the Coast Guard Dining Facility during regular meal hours.
3. Appellee was prohibited from wearing civilian clothing other than gym attire while at the gym. His civilian clothing was temporarily taken from him.
4. Appellee was required to move from his room to a restriction room where he enjoyed less privacy. Appellee was not, however, physically limited to only the barracks or the "restriction room."
5. Appellee was permitted visitors only with prior approval.
6. Appellee could not consume alcohol.
7. Appellee had reporting requirements after duty hours and on weekends.
8. After 2200 hours, Appellee could not leave his room unless there was an emergency.

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[32] *Id.* at 531, 532.

[33] United States v. Rendon, 58 M.J. 221, 224 (2003).

[34] United States v. Gregory, 21 M.J. 952, 958 n.16 (A.C.M.R. 1986).

[35] *Id. See also* Wiggins v. Greenwald 20 M.J. 823, 824 (A.C.M.R. 1985) (Wiggins received no credit as it was deemed that his conditions were lawful and that "the conditions of restraint, though substantial, were less onerous than those which were found tantamount to confinement . . . ."); *Smith*, 20 M.J. 528 (Smith's conditions, on the other hand, rose to "restriction tantamount to confinement" and Smith received fifty-six days credit for the period of restriction served prior to trial. Smith's restrictions, however, were also deemed legal.).

[36] *Rendon*, 58 M.J. at 224.

[37] *Id.*

[38] *See id.* at 222.

9. Appellee was required to get permission to go to sick call.
10. Appellee could not utilize the Mariner's Mart, Liberty Lounge, or the Cyber Cafe.
11. Personal property that Appellee brought to the "restriction room" was inspected, including his purchases from the Exchange.
12. Appellee's telephone and pager were taken from him and he was specifically prohibited from using them.
13. Appellee was told he could not use Morale, Welfare, and Recreation facilities.
14. Appellee was not required to be accompanied by an escort when he left the barracks.[39]

The trial judge found that, although a close call, the restriction was tantamount to confinement and awarded *Mason* credit.[40] On appeal, the Coast Guard Court of Appeals found that "the military judge erred when he declined to award Appellee additional credit for a violation of R.C.M. 305."[41] For the reasons discussed above, the CAAF set aside the Coast Guard's court decision because the appellee was not physically restrained, only geographically limited.[42] These conditions on liberty only limited the accused to certain geographical limits and did not rise to the level of physical restraint. Therefore, the accused was not entitled to credit for these particular limitations.

F. Case Law—Two-Part Test

The military courts have generally applied a two-part test in determining whether pretrial restraint amounts to pretrial punishment, or whether the actions are legally permissible restraint.[43] First, the court must determine "whether appellant's pretrial confinement conditions constitute illegal pretrial punishment or constitute legally permissible restraint."[44] In deciding this issue, the court will attempt to determine the intent of the command.[45] The court will determine if the "conditions are imposed 'for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose.'"[46] Second, the court must determine whether the arrest or confinement imposed is more rigorous than circumstances require to ensure the presence of the accused.[47] The Recent Developments/Case Law section in this article examines specific cases to help clarify this two-part test.

G. Other Consequences of Pretrial Confinement (RCM 305)

1. Speedy Trial Clock

Another result beyond credit for pretrial confinement is the start of the speedy trial clock.[48] Rule for Courts-Martial 707(a) requires that the accused be brought to trial within 120 days of preferral of charges or imposition of restraint for restriction in lieu of restraint, arrest or confinement as defined in RCM 304(a)(2)–(4).[49] Conditions on liberty do not invoke the speedy trial clock. Rule for Courts-Martial 707(a)(2) does not list RCM 304(a)(1) (conditions on liberty) as an imposition of restraint. In fact, conditions on liberty is expressly absent, therefore, conditions on liberty do not invoke the speedy trial clock.

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[39] *Id.* at 223.

[40] *See id.*

[41] *Id.* at 224.

[42] *See id.* at 226.

[43] *See generally* United States v. Gilchrist, 61 M.J. 785 (Army Ct. Crim. App. 2005); United States v Palmiter, 20 M.J. 90 (C.M.A. 1985); Bell v. Wolfish, 441 U.S. 520 (1979); UCMJ art. 13 (2005).

[44] *Gilchrist*, 61 M.J. at 796.

[45] *See id.*

[46] *Id.* (citing *Palmiter*, 20 M.J. at 99) (Everett, C.J., concurring in result) (quoting *Wolfish*, 441 U.S. at 538)).

[47] *See id.*; *see also* UCMJ art. 13.

[48] *See* MCM, *supra* note 3, R.C.M. 304(a) discussion.

[49] *Id.* R.C.M. 707(a)(1)(2).

2. Requirements to Continue Pretrial Confinement (RCM 305)

Rule for Courts-Martial 305(h)(B) requires the commander to release the accused from pretrial confinement unless the commander believes upon probable cause that:

> (1) an offense triable by court-martial has been committed; (2) the prisoner committed it; and (3) confinement is necessary because it is foreseeable that (a) the prisoner will not appear at trial, pretrial hearing or investigation, or (b) the prisoner will engage in serious criminal misconduct; and (c) less severe restraints are inadequate.[50]

A forty-eight hour probable cause determination by a neutral and detached officer is required after pretrial confinement is ordered.[51] Further, a seven day review of pretrial confinement is required by a neutral and detached officer appointed in accordance with regulations prescribed by the secretary concerned.[52] The seven day review shall determine if probable cause exists for pretrial confinement and the necessity of continued pretrial confinement.[53] In accordance with the Army's Part Time Military Magistrate (PTMM) Program, the forty-eight hour probable cause determination is not required if the PTMM holds a pre-trial confinement review within forty-eight hours of an individual's confinement.[54] Past Army practice has encouraged trial counsel to schedule the magistrate review within forty-eight hours of confinement to avoid the neutral and detached officer requirement.

3. Factors to Consider for Pretrial Confinement

> *"A person should not be confined as a mere matter of convenience or expedience."*[55]

Some factors to be considered are:

> (1) The nature and circumstances of the offenses charged or suspected, including extenuating circumstances;
> (2) The weight of the evidence against the accused;
> (3) The accused's ties to the locale, including family, off-duty employment, financial resources, and the length of residence;
> (4) The accused's character and mental condition;
> (5) The accused's service record, including any record of previous misconduct;
> (6) The accused's record of appearance at or flight from other pretrial investigations, trials, and similar proceedings; and
> (7) The likelihood that the accused can and will commit further serious criminal misconduct if allowed to remain at liberty.[56]

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[50] *Id.* R.C.M. 305(h)(B).

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

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

[53] *Id.*

[54] U.S. ARMY CHIEF TRIAL JUDICIARY,. STANDING OPERATING PROCEDURES FOR MILITARY MAGISTRATES 10 (15 Oct. 2006).

[55] *See* MCM, *supra* note 3, R.C.M. 305(h)(2)(B) discussion.

[56] *Id.*

III. Recent Developments/Case Law for Legal and Illegal Pretrial Restraint/Confinement

A. Shackled to a Cot[57]

A general court-martial convicted Private First Class Gilchrist, pursuant to his guilty pleas, of going from his appointed place of duty, disrespect toward a superior noncommissioned officer, failure to obey a lawful order (three specifications), wrongful use of marijuana, Xanax and cocaine (one specification each), wrongful distribution of Xanax (two specifications), and larceny of other than military property (two specifications).[58] The military judge also convicted Gilchrist of failure to obey a lawful order, contrary to his plea on that specification.[59]

The U.S. Army Court of Criminal Appeals (ACCA) considered whether Gilchrist should have received Article 13 credit for being shackled to a cot for eight hours in a utility room known as the "ice house."[60] The court adopted the following facts found by the military judge:

> On or about 16 January 2002, the accused was transported back to Fort Bliss from Fort Knox for the Article 32 investigation relating to additional charges in this case. Because the Provost Marshal [detention] cell was full, the accused was placed in a utility room on the first floor of the barracks. The room was called the Ice House because an ice-making machine was housed inside the room. It was well known to those in the unit. The room also contained a metal cot, several tables, as well as barracks maintenance equipment. There is no latrine in the room. The [charge of quarters (CQ)] desk was located 10–20 feet away from the door to the room. The duty drill sergeant's office was located another 10 feet from the CQ desk.
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> The military judge also found that appellant arrived between 2200 and 2300, was "secured with leg irons to one of the legs of the cot," and that SFC Wyatt "had to wake [appellant] in the morning at approximately 0630."[61]

For unrelated reasons, "the military judge granted five days credit for [a] name calling and 'public denunciation' in violation of Article 13, UCMJ, but [granted] no credit for having been shackled to the cot."[62]

The ACCA concluded that they would evaluate a two-part test to determine if credit was required for shackling a Soldier to a cot. First, they would decide "whether appellant's pretrial confinement conditions constitute illegal pretrial punishment or constitute legally permissible restraint."[63] Second, they would "determine if appellant's shackling to a barracks room cot was 'more rigorous' confinement 'than . . . required to insure' appellant's presence."[64]

In looking at the first point, ACCA had to determine whether the conditions were imposed "for the purpose of punishment or whether [they were] but an incident of some other legitimate governmental purpose."[65] The ACCA found that the pre-trial confinement conditions of being shackled to the cot in the ice house did not constitute illegal pretrial confinement.[66] They agreed with the military judge that the conditions were not made with the intent to punish or

[57] United States v. Gilchrist, 61 M.J. 785 (Army Ct. Crim. App. 2005).

[58] *Id.* at 786.

[59] *Id.* at 787.

[60] *Id.* at 795.

[61] *Id.*

[62] *See id.* at 796.

[63] *Id.*

[64] *Id.* at 797.

[65] *See id.* at 796 (quoting United States v. Palmiter, 20 M.J. 90, 99 (C.M.A. 1985) (Everett, C.J., concurring in the result)).

[66] *Gilchrist*, 61 M.J. at 798.

stigmatize.[67] The testimony revealed that the main reason he was kept in the room was because the detention cell was full.[68] Gilchrist was shackled because a previous detainee, who was not shackled, had escaped from the window in the room.[69]

As to the second part of the test, the ACCA concluded that the restraint was more rigorous than necessary.[70] The record contained "no evidence indicating appellant was a flight risk or posed a risk to others."[71] The court determined that at least four other Soldiers were available in the barracks that night and other lesser restraints were available.[72]

In summary, the court awarded "ten days of confinement credit for the unusually harsh circumstances of appellant's pretrial confinement while awaiting his Article 32, UCMJ, investigative hearing."[73] The ACCA found that shackling a pretrial prisoner to a cot was not per se unduly harsh, but they were not persuaded that shackling was required in this situation.[74] Therefore, this case emphasizes the importance of the underlying reasons for the commander's actions in determining whether credit is appropriate.

B. End of Service Obligation While in Pretrial Confinement

In *United States v. Fischer*, a Soldier was in pretrial confinement when his service obligation expired.[75] The case explored whether appellant was subjected to illegal pretrial punishment when his pay stopped because of the end of his service obligation.[76] The CAAF affirmed the lower court's decision stating that there was a legitimate non-punitive reason behind the Defense Department Finance Regulation which required the government to stop a servicemember's pay when he reached his end of service date.[77] The court determined that there was no distinction between a servicemember in pretrial confinement or any other status upon expiration of their service obligation.[78] The court stated that "[a]ll service members lose their entitlement to pay and allowances upon expiration of their enlistment contract."[79]

There are two exceptions to the policy but the appellant did not qualify for either.[80] One exception is if the servicemember remains in service and performs productive work.[81] The court found that standard confinement duties did not qualify as performing productive work.[82] The second exception requires that, upon acquittal, the service member be retroactively paid.[83] Fischer did not qualify for this exception as he was convicted.

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[67] *Id.* at 797.

[68] *See id.*

[69] *See id.*

[70] *See id.*

[71] *See id.*

[72] *See id.* at 797-98 (concluding that, "[d]espite the apparent availability of unit personnel to provide this lesser form of restraint, appellant was severely restrained without an individualized showing of cause that he would flee or otherwise fail to present himself the following day.").

[73] *See id.* at 798 (citing to RCM 305(k) "specifically authorizing more than day for day credit for unduly harsh conditions of pretrial confinement.").

[74] *See id.*

[75] 61 M.J. 415 (2005).

[76] *Id.* at 416.

[77] *See id*. at 421.

[78] *Id.* at 419.

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.*

The court also considered if the regulation was excessive.[84] Excessiveness is determined by evaluating whether the action is "more rigorous than necessary" under the circumstances. The CAAF disagreed, citing that even in a civilian context, confinees will lose jobs and income and the policy to reimburse those acquitted was more generous than its civilian counterpart and, therefore, was not excessive.[85]

The dissent in *Fischer* (a close, 3-2 decision) stated that "the regulation requiring the determination of pay [in these] circumstances is punitive in effect and its application constitutes illegal pretrial punishment."[86] The dissent could not concur in the view that the "[g]overnment can, solely for its own purposes, imprison a presumptively innocent individual, unilaterally continue military status with all its obligations and duties and at the same time take away one of the basic rights associated with active duty military status—the right to pay."[87] The dissent believed that the majority relied too heavily on the fiscal and historical prospective and did not properly interpret Article 13.[88]

Once again, the underlying reasons behind the action control the appropriateness of awarding credit. In this case, the legitimate, non-punitive reasons for the action determined that no credit was justified.

C. Soldier in Solitary Pretrial Confinement Isolated from Other Prisoners

The CAAF granted review in *United States v. King* to determine if Deandrea J. King, Jr., U.S Air Force, was improperly denied credit from a military judge because his status as a "maximum security" prisoner was illegal pretrial punishment.[89] The court used the two part test which prohibits the intent to punish and the imposition of unduly rigorous circumstances.[90]

After an initial evaluation, the confinement facility designated King as a maximum security prisoner and confined him in a double occupancy cell with certain maximum security restrictions.[91] These restrictions included:

1. Remaining in the cell with the exception of appointments and emergencies;
2. Eating all meals in the cell (meals were delivered to the cell);
3. No library or gym privileges (books and gym equipment were delivered to the cell);
4. No sleeping during duty hours;
5. A requirement to wear a yellow jumpsuit and shackles when released for appointments; and
6. Two escorts, one of whom was armed, whenever King was moved to appointments.[92]

King asserted that "he was unlawfully punished by being commingled with a sentenced prisoner and later when he had to endure two weeks of solitary confinement after [his] request for a waiver of the prohibition against commingling pre- and post trial prisoners was denied."[93]

The CAAF was reluctant to second guess the security determinations of the confinement officials and found no intent to punish and no excessive punishment as to the commingled conditions.[94] Commingling is a factor to consider, but not per se a

[84] *Id.* at 421 (Erdmann, J., dissenting).

[85] *Id.*

[86] *Id.* at 422.

[87] *Id.* at 423.

[88] *Id.* at 422.

[89] 61 M.J. 225 (2005).

[90] *Id.*

[91] *Id.*

[92] *Id.* at 226.

[93] *Id.* at 227.

[94] *Id.* at 228.

violation of Article 13.[95] However, the CAAF did find that the period King was segregated without explanation was so excessive as to be punishment.[96] Under RCM 305(k), the court provided three days of credit for each day he was confined in solitary.

The *King* case again illustrates the importance of focusing commanders on the reasons for designating actions against an accused. Preparing a commander to articulate her reasons for the actions she takes against an accused is vitally important when Article 13 issues are raised.

In the recently-decided case, *United States v. Adcock*, the CAAF granted two for one credit for an Air Force officer who was placed in civilian pretrial confinement in violation of several provisions of the Department of Air Force, Instruction 31-205.[97] In a ruling opposite to that found in the *King* case, where excessive punishment was found, the military judge ruled that there was a legitimate non-punitive governmental objective and there was no intent to punish.[98] Referring to *King*, the CAAF conceded that "confinement in violation of service regulations does not create a per se right to sentencing credit under the UCMJ."[99] The CAAF found that knowingly and deliberately violating confinement service regulations allows a military judge to consider credit for these violations under RCM 305(k).[100] Accordingly, counsel should be aware of their particular service regulations and instructions for confinement.[101]

IV. Deployment Issues

Trial counsel will have to make some unique decisions while prosecuting cases in a deployed environment. This section explores some unique challenges that may arise. The following topics come from issues in the Abu Ghraib cases after preferral of charges. Private Charles Graner, after his conviction, raised three Article 13 issues (among others). These three main issues raised were: (1) having his weapon removed in a combat environment; (2) denial of leave; and (3) being ordered to work outside of his primary and secondary military occupation specialty (MOS).[102]

A. Taking a Weapon from an Accused after Preferral of Charges in a Combat Environment

Upon preferral of charges, the company commander ordered the removal of then-Specialist (SPC) Charles Graner's personal M16 weapon and all ammunition.[103] The company commander explained that based on the pictures, the evidence, and the charges, he determined that these behaviors showed a lack of self-discipline, a lack of self-control, and no concern for human life.[104] In addition, the commander explained that he had a major concern for the safety of other Soldiers, witnesses, and the prosecution[105] who all lived at Camp Victory, Baghdad, Iraq, with SPC Graner.

By local regulation, Camp Victory dining facilities required Soldiers to carry a weapon to gain entry to eat. Soldiers without weapons were required to carry and present a memorandum from the company commander to the dining facility

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[95] *Id.*

[96] *Id.*

[97] 65 M.J. 18 (2007).

[98] *Id.* at 21.

[99] *Id.* at 23.

[100] *Id.* at 23-24.

[101] *See, e.g.*, U.S. DEP'T OF ARMY, REG. 190-47, MILITARY POLICE, THE ARMY CORRECTIONS SYSTEM (June 15, 2006); U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR. 1640.9C, DEPARTMENT OF THE NAVY CORRECTIONS MANUAL §§ 7103.2.b(2)(a), 12502.3.b (Jan. 3, 2006).

[102] Transcript of Record at 2360, United States v. Graner, Headquarters, III Corps (2004 (on file with author).

[103] *Id.* at 2282, 2321.

[104] *Id.* at 2321.

[105] *Id.*

guards in order to enter.[106] The memorandum stated that the bearer was authorized to eat without the weapon. It did not indicate why the Soldier did not possess a weapon.[107]

The military judge in this case ordered ten days sentencing credit for taking away the weapon for approximately eight months.[108] In his decision, the military judge articulated the following reasons:

> Concerning the weapons issue, where the weapons were taken—the accused's personal weapon was taken away from him on or about the 20th of March, 2004, until he left the unit at the end of November, 2004, the court finds that soldiers on Victory Base in uniform were basically required to have a weapon with them 24/7, and that, when they go to the mess hall, they have to have a weapon with them. There's a sign there to the effect that you can't eat without one. The court finds that the command addressed this issue with a permission slip and, although the court doesn't—the court also finds that not having a personal weapon in no way, shape, or form placed the accused at an appreciable risk while on Victory Base, as there are only indirect fire issues on Victory Base and having an M-16, an M-4, or a 9mm is going to do zero good to an RPG landing on your head. The court finds that there is no evidence that not having a weapon necessarily put the accused in a position of not being able to defend himself. However, the court does recognize the reality of the situation in Victory Base of not having a weapon. Not having a weapon does carry a certain stigma. The command says that he didn't have a weapon because he looked like an undisciplined soldier in those pictures. This, quite frankly, is a close call because, on the one hand, the court finds that there is no evidence that there was an intent to punish by this, but, on the other hand, the effect on the accused is to be one of the few soldiers without a weapon on Victory Base, and that amounts to a continual embarrassing situation. Because of that, the court will award some credit for the weapon on that basis only. Again, this is not strictly as a violation of Article 13, because the court finds that it wasn't taken away to punish the accused but the effect of a soldier not having a weapon on that base simply, quite frankly in this case, appears to be because he was pending charges. The court finds the effect on the accused is that he's subject to public embarrassment in various public places, not just the mess hall.[109]

Trial practitioners faced with removing a weapon from an accused in a combat zone must attempt to continue to advise commanders to articulate their reasons beyond punishment and minimize, to the best of their ability, any embarrassment caused by removal of a weapon.

B. Denial of Leave

Specialist Graner was also denied leave while serving at Camp Victory.[110] Although the Abu Ghraib cases were unique and high profile, taking longer than the average court-martial, it was still important to articulate reasons for a denial of leave. The company commander articulated a safety concern for SPC Graner due to the high profile case[111] and the fact that the commander had been notified that SPC Graner had received threatening e-mails. Specialist Graner had also been reported drunk and disorderly on a temporary duty trip to Germany for a hearing.[112] The company commander denied SPC Graner's leave request because motions and depositions concerning the case were pending.[113]

The military judge found:

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[106] *Id.* at 2290.

[107] *Id.*

[108] *Id.* at 2367–68.

[109] *Id.* at 2362–63.

[110] *Id.* at 2322.

[111] *Id.*

[112] *Id.* at 2323.

[113] *Id.*

> Concerning the defense motion for appropriate relief with respect to Article 13, the court makes the following findings: That, during his time in Iraq, the accused was never permitted to go on leave—excuse me, during the time that the accused was assigned to the 16th MP Brigade, from approximately March 2004 to December 2004, they never permitted him to go on leave. The command's articulated reason for denial of leave, the court finds, was death threats to the accused—against the accused and safety concern, particularly once the media interest in the case increased. The court finds that this occurred approximately in the May time-frame, which was before any requests for leave came in. The court finds that the initial denial for leave was based on an articulated objective rationale and had no intent to punish. In that, quite frankly, the court finds that, for the denial of leave during the entire time-frame, there was no evidence that it was intended to punish the accused, but rather that they made a judgment call, particularly in a high-visibility case, as to the safety of the accused. Subsequent requests were also impacted on the need for the accused to be around for the depositions and interviews of General Officers. Quite frankly, by having him around, it expedited—it facilitated his ability to prepare for this case.[114]

Although leave appears to be a privilege and not a right, the command must still articulate solid reasons for denial of leave. The command should not just deny leave because a Soldier is charged with a crime.

C. Working Outside of One's MOS

Specialist Graner was removed from his place of duty at Abu Ghraib prison and relieved of all military police duties.[115] He mainly worked Soldier-type work details.[116] At one point, for a five day period, Graner worked along side a Soldier performing punishment for an Article 15.[117] As to working outside the MOS, the judge provided no credit, but two days for every one day (for five days, a total of ten days credit) for working with a Soldier being punished under Article 15. The judge found:

> The court finds that the accused was not permitted to continue to work as a military policeman. Contrary to the defense contention, the court finds this extremely reasonable, given the types of charges that the accused was facing. Having him doing any military police duties, quite frankly, the court would be very surprised. But, at the end of the day, not having him perform military police duties is certainly not an intent to punish and was a reasonable reaction given the nature of the charges. As far as the duties that the accused did perform, the court finds that he performed a lot of details, filling sandbags, sweeping, and other details around the installation. The court also finds that the accused was given ample opportunity to work with his counsel and performed other duties other than the ones he articulated, in the sense that he was also permitted to perform construction duties and other things like that. The fact that he worked side-by-side on certain occasions with third-country nationals and/or Iraqi contractors, the court sees no evidence that this was done to humiliate him because there was no evidence that such was humiliating. There's no evidence before the court that working with the Iraqi people in any way, shape, or form was somehow humiliating or embarrassing. Now, it may be that, in various circumstances, one would feel that way, but there's no evidence before the court. The court does find that, at least on five separate occasions and unrebutted, the accused worked half-a-day with a soldier serving Article 15 punishment. For that, the accused will receive some credit.[118]

V. Factors—Pretrial Restraint versus Pretrial Punishment

A practical way to determine whether a command has crossed the line from pretrial restraint to pretrial punishment is various factors used by the military courts. These factors are:

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[114] *Id.* at 2360–61.

[115] *Id.* at 2277, 2282.

[116] *Id.* at 2282.

[117] *Id.* at 2284, 2364.

[118] *Id.* at 2364–65.

1. What similarities, if any, in daily routine, work assignments, clothing attire, and other restraints and control conditions exist between sentenced persons and those awaiting disciplinary disposition?
2. If such similarities exist, what relevance to customary and traditional military command and control measures can be established by the government for such measures?
3. If such similarities exist, are the requirements and procedures primarily related to command and control needs, or do they reflect a primary purpose of stigmatizing persons awaiting disciplinary disposition?
4. If so, was there an "intent to punish or stigmatize a person waiting disciplinary disposition?[119]

Although these factors are not the only considerations, they provide excellent guidelines and a good starting place when evaluating a command's rationale and technique for handling accused Soldiers. Both trial counsel and defense counsel should constantly evaluate the measures taken, the intent of the command, the purpose behind the action and the action itself to see if it goes over the line of acceptable conditions on liberty, pretrial restraint, or pretrial confinement.

VI. Conclusion

Despite the labels we put on conditions on liberty or pretrial restraint, the trial counsel must understand the limits a commander may put on the accused. Defense counsel, on the other hand, must disregard the labels as well, and analyze the actions taken against their clients. Black and white answers as to the worth of Article 13 credit are not always available. However, if you follow the words of the RCM, the principles of the case law, and the examples outlined in this article, you should be able to make sound decisions in the area of pretrial restraint and confinement. Actions speak louder than words and the commander's intent, the purpose behind the action, and the action itself will speak volumes in determining proper conditions on liberty and appropriate Article 13 credit.

[119] United States v. Smith, 53 M.J. 168, 172 (2000) (quoting FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 4-90.00, at 136-37 (2d ed. 1999) (footnotes omitted)).