Sentencing Credit for Pretrial Restriction

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I. Introduction

You are a new Marine Corps Judge Advocate. You graduated from Naval Justice School two months ago and have now been assigned as a defense counsel in Camp Pendleton, California. When you checked in, the senior defense counsel handed you twenty case files and told you that you can expect to carry about thirty clients at a time. As you attempt to wade through the procedural and substantive requirements of your new job you notice an issue that sends you to LexisNexis. One of the units aboard the base is Separations Company, Headquarters and Service Battalion, Marine Corps Base. This command receives all West Coast Marines who are arrested by civilian police or federal officers or return on their own after deserting from a unit for more than six months. Many of the Marines who are arrested pursuant to a federal warrant are placed in pretrial confinement when they arrive at Camp Pendleton. The Marines who turn themselves in usually are placed on pretrial restriction. Most of these deserters are charged with unauthorized absence (UA) and are tried in either a summary or special court-martial. Most of these clients plead guilty in order to serve their sentence, take their bad conduct discharge, and get back home as soon as they can. When these cases go to special court-martial, the clients who were placed in pretrial confinement receive a day for day sentencing credit,[1] but the clients who served pretrial restriction garner only "consideration" of their pretrial restraint.[2] For two clients with similar records, similar offenses, and similar adjudged sentences, the practical result can vary by a great deal. A client who is UA for three years, in pretrial confinement for 40 days, and receives a 180 day sentence and a bad conduct discharge from the military judge has 140 days until he can be released from confinement and head home on appellate leave.[3] Another client with the same term of UA, who is on pretrial restriction for 40 days and receives the same sentence from the military judge,[4] has 180 days until his release and appellate leave. In these two cases, the identical sentence from the judge results in one client effectively serving some type of restraint for forty days longer than the other.[5]

As you think about this apparent disparity, another scenario comes to mind. You have a client who is charged with breaking restriction. The maximum punishment for this offense is thirty days of confinement or sixty days of restriction.[6] If your client had been in pretrial confinement for fifteen days before going to court-martial, he would serve at most fifteen

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[1] *See* United States v. Allen, 17 M.J. 126 (C.M.A. 1984) (holding that all pretrial confinement served in anticipation of trial is credited day for day against the sentence adjudged).

[2] *See* U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 2-5-23 (15 Sept. 2002) (C2, 1 July 2003) [hereinafter BENCHBOOK].

[3] *See* UCMJ art. 76a (2008). Appellate leave is authorized under Article 76a for the period after convening authority's action. *Id.* Voluntary appellate leave is also permitted for the period of time after a sentence is served until convening authority's action upon an accused's request and the commander's approval. U.S. MARINE CORPS, ORDER 1050.16A, APPELLATE LEAVE AWAITING PUNITIVE SEPARATION (19 June 1998).

[4] *See* BENCHBOOK, *supra* note 2, para. 2-5-23. The *Military Judges' Benchbook* gives a list of factors for the court to consider in sentencing. *Id.* The duration of pretrial confinement or restriction is listed as one of them. *Id.* In practice, sentences do not seem to be reduced much if at all based upon this "consideration" of the duration of pretrial restriction unless it is exceptionally long.

[5] This article will not discuss the effect of credit awarded by confinement facilities for good behavior or other programs. Nor will it discuss the effect of pretrial agreements and sentence limitations on this issue. Good time credit is issued on an individual basis, depending on the behavior of each inmate. Similarly, the pretrial agreement is negotiated on an individual basis with a specific commander. Too many individual and idiosyncratic variables exist with these two elements of military justice practice to include and discuss in this "big picture" article.

[6] MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 102e (2008) [hereinafter MCM]. The maximum punishment for breaking restriction is confinement for one month and forfeiture of two-thirds pay per month for one month. *Id.* at A12-7. Rule for Courts-Martial 1003(b)(5) states that restriction may be adjudged for no more than two months for each month of authorized confinement, and in no case for more than two months. *Id.* R.C.M. 1003(b)(5). Therefore, with a maximum punishment of one month confinement for breaking restriction, the sentence imposed can either be one month confinement or two months restriction.

more days of confinement or thirty days of restriction.[7] But because he has been on pretrial restriction for fifteen days before the court-martial, he can be awarded the full thirty days of confinement or sixty days of restriction.[8] This troubles you because it seems inequitable and allows "punishment"[9] in excess of the maximum allowable under the Uniform Code of Military Justice (UCMJ).

After hours spent scouring the *Military Justice Reporters* and talking to fellow defense counsel, you decide to challenge the issue. You walk into court with a client from Separations Company who is pleading guilty to unauthorized absence from his unit for two years. He has been on pretrial restriction for forty days prior to trial. As sentencing begins, the military judge notes that the charge sheet shows no pretrial confinement and therefore, no *Allen* credit.[10] You stand up and address the military judge. "Sir, the defense moves for credit to be awarded to the accused for his pretrial restriction. We ask for twenty days of confinement credit based on forty days of pretrial restriction." The military judge looks back at the charge sheet, notes that the accused has indeed been on pretrial restriction for forty days, and looks back at you. "Counsel, what case law can you give me that tells me that I can or must give the credit you ask for?"

This article serves to answer to that question. The first portion of the article traces the history of sentencing credits in military criminal practice. The first judicially recognized credit for pretrial confinement came from *United States v. Allen* and since that time, several other types of judicially created and codified credits have emerged. An accused receives credit for all pretrial confinement served in a military facility.[11] An accused will receive credit if he is illegally punished before trial in violation of Article 13, UCMJ.[12] The accused receives sentencing credit for restriction that is deemed tantamount to confinement.[13] He receives credit for any nonjudicial punishment served for the same offense he is convicted of at court-martial.[14] An accused will be credited if the government violates Rule for Court-Martial (RCM) 305 procedures.[15] However, if an accused serves pretrial restriction that does not amount to confinement or punishment, he does not currently receive any recognized sentencing credit.

The second portion of this article will analyze the reasoning of the cases and the legislation that has developed the variety of sentencing credits that exist today. Although *Allen* credit is born out of judicial interpretation of Department of Defense Instruction (DODI) 1325.4 that on its face does not extend to restriction,[16] this article argues that as other credits have evolved since *Allen*, a credit for pretrial restriction must be judicially created.[17] This credit would serve to ensure equity and certainty in sentencing. It would also make certain that servicemembers did not serve punishments greater than the maximum allowable under the UCMJ.

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[7] *See* United States v. Pierce, 27 M.J. 367, 369 (C.M.A. 1989) (citing the MANUAL FOR COURTS-MARTIAL, UNITED STATES (rev. 1969), App. 25, Tbl. of Equivalent Punishments, ¶¶ 127*c*(2), 131*d*). In the 1969 Table of Equivalent Punishments that *Pierce* cites, one day of confinement is equivalent to two days of restriction. *Id*. Therefore, the fifteen days of pretrial confinement will be credited as fifteen days of confinement or thirty days of restriction, depending on whether the sentence adjudged is confinement or restriction.

[8] Once again, because pretrial restriction is only a consideration in sentencing, the full month of confinement or two months of restriction detailed *supra* in note 6 is available despite the pretrial restriction served.

[9] Pretrial restraint is not considered punishment, but rather a tool to ensure appearance at trial and to prevent the accused from committing future serious misconduct. However, *Allen* credit for pretrial confinement effectively replaces a day of "punishment" confinement with a day of pretrial "nonpunishment" confinement, so that pretrial confinement counts toward all maximum punishment calculations.

[10] *See* BENCHBOOK, *supra* note 2, para. 2-4.

[11] *See* 17 M.J. 126 (C.M.A. 1984).

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

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

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

[15] MCM, *supra* note 6, R.C.M. 305.

[16] *Allen*, 17 M.J. 126.

[17] The opinion in *Allen* was based on DODI 1325.4, which seemed to say that the military would award sentencing credit in the same manner as the federal courts. *Id.* The case law from federal courts on house arrest tends to disallow any credit for house arrest that is not tantamount to confinement. *See, e.g.*, United States v. Insley, 927 F.2d 185 (4th Cir. 1991) (holding that requiring a defendant to reside with parents, leave only to seek employment, work, or go to church, and be electronically monitored did not constitute "official detention" requiring sentencing credit); United States v. Edwards, 960 F.2d 278 (2d Cir. 1992) (holding that electronic monitoring and defendant's restriction largely to his residence did not entitle defendant to credit, although terms may be rather restrictive). This article will discuss the distinction between house arrest and restriction in lieu of arrest in section III.B., *infra*, and argue that our form of restriction cannot be captured by the Department of Justice (DOJ) rules on sentencing credit. Further, as mentioned *supra*, the military case law since *Allen* has moved from technical adherence to DOJ standards to equity-based judicial creations. From an equity standpoint, a credit for pretrial restriction is appropriate.

Finally, this article will advocate a specific credit that will permit one day of sentencing credit for every two days of pretrial restriction. This proposed sentencing credit is based on the concept of sentence equivalency that has existed since the 1969 revision of the UCMJ and continues to the present. The 1969 *Manual for Courts-Martial* (*MCM*) included a chart that listed equivalent punishments.[18] In this chart, one day of confinement equaled two days of restriction to limits.[19] This chart itself is not contained in the current version of the MCM; however the content remains in a different form. Rule for Courts-Martial 1003(b)(5) states that restriction can be awarded where confinement is authorized at a rate of two months restriction for one month of confinement.[20] It further states that both confinement and restriction can be adjudged, but they may not exceed the maximum authorized amount of confinement, "calculating the equivalency at the rate specified in this subsection."[21] Additionally, the *Military Judges' Benchbook* uses the equivalency chart from the 1969 *MCM* in its instruction on crediting prior nonjudicial punishment.[22] This table also establishes that one day of confinement is equal to two days of restriction.[23] Based on the history of sentencing credits and the philosophy behind the various credits currently given, this article will argue that a credit for pretrial restriction is a natural extension of the existing sentencing credits.

Whenever a new rule is created in military justice, its limits are quickly tested. As will be discussed in the background section in Part II, the creation of *Allen* credit soon generated questions about credit in cases where an accused was not put into pretrial confinement, but was restricted under conditions so severe as to essentially be confinement.[24] This led to case law that allowed the *Allen* credit to be extended to cases where terms of pretrial restraint were considered "tantamount to confinement."[25] Similarly, adoption of this restriction credit would engender its own questions. What would be the minimum restrictions to allow for the credit? Would the remedy always be one day of confinement credit for each two days of pretrial restriction, or would the military judge have the discretion to shape the remedy to fit the restriction? If the accused were restricted to his barracks, but allowed to wear civilian clothes and drive to his workspace, would he potentially receive only one day confinement credit for every three days of this restriction? Or would a bright line rule of minimum restriction standards that must be met in order to receive the credit be better? Would commanding officers be tempted to place an accused servicemember on pretrial restriction just slightly more permissive than this bright line in order to avoid the credit? Would the next step then be to develop a line of case law on restraint tantamount to restriction? In evaluating these logical follow on questions, this article will advocate a bright line rule for determining the type of restriction that allows for this credit. The credit would be like *Allen* credit and be defined, not discretionary. The minimum standard for applying the credit should mirror the definition of restriction in lieu of arrest under RCM 304(a)(2). This standard is the same one used to determine whether or not the speedy trial clock has begun and is therefore not a new standard, but a new application of an existing standard. This adoption of the RCM 707(a) standard for restriction should allow for a consistent application and easier transition into the new credit, rather than a graduated scale.

The background and analysis contained herein will give the practitioner a compilation of sources with which to make a motion for credit and, when posed with the question from the military judge in the hypothetical above, to answer it and either get the credit requested, or at least place the issue on the record so that it may be determined by the appellate courts in the future. Someday the credit may be not only recognized, it may be named after your client.

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[18] DAVID A. SCHLEUTER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE 632 (1982) (citing 1969 MCM, *supra* note 7, App. 25, Tbl. of Equivalent Punishments).

[19] *Id.*

[20] MCM, *supra* note 6, R.C.M. 1003(b)(5).

[21] *Id.*

[22] BENCHBOOK, *supra* note 2, para. 2-7-21, tbl.2-6.

[23] *Id.*

[24] *See, e.g.*, United States v. Mason, 19 M.J. 274 (C.M.A. 1985) (summary disposition); United States v. Smith, 20 M.J. 528, 531 (C.M.A. 1985).

[25] *Mason*, 19 M.J. 274.

II. The History of Sentencing Credits in Military Justice

A. Pre-*United States v. Allen*

Initially, confinement served before the convening authority took action on the proceedings of the court-martial was considered pretrial confinement and was not credited towards the sentence.[26] This type of confinement was legally distinguished from confinement as a result of a sentence because a prisoner could not legally be punished until the convening authority acted.[27]

Confinement prior to convening authority's action was not counted toward the sentence adjudged. However, military justice did have a mechanism for considering this term of "pretrial" confinement. Before the UCMJ was enacted, pretrial confinement was "a matter in mitigation to be considered by a reviewing authority in his action on sentence."[28] The convening authority was the only participant in the court-martial to consider the pretrial restraint and it was considered "highly irregular and impermissible" for members to consider pretrial confinement when they deliberated on a sentence.[29]

While the UCMJ was being drafted following World War II, a Cornell Law School professor proposed that pretrial confinement be included as a sentencing factor that the court considered in determining a sentence.[30] When the *MCM* containing the UCMJ was completed in 1951, it directed that pretrial confinement was a matter to be considered by the court-martial in adjudging an appropriate sentence.[31] This requirement continues today. The *Military Judges' Benchbook*'s sentencing instructions include a list of several factors to be considered on sentencing, including "the duration of the accused's pretrial confinement or restriction."[32]

In 1982, the Court of Military Appeals (COMA) heard the case of *United States v. Davidson*.[33] Airman First Class (A1C) Vance Davidson had been convicted of involuntary manslaughter and sentenced to a dishonorable discharge, three years confinement at hard labor, total forfeitures, and reduction to the lowest enlisted pay grade.[34] At the time, the three years confinement at hard labor was the maximum confinement authorized for the offense.[35] The accused had been in pretrial confinement for 143 days when his sentence was adjudged.[36] On appeal, the court looked at the issues of: (1) whether it was error for the military judge not to instruct the members to consider Davidson's pretrial confinement in determining their sentence; (2) whether it was error for the staff judge advocate not to advise the convening authority to consider the pretrial confinement; and (3) whether it was illegal for the accused to serve more confinement time than authorized under the UCMJ for the offense when his pretrial confinement was added to his adjudged confinement at hard labor.[37]

The court in *Davidson* surveyed the history of pretrial confinement and its role in acting as a "temporary restraint only as strict as necessary to secure the presence of the accused for trial and execution of his sentence."[38] The court pointed to Article 13, UCMJ stating that it "expressly provided that the imposition of pretrial restraint was not for the purpose of

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[26] *See* GEORGE B. DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES 64 (3d ed. 1913), *cited in* United States v. Davidson, 14 M.J. 81, 85 (C.M.A. 1982).

[27] *Id.*

[28] *Davidson*, 14 M.J. at 85 (citing editions of the *MCM*, U.S. Army from 1917 to 1949).

[29] *Id.*

[30] *Id.* (citing REPORT OF NAVY GENERAL COURT-MARTIAL SENTENCE REVIEW BOARD (KEEFE REPORT) 185 (Jan. 1947)).

[31] *Id.* This change was not made to remove consideration of pretrial restraint by the convening authority when taking action, it was added as an additional requirement. *Id.* Convening authorities were still to consider pretrial restraint in their action. *Id.* at 86.

[32] BENCHBOOK, *supra* note 2, para. 2-5-23.

[33] 14 M.J. 81.

[34] *Id.* at 82.

[35] *Id.* The 2008 edition of the *MCM* states a maximum allowable punishment for involuntary manslaughter of a dishonorable discharge, forfeiture of all pay and allowances, and confinement for ten years. MCM, *supra* note 6, at A12-3.

[36] *Davidson*, 14 M.J. at 82.

[37] *Id.* at 83.

[38] *Id.* at 84.

punishment but a necessary tool for the administration of justice."[39] Based on the premise that pretrial restraint is expressly not for punishment, the court found that the period of pretrial restraint does not extend an adjudged sentence beyond the maximum allowable for the offense.[40] The court found, however, that the military judge did err in neglecting to instruct the members to consider his pretrial confinement and that the staff judge advocate did err in neglecting to advise the convening authority to consider the pretrial confinement when taking action as required in the *MCM*.[41] The court ordered the lower court to reassess the accused's sentence and to reduce his sentence by at least the 143 days he served in pretrial confinement.[42] This was not to operate as a credit for his time, but was instead to substitute for the lack of consideration given those 143 days by the panel members and convening authority.[43]

In a concurring opinion, Chief Judge Everett addressed a 1966 change in federal law. In the Bail Reform Act, Congress directed that credit be given to federal prisoners for time spent in pretrial confinement.[44] Although the Act expressly excluded offenses triable by court-martial, Chief Judge Everett saw it as recognition by Congress that "although in legal theory pretrial confinement may not constitute punishment, it often seems almost the same from the standpoint of the persons confined and may have much the same effect upon him."[45] The Bail Reform Act meant that no federal civilian defendant would serve confinement beyond the maximum allowable for his offense, and Chief Judge Everett believed that the same consideration should be given to servicemembers tried under the UCMJ.[46] He further felt that failing to do so would create an equal protection issue.[47] Servicemembers serving pretrial confinement were subject to greater punishment than civilians in federal court and other servicemembers who were not placed in pretrial restraint.[48] The chief judge did not advocate a credit such as that given by the Bail Reform Act, but he did believe that in cases where the accused is sentenced to the maximum allowable confinement, his approved sentence should be reduced by the number of days served in pretrial confinement, so that he would not serve aggregate confinement beyond the maximum allowable.[49]

B. *United States v. Allen*[50]

Shortly after *Davidson* was decided, another case came before the court. This time, the Bail Reform Act played a prominent role in the majority opinion. Private First Class (PFC) Melvin Allen was a young Marine convicted of robbery and assault consummated by a battery.[51] He was sentenced to be confined at hard labor for twenty-four months, to forfeit $501.30 pay per month for six months, to be reduced to E-1, and to be discharged from the Marine Corps with a bad-conduct discharge.[52] Allen had spent eighty days in pretrial confinement and the military judge had properly instructed the members as required in *Davidson*.[53] The accused's argument for credit for his pretrial confinement was based on DODI 1325.4.[54] This instruction required the military services to use the same procedures to compute sentences that the Department of Justice

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[39] *Id.*

[40] *Id.*

[41] *Id.* at 86.

[42] *Id.*

[43] *Id.*

[44] 18 U.S.C. § 3568 (2000).

[45] *Davidson*, 14 M.J. at 87 (Everett, C.J., concurring).

[46] *Id.* at 88.

[47] *Id.* at 89.

[48] *Id.*

[49] *Id.*

[50] 17 M.J. 126 (C.M.A. 1984).

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.*; U.S. DEP'T OF DEFENSE, INSTR. 1325.4, TREATMENT OF MILITARY PRISONERS AND ADMINISTRATION OF MILITARY CORRECTION FACILITIES (7 Oct. 1968).

(DOJ) used.[55] Because the DOJ followed the mandate of the Bail Reform Act to give credit for pretrial confinement, PFC Allen argued that the DODI required the services to do the same.[56]

The court examined the fact that the Bail Reform Act expressly exempted offenses triable by court-martial, but determined that this was an exemption, not a prohibition.[57] The military was free to adopt this element of federal law if it so desired.[58] The court determined that the Secretary of Defense had in fact done just that in his instruction, "voluntarily incorporating the pretrial-sentence credit extended to other Justice Department convicts."[59]

This case created a day for day credit against an adjudged sentence for any pretrial confinement. In his concurring opinion, Chief Judge Everett pointed out the benefits of such a rule.[60] It provided a certainty in sentencing that had been missing.[61] He pointed out the difficulty in determining exactly how "consideration" of the accused's pretrial confinement fit into members' deliberations on sentence.[62] He also saw disparities in the way in which convening authorities considered pretrial confinement when taking their action.[63] This day for day credit removes uncertainty and allows the accused better information when determining what pleas to enter or what pretrial agreements to propose.[64]

Along with certainty, Chief Judge Everett felt that the new rule from *Allen* created a uniformity of treatment between civilian and military defendants.[65] Extending the sentencing credit to servicemembers tried by court-martial with pretrial confinement would put them in the same position as defendants tried in federal district courts.[66] Chief Judge Everett also referred back to his concurrence in *Davidson* and noted that the *Allen* credit would mean that the aggregate of pretrial and post-trial confinement would not exceed the maximum authorized confinement for an offense.[67]

The majority of the court determined that DODI 1325.4 required pretrial confinement to be credited towards a servicemembers sentence.[68] The opinion relies completely on the technicalities of that instruction and the Bail Reform Act.[69] Chief Judge Everett's equity arguments came in his concurrence to the majority result.[70] However, as this area of law has continued to evolve, the issue of sentencing credits has become more about these equity type arguments and less about strict interpretation of DODIs and statutes.

C. *United States v. Mason*[71]

Before *Allen* created a credit for pretrial confinement, pretrial restraint was still a heavily litigated area. The timing of pretrial confinement or arrest was significant in determining an accused's rights to due process and a speedy trial. The courts were examining the concept of restriction conditions that were tantamount to confinement when making speedy trial

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[55] *Allen*, 17 M.J. 126.

[56] *Id.*

[57] *Id.* at 127.

[58] *Id.*

[59] *Id.* at 128.

[60] *Id.* at 129 (Everett, C.J., concurring).

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.* at 128 (majority opinion).

[69] *Id.*

[70] *Id.* at 129 (Everett, C.J., concurring).

[71] 19 M.J. 274 (C.M.A. 1985) (summary disposition).

determinations under Article 10, UCMJ.[72] At the time, RCM 707 did not exist. Instead, speedy trial for those in pretrial confinement or arrest was governed by Article 10, which stated that: "When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or dismiss the charges and release him."[73] In addition to Article 10, the decisions in *United States v. Burton*[74] and *United States v. Driver*[75] created a presumptive violation of Article 10 whenever pretrial confinement exceeded ninety days.[76] If the case was not tried within those ninety days, the Government would then have a "heavy burden" to show diligence in processing the charges.[77]

Within this speedy trial context, in 1976 the Court of Military Appeals examined the issue of restriction tantamount to confinement in *United States v. Schlif*.[78] The accused was in pretrial confinement for seventy days. Additionally, he spent fifty-seven days restricted to the "narrow confines of his squadron area, the terms of said restriction including an hourly sign-in procedure."[79] The court agreed with the Air Force Court of Military Review that those days constituted "severe restriction amounting to confinement."[80] The fifty-seven days were added to the seventy days spent in pretrial confinement to make 127 days of pretrial confinement, triggering the *Burton* rule.[81]

Following on the heels of the *Allen* case, *United States v. Mason*[82] used a summary disposition to easily shift the analysis of pretrial restriction that had been used for speedy trial purposes in cases like *Schlif* to credit determination.[83] In *Mason*, the accused was restricted to the dayroom with permission to go to the latrine, chapel, and mess hall with an escort.[84] He was also required to sign in hourly and could not participate in training.[85] The court in *Mason* awarded day-for-day *Allen* credit for this restriction tantamount to confinement.[86]

A few months later, the court released its opinion in *United States v. Smith* further defining the parameters of restriction tantamount to confinement that should receive *Allen* credit.[87] Specialist (SPC) Smith was in pretrial confinement for six days before being released and restricted to his barracks for fifty-six days.[88] The restriction prohibited him from using the phone

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[72] *See, e.g.*, United States v. Schlif, 1 M.J. 251 (C.M.A. 1976) (finding that restriction tantamount to confinement combined with actual confinement to create a total period of 127 days before trial began); United States v. Burrell, 13 M.J. 437 (C.M.A. 1982) (holding that time spent in a hospital prior to pretrial confinement was not tantamount to confinement for speedy trial purposes).

[73] UCMJ art. 10 (1969). The Sixth Amendment to the United States Constitution ensures an accused's right to due process and a speedy trial. U.S. CONST. amend. VI. This right exists whether or not an accused is confined, whereas Article 10, UCMJ applies only to those assigned to pretrial confinement or arrest. However, the requirements of Article 10 as developed by *Burton* and *Driver* are more rigorous than those of the Sixth Amendment; therefore, speedy trial case law in military justice primarily looks to Article 10 to ensure that an accused in pretrial confinement has been afforded a speedy trial. *Burrell*, 13 M.J. 437.

[74] 21 C.M.A. 112 (C.M.A. 1971).

[75] 23 C.M.A. 243 (C.M.A. 1974).

[76] *Schlif*, 1 M.J. at 252.

[77] *Id.*

[78] 1 M.J. 251.

[79] *Id.* at 252.

[80] *Id.*

[81] *Id. United States v. Burton* created a presumptive violation of Article 10 whenever pretrial confinement exceeded ninety days. *See* 21 C.M.A. 112; *see also* United States v. Weisenmuller, 34 C.M.R. 434 (C.M.A. 1968) (finding restriction to the barracks, necessity store, and mess hall along with hourly sign in and other restrictions amounted to confinement); United States v. Acireno, 15 M.J. 570 (C.M.A. 1982) (holding that restriction to the barracks, mess hall, and legal services office with an escort along with other restrictions equated to confinement even without a sign in requirement). *But see* United States v. Burrell, 13 M.J. 437 (C.M.A. 1982) (holding that time spent in a hospital prior to pretrial confinement was not tantamount to confinement for speedy trial purposes); United States v. Powell, 2 M.J. 6 (C.M.A. 1976) (finding that restriction to post was not tantamount to confinement).

[82] 19 M.J. 274 (C.M.A. 1985) (summary disposition).

[83] *Id.*

[84] *See* United States v. Smith, 20 M.J. 528, 531 (C.M.A. 1985).

[85] *Id.*

[86] *Mason*, 19 M.J. at 274.

[87] 20 M.J. 528 (C.M.A. 1985).

[88] *Id.* at 530.

without permission, performing normal duties, leaving his barracks without permission and an escort, and having visitors outside of specified hours and location.[89] He was required to perform duties assigned by the company commander and first sergeant and to sign in every thirty minutes during certain periods.[90] He also had to remain in his room with the door unlocked during certain hours.[91]

The court in *Smith* stated that the determination of whether certain conditions of restriction are tantamount to confinement is based on the "totality of the conditions imposed."[92] The court specifically examined the case law concerning restriction tantamount to confinement for speedy trial purposes.[93] It then turned to the cases on restriction involving sentencing credit, including *Mason* and Article 13 cases.[94] In examining these cases, the court identified factors to be considered in determining whether an accused's pretrial restraint is tantamount to confinement.[95] These factors include the nature and scope of the restraint, the types of duties performed during the period of restraint, and the degree of privacy allowed.[96] Additional factors include the requirement to sign in with someone in authority or to be subject to regular checks to ensure the accused's presence; an escort requirement; the nature of any telephone and visitor privileges; access to religious, medical, recreational and other support facilities; the location of sleeping accommodations; and whether the accused is allowed to keep and use his personal property.[97]

The court in *Smith* took care to differentiate restriction tantamount to confinement from illegal pretrial punishment. The court found that although SPC Smith's restriction was essentially the same as pretrial confinement, it was not a violation of Article 13, UCMJ.[98] The conditions of the restriction were lawful and related to legitimate goals of pretrial restraint.[99] However, on a spectrum between "restriction" and "confinement," these conditions rendered his restriction tantamount to confinement.[100] The court granted SPC Smith fifty-six days of administrative credit for his pretrial restriction.[101]

Mason credit is significant for several reasons. First, neither *Mason* nor *Smith* discussed the federal statute or DODI 1325.4 which was used as the basis for *Allen*. Although federal case law does provide for pretrial confinement credit based on onerous, confinement-like conditions of a halfway house or house arrest,[102] it is never mentioned in these cases. Both *Mason* and *Smith* adopt the equity argument inherent in the *Schlif* line of cases and apply the same test to determine additional sentencing credit. This shows that although *Allen* was ostensibly decided on statutory interpretation as opposed to equity, basic notions of equity and fairness underlie sentencing credit case law as a whole. Also significant is the easy manner in which *Mason* picked up the analysis from one area of the law, speedy trial under *Burton* and Article 10, UCMJ and applied it to a new area, pretrial confinement credit. Section III.F. suggests a similar adaptation in extending *Allen* credit to pretrial restriction that does not amount to confinement. The current test used to determine when the speedy trial clock begins under RCM 707 can be used to determine when conditions are sufficient to warrant the type of restriction credit being proposed.

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[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.* at 531.

[95] *Id.*

[96] *Id.*

[97] *Id.* at 531–32.

[98] *Id.* at 532.

[99] *Id.*

[100] *Id.*

[101] *Id.* at 532–33.

[102] *See* United States v. London-Cardona, 759 F. Supp. 60 (D.P.R. 1991) (finding twenty-four-hour house arrest confining defendant to a small space—no more than thirty feet outside her front door—with surveillance around the clock and only truly necessary trips to church, doctors, and lawyers upon approval of court officials to constitute official detention for credit purposes).

D. *United States v. Pierce*[103]

Article 15, UCMJ details the procedures for nonjudicial punishment.[104] Article 15(f) states that nonjudicial punishment is not a bar to forwarding the same charge or related charges to a court-martial.[105] However, it also allows an accused to show that he has received punishment so that the previous nonjudicial punishment can be considered in determining an appropriate sentence in the court-martial.[106] In 1989, the case of *United States v. Pierce* came before the COMA, challenging the ability of a convening authority to court-martial a servicemember for an offense for which he had already received nonjudicial punishment.[107] The court determined that Congress's intent to allow a convening authority to do just that was apparent from the plain text of Article 15.[108] The court looked at exactly how a prior nonjudicial punishment could be used in a court-martial for the same offense.[109] The court held that the government cannot use the nonjudicial punishment in any way during the merits portion of the case—not even for impeachment or to show a bad service record.[110]

Although Article 15 clearly allowed an accused to be convicted of an offense for which he had previously been given nonjudicial punishment, the court held that Article 15 did not allow an accused to be punished twice for the same offense.[111] Allowing an accused to be punished twice for the same offense would violate "the most obvious, fundamental notions of due process of law."[112] Therefore, in cases where an accused has received nonjudicial punishment for an offense and is then court-martialed and found guilty of the same offense, he is entitled to "complete credit for any and all nonjudicial punishment suffered: day-for-day, dollar-for-dollar, stripe-for-stripe."[113] The court pointed to the table of equivalent punishments from the 1969 *MCM* as a guide to reconciling nonjudicial punishment with punishment received at a court-martial.[114] The court also discussed the manner in which the consideration would be given to the accused. The accused decides whether the prior punishment will be shown to the court-martial for its consideration on sentencing, or whether it will be left to the convening authority to ensure that credit is given.[115] In this case, the convening authority approved as much of the sentence as was allowed by the pretrial agreement, clearly not crediting the nonjudicial punishment against the sentence.[116] The court returned the case for the lower court either to determine whether the military judge had considered the nonjudicial punishment in his sentence or to adjust the appellant's sentence by crediting his nonjudicial punishment.[117]

The *Pierce* credit is significant because it allows credit to be applied for restriction served before trial. Although the restriction being credited in this case is "punishment" restriction as opposed to "restraint" restriction, it provides a framework for how this restriction can be credited. The opinion cites the 1969 *MCM* Table of Equivalent Punishments and states that "[c]onfinement for 1 day is equivalent to 2 days' restriction . . . ."[118] The fundamentals of due process that do not allow an accused to be punished twice for the same offense are based in the same equity arguments that should not allow an accused to serve more than the maximum allowable sentence through pretrial restriction.

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[103] 27 M.J. 367 (C.M.A. 1989).

[104] UCMJ art. 15 (2008).

[105] *Id.* art. 15(f).

[106] *Id.*

[107] 27 M.J. at 368.

[108] *Id.*

[109] *Id.* at 369.

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.* (citing 1969 MCM, *supra* note 7, App. 25, Tbl. of Equivalent Punishments).

[115] *Id.*

[116] *Id.* at 370.

[117] *Id.*

[118] *Id.* at 369.

E. Article 13 Violations

Article 13, UCMJ states that "[n]o 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 ensure his presence . . . ."[119] The seminal authority for cases where the conditions of arrest or confinement are unduly harsh or overly rigorous is *United States v. Suzuki*.[120] Not all Article 13 cases include conditions of confinement. Other forms of pretrial punishment have been the basis for sentencing credits.[121] For several years, the manner in which sentencing credits were applied for Article 13 violations was unclear.[122] In some circumstances, the credits were applied to the adjudged sentence and, in others, to the sentence as approved.[123] Finally, *United States v. Spaustat* created a prospective rule that settled the issue and determined that all Article 13 sentencing credits would be applied to the sentences as approved.[124]

1. United States v. Larner[125]

Although the military justice system lacked any type of sentencing credit for legal pretrial confinement prior to *United States v. Allen*, it handled illegal pretrial confinement in violation of Article 13 differently. In 1976, in the case of *United States v. Larner*,[126] the COMA created an administrative credit for illegal pretrial confinement. In that case, Marine Corporal (Cpl) Larner's sentence included ten years confinement.[127] On review, the Navy-Marine Corps Court of Military Review (NMCMR) determined that he had served fifty-six days of illegal pretrial confinement.[128] The NMCMR reassessed the sentence and reduced it to nine years, ten months.[129] Unfortunately for the accused, because of the graduated good time system in place at that time, this reduction would actually cause him to stay in confinement for 196 days more than if his sentence had been left alone.[130] The COMA determined that the original sentence had not become illegal because of the pretrial confinement, but that the illegality of the pretrial restraint made it equivalent to post-trial punishment.[131] Therefore, they found a sentence reassessment to be inappropriate.[132] The proper remedy was an administrative credit that gave the accused day-for-day credit for the pretrial confinement.[133]

2. United States v. Suzuki[134]

In 1983, still a year before *Allen* was published, the COMA decided the case of *United States v. Suzuki*.[135] Airman First Class Suzuki's sentence included four years confinement.[136] The trial judge in his case found that a period of sixty-five days

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[119] UCMJ art. 13 (2008).

[120] 14 M.J. 491 (C.M.A. 1983).

[121] *See, e.g.*, United States v. Rock, 52 M.J. 154 (C.A.A.F. 1999).

[122] Major Michael G. Seidel, *Giving Service Members the Credit They Deserve: A Review of Sentencing Credit and its Application*, ARMY LAW., Aug. 1999, at 1, 12.

[123] *See, e.g.*, *Rock*, 52 M.J. 154; United States v. Spausat, 57 M.J. 256 (C.A.A.F. 2002).

[124] *Spausat*, 57 M.J. at 263–64.

[125] 1 M.J. 371 (C.M.A. 1976).

[126] *Id.*

[127] *Id.* at 372.

[128] *Id.* This confinement was found to violate Article 13 of the UCMJ. *Id.*

[129] *Id.*

[130] *Id.* at 373. Under the good time schedule, a prisoner with a sentence of ten years or more can earn up to ten days of good time per month. *Id.* (citing SEC'Y OF THE NAVY INSTR. 1640.9, DEP'T OF THE NAVY CORRECTIONS MANUAL para. 1009.1 (May 31, 1973). Reducing Cpl Larner's sentence to nine years, ten months meant that he was now only able to earn eight days of good time a month. *Id.*

[131] *Larner*, 1 M.J. at 373.

[132] *Id.*

[133] *Id.* at 375. This administrative credit was to be applied to the approved sentence.

[134] 14 M.J. 491 (C.M.A. 1983).

of pretrial confinement was illegal.[137] He granted day for day credit for this period as dictated by *Larner*.[138] Additionally, there were seven days during this illegal confinement in which A1C Suzuki was placed in administrative and disciplinary segregation.[139] The conditions of this segregation led the military judge to grant an additional two days of credit for each day spent in this segregation, to be added to the sixty-five days already credited.[140] This created an overall credit of seventy-nine days towards A1C Suzuki's four year sentence.[141] The convening authority, on the advice of his staff judge advocate, gave Suzuki the sixty-five days of credit, but did not credit A1C Suzuki with the additional fourteen days ordered by the judge.[142]

The COMA found that the military judge's remedy of more than day-for-day credit was appropriate.[143] The court stated that "where pretrial confinement is illegal for several reasons and the military judge concludes the circumstances require a more appropriate remedy, a one-for-one day credit limit is not mandated."[144]

Suzuki is an interesting case primarily because of where it falls on the timeline of sentencing credit case law. *Larner* had equated illegal pretrial confinement to legal post-trial confinement, therefore garnering an accused credit for that time served.[145] *Suzuki* expanded a trial judge's ability to basically punish the government for illegal and harsh conditions by giving additional credit beyond just the number of days served illegally. This came just in time for the *Allen* decision. It allowed credit for illegal pretrial punishment to survive *Allen*. If *Larner* had been the last significant decision in this area, the argument that illegal pretrial confinement should be credited because it is essentially punishment in advance of a conviction would have been superceded by *Allen*'s decision to grant credit to all pretrial confinement as though it were post-trial punishment.[146] The decision in *Suzuki* gives military judges great discretion to determine what conditions and circumstances constitute an illegal pretrial punishment and then to award an adequate remedy, beyond just day-for-day credit due for pretrial confinement.

Also of note in the *Suzuki* decision is the dissent. Judge Cook looked to the fact that the accused's sentence was already greatly reduced by a pretrial agreement with the convening authority.[147] In fact, the four years of confinement which he was adjudged was reduced to thirteen months.[148] Judge Cook believed that the seventy-nine days of credit granted by the military judge were subsumed by the thirty-five month sentence reduction required by the pretrial agreement.[149] He did not agree that the sentencing credit should be applied against the approved sentence, but that it should instead be applied against the adjudged sentence.[150] This issue raised by Judge Cook lingered in the case law on illegal pretrial punishment credit until *United States v. Spaustat* was decided in 2002.[151]

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[135] *Id.*

[136] *Id.* at 492.

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] *Id.* at 494 (Cook, J., dissenting).

[142] *Id.* at 492 (majority opinion).

[143] *Id.* at 493.

[144] *Id.*

[145] United States v. Larner, 1 M.J. 371, 373 (C.M.A. 1976).

[146] The court in *Allen* did not make the decision to grant this credit because it believed that pretrial confinement was equivalent to post-trial punishment, but the practical effect is the same as pointed out in Chief Judge Everett's concurrence in *Davidson*. United States v. Davidson, 14 M.J. 81, 87 (C.M.A. 1982).

[147] *Suzuki*, 14 M.J. at 494 (Cook, J., dissenting).

[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] *See* 57 M.J. 256 (C.A.A.F. 2002).

3. United States v. Rock[152]

In 1999, the issue raised in the *Suzuki* dissent came before Court of Appeals for the Armed Forces (CAAF) in the case of *United States v. Rock.*[153] The accused, PFC Rock, spent 160 days before trial on pretrial restriction.[154] He was not allowed to train in his military occupational specialty, he performed work details, and had some conditions on his liberty.[155] These conditions together did not amount to restriction tantamount to confinement; however, they did amount to pretrial punishment in violation of Article 13, UCMJ.[156] The military judge awarded the accused 240 days of confinement credit for this illegal pretrial punishment.[157]

When the military judge announced his sentence, he announced that he had taken the 240 days (eight months) of credit into account when adjudging his sentence.[158] He stated that his adjudged sentence of fifty-three months included that credit.[159] The pretrial agreement then further reduced the adjudged sentence to an approved sentence of thirty-six months.[160] The issue on appeal was whether the eight months of credit should have been applied to the adjudged sentence[161] or to the thirty-six month sentence as approved.[162]

The court lays out the rule that "credit against confinement awarded by a military judge *always* applies against the sentence adjudged—unless the pretrial agreement itself dictates otherwise."[163] If the pretrial agreement limits confinement to a certain period less than that adjudged, then the accused cannot be required to serve more confinement than agreed upon, whether it is actual or constructive confinement.[164] If the Article 13 violation is overly rigorous pretrial confinement or restriction tantamount to confinement, then the pretrial agreement's maximum confinement provision would cause the sentencing credit to be applied to the approved sentence.[165] However, if the Article 13 violation does not involve confinement or conditions tantamount to confinement, then the pretrial agreement has no impact and the credit should be applied to the adjudged sentence.[166]

In a concurrence to this case, Judge Effron questioned whether or not applying credit to adjudged sentences allowed the accused to receive meaningful relief.[167] Along with this apparent inequity, the result in *Rock* further confused the area by creating different applications of sentencing credit depending on the type of Article 13 violation.[168]

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[152] 52 M.J. 154 (C.A.A.F. 1999).

[153] *Id.*

[154] *Id.* at 156.

[155] *Id.* at 155.

[156] *Id.*

[157] *Id.* at 156. The military judge used a calculation of 1.5 days credit for each day of this punishment. *Id.* Under *Suzuki*, the military judge has discretion to fashion a scale of credit for Article 13 violations that can extend beyond day-for-day credit. United States v. Suzuki, 14 M.J. 491 (C.M.A. 1983).

[158] *Rock*, 52 M.J. at 155.

[159] *Id.*

[160] *Id.*

[161] Essentially sixty-one months, because the fifty-three month announced sentence included those eight months of credit. *Id.*

[162] *Id.*

[163] *Id.* at 156–57.

[164] *Id.* at 157.

[165] *Id.*

[166] *Id.*

[167] *Id.* at 157–58 (Effron, J., concurring). This absence of meaningful relief is illustrated in *United States v. Ozores*. 53 M.J. 670, 675 (A.F. Ct. Crim. App. 2000) (holding that the seven days of Article 13 credit due the accused after he was taken to the hospital "while wearing only his underpants and undershirt and waiting to see a doctor for a considerable period of time in a public area while handcuffed" were correctly credited to the adjudged sentence instead of the approved sentence).

[168] *See* Seidel, *supra* note 122, at 12 (arguing for a clear uniform application of Article 13 sentencing credits to approved sentences).

4. United States v. Spaustat[169]

In 2002, the court reexamined the rule from *Rock* and cleared up the double standard.[170] Staff Sergeant Spaustat had been stripped of his staff sergeant stripes while in pretrial confinement.[171] The trial judge found this to be an Article 13 violation and ordered *Allen* credit for the 102 days of pretrial confinement and *Suzuki* credit for the 92 days he served in pretrial confinement without his rank.[172] The question in *Spaustat* was the application of these credits to his adjudged and approved sentence.[173] The court was able to decide this case under the rule in *Rock* because the illegal pretrial punishment was an incident of his pretrial confinement, and therefore the credit had to be applied to the approved sentence unless the pretrial agreement stated otherwise.[174] However, citing the confusion that remained in the case law as well as the inequity raised by Judge Effron in his concurrence in *Rock*, the court took the opportunity to issue a new rule that applies to all Article 13 credit cases.[175] The rule is now that the convening authority is required to apply all confinement credits for violations of Article 13 or RCM 305[176] and all *Allen* credit against the approved sentence unless the pretrial agreement provides otherwise.[177]

F. RCM 305(k) Credit

1. RCM 305

Rule for Courts-Martial 305 covers the rules and procedures governing pretrial confinement.[178] The rule dictates who may be confined, as well as who may order that confinement.[179] The rule establishes an accused's right to counsel as well as the notification requirements when an accused is ordered into pretrial confinement.[180] It also mandates a review of pretrial confinement by a neutral and detached officer within seven days of the imposition of confinement.[181]

Rule for Courts-Martial 305(k) defines the remedy for violations of the portions of the rule listed above.[182] This remedy is described as an administrative credit against the sentence adjudged for any confinement served as the result of these violations.[183] The credit is one day credit for each day served in confinement as a result of the violation.[184] Additionally, RCM 305(k) incorporates the finding in *Suzuki* and allows the military judge to order additional credit for each day of pretrial confinement that involves an abuse of discretion or unusually harsh circumstances.[185] All RCM 305(k) credit is applied in

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[169] 57 M.J. 256 (2002).

[170] *Id.*

[171] *Id.* at 257.

[172] *Id.* at 258. The military judge actually states that he is applying both credits to the adjudged sentence, but then deducts the difference between the adjudged sentence and the confinement limitation in the pretrial agreement as well, effectively applying all credits to the approved sentence. *Id.* It was the military judge's inability to clearly state his sentence and how he was applying credits that led to the issue in this case.

[173] *Id.* at 261–62.

[174] *Id.* at 262.

[175] *Id.* at 263.

[176] For further discussion on RCM 305 credit, see Section II.F. *infra.*

[177] *Spaustat*, 57 M.J. at 263–64.

[178] MCM, *supra* note 6, R.C.M. 305.

[179] *Id.* R.C.M. 305(b), (c).

[180] *Id.* R.C.M. 305(f), (h).

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

[182] *Id.* R.C.M. 305(k) (listing the remedy for violations of RCM 305(f), (h), or (i)).

[183] *Id.*

[184] *Id.*

[185] *Id.* Note, however, that this remedy only encompasses the Article 13 violation laid out in *Suzuki*: that of unusually harsh confinement conditions. Rule for Courts-Martial 305(k) does not grant a remedy for Article 13 violations that do not amount to confinement. Illegal pretrial punishment that does not involve or amount to confinement does not currently have a codified remedy. MCM, *supra* note 6, R.C.M. 305(k). This area of the law is still controlled by case law, including *United States v. Spausat.* 57 M.J. 256 (2002).

addition to other credit the accused may be entitled to, such as *Allen* or *Mason* credit.[186] Further, the rule states that if no confinement is adjudged, or is less than the amount of credit due, then the credit can be applied against hard labor without confinement, restriction, fine, and forfeitures, in that order.[187] When applying RCM 305(k) credit to punishment other than confinement, the rule points to the conversion formulas in RCM 1003(b)(6) and (7).[188] This is another example of the use of sentence equivalencies in current practice, despite the removal of the table that appeared in the 1969 *MCM*.

2. United States v. Gregory[189]

After *Mason* was decided, another issue arose out of the restriction tantamount to confinement line of cases regarding RCM 305(k) credit. If an accused is placed in pretrial restriction, the requirements of RCM 305 do not apply. However, if a court later determines that the terms of pretrial restriction were so onerous as to be tantamount to confinement, then is an accused also entitled to RCM 305(k) credit because the command did not follow the requirements of RCM 305 when placing him in that pretrial restriction? This question first arose in the case of *United States v. Gregory*.[190] Private Gregory was restricted for thirty-one days prior to his trial and the military judge at the trial level found that the conditions of the restriction were onerous enough to be considered tantamount to confinement.[191] The accused received thirty days of *Mason* credit as a result of this restriction.[192] On appeal, Gregory argued that because his restriction was equivalent to confinement, the Government was required to comply with the notification and review procedures in RCM 305.[193] The command in his case had not, and he asked the Army Court of Military Review (ACMR) to add thirty additional days of RCM 305(k) credit to the *Mason* credit already granted.[194] The court determined that restriction tantamount to confinement is a form of pretrial confinement and that, therefore, the provisions of RCM 305 do apply.[195] The court found that the rules promulgated in RCM 305 were aimed at the effect of a given type of pretrial restraint, rather than the formal label attached to the restraint.[196] Thus, where restraint is labeled restriction, but is essentially confinement, RCM 305 should apply.[197] The court granted the thirty days of RCM 305(k) credit along with the thirty days of *Mason* credit to the approved sentence in the case.[198] In deciding this case, the ACMR reemphasized the lack of a bright line rule to determine when restriction is tantamount to confinement, again referring to the totality of the circumstances test found in *Smith*.[199] The court attempted to calm commanders who might be alarmed at this new requirement by stating that conditions of restriction amounting to confinement were rare.[200] In a summary disposition, the COMA ruled that the ACMR had been correct in requiring RCM 305 procedures to apply to restriction tantamount to confinement and affirmed the decision.[201]

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[186] MCM, *supra* note 6, R.C.M. 305(k).

[187] *Id.* Courts have refused to extend this principle and apply credit for legal pretrial confinement to other forms of punishment when no confinement is adjudged. *See* United States v. Smith, 56 M.J. 290 (C.A.A.F. 2002) (holding that an accused who spent ninety-four days in legal pretrial confinement and then was not adjudged any confinement was not entitled to have pretrial confinement credit applied against his other adjudged punishments because RCM 305(k) only granted such credit for illegal pretrial confinement and neither Congress nor the President have acted to grant such credit for legal pretrial confinement).

[188] MCM, *supra* note 6, R.C.M. 305(k). Although the language in RCM 305(k) cites RCM 1003(b)(6) and (7), this appears to be an error reflecting an older version of RCM 1003(b) than is found in the current *MCM*. *Id.* The conversion formulas of RCM 1003(b) appear in paragraphs (5) and (6) and show one day of confinement to equal two days of restriction one and a half days of hard labor without confinement. *Id.* Rule for Courts-Martial 1003(b)(7) specifies confinement itself as an allowable punishment, without reference to any conversion rates. *Id.* R.C.M. 1003(b)(7).

[189] 21 M.J. 952 (A.C.M.R. 1986).

[190] *Id.*

[191] *Id.* at 953.

[192] *Id.*

[193] *Id.*

[194] *Id.*

[195] *Id.* at 955–56.

[196] *Id.* at 956.

[197] *Id.*

[198] *Id.* at 958.

[199] *Id.* at 955.

[200] *Id.* at 956.

[201] United States v. Gregory, 23 M.J. 246 (C.M.A. 1986).

3. United States v. Rendon[202]

The rule from *Gregory* was reexamined in *Rendon* in 2003.[203] The trial judge in *Rendon* had determined that the accused's restriction was tantamount to confinement.[204] For this he awarded the accused *Mason* credit.[205] The accused also requested thirty-three days of additional RCM 305(k) credit for the command's failure to provide a review of that restraint.[206] The trial judge denied the RCM 305(k) credit, finding that it asked too much of a commander to grant RCM 305 review based on a guess as to what a judge may eventually determine.[207] The CAAF looked at RCM 305 again and found "no evidence that the President intended the procedural protections or the credit provided in RCM 305 to apply to anything other than the physical restraint attendant to pretrial confinement."[208] The court supported its argument by acknowledging that the President had never expanded RCM 305's coverage to include any form of restriction despite the many years since the *Mason* decision.[209] The court adopted the new rule that restriction tantamount to confinement does not, per se, trigger RCM 305.[210] The procedural requirements of RCM 305 are only necessary when the conditions or circumstances of the restriction meet the definitional requirements for "confinement", including physical restraint depriving an accused of his freedom.[211]

The case law in this area has led to a murky state where restriction conditions can be onerous enough to be considered "tantamount to confinement," and are thus eligible for *Mason* credit, but somehow do not meet the definitional requirements for confinement requiring RCM 305 procedures and credit. Instead, in order to receive both *Mason* credit and RCM 305(k) credit, the pretrial restriction must not only be tantamount to confinement, but must also include physical restraint depriving an accused of his freedom. The lack of a bright line rule in this area is intended to allow the military judges the ability to examine a multitude of potential restrictions and conditions and determine what credit, if any, should apply.[212] However, the current state of the case law makes it difficult for commanders, staff judge advocates, and trial attorneys to anticipate the outcome of a motion for *Mason* and RCM 305(k) credit.

III. A New Credit for Pretrial Restriction

Against this background of sentencing credits, this article argues for a new credit, one for legal pretrial restriction that is not tantamount to confinement. This new credit flows logically from the credits that already exist. Its creation would create certainty and equity in sentencing. It would prevent an accused from serving more punishment than he is sentenced to, or more punishment than allowed by law. A credit for pretrial restriction that does not warrant *Mason* credit might allow the case law under *Mason* to shift and align more with *Rendon*, reducing the confusion in that area.

This pretrial restriction credit should be granted at the rate of two days of restriction for one day of confinement, according to the equivalency rate in the 1969 *MCM* and in the present day RCM 1003(b)(5). Although it would seem that this new credit would impose an added requirement on military judges to determine what constitutes "restriction" for credit purposes, this standard already exists in the speedy trial arena. Much as the court in *Smith* adopted the standards for

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[202] 58 M.J. 221 (C.A.A.F. 2003).

[203] *Id.*

[204] *Id.* at 222–23. Seaman Rendon was restricted to Training Center Yorktown, prohibited from wearing civilian clothes, required to stay in a restriction room, had reporting requirements after duty hours and on weekends, could not leave his room after 2200, and could not utilize MWR facilities. *Id.*

[205] *Id.*

[206] *Id.* at 223.

[207] *Id.*

[208] *Id.* at 224.

[209] *Id.* Of note is the fact that in *Gregory*, the court noted that if the President did not agree with the court's application of RCM 305 to restriction tantamount to confinement, then he would be able to limit its applicability through clarification of the rule in future reviews of the *MCM*. *Id.* The President did not do so.

[210] *Id.*

[211] *Id.*; *see also* United States v. Regan, 62 M.J. 299 (C.A.A.F. 2006) (holding that an officer sent to treatment prior to trial was restricted in a manner tantamount to confinement for *Mason* purposes, but was not physically restrained beyond conditions imposed for medical reasons and was therefore not entitled to RCM 305 review or credit).

[212] United States v. Gregory, 21 M.J. 952 (A.C.M.R. 1986).

restriction tantamount to confinement from speedy trial, so can trial courts look to past analysis under RCM 707(a) for guidance on determining when restriction begins.

A. Certainty

Currently, an accused who has served pretrial restraint merits some consideration of his pretrial restraint by the members or military judge when it comes to sentencing. That restraint lies in a list of factors to be considered, such as the accused's age, education, rank, etc.[213] It is impossible to tell what level of consideration that pretrial restraint is given when the sentence is announced. Certainly, an accused can still be awarded the maximum punishment allowable for an offense, causing an observer to deduce that the sentencing authority "considered" the restraint, but placed no appreciable value on it. This is the same concern that Chief Judge Everett expressed in his concurrence in *Allen* when it came to pretrial confinement.[214] Before *Allen*, no one could either foresee exactly what weight was being given to pretrial confinement by various sentencing authorities and convening authorities, or determine how court members factored pretrial confinement into their sentence.[215] Therefore, the credit created by *Allen* provided a "certainty that [was then] lacking in the treatment of pretrial confinement in this military justice system."[216] Chief Judge Everett saw the value of the *Allen* rule in providing certainty to all parties.[217] A convening authority could consider the credit that would be applied when determining to which level of court-martial to refer a case.[218] An accused could make the same consideration when proposing a pretrial agreement.[219] Court members who are advised as to the amount of an accused's pretrial confinement will know specifically how this will be treated for sentencing purposes.[220]

This same argument can be made for pretrial restriction. All sides of the court-martial process—the convening authority, the accused, and the fact-finder—will understand from the outset how the period of pretrial restriction will factor into the sentencing. It can also inform a convening authority's decision to impose pretrial restriction.

An additional aspect of certainty comes into play when examining the case law on restriction tantamount to confinement. The case law since *Mason* has left the area anything but clear. The factors in *Smith* help, but commands are able to come up with restrictions not contemplated or laid out in *Smith*. Often, military judges are left to their own discretion and therefore can come up with different results for substantially the same set of facts. Three cases from the Air Force appellate court illustrate this fact. In 1991, the court heard the case of Cadet First Class (C1C) Sassaman.[221] Cadet First Class Sassaman was restricted to the cadet command post for fifty-one days.[222] He was allowed access to the chapel, library, and gym under escort and had to sign in and out whenever he left his room.[223] This was determined to be restriction tantamount to confinement and C1C Sassaman was granted *Mason* credit.[224]

In 1995, the court decided *United States v. Perez*, a case where the accused was restricted only to the confines of the base.[225] The trial judge had determined this to be tantamount to confinement and the Court of Criminal Appeals affirmed under the abuse of discretion standard.[226]

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[213] *See* BENCHBOOK, *supra* note 2, para. 2-5-23.

[214] United States v. Allen, 17 M.J. 126, 129 (C.M.A. 1984) (Everett, C.J., concurring).

[215] *Id.*

[216] *Id.*

[217] *Id.*

[218] *Id.*

[219] *Id.* at 130.

[220] *Id.*

[221] United States v. Sassaman, 32 M.J. 687 (A.F.C.M.R. 1991).

[222] *Id.* at 691.

[223] *Id.*

[224] *Id.*

[225] United States v. Perez, No. 28853, 1995 CCA LEXIS, at *12 (A.F. Ct. Crim. App. Mar. 10, 1995).

[226] *Id.* at *7.

A year later, in *United States v. Truell*, the Air Force Court of Criminal Appeals agreed with a military judge who determined that Airman Truell's restriction did not rise to the level of confinement when he was restricted to his three-room suite in the dormitory, his work site and the dining hall.[227] He was prohibited from drinking alcoholic beverages, had to report daily to the mental health clinic to receive Antabuse, and had to receive permission to go anywhere else.[228]

The disparate outcomes at the trial level and great discretion on the issue granted to trial courts by appellate courts illustrate the uncertainty inherent in this area of the law. A credit for pretrial restriction would ensure that all restriction received some credit. If some credit existed for all pretrial restriction, military judges would be less likely to grant *Mason* credit for the close cases. Instead of facing a choice between no credit and day-for-day credit, a military judge would have a choice between this proposed credit and day-for-day credit. The judge may decide that the conditions of pretrial restriction are adequately compensated by the credit proposed here and avoid extending *Mason* credit to cases that may not require that extreme remedy. Limiting *Mason* credit to the outlying cases can increase the certainty among all parties as to what type of sentencing credit an accused will receive at trial.

B. Equity

In reading *United States v. Allen*, a credit for pretrial restriction does not leap out as a logical extension. This is because of the technical aspect of the *Allen* opinion. Despite Chief Judge Everett's concurrence, the majority opinion comes down to statutory interpretation of DODI and a federal statute.[229] In determining whether this interpretation could extend to pretrial restriction, we look at the case law that has developed under the federal law. The Bail Reform Act that was the original basis of *Allen* was 18 U.S.C. § 3568.[230] The current federal law that calls for credit for pretrial confinement is 18 U.S.C. § 3585.[231] Under that law, a string of cases attempting to gain credit for restriction less than confinement have developed. Generally, the closest equivalent that civilians have to pretrial restriction is house arrest. For the most part, federal courts have not given confinement credit to defendants serving house arrest.[232] The only time that credit is given is when the conditions of house arrest are so onerous as to equate to confinement, much as military courts have created *Mason* credit.[233]

Although federal defendants under house arrest are not allowed credit under federal law, this does not mean that military accused should not receive credit for pretrial restriction. Civilian house arrest is not nearly as restrictive as military pretrial restriction. A civilian under house arrest can enjoy the comfort of his home, can usually have visitors to his home, and can make meals and eat in his home. Further, when the civilian defendant leaves his home to go to work, his employment is not part of the system imposing restrictions. His work is not affected by his house arrest, his duties should not change, and while at work, he can escape the confines of his restraint. Military accused are ordinarily required to serve their pretrial restriction in the barracks. The comfort inherent in a person's home is generally absent from a barracks. The style of barracks can range from an open squad bay occupied by forty servicemembers to a "dorm" room that provides some privacy, but is still largely regulated. While in the barracks, restricted servicemembers usually go to the mess hall for meals, often with an escort. Their ability to have visitors is regulated by both barracks regulations and the terms of their restriction. Instead of just electronic monitoring, pretrial restriction usually involves some sort of sign-in requirement and supervision by an appointed noncommissioned officer or servicemember standing duty. A servicemember's job duties are dictated by his unit and are frequently impacted by his pretrial status, if not by the restriction itself. These differences between house arrest and

[227] United States v. Truell, No. 29014, 1996 CCA LEXIS, at *157 (A.F. Ct. Crim. App. May 13, 1996).

[228] *Id.* at *3. Antabuse (generic name disulfiram) is used to treat alcohol abuse by producing unpleasant side effects when the patient drinks or is exposed to alcohol. Medline Plus Drug Information: Disulfiram, U.S. Nat'l Library of Medicine & Nat'l Inst. of Health, http://www.nlm.nih.gov/medline plus/druginfo/medmaster/a68260.html (last visited Sept. 15, 2008).

[229] United States v. Allen, 17 M.J. 126, 128 (C.M.A. 1984).

[230] *Id.* at 126.

[231] 18 U.S.C. § 3568 (2000).

[232] *See* United States v. Insley, 927 F.2d 185 (4th Cir. 1991) (holding that requiring a defendant to reside with parents, leave only to seek employment, work, or go to church, and be electronically monitored did not constitute "official detention" requiring sentencing credit); United States v. Edwards, 960 F.2d 278 (2d Cir. 1992) (holding that electronic monitoring and defendant's restriction largely to his residence did not entitle defendant to credit, although terms may be rather restrictive).

[233] *See* United States v. London-Cardona, 759 F. Supp. 60 (D.P.R. 1991) (finding twenty-four-hour house arrest confining defendant to a small space—no more than thirty feet outside her front door—with surveillance around the clock and only truly necessary trips to church, doctors, and lawyers upon approval of court officials to constitute official detention for credit purposes).

pretrial restriction argue against applying the federal view of house arrest to pretrial restriction. A federal court would likely view military pretrial restriction as equivalent to "official detention," even if a military court would not find it tantamount to confinement.

Even if house arrest and pretrial restriction were considered to be the same, and pretrial restriction would not merit sentencing credit under 18 U.S.C. § 3585, an argument still exists for the extension of credit to pretrial restriction for equity reasons. Although *Allen* was a technical, statutory decision instead of an equitable one, the equity reasons cited by Chief Judge Everett in his concurrence can be found in other areas of military sentencing credit jurisprudence. The decision in *Pierce* cites due process considerations in determining that an accused cannot be punished twice for the same offense. *Mason* is born out of consideration for an accused who faces the constraints of confinement without the formal designation. *Suzuki* credit is entirely an equity-based credit; the discretion of the military judge allows him to make an accused whole after the accused suffers illegal pretrial confinement.

Extending credit to pretrial restriction is an equitable solution as well. Although RCM 304 dictates that pretrial restraint is not to be used as punishment,[234] the effect of pretrial restriction is largely the same as the effect of punitive restriction. In looking at the definitions, the definition of restriction in lieu of arrest in RCM 304(a) 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."[235] Restriction that can be awarded as punishment at court-martial is specified as "restriction to specified limits."[236] It is not further defined, but the discussion section states that restriction does not exempt the person on whom it is imposed from any military duty.[237]

In *Davidson*, Chief Judge Everett stated that "confinement while awaiting trial is not completely dissimilar from confinement after sentence is adjudged."[238] He also stated that "while pretrial confinement may be necessary to protect certain well-defined and circumscribed societal interests, . . . the fact remains that significant adverse consequences are inflicted on the persons confined."[239] Similarly, an accused on pretrial restriction may be placed there for legitimate reasons that do not equate to punishment. However, the restrictions on his liberty feel the same as post-trial restriction does. Therefore, fairness would demand that once his sentence is adjudged, the accused receive credit for the time already spent in this status.

C. Maximum allowable punishment

Chief Judge Everett raised an additional point in his concurrence in *Davidson*. He felt that failing to grant credit for pretrial confinement created an issue with the maximum allowable punishments for offenses.[240] In *Davidson*, the accused served 143 days in pretrial confinement before being sentenced to the maximum punishment for his offense.[241] Chief Judge Everett advocated following the Bail Reform Act and granting credit for pretrial confinement to avoid punishing a servicemember beyond the sentence prescribed by the President in the Table of Maximum Punishments.[242]

Although the decision in *Allen* fixes this problem regarding confinement, the same problem identified by Chief Judge Everett in 1982 still exists for pretrial restriction. As stated above, the practical differences between pre- and post-trial restriction are usually as small as the differences between pre- and post-trial confinement. Allowing an accused to serve pretrial restriction and then receive the maximum sentence for an offense exceeds the Table of Maximum Punishments as well. Crediting that pretrial restriction will resolve this problem in the same manner that *Allen* attempted to in 1984.

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[234] MCM, *supra* note 6, R.C.M. 304.

[235] *Id.* R.C.M. 304(a)(2).

[236] *Id.* R.C.M. 1003(b)(5).

[237] *Id.* R.C.M. 1003(b)(5) discussion.

[238] United States v. Davidson, 14 M.J. 81, 88 (C.M.A. 1982) (Everett, C.J., concurring).

[239] *Id.*

[240] *Id.* at 88.

[241] *Id.* at 82 (majority opinion).

[242] *Id.* at 88 (Everett, C.J., concurring).

D. *Mason*/RCM 305(k) Confusion

After the decision in *Gregory*, the case law on RCM 305(k) credit for restriction tantamount to confinement was clear, although it imposed a difficult requirement on the command. *Gregory* essentially required a commander to guess what a military judge would find at trial and determine whether he needed to follow the procedures of RCM 305 when placing an accused on pretrial restriction. When the CAAF decided *Rendon*, it created confusion in the area of restriction tantamount to confinement. Although *Rendon* alleviated some of the concern over the likelihood of a judge granting RCM 305 credit, it muddied the waters regarding the difference between restriction tantamount to confinement and restriction that merits RCM 305 procedures. After all, what is the difference between restriction "tantamount to confinement" and restriction that meets the "definitional requirements" of confinement, including physical restraint? How can restriction be deemed tantamount to confinement, yet not meet the definitional requirement of confinement? This problem seems to exist because military judges are attempting to find a balance between compensating an accused for what the judge perceives to be harsh restriction conditions, and understanding the commander's difficulty in prejudging restriction in order to determine whether to follow RCM 305 procedures.

If credit is given for pretrial restriction, military judges will be less inclined to find restriction to be tantamount to confinement in the marginal cases. The military judge will not have to compensate the accused for all but the most severe restriction conditions under *Mason* if he is already receiving a credit for pretrial restriction. Military judges will likely save *Mason* credit for conditions that follow the *Rendon* definition of confinement. Once the conditions of restriction tantamount to confinement qualifying for *Mason* credit are more in line with the conditions that trigger RCM 305 requirements under *Rendon*, the entire body of restriction tantamount to confinement law will be clearer. Severe restriction conditions involving physical restraint that approximate confinement would not only qualify an accused for *Mason* credit, but are also easier for commanders to identify as triggering RCM 305 procedures. The inconsistency in these two lines of cases will resolve itself.

E. Equivalency Formula

In the 1969 *MCM*, Appendix 25 included a Table of Equivalent Punishments.[243] In this table, one day of confinement equaled two days of restriction to limits.[244] This table no longer accompanies the UCMJ, but the equivalency it states is incorporated into the current *MCM*. Rule for Courts-Martial 1003(b)(5) lists restriction as an allowable punishment resulting from a court-martial.[245] It also states that restriction may be adjudged for no more than two months for each month of authorized confinement.[246] In no case may it be adjudged for more than two months.[247] Confinement and restriction may both be adjudged, but they may not be added together to exceed the maximum authorized confinement when two days of restriction is calculated to equal one day of confinement.[248] This conversion formula is also referenced in RCM 305(k) when granting credit for illegal pretrial confinement to adjudged punishments other than confinement.[249]

It makes sense then to keep this equivalency when granting sentencing credit for pretrial restriction. If confinement is awarded at trial, then the rate of credit would be one day of confinement credit for every two days of pretrial restriction. If restriction is awarded at trial, then the pretrial restriction would be credited at a rate of day-for-day. This rate should be definite, as the *Allen* credit is, because it is not granted based on wrongdoing by the command, as in *Suzuki*. This credit merely serves to credit the accused for the restraint served before trial, as *Allen* credit does. The military judge should not have discretion to alter this conversion based on conditions of restriction. Any restriction that meets the restriction in lieu of arrest standard would qualify for credit in this amount. Military judges concerned with adjusting credit based on difficult conditions of pretrial restriction can still look to *Mason* credit or Article 13 credit if the restriction is found to be tantamount to confinement or to constitute punishment.

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[243] SCHLEUTER, *supra* note 18, at 632 (citing 1969 MCM, *supra* note 7, App. 25, Tbl. of Equivalent Punishments).

[244] *Id.*

[245] MCM, *supra* note 6, R.C.M. 1003(b)(5).

[246] *Id.*

[247] *Id.*

[248] *Id.*

[249] *Id.* R.C.M. 305(k).

F. RCM 707 analysis

In 1986, RCM 707 was amended to state that the speedy trial clock begins for an accused when pretrial restriction in lieu of arrest, arrest, or confinement is imposed.[250] This amendment removed the 1984 standard wherein all forms of restraint, including conditions on liberty, triggered the speedy trial clock.[251] The effect of such a change meant that the courts were forced to differentiate between conditions on liberty and restriction in lieu of arrest. The definition in the *MCM* of 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."[252] This definition does not cover many of the requirements that commands impose for pretrial restrictees, including prohibitions on wearing civilian clothes, sign in requirements, escort requirements, etc. The trial judges have been given a great deal of discretion in determining whether a set of conditions crosses the line from conditions on liberty to restriction in lieu of arrest.[253] The cases that have made these determinations have focused on whether the conditions of pretrial restraint place any "realistic, significant restraint on the liberty of the service member concerned."[254] Restricting a Soldier who lives in the barracks to post is more likely to be a condition on liberty, while requiring a married Soldier to move into the barracks could be considered restriction in lieu of arrest.[255] Just as trial judges can distinguish between conditions on liberty and restriction for speedy trial purposes, so can they make that determination in deciding whether credit for pretrial restriction is warranted.[256]

G. Potential issues

There is still some potential for abuse in this new credit. Commands may try to characterize the restraint as conditions on liberty instead of pretrial restriction in order to skirt the credit. However, the level of restraint required for restriction in lieu of arrest is still relatively low. Most commanders who place an accused in pretrial restraint do so out of legitimate concerns about appearance for trial or further misconduct. These commanders will ensure that the accused is restricted as much as necessary to minimize the risk of flight or misconduct. Almost any restrictions that will accomplish these goals will place an accused in the equivalent of pretrial restriction, entitling him to this credit. Commanders will take the credit for this restriction as a given, just as they do for pretrial confinement. Most commanders do not make decisions on pretrial restraint based on an attempt to keep an accused from receiving credit, but in order to accomplish the legitimate goals of pretrial restraint. Once the credit is established, it will figure into bargaining for pretrial agreements, preventing windfalls by the accused. On the contrary, because this credit will create certainty in the area and reduce *Mason* credit, the command will avoid situations where the accused gains unanticipated credit.

IV. Conclusion

The case law surrounding credit for pretrial confinement began with *United States v. Allen*[257] in 1984. Since that time, the law has expanded to create several types of credits. The focus has shifted from statutory interpretation back to traditional notions of equity. For the same reasons of equity, sentencing credit should be extended to pretrial restriction. The client sitting next to you at the defense table should not serve more time in restraint than a client placed in pretrial confinement, and certainly should not serve more than is authorized by law. The loophole should be closed, and a credit of one day of confinement should be granted for every two days of pretrial restriction served.

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[250] *See* United States v. King, 30 M.J. 59 (C.M.A. 1990) (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 707 (1984) (C2, 15 May 1986)).

[251] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 707 (1984).

[252] MCM, *supra* note 6, R.C.M. 304(a)(2).

[253] *See, e.g.*, United States v. Buford, No. 32161, 1997 CCA LEXIS 11, at *6–7 (A.F. Ct. Crim. App. Jan. 8, 1997).

[254] United States v. Fujiwara, 64 M.J. 695, 699 (A.F. Ct. Crim. App. 2007) (holding that possible requirement to "stay in the local area" did not create a restriction in lieu of arrest).

[255] *Id.* (comparing United States v. Wilkinson, 27 M.J. 645 (A.C.M.R. 1988), *with* United States v. Wagner, 39 M.J. 832 (A.C.M.R. 1994)).

[256] *See, e.g.*, *Buford*, No. 32161, 1997 CCA LEXIS, at *11 (finding that the military judge did not abuse discretion when he found that restriction to base and requirement to ask permission for off-base appointments did not constitute restriction in lieu of arrest); United States v. McLeod, No. 30883, 1995 CCA LEXIS 184 (A.F. Ct. Crim. App. July 20, 1995) (finding that placement in the transition flight with some limitations on the accused's freedom of movement did not constitute restriction in lieu of arrest); *Wagner*, 39 M.J. 832 (finding that order for married soldier to move from off-base home with family into barracks could potentially constitute restriction in lieu of arrest, but break in such restriction prevented speedy trial violation).

[257] 17 M.J. 126 (C.M.A. 1984).