A Distinction with a Difference: Rule for Courts-Martial 304 Pretrial Restraint and Speedy Trial

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I. Introduction

The phone rings. Captain (CPT) Brown, one of the company commanders in your brigade, is calling. "I've got a problem with one of my Soldiers. The brigade judge advocate said I should call the trial counsel. That's you, right?" Captain Brown informs you that one of his Soldiers has just been accused of sexually assaulting his wife. He explains that Specialist (SPC) White and his spouse have been having marital problems for a few months, but nothing like this, and SPC White has never been in trouble before. Specialist White is very depressed, and CPT Brown is concerned for the safety of both individuals. Captain Brown wants to order the Soldier into pretrial confinement (PTC).[1]

You have been a trial counsel for a few months now and have dealt with similar situations several times already. You take a deep breath and launch into your standard spiel: "I understand that you want to protect the Soldier and his spouse, but PTC is only appropriate when the Soldier is a flight risk, or it is foreseeable that he will engage in additional acts of serious criminal misconduct. Because SPC White has been a good Soldier and has not had any problems in the past, I recommend you impose a lesser form of restraint."[2]

You recommend that CPT Brown impose conditions on liberty pursuant to Rule for Courts-Martial (RCM) 304.[3] To minimize risk, CPT Brown wants to restrict the Soldier as much as possible, so you hit the books and draft the most rigorous conditions you can, without crossing the line into "restriction tantamount to confinement."[4] The conditions you draft prohibit SPC White from having contact with his wife or any other potential witnesses, revoke his off-post pass privileges, require him to have CPT Brown's permission and a non-commissioned officer (NCO) escort to travel outside the battalion footprint, prohibit the Soldier from consuming alcohol, and impose an hourly sign-in requirement when off duty between the hours of 0600–2200 at the barracks Charge of Quarters (CQ) desk. Captain Brown takes your advice and imposes the conditions you propose.

Approximately 180 days later, after a lengthy Criminal Investigation Division (CID) investigation and an enormous amount of preparation, the case is ready to go to trial; but it never gets there. The defense moved for dismissal, alleging the government failed to take immediate steps to bring the case to trial as required by Article 10 of the Uniform Code of Military Justice (UCMJ).[5] The military judge granted the motion and dismissed the charges with prejudice. After the motions hearing, you plop down in your office chair and wonder where you went wrong. How did the government violate Article 10 when the accused was never confined?

In the above hypothetical scenario, the trial counsel set the stage for dismissal by focusing only on avoiding restriction tantamount to confinement when imposing pretrial restraint. In doing so, he overlooked the distinction that RCM 304 creates among conditions on liberty, restriction in lieu of arrest, and arrest, and failed to consider their disparate impact on the government's speedy trial obligations.[6] Restriction in lieu of arrest starts the RCM 707 speedy trial clock; arrest also triggers Article 10.[7] These collateral consequences create a high-stakes "distinction with a difference" because the only remedy for violating either speedy trial provision is dismissal, with or without prejudice.[8] Consequently, to minimize the risk of dismissal, government counsel must be able to precisely apply RCM 304 when advising commanders on the imposition of pretrial restraint.

Unfortunately for practitioners, the RCM 304 framework contains subtle nuances that make it deceptively complex. This problem is compounded by case law that rejects bright-line rules in favor of multi-factor tests whose outcomes can be difficult to predict.[9] The result is more confusion and more uncertainty. The key is to recognize this uncertainty and to proceed carefully and deliberately. This article attempts to make that possible.

With that goal in mind, Part II defines pretrial restraint

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[1] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 305 (2012) [hereinafter MCM] (Pretrial confinement) (establishing the requirements and procedures for imposing pretrial confinement).

[2] *See id.* R.C.M. 305(h)(2)(B) (stating confinement is not appropriate unless lesser forms of restraint are inadequate, and it is foreseeable that the accused will not appear at trial, pretrial hearing, or investigation, or the accused will engage in serious criminal misconduct).

[3] *Id.* R.C.M. 304(a)(1) (Conditions on liberty).

[4] For a thorough analysis of "restriction tantamount to confinement," see Major John M. McCabe, *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*, ARMY LAW., Aug. 2007, at 46.

[5] UCMJ art. 10 (2012).

[6] *See infra* Parts III.–IV.

[7] *See infra* Part IV.

[8] *Id.* The phrase "distinction with a difference" was specifically applied to this issue in *United States v. Wagner*, 39 M.J. 832, 833 (A.C.M.R. 1994).

[9] *See infra* Part V.

in order to clearly delineate the applicability and scope of RCMs 304 and 305. Part III then introduces the various types of moral and physical pretrial restraint. Part IV discusses the collateral consequences associated with each type, focusing on speedy trial. Upon this foundation, Part V analyzes the legal and factual distinctions between administrative restraint and the three forms of moral restraint listed in RCM 304. The rest of the article outlines preventative law. Part VI provides an alternate course of action for situations where the chain of command may be tempted to impose restriction tantamount to confinement, while Part VII identifies steps available to the government to cure inadvertent speedy trial triggers. Finally, to prevent practitioners from falling into the same trap as the trial counsel in the hypothetical scenario, the article contains appendices illustrating a table capturing pretrial restraint's collateral consequences, and sample language that may be used to deliberately impose specific types of restraint.

II. Pretrial Restraint Defined

To successfully impose pretrial restraint, practitioners must first understand what this term means. Rule for Courts-Martial 304 defines pretrial restraint as "moral or physical restraint on a person's liberty which is imposed before and during disposition of offenses."[10] The rule goes on to explain that pretrial restraint may be imposed whenever probable cause exists to believe that an accused committed an offense, and there is a reasonable belief that restraint is required under the circumstances.[11] Unless the authority has been withheld, commanding officers may impose pretrial restraint against officers and civilians subject to their authority, and any officer may order the restraint of any enlisted Soldier.[12]

The plain language of Article 13 indicates the only permissible purpose of pretrial restraint is to ensure the accused's presence at trial.[13] In practice, however, this provision has not been interpreted so exclusively. Historical practice, RCM 305, and case law all support the idea that pretrial restraint may properly be imposed to prevent the accused from engaging in future criminal misconduct, tampering with witnesses, or otherwise obstructing justice.[14]

Other portions of RCM 304, the UCMJ, and case law help define pretrial restraint by explaining what it is *not*. To begin with, pretrial restraint is not punishment and may not be imposed as punishment.[15] Imposing pretrial restraint in a punitive manner by requiring accused Soldiers to work extra hours, wear special uniforms, or otherwise humiliate and degrade them violates Article 13, UCMJ, as well as the fundamental idea that an accused is innocent until proven guilty.[16]

Pretrial restraint is also not the initial taking of a person into custody. Taking a person into custody falls under the definition of *apprehension* contained in Article 7, UCMJ.[17] This distinction is emphasized by the fact that apprehension is not governed by RCM 304 but is instead regulated by a separate rule: RCM 302.[18] Apprehension terminates when the proper authority, usually the accused's commander, is notified and takes action.[19]

Having clarified that pretrial restraint includes neither punishment nor apprehension, practitioners must recognize that pretrial restraint does not include administrative restraint either.[20] Administrative restraint is imposed for reasons "independent of military justice."[21] This distinction highlights a very important principle: intent matters.

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[10] MCM, *supra* note 1, R.C.M. 304(a).

[11] *Id.* R.C.M. 304(c).

[12] *Id.* R.C.M. 304(b).

[13] UCMJ art. 13 (2012) ("[N]or shall the arrest or confinement imposed upon him be any more rigorous than the circumstances require to ensure his presence . . . .").

[14] *See, e.g.*, United States v. Smith, 53 M.J. 168, 171 (C.A.A.F. 2000) ("In the military, the need to prevent serious misconduct is acute. 'The business of military units and the interdependence of their members render the likelihood of serious criminal misconduct by a person awaiting trial of even graver concern than in civilian life.'") (quoting MANUAL FOR COURTS-MARTIAL, UNITED STATES, app. 21 (1998)); MCM, *supra* note 1, R.C.M. 305(h)(2)(B) (allowing pretrial confinement to be imposed when it is foreseeable that an accused will either not appear at trial or engage in "serious criminal misconduct" and defining "serious criminal misconduct" to include "intimidation of witnesses or other obstruction of justice, serious injury of others, or other offenses which pose a serious threat to the safety of the community or to the effectiveness, morale, discipline, readiness, or safety of the command, or to the national security of the United States"); MANUAL FOR COURTS-MARTIAL, UNITED STATES, ¶ 19(b) (1949), http://www.loc.gov/rr/frd/Military_Law/pdf/manual-1949.pdf (authorizing pretrial restriction of an accused as "a wise precaution . . . in order that he may not again be exposed to the temptation of misconduct similar to that for which he is already under charges").

[15] MCM, *supra* note 1, R.C.M. 304(f).

[16] *See, e.g.*, United States v. Gilchrist, 61 M.J. 785, 796 (A. Ct. Crim. App. 2005) ("Article 13, UCMJ, prohibits: (1) purposefully imposing punishment or penalty on an accused before guilt is established at trial . . . and (2) arrest or pretrial confinement conditions more rigorous than circumstances require to ensure an accused's presence at trial . . . ."); *see also* McCabe, *supra* note 4 (discussing restraint that violates Article 13).

[17] UCMJ art. 7(a) (2012) ("Apprehension is the taking of a person into custody.").

[18] MCM, *supra* note 1, R.C.M. 302(a) discussion ("Apprehension is the equivalent of 'arrest' in civilian terminology. (In military terminology, 'arrest' is a form of restraint. *See* Article 9; R.C.M. 304.)").

[19] *Id.*

[20] *Id.* R.C.M. 304(h) ("Nothing in this rule prohibits limitations on a servicemember imposed for operational or other military purposes independent of military justice, including administrative hold or medical reasons.").

[21] *See* United States v. Fujiwara, 64 M.J. 695, 698 (A.F. Ct. Crim. App. 2007) ("Limitations imposed for legitimate administrative reasons and not as a precursor to criminal prosecution do not qualify as 'restraint' for purposes of R.C.M. 304 and 707.").

The distinction between pretrial and administrative restraint is important for practitioners to understand because the RCMs do not apply to administrative restraint.[22] To distinguish pretrial restraint from administrative restraint, courts look to the primary purpose of the imposing official.[23] Pretrial restraint exists when the primary purpose is to ensure the accused's presence at trial or to avoid interference with the trial process.[24] On the other hand, if the same level of restraint would have been imposed even if the accused were not pending trial, the restraint is likely administrative.[25] Appropriate reasons for imposing administrative restraint include: medical hold, military operational necessity, or safety of the accused.[26] Restraint imposed in a reasonable manner for one of these reasons, no matter how severe, does not constitute pretrial restraint.[27]

Accordingly, practitioners should view pretrial restraint as a term of art that refers only to non-punitive restraint—other than apprehension—imposed to advance a valid military justice purpose. Consequently, practitioners should be precise and use the term administrative restraint when the commander's primary purpose is administrative, and should be on the lookout for situations in which pretrial restraint is used as a subterfuge for illegal pretrial punishment.

III. Pretrial Restraint as a Spectrum

The *Manual for Courts-Martial* instructs commanders to impose pretrial restraint on a case-by-case basis, and to tailor the nature of the restraint to the particular set of circumstances before them.[28] Because every case is different, the level of restraint used in any particular case is likely to be different as well. As a result, courts conceptualize pretrial restraint as a spectrum.[29] Rules for Courts-Martial 304 and 305 establish key milestones along this spectrum.[30]

At the outset, RCMs 304 and 305 divide restraint into two broad categories: moral and physical.[31] Physical restraint is the more onerous of the two because "locks or guards" physically compel the accused to submit.[32] Pretrial confinement is a form of physical restraint.[33] The essence of moral restraint, on the other hand, is that the accused retains the freedom to choose whether or not he will comply.[34]

Rule for Courts-Martial 304 governs moral restraint and establishes three different types: conditions on liberty, restriction in lieu of arrest, and arrest.[35] Of these, arrest is the most restrictive. Arrest is an order requiring an accused to remain within specified limits. According to RCM 304(a)(3), once placed under arrest, an accused may not be required to perform "full military duties."[36]

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[22] *Id.*

[23] United States v. Bradford, 25 M.J. 181, 186 (C.M.A. 1987) (holding that pretrial restraint exists when "the primary purpose . . . is to restrain an accused prior to trial in order to assure his presence at trial or to avoid interference with the trial process").

[24] *Id.*

[25] United States v. Facey, 26 M.J. 421, 425 (C.M.A. 1988) ("The Manual is concerned with impairments of a servicemember's freedom which derive from his status as an accused, rather than those which are shared with all the members of his unit.").

[26] MCM, *supra* note 1, R.C.M. 304(h); *Fujiwara*, 64 M.J. at 698 (identifying restraint imposed to prevent an accused from committing suicide as a legitimate basis for imposing administrative restraint not subject to Rule for Courts-Martial (RCM) 304 or RCM 707); United States v. Smith, 53 M.J. 168, 173 (C.A.A.F. 2000) (finding that ensuring an accused's safety is a valid basis for imposing administrative restraint pursuant to RCM 304(h)).

[27] *See* United States v. Miller, 26 M.J. 959 (A.C.M.R. 1988) (ruling that five days restriction to a hospital following a suicide attempt constituted RCM 304(h) administrative restraint); United States v. Pouncey No. ACM 34497, 2002 WL 1162284, at *2 (A.F. Ct. Crim. App. 2002) (ruling that restraint severe enough to be tantamount to confinement was only administrative when motivated by a reasonable belief that the accused needed twelve to twenty-four hours monitoring following reported illegal drug use). *But see* United States v. Doane, 54 M.J. 978, 979 (A.F. Ct. Crim. App. 2001) (holding that an accused may not be ordered into pretrial confinement solely to prevent suicide).

[28] MCM, *supra* note 1, R.C.M. 304(h) ("The decision whether to impose pretrial restraint, and, if so, what type or types, should be made on a case-by-case basis. The factors listed in the Discussion of RCM 305(h)(2)(B) should be considered."). The discussion to RCM 305(h)(2)(B) states, "Some of the factors which should be considered . . . are: (1) [t]he nature and circumstances of the offenses charged or suspected, including extenuating circumstances; (2) [t]he weight of the evidence against the accused; (3) [t]he accused's ties to the locale, including family, off-duty employment, financial resources, and length of residence; (4) [t]he accused's character and mental condition; (5) [t]he accused's service record, including any record of previous misconduct; (6) [t]he accused's record of appearance at or flight from other pretrial investigations, trials, and similar proceedings; and (7) [t]he likelihood that the accused can and will commit further serious criminal misconduct if allowed to remain at liberty." *Id.* R.C.M. 305(h)(2)(B) discussion.

[29] *See, e.g.*, United States v. Smith, 20 M.J. 528, 531 (A.C.M.R. 1985) ("[C]ourts closely scrutinize those factors which reflect substantial impairment of the basic rights and privileges enjoyed by service members. As a result of this factual scrutiny, levels of restraint can be identified which fall somewhere on a *spectrum* . . . .") (emphasis added).

[30] *See* MCM, *supra* note 1, R.C.M. 304–305.

[31] Rule for Courts-Martial 304(a) describes pretrial restraint as "moral or physical restraint." *Id.* R.C.M. 304(a). Within the types of restraint annotated in RCM 304(a), only pretrial confinement is categorized as "physical restraint." *See id*. Rule for Courts-Martial 305(a) begins by describing pretrial confinement as "physical restraint." *Id.* R.C.M. 305(a).

[32] *See* United States v. Gregory, 21 M.J. 952, 955 (A.C.M.R. 1986) (explaining that when only moral restraint is imposed, "[n]o locks or guards block the soldier's freedom of locomotion; only his moral conscience thereafter circumscribes his movements").

[33] MCM, *supra* note 1, R.C.M. 305; UCMJ art. 9 (2012).

[34] *Gregory*, 21 M.J. at 955.

[35] MCM, *supra* note 1, R.C.M. 304(a).

[36] *Id.* R.C.M. 304(a)(3) (discussed *infra* Part V.D). According to the rule, resumption of full military duties terminates the status of arrest. *Id.*

Restriction in lieu of arrest is a less severe form of restraint than arrest.[37] An accused who is only restricted enjoys greater freedom of movement than one who is arrested.[38] In exchange for this freedom, conditions on liberty may be imposed in conjunction with restriction.[39]

Conditions on liberty are simply orders that require an accused to "do or refrain from doing specified acts."[40] No-contact orders that forbid an accused from communicating with potential witnesses are a common example of conditions on liberty.[41]

Case law further supplements this spectrum with another form of restraint not found in RCMs 304 or 305: restriction tantamount to confinement. Restriction tantamount to confinement exists when "the level of restraint falls so close to the 'confinement' end of the spectrum as to be tantamount thereto."[42] Restriction tantamount to confinement may be moral or physical.[43] Accordingly, practitioners should conceptualize it as occupying a place on the spectrum separate from, and more severe than, arrest.

Thus, fully fleshed out, the spectrum of restraint begins with no restraint and progresses through conditions on liberty, restriction, arrest, restriction tantamount to confinement, and finally, confinement. A progressively onerous array of collateral consequences linked to the severity of the restraint imposed provides strong incentives for commanders to remain as close to the beginning of this spectrum as possible.

IV. Trigger Points: Collateral Consequences of Imposing Restraint

Understanding where on the spectrum of restraint a particular case falls is critically important because of the collateral consequences established by the UCMJ, RCMs, and case law. Arrest and confinement trigger Article 10, UCMJ.[44] Article 10 requires the government to take immediate steps to bring the accused to trial following arrest or confinement and exercise reasonable diligence throughout the pretrial period.[45] Violations of Article 10, UCMJ, may not be cured; the only remedy is dismissal with prejudice.[46] As was the case in the hypothetical, inadvertently triggering Article 10 can be catastrophic.

Arrest and restriction also trigger the RCM 707 speedy trial clock.[47] This rule requires the accused to be arraigned within 120 days of the imposition of restraint.[48] The only remedy for violating this provision is dismissal, with or without prejudice.[49] Because restriction tantamount to confinement must be at least as severe as arrest, it follows that it must also trigger Article 10 and RCM 707 protections.[50] Further, restriction tantamount to confinement affords the accused the added bonus of being entitled to administrative sentence credit pursuant to *United States v. Mason*[51] and, in some cases, even more credit under RCM 305(k).[52]

In contrast with the collateral effects triggered by arrest and restriction, conditions on liberty trigger neither Article 10 nor the RCM 707 speedy trial clock. Consequently, this form of pretrial restraint imposes the least burden on the government to expedite the pretrial processing of a case.[53] The dramatically different consequences triggered by the various forms of pretrial restraint make differentiating

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[37] *Id.* R.C.M. 304(a)(2) (discussed *infra* Part V.D).

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

[39] United States v. Miller, 16 M.J. 858, 862–63 (N.M.C.M.R. 1983) ("To be viable, from a military point of view, restriction in lieu of arrest requires additional conditions [on liberty] to balance the greater liberty of movement granted."); MCM, *supra* note 1, R.C.M. 304(a)(1) ("[Conditions on liberty] may be imposed with other forms of restraint or separately.").

[40] MCM, *supra* note 1, R.C.M. 304(a)(1) (discussed *infra* Part V.B).

[41] United States v. Fujiwara, 64 M.J. 695, 698 (A.F. Ct. Crim. App. 2007) (referring to a no contact order as "classic conditions on liberty"); MCM, *supra* note 1, R.C.M. 304(a) discussion (listing orders not to associate with potential witnesses as an example of conditions on liberty).

[42] United States v. Smith, 20 M.J. 528, 531 (A.C.M.R. 1985).

[43] *See* United States v. Rendon, 58 M.J. 221, 225 (C.A.A.F. 2003) (acknowledging that in some situations the "conditions and constraints" of restriction tantamount to confinement may surpass moral restraint and constitute actual physical restraint).

[44] UCMJ art. 10 (2012) ("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.").

[45] *E.g.*, United States v. Kossman, 38 M.J. 258, 262 (C.M.A. 1993).

[46] *Id.*

[47] MCM, *supra* note 1, R.C.M. 707(a)(2).

[48] *Id.*

[49] United States v. Bray, 52 M.J. 659, 663 (A.F. Ct. Crim. App. 2000); MCM, *supra* note 1, R.C.M. 707(d).

[50] *See* United States v. Smith, 20 M.J. 528 (A.C.M.R. 1985) (using cases in which Article 10 was triggered as a starting point to determine whether restriction was tantamount to confinement).

[51] United States v. Mason, 19 M.J. 274 (C.M.A. 1985) (ruling an accused is entitled to day-for-day credit for time spent in restriction tantamount to confinement).

[52] When an accused is improperly placed in pretrial confinement they are entitled to additional administrative sentence credit. MCM, *supra* note 1, R.C.M. 305(k). Rule for Courts-Martial 305(k) credit is also available to an accused who is subjected to physical forms of restriction tantamount to confinement. United States v. Rendon, 58 M.J. 221 (C.A.A.F. 2003).

[53] Conditions on liberty (and every other form of pretrial restraint) does, however, trigger an accused's right to counsel before being subjected to a line-up. MCM, *supra* note 1, MIL. R. EVID. 321(b)(2).

between them a "distinction with a difference."[54] Accordingly, prior to imposing pretrial restraint, military justice practitioners must attempt to gauge where on the spectrum of restraint a particular case is likely to fall.

V. Differentiating Between the Types of Restraint

A. Administrative Restraint

As previously stated, administrative restraint is not pretrial restraint.[55] As a result, administrative restraint does not impose any speedy trial burden on the government and should not serve as a basis for awarding administrative sentence credit.[56] Because of this, government counsel should be cognizant of situations in which administrative restraint, as opposed to pretrial restraint, is the most appropriate course of action. Perhaps the single greatest scenario in which this is likely to come up in today's Army is when the commander's primary purpose is to ensure the health, welfare, and safety of the accused.[57]

The purpose of pretrial restraint is to ensure the accused is present for trial and to avoid interference with the trial process.[58] Maintaining the safety of the accused falls outside this scope.[59] Ensuring Soldier safety is, however, a valid basis for imposing administrative restraint.[60] While requiring an accused to be physically guarded and escorted at all times for the purpose of preventing flight or future criminal misconduct would almost certainly be restriction tantamount to confinement and constitute illegal pretrial punishment, imposing the same conditions to prevent a Soldier from committing suicide, or to protect an accused from violence at the hands of others, is an entirely different story.[61] Commanders have an obligation to safeguard every member of their command, and should take appropriate measures to do so.[62]

Restraint imposed for safety, or other administrative reasons, however, must be specifically tailored to fit the facts at hand.[63] For example, in the case of a suicidal Soldier, the restraint should not be in place "pending trial," but rather should terminate when the commander, in consultation with medical providers, determines that the Soldier is no longer a suicide risk.[64] Likewise, commanders who are genuinely concerned about a Soldier's potential to harm himself should avoid imposing measures that may be stigmatizing.[65] Measures that stigmatize are likely to do more harm than good, and may indicate that the commander's articulated administrative purpose is actually a subterfuge for illegal pretrial punishment or pretrial restraint.[66]

Accordingly, when the phone inevitably rings because a commander urgently wants to impose restraint, government counsel should question the commander to determine whether Soldier safety, or some other valid administrative purpose, is the primary motivator. Failure to do so may result in unnecessarily triggering the collateral consequences attached to the imposition of pretrial restraint or, even worse, result in a failure to impose adequate safeguards to protect a vulnerable Soldier.

B. Conditions on Liberty

As previously stated, conditions on liberty are orders that require an accused to "do or refrain from doing specified acts."[67] The breadth of this definition provides commanders with an extremely flexible tool for controlling an accused. Military case law is replete with examples of creative uses of this power, including: no-contact orders, orders prohibiting the consumption of alcohol, orders to provide urine samples, requirements that accused Soldiers be escorted by NCOs, sign-in requirements at the barracks CQ or staff duty desk, revocation of civilian clothing privileges, limiting visitors, and limiting access to telephones and other communication devices.[68] As long as the order is otherwise

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[54] Appendix A (Table: Collateral Effects of Restraint) (containing a quick reference table capturing the collateral consequences of restraint).

[55] *See supra* Part II.

[56] *Id.*

[57] U.S. DEP'T OF ARMY, REPORT, ARMY 2020: GENERATING HEALTH & DISCIPLINE IN THE FORCE AHEAD OF THE STRATEGIC RESET (2012) [hereinafter THE GOLD BOOK] (correlating engaging in criminal misconduct with a heightened risk for committing suicide).

[58] United States v. Bradford, 25 M.J. 181, 186 (C.M.A. 1987); MCM, *supra* note 1, R.C.M. 305(h)(2)(B).

[59] *See* United States v. Doane, 54 M.J. 978 (A.F. Ct. Crim. App. 2001).

[60] *See* United States v. Fujiwara, 64 M.J. 695, 698 (A.F. Ct. Crim. App. 2007); United States v. Smith, 53 M.J. 168, 173 (C.A.A.F. 2000).

[61] *Id.*

[62] *See, e.g.*, THE GOLD BOOK, *supra* note 57 (emphasizing the importance of identifying high-risk Soldiers and imposing risk mitigation measures to protect them).

[63] *See* United States v. Pouncey, No. ACM 34497, 2002 WL 1162284, at *2 (A.F. Ct. Crim. App. 2002) (stating in dicta that a judge may order sentence credit when administrative restraint is more rigorous than is necessary).

[64] United States v. Wilkinson, 27 M.J. 645, 648 (A.C.M.R. 1988) (stating that imposing restraint "pending trial" and failing to dispense with restraint once medical authorities determined the accused was not a suicide risk belied the commander's "self-serving" testimony that the primary purpose was administrative).

[65] THE GOLD BOOK, *supra* note 57, at 70 (stating that restricting an accused at risk of harming himself to the unit area may increase stigma and is likely to make things worse).

[66] *See Wilkinson*, 27 M.J. at 648.

[67] MCM, *supra* note 1, R.C.M. 304(a)(1).

[68] *See, e.g.*, United States v. Schuber, 70 M.J. 181 (C.A.A.F. 2011); United States v. Rendon, 58 M.J. 221 (C.A.A.F. 2003); United States v. Smith, 53 M.J. 168, 173 (C.A.A.F. 2000); United States v. Muniz, No. 20000668,

lawful, does not inhibit pretrial preparation, and the commander reasonably believes it is necessary to ensure the accused's presence at trial or to prevent future acts of misconduct, it may be imposed as a condition on liberty under RCM 304(a)(1).[69]

C. Differentiating Between Conditions on Liberty and Restriction in Lieu of Arrest

Just because a set of lawfully imposed requirements meet the RCM 304(a)(1) definition of "conditions on liberty," it does not mean the courts will always place it in that legal category. The court could find that the restraint rises to the level of restriction, or even arrest, because courts do not confine themselves to bright-line definitions when categorizing restraint for speedy trial purposes.[70] Courts also do not give any deference to the label applied by the command.[71] Instead, courts closely scrutinize the facts of the case and examine the degree to which "the basic rights and privileges enjoyed by service members" have been substantially impaired to determine, under the totality of the circumstances, where on the spectrum of pretrial restraint a particular case falls.[72] As articulated in *United States v. Smith*:

> Some of the relevant factors to be considered in determining the nature of an accused's pretrial restraint are: 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. Other important conditions which may significantly affect one or more of these factors are: whether 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 [the] accused was allowed visitation and telephone privileges; what religious, medical, recreational, educational, or other support facilities were available to the accused's use; the location of the accused's sleeping accommodations; and whether the accused was allowed to retain and use his personal property (including his civilian clothing).[73]

As a result, practitioners must be careful because combining too many conditions on liberty together may cause a judge to conclude that, under the totality of the circumstances, the "conditions" actually constituted "restriction" and triggered the RCM 707 speedy trial clock.

The probability of this occurring is especially high when an accused's pass privileges are revoked pending trial. Until relatively recently, the prevailing view in the Army was that revoking or limiting pass privileges either did not constitute pretrial restraint or, at most, rose to the level of conditions on liberty.[74] These cases led many practitioners to conclude that revocation of pass privileges could never start the RCM 707 speedy trial clock.[75] In *United States v. Muniz*, however, the Army Court of Criminal Appeals (ACCA) signaled otherwise.[76]

In *Muniz*, the accused's pass privileges were revoked, prohibiting him from leaving Fort Drum, New York, without his company commander's permission. Additionally, the commander prohibited the accused from entering any of the three establishments that served alcohol on Fort Drum. The commander's order was issued 78 days prior to the preferral of charges and 177 days prior to arraignment. Only twenty-seven days of delay were attributed to the defense or otherwise excluded. At trial, the defense moved to dismiss, arguing that the accused's speedy trial rights had been violated because the commander's order constituted restriction in lieu of arrest, thus starting the speedy trial clock 78 days prior to preferral, and resulting in an elapsed time of 150 days between the imposition of restraint and arraignment. The trial judge denied the motion and affirmatively ruled that revocation of the accused's pass privileges only constituted conditions on liberty.[77]

2004 WL 5862921, at *6 (A. Ct. Crim. App. 2004); Washington v. Greenwald, 20 M.J. 699 (A.C.M.R. 1985).

[69] *See* MCM, *supra* note 1, R.C.M. 304.

[70] *E.g.*, United States v. Gregory, 21 M.J. 952, 955 (A.C.M.R. 1986) ("This court consistently has declined to apply a 'bright-line' test in determining the severity and character of pretrial restraint.").

[71] *E.g.*, *Wilkinson*, 27 M.J. at 649 ("The characterization of the nature of the restraint by the command does not determine its actual legal nature . . . .").

[72] United States v. Smith, 20 M.J. 528, 531 (A.C.M.R. 1985); *see also* United States v. Wagner, 39 M.J. 832, 834 (A.C.M.R. 1994); United States v. Russell, 30 M.J. 977, 979 (A.C.M.R. 1990).

[73] *Smith*, 20 M.J. at 531–32.

[74] *See, e.g.*, *Wilkinson*, 27 M.J. at 649 n.3 (stating that lack of pass privileges will usually have no impact on speedy trial rules).

[75] *See* THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, COMMANDER'S LEGAL HANDBOOK 13 (June 2013) (stating that pulling pass privileges does not start the speedy trial clock).

[76] United States v. Muniz, No. 20000668, 2004 WL 5862921 (A. Ct. Crim. App. 2004).

[77] *Id.* at *1–3.

In an unpublished opinion, the ACCA disagreed and granted the defense motion to dismiss. The court's reasoning was plain:

> The President's directions in R.C.M. 304 are clear. Directing a [S]oldier "to remain within specified limits" is a restriction under R.C.M. 304(a)(2), if imposed before and during disposition of offenses." For example: "You will remain on the Fort Drum installation," would be a form of restriction if imposed based on an allegation of misconduct and continued pending its final adjudication. Conditions on liberty, on the other hand, require a [S]oldier "to do or refrain from doing specified acts."[78]

In reaching this result, ACCA marginalized a host of previous cases that arguably stood for the proposition that revocation of pass privileges is not the same as restriction in lieu of arrest and does not trigger the speedy trial clock. For example, in *United States v. Reynolds*, the Army Court of Military Review (ACMR) ruled that limits on the pass privilege, even when coupled with limitations on the wear of civilian clothing, constituted only conditions on liberty and did not rise to the level of restriction.[79] The *Muniz* court severely limited the applicability of this precedent, stating, "At best, *Reynolds* stands only for the proposition that some 'limits on the pass and civilian clothing privilege' [outside the continental United States] may be deemed conditions on liberty."[80]

Similarly, in *United States v. Wagner*, the court stated, "When a single [S]oldier who lives in the barracks is restricted to the limits of a military installation, the action is commonly characterized as 'pulling pass privileges.' This has been held not to be restriction for speedy trial purposes . . . . Thus, such a restriction is characterized as 'conditions on liberty.'"[81] In *Muniz*, ACCA dismissed this unambiguous announcement as "mere dicta."[82]

The *Muniz* opinion also takes the opportunity to highlight another potential speedy trial trigger commonly associated with conditions on liberty: physical sign-in requirements. In a footnote, the court cautioned that "[a] 'sign-in requirement' may also amount to a restriction if the time interval [is] so short as to prevent a [S]oldier from effectively leaving a reasonably well-defined area."[83] The implication is that sign-in requirements that are tantamount to restriction also trigger the RCM 707 speedy trial clock. Most likely, this cautionary note only applies to sign-in requirements that require an accused to periodically report *in person* to a specified location. Armed with this insight, practitioners should consider whether imposing telephonic sign-in requirements, in lieu of physical ones, would provide an adequate level of control over the accused. Avoiding physical sign-in requirements, whenever possible, eliminates another potential source of speedy trial problems.

Accordingly, in the wake of *Muniz*, practitioners should assume that any form of restraint, regardless of its label, that serves to prevent a Soldier from leaving a reasonably well-defined area will be tantamount to restriction and trigger the RCM 707 speedy trial clock. Practitioners should recognize this is especially likely to be true in cases like *Muniz*, where the accused is stationed inside the continental United States and prohibited from using any on-post facility.

D. Differentiating Between Restriction in Lieu of Arrest and Arrest

Recall that as defined in RCM 304, both restriction in lieu of arrest and arrest are forms of moral restraint that require an accused to remain within certain specified limits.[84] The concept of arrest also has a separate statutory basis: Article 9, UCMJ. Article 9 defines arrest as "the restraint of a person by an order, not imposed as a punishment for an offense, directing him to remain within certain specified limits."[85]

On its face, this broad statutory definition appears to encompass both "restriction" and "arrest," as those terms are used in RCM 304, because both forms of restraint require Soldiers to "remain within specified limits."[86] Furthermore, nothing in the UCMJ recognizes restriction as a lesser form of pretrial restraint than arrest.[87] Consequently, the rule appears to be at odds with the statute. The Court of Appeals for the Armed Forces (CAAF) resolved this issue in *United States v. Schuber*.[88]

Airman First Class Schuber was ordered into pretrial confinement after providing four urine samples that tested positive for controlled substances in a two-month period.

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[78] *Id.* at *5.

[79] United States v. Reynolds, 36 M.J. 1128, 1130 (A.C.M.R. 1993).

[80] *Muniz*, 2004 WL 5862921, at *7.

[81] United States v. Wagner, 39 M.J. 832, 833 (A.C.M.R. 1994) (citing United States v. King, 30 M.J. 59, 62 n.6 (C.M.A. 1990)).

[82] *Muniz*, 2004 WL 5862921, at *8.

[83] *Id.* at *5 n.8.

[84] MCM, *supra* note 1, R.C.M. 304(a)(2)–(3) (discussed *supra* Part III).

[85] UCMJ art. 9 (2012).

[86] MCM, *supra* note 1, R.C.M. 304(a)(2)–(3).

[87] The text of the UCMJ does not mention restriction tantamount to confinement. *See* UCMJ (2012).

[88] United States v. Schuber, 70 M.J. 181 (C.A.A.F. 2011).

He was released after seventy-one days.[89] Between his release and trial, another sixty-seven days transpired in which he was required to remain within the limits of the installation (except for one three-day pass) and to provide weekly urine samples.[90] During this time, he performed full military duties, did not have an escort requirement, and could "avail himself of all usual base activities."[91] Prior to trial, defense counsel made six separate discovery requests, all of which contained a provision demanding speedy trial. In total, the accused was either restrained or confined for 138 days prior to trial.[92]

At trial, the defense argued that this period of delay violated Article 10. Their argument was rooted in a plain-language interpretation of Article 9 that categorized any order to remain within specified limits as arrest.[93] The trial judge agreed and dismissed the charges.[94] On appeal, in a 3–2 decision, the CAAF rejected the accused's plain language argument. Instead, the majority interpreted Articles 9 and 10 in light of the history of arrest in the military, and ruled that Article 10 is only triggered by pretrial restraint analogous to "close arrest."[95] Applying this interpretation to the facts at hand, the majority ruled that the government was not accountable under Article 10 for the period of time following the accused's release from pretrial confinement because the restraint imposed only rose to the level of "open arrest."

To distinguish between "open" and "close" arrest, the majority adopted a contextual analysis. Under their approach, the relevant factors include: whether regular military duties are performed, the geographic limits of constraint, the extent of sign-in requirements, and whether restriction is performed with or without escorts. The court did not indicate whether any of these factors were more dispositive than the others.[96]

While *Schuber* firmly establishes that restriction and arrest are not "coterminous,"[97] the majority opinion makes it difficult for practitioners to predict when moral restraint is likely to trigger Article 10; this is because neither historical practice nor case law provide any real insight into how to apply the *Schuber* contextual analysis.

The majority opinion purports to rely on historical practice, but little historical guidance actually exists. The concept of "open arrest" is not described in any published opinions of The Judge Advocate General of the Army.[98] Nor does the majority cite to any earlier judicial opinions.[99] The only source cited by the majority opinion in *Schuber* to establish the principle that Article 10 is not triggered by restraint analogous to "open arrest" is congressional testimony from 1916 given by Brigadier General Enoch Crowder, The Judge Advocate General of the Army.[100] This testimony is unhelpful, however, because it only documents the existence of "open arrest" without describing what it actually entails.[101]

Winthrop's *Military Law and Precedents* contains a fairly detailed discussion of the distinction between "open" and "close" arrest, in which numerous other military law treatises from the era are cited.[102] Problematically, however, Winthrop's explanation of "open arrest" appears to be at odds with the "contextual analysis" adopted by the majority in *Schuber*. Winthrop indicates that "close arrest" referred to the specific practice of restricting an accused to his quarters, and that the term "open arrest" described any more lenient form of restraint.[103] In other words, *Winthrop* relies on only one factor—the geographic limits of constraint—where the majority opinion in *Schuber* weighs several.[104] Because of this discrepancy, it is unclear whether *Winthrop* provides any insight into how courts will apply *Schuber* in future cases.

The uncertainty created by minimal, and in some cases

[89] *Id*. at 183–84.

[90] *Id*. at 184.

[91] *Id*. at 187.

[92] *Id*. at 183–84.

[93] *Id.* at 185.

[94] *Id*. at 184.

[95] *Id.*

[96] *Id.* at 187.

[97] *Id.*

[98] *See* DIGEST OF OPINIONS OF THE JUDGE ADVOCATES GENERAL OF THE ARMY, 1912 (1917); DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY, 1912–1930 (1932); DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY, 1924–1930 (1932) (with 1931 Supplement); DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY, 1912–1940 (1942) (with Supplement).

[99] *See Schuber*, 70 M.J. 181.

[100] This is the only source cited by the majority opinion. *Id.*

[101] *See* S. REP. NO. 64-130, at 74 (1916).

[102] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 113 (2d ed. 1920 reprint).

[103] *Id.* ("[L]arger limits than the quarters . . . are granted . . . , the arrest being in this manner reduced from a 'close' to an 'open' one . . . .").

[104] Similarly, the majority's adoption of a contextual analysis in *Schuber* also implicitly rejects the RCM 304(a)(3) definition as a means of distinguishing arrest from restrictions. *See* MCM, *supra* note 1, R.C.M. 304(a)(3) (stating that a person in the status of arrest may not be required to perform full military duties, and that arrest automatically terminates when a person is assigned duties inconsistent with the status of arrest). Had the court adopted this standard, a multi-factor contextual analysis would not be required because the only relevant factor would be whether or not full military duties were performed.

countervailing, historical guidance is further compounded by a lack of relevant case law. Dicta in *Schuber* suggests that any case dealing with this issue prior to *United States v. Walls*[105] may no longer be good law.[106] This is because prior to *Walls*, the Court of Military Appeals tended to hold that *any* geographic restraint triggered Article 10.[107] Furthermore, despite having a relatively well-developed body of case law, the majority in *Schuber* did not cite to any restriction tantamount to confinement cases to illustrate the difference between restriction and arrest.[108] Arguably, this omission serves to further narrow the field of applicable precedent to only those cases specifically addressing the applicability of Article 10 where restraint *not* tantamount to confinement was imposed. Between the negative treatment of all case law prior to *Walls* and the exclusion of cases dealing with restriction tantamount to confinement, the CAAF virtually cleared the field of all applicable precedent, leaving practitioners with only a handful of cases for guidance.

Of these, the most helpful is *United States v. Acireno* from 1982.[109] Specialist Acireno was charged with committing a lewd act upon a female under the age of sixteen. Prior to trial, he was restricted to two floors of his barracks for 153 days. He was only permitted to leave with an NCO escort, and then was only permitted to go to the mess hall, chapel, or "JAG." His civilian clothing was confiscated, and he was prohibited from attending unit formations, physical training, and the company's Christmas party (even though it took place in the barracks). Following his conviction, the ACMR ruled that his pretrial restraint rose to the level of arrest and violated Article 10. As a result, the court was left with only one remedy: the findings and sentence were set aside, and the charges were dismissed.[110]

Acireno shows that Article 10 protections may be triggered even when the accused is allowed freedom of movement to an area outside his immediate quarters.[111] Unfortunately for practitioners, however, the *Schuber* opinion does not strongly indicate, one way or the other, how *Acireno* would have fared under the *Schuber* contextual analysis. While practitioners in Winthrop's period would have undoubtedly concluded that SPC Acireno was subjected to nothing more than "open arrest," it is hard to imagine a modern court ruling that the restraint imposed upon SPC Acireno triggered nothing more than RCM 707 speedy trial protections; only time will tell. Consequently, until post-*Schuber* case law clarifies the types of factual circumstances that distinguish restriction from arrest, prudent command legal advisors should exercise caution any time an accused is restricted to a small unit area or building complex. When in doubt, plan for the worst, and assume Article 10 is triggered.

VI. Arrest as an Alternative to Restriction Tantamount to Confinement

A plethora of case law and scholarly articles testify to the reality that, sometimes, commanders take pretrial restraint too far.[112] When that occurs, and the trial judge finds that restriction tantamount to confinement was imposed, the accused is sure to receive sentence credit—and lots of it.[113] In contrast, no court has ever ruled that arrest imposed pursuant to RCM 304(a)(3) entitles an accused to receive any credit.[114]

Command legal advisors should keep this in mind in the event a situation arises where a significant amount of pretrial restraint is warranted, but pretrial confinement is not an option (perhaps because a part-time military magistrate disagrees with the command regarding the likelihood that the accused will engage in serious criminal misconduct). It may be possible to exercise sufficient control over the accused by imposing arrest in the historical and most literal sense: suspend the accused from performing full military duties and restrict him to quarters. If this occurs, the command should call it arrest and clearly indicate that it is imposed pursuant to RCM 304(a)(3). While the actual nature of the restraint and not the command's characterization of it will determine its legal category,[115] words still matter. If nothing else, labeling the restraint as "arrest" from the outset should help the government frame the issue at trial and allow trial counsel to argue that even though Article 10 was triggered, the accused is not entitled

[105] United States v. Walls, 9 M.J. 88 (C.M.A. 1980) (ruling that revocation of accused's pass privileges, when the installation contained a service club, post exchange, snack bar, gym, chapel, and an enlisted men's club, did not trigger Article 10).

[106] United States v. Schuber, 70 M.J. 181, 185 (C.A.A.F. 2011).

[107] *Id.*

[108] *See id.*

[109] United States v. Acireno, 15 M.J. 570 (A.C.M.R. 1982).

[110] *Id.*

[111] *See id.*

[112] *See generally* McCabe, *supra* note 4.

[113] *See generally id.* (discussing restriction tantamount to confinement and resulting sentence credit).

[114] In cases not implicating Article 13, for an accused to be entitled to administrative sentence credit, the restraint must be "tantamount to confinement." *See, e.g.*, Washington v. Greenwald, 20 M.J. 699, 700 (A.C.M.R. 1985) ("[W]e conclude that the petitioner's pretrial restriction was not tantamount to confinement and that therefore no administrative credit is warranted."). As argued throughout this article, arrest is not the same as restriction tantamount to confinement. Accordingly, individuals placed under arrest not tantamount to confinement should not be entitled to any administrative sentence credit. The period of arrest is, nevertheless, relevant for sentencing purposes. United States v. Brown, 33 M.J. 743, 746 (A.C.M.R. 1991).

[115] United States v. Muniz, No. 20000668, 2004 WL 5862921, at *6 (A. Ct. Crim. App. 2004).

to administrative sentence credit.

VII. Curing Inadvertent Speedy Trial and Article 10 Triggers

In the event that either the RCM 707 speedy trial clock or Article 10 is inadvertently triggered by the imposition of pretrial restraint, all hope is not lost. The key is for government counsel to pay attention to what the unit is doing and catch these mistakes early. Pursuant to RCM 707, the speedy trial clock is reset whenever the accused is released from restraint for a "significant period."[116] As little as five days can constitute a "significant period" as long as no gamesmanship is involved.[117] Moreover, the accused does not have to be released from *all* restraint: conditions on liberty may still be in place.[118] In order for the government to avail themselves of this reset provision, however, the accused must also have no charges pending during the period of release.[119] As a result, to have any meaningful impact, the period of release must generally occur prior to preferral.

In cases where the government has unwittingly triggered Article 10 by inadvertently placing the accused under arrest, the rules are less forgiving. Article 10 requires the government to take "immediate steps" to try the accused or "dismiss the charges and release him."[120]

In *Schuber*, the CAAF clarified this provision by ruling that the government is not required to both release the accused *and* dismiss the charges to toll the Article 10 clock; simply releasing the accused will suffice.[121] Tolling Article 10, however, is not the same as a complete reset. Consequently, the government is still accountable under Article 10 for all of the days that the accused was under arrest, and trial counsel must be prepared to produce a chronology and demonstrate that the government took immediate steps to bring the accused to trial during this period.[122]

VIII. Conclusion

When misconduct occurs, good commanders like CPT Brown in the hypothetical will want to take immediate steps to mitigate risk, prevent future misconduct, and facilitate the administration of military justice. Pretrial restraint and administrative restraint are the most powerful and flexible tools commanders have to accomplish these objectives. When advising commanders on this topic, however, judge advocates must be careful and deliberate.

Imposing restraint without fully understanding how courts conceptualize the spectrum of restraint, and the corresponding collateral effects, can result in unnecessary sentence credit, or even worse, dismissal. Applying the right amount and form of restraint in a deliberate and precise manner, however, maximizes the usefulness of this tool, and ultimately furthers the best interests of the Army, the community, and even the accused.

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[116] MCM, *supra* note 1, R.C.M. 707(b)(3)(B).

[117] United States v. Hulsey, 21 M.J. 717 (A.F.C.M.R. 1975); United States v. Miller, 26 M.J. 959 (A.C.M.R. 1988).

[118] United States v. Reynolds, 36 M.J. 1128, 1130 (A.C.M.R. 1993) (ruling that reducing an accused's pretrial, pre-preferral restraint from restriction to conditions on liberty re-set the RCM 707 speedy trial clock).

[119] Otherwise, the period of restriction or arrest would overlap with preferral and there would be no significant period of release. *See id.*; MCM, *supra* note 1, R.C.M. 707(b)(3)(B).

[120] UCMJ art. 10 (2012).

[121] United States v. Schuber, 70 M.J. 181, 187 (C.A.A.F. 2011).

[122] *See id*. Rule for Courts-Martial 707 states, "Upon accused's timely motion to a military judge under R.C.M. 905 for speedy trial relief, counsel should provide the court a chronology detailing the processing of the case. This chronology should be made a part of the appellate record." MCM, *supra* note 1, R.C.M. 707(c)(2).

Appendix A

Table: Collateral Effects of Restraint

Type of Restraint	Right Triggered: Right to Counsel Before Line-up	RCM 707 Speedy Trial Clock	Article 10	Day for Day *Mason* Credit	Potential for RCM 305(k) Credit
Administrative Restraint	No	No	No	No	No
Conditions on Liberty	Yes	No	No	No	No
Restriction in Lieu of Arrest	Yes	Yes	No	No	No
Arrest	Yes	Yes	Yes	No	No
Restrcition Tantamount to Confinement	Yes	Yes	Yes	Yes	No
Restrcition Tantamount to Confinement (physical)	Yes	Yes	Yes	Yes	Yes
Pretrial Confinement	Yes	Yes	Yes	Yes	Yes

Appendix B

Sample Order Imposing Administrative Restraint

The following is provided as an example of RCM 304(h) administrative restraint imposed to mitigate risk of self-harm. Practitioners should feel free to deviate from these conditions as the circumstances require. The restraint may be issued in memorandum form or using DA Form 4856 (Developmental Counseling). Where helpful, explanatory notes have been added in brackets at the end of paragraphs and italicized—these should be deleted prior to use.

SUBJECT: Imposition of Administrative Restraint Pursuant to RCM 304(h)

1. After consulting with your professional health care providers, I have determined that reasonable grounds exist to believe that you may be at-risk for harming yourself. Because of this, I am imposing administrative restraint. I am taking this action because I am concerned that, due to the stressors you currently face, you may be a danger to yourself.

2. To monitor your progress and ensure that you do not harm yourself, I am imposing the following risk-mitigation measures: *[Modify as necessary under the circumstances: either less stringent or, in the case of a Soldier at high-risk for committing suicide, more stringent. Ensure that all measures imposed are reasonable under the circumstances.]*

a. You will live in the barracks. You will not stay overnight in any other individual's barracks room, or any other quarters, without my permission. To monitor your welfare, your squad leader and other members of your chain of command will routinely check on you during off-duty hours and weekends to ensure that you are safe and are receiving all of the support you require.

b. If you wish to leave the installation, you must first receive permission from me.

c. You may not consume or possess any alcoholic beverages, or enter any establishment on the installation that serves alcoholic beverages.

d. If you have any privately owned weapons on the installation, you will turn them into the unit arms room. *[When gathering information pertaining to privately owned firearms, ensure compliance with Section 1062 of the Fiscal Year (FY) 2011 National Defense Authorization Act (NDAA), as amended by Section 1057 of the FY 2013 NDAA.]*

e. You will obtain an NCO escort whenever you wish to leave the 11th Hussars regimental footprint. Your squad leader has been designated as your primary escort. You can reach him at (555) 555-5555, any time, day or night. His primary responsibility is to ensure your safety.

f. When off-duty (whether on a weekend or training holiday), you will check in telephonically with your squad leader every hour between the hours of 0600–2200. Texting does not fulfill this requirement. You must actually speak with your squad leader so that he can hear your voice and assess your demeanor. *[For lower-risk Soldiers telephonic check-in requirements may be a less stigmatizing alternative to a physical sign-in requirement.]*

3. These measures have not been imposed as punishment or as a form of pretrial restraint. The primary purpose is to ensure your health and safety. These measures will remain in effect until the chain of command, in consultation with your health care providers, determines that they are no longer necessary to ensure your welfare. *[Note that the measures are not in place pending trial or final disposition of offenses. This was expressly stated to avoid the perception that the measures were imposed for military justice purposes.]*

4. If at any time you feel these measures are too harsh or unnecessary, you may request that I review them. I will review these measures once within the next five days and then once again every thirty days to determine if these measures should be continued or amended.

5. Failure to comply with these measures may constitute a violation of Article 92 of the UCMJ (failure to obey a lawful order), and may result in punishment (either judicial or nonjudicial) or adverse administrative action.

6. You must understand that even though you may be under a considerable amount of stress at this time, committing additional acts of misconduct will not reduce that stress. I encourage you to take advantage of all the resources the Army has to help you. Chaplains, Mental Health Providers, Military One Source, and the Family Life Counselors at Army Community Services (ACS) all provide free counseling services. I cannot emphasize enough that no stigma is associated with seeking mental health services. Your chain of command is here to help you as well. I strongly encourage you to use these resources.

JAMES T. BRUDENELL
CPT, AR
Commanding

I have read and understand all paragraphs and my commander has answered any questions I had pertaining to this order.

HARRY P. FLASHMAN
SPC, USA

Appendix C

Sample Order Imposing Conditions on Liberty

The following is provided as an example of conditions on liberty imposed pursuant to RCM 304(a)(1). Practitioners should feel free to deviate from these conditions as the circumstances require. The restraint may be issued in memorandum form or using DA Form 4856 (Developmental Counseling). Where helpful, explanatory notes have been added in brackets at the end of paragraphs and italicized—these should be deleted prior to use.

SUBJECT: Imposition of Conditions on Liberty Pursuant to RCM 304(a)(1)

1. After careful deliberation, I have determined that probable cause exists to believe that you have committed the offense of Wrongful Use of Illegal Drugs in violation of Article 112a, UCMJ. *[RCM 304(e) requires the accused be notified of the offense forming the basis for imposing restraint.]*

2. To ensure your presence at trial and promote the effective administration of military justice, I am placing the following conditions on your liberty pursuant to RCM 304(a)(1):

a. You are prohibited from initiating any contact or communication with any potential witness in this case, either directly or through a third party. For purposes of this order, the term "communication" includes, but is not limited to, communication in person, or through a third party, via face-to-face contact, telephone, or in writing by letter, data fax, electronic mail, text message, or social media. If a potential witness initiates contact with you, you must immediately notify me regarding the facts and circumstances surrounding the contact. This order does not apply to any detailed military or retained civilian defense counsel engaged in case preparation. *[Pretrial restraint may not hinder case preparation. Rule for Courts-Martial 304(a) discussion. Much of the language in this paragraph was taken from DD Form 2873, Military Protective Order.]*

b. If you wish to leave the local area, you must first receive permission from me. For the purposes of this order the term “local area” includes any place within a 25 mile radius of the post headquarters. *[In response to United States v. Muniz, the accused is allowed to travel in the local area off-post. Likewise, leaving the door open for the accused to ask for permission to go elsewhere was selected by the author as a more conservative approach than outright revocation of pass privileges.]*

c. You may not consume or possess any alcoholic beverages. *[To distinguish these conditions from the facts of United States v. Muniz, the accused is not prohibited from entering on-post facilities that serve alcohol.]*

d. If you have any privately owned weapons on the installation, you will turn them into the unit arms room. *[When gathering information pertaining to privately owned firearms ensure compliance with Section 1062 of the Fiscal Year (FY) 2011 National Defense Authorization Act (NDAA), as amended by Section 1057 of the FY 2013 NDAA.]*

e. When off-duty (whether a weekend or training holiday), you will sign in at the staff duty desk each day at 0900 and 1700. *[Ensures personnel accountability and compliance with revocation of pass privileges, without operating as a tether to further restrain the accused’s freedom of movement.]*

3. While your conditions on liberty are in place you will continue to perform full military duties. Likewise, you will have normal visitation and telephone privileges and will be allowed to retain and use your personal property (including civilian clothing). *[This paragraph addresses the privileges included in the Smith factors that are unaffected by the order.]*

4. These measures have not been imposed as punishment. These measures will remain in effect until rescinded by me or a superior commanding officer. If at any time you feel these conditions are too harsh, unnecessary, or are impeding your pretrial preparation, you may request that I review them. I will review these measures once within the next five days and then once again every thirty days to determine if these measures should be continued or amended.

5. Failure to comply with these conditions may constitute a violation of Article 92, UCMJ (failure to obey a lawful order), and may result in punishment (either judicial or nonjudicial) or adverse administrative action.

6. If you do or say anything that causes me to believe that you will disobey these conditions or if you commit additional acts of misconduct, I will consider imposing more stringent forms of restraint, to include pretrial confinement.

JAMES T. BRUDENELL
CPT, AR
Commanding

I have read and understand all paragraphs and my commander has answered any questions I had pertaining to this order.

HARRY P. FLASHMAN
SPC, USA

Appendix D

Sample Order Imposing Restriction

The following is provided as an example of restriction imposed in conjunction with conditions on liberty imposed pursuant to RCM 304(a)(1–2). Practitioners should feel free to deviate from this example as the circumstances require. The restraint may be issued in memorandum form, or using DA Form 4856 (Developmental Counseling). Remember that the imposition of restriction in lieu of arrest will start the RCM 707 speedy trial clock. Where helpful, explanatory notes have been added in brackets at the end of paragraphs and italicized—these should be deleted prior to use.

SUBJECT: Imposition of Conditions on Liberty and Restriction in Lieu of Arrest Pursuant to RCM 304(a)(1–2)

1. After careful deliberation, I have determined that probable cause exists to believe that you have committed the offense of Wrongful Use of Illegal Drugs in violation of Article 112a, UCMJ. *[RCM 304(e) requires the accused be notified of the offense forming the basis for imposing restraint.]*

2. To ensure your presence at trial and promote the effective administration of military justice, I am restricting you as follows pursuant to RCM 304(a)(2):

a. Your off-post pass privileges are revoked. If you wish to leave the installation at any time (whether on duty or off) you must first receive permission from me.

b. You will live in the barracks. You will not stay overnight in any other individual's barracks room, or any other quarters, without my permission.

c. You are restricted to the brigade footprint. *[Describe the boundaries of the brigade footprint.]* You may only travel outside the brigade footprint with an NCO escort. You may obtain an NCO escort by reporting to the battalion staff duty desk and requesting one. Additionally, you may only travel outside the brigade footprint to the following locations:

(1) If you need to purchase hygiene products, you may do so at _____ PX/Shoppette.

(2) You are authorized to attend religious services and to speak to the chaplain.

(3) You are authorized to attend sick call at the company. You may go directly to the emergency room for medical treatment in the event of an emergency. As soon as the emergency has passed or you are cleared, you will contact the company and notify us of your status and location.

(4) You are authorized to see your attorney at Trial Defense Service (TDS).

(5) You may exercise at _____ gym.

d. You are expressly prohibited from entering any establishment on the installation that serves alcoholic beverages. *[Together, these geographic limitations are less stringent than those imposed in United States v. Acireno. Unlike Acireno, in this example, the accused is able to freely travel outside the barracks anywhere in the brigade footprint.]*

3. Additionally, I am placing the following conditions on your liberty pursuant to RCM 304(a)(1):

a. You are prohibited from initiating any contact or communication with any potential witness in this case, either directly, or through a third party. For purposes of this order, the term "communication" includes, but is not limited to, communication in person, or through a third party, via face-to-face contact, telephone, or in writing by letter, data fax, electronic mail, text message, or social media. If a potential witness initiates contact with you, you must immediately notify me regarding the facts and circumstances surrounding the contact. This order does not apply to any detailed military or retained civilian defense counsel engaged in case preparation. *[Pretrial restraint may not hinder case preparation. Rule for Courts-Martial 304(a) discussion. Much of the language in this paragraph was taken from DD Form 2873, Military Protective Order.]*

b. You may not consume or possess any alcoholic beverages.

c. If you have any privately owned weapons on the installation, you will turn them into the unit arms room. *[When gathering information pertaining to privately owned firearms ensure compliance with Section 1062 of the Fiscal Year (FY) 2011 National Defense Authorization Act (NDAA), as amended by Section 1057 of the FY 2013 NDAA.]*

d. When off-duty (whether a weekend or training holiday), you will sign in at the battalion staff duty desk every four hours from 0600 to 2200.

4. While your restriction and conditions on liberty are in place, you will continue to perform full military duties. Likewise, you will have normal visitation and telephone privileges, and will be allowed to retain and use your personal property (including civilian clothing). *[This paragraph addresses the privileges included in the Smith factors that are unaffected by the order.]*

5. These measures have not been imposed as punishment. These measures will remain in effect until rescinded by me or a superior commanding officer. If at any time you feel these conditions are too harsh, unnecessary, or are impeding your pretrial preparation, you may request that I review them. I will review these measures once within the next five days and then once again every thirty days to determine if these measures should be continued or amended.

6. Failure to comply with these conditions may constitute a violation of Article 92, UCMJ (failure to obey a lawful order) or Article 134, UCMJ (breaking restriction) and may result in punishment (either judicial or nonjudicial) or adverse administrative action.

7. If you do or say anything that causes me to believe that you will disobey these conditions, break your restriction, or if you commit additional acts of misconduct, I will consider imposing more stringent forms of restraint, to include pretrial confinement.

JAMES T. BRUDENELL
CPT, AR
Commanding

I have read and understand all paragraphs and my commander has answered any questions I had pertaining to this order.

HARRY P. FLASHMAN
SPC, USA

Appendix E

Sample Order Imposing Arrest

The following is provided as an example of arrest imposed pursuant to RCM 304(a)(3). Practitioners should feel free to deviate from this example as the circumstances require. The restraint may be issued in memorandum form or using DA Form 4856 (Developmental Counseling). Where helpful, explanatory notes have been added in brackets at the end of paragraphs and italicized—these should be deleted prior to use.

SUBJECT: Imposition of Arrest Pursuant to RCM 304(a)(3)

1. After careful deliberation, I have determined that probable cause exists to believe that you have committed the offense of Wrongful Use of Illegal Drugs in violation of Article 112a, UCMJ. *[RCM 304(e) requires the accused be notified of the offense forming the basis for imposing restraint.]*

2. To ensure your presence at trial and promote the effective administration of military justice, I am placing you under arrest pursuant to RCM 304(a)(3).

3. The conditions of your arrest are as follows:

a. You are suspended from performing full military duties. You may, however, be required to take part in ordinary cleaning, policing, routine training, and other routine duties.

b. You are restricted to the limits of your barracks room. Should you desire to leave your room, you must contact your chain of command by telephone, or by reporting to the barracks CQ desk. If you desire, you may submit a schedule to me for pre-approval listing the dates, times, and locations of places you would like authorization to travel to. At a minimum, the First Sergeant will make arrangements for you to eat three times per day and to exercise once per day. You will also be allowed access to your attorney at Trial Defense Service (TDS).

c. You are prohibited from initiating any contact or communication with any potential witness in this case, either directly or through a third party. For purposes of this order, the term "communication" includes, but is not limited to, communication in person, or through a third party, via face-to-face contact, telephone, or in writing by letter, data fax, electronic mail, text message, or social media. If a potential witness initiates contact with you, you must immediately notify me regarding the facts and circumstances surrounding the contact. This order does not apply to any detailed military or retained civilian defense counsel engaged in case preparation. *[Pretrial restraint may not hinder case preparation. Rule for Courts-Martial 304(a) discussion. Much of the language in this paragraph was taken from DD Form 2873, Military Protective Order.]*

d. Your off-post pass privileges are revoked.

e. You may not consume or possess any alcoholic beverages.

f. If you have any privately owned weapons on the installation, you will turn them in to the unit arms room. *[When gathering information pertaining to privately owned firearms, ensure compliance with Section 1062 of the Fiscal Year (FY) 2011 National Defense Authorization Act (NDAA), as amended by Section 1057 of the FY 2013 NDAA.]*

g. While under arrest you will have normal visitation and telephone privileges and will be allowed to retain and use your personal property (including civilian clothing). *[This paragraph addresses the privileges included in the Smith factors that are unaffected by the order imposing arrest in an effort to distinguish this restraint from restriction tantamount to confinement.]*

4. These measures have not been imposed as punishment. These measures will remain in effect until rescinded by myself or a superior commanding officer. If at any time you feel these conditions are too harsh, unnecessary, or are impeding your pretrial preparation, you may request that I review them. I will review these measures once within the next five days and then once again every thirty days to determine if these measures should be continued or amended.

5. Failure to comply with the conditions of your arrest may constitute a violation of Article 92, UCMJ (failure to obey a lawful order), or Article 95, UCMJ (breaking arrest), and may result in punishment (either judicial or nonjudicial) or adverse administrative action.

6. If you do or say anything that causes me to believe that you will break the conditions of your arrest, or if you commit additional acts of misconduct, I will consider ordering you into pretrial confinement.

JAMES T. BRUDENELL
CPT, AR
Commanding

I have read and understand all paragraphs and my commander has answered any questions I had pertaining to this order.

HARRY P. FLASHMAN
SPC, USA